

**THE RULE OF LAW, THE PRINCIPLE OF LEGALITY AND THE TEST  
FOR RATIONALITY: A CRITICAL ANALYSIS OF THE SOUTH AFRICAN  
JURISPRUDENCE IN THE LIGHT OF THE SEPARATION OF POWERS.**

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by

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## DECLARATION

I, Nkosinathi Mzolo, student number 207524259, hereby declare that the thesis titled “*The rule of law, principle of legality and the test for rationality in the South African jurisprudence in the light of the principle of separation of powers*” for LLM is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University.

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Nkosinathi Mzolo.

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only envisaged a “poor if not poorest standard” and never anticipated it to develop the way it actually has.

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## ABSTRACT

Over the past twenty (20) years the South African jurisprudence has been shaped by numerous factors that emanate primarily from the interpretation of the Constitution. As a result the study, knowledge and philosophy of law has witnessed vital developments which at some point seem to cause confusions in the legal fraternity. Among other confusions that exist is what constitutes “rationality” in law, what factors are relevant in defining rationality, how has rationality been defined and how has it been applied?

The thesis explores various instances where our courts particularly the Constitutional Courts and the Supreme Court of Appeal has defined and applied the rationality test when testing for the exercise of public power by the public functionaries. To begin with, our courts have held that rationality is a central principle under the principle of legality which is an implicit term to the study of the rule of law. The rule of law itself has been held to be an implicit term to the Constitution of the Republic of South Africa and that all actions will only be valid if they comply with the rule of law as a constitutional value thereof.

However this is not to imply that other values of the constitution like transparency, openness and accountability are less important than the rule of law but most litigation has occurred under rule of law, hence why the focus of this thesis is on the rule of law. Under this legality principle, there are a lot of principles like the principle of authority but rationality appears to be the most significant and the courts have focused mostly on it.

In defining what legality rationality is, our courts have pronounced that it is a legal safety-net applicable to every exercise of public power but more particularly where no constitutionally defined right has been violated, it protects individuals against the abuse of power. The courts initially envisaged a ‘poor rationality’, however when comparing how the principle has developed over years it is clear that the principle has been used variably. At some point rationality has been applied leniently while at some point more stringently without any clear guidance, which creates uncertainty as to the correct legal position.

Among other considerations of the thesis includes the fact that when the rationality principle is stringently applied, it has been held to threaten the principle of the separation of powers,

however when the same principle is leniently applied, it has been held to fall short of the required standards and the demands of the constitutions especially the transparent basis of the decisions. And when this principle is applied variably, it has been seen to undermine the very principle of the rule of law that it is meant to give effect to; this is because the rule of law demands that law should be static and predictable. This confusion stimulates the construction of the thesis as different developments have been formulated but most interestingly proposes the different standards that should apply to executive and legislative decisions.

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## CHAPTER 1: INTRODUCTION

### 1. Background

Section 1 of the Constitution<sup>1</sup> provides that the Republic of South Africa is “one, sovereign, democratic state” that is founded, *inter alia*, on the values of the “supremacy of the Constitution and the rule of law”.<sup>2</sup> Apart from the supremacy of the Constitution and the rule of law, section 1 further provides that the Republic is also founded on the value of a “multi-party system of democratic government to ensure accountability, responsiveness and openness”.<sup>3</sup>

In its controversial judgment in *United Democratic Movement v President of the Republic of South Africa*,<sup>4</sup> the Constitutional Court held that these values are significant for two reasons: first, because they influence the interpretation of the other provisions of the Constitution and ordinary rules of law; and, second, because they set positive standards with which ordinary rules of law and conduct must comply in order to be valid. An important consequence of this latter function is that law or conduct which is in conflict with the values listed in Section 1 can be declared invalid and struck down.<sup>5</sup>

### 2. The principle of the rule of law

Out of all of the values set out in Section 1, the principle of the rule of law has arguably attracted the most judicial attention and, accordingly, has played a critical role in the development of South Africa’s system of constitutional review. The Constitutional Court itself has referred to and discussed the principle of the rule of law in at least 30 different judgments.

The Constitutional Court’s jurisprudence on the principle of the rule of law can be traced back to its judgment in *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council*.<sup>6</sup>

The facts of this case are as follows. In 1996 the Greater Johannesburg Transitional Metropolitan Council and its substructures passed resolutions adopting a new uniform rate of

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Section 1(c).

<sup>3</sup> Section 1(d).

<sup>4</sup> *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC).

<sup>5</sup> *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) para 19.

<sup>6</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC).

6.45 cents in the Rand on all land under their jurisdiction for the financial year ahead.<sup>7</sup> One of the consequences of adopting this new uniform rate was that the rates payable by some ratepayers, such as the appellants, went up, while the rates payable by others went down.

After the resolutions were passed, the appellants applied to the Johannesburg High Court for an order declaring them to be unconstitutional and invalid. They based their application on the grounds that the resolutions fell outside the powers of the respondents and thus infringed the “principle of authority” which forms a part of the constitutional right to just administrative action guaranteed in section 24(a) of the interim Constitution.<sup>8</sup>

The Johannesburg High Court dismissed the application and the appellants then appealed unsuccessfully to the Supreme Court of Appeal and then to the Constitutional Court. Like the Supreme Court of Appeal, the Constitutional Court also dismissed the application and found in favour of the respondents.

In arriving at this decision, the Constitutional Court began by pointing out that the first issue it had to decide was whether the resolutions passed by the respondents imposing a new uniform rate could be classified as administrative action. This is because the right to just administrative action applies only to those exercises of public power that can be properly classified as administrative action.

Insofar as this issue was concerned, the Constitutional Court held that the resolutions passed by the respondents could not be classified as administrative action. Instead, it had to be classified as legislative action. This is because, under the interim Constitution, the legal status of municipal councils had changed from being administrative bodies to legislative bodies whose members were directly elected and whose decisions were based on political considerations.<sup>9</sup>

Despite the fact that the resolutions could not be tested against the right to just administrative action, the Constitutional Court held further, this did not mean that they could not be reviewed

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<sup>7</sup> The four substructures were the the Eastern Metropolitan Substructure, the Northern Metropolitan Substructure, the Western Metropolitan Substructure and the Southern Metropolitan Substructure.

<sup>8</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>9</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) at para 41.

at all. Instead of being tested against the right to just administrative action, they would have to be tested against the principle of legality which applies to legislative action and which, like the right to just administrative action, also encompasses the “principle of authority”.<sup>10</sup>

“These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition, it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law to the extent at least that it expresses this principle of legality is generally understood to be a fundamental principle of constitutional law”.<sup>11</sup>

It follows from this finding, the Constitutional Court went on to hold, that while every exercise of public power is subject to the principle of authority, the source of this principle differs depending upon the nature of the power in question. In the case of administrative action, the principle of authority is encompassed in the right to just administrative action. In the case of legislative and executive action, the principle of authority is encompassed in the principle of legality which forms a part of the rule of law.<sup>12</sup>

Apart from the *Fedsure Life Insurance* case, the Constitutional Court has discussed the principle of legality on a number of other occasions. In these cases it has held that the principle of legality imposes a number of other restrictions on the exercise of legislative power. Among these are the following:

- (a) First, the legislature may not pass legislation that applies retrospectively or that targets a particular individual or a particular group.<sup>13</sup>
- (b) Second, the legislature may not pass legislation that is arbitrary or capricious or irrational.<sup>14</sup>
- (c) Third, the legislature may not pass legislation that is so vague and uncertain that those who are bound by it do not know what is expected of them.<sup>15</sup>

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<sup>10</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) at para 58.

<sup>11</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) at para 56.

<sup>12</sup> Section 1(c).

<sup>13</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>14</sup> *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) and *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).

<sup>15</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108. See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 102. These examples are taken from G Manyika *The rule of law, the*

Besides imposing additional restrictions on the exercise of legislative powers, the Constitutional Court has held that the principle of legality also imposes similar restrictions on the exercise of executive power. Among these are the following:

- (a) First, the executive must exercise its powers to serve the legitimate purpose of those powers: it must not act arbitrarily, and for no purpose or with an ulterior motive.<sup>16</sup>
- (b) Second, the executive may not exercise the powers that have been conferred upon it in a manner that is irrational.<sup>17</sup>
- (c) Third, the executive may not exercise the powers that have been conferred upon it in bad faith or misconstrue its powers.<sup>18</sup>
- (d) Fourth, the executive must exercise its powers diligently and without undue delay.<sup>19</sup>
- (e) Last, when the executive exercises its powers it may not ignore relevant considerations<sup>20</sup> and it must act with procedural rationality.<sup>21</sup>

### **3. The test for rationality**

In the same way that the principle of the rule of law has attracted the most judicial attention out of all of the values listed in Section 1, the test for rationality has attracted the most judicial attention out of all of the components of the principle of legality. Like the principle of the rule of law, therefore, the test for rationality has also played a critical role in the development of South Africa's system of constitutional review.

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*principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the Constitutional Court* Unpublished LLM Thesis, University of KwaZulu-Natal (2016) at 5.

<sup>16</sup> *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng Provincial Government* 2012 (5) SA 24 (SCA).

<sup>17</sup> *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) and *Poverty Alleviation Network v President of the RSA* 2010 6 BCLR 520 (CC).

<sup>18</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

<sup>19</sup> *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC).

<sup>20</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

<sup>21</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC). These examples are taken from G Manyika *The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the Constitutional Court* Unpublished LLM Thesis, University of KwaZulu-Natal (2016) at 6.

The Constitutional Court's jurisprudence on the test for rationality can be traced back to its judgment in *Prinsloo v Van der Linde*.<sup>22</sup>

In this case the applicant applied for an order declaring section 84 of the Forest Act<sup>23</sup> to be unconstitutional and invalid on the ground that it infringed the right to equality before the law guaranteed in section 8(1) of the interim Constitution. Section 84 of the Forest Act differentiated between owners of land located inside designated fire control areas and owners of land located outside designated fire control area. Owners of land located outside designated fire control areas were presumed to be negligent when a fire started on their land, while owners of land located inside such areas were not.

A majority of the Constitutional Court rejected the application and found that the differentiation did not infringe section 8(1). In arriving at this decision, the majority held that a differentiation which does not amount to unfair discrimination (i.e. a mere differentiation) will only infringe section 8(1) if there is no rational relationship between the differentiation and a legitimate governmental purpose. This is because when it comes to a mere differentiation "the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate purpose, . . .".<sup>24</sup>

After setting out these principles, the majority turned to apply them to the facts. In this respect the majority found that the differentiation was rationally related to a legitimate governmental purpose, namely reducing the risk of fires spreading from land located outside a designated fire control area. The differentiation was rationally related to this purpose because it encouraged owners of land located outside designated fire control areas (who were not required to take any fire prevention measure by the statute itself) to be more vigilant about preventing fires.<sup>25</sup>

Following this judgment, the Constitutional Court dramatically extended the application of the test for rationality when it used the test, initially, to determine the constitutional validity of legislative action in *New National Party v Government of the RSA*<sup>26</sup> and, later, to determine

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<sup>22</sup> 1997 (3) SA 1012 (CC).

<sup>23</sup> 122 of 1984.

<sup>24</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at paras 25-26.

<sup>25</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at paras 39-40.

<sup>26</sup> *New National Party v Government of the RSA* 1999 (3) SA 191 (CC) at para 19.

the constitutional validity of executive action in *Pharmaceutical Manufactures: In re the Ex parte Application of the President*.<sup>27</sup>

In the *New National Party* case the applicant applied for an order declaring sections 1(xii) and 6(2) read together with section 38(2) of the Electoral Act to be invalid on the grounds that they infringed the right to vote guaranteed in section 19 of the Constitution. These sections of the Electoral Act provided that a citizen could register to vote and thus vote only if he or she was in possession of a bar-coded identity document (“ID”).

A majority of the Constitutional Court rejected the application and found that the bar-coded ID requirement did not infringe section 19 and neither did it infringe the principle of legality. In arriving at this decision the majority held that not only must legislation which merely differentiates be rationally related to a legitimate governmental purpose, but so must all legislative schemes and that Parliament cannot “act arbitrarily or capriciously”.

“It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose”.<sup>28</sup>

After setting out these principles the majority turned to apply them to the facts. In this respect the majority found that the bar-coded ID requirement was rationally related to a legitimate governmental purpose, namely the effective, efficient and reliable exercise of the right to vote. The bar-coded ID was rationally related to this purpose because it was administratively efficient, it reduced the possibility of electoral fraud and it did not indicate the race of its bearer.<sup>29</sup>

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<sup>27</sup> 2000 (2) SA 674 (CC).

<sup>28</sup> *New National Party v Government of the RSA* 1999 (3) SA 191 (CC) at para 19.

<sup>29</sup> *New National Party v Government of the RSA* 1999 (3) SA 191 (CC) at paras 26-27.

In the *Pharmaceutical Manufacturers* case the President applied for an order declaring his decision to bring the Medicines and Medical Devices Regulatory Authority Act (the “Medicines Act”) prematurely into operation to be invalid on the grounds that his decision fell outside the powers conferred upon him by the Act and thus infringed the “principle of authority” which is encompassed by the common law right to just administrative action.

The Constitutional Court granted the application not on the grounds that the President’s decision fell outside his authority and thus infringed the right to just administrative action, but rather on the grounds that the President’s decision was irrational and thus infringed the principle of legality. In arriving at this decision, the Court held that the test for rationality essentially provides that the exercise of public power by the executive and other functionaries should not be arbitrary.

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”<sup>30</sup>

In addition, the Constitutional Court also held, the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. “Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle”.<sup>31</sup>

After setting out these principles, the Constitutional Court then turned to apply them to the facts of the case and came to the conclusion that the President’s decision to bring the Medicines Act into operation was irrational. This is because the machinery required to implement the Act was not yet in place and the President’s decision rendered the Act inoperable. It also created a dangerous lacunae in the law.<sup>32</sup>

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<sup>30</sup> *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.

<sup>31</sup> *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 86.

<sup>32</sup> *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 89.



#### 4. The development of the test for rationality

As Hoexter has pointed out, following the judgment in the *Pharmaceutical Manufacturers* case it appeared as though the test for rationality would be applied only on very rare occasions for the following two reasons:

- First, because the principle of legality itself is merely a residual ground of review and, accordingly, that it should be used only in very limited circumstances, namely when no other ground of review is applicable.
- Second, because, as it was defined and described by the Constitutional Court in the *Pharmaceutical Manufacturers* case, the test for rationality is a minimum threshold requirement for the exercise of public power.<sup>33</sup>

The low level nature of the test for rationality was expressly confirmed by the Constitutional Court in *Law Society of South Africa v Minister of Transport*<sup>34</sup> where it rejected an invitation to go beyond “the rational connection test between means and ends” and embrace a much wider standard of review, one which not only asks “whether the impugned legislative measure discriminates unfairly, but also whether it ‘unfairly deprive[s] people of constitutional protection’”.<sup>35</sup>

In arriving at this decision, the Constitutional Court expressly stated that “the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used”. Instead, it is simply a threshold requirement and as such is restricted to asking “whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise” and nothing more.<sup>36</sup>

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<sup>33</sup> C Hoexter “A rainbow of one colour? Judicial review on substantive grounds in South African law” in H Willberg and M Elliot. *The Scope and Intensity of Substantive Review* (2015). See also *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 67 where the Court stated that “[t]he test for rationality is a relatively low one. As long as the government purpose is legitimate and the connection between the law and the government purpose is rational and not arbitrary, the test will have been met”.

<sup>34</sup> 2011 (1) SA 400 (CC).

<sup>35</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para 29.

<sup>36</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para 38. These statements were reaffirmed by the Constitutional Court more recently in its judgment in *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at para 42 where the Court held that the requirement of rationality sets the “lowest possible threshold for the validity of executive action” and explained that the reason for adopting such a low level test was to give the legislative and executive branches of government the widest possible latitude within the limits of the Constitution.

In the years that have followed the *Pharmaceutical Manufacturers* case, however, the principle of legality, and especially the test of rationality, has developed into a much broader and more stringent legal mechanism. In a series of recent judgments both the Constitutional Court and the Supreme Court of Appeal have expanded the test for rationality to encompass procedural fairness (see, for example, *Albutt v Centre for the Study of Violence and Reconciliation*)<sup>37</sup> and the giving of reasons (see, for example, *Judicial Service Commission v Cape Bar Council*).<sup>38</sup>

In addition, both courts have also applied the test for rationality in a much more stringent manner, one which appears to be approaching not only the test for rationality set out in the Promotion of Administrative Justice Act (“PAJA”)<sup>39</sup> (see, for example, *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism*),<sup>40</sup> but even the test for reasonableness, which includes proportionality (see, for example, *Zealand v Minister for Justice and Constitutional Development*<sup>41</sup> and *Democratic Alliance v President of the RSA*).<sup>42</sup>

The expanded and enhanced test for rationality, however, has been criticised by academic commentators. Apart from denouncing the enhanced test on the grounds that it subverts the right to just administrative action guaranteed in section 33 of the Constitution<sup>43</sup> and the Promotion of Administrative Justice Act (the “PAJA”),<sup>44</sup> academic commentators have also criticised the expanded and enhanced test on the grounds that it infringes the doctrine of the separation of powers. Kohn, for example, argues that the courts are using the expanded and enhanced rationality test to increase their reservoir of judicial power and expand their supervisory review jurisdiction in a manner that is inconsistent with the principle of the separation of powers doctrine.<sup>45</sup>

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<sup>37</sup> 2010 (3) SA 293 (CC). See also *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) and *eTV (Pty) Ltd v Minister of Communications* [2016] ZASCA 85 (31 May 2016).

<sup>38</sup> 2013 (1) SA 170 (SCA).

<sup>39</sup> 3 of 2000.

<sup>40</sup> [2011] 2 All SA 529 (SCA).

<sup>41</sup> 2008 (4) SA 458 (CC).

<sup>42</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC).

<sup>43</sup> Section 33 of the Constitution provides that: “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration”.

<sup>44</sup> 3 of 2000.

<sup>45</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130 *SALJ* 810 at 812.

