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THE EVOLUTION OF THE TEST FOR RATIONALITY UNDER THE LEGALITY PRINCIPLE IN SOUTH AFRICAN ADMINISTRATIVE LAW

by

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Abstract

The principle of legality was confirmed early in South Africa's constitutional era as a product of the rule of law and the minimum standard to which the exercise of public power must be held to account. It has become an indispensable tool and 'safety net' to review administrative decisions where the action which it reviews does not constitute administrative action as it is defined in the Promotion of Administrative Justice Act, 2000. Rationality has emerged as the test applied in such reviews of whether the means applied to reach a decision are rationally related to the ends (the decision). Rationality has however come to comprise elements such as procedural fairness and -rationality that are not always consistently defined or applied by the courts. This variability and unpredictability lead to uncertainty in administrative law review which has the effect of causing the 'safety net' to stretch too far – by undermining the rule of law, the principle of legality itself and constitutional democracy.

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1. Introduction

The principle of legality as a product of the rule of law, one of the founding values of the Constitution of the Republic of South Africa, 1996, is premised on the requirement that any exercise of public power (whether such an exercise is of an administrative, executive or legislative nature) is regulated and bound by the Constitution.

Chaskalson J, in his judgment in the Constitutional Court in 2000, famously held in the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa and others*:

> '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 public power by the executive and other functionaries must, *at least*, comply with this requirement'.[1]

He went on to say that '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*'.[2] He also said that rationality can be regarded as '*a minimum threshold requirement* to the exercise of all public power by members of the executive and other functionaries'.[3]

Rationality as a 'minimum threshold' has also been referred to as the 'baseline' for administrative review[4] and described as a 'catch all' and 'a much-needed safety net' when the Promotion of Administrative Justice Act, 2000 (PAJA) does not apply to the public power under review.[5] The content of rationality has undergone several analyses in the courts in the last 22 years. Widely regarded as an evolving principle, its evolution has certainly not been linear and the elements that it has come to comprise (such as procedural fairness or -rationality), not consistent. It appears to have become so pliable

[1] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 ('*Pharmaceutical Manufacturers*') 85 (emphasis added).
[2] Ibid 86 (emphasis added).
[3] Ibid 90 (emphasis added).
[4] A Price 'The evolution of the rule of law' (2013) 130 *SALJ* 649.
[5] C Hoexter 'Administrative action in the courts' 2006 *Acta Juridica* 308.

that it can be applied to almost any given set of facts. In 2017 Mogoeng CJ warned that 'rationality is not a master key that opens all doors, anytime, anyhow'.[6]

The principle of legality was also considered to be a 'wonderfully useful and flexible device' which, according to Hoexter, operated as a residual repository of fundamental norms about how public power ought to be used.[7] It was 'a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards', and was seen as a way of overcoming the all-or-nothing results that were dictated by the use of the threshold concepts in the PAJA.[8] By 2014, Brand JA said in *National Director of Public Prosecutions v Freedom Under Law* that the principle of legality 'acts as a safety net to give the court some sort of control over action that does not qualify as administrative under PAJA', and that, at the time (or currently, as he says) 'provides a more limited basis of review than PAJA'.[9] He added: 'Why I say "currently" is because it is accepted that legality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner'.[10]

Hoexter and Penfold say that the principle of legality is now an increasingly important source of administrative law and 'the judges' darling' because of its contrast with the PAJA that is often perceived to define administrative action 'narrowly and in a convoluted fashion', whereas 'the beauty of the principle of legality lies in its generality'.[11] This has resulted in the principle coming to encompass almost the full range of administrative law precepts.[12]

In this research report, I illustrate how as a result of rationality's variability, its unpredictability, and in having become what the litigant requires of it (as long as it meets a minimum threshold), it may very well have the effect of undermining its own function as 'safety net'. In consequence, it may then undermine the principle of legality and constitutional democracy.

