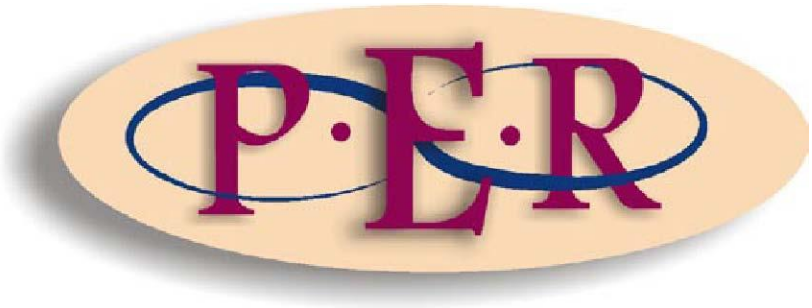
Author: A Klaasen

PUBLIC LITIGATION AND THE CONCEPT OF "DEFERENCE" IN JUDICIAL REVIEW

eISSN 1727-3781



2015 VOLUME 18 No 5

http://dx.doi.org/10.4314/pelj.v18i5.22

PUBLIC LITIGATION AND THE CONCEPT OF "DEFERENCE" IN JUDICIAL REVIEW

A Klaasen*

1 Introduction

The Constitutional Court subscribes to a standard of "deference" in judicial review.[1] The principle of deference concerns the function of the judge in mediating between the law and legislative and executive politics. The 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.[2] O'Regan frames this vision as follows:[3]

> The role of the courts under our Constitution is to protect the Constitution, and in particular individual fundamental rights. At times, in asserting this function, courts will have to intrude to some extent on the terrain of the legislature and the executive. In doing so, however, it is clear from the jurisprudence that is emerging that courts must remain sensitive to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and the legislature.

This defence of the theory of judicial interpretation employed seems to encourage judges to limit the exercise of their own power, and go to great lengths to defer to the legislature and the executive. Therefore, the theory of judicial deference, as employed by the courts, increasingly sounds like judicial restraint. Is this theory of judicial review employed by the courts suitable for the current politico-legal landscape of the South African constitutional state? Pieterse argues:[4]

> Given the executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure accountability and for the protection of their basic interest. Today, the judiciary acts both as watchdog over the other branches' adherence to the doctrine of separation of powers and as primary protector of citizens' rights within its confines. In South Africa, as elsewhere, this reality has been underscored by the

* Abraham Klaasen. BProc, LLM (UNISA). Lecturer Faculty of Law, North West University, E-mail: 11232536@nwu.ac.za

1 O'Regan 2005 *PER/PELJ* 132.

2 *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC).

3 O'Regan 2005 *PER/PELJ* 132.

4 Pieterse 2004 *SAJHR* 383.

> introduction of a justiciable Bill of Rights, which "fundamentally changed the place of the judiciary in South Africa's constitutional and political order".

The dominance of the executive over Parliament means that at all three levels of government there are few effective checks and balances on the abuse of power by the executive. The deployment policy of the ANC speaks in a language that is unapologetically Leninist, calling for the placement of "cadres" in key positions in national, provincial, local government and the public sector, even the independent Chapter 9 institutions, with the aim of bringing these institutions under its control.[5] According to documents of the ruling party, the transformation of the state entails, primarily:[6]

> Extending the power of the National Liberation Movement (NLM) over all levers of power: the army, the police, the bureaucracy, intelligence structures, the judiciary, parastatals, and agencies such as regulatory bodies, the public broadcaster, the central bank and so on.

The ruling party claims social control over all levels of powers within the South African constitutional state. It can be argued that the document envisages the thought that the principle of majority decision-making is constrained by respect for the rights of individuals and minorities, a tendency embedded in national liberation thought, which equates majoritarianism with democracy.[7] This train of thought allows liberation movements to use their domination of the political arena in a manner which belies their commitment to a constitutional democracy by shifting the balance of powers in favour of the executive, justifying such actions by reference to their possession of a majority in Parliament.[8] The strategy employed by the ruling party is deeply at odds with the notions of the separation of powers and constitutional supremacy as embedded in the *Constitution*.

McLean states that this means that the traditional separation of powers between the three branches of government is effectively found only between the courts on the one hand and the executive and legislature on the other. In the absence of robust checks

---

5 Roux *Politics of Principle* 181.

6 ANC 1998 https://amadlandawonye.wikispaces.com/1998,+ANC,+State,+Property+Relations,+Social+Transformation.

7 Southall 2014 *Africa Spectrum* 86.

8 Southall 2014 *Africa Spectrum* 86.

and balances elsewhere, courts should respond, not by adopting a deferential position, but by ensuring that the other branches of government are held accountable to it and the *Constitution*.[9] This work investigates the theory of judicial review employed by the courts against the context of the public litigation where it is utilised.

Section 2 of this work investigates the concept, characteristics and benefits of public litigation. Around the world, litigation or judicial review has become immensely popular as a treatment for the pains of modern governance.[10] South Africa is no exception to this phenomenon.[11] This activism by litigation consists of efforts to promote, impede, or direct social, political, economic, or environmental change, or stasis.[12] The question is asked; can the concept of public litigation offer assistance in shaping and influencing the theory of judicial review employed by the courts?

In Section 3 the application of the theory of deference as employed by the courts is discussed. The *Constitution* opted for a model of the relationship between the legislature and executive modelled more closely on the Westminster system than on the presidential system found in France and the United States.[13] Unfortunately, this weakens the ability of Parliament to function as an effective check on the abuse of power by the executive. It is argued that, given the fusion between the executive and the legislature in South Africa[14] and the overconcentration of executive power in the legislature,[15] the concept of deference in judicial review falls short of finding the correct balance between the constitutional values of participation, openness, justification and accountability.