“The principle concern of this article is that in developing such an expansive substantive conception of rationality review – in the absence of *meaningful* engagement with the prescripts of the separation of powers doctrine – and thereby increasing their reservoir of judicial power, the courts may be perceived to be expanding their supervisory review jurisdiction in a manner that amounts to an affront to this doctrine. In particular, given our current political climate and the disconcerting attacks against the judiciary for being counter-majoritarian, the extension of the more onerous review grounds, designated for the carefully crafted realm of administrative action to decisions of a discretionary nature in the political realm, may lead to the gradual chipping away of our court’s fiercely guarded institutional security and thus the ‘authoritative legitimacy’ that lies at the heart of their power”.<sup>46</sup>

It is not entirely clear, however, whether this criticism is entirely justified. This is because a careful examination of the case law shows that while the courts are willing to apply the expanded and enhanced rationality test to executive action (see, for example, *Democratic Alliance v President of the RSA*), they are reluctant to do so to legislative action (see, for example, *Merafong Demarcation Forum v President of the RSA*<sup>47</sup> and *Poverty Alleviation Network v President of the RSA*).<sup>48</sup> The distinction drawn by the courts between executive and legislative action, it will be argued, is consistent with the doctrine of the separation of powers and particularly with a substantive theory of the separation of powers that reflects the participatory nature of South Africa’s constitutional democracy.

The purpose of this thesis, therefore, is to determine whether the expanded and enhanced rationality standard is consistent with a substantive theory of the separation of powers which is consistent with participatory democracy.

## **5. The research question**

As stated above, the purpose of this study is to determine whether the expanded and enhanced rationality standard is consistent with a substantive theory of the separation of powers which is consistent with participatory democracy.

More particularly, the purpose of this thesis is to:

- Set out and discuss the rationality test;

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<sup>46</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130 *SALJ* 810 at 812.

<sup>47</sup> 2008 (5) SA 171 (CC).

<sup>48</sup> 2010 (6) BCLR 520 (CC).

- Set out and discuss the separation of powers;
- Critically analyse the manner in which the expanded and enhanced rationality test is applied to legislative action;
- Critically analyse the manner in which the expanded and enhanced rationality test is applied to executive action; and
- Determine whether the manner in which the expanded and enhanced rationality test is applied to legislative and executive action is consistent with a substantive theory of the separation of powers which is consistent with participatory democracy.

## **6. The methodology**

This thesis is based on a qualitative approach as opposed to an empirical or quantitative approach. As such it will involve a desktop review, analysis and critical evaluation of various legal materials. Both primary and secondary legal authorities will be explored in an attempt to provide for the trace and proof for historical legal trends, exposing contradictions and inconsistencies between some theoretical and practical observations of applications of some legal principles and also providing for suggestions.

## **7. The structure of the study**

This thesis will be divided into five chapters. These chapters will be as follows:

### *Chapter One: Introduction*

The background, the research question and the research methodology are set out and discussed in Chapter One. In addition, the structure of the thesis is also set out in this chapter.

### *Chapter Two: The principle of the rule of law*

The historical origins of the rule of law as well as certain formalist and substantive versions of the rule of law are set out and discussed in Chapter Two. In addition, the implications of the substantive versions for the separation of powers will also be examined.

### *Chapter Three: Rationality, the right to procedural fairness and the right to be given reasons*

The minimalist version of the test for rationality which was initially adopted by the Constitutional Court is set out and discussed in Chapter Three. The manner in which this

minimum version has subsequently been expanded to include the right to procedural fairness as well as the right to be given reasons is also examined.

#### *Chapter Four: Rationality, enhanced rationality and reasonableness*

The differences between the minimalist version of the test for rationality initially adopted under the principle of legality, the enhanced version of test for rationality set out in section 6(2)(f)(ii) of PAJA and the test for reasonableness set out in section 6(2)(h) of PAJA are set out and discussed in Chapter Four. The stricter application of the minimalist version is also examined.

#### *Chapter Five: The doctrine of the separation of powers*

The origins, purpose and elements of the separation of powers are set out and discussed in Chapter Five. The counter-majoritarian difficulty and its implications for the power of judicial review are also considered. A substantive theory for the separation of powers which is consistent with a participatory democracy is also proposed.

#### *Chapter Six: Analysis and Conclusion*

The manner in which the courts have applied the expanded test for rationality to legislative and executive action is set out and discussed in Chapter Six. Following this discussion a number of concluding points are made.

### **8. The limitations of the study**

This study will only be limited to what is relevant to the study of rationality. Although some other grounds of review beyond rationality principle may be inflicted, they will only be discussed insofar as they define the scope of rationality. This is referred to as “proof by contradiction” which is to define what something is not to prove and contrast what it is. This is exactly the purpose of possibly consulting other grounds of review to prove what rationality is not in proving what it is.

## CHAPTER TWO: THE PRINCIPLE OF THE RULE OF LAW

### 1. Introduction

Before turning to discuss the way in which the test for rationality been interpreted and applied by the courts in South Africa, it is important to set out and discuss the principle of the rule of law from a conceptual perspective. This conceptual perspective will help to locate the test for rationality, which is an aspect of the principle of legality which in turn is an incidence of the principle of the rule of law, in a theoretical framework. This theoretical framework will facilitate a critical assessment of the manner in which the South African courts have interpreted and applied the test for rationality in light of the doctrine of the separation of powers.

### 2. The origins of the principle of the rule of law

Although the principle of the rule of law is sometimes traced back to clauses 39 and 40 of the Magna Carta, which King John of England (1166-1216) was compelled to sign at Runnymede by a group of rebel barons on 15 June 1215,<sup>49</sup> the more modern version (including the term itself) is usually traced back to the English constitutional law scholar Professor Albert Venn Dicey (1835-1922), who used it his book *An Introduction to the Study of the Law of the Constitution* (1885).<sup>50</sup>

In this book Dicey argued that the rule of law encompasses three principles:

The first principle is usually referred to as the principle of the supremacy of the law and it states that the ordinary law is supreme and that a person cannot be deprived of his or her rights through the arbitrary exercise of discretionary power. Dicey himself described this principle as follows:

“We mean, in the first place that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”.<sup>51</sup>

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<sup>49</sup> Clause 39 of the Magna Carta, which means Great Charter, provides that “[n]o free man shall be taken, imprisoned, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his equals and the by law of the land”. Clause 40 provides that “[t]o no one will we sell, to no one will we deny, or delay, right or justice”.

<sup>50</sup> AV Dicey *An Introduction to the Study of the Law of the Constitution* 9ed (1945).

<sup>51</sup> AV Dicey *An Introduction to the Study of the Law of the Constitution* 9ed (1945) at 188.

The second principle is usually referred to as the principle of equality and it states that no person, including state officials and especially high-ranking state officials, is above the law and that every person is subject to the same laws and the jurisdiction of the same normal courts. Dicey described this principle as follows:

“We mean in the second place, when we speak of ‘the rule of law’ as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary laws of the realm and amenable to the jurisdiction of the ordinary tribunals”.<sup>52</sup>

The third principle is referred to as the general principle and it provides that the fundamental rights of the individual are protected by the ordinary remedies contained in the common law and provided by the normal courts, rather than by a Bill of Fundamental Rights. Dicey described this principle as follows:

“There remains yet a third and a different sense in which the ‘rule of law’ . . . may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right to public meetings) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution”.<sup>53</sup>

Dicey’s [third] principle was inferred from a comparison between the positions in Britain and elsewhere in Western Europe, where various constitutions contained extensive bills of rights without effective mechanisms for their enforcement. It is now generally acceptable that a judicially enforceable bill of rights provides better protection to the individual than a system which “sovereignty of parliament” forms the basis of constitutional law.<sup>54</sup>

In the decades that have followed the publication of Dicey’s book, several different versions of the rule of law have been developed. These versions may be divided into two categories, namely formalist versions and substantive versions.<sup>55</sup> These categories lay down a fundamental framework on how the rule of law at least from a theoretical understanding should be perceived.

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<sup>52</sup> AV Dicey *An Introduction to the Study of the Law of the Constitution* 9ed (1945) at 193.

<sup>53</sup> AV Dicey *An Introduction to the Study of the Law of the Constitution* 9ed (1945) at 195.

<sup>54</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 104. L Fuller *The Morality of Law* (1964) at 41;

<sup>55</sup> See B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 91.

Each of these categories will be discussed in turn starting with the formalist versions and then going on to the substantive versions.

### 3. Formalist versions

#### 3.1 Introduction

As Kruger has pointed out, “formal versions of the rule of law focus on the procedure or manner of the promulgation of laws and do not set any requirements for the content of laws”.<sup>56</sup> Formal versions of the rule of law, however, “do not seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met”.<sup>57</sup>

Some formal versions of the rule of law encompass only a few requirements and are usually referred to as thin versions of the rule of law while others encompass more requirements and are usually referred to as thick versions of the rule of law. Generally speaking thicker formal versions of the rule of law incorporate the requirements that make up the preceding thinner formal versions. Tamanaha distinguishes between three formal versions of the rule of law: “rule by law” (which is the thinnest); “formal legality” (which is thicker); and “democracy plus legality” (which is the thickest).<sup>58</sup> Each of these will be considered in turn below.

#### 3.2 Rule by law

The rule by law version of the rule of law simply provides that the state must act in accordance with a valid law irrespective of its procedural and/or substantive characteristics. Or, to put it another way, the state may only exercise those powers that have been vested in it by the law, but the law itself does not have to comply with any procedural or substantive requirements. It simply has to be law.<sup>59</sup>

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<sup>56</sup> See R Krüger “The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?” (2010) 13(3) *PER/ PELJ* 468 at 476.

<sup>57</sup> See P Craig “Formal and substantive conceptions of the rule of law: An analytical framework” 1997 *Public Law* at 1/469. See also *Supra* Kruger at 476.

<sup>58</sup> See B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 91.

<sup>59</sup> See R Krüger “The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?” (2010) 13(3) *PER/ PELJ* 468 at 476. B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 92. P Craig “Formal and substantive conceptions of the rule of law: An analytical framework” 1997 *Public Law* at 469; L Fuller *The Morality of Law* (1964) at 41.



### 3.3 Formal legality

#### (a) Introduction

The formal legality version of the rule of law accepts the requirements set out in the rule by law version but goes on to impose at least some procedural requirements on the state's authority to make and implement laws. These procedural requirements are usually said to be the following: that the law must be general in nature; that it must be prospective and not retrospective; and that it must be clear, that it must be open and that it must be relative stable.<sup>60</sup> Each of these requirements is discussed in more detail below.

##### *(i) Laws should be general*

This requirement provides that laws should apply equally to everyone, except to the extent that objective differences justify differentiation, for example race and gender. In addition, it also provides that laws should not target individuals. In other words, there should be no bills of attainder. A bill of attainder is one which singles out a group or individual for punishment without following a fair process.<sup>61</sup>

##### *(ii) Laws should be prospective and not retrospective*

This requirement provides that laws should only take effect after they have been passed. In other words, that laws should apply into the future and not into the past. There are a number of reasons for this requirement. Perhaps the most important is that people cannot be expected to comply with the law if the law does not exist or has not been introduced. This is because they cannot adjust their behaviour to comply with the law, even if they wanted to.<sup>62</sup>

##### *(iii) Laws should be clear, open and stable*

This requirement provides that laws should not be vague, that they should not be made in secret and that they should not be constantly changing. In other words, that laws should be reasonably easy to understandable and reasonably easy to access. Once again, there are a number of

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<sup>60</sup> See R Krüger "The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?" (2010) 13(3) *PER/PELJ* 468 at 476. See also J Raz "The rule of law and its virtues" 1977 *LQR* at 198; L Fuller *The Morality of Law* (1964) at 41; and B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 93.

<sup>61</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 6. See also T Bingham *The rule of law* (2010) at 55.

<sup>62</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 6.

reasons why laws must be clear, open and stable. Perhaps the most important is that people cannot be expected to comply with the law if they cannot understand or access the law or if the law is in a state of constant change.<sup>63</sup>

### **(b) Joseph Raz's formal legality**

Apart from the requirements set out above, Joseph Raz added several others. Among these are that “the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of the principles of the rule of law in respect of administrative action and legislation, courts should be easily accessible; and the discretion of law enforcement agencies should not be allowed to pervert the law”. Raz argues that these requirements are necessary to implement those set out above.<sup>64</sup> Once again, each of these requirements will be discussed in turn below.

#### *(i) The independence of the judiciary must be guaranteed*

This requirement provides that judicial officers must be independent from the other branches of government. When judicial officers are independent from the other branches of government, they are more likely to uphold the requirements of the rule of law without fear, favour or prejudice.<sup>65</sup>

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<sup>63</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 6 and 7. See also T Bingham *The rule of law* (2010) at 37.

<sup>64</sup> J Raz “The rule of law and its virtues” 1977 *LQR* 198 at 198-201. Many of the requirements identified by Raz were adopted by the South African Law Review Commission and subsequently found their way in the both the interim Constitution and the Constitution. See: CRM Dlamini “The administrative law of a typical South African university” 1994 Thesis (LL. D.). University of the Western Cape. These reports included draft legislation aimed at codifying the power of judicial review. This Judicial Review Bill provided, inter alia, that the courts would be entitled to review a decision if: the applicable principles of natural justice have been violated; a procedure or a condition required by law has not been complied with in the making of a decision; the organ which made a decision was not by law authorised to make a decision; the decision was not authorised by the provisions of the law in terms of which it purports to have been made; the decision was materially influenced by an error of law or fact; the decision was made for an ulterior motive or purpose; and the decision was otherwise contrary to the law. Even before the interim Constitution was adopted these reports had a profound influence on the common law. This is because in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) the Appellate Division held that an administrative decision may be reviewed and set aside if the decision-maker failed to apply his mind to the relevant issues in accordance with the “behests of the statute and the tenets of natural justice”. Such a failure, the Appellate Division held further, may be shown, *inter alia*, by proof that: the decision was arrived at arbitrarily or capriciously or *mala fide*; or as a result of unwarranted adherence to a fixed principle; or in order to further an ulterior or improper purpose; or that the decision-maker misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignore relevant ones; or that the decision as so grossly unreasonable as to warrant the inference that he failed to apply his mind to the matter.

<sup>65</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 7.

*(ii) The principles of natural justice must be observed*

This requirement provides that everyone is entitled to a fair hearing. At a minimum these means that each party must be given an opportunity to present his or her case (*audi alteram partem* (hear the other side)) and that the judicial officer must be impartial (*nemo iudex in sua causa* (no one may be a judge in their own case)). When the principles of natural justice are observed, the judicial officer is much more likely to interpret and apply the law correctly.<sup>66</sup>

*(iii) The courts should have review powers over the implementation of the principles of the rule of law*

This requirement provides that the courts should have the authority to review the manner in which the other branches of government have implemented the requirements of the rule of law. An important consequence of this requirement is that the courts should also have the power to declare law or conduct which infringes the principles of the rule of law to be invalid and to set such law or conduct aside.<sup>67</sup>

*(iv) The courts should be easily accessible*

Given the central position of the courts in ensuring the rule of law, this requirement provides that the courts must be accessible to all, including both the rich and the poor, the strong and the weak. In addition, it also means that matters should be dealt with timeously and long delays should be avoided.<sup>68</sup>

*(v) The discretion of law enforcement agencies should not be allowed to pervert the law*

This requirement provides that the conduct of the police and the prosecuting authorities should not be allowed to subvert the law. The police, for example, should not be allowed to allocate their resources to avoid the prevention or detection of certain crimes or to avoid prosecuting certain classes of criminals. Similarly, the prosecution should not be allowed to decide not to prosecute the commission of certain crimes, or crimes committed by certain classes of offenders. This aspect is closely linked to the principle that laws should be general and that they should be open, stable and clear. This is because it provides that there must be established rules guiding when and how the police, the prosecuting authorities and other agencies must

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<sup>66</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 8.

<sup>67</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 8.

<sup>68</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 8-9.

function. This will assist in ensuring that there is no abuse of power or bias on the side of the agencies but rather that the public receive equal and uniform treatment.<sup>69</sup>

### **3.4 Democracy plus legality**

Finally, the democracy plus legality version of the rule of law accepts the requirements set out in the rule by law and formal legality versions, but goes on to provide that the people must also consent to the laws that govern their lives and they must be allowed to do so through a democratic process. The reason why the people must consent to the laws that govern their lives through a democratic process, the theorists who support this version argue, is because it legitimates the law and thus provides an important, if not the most important, ground on which the law can base its authority and, especially, its coercive authority.<sup>70</sup>

## **4. Substantive legality**

### **4.1 Introduction**

While the formal versions of the principle of the rule of law, and especially the thicker versions, go a long way towards ensuring that the state does not abuse the power that has been conferred upon it, all of the formal versions suffer from the fact that they do not place any limitations or restrictions on the substantive content of laws. As a result it is possible that even a law which complies with the requirements democracy plus legality may still be a bad law.

As Tamanaha points out, in a democracy the legislature has the authority to make changes to the law whenever it desires. An organised cabal or subgroup, therefore, may use the democratic system (which occasionally experiences dramatic swings in public sentiment) as a mechanism to acquire control of the legislature. It can then use the legislature to pass laws aimed at advancing its particular agenda, while simultaneously claiming the legitimacy conferred by its participation in the democratic system. “Democracy”, he points out further, “is a blunt and unwieldy mechanism that offers no assurance of producing morally good laws”.<sup>71</sup>

In order to address this weakness in the formal versions of the principle of the rule of law, substantive versions encompass the requirements of all of the formal versions but go further

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<sup>69</sup> See A Mathews *Freedom, State Security and the Rule of Law* (1986) at 9.

<sup>70</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 99.

<sup>71</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 101.

and impose restrictions on the substantive content of the laws. Like the formal versions of the rule of law, some substantive versions encompass only a few requirements and are referred to as thin versions, while others encompass more requirements and are referred to as thicker versions. Also like the formal versions, the thicker substantive versions incorporate the restrictions that make up the preceding thinner versions. Tamanaha distinguishes between two substantive versions of the rule of law: a “thin” version and a “thick” version.<sup>72</sup> Each of these will be considered in turn below.

#### **4.2 The “thin” version of the rule of law**

The thin substantive version of the rule of law provides that the law must promote and protect individual civil and political rights, such as the right to equality, the right to freedom of expression, the right to freedom of religion, the right to privacy, the right to property and the right not to be treated in a cruel and inhuman manner. This substantive version is particularly concerned about the potential of the state to abuse the power that has been conferred upon it. It thus imposes a negative duty on the state to refrain from unlawfully interfering in the private lives of individuals. This version also provides that individual civil and political rights do not depend for their existence on a Bill of Rights. This is because they are derived from the rule of law itself. In terms of this version, therefore, the rule of law is regarded as a mini-Bill of Rights.<sup>73</sup>

#### **4.3 The “thick” version of the rule of law**

The thick substantive versions of the rule of law provides that the law must not only promote and protect individual civil and political rights, but also social and economic rights, such as the right to education, the right to health care, the right to housing and the rights to food and water. This thick version of the rule of law is particularly concerned with the establishment by the state of the social, economic, educational and cultural conditions under which a person’s legitimate aspirations and dignity may be realised. It thus imposes an affirmative duty on the state to help make life better for the people, to enhance their existence, including effectuating a measure of distributive justice.<sup>74</sup>

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<sup>72</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 91.