I begin by briefly discussing the early constitutional roots of the legality principle that brought about rationality as it is known today. Secondly, I discuss and contextualize

[6] *Electronic Media Network Limited and Others v e.tv (Pty) Ltd and Others* 2017 (9) BCLR 1108 (CC).
[7] Ibid.
[8] C Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Maquarie Law Journal* 165, 95–96.
[9] 2014 (4) SA 298 SCA 29.
[10] Ibid.
[11] C Hoexter & G Penfold *Administrative law in South Africa* 3 ed (2021) 489.
[12] Ibid.

the advent of rationality under the legality principle as a 'safety net' for reviews of public power that do not constitute administrative action. I then consider and discuss the development of rationality in the constitutional era, with the emphasis on selections of jurisprudence and critique of such jurisprudence, that underpinned this development. In conclusion, a view is presented of the evolution of rationality to date and whether it still amounts to the safety net that it was perceived to be in its early years.

2. The early constitutional standard for the review of public power in terms of the principle of legality

The rule of law, and the principle of legality, oblige government action to be authorised by law.[13] Before 1993, government action would be justified by an Act of Parliament. As a result legality, prior to the enactment of the interim Constitution of 1993, was rooted in legislation and institutions that empowered officials to act, and that demarcated the bounds of public authority.

The PAJA now codifies the grounds for judicial review of administrative action, and the remedies available in reviewing administrative action in terms of the PAJA. The PAJA only applies to exercise of public power that constitutes administrative action in terms of the PAJA's narrow definition. The PAJA was not intended for, nor could it be applied to, judicial review of all public power which, in terms of the principle of legality, is subject to the rule of law.

The absence of provision in the PAJA for review of public powers not constituting administrative action led to the piecemeal adoption of rationality as the most basic measure of the exercise of public power in terms of the principle of legality. As Yacoob ADCJ later described it in the matter of the *Democratic Alliance v President of South Africa*,[14] (commonly known as the *Simelane* case), the concept of 'reasonableness' (in terms of the PAJA) would be concerned with the decision itself (as the court had generally defined it in *Bato Star*)[15] whereas a decision challenged on the grounds of rationality (as the court had held in *Albutt*)[16] must be examined to determine whether the

[13] W Wade & C Forsyth *Administrative law* 11 ed (2014) 15.
[14] *Democratic Alliance (DA) v President of the Republic of South Africa and others* 2013 (1) SA 248 (CC) 29 ('*Simelane*').
[15] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs v Tourism and others* 2004 (4) SA 490 (CC).
[16] *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC) ('*Albutt*').

means selected are rationally related to the objective sought to be achieved.[17] In doing so, the court's task was not to determine whether there are *any other means* that could have been used, but whether the means selected are rationally related to the objective sought to be achieved and the purpose for which the power was conferred.[18]

Three early cases referring to the principle of legality were *Fedsure,*[19]*, SARFU*[20] and *Pharmaceutical Manufacturers*.[21] All three of these cases concerned the exercise of public power that did not constitute administrative action. In these three cases, the Constitutional Court considered how public action, when a review in terms of the PAJA were precluded, could and should be weighed against the court's fairly new mandate of reviewing all exercises of public power in terms of the principle of legality, which was now rooted in the Constitution.

2.1. Fedsure Life Assurance v Greater Johannesburg Metropolitan Council[22]

In 1998, in *Fedsure.* the Constitutional Court dealt with the powers of local government, reiterating that such powers are prescribed by the interim Constitution, supplemented by the powers, functions and structures provided for in other laws. The relevant powers did not constitute administrative action within the ambit of s 24 of the interim Constitution.[23] In consequence, the court had to determine the extent of its constitutional control over the exercise of local government legislatures.[24] Hoexter writes that: 'The court [in *Fedsure*] first identified the principle of legality as being necessarily implicit in the Constitution'.[25]

The court held that, by implication, an act of public authority that was 'ultra vires' would be unconstitutional,[26] and that 'fundamental to the interim Constitution is the principle of legality.'[27]

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[17] Emphasis added.
[18] Note 14 above 31.
[19] *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) ('*Fedsure*').
[20] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ('*SARFU*').
[21] Note 1 above.
[22] Note 19 above.
[23] Note 19 above 47.
[24] Ibid 53.
[25] C Hoexter *Administrative Law in South Africa* 2 ed (2012) 124.
[26] Note 19 above 54–6.
[27] Ibid 58–9.