Section 4 of the work explores the culture of justification articulated by Davis as a coherent theory of judicial review set against the backdrop of public litigation.

---

9 McLean *Constitutional Deference* 209.
10 Hertogh & Halliday *Judicial review and bureaucratic impact in future research* 15.
11 Hoexter *Administrative Law* 104.
12 Schokman, Creasey and Mohen *Short Guide* 3.
13 O'Regan 2005 *PER/PELJ* 125.
14 Labuschagne 2011 *Politeia* 2; Choudhry 2009 *CCR* 11; Giliomee, Myburgh and Schlemmer 2001 *Democratization* 44-45.
15 Malan 2014 *PER/PELJ* 1968-1969; Roux *Politics of Principle* 167-168.

2 Public litigation

Scholars have disagreed about the defining features of public litigation, a term often used to refer to the diverse proceedings of modern, non-traditional litigation.[16] The term public litigation is used in this work to refer to lawsuits challenging legislative or executive action, seeking policy changes within government, and seeking to restructure the organisation of public institutions or expose corruption. A focal point for public litigation in this sense is that the legislator or the executive will always be a party to the proceedings. Although public litigation is typically brought following specific violations of constitutional rights, values or obligations, the aim is not redress for past damages. Contrary to the traditional plaintiffs of the South African common law, litigants use public litigation to rectify constitutional violations not easily definable in terms of personal, financial loss or other damages claimable at common law. Public litigation therefore allows for participation in the political decision-making process for individuals, minorities and groups that are politically marginalised.

Although the motives for the litigation vary, litigants may seek to reform the institutional structure from which constitutional violations arose and from which similar wrongs may arise again. In this sense, public litigation, or activism by litigation, presents a new means of policymaking not found in any civics books.[17] Activists are then able, through the legal process, and by using the courts, to influence government decisions and advance their own interests. 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,[18] or to correct constitutional violations where political means have failed.

Schokman states that the organisation or individual takes on a legal case as part of a strategy to achieve broader systemic change. The case may create change either

---

16 Traditional litigation refers to the common law principles of litigation as defined in *Ferreira v Levin* 1996 1 SA 984 (CC) para 229. Litigation is instituted to claim for damages, to correct a wrong or to obtain relief from another. The traditional cause of action featured a plaintiff with clear and identifiable rights and the defendant with clear obligations or liabilities. In terms of the common law, the litigants would pray for a remedy that would usually involve monetary compensation, and the effect of the remedy would rarely reach beyond the parties to the case.

17 Boyer 1999 *New Yorker* 54.

18 Ranchod 2007 *Policy* 3.

through the success of the action and its impact on law, policy or practice, or by publicly exposing injustice, raising awareness and generating broader change.[19]

Litigants seek to enforce constitutional principles and values that affect others as directly as they themselves and that are valued for moral or political reasons and are independent of economic interests. Litigants therefore seek to regulate executive and legislative action in accordance with the *Constitution*. The relief claimed aims to restructure the public organisation or conduct by the legislature and/or executive to eliminate a threat to the principles and values enshrined in the *Constitution*.[20]

In *Ferreira v Levin*,[21] Justice O'Regan investigated the concept of public litigation.[22] She stated that in litigation of a public character the relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Because the alleged harm is often nondescript, the motive behind public litigation is often difficult to determine. This allows for the misuse of the court process by individuals, groups, political parties and the state. Litigants abusing the court process are able to frustrate or delay legitimate administrative action or attempt to gain political mileage from the litigation.

In *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape,*[23] the Court held as follows:[24]

> The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward looking, in the sense of redressing past wrongs, but also forward-

19 Schokman, Creasey and Mohen *Short Guide* 3.
20 Fallon 1984 *NYU L Rev* 3-5 have been consulted and adapted to fit South African circumstances in drafting this paragraph.
21 *Ferreira v Levin* 1996 1 SA 984 (CC) para 229.
22 *Ferreira v Levin* 1996 1 SA 984 (CC) para 229.
23 *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E).
24 *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E) paras 619C-D.

> looking, to ensure that the future exercise of public power is in accordance with the principle of legality.

The fact that a wide range of individuals may be affected by the outcome of the case is problematic. People may be affected without any input in the case. Therefore, because a wide range of people are affected by the litigation and the possibility of abuse of the process exists, an expansive theory of judicial review is called for. This expansive theory should be based on the founding provisions of the *Constitution*.[25] This allows the court to query whether an order made by the court will achieve or advance the values of human dignity, equality, human rights, the supremacy of the *Constitution* and the rule of law and the democracy of government, including accountability, responsiveness and openness.

The function of the judge in public litigation may also differ from his or her position in private litigation. In private litigation the judge will usually not be involved in the case after granting of the order. In public litigation the judge may stay involved in the proceedings after the final order is granted. Although South African courts were initially reluctant to grant supervisory orders or structural interdicts,[26] the courts have more recently granted supervisory orders in several cases.[27] In public litigation the judge is active, with the responsibility not only for credible fact assessment but also for organising and shaping the litigation to ensure a just and viable outcome.[28] The fact that the judge is active in shaping the litigation and stays involved after ruling on the matter rules out a formalistic approach to constitutional interpretation. Public litigation then is a space of possibility, with the protection and advancement of the *Constitution* the goal.

---

25 Section 1 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

26 *Modderfontein Squatters, Greater Benoni Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA).

27 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *Nyathi v Department of Health, Gauteng* 2008 5 SA 94 (CC); *Sibiya v The Director of Public Prosecutions, Johannesburg* 2005 5 SA 315 (CC).

28 *Director of Public Prosecutions v Minister of Constitutional Development* 2009 4 SA 222 (CC). Here the Court called for information as the first step in the supervisory process and ordered the Director General of the Department of Justice to submit a report to the Court with detailed information relating to the matter.