<sup>73</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 111. See also A Mathews *Freedom, State Security and the Rule of Law* (1986) at 11 and 20.

<sup>74</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 111.

#### **4.4 The substantive version of the rule of law and the separation of powers**

While both the thin and thick substantive versions of the rule of law address the criticism levelled against the formal versions by imposing limitations or restrictions on the substantive content of law in order to protect human rights, they give rise to their own difficulties. The most significant of these is that they threaten the separation of powers between the judicial branch of government and the legislative and executive branches of government (the political branches).

The reason why the substantive versions threaten the separation of powers between the judicial branch of government and the political branches is because they give the courts the power to review the content and thus potentially the merits of the decisions made by the political branches, which are often based on policy (ideological, moral, political and religious) considerations. The substantive versions of the rule of law thus potentially allow the courts to intrude very far into the terrain the political branches.

As Tamanaha points out, this may lead to conflict between the judicial and political branches of government:

“When courts, in the name of protecting individual rights, squelch democratic law-making too much, their conduct can result in a backlash that prompts the judiciary to restrain its conduct. A notorious example of this was the 1930s US Supreme Court, which invalidated social welfare legislation until President Roosevelt proposed to enlarge the Court as means to appoint more compliant Justices; this ‘court packing plan’ failed to obtain Congressional support, but the Court took notice and halted its obstructionist practice”.<sup>75</sup>

Apart from threatening the separation of powers, Tamanaha points out further, the substantive version may also be undemocratic. This is because unlike the political branches, the courts are not elected by the people. This means that not only do judicial decisions lack democratic legitimacy, but also that they cannot be overturned by the people. In addition, because human rights are indeterminate there may be reasonable disagreements about the merits of policy decisions. As a result, a democratic society may find itself where it is ruled by a bevy of Platonic Guardians deciding on the content of rights and the validity of policy decisions in accordance with their own subjective views.

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<sup>75</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 111.

“No concern would arise from [allocating the power to review legislation and executive decisions to the courts] if the content and application of rights were readily apparent, but as already indicated that is often not the case. Here the indeterminacy problem discussed in Chapter Six is most acute. If judges consult their own subjective views to fill in the content of rights, the system would no longer be the rule of law, but the rule of the men and women who happen to be the judges. Substitute one judge for another with different views, or get a different mix of judges, and the result might be different. It amounts to a clutch of Platonic Guardians presiding over the common people and their representatives”.<sup>76</sup>

## **5. Conclusion**

Having briefly set out and discussed the principle of the rule of law from a conceptual perspective, we may now turn to discuss the manner in which the test for rationality been interpreted and applied by the courts in South Africa. In this respect we will begin by discussing the manner in which the courts have expanded the minimalist version of the test for rationality to include the right to procedural fairness and the right to be given reasons (Chapter Three). Thereafter, we will discuss the manner in which the courts have enhanced to the minimalist version to bring it in line either with the enhanced version of the test for rationality set out in section 6(2)(f)(ii) of PAJA and even the test for reasonableness set out in section 6(2)(h) of PAJA (Chapter Four).

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<sup>76</sup> B Z Tamanaha *On the rule of law: History, Politics, Theory* (2004) at 105.

## CHAPTER THREE: RATIONALITY, THE RIGHT PROCEDURAL FAIRNESS AND THE RIGHT TO BE GIVEN REASONS

### 1. Introduction

As we saw in Chapter One, the test for rationality may be traced back to the judgments in *Prinsloo v Van der Merwe*<sup>77</sup>(equality); *New National Party v Government of the RSA*<sup>78</sup> (legislation); and *Pharmaceutical Manufacturers: In re the Ex parte Application of the President*<sup>79</sup> (executive conduct) where the Constitutional Court held, not only that rationality is a requirement of the principle of legality, but also that this requirement essentially provides that a decision (legislation or executive conduct) must be rationally related to a legitimate governmental purpose, otherwise it will in effect be arbitrary and inconsistent with the Constitution.<sup>80</sup>

In the same chapter we also saw that following these judgments, and especially the judgment in the *Pharmaceutical Manufacturers* case, it appeared as though the test for rationality would be applied only on very rare occasions for the following two reasons:

- First, because the principle of legality itself is a residual ground of review and, accordingly, that it should be used only in very limited circumstances, namely when no other ground of review is applicable.
- Second, because, as it was defined and described by the Constitutional Court in the *Pharmaceutical Manufacturers* case, the test for rationality established a minimum threshold requirement for the exercise of public power.<sup>81</sup>

In the years that have followed the *Pharmaceutical Manufacturers* case, however, both the Constitutional Court and the Supreme Court of Appeal have expanded the test for rationality to encompass procedural fairness (see, for example, *Albutt v Centre for the Study of Violence*

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<sup>77</sup> 1997 (3) SA 1012 (CC).

<sup>78</sup> 1993 (3) SA 191 (CC).

<sup>79</sup> 2000 (2) SA 674 (CC).

<sup>80</sup> See section 3 of Chapter One above: Apart from introducing and describing the test for rationality, the Constitutional Court in the *Pharmaceutical Manufacturers* case also held that the requirement is an objective one. This is because “[o]therwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle” (at para 86).

<sup>81</sup> See section 4 of Chapter One above. See also C Hoexter “A rainbow of one colour? Judicial review on substantive grounds in South African law” in H Willberg and M Elliot *The Scope and Intensity of Substantive Review* (2015).



*and Reconciliation*)<sup>82</sup> and the giving of reasons (see, for example, *Judicial Service Commission v Cape Bar Council*).<sup>83</sup>

In addition, they have applied rationality in a much more stringent manner, one which appears to be approaching not only the test for rationality set out in the Promotion of Administrative Justice Act (“PAJA”)<sup>84</sup> (see, for example, *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism*),<sup>85</sup> but even the test for reasonableness, which include proportionality (see, for example, *Zealand v Minister for Justice and Constitutional Development*<sup>86</sup> and *Democratic Alliance v President of the RSA*).<sup>87</sup>

The purpose of this chapter is to discuss the key judgments in which the courts have expanded the test for rationality to include the right to procedural fairness, the right to procedural rationality and the right to be given reasons. The judgments in which the courts have applied the test for rationality in a more stringent manner will be discussed in the next chapter. Before turning to consider these judgments, however, it will be helpful to discuss the two elements that make up the minimalist version of the rationality requirement in more detail, namely a legitimate governmental purpose and whether the means used are rationally related to that purpose.

## **2. A legitimate governmental purpose**

This is the first element of minimum test for rationality. Under this element of the test, a litigant can challenge a decision based on the argument that the purpose sought to be achieved is illegitimate in a constitutional democracy. It is worth noting that very little (if any) judicial attention has been given to the legitimacy or illegitimacy of the purpose. Instead, the emphasis has overwhelmingly focused on the relationship between the decision and the purpose. There is no doubt, however, that a litigant may use this element to successfully challenge a decision. This means that before even proceeding to question whether a rational link exists between a

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<sup>82</sup> 2010 (3) SA 293 (CC). See also *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) and *eTV (Pty) Ltd v Minister of Communications* [2016] ZASCA 85 (31 May 2016).

<sup>83</sup> 2013 (1) SA 170 (SCA).

<sup>84</sup> 3 of 2000.

<sup>85</sup> [2011] 2 All SA 529 (SCA).

<sup>86</sup> 2008 (4) SA 458 (CC).

<sup>87</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC).

decision and the purpose of that decision, one can question the legitimacy of the purpose itself.<sup>88</sup>

In order to fulfil this element, a court must be satisfied that the decision serves at least one legitimate purpose. This will require the court to, first, identify the purpose of the decision and then, second, to determine whether it is legitimate. While the purpose may be identified by applying the normal principles of interpretation, it is not clear how a court will determine whether that purpose is legitimate. This is because it calls for a value judgment. Price argues in this respect that the courts do not have an unrestrained discretion to determine whether the purpose is legitimate. Instead, he argues further, the courts must determine whether the purpose is legitimate by taking into account the Constitution's "objective, normative value system". Only if the purpose is inconsistent with this value system may it be declared illegitimate.<sup>89</sup>

### **3. The relationship between the means used and the purpose sought to be achieved**

This is the second element of the minimum test for rationality. As pointed out above, judicial attention has focused almost exclusively on this element. In order to fulfil this element, a court simply has to determine whether there is a rational connection between a decision and its legitimate purpose. Like the "legitimacy" requirement, however, the "rational connection" requirement is also vague. This is because the test for rationality does not indicate how, or how well, the decision should serve its purpose. Price argues in this respect, however, that a decision will be rationally connected to its purpose in at least two circumstances: first, where it is capable of achieving its purposes as a matter of fact (i.e. when there is a causal link); and, secondly, where it is capable of achieving its purpose in a symbolic sense (i.e. where it has an intrinsic value). He also argues that where a decision is not capable of achieving its purpose at all, then it is clearly irrational.<sup>90</sup>

Having discussed the two elements that make up the minimalist version of the rationality requirement, we may now turn to discuss the key judgments in which the courts have expanded the test for rationality to include the right to procedural fairness and the right to be given

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<sup>88</sup> A Price "The content and justification of rationality review" 2010 *SAPL* 346 at 355.

<sup>89</sup> A Price "The content and justification of rationality review" 2010 *SAPL* 346 at 355-356.

<sup>90</sup> A Price "The content and justification of rationality review" 2010 *SAPL* 346 at 355-356.

reasons, namely *Albutt v Centre for the Study of Violence and Reconciliation*<sup>91</sup> and *Judicial Service Commission v Cape Bar Council*.<sup>92</sup>

## **4. Rationality and the right to a fair procedure**

### **4.1 Introduction**

The Constitutional Court's approach to the principle of legality and the right to a fair procedure has evolved over time.

Initially, in *Masetlha v President of the RSA*,<sup>93</sup> the Court held that the right to a fair procedure is not a self-standing requirement of the principle of legality. Then, in *Albutt v Centre for the Study of Violence and Reconciliation*,<sup>94</sup> the Court held that while the right to a fair procedure is not a self-standing requirement, it may be enforced as a part of the test for rationality, but only in certain limited circumstances.

Most recently, in *Minister of Defence and Military Veterans v Motau*<sup>95</sup> the Court stated, but did not decide, that the right to a fair procedure may in fact be a self-standing requirement of the principle of legality. Despite the confusion the Court's evolving jurisprudence has given rise to, in light of the judgment in *Albutt v Centre for the Study of Violence and Reconciliation*<sup>96</sup> there is no doubt that the test for rationality does encompass the right to a fair procedure in certain limited circumstances.

### **4.2 Albutt v Centre for the Study of Violence and Reconciliation**

#### *(a) The facts*

The facts of this case are as follows. In late 2007 former President Mbeki announced that he intended to create a "special dispensation" in terms of which certain political prisoners could apply for a pardon under section 84(2)(j) of the Constitution, which provides that the President is responsible for "pardoning or relieving offenders". The political prisoners who could apply

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<sup>91</sup> 2010 (3) SA 293 (CC).

<sup>92</sup> 2013 (1) SA 170 (SCA).

<sup>93</sup> 2008 (1) SA 566 (CC).

<sup>94</sup> 2010 (3) SA 293 (CC).

<sup>95</sup> 2014 (5) SA 69 (CC).

<sup>96</sup> 2010 (3) SA 293 (CC).

in terms of this special programme, he also announced, were those who had been convicted of a political crime which had been committed before 16 June 1999 and who had decided not to participate in the Truth and Reconciliation Commission's (the "TRC's") amnesty process for whatever reason.

At the same time that he announced the special dispensation, former President Mbeki also explained that the fundamental objectives of this dispensation were the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and to make a further break with matters which arose from the conflicts of the past. In addition, he also explained that in deciding whether to grant a pardon or not he would "be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation" and that he would "uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process".<sup>97</sup>

After former President Mbeki had made his announcement in Parliament, a coalition of non-governmental organisations led by the Centre for the Study of Violence and Reconciliation (the respondents) made several attempts to obtain the participation of the victims (of the offences in respect of which pardons were sought) in the special dispensation process. Unfortunately, all of these attempts were rejected by the Office of the President which argued that neither the Terms of Reference for the special dispensation nor the Explanatory Memorandum nor any law compelled the President to grant the victims of the offences a hearing before he made his decision whether to grant a pardon or not.

After the President refused to grant the victims of the offences a hearing, the respondents applied to the High Court for an order compelling the President to do so. In their application, the respondents submitted that the President's decision to grant a pardon is an administrative decision and, consequently that it had to comply with fair procedure provisions set out in section 3(2) of the PAJA.<sup>98</sup> The High Court agreed with the respondents and granted the order.

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<sup>97</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 6.

<sup>98</sup> Section 3(2) of the PAJA provides that: "(a) A fair administrative procedure depends on the circumstances of each case. (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)(a) adequate notice of the nature and purpose of the proposed administrative action; (b) a reasonable opportunity to make representations; (c) a clear statement of the administrative action; (d) adequate notice of any right of review or internal appeal, where applicable; and (e) adequate notice of the right to request reasons in terms of section 5".

The applicants then appealed to the Constitutional Court. In the Constitutional Court the key question that had to be answered was whether the President was required, prior to the exercise of the power to grant pardon to this group of convicted prisoners, to follow a fair procedure and afford the victims of these offences a hearing.

*(b) The judgment*

The Constitutional Court found in favour of the respondents and dismissed the appeal. In arriving at this decision, the Court began its judgment by stating that it was not necessary to determine whether the President's decision to grant a pardon is an administrative or executive act. It is a well-established principle of South Africa's system of constitutional law, the Court stated further, that the exercise of all power, including the power to grant a pardon in terms of section 84(2)(j), has to comply with the principle of legality which is an incident of the rule of law. The principle of legality, the Court went on to state, provides that every exercise of power, at a minimum has to be rational.<sup>99</sup>

When it came to determining whether the President's decision to grant a pardon was rational or not, the Constitutional Court pointed out, it had to determine whether the decision not to grant the victims of the offences in respect of which pardons were being sought (the means) a hearing was rationally related to the objectives the President was seeking to achieve with the special dispensation, namely nation building, national reconciliation and the further enhancement of national cohesion (the ends).<sup>100</sup>

After setting out these principles, the Constitutional Court turned to apply them to the facts. In this respect the Court held that affording a hearing to the victims of the offences in respect of which pardons were being sought was fundamental to the special dispensation. This is because the participation of both victims and perpetrators was crucial to the achievement of the objectives that underpinned the TRC and especially the amnesty process of the TRC, namely nation building, national reconciliation and the further enhancement of national cohesion.<sup>101</sup>

"The participation of victims was fundamental to the amnesty process. The process encouraged victims and their dependants "to unburden their grief publicly, to receive the collective recognition of a new nation that they were

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<sup>99</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 49.

<sup>100</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 68.

<sup>101</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 56,

wronged, and, crucially, to help them to discover what did in truth happen to their loved ones”. But the truth of what really happened could only be known if those who were responsible for gross violations of human rights were encouraged to disclose it with the incentive that they would not be punished. Thus, the participation of both the victims and the perpetrators was crucial to the achievement of the twin objectives of rebuilding a nation torn apart by an evil system and promoting reconciliation between the people of South Africa”.<sup>102</sup>

In light of the fact that the objectives of the TRC’s amnesty process could be achieved only through the active participation of both the victims and the perpetrators, the Constitutional Court held further, it followed as a matter of simple logic that the objectives of the special dispensation could also be achieved only through the active participation of both the victims and the perpetrators. The participation of the victims, therefore was implicit in the specific features of the special dispensation process.<sup>103</sup>

“In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based”.<sup>104</sup>

Given these points, the Constitutional Court then concluded, the decision to exclude the victims of the offences in respect of which pardons were sought under the special dispensation process was irrational. Accordingly, the victims of these crimes were entitled to be given the opportunity to be heard before the President he made a decision whether to grant a pardon under the special dispensation or not.<sup>105</sup>

The Constitutional Court, however, made a significant remark that the question whether victims of other categories of applications for pardon are entitled to be heard is left open. The granting of hearing applied to this category of applications for pardon only for specific purposes. It therefore did not mean that granting of hearing to pardon applications would operate as a general rule. This would differ from one case to another.<sup>106</sup>

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<sup>102</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 56,

<sup>103</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 72.

<sup>104</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 72.

<sup>105</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 74.

<sup>106</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 75.

“Lest there be a misunderstanding of the scope of this conclusion, I had better stress the obvious. This case is concerned with applications for pardon under the special dispensation. What I have said in this judgment therefore applies to this category of applications for pardon only. What distinguishes this category from others not before us is that the crimes in respect of which pardons are sought are alleged to have been committed with a political motive; the objective of these pardons is to promote national unity and reconciliation; and the crimes concerned were committed in a particular historical context. Different considerations may very well apply to other categories of applications for pardon. This judgment does not therefore decide the question whether victims of other categories of applications for pardon are entitled to be heard. That question is left open”.<sup>107</sup>

*(c) Comment*

Although the Constitutional Court explicitly stated that its findings were limited to the peculiar facts of the case and, therefore, could not necessarily be applied in other circumstances, it opened up the space for the further development of the test for rationality in this respect. As Hoexter has pointed out, it is difficult to think of a decision whose rationality would not be improved by giving both sides an opportunity to present their case. It is, consequently, not surprising that in *Minister of Home Affairs v Scalabrini Centre*<sup>108</sup> and *eTV (Pty) Ltd v Minister of Communications*<sup>109</sup> the Supreme Court of Appeal held that the failure to consult with interested parties was irrational and thus infringed the principle of legality. Each of these judgments will be discussed in turn.

### **4.3 Minister of Home Affairs v Scalabrini Centre**

*(a) The facts*

The facts of this case are as follows. In May 2012, the Director-General of the Department of Home Affairs decided that applications for asylum in terms of the Refugees Act<sup>110</sup> would no longer be accepted and processed by the Refugee Reception Office (the “RRO”) in Cape Town (the CT RRO”). Instead, applications for asylum would in future have to be submitted at RROs in other provinces and especially in provinces located along the northern borders of South Africa.

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<sup>107</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 75.

<sup>108</sup> 2013 (6) SA 421 (SCA).

<sup>109</sup> [2016] ZASCA 85 (31 May 2016).

<sup>110</sup> 130 of 1998.