In sum, *Fedsure* comprised the initial evolution of the principle of legality, starting from the pre-constitutional requirement of public authority to act *intra vires*, and at the very least in accordance with the principles of natural justice, to the present version of the constitutional principle of legality that had replaced the common law principle of legality.

2.2. President of the Republic of South Africa v South African Rugby Football Union[28]

The following year, in 1999, the Constitutional Court heard and decided *SARFU*. The court decided whether two presidential notices published in the *Government Gazette* appointing a commission of enquiry were valid.

The court, with reference to *Fedsure*, confirmed that even though the President's act of appointing a commission of enquiry did not constitute administrative action as contemplated in s 33 of the Constitution, the President's powers were constrained by the principle of legality, and that it is implicit in the Constitution that the president 'must act *in good faith* and must *not misconstrue* its powers.'[29] The court also considered it to be *appropriate and desirable* for the President to consult with and take advice of Ministers and advisors in exercising the power to appoint a commission of inquiry (however cursory such a consultation may be).[30]

The respondents argued in *SARFU* that the President had acted procedurally unfairly by not affording the respondents a hearing prior to his decision.[31] The Constitutional Court however held that as far as the President was obligated to consult with the deputy President in terms of s 84(3) of the Constitution prior to appointing a commission of inquiry, the President had complied with this requirement and that *it did not effectively matter what the consultation was required to entail* – it could range from 'a protracted and deliberate exchange of views to obtaining a swift signification of consent'[32] (i.e. a minimum threshold of a variable standard). The court found that the President had met his constitutional obligation in the reason for and manner in which he appointed the commission of inquiry and confirmed the substantive rationality of the President's decision – whilst not considering or stating what consultation with Ministers and advisors should or could have comprised.

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[28] Note 20 above.
[29] Ibid 148 (emphasis added).
[30] Ibid 34-41 (emphasis added).
[31] Ibid 129.
[32] Ibid 153 (emphasis added).

2.3. Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa and others[33]

Pharmaceutical Manufacturers, as Chaskalson P said at the very beginning of his judgment, raised 'the question whether a court has the power to review and set aside a decision taken by the President of this country to bring an Act of Parliament into force'.[34] The application was brought as a result of the President's proclamation to bring into effect the new South African Medicines and Medical Devices Regulatory Act, 1998, when the requisite schedules and regulations had not yet been effected to permit the transition from *inter alia* the existing and now substantially repealed Medicines and Related Substances Control Act, 1965.[35]

The court, with reference to *Fedsure* and *SARFU*, reiterated that the exercise of all public power is now subject to the 'doctrine of legality'[36] saying further that: 'The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter'.[37] This cemented the principle of legality as the baseline for review of public power. The court further affirmed, as mentioned above, that the arbitrary exercise of public power is inconsistent with the rule of law, and legality.[38]

3. Rationality takes root

The principles of legality and rationality have grown in importance in South Africa's democratic era. As Price holds, it has grown both in practice (for litigants who seek to hold public functionaries to account) but also in theory, for those who seek to understand and 'to evaluate a contemporary and local manifestation of an ancient political ideal, namely that of a community ruled by its law, rather than by its politicians or indeed by its judges'.[39] One of the critical characteristics of a community ruled by its law implies at its most basic democratic participation, which implies fair process and transparency. However, as the early judgments illustrate, the very content, both substantively and

[33] Note 1 above.
[34] Ibid 1 and 5.
[35] Ibid 1.
[36] Ibid 17.
[37] Ibid 20.
[38] Ibid 85.
[39] Note 4 above 649-650.

procedurally, of rationality has been (and arguably remains) uncertain and draws its objectives of achieving fairness and transparency in public decision-making into question.