The concept of South African public litigation conforms with the investigation of American public litigation conducted by Chayes.[29] Chayes in his investigation of public law litigation finds as follows:[30]

> In public law litigation, then, fact-finding is principally concerned with "legislative" rather than "adjudicative" fact. In addition, "fact evaluation" is perhaps a more accurate term than "fact finding." The whole process begins to look like the traditional description of legislation: Attention is drawn to a "mischief," existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act.

Public litigation in South Africa can lead to the same result where directed at litigation regarding the constitutionality or interpretation of legislation. Where the area of contention is decisions made by officials, which are administratively or legally unsound, an order of the Court may have the effect of realigning the offending decision with the *Constitution*.

Public litigation allows for the measuring of legislation and legislative and executive acts against a constitutional backdrop guaranteeing the supremacy of the *Constitution*. This allows for a constitutional review that is forward looking, allowing for the scrutiny of possible constitutional violations before they occur. The judiciary is institutionally suited for this role. The *Constitution* is the supreme law in South Africa and any law or conduct inconsistent with it is invalid.[31] The Constitutional Court is the highest court in all constitutional matters[32] and makes the final decision in all constitutional matters.[33] An order of the Constitutional Court binds all persons to whom and organs of the state to which it applies.[34] Therefore, the Constitutional Court is the ultimate forum for decision-making in the South African constitutional democracy, including

29 Chayes 1976 *Harv L Rev* 1282-1284, 1302.
30 Chayes 1976 *Harv L Rev* 1297.
31 Section 2 of the *Constitution*.
32 Section 167(3)(a) of the *Constitution*.
33 Section 167(3)(c) of the *Constitution*.
34 Section 165(5) of the *Constitution*.

decisions of a political nature that fall within the scope of the *Constitution*. However, without public litigation the courts are unable to investigate constitutional violations.[35]

When examining the defining characteristics of public litigation, it is clear that the outcomes that litigants seek correspond with one of the founding provisions of the *Constitution*, the supremacy of the *Constitution* and the rule of law. The motif behind the litigation is therefore the protection of the public interest vested in the *Constitution*. The founding values inform the interpretation of the *Constitution* and other law, and set positive standards to which all law must comply. The founding values allow the courts to assist organs of the state and society to ensure constitutionality and effective governance. This allows the courts to build institutional legitimacy and play an effective role in democratic politics. The benefits of public litigation highlighted are many. However, should it shape and influence the theory of judicial review that the courts employ? The investigation of public litigation shows that an expansive theory of judicial review based on the founding values of the *Constitution* is called for. This rules out a formalistic constitutional interpretation of the theory of judicial review.

In *Glenister v President of the RSA*,[36] the Court found:

> In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. But even in these circumstances, courts must observe the limits of their power.

Therefore, although the courts have the duty to intervene in constitutional violations, they have the discretion to decide when and to what extent to intervene when such a violation occurs within the domain of other branches of government. The decision on when to intervene and then to what extent will depend on the standard of judicial review to which the courts subscribe. It is imperative for legal certainty that litigators

---

35 This is in contrast with the extensive original jurisdiction of the Indian Supreme Court in terms of a 32 of the *Constitution of India*, 1950.

36 *Glenister v President of the RSA* 2009 1 SA 287 (CC) para 30.

and activists are aware of when the court will intervene within the sphere of other state institutions and when the court will defer to such institutions.

Chayes writes that, unlike an administrative bureaucracy or a legislature, the judiciary *must* respond to the complaints of the aggrieved.[37] Can the courts avoid this duty by electing not to intervene in a constitutional violation as it occurred within the sphere of another state organ? The discretion implied in the deference doctrine certainly suggests so. It is submitted that the legal uncertainty inherent in the deference doctrine is bad in law and can be avoided by subscribing to a more expansive theory of judicial review.

3 Determination of the "proper standard" for judicial review

The principle of judicial review is well established in the South African constitutional state. The *Constitution* clearly mandates the courts to review legislation or conduct that is inconsistent with constitutional provisions.[38] Although there should be a culture of mutual co-operation and respect between the different branches of government,[39] the courts are mandated by constitutional provisions to ensure that the executive and legislature operate within the boundaries of the *Constitution*.

In seeking to develop an appropriate response to judicial review within a constitutional dispensation, Hoexter contends that the judiciary must display:[40]

> A willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.

Hoexter contends that these considerations permit the adoption of a concept of deference, which is consistent with the concern for individual rights and a refusal to tolerate corruption and maladministration. She states that because of the wide powers

---

37 Chayes 1976 *Harv L Rev* 1308.

38 Section 2 of the *Constitution*, which states that the *Constitution* is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

39 Chapter 3 of the *Constitution*.

40 Hoexter 2000 *SALJ* 501.

conferred on the courts to review executive and legislative actions, it is essential that courts justify their intervention or non-intervention. It is also important that this be done candidly and consciously rather in a formalistic or coded style.[41] The culture of deference has been increasingly employed by South African courts.[42]

O'Regan argues that an important aspect of the South African doctrine of separation of powers is that the separation between judicial, legislative and executive powers contains a structural and functional distinction between the arms of government which, in order to preserve their institutional integrity and their democratic function, need to be preserved from intrusion.[43]

In *Speaker of the National Assembly v De Lille*,[44] the Court noted that the constitutional order requires courts to intervene to protect fundamental rights. Accordingly, the principle of non-interference with the affairs of another branch of government, an important aspect of the doctrine of separation of powers, must give way to the need to provide protection for the individual rights which lie at the heart of our democratic order. O'Regan states that it is clear from the court's jurisprudence that the principle of non-intrusion, although qualified, is an important aspect of our doctrine of separation of powers.[45] Although this doctrine is an important aspect of the South African constitutional state, this statement disregards the fact that the Constitutional Court is the ultimate forum for decision-making in all constitutional matters.[46] The courts are constitutionally mandated to uphold the provisions and values of the *Constitution* and to declare laws and conduct that is inconsistent with the *Constitution* invalid.[47] Therefore, when "intruding" at a legitimate time and in a legitimate manner the courts are performing their function in respect of the separation of powers.