After the Director-General took this decision, the respondent, which was a non-profit organisation established to assist displaced persons and migrant communities, applied to the High Court for an order setting aside this decision. The High Court granted the order and the Minister then appealed to the Supreme Court of Appeal. In this court the respondent raised several arguments. One of these was that the Director-General's decision was an administrative act and, accordingly, that it had to comply with the fair procedure provisions of section 3(2) of the PAJA. Unfortunately, they argued further, the facts showed that the Director-General's decision did not comply with section 3(2) and, consequently, that it was invalid.

*(b) The judgment*

The Supreme Court of Appeal found in favour of the respondents and dismissed the appeal. In arriving at this decision, the Court first had to determine whether the Director-General's decision could be classified as an administrative act. After carefully examining the nature of the decision and the consideration which the Director-General had to take into account, the Court held that it could not be classified as an administrative act. Instead, it had to be classified as an executive act.<sup>111</sup>

Given that the Director-General's decision was an executive and not an administrative act, the Supreme Court of Appeal held further, it was not governed by the PAJA, but rather by the principle of legality. Insofar as the principle of legality was concerned, the respondent's had argued that this principle imposes a general obligation on those who exercise public power to follow a fair procedure and to give interested and affected parties a hearing before taking a decision.<sup>112</sup>

Although this argument went too far and, accordingly, could not be upheld, the Supreme Court of Appeal went on to hold, in light of the Constitutional Court's judgment in *Albutt* it is quite clear that there are circumstances in which the failure to follow a fair procedure would be irrational and, therefore, would infringe the principle of legality. This means, the Court concluded, that procedural fairness is a ground on which executive acts may be reviewed, but only to the extent that the test for rationality requires it.<sup>113</sup>

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<sup>111</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 57.

<sup>112</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 67.

<sup>113</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 68 and 69.



“Nonetheless, there are indeed circumstances in which rational decision-making calls for interested persons to be heard. That was recognised in *Albutt v Centre for the Study of Violence and Reconciliation*,<sup>37</sup> which concerned the exercise by the President of the power to pardon offenders whose offences were committed with a political motive. One of the questions for decision in that case was whether the President was required, before exercising that power, to afford a hearing to victims of the offences. It was held that the decision to undertake the special dispensation process under which pardons were granted, without affording the victims an opportunity to be heard, must be rationally related to the achievement of the objectives of the process”.<sup>114</sup>

After setting out these principles, the Supreme Court of Appeal turned to apply them to the facts. In this respect it found that the Director-General had failed to give the respondents and other interested and affected parties a hearing before he made his decision to close down the CT RRO. The failure to give the respondents and other interested and affected parties a hearing was irrational, the Court found further, because the Director-General had in fact promised them that he would do so before making his decision because of their special expertise. The Director-General’s failure to live up to this promise, therefore, was unconstitutional and invalid.<sup>115</sup>

“That conclusion in this case does not have as a consequence that there is a general duty on decision makers to consult organisations or individuals having an interest in their decisions. Such a duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware. Here the irrationality arises because the Director-General, through his representatives, at the meeting on 7 May 2012, acknowledged the necessity for such consultation. That he did so is not surprising bearing in mind that the organisations represented at that meeting included not only the Scalabrini Centre, with its close links to the refugee community, but also the United Nations High Commissioner for Refugees, and organisations close to the challenges relating to alleged refugees”.<sup>116</sup>

### *(c) Comment*

As we have already seen, in *Albutt* the Constitutional Court held that the executive has to follow a fair procedure if this is the only rational way in which it can achieve the goals that it has set for itself. Despite the fact that the Constitutional Court stated that this principle could not necessarily be applied in other circumstances, in *Scalabrini* the Supreme Court of Appeal has taken this principle a step further and held that the executive also has to follow a fair procedure when it has promised to do so. It appears, therefore, that the Supreme Court of Appeal at least is willing to review the exercise of executive power on the grounds of procedural fairness in a

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<sup>114</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 68 and 69.

<sup>115</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 72.

<sup>116</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 72.

variety of different circumstances. This approach was confirmed in the Supreme Court of Appeal's subsequent judgment in and *eTV (Pty) Ltd v Minister of Communications*.<sup>117</sup>

#### **4.4 eTV (Pty) Ltd v Minister of Communications**

##### *(a) The facts*

The facts of the case are as follows. In 2008 the Minister of Communication published the Broadcasting Digital Migration Policy (the "Digital Migration Policy") in terms of s 3(1) of the Electronic Communications Act (ECA).<sup>118</sup> This Policy was aimed at facilitating the migration of television broadcasting signals in South Africa from an analogue terrestrial television system to a digital terrestrial television system in order to free up signal space. This process is commonly known as the digital migration process.

One of the difficulties that the digital migration process faces is that the majority of privately owned television sets in South Africa were designed to receive only analogue signals and, consequently, are not capable of receiving a digital signal. In order to overcome this difficulty each of these older television sets requires a set-top box ("STB"). Given the high-cost of these STBs, however, the government resolved that it would provide them free of charge to poorer households.

When the Digital Migration Policy was first published in 2008 it stated that not only would the STBs be provided free of charge to poorer households, but also that these STBs would have encryption technology. This technology would allow each STB to decrypt signals that have been encrypted. Pay television operators usually encrypt their signals in order to ensure that only fee-paying subscribers can receive them. Free television operators also use encryption to obtain high quality programmes from private studio and to prevent their own programmes being pirated.

After it was first published in 2008, the Digital Migration Policy was amended first in 2012, then in 2013 and finally in 2015. As a result of these amendments the provisions dealing with

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<sup>117</sup> [2016] ZASCA 85 (31 May 2016).

<sup>118</sup> 36 of 2005.

encryption technology were changed and eventually the 2015 Digital Migration Policy provided that STBs would no longer have encryption technology.

Following the publication of the 2015 Digital Migration Policy, eTV and the other appellants, who supported the inclusion of encryption technology, applied to the High Court for an order setting aside the decision to amend the Policy. The High Court dismissed the application and the appellants then appealed to the Supreme Court of Appeal.

In the Supreme Court of Appeal, the appellants argued that the Minister's decision to amend the Digital Migration Policy was an administrative act and, accordingly, that it had to comply with the fair procedure provisions of section 3(2) of the PAJA. Unfortunately, they argued further, the facts showed that the Minister's decision did not comply with section 3(2) and, consequently, that it was invalid. In addition, they also argued that the Minister's decision was irrational and thus breached the principle of legality.

*(b) The judgment*

The Supreme Court of Appeal found in favour of the appellants and upheld the appeal. In arriving at this decision the Court focused on the principle of legality rather than the right to just administrative action. Insofar as the principle of legality was concerned, the Court held, *inter alia*, that “[w]here a policy or policy amendment impacts on rights . . . it is only fair that those affected be consulted. Fairness in procedure, and rationality, are at the heart of the principle of legality”.<sup>119</sup> In addition, the Court held further, the duty to consult arises from the value of fairness which underlies the principle of legality.<sup>120</sup> After setting out these principles, the Supreme Court of Appeal turned to apply them to the facts and found that where a significant change has been made to a policy, as in this case, a failure to consult with interested and affected parties would be unfair and thus irrational.<sup>121</sup>

*(c) Comment*

It seems as though the Court in this case was more prepared to pronounce that the process or procedure is an aspect of rationality; that the process upon which the decision is taken must be fair for the rationality test to have been established regardless of the nature of the decision.

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<sup>119</sup> *eTV (Pty) Ltd v Minister of Communications* [2016] ZASCA 85 (31 May 2016) at para 38.

<sup>120</sup> *eTV (Pty) Ltd v Minister of Communications* [2016] ZASCA 85 (31 May 2016) at para 42.

<sup>121</sup> *eTV (Pty) Ltd v Minister of Communications* [2016] ZASCA 85 (31 May 2016) at para 45.

However the Court still remained indirect in its judgment of this stand-point and whether this would be a correct position given the principle of the separation of powers in South Africa.

## **5. Rationality and the right to be given reasons**

### **5.1 Introduction**

Apart from the right to a fair procedure, the Supreme Court of Appeal has held that the test for rationality also includes the right to be given reasons, once again in certain limited circumstances. This approach was held in the case of *Judicial Service Commission and Another v Cape Bar Council*.<sup>122</sup>

### **5.2 Judicial Service Commission and Another v Cape Bar Council**

#### *(a) The facts*

The facts of the case were as follows. In 2011 the Judicial Service Commission (the “JSC”) advertised three vacancies for judicial appointment in respect of the Western Cape High Court in Cape Town (the “WCHC”) and invited suitably qualified persons to apply. Although a number of people applied, only seven applicants were shortlisted. These seven applications were interviewed by the JSC on 12 April 2011 and after these interviews were concluded the JSC recommend the appointment of only one of them. No other recommendations were made. Two positions thus remained vacant.

Following the JSC’s recommendations, the Cape Bar Council applied to the High Court for an order, *inter alia*, declaring the JSC’s failure to fill two judicial vacancies in the WCHC to be unconstitutional and invalid and directing it to reconsider afresh the applications of the shortlisted candidates who were not selected. The High Court granted the application and the JSC then appealed to the Supreme Court of Appeal. The Cape Bar Council based its application on two grounds: first, that the JSC was not properly constituted when it made its decision not to fill the two vacancies; and, second, that its decision was irrational and thus unconstitutional.

The JSC was not properly constituted, the Cape Bar Council argued, because section 178(1) of the Constitution provides that the JSC consists, *inter alia*, of the President of the Supreme Court

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<sup>122</sup> 2013 (1) SA 170 (SCA).

of Appeal and section 178(7) provides that if the President is temporarily unavailable, the Deputy-President of the Supreme Court of Appeal must act as his or her alternate. Unfortunately, the Cape Bar Council argued further, neither the President nor the Deputy-President attended the meeting of the JSC on 12 April 2011. This is because the President was excused in order to attend another meeting and the Deputy-President was never invited.

The JSC's decision not to fill the two vacancies was irrational and thus unconstitutional, the Cape Bar Council also argued, because when it asked the JSC to provide reasons why it had decided not to fill the two vacancies, the JSC's only response was that none of the unsuccessful candidates received a majority of the votes. Unfortunately, the Cape Bar Council argued further, this response was no answer at all and it could be inferred from this non-answer that the decision not to fill the two vacancies was in fact irrational and thus unconstitutional.

*(b) The judgment*

The Supreme Court of Appeal found in favour of the Cape Bar Council and dismissed the appeal. In arriving at this decision, the Court began by pointing out that it first had to determine whether the decision of the JSC not to fill the two vacancies was reviewable at all. This is because the JSC's power to recommend the appointment of judges of the High Court is expressly excluded from the definition of administrative action in the PAJA. While it was true that the JSC's power to recommend the appointment of judges could not be reviewed in terms of the PAJA, the Supreme Court of Appeal held, it could still be reviewed in terms of the principle of legality and especially the test for rationality. This is because the JSC's power to recommend the appointment of judges is derived from section 174(6) of the Constitution and, therefore, is clearly a public power.<sup>123</sup>

After having found that the JSC's decision not to fill the two vacancies was reviewable, the Supreme Court of Appeal turned to consider the grounds on which the Cape Bar Council had based its application, namely: first, that the JSC was not properly constituted when it made its decision not to fill the two vacancies; and, second, that its decision was irrational and thus unconstitutional

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<sup>123</sup> *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at para 22.

Insofar as the first ground was concerned, the JSC argued, *inter alia*, that section 2(2) of the Judicial Service Amendment Act<sup>124</sup> expressly provided that meetings of the JSC can be validly held and decisions validly taken if the Chief Justice and the Deputy Chief Justice are unavailable. The same principle, the JSC argued further, must also apply when the President and the Deputy-President of the Supreme Court of Appeal are unavailable. This meant, the JSC submitted, that even though neither the President of the Supreme Court of his Appeal nor his Deputy were present at the meeting on 12 April 2011, it was still valid.

Although there was no doubt that this argument was correct, the Supreme Court of Appeal held, the difficulty that the JSC faced in the case at hand was that the evidence showed that Deputy-President of the Supreme Court of Appeal was not unavailable. In fact he was available to attend the meeting of the JSC on 12 April 2011. The problem was that he had simply had not been invited to attend the meeting. The meeting of the JSC on that day, therefore, the Supreme Court of Appeal concluded, was not properly constituted and its decisions were invalid.<sup>125</sup>

Insofar as the second issue was concerned, the JSC argued (a) that neither the Constitution nor any other law imposed an express obligation on it to provide reasons for its decisions; (b) that it had in any event given a reason for its decision not to fill the two vacancies, namely that none of the unsuccessful candidates had received a majority of the votes; and (c) that because the members of the JSC voted in secret, it was not possible it to provide a better or more detailed reason than the one it had already give.

While it was true that neither the Constitution nor any other law imposed an express obligation on the JSC to provide a reason for its decision not to fill the two vacancies, the Supreme Court of Appeal held, such an obligation is implicit in the duty that the principle of legality imposes on the JSC to act in a manner that is not irrational or arbitrary. The obligation to give reason is implicit in the duty to act in a manner that is not irrational or arbitrary, the Court held further,

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<sup>124</sup> 20 of 2008. Section 2(2) reads as follows: “If neither the Chief Justice nor the Deputy Chief Justice is available to preside at a meeting of the Commission, the members present at the meeting must designate one of the members holding office in terms of section 178(1)(b) or (c) of the Constitution as the acting chairperson for the duration of the absence”.

<sup>125</sup> *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at paras 31 and 32.

because this is the only way in which an affected party can determine whether a decision is rational or not.<sup>126</sup>

“But once these premises are accepted as valid, I cannot see how the inference of an obligation to give reasons can be avoided. It is difficult to think of a way to account for one’s decisions other than to give reasons (see eg *Mphahlele v First National Bank of SA Ltd* [1999] ZACC1; 1999 (2) SA 667 (CC) para 12). As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision-maker: ‘Trust me, I have good reasons, but I am not prepared to provide them’? Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge. I believe the same sentiment to have been expressed by Mokgoro and Sachs JJ when they said in *Bell Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002 (3) SA 265 (CC) para 159:

‘The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law’.<sup>127</sup>

The Supreme Court of Appeal then went on to conclude therefore that the JSC is, as a general rule, obliged to give reasons for its decision not to recommend a particular candidate if properly called upon to do so.<sup>128</sup>

### *(c) Comment*

Even though in this judgment the SCA makes it clear that with regards to giving reasons for the decisions taken, each case will be judged on its own merits, it is however undeniable that it (the SCA) accepted that reasons giving forms part of rationality which in turn widens the scope for the rationality review principle. What lies to be established though is whether these reasons should be in writing as per the requirements for the administrative actions set out in section 5(2) of PAJA.<sup>129</sup> It seems that this precedent serves to further highlight the different levels of scrutiny required for reviewing executive and legislative actions.

## **6. Conclusion**

Apart from expanded the minimalist version of the test for rationality to include the right to procedural fairness and the right to be given reasons, the courts have also enhanced to the

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<sup>126</sup> *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at paras 43 and 44.

<sup>127</sup> *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at para 44.

<sup>128</sup> *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at paras 45.

<sup>129</sup> Section 5(2) of the PAJA reads as follows: “The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.”

minimalist version to bring it in line either with the enhanced version of the test for rationality set out in section 6(2)(f)(ii) of PAJA and even the test for reasonableness set out in section 6(2)(h) of PAJA. These developments are set out and discussed in the next chapter.



## CHAPTER FOUR: RATIONALITY, ENHANCED RATIONALITY AND REASONABLENESS

### 1. Introduction

As we saw in Chapter Three, the Constitutional Court and the Supreme Court of Appeal have not only expanded the scope and ambit of the test for rationality by incorporating the right to “procedural fairness and the right to be given reasons”<sup>130</sup>, they have also enhanced the test for rationality by applying it in a more stringent manner. This enhanced approach appears to approach not only the test for rationality set out in the Promotion of Administrative Justice Act (“PAJA”)<sup>131</sup> (see, for example, *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism*),<sup>132</sup> but even the test for reasonableness (see, for example, *Democratic Alliance v President of the RSA*<sup>133</sup> and *Zealand v Minister for Justice and Constitutional Development and Another*).<sup>134</sup> The purpose of this chapter is to set out and discuss these judgments.

### 2. Administrative rationality

#### 2.1 Introduction

The test for rationality has always been an important requirement of administrative law. This is because in terms of section 33 of the Constitution<sup>135</sup> all administrative actions must, *inter alia*, be reasonable<sup>136</sup> and rationality is one of the components of the test for reasonableness.

It is consequently not surprising that section 6(2)(f)(ii) of the PAJA provides that an administrative act may be reviewed and set aside if it is not rationally connected to:

- “(aa) the purpose for which it was taken;
- (bb) the purpose of the empowering decision;
- (cc) the information before the administrator; or

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<sup>130</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 68 and 69 and *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at paras 45 respectively.

<sup>131</sup> 3 of 2000.

<sup>132</sup> [2011] 2 All SA 529 (SCA).

<sup>133</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC).

<sup>134</sup> 2008 (4) SA 458 (CC).

<sup>135</sup> Section 33 of the Constitution of RSA, 1996.

<sup>136</sup> Section 33 of the Constitution of RSA, 1996.

(dd) the reasons given for it by the administrator”.<sup>137</sup>

While the tests for rationality set out in paragraphs (aa), (bb) and (dd) appear to be closely aligned with minimalist version of the constitutional test for rationality established in the *New National Party*<sup>138</sup> and *Pharmaceutical Manufacturers* cases,<sup>139</sup> the test set out in paragraph (cc) goes further. It is not surprising, therefore, that Hoexter refers to this administrative test as a “rigorous and searching ground”.<sup>140</sup>

The differences between the “administrative” test for rationality and the minimalist version of the constitutional test for rationality, however, appear to have been narrowed by the courts. This is most clearly illustrated in the Supreme Court of Appeal’s judgment in *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism*.<sup>141</sup>

## **2.2 SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism**

### *(a) The facts*

The facts of the case are as follows. On 23 February 2007 the Minister of Environmental Affairs and Tourism (the “Minister”) published the Threatened or Protected Species Regulations in terms of the National Environmental Management: Biodiversity Act (the “Biodiversity Act”).<sup>142</sup> At the same time, he also published lists of critically endangered, vulnerable and protected species. In light of the fact that they face a high risk of extinction in the world in the medium-term future, the Minister classified lions (*panthera leo*) as a vulnerable species.<sup>143</sup>

Apart from classifying lions as a vulnerable species, the Regulation 24(1) of the Threatened or Protected Species Regulations also prohibited the hunting of a listed large predator (including lions) which was, *inter alia*, a “put and take” animal. A “put and take” animal was defined in

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<sup>137</sup> Section 6(2)(e)(vi) of the PAJA also provides for an administrative act may be reviewed and set aside if it was taken “arbitrarily or capriciously”.