3.1. Procedural fairness / rationality

The cases of *Masetlha* and *Albutt*, in contrast with what has become known as the *Simelane* matter,[40] illustrate the uncertainty that has resulted in respect of the inclusion (or not) of procedural fairness as an element of rationality. This uncertainty has led to the point that procedural fairness itself has been elevated to a form of procedural rationality, but without clarifying its content or its relation to substantive rationality.

3.1.1. Masetlha v President of the Republic of South Africa[41]

In 2007, the President suspended and subsequently dismissed Mr Billy Masetlha as Director-General of the then South African National Intelligence Agency (NIA). The High Court had, in the first instance, dismissed Mr Masetlha's application to review the President's decision.[42] It did however confirm that even though the President's authority to dismiss was not susceptible to judicial review under the provisions of the PAJA, the President's decision was not 'beyond the reach of judicial review on any basis'. The President was required to exercise his power to dismiss in conformity with the principle of legality, and not 'in bad faith, arbitrarily or irrationally'.[43] The Constitutional Court confirmed that the President's power and obligation to appoint a head of intelligence services was not sourced from private law and was about 'whether public authority had been exercised in a constitutionally valid manner'.[44]

Notably, the court also considered whether this public power was subject to the requirement of procedural fairness, that is whether the President had to afford Mr Masetlha the opportunity to be heard before being dismissed. Moseneke DCJ emphasized that the *audi alteram partem* principle, derived from the tenets of natural justice and the common law, required a party who stands to be adversely affected by a decision to be

[40] Note 14 above.
[41] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) ('*Masetlha*').
[42] Ibid 3.
[43] Ibid 23.
[44] Ibid 65.

heard ahead of such a decision.[45] The court however concluded that the President's power to dismiss the head of the NIA was an executive function arising from the Constitution and national legislation and that the PAJA excludes the review of the executive powers and functions of the President. As a result, the court said, the President had a special power to appoint a head of NIA which would only be reviewable on 'narrow grounds',[46] which did not comprise procedural fairness as it 'would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action'. The court was of the view that the President should be able to fulfil his executive function and 'not be constrained *any more than through the principle of legality and rationality*'.[47] Procedural fairness would, according to this dictum, fall squarely outside of the test standard for rationality (which Moseneke DCJ had seemingly found to have been satisfied). Krüger notes that the judge appeared to be of the view that procedural fairness existed as a constraint separate from legality and rationality.[48]

Ngcobo J fundamentally disagreed with Moseneke DCJ's finding, saying that the President was *required to consult* with Mr Masetlha prior to altering his term of office, which he did not do, and which constituted a breach of the principle of the rule of law.[49] In this regard, Krüger emphasizes (as Ngcobo J had said) that non-arbitrariness in the rule of law refers to the deeper principle of fundamental fairness.[50] She argues that it links the rule of law as a founding value of the Constitution with the founding values of accountability, openness and responsibility, holding that adherence to these values is possible only when there is participation in decision making.[51]

As an interesting aside (and to illustrate the importance of certainty as far as the content of the rule of law is concerned), Krüger assesses *Masetlha* in view of Tamanaha's outline of rule of law theories, which posits these theories on a continuum of formal theories on the one side and substantive theories on the other. She says that whereas formal rule of law conceptions focus on the procedure or manner of the promulgation of laws, and do not set requirements with regard to the content of the laws, the most basic

[45] Ibid 75.
[46] Ibid 77.
[47] Ibid 77–78 (emphasis added).
[48] R Krüger 'The South African constitutional court and the rule of law: The Masetlha judgment, a cause for concern?' *PER* 2010 (13) 3 472.
[49] Note 41 above 108.
[50] Note 48 above 473.
[51] Ibid 473.