41 Hoexter *Administrative Law* 138.
42 *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) paras 20–21; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 6 SA 407 (SCA).
43 O'Regan 2005 *PER/PELJ* 131.
44 *Speaker of the National Assembly v De Lille* 1999 4 All SA 241 (A).
45 O'Regan 2005 *PER/PELJ* 132.
46 Section 167(3)(a) of the *Constitution.*
47 Section 2 of the *Constitution*.

Consequently, the principle of non-intrusion or deference cannot be justified by reliance on the doctrine of the separation of powers alone.

In *Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal*[48] the Court held that:[49]

> In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government, which will inhibit its ability to make and implement policy effectively (a principle well recognised in the common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.

The Court thus recognises the importance of allowing the executive to carry out its functions without undue hindrance. The Court reasoned as follows:

> In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.
>
> The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. This does not mean however that where the decision is one which a will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

There can be no doubt that the executive and legislative branches must be accorded their proper role in terms of the *Constitution*. However, the *Constitution* does not limit the roles and powers of state organs. The *Constitution defines* the roles and powers of all role-players within the constitutional state. Judicial review that is based on the objectives, obligations and values gleaned from the constitutional text does not intrude

---

48 *Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC).

49 *Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 51.

within the sphere of other government departments. Judicial review ensures that the roles and powers of state institutions are exercised as defined by the *Constitution*.

4 Judicial review and a culture of justification

Mureinik wrote: "The principles of judicial review represent the core of the judicial conception of justice."[50] Mureinik articulated the following principles that are considered fundamental for judicial review:[51]

1 The principle that policy should be implemented in a reasonable or non-discriminatory fashion.
2 The principle that someone whose rights are affected by an official decision has a right to be heard before that decision is made.
3 The principle that, when a statute says that an official must have reason to believe that x is the case before he acts, the court should require that reasons be produced sufficient to justify that belief.
4 The principle that no executive decision can encroach on a fundamental right unless the empowering statute specifically authorises that encroachment.
5 The principle that regulations made under discretionary powers (for example, the power to make regulations declaring and dealing with a state of emergency) must be capable of being defended in a court of law by a demonstration that there are genuine circumstances of the kind which justify invoking the power and that the powers actually invoked are demonstrably related to the purpose of the empowering statute.

If the above principles are analysed, it becomes clear that he argues for a policy of non-discrimination, openness, justification, accountability and participation. A person whose rights are affected must be given an opportunity to be heard, reasons must be given for decisions, and the decisions must be based on and related to an empowering statute.

50 Mureinik 1986 *SALJ* 617.
51 Dyzenhaus 1998 *SAJHR* 18.

Dyzenhaus proposes three separate approaches to the problem of the judicial role in reviewing decisions of the administration:[52]

1. Law as authority: the law reflects the preferences of the majority of society as developed through the medium of a democratically-elected legislature;

2. Law as a culture of neutrality, which seeks to protect a range of individual rights from interference by the state. Statutes that infringe on the individual's right to decide how to live, for example, are illegitimate; they offend against public reason, the custodians of which are the judges;[53] and

3. Law as a culture of justification, which seeks to promote the idea that parties are entitled to participate in decisions which affect them, that is, decisions which determine their rights, and further, that the decisions of organs of state must be justified by the decision-maker within the public discourse fashioned by the *Constitution*, thereby rendering the decision-maker accountable to the public he serves.

The third approach proposed by Dyzenhaus corresponds with the fundamental principles articulated by Mureinik. Law as a culture of justification resonates with the constitutional values of accountability, participation, justification and openness.

Davis writes that the concept of deference is employed by the courts to promote certain basic principles, namely:[54]

1 South Africa is committed to transformation and to meeting the needs of the poor, hence government and its administrations are of critical importance;
2 Often, the substance of decisions made by government agencies is not appropriate to judicial decision-making, particularly because of the poly-centricity of task and consequence; and
3 The government official/agency is an expert or at least more of an expert than the court deciding the issue in question.

52 Dyzenhaus 1998 *SAJHR* 11.
53 Davis 2006 *Acta Juridica* 29.
54 Davis 2006 *Acta Juridica* 26.

When analysing the principles promoted by the Court's reliance on the notion of deference, there is no provision for the realisation of the values and objectives enshrined in the *Constitution*. The only value addressed is the principle of transformation. The principles promoted by reliance on the theory of deference allow the courts to abdicate their duty to apply the *Constitution* without fear, favour or prejudice.[55]

The principles listed by Davis are clearly illustrated by the finding of the Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs.*[56] The question was raised as to the extent to which an executive decision is susceptible for review under the constitutional order. The Court employed the following test to determine whether the decision was reviewable:[57]

> If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed. The task of allocation of fishing quotas is a difficult one, intimately connected with complex policy decisions and requires on-going supervision and management of that process by the departmental decision-makers who are experts in the field.

Ngcobo J formulated an approach of judicial review by way of the constitutional framework within which all decisions of state organs need to be assessed. He commenced his judgment by referring to the transformative objectives of the *Constitution*.[58] He then emphasised that a foundational principle of the Act is the transformation of the fishing industry. Ngcobo J concluded that, if the Minister were to fail to heed the transformative considerations enshrined in the Act, "he would be acting unlawfully and his decision would be open to attack".[59] The duty of the courts, however, does not extend to telling the functionaries how to implement the transformation. That must be left to the functionaries concerned.[60]

---

55 Section 165(2) of the *Constitution*.
56 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 48.
57 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 48.
58 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 69.
59 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 85.
60 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 104.