<sup>138</sup> *New National Party v Government of the RSA* 1999 (3) SA 191 (CC) at para 19.

<sup>139</sup> *Pharmaceutical Manufactures: In re the Ex parte Application of the President* 2000 (2) SA 674 (CC)

<sup>140</sup> C Hoexter “A rainbow of one colour? Judicial review on substantive grounds in South African law” in H Wilberg and M Elliot *The Scope and Intensity of Substantive Review* (2015).

<sup>141</sup> [2011] 2 All SA 529 (SCA).

<sup>142</sup> 10 of 2004.

<sup>143</sup> *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 4.

Regulation 1 as a “live specimen of a captive bred listed large predator . . . that is released on a property irrespective of the size of the property for the purpose of hunting the animal within a period of 24 months”.

In other words, Regulation 24(1) essentially prohibited what is commonly known as the “canned hunting” of lions.

The prohibition against canned hunting, however, was subject to an exception set out in Regulation 24(2). This exception provided that Regulation 24(1) did not apply to a listed large predator bred or kept in captivity which:

“(a) had been rehabilitated in an extensive wildlife system; and  
(b) had been fending for itself in an extensive wildlife system for at least twenty four months.”<sup>144</sup>

An important consequence of this exception is that it essentially sterilized the canned hunting of lions for a period of 24 months.

After these regulation were published, the appellant, which was a society representing the interests of breeders of predators and of hunters of such animals bred in captivity, applied to the High Court for an order declaring them to be invalid on the grounds that . The High Court refused to grant the application and the appellants appealed to the Supreme Court of Appeal.

In the Supreme Court of Appeal the appellants based their application on a number of grounds. One of these was that the 24 month sterilization of the hunting of captive-bred lions created by Regulation 24(2) was irrational. This Regulation was irrational, the appellants argued, for the following reasons:

- First, the period of 24 months bore no rational connection to any legislative purpose of the Biodiversity Act.
- Second, no rational basis existed for the underlying assumption that captive-bred lions could be rehabilitated at all.
- Third, the period of 24 months could not be rationally justified by an information in the possession of the Minister when he approved the Regulations.

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<sup>144</sup> Section 24 of the National Environmental Management: Biodiversity Act.

*(b) The judgment*

The Supreme Court of Appeal found in favour of the appellants and upheld the appeal. In arriving at this decision, the Court began with a brief discussion of the test for rationality. In this respect, the Court held that:

“Rationality, as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action. As noted in the *Pharmaceutical* case at para 90 ‘a decision that is objectively irrational is likely to be made only rarely but, if this does occur a court has the power to intervene and set aside an irrational decision’”.<sup>145</sup>

After setting out these principles the Supreme Court of Appeal turned to apply to the facts.

In this respect, the Supreme Court of Appeal started its analysis by pointing out that the Minister’s decision to prohibit the canned hunting of lions had to be read subject to section 57(2) of the Biodiversity Act. This section provided, inter alia, that the Minister could prohibit an activity only if the prohibition would protect the survival of a listed threatened or protected species. It followed, therefore, that when the Minister decided to prohibit the canned hunting of lions in Regulation 24(1) he must have been satisfied that this activity was a threat to the survival of the species.<sup>146</sup>

An important consequence of this decision, the Supreme Court of Appeal pointed out further, is that when the Minister decided that the canned hunting of lions would be prohibited only for a period of 24 months in terms of Regulation 24(2), he must have also been satisfied that at the expiry of this period the canned hunting of lions no longer posed a threat to the survival of the species and that only if he was so satisfied could his decision to make Regulation 24(2) be rational.<sup>147</sup>

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<sup>145</sup> *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 28.

<sup>146</sup> *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 30.

<sup>147</sup> *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 31.

“Regulation 24 requires to be read as a whole. Subreg (1) proclaims a series of prohibited activities including the hunting of listed large predators which are ‘put and take’ animals. Subreg (2) uplifts the prohibition created in reg 24(1)(a) under specified circumstances. What legislative purpose does the prohibition on the hunting of ‘put and take’ lions serve? The two principal purposes of the Act are the management and conservation of South Africa’s biodiversity and the protection of species and ecosystems. More specifically, s 57(2) of the Act, in empowering the Minister to prohibit the carrying out of any activity involving a listed threatened or protected species provides that he or she may only do so if that activity ‘is of a nature that may negatively impact on the survival’ of that species. The specific condition for the exercise of a prohibiting power is thus one which serves for the protection of that species. Although s 57(2) contemplates publication of a prohibitory notice on an ad hoc basis in the Gazette, it is clear that in so far as the Minister chooses to include an equivalent prohibition in regulations made under his powers under s 97(b) of the Act the exercise of his power must be read as subject to s 57(2)(a) since it is s 57 which creates the bar on carrying out restricted activities and empowers the Minister to licence them. One may therefore accept that the Minister in making reg 24(1)(a) considered that the hunting of put and take lions with or without a permit constituted a threat to the survival of the lion as a species. Where a power to impose a prohibition can only be exercised if it will achieve or tend to a particular result – as is the case with s 57(2)(a) – and the functionary decides to terminate the prohibition such a decision will be irrational unless he or she first considers whether the reason for the prohibition has ceased to apply. It follows that, in arriving at his decision to include provision for the uplifting of the prohibition the Minister should have considered whether there was evidence available that, if the prohibition were to be lifted, the potential negative impact on the survival of the species would not persist. Only if he was so satisfied could he rationally have made s 24(2)”.<sup>148</sup>

The Minister, however, did not state that this was the reason for making Regulation 24(2). Instead, he stated that the reason for making Regulation 24(2) was to ensure that captive bred lions could become in fact self-sustaining and the reason why he wanted to ensure that captive-bred lions could become self-sustaining was to address the criticisms that had been levelled against the canned hunting of lions and to promote a more ethical form of hunting, one which included a “fair chase”.<sup>149</sup>

The problem with these justifications, the Supreme Court of Appeal, went on to point out, was:

- First, that a careful examination of the scientific evidence showed there was no scientific basis for the belief that a captive-bred lion could become self-sufficient within 24 months or within any period at all. Given this fact, the prohibition on the canned

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<sup>148</sup> *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 30.

<sup>149</sup> *SA Predator Breeders’ Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 34.

hunting of lions could never be lifted in practice and Regulation 24(2), therefore, was meaningless.<sup>150</sup>

- Second, that the desire to promote ethical hunting and the principle of a fair chase with respect to captive-bred lions that were never intended to be released into the wild did not fit into the legislative scheme of the Biodiversity Act which was designed to promote and conserve biodiversity in the wild.<sup>151</sup>
- Third, although the Minister claimed to have based his decision on the recommendations of a panel of experts he had appointed to assist him, a careful examination of the panel's recommendations showed that he had distorted and misrepresented the panel's views. The panel had never referred to a period of 24 months. Instead, the panel had simply stated that hunting should be permitted once the animal became self-sustaining in the wild, without specifying any period at all.<sup>152</sup>

In light of these problems, the Supreme Court of Appeal went on to conclude, the Ministers reasons for making Regulation 24(2):

- “(i) do not rationally conduce to the objectives of the Act;
- (ii) given his intention that hunting should not be the subject of a total prohibition, tend to the opposite effect;
- (iii) cannot be justified according to the facts and opinions available to him”.<sup>153</sup>

*(d) Comment*

The judgment of the Supreme Court of Appeal in this case narrowed the difference between the minimalist constitutional test for rationality (which the Court purported to apply) and the enhanced administrative test for rationality (a) by subjecting the scientific evidence on which the Minister based his decision to a searching and thorough examination; and (b) by finding that the Minister's decision was not rationally connected to the information provided to him by

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<sup>150</sup> *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 36 and paras 40-44.

<sup>151</sup> *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 37.

<sup>152</sup> *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 38.

<sup>153</sup> *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para: 45.

the panel of experts. In other words, the Court essentially applied the test for rationality set out in section 6(2)(f)(ii)(cc) of the PAJA, namely that an administrative act may be reviewed and set aside if it is not rationally connected to the information before the administrator.

### 3. Reasonableness

#### 3.1 Introduction

Although it is not entirely clear which elements are encompassed by the test for reasonableness, Hoexter argues that it must include more than just rationality. This is partly because rationality and reasonableness are listed as separate grounds of review in PAJA. Rationality is listed as ground of review in section 6(2)(f)(jj) and reasonableness as a ground of review in section 6(2)(h). It follows, therefore, that they cannot mean the same thing.<sup>154</sup>

Apart from rationality, Hoexter argues that reasonableness also includes proportionality (or at least some elements of proportionality), although this is controversial.<sup>155</sup> The concept of proportionality is derived from German law and its purpose is to “avoid an imbalance between the adverse and beneficial effects . . . of an action and to encourage the administrator to consider both the needs for the action and the possible use of less drastic or oppressive means to accomplish the desired end”.<sup>156</sup> Among its essential elements, therefore, are balance, necessity and suitability.<sup>157</sup>

When it comes to determine whether a decision is reasonable a variety of factors have to be taken into account. These factors, which were identified by the Constitutional Court in its judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>158</sup> are as follows:

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<sup>154</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 343.

<sup>155</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 343-345 and 349-350.

<sup>156</sup> C Hoexter “Standards of review of administrative action: Review for reasonableness” in J Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy* (2006) 61 at 64.

<sup>157</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 344.

<sup>158</sup> 2004 (4) SA 490 (CC).

“the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”.<sup>159</sup>

In the same way that the courts appear to have narrowed the differences between the administrative test for rationality and the minimalist version of the constitutional test for rationality, they also appear to have narrowed the differences between the test for reasonableness and the minimalist test for rationality. This is most clearly illustrated in the Constitutional Court’s judgments in *Zealand v Minister for Justice and Constitutional Development*<sup>160</sup> and *Democratic Alliance v President of the RSA*.<sup>161</sup>

### **3.2 Zealand v Minister for Justice and Constitutional Development**

#### *(a) The facts*

The facts of the case were as follows: On 24 January 1997 the applicant was charged in the regional court, together with at least two other co-accused with murder, rape and assault with intent to do grievous bodily harm (the first case). That case was postponed several times, with the applicant being remanded in custody. On 15 May 1997 the applicant escaped from custody and was re-arrested and put back into custody on 6 August 1997.<sup>162</sup>

On 20 April 1998 the applicant was convicted of escaping from custody and sentenced to imprisonment for six months, wholly suspended. On 28 September 1998, while still awaiting trial on the first case he was convicted in the Port Elizabeth High Court of the murder of Melvin Phillips and of the unlawful possession of a firearm and ammunition, crimes allegedly committed after the applicant's escape from custody but before his re-arrest (the second case). He was sentenced to imprisonment for 18 years for these offences and was imprisoned in the maximum security block at St Albans Prison.<sup>163</sup>

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<sup>159</sup> *Bato Star Fishing (Pty) Ltd v Minister for Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 45.

<sup>160</sup> 2008 (4) SA 458 (CC).

<sup>28</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC).

<sup>162</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para: 2.

<sup>163</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para: 3.



He was granted leave to appeal against his conviction and sentence in the second case to the full court of the Grahamstown High Court. His appeal was successful, with the result that his conviction and sentence in the second case were set aside on 23 August 1999. The registrar of that High Court, however, negligently failed to issue a warrant for the applicant's release, or otherwise to inform St Albans Prison of the successful appeal until 8 December 2004. The applicant was eventually released only on 9 December 2004 which was more than five years after his successful appeal against his conviction and sentence in the second case.<sup>164</sup>

The registrar's negligence was admitted by the respondents. Mrs Adendorff, the acting head of the maximum security section of St Albans Prison testified before the High Court that, had the registrar properly issued the release warrant after the applicant's successful appeal on 23 August 1999, he would immediately have been transferred to the medium security, the awaiting-trial section of the prison. That did not occur. Instead, notwithstanding his successful appeal, the applicant remained in detention in the maximum security block, an area which, as Mrs Adendorff explained housed only convicted and sentenced prisoners until his release on 9 December 2004.<sup>165</sup>

In addition between 23 August 1999 and the applicant's release, the first case was repeatedly postponed in the regional court, until the charges were finally withdrawn on 1 July 2004. The record of appearances and remands in the first case shows that in respect of the overall majority of the postponements after he was sentenced in the second case on 28 September 1998 (including those after his successful appeal), the clerk of the regional court was directed by the St Albans Prison authorities, by way of the appropriate forms, that the applicant was not to be released because he was a sentenced prisoner. On most occasions, the presiding magistrates who ordered the postponements remanded the applicant in custody at St Albans Prison by way of warrants for detention. Notably, and again despite the applicant's successful appeal in the second case during August 1999, it was subsequently recorded on at least five occasions that he was to be held in custody because of the 18-year sentence of imprisonment imposed upon him on 28 September 1998.<sup>166</sup>

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<sup>164</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para: 4.

<sup>165</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para: 5.

<sup>166</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para: 6.

Finally the record in the first case also reveals that on 11 October 2001 an order was made by magistrate that the case be postponed and that the applicant be released on warning. In addition, the relevant form contains the inscription that the applicant was to be released on warning. A warrant of detention which is normally issued by a presiding officer following a remand in custody, was not issued. However, for reasons that are not apparent on the record, the applicant was not released. Instead, he was returned to the maximum security section of St Albans Prison and, at his very next appearance on 29 October 2001, a different magistrate again remanded him in custody.<sup>167</sup>

*(b) The issue(s)*

The fundamental issue that had to be established by the Constitutional Court on appeal were whether or not the applicant's detention between 23 August 1999 and 30 June 2004 as a sentenced prisoner in the maximum security section of St Albans Prison was unlawful for the purpose of delictual damages. This could be framed differently as: is it lawful to detain a person as if he or she were a convicted prisoner in circumstances where (i) the ostensible basis for his or her detention is absent especially where a court of law has upheld his or her appeal against conviction and sentence, but (ii) he or she is awaiting trial on other charges in relation to a separate offence in respect of which he or she has not been convicted or sentenced?<sup>168</sup>

*(c) The judgment*

After a careful examination, the Constitutional Court held that the applicant should succeed primarily because his s12(1)(a)<sup>169</sup> of the constitution as well as the founding value of freedom<sup>170</sup> rights had been infringed.<sup>171</sup> Accordingly, it was held to be sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken. It

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<sup>167</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para: 7.

<sup>168</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 21.

<sup>169</sup> Section 12 of the constitution reads as follows: “(1) Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause”.

<sup>170</sup> Section 1(a) and 7(1) of the constitution. These sections read as follows: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms”. Section 7(1): “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”.

<sup>171</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 24.

found that the only reason to detain him was so secure his court attendance, which could not justify keeping him in a maximum security as a convicted prisoner.<sup>172</sup>

“In my view in detaining the applicant as a sentenced prisoner in maximum security, the State failed to comply with the substantive component of the s 12(1)(a) right, for the following reasons. Following his successful appeal in the second case, the applicant was treated as a sentenced prisoner when he was not in fact sentenced, and was remanded into maximum security when he had no conviction of any serious criminal wrongdoing. The only possible legal basis on which to justify any deprivation of the applicant's freedom at all was the fact that he was still awaiting trial in the first case. That, however, was insufficient to justify treating him as if he were convicted and sentenced...”<sup>173</sup>

The Court then seemed to have adopted a proportionality standard to find that this infringement on his liberty was undoubtedly greater than was necessary to secure the applicant's attendance at trial. It further reasoned that other prisoners who were awaiting their trials in detention at St Albans Prison were not subjected to the same treatment. It follows that the deprivation of freedom inflicted upon the applicant was undoubtedly 'without just cause' in terms of s 12(1)(a) of the Constitution. Furthermore, the fact that the deprivation was in no way rationally connected to an objectively determinable purpose must mean that it was also 'arbitrary' within the meaning of that provision.<sup>174</sup>

The Constitutional Court found that the reasoning and interpretation of this right (s12(1)(a) of the Constitution) should include the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause. It further found that right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates issued orders remanding the applicant in detention is not sufficient to establish that the detention was not 'arbitrary or without just cause'. The Court still maintained that the decision not release the applicant was irrational.<sup>175</sup>

The Constitutional Court then drew three grounds upon which it believed and concluded that the principle of legality had been violated: First, the effect of Prison authorities conduct was to

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<sup>172</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 34.

<sup>173</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 34.

<sup>174</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 34.

<sup>175</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 43.

bring about an illegal state of affairs, namely, the detention of the applicant as a sentenced prisoner in a maximum security facility contrary to his constitutional right to freedom and security of the person in terms of s 12(1)(a) of the Constitution. Second, the orders were irrational and therefore arbitrary, in the sense that the power to grant them was not exercised in a manner that was rationally related to the purpose for which that power was given. The purpose of the power to remand an awaiting-trial prisoner in custody is to ensure his or her attendance at trial; detaining the applicant as a sentenced prisoner was unnecessary for that purpose. Third, the orders were also issued in breach of s168 and s276 of the Criminal Procedure Act.<sup>176</sup> With this, the Court therefore concluded that this detention amounted to a form of punishment, which was wrong.<sup>177</sup>

The Court finally held that the inevitable conclusion is that the applicant was unjustifiably detained in a manner that violated his right not to be deprived of freedom arbitrarily and without just cause. Further, that violation cannot be justified under s 36 of the Constitution because it was not 'in terms of law of general application'. It follows that the applicant's detention from 23 August 1999 until 30 June 2004 was indeed unlawful.<sup>178</sup>

*(d) Comment*

While it cannot be disputed that detaining the applicant would still serve the purpose of imprisoning someone in a general sense (that of securing a court attendance) which would then make applicant's detention a rational decision given the objective; the Court in this case seem to have used the proportionality standard to find in the applicant's favour. In other words it can be argued that the means used of keeping the accused in a maximum security section as a convicted prisoner while he was merely awaiting a trial would still and surely meet the intended objective which is to secure his courts attendance. However this was held to be a disproportionate measure given the objective. When this is done, it then blurs the distinction between the rationality and the reasonableness standards as they then seem to require a similar factor; that of proportionality.

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<sup>176</sup> Act 51 of 1977. These sections are as follows: Section:168 "A court before which criminal proceedings are pending may adjourn those proceedings on terms which to the court may seem proper and which are not inconsistent with any provisions of this Act". Section 276 empowers a court to pass punitive sentences only "upon a person convicted of an offence".

<sup>177</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 44.

<sup>178</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 46.