or thinnest conception of the rule of law requires that government action should be backed by law. This 'thinnest conception' of the rule of law, according to Krüger, 'allows any government, however authoritarian or abusive of human rights, to claim compliance with the rule of law so long as their authoritarian or abusive actions are sanctioned by law', whereas she says that 'such an understanding of the rule of law contributes little, if anything, to the restraint of abuse of power, which is generally regarded as the purpose that the rule of law is meant to serve'.[52] On the contrary, a so-called 'thicker', formal version of the rule of law comprises adherence to the manner, form *and procedures* of law, and incorporates the principles of natural justice that require the application of *open and fair hearings* – also in respect of administrative decision making.[53] Krüger summarizes this view, saying:

> 'In a case where the right to procedural fairness is extended to executive decision-making, it has been accepted that the facts of the particular case will determine the extent of the required procedural fairness. When this is done, legality is extended to allow for *context-specific considerations* to determine the scope of the rule of law, which means a move towards a more substantive interpretation of the rule of law*'*.[54]

Moseneke DCJ's judgment in *Masetlha* is criticized on this basis, notably that it can be read to exclude procedural fairness in its entirety from executive action (and thus not to constitute a facet of rational public action at all). Krüger highlights that Moseneke DCJ repeatedly stated that the executive power of the President was constrained only by legality and rationality, which, in his view, excluded the procedural fairness requirement'.[55] This had the effect of separating rationality and procedural fairness from one another and would set a 'perilous precedent reducing the constraints on the exercise of executive power significantly, potentially eroding the supremacy of the Constitution in that respect'.[56] On the other hand, Ngcobo J's contention that procedural fairness is a fundamental requirement of legality and the rule of law, and that the extent of procedural fairness would be determined on a case-by-case basis, accorded with the approach in *SARFU* which did not exempt the exercise of executive power from the requirement of

[52] Ibid 476.
[53] Ibid 477 (emphasis added).
[54] Ibid 477–478.
[55] Ibid 485.
[56] Ibid.

procedural fairness. This, in turn, allows for 'an interpretation of the rule of law in harmony with the other foundational values of accountability, openness and responsiveness'.[57] This view, according to Krüger, is to be preferred to the limited interpretation of the rule of law that places a minimum constraint on the exercise of executive power, proffered by the majority judgment penned by Moseneke DCJ[58] and which, according to Murcott, remains authority for a problematic proposition that 'executive power ought not to be constrained by procedural fairness requirements, since procedural fairness is not a component of the rule of law'.[59]

3.1.2. Albutt v Centre for the Study of Violence and Reconciliation[60]

Also about 2007, then President Mbeki sought to pardon persons convicted of offences committed with a political motive by virtue of a special dispensation and in terms of section 84(2)(*j*) of the Constitution. This was to be an attempt, generally speaking, to 'deal with the unfinished business' of the Truth and Reconciliation Commission (TRC), while persons would qualify for the pardon under the special dispensation on account of allegedly having committed politically motivated offences before 16 June 1999, and having not applied for amnesty from the TRC.[61] A number of non-governmental organisations (NGOs) challenged the special dispensation, claiming that the victims of the offences should have been heard prior to establishing the dispensation. The President had not permitted the victims to make representations, despite their requests to do so.[62]

The NGOs alleged, amongst other things, that the President's decision to exclude the victims' participation was irrational, and that it was not rationally related to the objectives which the dispensation ostensibly sought to achieve, which were national unity and -reconciliation. The state opposed this stance, maintaining that the President's decision to deny the victims their representations was not irrational.[63]

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[57] Ibid.
[58] Ibid 486.
[59] M Murcott 'Procedural fairness as a component of legality: is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 271.
[60] Note 16 above.
[61] Constitution Hill 'Victims must have a say in pardons: Albutt v Centre for the Study of Violence and Reconciliation and Others (2010)' *https://ourconstitution.constitutionhill.org.za/victims-must-have-a-say-in-pardons/.*
[62] Note 16 above 45.
[63] Ibid 38–39.