Therefore, although Ngobo J sets a standard to which the executive must aspire; the attainment of the transformation of the fishing industry, the Court deferred to the executive on how to achieve this goal. This approach is incorrect. The Justice seems to be satisfied with the fact that the issue of transformation is addressed by the executive. Accordingly, the law can now be seen as a more or less "closed" normative system with no further input required from the *Constitution*. That is, with respect, a formalistic interpretation. At the heart of the *Constitution* is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws.[61] The courts do not need to tell the executive how to implement policy. What is needed is for the courts to ensure that the founding values of the *Constitution* are entertained by the executive when forming and implementing the policy. By enquiring whether the values of non-discrimination, accountability, participation, responsiveness and openness are addressed, the courts can explore the substantive justice of the law or policy.

In ascribing to the deference of the courts to other branches of government, O'Regan J stated as follows:

> In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government.

This approach by the Justice creates the impression that the courts go to great lengths to defer to the other organs of state, thus subscribing to a minimalist approach of constitutional interpretation. The Justice does not clarify where the self-imposed constraint emanates from. Is it gleaned from the text of the *Constitution* or are the courts deferring to the will of the more "democratic" organs of state? The *Constitution* subscribes to the principle of co-operative government[62] and states that spheres of government should respect one another[63] and not assume any power or function except those conferred by the *Constitution*,[64] and the *Constitution* is the supreme

61 Langa 2006 *Stell LR* 357.
62 Chapter 3 of the *Constitution*.
63 Section 41(1)(e) of the *Constitution*.
64 Section 41(1)(f) of the *Constitution*.

law.[65] Therefore, the constitutional obligations to apply the *Constitution* impartially and without fear, favour or prejudice,[66] impel the courts to intervene in the actions of other organs of state, should constitutional violations occur. The duty of the courts to uphold the *Constitution* does not call for a minimalist approach to constitutional interpretation. Furthermore, the Constitutional Court rejected the majoritarian approach to constitutional interpretation from its inception.[67]

Davis also criticises the dictum by the Justice:[68]

> This dictum appears to be more concerned with judicial restraint than with the construction of a coherent concept of deference that might serve as a guide to a court, which seeks to mediate between law and the implementation of legislative and executive politics.

He continues by citing from para 42 of the *Bato Star Fishing* case, where the court argues:

> This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

According to Davis, this illustrates an "absence of a coherent theory of review in a constitutional context". Justice O'Regan's judgment turns on the deference owed to the expertise of the department charged with the decision to allocate fishing quotas, and Justice Ncobo bowed to transformational prominence and the fact that "functionaries" should be given the scope to implement these objectives.[69]

Davis is rightly critical of both judgments and states that it is bizarre that the full bench concurred with both:[70]

---

65 Section 2 of the *Constitution*.

66 Section 165(2) of the *Constitution*.

67 *S v Makwanyane* 1995 3 SA 391 (CC) para 87, where the Court held that what the majority of South Africans believe a proper sentence for murder should be is irrelevant. It is whether the *Constitution* allows the sentence. Public opinion therefore may have some relevance but it is no substitute for the duty vested in the courts to interpret the *Constitution* and to uphold its provisions without fear or favour.

68 Davis 2006 *Acta Juridica* 26.

69 Davis 2006 *Acta Juridica* 26.

70 Davis 2006 *Acta Juridica* 28.

> One judgment is, at best, committed to respect for the principle of separation of powers. The other judgment appears to nudge the legal community to accept that an interrogation of constitutional values rather than a conflation of a contested concept of institutional competence with the principle of separation of powers must be the key guideline for review of administrative decisions. But, as it is about to take the conclusive step, it falters into line with the judgment of O'Regan J. The coherent theory of review in the constitutional era appears as much an illusion as the respondent department's commitment to transformation!

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 the separation of powers.[71] Davis suggests that judges have to interpret their own role in a constitutional democracy, not only about unlocking the big constitutional conundrums, but also about the manner in which they go about the business of the review of the administration.[72] He argues that:

> If the model of government is based on the idea of participation by citizens in decisions which affect them, the right to express views about any decision which an administrative agency is about to take which may determine a right of a citizen needs to be robustly protected, as would the right to reasons for any such decision and the corollary thereto, the provision of all reasonable means to participate in the decision-making process. The principle of separation of powers should not be allowed to undermine these rights of participation; in other words, deference should usually not play a significant role in the formulation of the scope and content of these procedural rights.

Although Davis's work is meant 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. This 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

71 Davis 2006 *Acta Juridica* 28.
72 Davis 2006 *Acta Juridica* 30.

them. Although deference may have been the correct approach for the Constitutional Court at its inception, the Court and the *Constitution* are now permanent facets of the South African State. Therefore:[73]

> A group of judges collectively committed to the ideal of adjudication according to the law might disregard the political constraints impacting on their decisions without any conscious appreciation of their decisions on their court's capacity to withstand political attack.

The *Constitution* sets the values against which executive and legislative action must be tested. The inherent values of openness, justification, participation and accountability that form the basis of the South African *Constitution* are not realised when the courts subscribe to a policy of deference. The culture of justification allows the courts to test executive and legislative action against the foundational values of the *Constitution* and finds the correct balance in the application of the principle of separation of powers.

In *Helen Suzman Foundation v President of the Republic of South Africa*[74] the Court found:[75]

> Separation of powers requires that the Judiciary refrain from being unnecessarily prescriptive to both the Executive and Parliament on the kind of institutionally independent body required to stem the tide of corruption in this country. The constitutionally compliant policy choices they make must be respected, even if there are, in the opinion of the Judiciary, better options available.