### 3.3 Democratic Alliance v President of the RSA

#### (a) *The facts*

In this case the facts were as follows: On or about Wednesday 25 November 2009 the President of the Republic of South Africa purportedly in terms of s 179 of the Constitution of the Republic of South Africa (the Constitution)<sup>179</sup>, read with s9 and s10 of the National Prosecuting Authority Act<sup>180</sup> to appoint Mr Menzi Simelane as the National Director of Public Prosecutions (the appointment). This appointment was challenged on various constitutional grounds *inter alia* that Mr Menzi Simelane was not a fit and proper person with sufficient conscientiousness and integrity to be entrusted with the responsibilities of this office as required by the constitution.<sup>181</sup>

The factual background of the case broadly summarised was that

“Mr Simelane, in his capacity as the Director-General of the Department for Justice and Constitutional Development (Director-General) was intimately involved in a dispute concerning the proper role of the then National Director, Mr Vusi Pikoli. The dispute related to the powers and duties of the Minister for Justice and Constitutional Development and the National Director where Mr Pikoli was suspended by the then President Thabo Mbeki. He (Mr Mbeki) appointed a commission of enquiry headed by a former Speaker of Parliament, Dr Frene Ginwala (Ginwala Commission) to inquire into Mr Pikoli’s fitness to hold office as the National Director. Mr Simelane presented the government’s submissions and gave evidence under oath before the Ginwala Commission where the credibility of his evidence was criticised. His conduct was then investigated by the Public Service Commission of which in a detailed report, recommended disciplinary proceedings against Mr Simelane arising out of his conduct and evidence before the Ginwala Commission. However the President chose to ignore these recommendations and appointed Mr Simelane as the National Director of Public Prosecutions.”<sup>182</sup>

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<sup>179</sup> The Constitution of RSA, 1996. Section 179(1) reads as follows: “There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament”.

<sup>180</sup> Act 32 of 1998. The sections read as follows: Section 9 (1): “Any person to be appointed as National Director, Deputy National Director or Director must (a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and (b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned. S10 The President must, in accordance with section 179 of the Constitution, appoint the National Director.

<sup>181</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 12.

<sup>182</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 4.

The Democratic Alliance contended that the President *inter alia* ought to have considered the relevant parts of the transcript of proceedings, reports and the recommendations by the Public Service Commission which spoke to Mr Simelane's fitness for office; in this they contended that the President failed to make a proper objective assessment of Mr Simelane's fitness for office. They further contended that the President insisted on appointing Mr Simelane as someone through which he could 'tame and control' the NPA. Thus, the appointment was made for an ulterior purpose.<sup>183</sup>

*(b) The issue(s)*

The issues that arose therefore were *inter alia*: whether the process as well as the ultimate decision must be rational; the consequences for rationality if relevant factors are ignored.

*(c) The judgment*

The Constitutional Court dismissed the application and held that the right to a fair procedure is not a self-standing component of the principle of legality. In arriving at this decision, the Court held that both the process by which the decision is made and the decision itself must be rational.<sup>184</sup> To reiterate this point the Court carefully observed *Albutt's* case and held that:

"It is true that the decision by the President in this case was made as head of the National Executive. It is illogical to suggest that while decisions by the President as Head of State must be rational in process and outcome, decisions of the President as head of the National Executive should be rational only in outcome and not in so far as they relate to the process."<sup>185</sup>

This means it did not matter in what capacity the President was acting, the process by which the decision was made must also be rational like the decision itself. The Court went on to reason that not only the decision taken must be rational but everything done in the process of taking that decision becomes part of the means and so must be rational as well.

"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only

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<sup>183</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 11.

<sup>184</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 34.

<sup>185</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 35.

the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.”<sup>186</sup>

This means if any step in the process of a decision (as the Court reasoned) bears no rational link to the objective of the empowering provision, the entire decision will successfully be reviewed for irrationality. However the absence of this process-related link to the objective that is sought to be achieved must be of such a kind that it taints the entire process with irrationality.<sup>187</sup> In addition, the steps taken to arrive at a particular decision have significant effects on the decision itself and are therefore crucial in the objective sought to be achieved; they therefore can never be separated from the decision.

In the context of the case, the Constitutional Court went on to hold that the President’s failure to take into account extracts from the report of the Ginwala Commission which ought to have been considered by any person involved in the process of Mr Simelane’s appointment to the position of National Director of Public Prosecutions was not be rationally related to the purpose of the power, that is, to appoint a fit and proper person.<sup>188</sup>

The Court further went to set up a three-stage test to declare that this decision was irrational which are: “firstly whether the factors ignored are relevant; the second requires the consideration of whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if

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<sup>186</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 36.

<sup>187</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 37 “This conclusion addresses the differences that emerged in argument on whether the decision needs to be rational or whether the process resulting in the decision should also have been rational for an executive decision to stand. A related question, if the process is to be rationally related to the purpose for which the power has been conferred, is whether each step in the process must be so rationally related. The parties were ultimately in agreement that, while each and every step in the process resulting in the decision need not be rationally viewed in isolation, the rationality of the steps taken have implications for whether the ultimate executive decision is rational. In my view, the decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.”

<sup>188</sup> *Democratic Alliance v President of the RSA 2013 (1) SA 248 (CC)* at para 52 “These extracts from the report of the Ginwala Commission ought to have been cause for great concern. Indeed, these comments represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane’s appointment to the position of National Director. Any failure to take into account these comments, or any decision to ignore them and to proceed with Mr Simelane’s appointment without more, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility.”

the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.”<sup>189</sup>

After a closer evaluation and application of these three stages, the Court went on to hold that there may be very few (if any) circumstances where the factors ignored may be relevant to the objective but ignoring them would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end that is sought to be achieved.<sup>190</sup> It therefore came to the conclusion that the President’s decision to ignore these factors was of a kind that coloured the entire process irrational, and thus rendered the ultimate decision irrational.<sup>191</sup> And that there is no rational relationship between ignoring the findings of the Ginwala Commission without more and the purpose for which the power had been given.<sup>192</sup> Therefore the decision to ignore these factors was an irrational one and had to be set aside.<sup>193</sup>

*(d) Comment*

From this judgment the concern that arises is that it seems that the information before the administrator, the range of factors and the options available to the President among others mattered in as far as the rationality principle is concerned. These are the factors that are known

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<sup>189</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at para 39 “It follows that this principle would not directly govern the President’s power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.”

<sup>190</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at para 40: “I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.”

<sup>191</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at para 86.

<sup>192</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at para 88.

<sup>193</sup> *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at para 89: “The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside.”



to form part of the reasonableness standard under PAJA as such this further blurs the difference between the two standards.<sup>194</sup> One would therefore question whether these factors should also form the basis for an executive decision to be reviewable, thus be declared irrational.

#### 4. Critical reaction

The expanded and enhanced test for rationality has been criticised by academic commentators. Apart from denouncing the expanded and enhanced test for rationality on the grounds that it subverts the PAJA, academic commentators have also criticised the expanded and enhanced rationality test on the grounds that it infringes the doctrine of the separation of powers.

Kohn, for example, argues that the courts are using the expanded and enhanced rationality test to increase their reservoir of judicial power and expand their supervisory review jurisdiction in a manner that is inconsistent with the principle of the separation of powers doctrine. Given the attacks that have been levelled against the courts for being counter-majoritarian, she argues further, the expanded and enhanced test for rationality may lead to “gradual chipping away of our court’s fiercely guarded institutional security and thus the ‘authoritative legitimacy’ that lies at the heart of their power”.<sup>195</sup>

Unlike the expanded and enhanced test for rationality, Kohn goes on to argue that

“the minimalist version of the test for rationality does not offend the separation of powers. This is because the minimalist test focuses on the structure of the decision-making process rather than the decision itself. It requires an assessment, first, of whether the conduct or decision in question furthers a legitimate government purpose, and, second, of whether the means chosen to achieve this purpose are objectively capable of furthering it based upon the information before the administrator and any reasons given for the decision.”<sup>196</sup>

In addition, she argues, the test does not require an assessment of the correctness of the decision itself, nor an analysis of whether the means chosen serve the purpose “sufficiently well”. Instead, it requires solely that the decision was made pursuant to a constitutionally legitimate “rhyme or reason”. This is different from reasonableness which requires a stricter compliance

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<sup>194</sup> Promotion of Access to Justice Act, 3 of 2000. Section 6(2) (h) of the Act reads as follows: “The exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.”

<sup>195</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130 *SALJ* 810 at 812.

<sup>196</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130 *SALJ* 810 at 825.

in relation to administrative actions. This standard essentially requires that it be shown that the means chosen were the most appropriate, or “suitable”, in the circumstances.<sup>197</sup>

Finally, Kohn argues that while the expanded and enhanced test for rationality has some benefits, it also gives rise to problems, or in her own words, it “is not free from potholes. It is not the yellow brick road”. This test, she argues further, results in uncertainty for “lay persons and civil servants alike. Far from being a simply pathway to review, it creates its own form of complexity. The most significant of these is that it runs the risk of becoming too broad. Given this danger, she goes on to conclude, it is very important that when the courts apply this expanded and enhanced test for rationality that they engage with the requirements of the doctrine of the separation of powers.<sup>198</sup>

## **5. Conclusion**

As it by should now be a settled argument given the above chapter three and the above discussions that our legal jurisprudence seem to lean too much towards the principle of rationality as more than just a “mere simple means-ends” test but to incorporate some aspects of reasonableness; PAJA requirements; procedural fairness and reasons-giving *inter alia*, what follows then is a careful observation of what effect this expanded notion of rationality has on the principle of the separation of powers. More than just exploring this effect, the following chapter will seek to focus on what and how the substantive theory of the principle can be used to justify this inference by the Supreme Court of Appeal and the Constitutional Court on the executive and legislative powers.

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<sup>197</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130 *SALJ* 810 at 826.

<sup>198</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130 *SALJ* 810 at 828.

## CHAPTER FIVE: THE DOCTRINE OF THE SEPARATION OF POWERS

### 1. Introduction

The purpose of this chapter is to identify and discuss a substantive theory of the doctrine of the separation of powers. This substantive theory of the separation of powers will then be employed to evaluate the validity of the criticisms that have been levelled against the manner in which the courts have expanded and enhanced the test for rationality. Before considering a substantive theory of the separation of powers, however, the origins, purpose and elements of the separation of powers will be considered. The separation of powers concerns that the power of judicial review gives rise to will also be examined.

### 2. The origin of the doctrine of the separation of powers

While the origin of the doctrine of the separation of powers is sometimes traced back to the English philosopher John Locke (1632-1704), who argued that the power of the state should be divided into legislative, executive and foreign relations functions,<sup>199</sup> the more modern version is usually traced back to the French political philosopher Baron de Montesquieu (1689-1755) who discussed it in his book *The Spirit of the Laws* (1748).<sup>200</sup>

In this book Montesquieu argued that in order to prevent the abuse of power and thus to enhance the freedom of the individual it was important to decentralise the power of the state by dividing it into three distinct categories, namely legislative power, executive power and judicial power and then to vest each of these categories of power in separate branches of the state, namely the legislature, the executive and the judiciary.<sup>201</sup> He states in this respect that:

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge

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<sup>199</sup> ECS Wade and A Bradley *Constitutional and Administrative Law* (1991) at 51.

<sup>200</sup> Charles de Secondat, Baron de Montesquieu *The Spirit of the Laws* (translation by T Nugent) Rev ed Vol 1 (1902).

<sup>201</sup> MJC Vile *Constitutionalism and the Separation of Powers* (1967) at #.

would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression”.<sup>202</sup>

Montesquieu’s argument in favour of decentralising power by dividing into legislative, executive and judicial categories was supported by James Madison, who helped draft the United States Constitution. In the *Federalist Papers*, Madison agreed that “the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny”.<sup>203</sup>

### **3. The purpose of the doctrine of the separation of powers**

Apart from enhancing the freedom of the individual by preventing the abuse of power, in most democracies, including South Africa, the doctrine of the separation of powers also has a number of other goals. Perhaps the most important of these is that it creates a division of labour. In this way it promotes the efficiency and expertise of the different branches of government. Each branch can concentrate on and develop its ability to implement its own unique functions, without being distracted by the burden of having to implement the functions of the other branches of government.

### **4. The elements of the separation of powers**

Since Montesquieu first introduced the separation of powers, the doctrine has evolved and “today it is usually divided into four principles, namely: the principle of *trias politica*; the principle of the separation of functions; the principle of the separation of personnel; and the principle of checks and balances.”<sup>204</sup>

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<sup>202</sup> Charles de Secondat, Baron de Montesquieu *The Spirit of the Laws* (translation by T Nugent) Rev ed Vol 1 (1902) at 163.

<sup>203</sup> James Madison, Alexander Hamilton and John Jay *The Federalist Papers* (1788) Kramnick I (ed) (1987) at 303.

<sup>204</sup> J D van der Vyver ‘The Separation of powers’ 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2<sup>nd</sup> ed (1967) 13 and P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

The principle of *trias politica* provides that the power of the state should be divided into legislative, executive and judicial power and then allocated to three separate branches of the state, namely: the legislature, the executive and the judiciary.<sup>205</sup>

The principle of the separation of functions provides that each of the three branches of the state may exercise only those powers and functions that have been conferred upon it and may not exercise any of the powers that have been conferred on the other two branches.<sup>206</sup>

Somewhat similarly, the principle of the separation of personnel provides that each of the three branches of the state must be composed of separate and distinct groups people and that a person who is a member of one branch may not simultaneously be a member of another branch.<sup>207</sup>

Finally, the principle of checks and balances provides that each branch must act as check on the others in order to maintain a balance of power. In order to achieve this goal, however, the principle of checks and balances accepts that each branch will inevitably have to intrude upon the terrain of the others. It thus undermines the strict separation envisaged by the first three principles.<sup>208</sup>

The strict approach suggested by the first three principles is sometimes also referred to as the formalist approach, while the less strict approach suggested by the principle of checks and balances is sometimes also referred to as the functionalist approach.

The formalist approach is based on the idea that the functions and the personnel of each of the three branches of the state can be distinguished from one another and must be kept strictly

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<sup>205</sup> J D van der Vyver 'The Separation of powers' 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2<sup>nd</sup> ed (1967) 13 and P Labuschagne 'The doctrine of the separation of powers and its application in South Africa' (2004) 23(3) *Poleitia* 84 at 86.

<sup>206</sup> J D van der Vyver 'The Separation of powers' 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2<sup>nd</sup> ed (1967) 13 and P Labuschagne 'The doctrine of the separation of powers and its application in South Africa' (2004) 23(3) *Poleitia* 84 at 86.

<sup>207</sup> J D van der Vyver 'The Separation of powers' 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2<sup>nd</sup> ed (1967) 13 and P Labuschagne 'The doctrine of the separation of powers and its application in South Africa' (2004) 23(3) *Poleitia* 84 at 86.

<sup>208</sup> J D van der Vyver 'The Separation of powers' 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2<sup>nd</sup> ed (1967) 13 and P Labuschagne 'The doctrine of the separation of powers and its application in South Africa' (2004) 23(3) *Poleitia* 84 at 86.

separate. In terms of this approach each branch of the state must focus exclusively on its own functions and must not interfere in the functions of the other branches.<sup>209</sup>

The functionalist approach is based on the idea that the functions and personnel of each of the three branches of the state cannot always be easily distinguished from one another and, more importantly, nor should they always be. Instead, this approach argues that each branch is entitled to intrude into the terrain of the others in order to hold them accountable and thus promote a balance of power. This approach thus acknowledges that it is not always possible to divide state power into separate packages and seeks to ensure that no single branch assumes too much power.<sup>210</sup>

Out of these two approaches, the functionalist approach is much more common. In fact, there is no modern state which has adopted a pure version of the formalist approach. As Carolan points out, this is because it would be difficult, if not impossible, for a state to function effectively if each branch was prohibited or restricted from interacting with the others.<sup>211</sup> In addition, he points out further, this approach is based on the assumption that it is always possible to clearly distinguish legislative, executive and judicial functions from one another. While this may be true at a general level, it is not true at a practical level. At a practical level the distinction is so indeterminate, he concludes, that it renders the entire formalist approach impractical.<sup>212</sup> Like most other countries, South Africa has adopted a functionalist approach to the separation of powers.

## **5. The doctrine of the separation of powers in South Africa**

During the negotiations for a new democratic South Africa in the early 1990s,<sup>213</sup> the negotiators agreed that the final constitution had to be based, *inter alia*, on a separation of

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<sup>209</sup> E Carolan *The New Separation of Powers; A Theory of the Modern State* (2000) at 25.

<sup>210</sup> E Carolan *The New Separation of Powers; A Theory of the Modern State* (2000) at 25.

<sup>211</sup> E Carolan *The New Separation of Powers; A Theory of the Modern State* (2000) at 19.

<sup>212</sup> E Carolan *The New Separation of Powers; A Theory of the Modern State* (2000) at 22 and 27.

<sup>213</sup> Following the unbanning of the African National Congress (the ("ANC")) and other liberation movements by President FW de Klerk on 2 February 1990, formal multi-party negotiations for a new democratic dispensation for South Africa began when the Convention for a Democratic South Africa ("CODESA") was convened on 20 December 1991. Although agreement was reached on a number of important issues, the ANC and the National Party ("NP") government could not reach agreement on the majority required in an elected constitutional assembly to adopt the final constitution. As a result of this failure, the CODESA process broke down on 15 May 1992. Despite the breakdown in CODESA, the ANC and NP engaged in confidential talks aimed at restarting the formal process for negotiating a new democratic dispensation. These formal negotiations began in April 1993 and were simply known as the Multi-Party Negotiating Process (MPNP). Unlike CODESA, the MPNP

powers between the legislature, the executive and the judiciary. This agreement was included in the interim Constitution<sup>214</sup> as Constitutional Principle VI. This principle provided that:

“There shall be a separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”<sup>215</sup>

Although neither the interim Constitution nor the Constitution<sup>216</sup> expressly refers to the separation of powers, there is no doubt that this doctrine does form a part of the system of government envisaged by the Constitution. This is primarily because the Constitution distinguishes between legislative, executive and judicial power and allocates these powers to different and separate organs of state.<sup>217</sup>

Legislative power is conferred on Parliament at a national level,<sup>218</sup> the provincial legislatures at a provincial level<sup>219</sup> and the municipal councils at a local level.<sup>220</sup> Executive power is conferred on the President and the National Executive at a national level,<sup>221</sup> the Premiers and

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was successful and brought about a new democratic dispensation for South Africa (see P de Vos and W Freedman *Constitutional Law in Context* (2013) at 19-22).