The Chief Justice concludes:

> Ours is to ensure that the constitutional requirements for a functional and efficient corruption-busting machinery have been met and nothing more or less.

The statement by the Chief Justice suggests that the *South African Police Service Amendment Act*[76] and the *South African Police Service Act*[77] have exhausted normative and policy considerations and that accordingly the laws could be seen as "closed" normative systems. This formalistic logic does not satisfy constitutional values, which

---

73 Roux *Politics of Principle* 95.
74 *Helen Suzman Foundation v President of the RSA* 2015 2 SA 1 (CC).
75 *Helen Suzman Foundation v President of the RSA* 2015 2 SA 1 (CC) para 75.
76 *South African Police Service Amendment Act* 10 of 2012.
77 *South African Police Service Act* 68 of 1995.

are not a closed-set of logically organised rules. A formalistic approach to constitutional interpretation proposes that the substantive justice of the law under constitutional scrutiny is irrelevant. Such an interpretation runs counter to the founding values of the *Constitution*.

The culture of deference that the Constitutional Court subscribes to increasingly looks like judicial restraint.[78] The American author Dworkin rejects judicial restraint because judicial review exists to protect minorities against the oppression of the majority and judges should not defer to the will of the legislature. Courts must instead interpret constitutional rights according to the demands of precedent and integrity. Dworkin is also sceptical about the seriousness with which the legislature takes its responsibility to interpret the *Constitution* faithfully and to act in accordance with that interpretation. He distrusts elected officials, believing that they are likely, due to electoral pressure, to ignore the *Constitution* and to take the side of the majority against the minority.[79]

Dworkin's view has relevance in the South African constitutional state for two reasons. Firstly, because of the "fused" nature of the South African legislature/executive[80] and the overconcentration of the power of the ANC in state institutions.[81] The second reason relates to the ANC's subscription to majoritarianism.[82] Moreover, the demands of precedent and integrity, as argued for by Dworkin, can be met by relying on the inherent values of openness, justification, participation and accountability that form the basis of the South African *Constitution*.

5 Public litigation and the culture of deference

Due to the influence of Dicey, parliamentary systems have a deep distrust of any supervisory role by the courts over the administration. For Dicey, all exercise of public power was to be channelled through Parliament, as Parliament reflects the will of the people and hence is the appropriate mechanism within a democratic state to exercise

78 Davis 2006 *Acta Juridica* 26.
79 Dworkin *Is Democracy Possible Here?* 134.
80 O'Regan 2005 *PER/PELJ* 125, Labuschagne *Funksionele en Strukturele Ontleding* 218.
81 Devenish 2003 *THRHR* 89; Giliomee, Myburgh and Schlemmer 2001 *Democratization* 44-45, Malan 2014 *PER/PELJ* 1968-1969.
82 Hulme and Peté 2012 *PER/PELJ* 55.

such an oversight role.[83] This distrust is still evident in South Africa with its hybrid parliamentary form of government, and coincides with the Marxist attitude of the executive, shared by many of the ANC majority in Parliament and the Cabinet.[84] Davis states that in a constitutional democracy the principle of accountability means that decisions of the administrative agencies must be accountable to constitutional provisions and values and must mean more than the right to be informed about decisions. This principle must be true to a concept of "public interest" which is defined by constitutional values.[85]

The strength of the executive means that it increasingly displays an unwillingness to engage with the courts through judicial proceedings[86] by ignoring the process[87] or through questioning the final judgment.[88] In *Minister of Home Affairs v Somali Association of South Africa Eastern Cape*,[89] the Minister failed to adhere to a court order instructing the state to reopen a refugee reception office. The Court stated that it is a most dangerous thing for a litigant, particularly a State department and senior officials in its employ, to wilfully ignore an order of court.[90] The Court found that:[91]

> The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons, more especially State departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey the order.

The Court found that no democracy could survive if court orders can be shunned and trampled on as happened in this matter and that there is a likelihood of a future

---

83 Davis 2006 *Acta Juridica* 24.

84 The ANC's political character allows it to align with groupings to the left or right with centralists continuing to hold the balance of power in the organisation. The ANC's commitment to constitutionalism is fragile and depends on the perceived public perception of the benefits of the negotiated settlement. Roux *Politics of Principle* 154, 160.

85 Davis 2006 *Acta Juridica* 31.

86 McLean *Constitutional Deference* 208.

87 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), where the executive failed to respond to the court's direction.

88 The Minister of Health stated that she would ignore the court order handed down in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC).

89 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* 2015 3 SA 545 (SCA).

90 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* 2015 3 SA 545 (SCA) para 35.

91 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* 2015 3 SA 545 (SCA) para 33.

repetition of similar conduct on the part of the relevant authorities.[92]

Lenta writes that the political majority enjoyed by the ANC may tempt the government to not always act in a way that furthers the common good, but rather in a way that prioritises the government's and its supporters' interests over considerations of justice.[93] It is imperative that judicial review is structured in such a manner that state action is kept within the bounds of the *Constitution*. Venter posits that the justification for constitutional review should rather be sought in the need for the qualification of blind popular majoritarianism with rational judicial argument.[94] The principle of deference is not an effective qualification of the concept of majoritarianism. In fact, the principle of deference subscribes to a majoritarian vision of democracy by countenancing a "superior role" for the legislature and executive in lieu of the courts. Venter argues as follows:[95]

> Where the Court orders the state "to take measures to meet its constitutional obligations" and subjects the reasonableness of government conduct to evaluation, it can by definition not be a meek and inhibited role. The Court has made it patently clear that, in terms of the powers granted it by the Constitution, it primarily lies within its domain to determine what is consistent with the Constitution and what not.

Although this statement was made concerning judgments relating to socio-economic rights, there is no reason why a more expansive, uniform theory of constitutional review cannot be implemented by the courts. Davis argues: "The courts should ascribe to a more expansive theory of judicial review which would embrace the values and objectives which are quarried from the constitutional text."[96] This expansive theory should allow for the promotion of the principles of participation and accountability in governance, an important step towards the attainment of transparent and accountable government.

---

92 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* 2015 3 SA 545 (SCA) paras 35-36.
93 Lenta 2004 *SAJHR* 30.
94 Venter 2005 *ZaöRV* 145.
95 Venter 2005 *ZaöRV* 158-159.
96 Davis 2006 *Acta Juridica* 31.

6 Conclusion

The dominance of the executive over Parliament means that at all three levels of government there are few effective checks and balances on the abuse of power by the executive. The deployment policy of the ANC calls for the placement of cadres in key positions in government and the public sector with the aim of bringing these institutions under its control.[97]

McLean states that this means that the traditional separation of powers between the three branches of government is effectively found only between the courts on the one hand and the executive and legislature on the other. In the absence of robust checks and balances elsewhere, courts should respond, not by adopting a deferential position, but by ensuring that the other branches of government are held accountable to it and the *Constitution*.[98] The benefits of public litigation show that it can be an effective check on the power of the legislative and executive branches but only if a more coherent and inclusive form of judicial review is embraced by the courts. This theory of judicial review should embrace the founding values of the *Constitution*.

It is suggested that it is time for a change of direction by the Constitutional Court, as the Court could not be said to have achieved the degree of institutional independence characteristic of a court in a mature democracy.[99] Chief Justice Mogoeng Mogoeng accused the executive of interfering with the judiciary's independence and said that the judiciary needed to take collective responsibility and do things differently.[100] He stated that:

> We ought to be worried when there is instability or a measure of instability in the executive and in the legislative arm of government. But we ought to be terrified and deeply concerned when the judiciary does not appear to be what it was established to be. When there is a possibility, no matter how remote that the judiciary might be

97 Roux *Politics of Principle* 181.
98 McLean *Constitutional Deference* 209.
99 Roux *Politics of Principle* 391.
100 Chief Justice Mogoeng Mogoeng addressing the Association of Regional Magistrates of Southern Africa (Van Eeden 2015 https://litigator.co.za/hands-off-judiciary-warns-chief-justice).

> manipulated, then we have to be vigilant. Without an independent judiciary, democracy is doomed.

It is submitted that such a change in direction could be achieved by discarding the out-dated principle of deference and subscribing to a policy of judicial review based on the founding values of the *Constitution*; openness of government, justification of decisions by those in power, and the right to participation by those affected by the decision. Judicial review based on a culture of justification will allow for decisions by organs of state to be justified by the decision-maker within the public discourse fashioned by the *Constitution*, thereby rendering the decision-maker accountable to the public he serves.[101]

The culture of "justification" approach as proposed by Davis finds the correct balance for judicial review in both an objective interpretation of constitutional provisions and the values inherent in the *Constitution* and offers a workable concept for the doctrine of the separation of powers.

South Africa subscribes to a democratic style of government based on accountability, responsiveness and openness.[102] When executive and legislative action is tested through litigation against a culture of justification, it allows these values to be explored and realised. This will allow for the opportunity for systemic change to the South African constitutional landscape based on the principles and values of the *Constitution*. The *Constitution* does not call on judges to be passive administrators of justice. in the circumstances in which the South African constitutional state currently operates, where multiparty democracy comes under pressure, non-majoritarian constitutional review is essential for the survival of constitutionalism.[103] As stated by Venter: "Strong and fearless judicial consistency is needed as a corrective to majoritarian arrogance rather than judicial echoes of government policy and ideology".[104]

---

101 Davis 2006 *Acta Juridica* 30.

102 *Hugh Glenister v President of the RSA* 2011 3 SA 347 (CC) para 165 where the Court state that our *Constitution* pointedly regards as a fundamental value not only universal adult suffrage but also "accountability, responsiveness and openness" of government.

103 Venter 2005 *ZaöRV* 165.

104 Venter 2005 *ZaöRV* 165.

BIBLIOGRAPHY

Literature

Boyer 1999 *New Yorker*

Boyer PJ "Big Guns" 17 May 1999 *The New Yorker* 54

Choudhry 2009 *CCR*

Choudhry S "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" 2009 *CCR* 1-86

Chayes 1976 *Harv L Rev*

Chayes A "The Role of the Judge in Public Law Litigation" 1976 *Harv L Rev* 1281-1316

Davis 2006 *Acta Juridica*

Davis DM "To Defer and then When? Administrative Law and Constitutional Democracy" 2006 *Acta Juridica* 23-41

Devenish 2003 *THRHR*

Devenish GE "The Doctrine of Separation of Powers with Special Reference to Events in South Africa and Zimbabwe" 2003 *THRHR* 84-99

Dworkin *Is Democracy Possible Here?*

Dworkin R *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press Princeton NJ 2008)

Dyzenhaus 1998 *SAJHR*

Dyzenhaus D "Law as Justification: Etienne Mureinik's Conception of Legal Culture" 1998 *SAJHR* 11-37

Fallon 1984 *NYU L Rev*

Fallon RH Jnr "Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons" 1984 *NYU L Rev*

Giliomee, Myburgh and Schlemmer 2001 *Democratization*

Giliomee H, Myburgh J and Schlemmer L "Dominant Party Rule, Opposition Parties and Minorities in South Africa" 2001 *Democratization* 161-182

Govindjee et al *Introduction to Human Rights Law*

Govindjee A *et al Introduction to Human Rights Law* (LexisNexis Durban 2009)