<sup>214</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>215</sup> Principle VI of Constitution of the Republic of South Africa, Act 200 of 1993

<sup>216</sup> Constitution of the Republic of South Africa, 1996.

<sup>217</sup> P Labuschagne “Trias politica as guiding constitutional principle in the modern state: Obsolete relic or constitutional necessity?” 2006 25 (1) *Unisa Press* 21.

<sup>218</sup> Section 43(a). This section reads as follows: “In the Republic, the legislative authority of the national sphere of government is vested in Parliament, as set out in section 44”.

<sup>219</sup> Section 43(b). This section reads as follows: “In the Republic, the legislative authority . . . of the provincial sphere of government is vested in the provincial legislatures.

<sup>220</sup> Section 43(c): This section reads as follows: “In the Republic, the legislative authority . . . of the local sphere of government is vested in the Municipal Councils, as set out as set out in section 104; and in section 156 respectively”.

<sup>221</sup> Section 85. This section reads as follows: “(1) The executive authority of the Republic is vested in the President; (2) The President exercises the executive authority, together with the other members of the cabinet by (a) implementing national legislation except where the Constitution or an Act of provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or national legislation.”

the Executive Councils at a provincial level<sup>222</sup> and the municipal councils at a local level.<sup>223</sup> Finally, judicial power is conferred on the courts and judicial officers.<sup>224</sup>

Given these provisions, it is not surprising that the Constitutional Court has confirmed that the doctrine of the separation of powers does form a part of South Africa's system of government.<sup>225</sup>

In *SA Association of Personal Injury Lawyers v Heath*,<sup>226</sup> for example, the Constitutional Court held that the existence of the doctrine of the separation of powers in South Africa may be derived from the wording and the structure of the Constitution:

“In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. In the *Western Cape* case<sup>227</sup> it enforced that separation by setting aside a proclamation of the President on the grounds that the provision of the Local Government Transition Act<sup>228</sup>, under which the President had acted in promulgating the Proclamation, was inconsistent with the separation of powers required by the Constitution, and accordingly invalid. It has also commented on the constitutional separation of powers in other decisions. There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in this regard, are invalid.”<sup>229</sup>

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<sup>222</sup> Section 125. This section reads as follows: “There shall be a legislature for each province.(2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution”.

<sup>223</sup> Section 156. This section reads as follows: “(1) A municipality has executive authority in respect of, and has the right to administer (a) the local government matters.... (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. (3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.....(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.”

<sup>224</sup> Section 165: This section reads as follows: “(1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies”.

<sup>225</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) paras 106-113; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 22; *Glenister v President of the RSA* 2009 (1) SA 287 (CC) paras 28-30; and *Justice Alliance of South Africa v President of the RSA* 2011 (5) SA 388 (CC) para 32.

<sup>226</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

<sup>227</sup> *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC).

<sup>228</sup> Local Government Transition Act 209 of 1993.

<sup>229</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 22.



And, in *Justice Alliance of South Africa v President of the RSA*,<sup>230</sup> the Court reaffirmed that the existence of the doctrine of the separation of powers may be derived from the structure of the Constitution:

‘The principle of the separation of powers emanates from the wording and structure of the Constitution. The Constitution delineates between the legislature, the executive and the judiciary. This Court recognised a fundamental principle of the new constitutional text as being “a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.”<sup>231</sup>

## 6. The functionalist approach in South Africa

Apart from finding that the doctrine of the separation of powers forms an implicit part of South Africa’s system of government, the Constitutional Court has also found that the separation of powers envisaged by the Constitution is not based on a formalist approach, but rather on a functionalist approach. In other words, the Court has found that the principle of checks and balances forms a part of the South African doctrine of the separation of powers.<sup>232</sup>

In the *First Certification Judgment*,<sup>233</sup> for example, the Constitutional Court held that:

“There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.<sup>234</sup> . . . The principle of separation of powers, on the one hand, recognises the functional independent of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.”<sup>235</sup>

And in *De Lange v Smuts NO*,<sup>236</sup> the Constitutional Court repeated these points and then went on to hold that:

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<sup>230</sup> *Justice Alliance of South Africa v President of the RSA* 2011 (5) SA 388 (CC).

<sup>231</sup> *Justice Alliance of South Africa v President of the RSA* 2011 (5) SA 388 (CC) para 32.

<sup>232</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108; *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 60; and *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries* 2013 (10) BCLR 1159 (CC) para 13.

<sup>233</sup> *First Certification Judgment* 1996 (4) SA 744 (CC).

<sup>234</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108.

<sup>235</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 109.

<sup>236</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

“ . . . over time our Courts will develop a distinctly South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.”<sup>237</sup>

As we have already seen, and as these judgments confirm, an important consequence of the functionalist approach envisaged by the Constitution, and confirmed by the Constitutional Court, is that one branch of government will inevitably intrude on the terrain of the others and restrain the manner in which it carries out its functions. Although the necessary or unavoidable intrusion of one branch on the terrain of the others may take many different forms, one of the most important restraints is the power of judicial review.<sup>238</sup>

In the South African principle of checks and balances, therefore, every exercise of power is justiciable. There is no immune principle that exists; all organs of state are subject to the rule of law.<sup>239</sup> The Constitutional Court has the power to review legislative and executive action for consistency with the Constitution, in some instances as the final arbiter and in others as the exclusive arbiter.<sup>240</sup> This in essence means the Constitutional Court has the final say as the final arbiter in all constitutional matters of the land. It does this in various ways including judicial reviews.

## **7. The functional approach and the power of judicial review**

The power of judicial review is the most effective way in which the courts can act as a check on the abuse of power by the legislature and the executive. It allows the courts to test laws and conduct against the provisions of the Constitution and to declare them to be

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<sup>237</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 60. The system of checks and balance that is referred to in these judgments is sometimes referred to as the principle of accountability, the essence of it is to ensure that not too much power is diffused completely to one arm of the government as this is likely to amount to corruption or abuse of power by that arm.

<sup>238</sup> M Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 383. In this article Pieterse refers to judicial review as the “most common and dramatic instance of . . . checks and balances” (at 386).

<sup>239</sup> See sections 2; 167 and 172 of the Constitution.

<sup>240</sup> S Seedorf and S Sibanda “Separation of Powers” in S Woolman et al (eds) *Constitutional Law of South Africa* (2-1) at 12-55 and 12-59..

unconstitutional and invalid if they conflict with the provisions of the Constitution and that conflict cannot be justified in an open and democratic society.<sup>241</sup>

“In order to function as an effective check on the abuse of power by the other branches of government, however, the courts have to be, and have to be seen to be, independent and staffed by impartial judges. Judicial independence, therefore, forms an important part of the principle of checks and balances, in particular, and of the doctrine of the separation of powers, in general.”<sup>242</sup>

The independence of the judiciary and the power of judicial review is provided for in various sections of the Constitution. Among the most important of these is section 165(2) which provides that:

“The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

In addition, section 165(3) goes on to provide that no person or organ of state may interfere with the functioning of the court and section 165(4) provides that:

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

And, finally, section 172 of the Constitution provides that a court must declare any law or conduct that is inconsistent with the Constitution to be invalid. It provides that:

“When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.

As the Constitutional Court has pointed out, the goal of all of these provisions is to ensure that the judiciary can fulfil its role as the guardian of the constitutional system:

“In our constitutional order the judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands

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<sup>241</sup> G Manyika *The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the Constitutional Court*, Unpublished LLM, University of KwaZulu-Natal (2016) at 65.

<sup>242</sup> G Manyika *The rule of law, the principle of legality and the right to procedural fairness: A critical analysis of the jurisprudence of the Constitutional Court*, Unpublished LLM, University of KwaZulu-Natal (2016) at 65.

on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights even against the State.”<sup>243</sup>

Although the power of judicial review is an important part of the principle of checks and balances and thus of the doctrine of the separation of powers, the manner in which this power is exercised may give rise to its own separation of powers concerns. This is because the courts may, at least in theory, use the power of judicial review to usurp the powers and functions of the legislature and the executive and thus undermine the democratic will of the majority of the people. This concern is sometimes referred to as the counter-majoritarian difficulty.

### **8. Judicial review and the counter-majoritarian difficulty**

As Kohn has pointed out, the power of judicial review is said to be counter-majoritarian because it gives unelected and seemingly unaccountable judges the power to declare laws made by democratically elected legislatures and policies made by democratically elected executives invalid. When an unelected and unaccountable judge declares a law or policy to be unconstitutional and invalid, therefore, he or she does not act on behalf of the majority, but against it.<sup>244</sup>

Although this criticism is based on “a particularly thin, and thus misguided notion of democracy”, one which is not consistent with the protection of both the sovereignty of the people and the fundamental rights of individuals,<sup>245</sup> it has nevertheless been levelled against the South African courts, often by high-ranking public officials, in recent years.

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<sup>243</sup> *S v Mamabolo* 2001 (3) SA 409 (CC) at para 16.

<sup>244</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?” 2013 (13) *SALJ* 810 at 819. See also D Davis “Democracy –its influence upon the process of constitutional interpretation” (1994) 10 *SAJHR* 104.

<sup>245</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?” 2013 (13) *SALJ* 810 at 819.

President Zuma himself, for example, has stated that the power conferred upon the courts cannot be seen as superior to the powers the executive have received from the people through a popular mandate:

“We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation. The executive must be allowed to conduct its administration and policy making work as freely as it possibly can.

The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote. We also reiterate that in order to provide support to the judiciary and free our courts to do their work, it would help if political disputes were resolved politically. We must not get a sense that there are those who wish to co-govern the country through the courts, when they have not won the popular vote during elections”.<sup>246</sup>

Apart from President Zuma, Ngoako Ramatlhodi, the then Minister of Public Administration, has also argued that the ANC and other liberation parties made a fatal error at the Multi-Party Negotiation Process (MPNP) when they agreed that the Constitution should be supreme and that the courts should be given the power of judicial review. This was a fatal error because it transferred a substantial amount of power from the legislature and the executive to the judiciary and allowed apartheid forces to retain white domination under a black government.<sup>247</sup>

## **9. The counter-majoritarian difficulty and judicial restraint**

### **9.1 Introduction**

The manner in which the Constitutional and other South African courts have responded to the counter-majoritarian difficulty is to follow a system of judicial restraint. In terms of this approach the Constitutional Court has held that when it exercises the power of judicial review it must respect the legitimate constitutional interests of the other branches of government and intrude as little as possible into the terrain of the legislature and executive while still protecting the fundamental rights of individuals.<sup>248</sup>

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<sup>246</sup> Jacob Zuma *Address by President Jacob Zuma, on the occasion of bidding farewell to Former Chief Justice Sandile Ngcobo, and welcoming Chief Justice Mogoeng Mogoeng, National Assembly* 1 November 2011.

<sup>247</sup> Ngoako Ramatlhodi ‘The Big Read: The ANC’s Fatal Concession’ *Times Live* 1 September 2011.

<sup>248</sup> K O’Regan “Checks and Balances: Reflections on the development of the doctrine of the separation of powers under the South African Constitution” 2005 *PER/PEL* 120 at 132.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>249</sup> for example, the Constitutional Court held that while it should not rubberstamp an unreasonable decision simply because of the complexity of that decision and the identity of the decision maker, it should “give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field”.

“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.”<sup>250</sup>

And in *National Treasury v Opposition to Urban Tolling Alliance*<sup>251</sup> the Constitutional Court held that while the courts are mandated to ensure that “all branches of government act within the law”, they must “refrain from entering the exclusive terrain of the executive and legislative branches of government unless the intrusion is mandated by the Constitution itself”.<sup>252</sup>

“Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.”<sup>253</sup>

As these judgments illustrate, the deferential approach adopted by the courts is based on two important considerations, namely “democratic principle” and “institutional competence”.

## 9.2 Democratic principle

This principle provides that the “duty of respect” which the courts owe to the decisions of the legislative and the executive branches of the state arises out of the fact that these branches have democratic legitimacy. These branches have democratic legitimacy because the

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<sup>249</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

<sup>250</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 48.

<sup>251</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 233 (CC)

<sup>252</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 233 (CC) at para 44.

<sup>253</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 233 (CC) at para 44. See also *Premier Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 51; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) at paras 155-156; and *Helen Suzman Foundation v President of the RSA* 2015 (2) SA 1 (CC) at para 75.

members of the legislature are directly elected by the people, while the members of the executive are indirectly elected. They, therefore, represent the people, or at least the majority of the people, and are accountable to them. Given these facts, the decisions of the legislative and executive branches should not easily be overturned by the courts.<sup>254</sup>

### **9.3 Institutional competence**

This principle provides that the “duty of respect” which the courts owe to the decision of the legislative and executive branches of the state arises out of the fact that these branches are better placed to make certain kinds of decisions than the courts are. This is particularly true insofar as “polycentric decisions” are concerned. A polycentric decision is one which involves a subject that is not legal in nature, but which is political in nature. The courts are not as good at making these sorts of decision as the legislative and executive branches because they often lack the experience, the expertise and the resources that are required to make them.<sup>255</sup>

## **10. Judicial restraint and a theory of the separation of powers**

### **10.1 Introduction**

Although the Constitutional Court has held that the courts must respect the decisions of the legislative and executive branches of government, it is important to note that it is the courts themselves who determine when and to what extent they should intervene in a decision taken by the legislative or executive branch of government. In other words, it is the courts themselves who decide where judicial review begins and where it ends.

This point was highlighted by the Constitutional Court in its judgment in *Glennister v President of the RSA*<sup>256</sup> when it stated the following:

“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 in the performance of this that the courts are more likely to confront the question of whether to venture into the

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<sup>254</sup> A Price “Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*” 2010 *SALJ* 580 at 588

<sup>255</sup> A Price “Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*” 2010 *SALJ* 580 at 588

<sup>256</sup> *Glennister v President of the RSA* 2009 (1) SA 287 (CC).

domain of the other branches of government and the extent of such intervention. But even in these circumstances, courts must observe the limits of their powers.”<sup>257</sup>

As Davis has pointed out, however, the decision on when to intervene and then to what extent depends on a coherent and substantive theory of the doctrine of the separation of powers, in general, and of judicial review, in particular. Unfortunately, he goes on to point out, the Constitutional Court has largely failed to develop such a theory. There is, consequently, very little in the jurisprudence of the Constitutional Court that the other courts can rely on when they have to decide on the scope and ambit of the power of judicial review.<sup>258</sup>

Although the Constitutional Court has failed to develop a coherent and substantive theory of the doctrine of the separation of powers, academic commentators such as Davis and Pretorius have attempted to do so. The theories suggested by each of these commentators will be discussed in turn.

## 10.2 Davis

In a comment published in the *South African Law Journal* in 2016, Davis argues that while there are a number of different principles on which a substantive theory of the separation of powers may be based, the most appropriate for South Africa is Fraser’s “principle of participatory parity”.<sup>259</sup> This is because, he argues further, it is consistent with the “kind of active citizenship which is required for the [participatory] democracy envisaged by our Constitution”.<sup>260</sup>

Insofar as the principle of participatory parity is concerned, Fraser argues that people are entitled to participate in society as peers or equals. In order to achieve this goal, however, she argues further, two substantive conditions must be satisfied.

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<sup>257</sup> *Glenniser v President of the RSA* 2009 (1) SA 287 (CC) at para 30.

<sup>258</sup> DM Davis “To defer and then when? Administrative law and constitutional democracy” 2006 *Acta Juridica* 23 at 26.

<sup>259</sup> See N Fraser “Rethinking the public sphere: A contribution to a critique of actually existing democracy” in C Calhoun (ed) *Habermas and the Public Sphere* (1992) at 109 and N Fraser “Social justice in the age of identity politics: Redistribution, recognition and participation” in N Fraser and A Honneth (eds) *Redistribution or Recognition: A political philosophical Exchange* (2003) at 7.

<sup>260</sup> DM Davis “Separation of powers: Juristocracy or democracy?” 2016 *SALJ* 258 at 262



The first, which may be referred to as an objective condition, focuses on the economic and social conditions in a society. It provides that every person is entitled to a minimum standard of life so that they can participate effectively in the political process.<sup>261</sup> Systematic economic inequalities, therefore, must be eliminated. This does not mean “that everyone must have exactly the same income, but it does require the sort of rough equality that is inconsistent with systematically generated relations of dominance and subordination”. This condition is related to the politics of redistribution.<sup>262</sup>

The second, which may be referred to as an inter-subjective condition, focuses on the culture, identity and status of individuals in a society. It provides that every person is entitled to be recognised no matter what their race, gender or sexual orientation is. Social relations that “deny some people that status of full partners in interactions – whether by burdening them with excessive ascribed ‘difference’ or by failing to acknowledge their distinctiveness” must be eliminated. While the first condition is related to the politics of redistribution, this condition is related to the politics of recognition to affirm the identity and equal recognition of groups.<sup>263</sup>

The two substantive conditions identified by Fraser highlights a core feature of the South African Constitution, namely that a participatory democracy is incompatible with poverty or stark inequality. The active participation envisaged by South Africa’s system of democracy imposes an obligation on the state to provide each individual with the economic and social conditions he or she needs in order to able to participate in a manner that promotes his or her dignity, freedom, self-respect and self-rule.<sup>264</sup>

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<sup>261</sup> As Davis puts it, “[g]rinding poverty, homelessness, lack of access to health care and education are simply incompatible with a meaningful democracy” (see DM Davis “Separation of powers: Juristocracy or democracy?” 2016 *SALJ* 258 at 267).

<sup>262</sup> See N Fraser “Rethinking the public sphere: A contribution to a critique of actually existing democracy” in C Calhoun (ed) *Habermas and the Public Sphere* (1992) at 121 and N Fraser “Social justice in the age of identity politics: Redistribution, recognition and participation” in N Fraser and A Honneth (eds) *Redistribution or Recognition: A political philosophical Exchange* (2003) at 36.

<sup>263</sup> See N Fraser “Social justice in the age of identity politics: Redistribution, recognition and participation” in N Fraser and A Honneth (eds) *Redistribution or Recognition: A political philosophical Exchange* (2003) at 36.

<sup>264</sup> DM Davis “Separation of powers: Juristocracy or democracy?” 2016 *SALJ* 258 at 270.

### 10.3 Pretorius

Like Davis, Pretorius<sup>265</sup> has also proposed a substantive theory of the separation of powers. In an article published in *Southern African Public Law* in 2014, he argues that constitutional review must show a deliberative character, and that the interpretation and application of the Constitution together with the process of the constitutional review must reflect an adherence to the democratic and constitutional values which include *inter alia* openness, transparency and accountability.<sup>266</sup>

“Given the fundamental importance of constitutional review and the fact of the indeterminacy of much of the constitutional essentials, this function itself must – in order to reflect the interdependence of democracy and constitutionalism – display a deliberative character. It would be hard otherwise to counter the accusation of paternalism or elitism often directed at the institution of constitutional review. The interpretation and application of the Constitution must be equally situated in a fully inclusive deliberative space. The process of constitutional review itself must be reflective of, and conducive to, the substantive democratic values of participation, inclusivity, openness, transparency, and public justification.”<sup>267</sup>

This outlines the core requirement of public accountability which can summarily be referred to as the need for justification through publicly acceptable reasons<sup>268</sup> which is also an important value of the constitution. In defining this Pretorius argues that in order to meet the higher demands of legitimacy required, the deliberative conception of democracy is organised around an idea of political justification, since it requires the finding of publicly acceptable reasons for collectively binding decisions.<sup>269</sup> And that it is driven by the intuition that democratic legitimacy is closely linked to the ability and opportunity to participate in effective deliberation on the part of those subject to collective decisions, which “requires justification in terms and reflection that [people] are capable of accepting”.<sup>270</sup>

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<sup>265</sup> Supra JL P, Professor of Public Law, University of the Free State.

<sup>266</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 408.

<sup>267</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 418.

<sup>268</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 415.

<sup>269</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 414.

<sup>270</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 414 citing Dryzek *Deliberative democracy and beyond: Liberals, critics, contestations* (2000) 1. For a brief overview of deliberative democracy theory, see Roux ‘Democracy’ in Woolman et al (eds) *Constitutional law of South Africa* 2 ed (2006) 1

Therefore justification through deliberative engagement depends on both procedural (participatory) and substantive (‘public reason’) conditions, so the Constitution provides for the framework for public participation and accountability.

“[C]onstitutionalism authoritatively defines and safeguards a democracy’s legitimating basis by entrenching a deliberative structure, which is defined by both inclusive participation and accountability in terms of a particular normative framework.”<sup>271</sup>

Unlike Davis, Pretorius uses his substantive theory to critique the minimalist version of the test for rationality adopted by the Constitutional Court. In this respect he argues that the minimalist version has the potential to encourage a narrow version and understanding of the test for rationality, thereby jeopardising its legitimising value as a standard of constitutional review that requires justification for both governmental means and ends.<sup>272</sup> In terms of the minimalist version the test for rationality runs the risk of degenerating into a matter of pure instrumental rationality.<sup>273</sup>

This (instrumental) rationality standard, Pretorius argues further, is an ‘ill-suited’ standard to regulate the exercise of public power.<sup>274</sup> This is because it provides no basis to choose among different competing ends or to relate them in a meaningful way to an integrating normative perspective which is what legal standards are supposed to be about if they are to claim any democratic justificatory and legitimising value.<sup>275</sup>

“But instrumental rationality is ill-suited to serve as a normative constitutional standard to justify and legitimise the exercise of public power in order to resolve conflict and effect socio-political integration. Instrumental rationality as such provides no basis to choose among different competing ends or to relate them in a meaningful way to an integrating normative perspective – which is what legal standards are supposed to be about if they are to claim any *democratic* justificatory and legitimising value. As argued above, an instrumentalist understanding

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<sup>271</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 418.

<sup>272</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 420.

<sup>273</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 422.

<sup>274</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 423.

<sup>275</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 423.

of the rationality criterion tends to treat governmental purposes as givens and ends in themselves and therefore does not provide any external vantage point to reflect rationally on such ends.”<sup>276</sup>

In addition, Pretorius goes on to argue, the minimalist test for rationality may also be criticised on the grounds that it creates a deliberative framework that is not inclusive enough to allow for the fair representation of all relevant perspectives and interests. This tendency to exclude and distort undermines the capacity of the minimalist test of rationality to facilitate discussion and contestation of the kind of normative reasons that can be legitimately invoked in the justification of the exercise of governmental power.<sup>277</sup>

Apart from the criticisms set out above, Pretorius also argues that there is another compelling ground on which the minimalist version of the test for rationality may be criticised, namely that it is a deferential approach has often been applied to an already deferential standard.

“Indeed, one of the problems with the current application of the test is that a deferential approach has often been applied to an already deferential standard. ....since the government merely has to show a rational connection, not perfect rationality.”<sup>278</sup>

What this means is that most focus of the lenient or minimum standard rationality is not often directed at testing whether the governmental objective is a legitimate one, but instead on the means used to achieve a purpose. Very least litigation (if any) has questioned the governmental objective, which raises the perception that it is often treated as a given or a free-standing frame of reference. When this is done, the deference has already been paid in relation to the legislative or executive decisions.

“From a reading of the case law, it appears that the rationality analysis is often limited, for the purpose of establishing constitutional compliance, to an investigation of the utility of the means to serve particular ends. Although – at least theoretically – the standard also requires courts to investigate the legitimacy of governmental purposes, this aspect is often treated as a given and/or considered within a non-relational, free-standing frame of reference.”<sup>279</sup>

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<sup>276</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 423.

<sup>277</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 423.

<sup>278</sup> Du Plessis, M & Scott, S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 616.

<sup>279</sup> JL Pretorius “Deliberative democracy and constitutionalism: the limits of rationality review” (2014) 29 *SAPL* 421.

He argues that the courts should not let an already low-level standard drop below the floor by applying the test in a deferential manner. Rather since the test is inherently a low-level standard, it is incumbent for the court to demonstrate that it has scrutinised the government's arguments closely. With regard to the argument that a deferential application is necessary in order to respect the doctrine of separation of powers, it is submitted that the doctrine is already respected implicitly by only requiring the government to meet a very low threshold (of merely establishing a rational connection).<sup>280</sup> Thus, it is arguable that deference need not be applied in order to respect the doctrine. Instead, the court ought to take a robust approach when determining whether government has satisfied the low level required of it.<sup>281</sup>

“The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.”<sup>282</sup>

Moreover, it is further contended that the constitution provides that the courts have ‘a policing role to ensure that public power is exercised in accordance with the principle of legality’ and that ‘the courts are the final instruments to ensure the accountability of the exercise of public power’. Accordingly, if the courts do not adequately hold government to account when public power is exercised, then the courts are ultimately failing in their policing role.<sup>283</sup> Thus; it would be hard to contemplate how the rationality standard could otherwise meaningfully play the role that the court indicated for it in *Prinsloo*<sup>284</sup>, namely to contribute to ‘a culture of justification’ by requiring an account of how ‘governmental action [is] relate[d] to a defensible vision of the public good’, as well as to ‘enhance the coherence and integrity of legislation’.<sup>285</sup>

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<sup>280</sup> Du Plessis, M & Scott, S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 616.

<sup>281</sup> Du Plessis, M & Scott, S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 616.

<sup>282</sup> Du Plessis, M & Scott, S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 616.

<sup>283</sup> Du Plessis, M & Scott, S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 616-617 citing *Froneman J in Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA609 (E).

<sup>284</sup> *Prinsloo v Van Der Linde and another* 1997 (3) SA 1012 (CC).

<sup>285</sup> <sup>285</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL*422.

## 11. Conclusion

The improved notion of the rationality principle has received some major criticisms from academic commentators like *Kohn*<sup>286</sup> especially in that it threatens the principle of the separation of powers. Despite these criticisms that have been academics like *Pretorius*<sup>287</sup> who have come up with some justifications of which *inter alia* include that rationality has a substantive aspect more than a formal approach. He further contends that a substantive aspect has a procedural requirement that would be required of any decision taken. And finally that courts have a policing role that they should or cannot fail. And *Du Plessis* and *Scott*<sup>288</sup> are of the opinion that separation of powers doctrine is not a question of whether or not the decision is ration.

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<sup>286</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?” 2013 (13) *SALJ* 810.

<sup>287</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 423.

<sup>288</sup> Du Plessis, M & Scott, S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 616.

## CHAPTER SIX: ANALYSIS AND CONCLUSION

### 1. Introduction

It is incontrovertible from the above chapters that the study of rationality from a theoretical conception; definitions conferred to the principle at the inception; development of the principle and values that bolster it have created a measure misunderstanding in the legal fraternity. This ill-fated consequence has led to the uncertainty as to the correct legal position regarding the principle; beyond this it has received some criticism since the principle of legality in itself demands that law should be certain, ascertainable and predictable.

Over and above, the prevailing confusion that emanates from this calamity is that the theoretical admonitions of the principle seem to be undermined by its very practice. This in simple terms suggest that the theoretic understanding of the principle seems to be at odds with its practical application; it seems as though our Courts are saying left but going right which should not be the case. However the interesting note is that whichever direction that one might want to follow, either a theoretical definition “minimum standard” or evidentially practical “rigorous standard” seem to attract some hurdles to overcome.

This chapter therefore aims at posing some deep and insightful issues that come with variable standards of rationality and hurdles that ensue. It further wishes to expose some academic considerations and conflicts on the principle; reflect and comment on what seems to be the prevailing consideration; and most importantly make possible suggestions on the study as conclusions.

### 2. Analysis of the study of a “dual” rationality and the schools of thought

The above study has remarkably drawn some intuitive confirmations that rationality under legality has developed from a “minimum standard” to a “rigorous standard.” This was evidently drawn from how the principle has been defined against how it has been applied. This shift has been seen by others like *Pretorius*<sup>289</sup> as a justifiable development given purpose of the rule of law of which includes *inter alia* that no one is above the law; that the democratic principles like accountability, openness and transparency must be observed.

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<sup>289</sup> JL Pretorius “Deliberative democracy and constitutionalism: The limits of rationality review” (2014) 29 *SAPL* 408.

According to him, minimum standard rationality does not reflect transparent basis of the decisions taken. Therefore (as he holds) the duties conducted by the public functionaries or authority must *inter alia* follow the fair process, give reasons for the decisions taken and give a fair hearing to the affected victims.

However this contention has been criticised by academics like *Kohn*<sup>290</sup> who believe rationality should remain a simple test so that it remains in line with the separation of powers doctrine. Therefore to improve the test would threaten the principle of the separation of powers, which is certainly part of our legal system. Among other factors that she provides include that, it is not ideal to constrain the exercise of public power especially by politicians who have been given a popular mandate to govern according to the “will” of the people conferred in proper democratic processes. The courts are should not be allowed to be too intrusive as they are not better placed to deal with other matters.

While on the one hand the rationality principle has been considered in a “minimum standard” form and ideally giving due respect to the principle of the separation of powers but seemingly failing to reflect the constitutional values which include *inter alia* openness, transparency and accountability. On the other hand, the principle has been considered in a “more exacting” form and ideally reflecting sufficiently on the constitutional values but criticised for undermining *inter alia* the democratic principle and institutional competence principles which hare core in the separation of power doctrine

There is therefore another school of thought that is advanced and supported by the academics like *Du Plessis* and *Scott*.<sup>291</sup> According to them, the rationality test review oscillates depending on what is being reviewed at a particular time.<sup>292</sup> While they support the idea that the courts should not be too intrusive especially on the matters of the legislature and the executive but they concede to the fact that “this intensity of rationality review becomes most stark when analysing some Constitutional Court decisions.”<sup>293</sup> Again this approach has been

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<sup>290</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?” 2013 (130) *SALJ* 810.

<sup>291</sup> M du Plessis and S Scott “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 597.

<sup>292</sup> M du Plessis and S Scott “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 597 at 604.

<sup>293</sup> M du Plessis and S Scott “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 (130) *SALJ* 597 at 603-604.



criticised for failing to attach certainty in law which is the requirement of the very rule of law in that the rule of law demands that the “law to be accessible, precise, and the law of general application.”<sup>294</sup>

### 3. Suggestions and conclusion

Notwithstanding these critics that inevitably attach to each of the possible directions as evidently advanced by the academic commentators, there can be some positive conclusions that can also be drawn. In short, all these suggestions (democratic and constitutional principles to be foundational, deference to be paid to political decisions and rationality principle to be context-specific) are compelling and thus; worthy considering but the submission that can be made is that at the very least they can possibly be reconciled.

Some insightful submissions in support of an improved rationality include that a minimum standard rationality (if it fails to question the legitimacy of the governmental objective and fails to observe the constitutional principles) fails the test before it is even applied. However an improved rationality can also be seen as a strategy for courts to justify their heightened level of intrusiveness in polycentric decisions of which they are not best positioned constitutionally to deal with. Another position is also important in that rationality standard should be context-specific and this should determine what standard will be relevant. It is submitted that these three contentions are reconcilable, and are not at odds with each other as they seem.

What follows is a consideration when the test needs to be strict and when it needs to be lenient. This will then serve to account for a doubtful position over the past two decades of whether the test must remain simple or it must improve. The answer to this question lies in successfully analysing the institutional setting of the national executive and the legislature of the state. Some fundamental questions would include *inter alia* who forms each arm? Is it directly or indirectly accountable to the people? Within its construction or composition, what is the likelihood of collusive and thus; irrational decisions? Is there enough system of checks and balance in the composition of structure to avoid the abuse of power?

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<sup>294</sup> *President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)* at para: 102.

In as much as one can agree with *Kohn* in that the rationality standard must be a low standard, it is submitted that this approach can only be compelling in as far as the legislative decisions are concerned and not in executive decisions. The basis of this approach will be explored shortly below.

I partly agree with *Kohn* in that the review of public power in relation to legislative actions, the standard must be lenient for the following reasons. The Parliament is directly accountable to the people, they (people) vote directly for the political party, thus; it leads and delivers based on a popular mandate. The institutional setting of the Parliament or legislature comprises among others members of the leading political party (with most votes), opposition party's members, and the decision-making process includes public participation.<sup>295</sup> Therefore the decision goes under very tight inspection and therefore less-likely to be irrational. There is more than enough safe-guard in the process of the decision-making. There is less-likelihood of the abuse of power, and therefore the courts must pay a particular respect to the decisions taken by the constitutionally empowered personnel. In these particular type of decisions rationality must be kept a minimum standard. However where the decision is found to be irrational, the decision must be declared unlawful but most importantly sent back to the legislature for rectification. It is therefore submitted that the *Poverty Alleviation* judgment was a correct one. In this the separation of powers would have been respected.

I disagree with *Kohn* in relation to the rationality standard for the executive decisions but instead agree with *Pretorius* in that the test has to be stricter for the following reasons. First, the executive arm of the government is indirectly accountable to the public, the public does not vote for the President but a majority political party appoints him. It is also the President who appoints his cabinet ministers. The institutional setting of the arm is only formed by the leading political party in the absence of the opposition parties and hence no opposition views. In addition there is no public participation process in the decision-making of this branch. In these decision formulations, there is less or no safe-guard at all. These decisions are highly-likely to be biased and therefore irrational. There is a very high risk of the abuse of power in these decisions since there is no proper policing by other political parties. The courts would

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<sup>295</sup> An example of public participation being peremptory can be traced in the *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010)* where Constitutional Court confirmed that the residents of Matatiele had to be consulted in the law-making process.

therefore have to exercise their constitutional mandate to check for constitutional compliance like non-arbitrariness, values adhered to and abuse of power. The courts in these decisions therefore have to even check for the procedural aspects, reasons-giving among others. This is another way of saying the standard must be rigorous. It is therefore submitted that the *Albutt, Motau, Economic Freedom Fighters v Speaker of the National Assembly and Others*<sup>296</sup> *inter alia* were correctly decided which possibly calls for a repeal of the *Masetlha*<sup>297</sup> case.

In this particular instance it seems that *Davis*<sup>298</sup> principles of participation and recognition are key to the determination of the standard of the review relevant to the test for rationality. What would be relevant would be whether or not the principle of participatory parity has been complied with. I therefore agree with this reasoning in that in the legislative processes, the public participation is already structurally effected to so the scope of review needs to be lenient and in executive decision, the public participation is ignored and so the review standard need to be stricter.

When the above review standard is done, the compliance with the constitutional and democratic principles will be satisfied while the separation of powers principle will also be respected. In relation to legislative decisions the constitutional and democratic principles will be done by the political parties but in the executive decision, it will be done by the court itself. In this as well the principle of the rule of law will have been satisfied in the law will be static and have guidance.

In summary when closely reviewing the South African legal jurisprudence especially using the *Democratic Alliance* and *Merafong Municipality* cases as examples among others, it seems as though our court are already reviewing more stringently in executive and less stringently in legislative actions without saying it. It is submitted that this seems to be the correct approach in our constitutional setting.

I finally wish to attempt to respond to the counter-majoritarian debate that has been existing for the past 20 years. Besides that in the above submissions the problem seems to have been

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<sup>296</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

<sup>297</sup> *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007)

<sup>298</sup> D M Davis. "Separation of powers: Juristocracy or democracy" 2016 *SALJ* 258-217.

addressed or settled, Sachs<sup>299</sup> made some insightful arguments in relation to this. He contends that “the constitution does not envisage a mathematical form of democracy but rather a “pluralistic” democracy where continuous respect is given to the rights of all to be heard and have views considered.”<sup>300</sup> What this essentially means is that in a democratic state where the constitution is supreme, the decisions must always be in line with the constitution. Therefore reducing majoritarian understanding to electoral results and therefore thinking that there is a popular mandate which suppresses the values of the constitution will be a shallow-minded understanding of the system. This refers to a system where even those who received the majority vote are still subjected to the constitution as “the supreme law of the land”<sup>301</sup> and the rights and views of the minority group must be heard.

In addition, *Kohn* argues that democracy is a dual standard in its construction, hence it is concerned with both the fair process and justifications of decisions, and mostly conflicting ends of the minority and the majority groups.

“democracy has both a procedural and a substantive component in that it is concerned not only with the idea of popular sovereignty, but also with the protection of substantive rights. It is concerned not only with listening to the voice of the majority, but also with giving a voice to those in the minority and finally democracy is not the acquisition of authority by a few but the acquisition of the capacity by all to resist authority when it is abused.”<sup>302</sup>

This means that democracy is about a collective decision making where all opposing views should be given equal consideration. I submit that in my view this is the correct way of looking at democracy in a constitutional democratic state and hence rationality has to be viewed in this context.

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<sup>299</sup> AL Sachs is an activist and a former judge of the Constitutional Court of South Africa.

<sup>300</sup> AL Sachs in *Democratic Alliance v Masondo NO* 2003 (2) SA 413 (CC). This view is also expressed by Dikgang Moseneke in “Courage of Principle: Reflections on the 30th Anniversary of the Assassination of Ruth First” 2015 in the *Constitutional Court Review* (5) 91 at 95.

<sup>301</sup> Section 1© of the constitution.

<sup>302</sup> L Kohn “The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?” 2013 (130) *SALJ* 810 at 819.

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