Cane P "Understanding Judicial Review and Its Impact" 15-42 OR

Hertogh M and Halliday S "Judicial Review and Bureaucratic Impact in Future Research" 269-284?

in Hertogh M and Halliday S (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press Cambridge 2004)

Hoexter 2000 *SALJ*

Hoexter C "The Future of Judicial Review in South African Administrative Law" 2000 *SALJ* 484-519

Hoexter *Administrative Law*

Hoexter C *Administrative Law in South Africa* 2nd ed (Juta Cape Town 2012)

Hulme and Peté 2012 *PER/PELJ*

Hulme D and Peté S "Vox Populi? Vox Humbug! – Rising Tension between the South African Executive and Judiciary Considered in Historical Context – Part Two" 2012 *PER/PELJ* 44-67

Labuschagne 2011 *Politeia*

Labuschagne P "State Instability in South Africa: A Matter of an Organic State Trapped within Constitutional State?" 2011 *Politeia* 1-24

Labuschagne *Funksionele en Strukturele Ontleding*

Labuschagne PAH *'n Funksionele en Strukturele Ontleding van die 1993- en 1996-Grondwet met Spesiale Verwysing na die Trias Politica-Leerstuk* (LLD-thesis UNISA 2007)

Langa 2006 *Stell LR*

Langa P "Transformative Constitutionalism" 2006 *Stell LR* 351-360

Lenta 2004 *SAJHR*

Lenta P "Democracy, Rights Disagreements and Judicial Review" 2004 *SAJHR* 1-31

Malan 2014 *PER/PELJ*

Malan K "Reassessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa" 2014 *PER/PELJ* 1965-2040

McLean *Constitutional Deference*

McLean K *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP Pretoria 2009)

Mureinik 1986 *SALJ*

Mureinik E "Administrative Law in South Africa" 1986 *SALJ* 615-645.

O'Regan 2005 *PER/PELJ*

O'Regan K "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution" 2005 *PER/PELJ* 120-150

Pieterse 2004 *SAJHR*

Pieterse M "Coming to Terms with the Judicial Enforcement of Socio-economic Rights" 2004 *SAJHR* 383-417

Ranchod 2007 *Policy*

Ranchod K "State-civil Society Relations in South Africa: Some Lessons from Engagement" 2007 *Policy: Issues and Actors* 1-23

Roux *Politics of Principle*

Roux T *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press Cambridge 2013)

Schokman, Creasey and Mohen *Short Guide*

Schokman B, Creasey D and Mohen P 2012 *Short Guide: Strategic Litigation and its Role in Promoting and Protecting Human Rights* (Advocates for International Development London 2012)

Southall 2014 *Africa Spectrum*

Southall R "Threats to Constitutionalism by Liberation Movements in Southern Africa" 2014 *Africa Spectrum* 79-99

Venter 2005 *ZaöRV*

Venter F "The Politics of Constitutional Adjudication" 2005 *ZaöRV* 129-166

Case law

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC)

Dalrymple v Colonial Treasurer 1910 TS 372

Director of Public Prosecutions v Minister of Constitutional Development 2009 4 SA 222 (CC)

Ferreira v Levin 1996 1 SA 984 (CC)

Glenister v President of the RSA 2009 1 SA 287 (CC)

Helen Suzman Foundation v President of the RSA 2015 2 SA 1 (CC)

Hugh Glenister v President of the RSA 2011 3 SA 347 (CC)

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 SA 505 (CC)

Logbro Properties CC v Bedderson 2003 2 SA 460 (SCA)

Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 6 SA 407 (SCA)

Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC)

Minister of Home Affairs v Somali Association of South Africa Eastern Cape 2015 3 SA 545 (SCA)

Modderfontein Squatters, Greater Benoni Council v Modderklip Boerdery (Pty) Ltd 2004 6 SA 40 (SCA)

Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 2 SA 609 (E)

Nyathi v Department of Health, Gauteng 2008 5 SA 94 (CC)

Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal 1999 2 SA 91 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC)

Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87

S v Makwanyane 1995 3 SA 391 (CC)

Sibiya v The Director of Public Prosecutions, Johannesburg 2005 5 SA 315 (CC)

South African Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC)

Speaker of the National Assembly v De Lille 1999 4 All SA 241 (A)

United Democratic Movement v President of the RSA (No 2) 2003 1 SA 495 (CC)

Whittaker v Roos 1911 TS 1092

Legislation

Constitution of India, 1950

Constitution of the Republic of South Africa, 1996

Constitution Seventeenth Amendment Act, 2012

South African Police Service Act 68 of 1995

South African Police Service Amendment Act 10 of 2012

Internet sources

ANC 1998 https://amadlandawonye.wikispaces.com/1998,+ANC,+State,+Property+Relations,+Social+Transformation

African National Congress 1998 *The State, Property Relations and Social Transformation - Umrabulo No 5, 3rd Quarter 1998* https://amadlandawonye.wikispaces.com/1998,+ANC,+State,+Property+Relations,+Social+Transformation accessed 23 November 2015

Van Eeden 2015 https://litigator.co.za/hands-off-judiciary-warns-chief-justice

Van Eeden M 2015 *Hands Off Judiciary Warns Chief Justice* https://litigator.co.za/hands-off-judiciary-warns-chief-justice accessed 23 November 2015

LIST OF ABBREVIATIONS

ANC	African National Congress
CCR	Constitutional Court Review
Harv L Rev	Harvard Law Review
NLM	National Liberation Movement
NYU L Rev	New York University Law Review
PER/PELJ	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
ZaöRV	Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht

PUBLIC LITIGATION AND THE CONCEPT OF "DEFERENCE" IN JUDICIAL REVIEW

A Klaasen*

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

* Abraham Klaasen. BProc, LLM (UNISA) Lecturer Faculty of Law, North West University.

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.