Ngcobo CJ wrote the majority judgment, which was in effect unanimous, stating at the outset: 'It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.'[64]

With reference to *Fedsure* and *SARFU*, amongst others, the court emphasized that the constitutional powers of the President to pardon convicted prisoners required an application of this nature to be 'considered and decided upon rationally, in good faith, and in accordance with the principle of legality'. The court then summarized the 'test' for rationality, stressing that 'the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved'.[65]

Ultimately, Ngcobo J found that the participation of victims in the amnesty process and the granting of pardons was crucial in achieving the objectives of amnesty and the special dispensation. He held that it could not be said that the exclusion of victims from the process was rationally related to the objectives that it was meant to achieve.[66] In a nutshell, without meeting a requirement of procedural fairness, the President's decision to grant pardons would be irrational.

The result of *Albutt* was, according to Price, that rationality review would also encompass the process by which an impugned decision is reached, provided that a decision would be assessed as a whole[67] (and not, as appeared to happen in *Masetlha*, that procedural fairness was distinct from the rationality of the decision itself). Murcott also argues that *Albutt* rendered the principle of legality capable of imposing procedural fairness standards on the exercise of public power, where it would be irrational not to do so.[68] This was contrary to the Constitutional Court's decision in *Masetlha*.[69] The court in *Albutt*, however, did not overrule *Masetlha*. Murcott, with reference to Ngcobo J's minority judgment in Masetlha, identifies a 'tension' between his positions in *Masetlha* and *Albutt* – that is, that Ngcobo CJ did not elect to invoke his reasoning in *Masetlha* in terms of which procedural fairness would constitute an important component of the rule of law.[70] She holds that the Constitutional Court should, in *Albutt*, have developed the

[64] Ibid 49.
[65] Ibid 50–51.
[66] Ibid 68.
[67] Price (note 4 above) 650.
[68] Murcott (note 59 above) 260.
[69] Ibid 261, with reference to *Masetlha* 77.
[70] Ibid 265.

principle of legality to include procedural fairness where it was required by rationality. Instead, the court effectively limited the scope of imposing a procedural fairness standard to cases where it would, *in the context of a specific case*, be irrational.[71]

Neither *Masetlha* nor *Albutt* answered the question whether procedural fairness was a component of rationality or even, essentially, a requisite for compliance with the rule of law. In both cases, and perhaps as a result of an overly deferential approach given that both cases dealt with executive decision-making, the court at best entertained the requirement of procedural fairness as a context-driven and therefore variable consideration, and not a universal component of or requirement to achieve a rational administrative decision.

3.1.3. Democratic Alliance v President of South Africa[72]

The DA challenged the appointment of Adv. Menzi Simelane by former President Jacob Zuma to the position of National Director of Public Prosecutions in 2012. Mr Simelane was appointed in this position despite the fact that evidence that he had given in the Ginwala Commission of Inquiry lacked credibility to the extent that the Public Service Commission recommended that disciplinary proceedings be taken against him.[73]

The Minister for Justice and Constitutional Development, in defending the DA's application, relied on the fact that neither the Constitution nor the National Prosecution Act, 1981, prescribed a *process* for the appointment of a national director for the NPA, so that the President ostensibly had the discretion to decide on a process by which to come to a decision. The Minister further argued that the 'rationality requirement is not onerous',[74] and that the test employed by the Supreme Court of Appeal (SCA), (which found the President's decision to appoint Mr Simelane to be irrational), had gone beyond the question of rationality. This, the Minister said, intruded into Presidential and executive territory and undermined the separation of powers, which required a 'more deferential approach'.[75]

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[71] Ibid 271–272, with reference to C Hoexter 'The rule of law and the principle of legality in South African administrative law today' in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty, Essays in Honour of Tony Matthews* (2011) 55 60.
[72] Note 14 above.
[73] Ibid 4.
[74] Ibid 8.
[75] Ibid.

The court, with reference to *Albutt*, emphasized that both the process by which a decision is made and the decision itself must be rational – the *process*, in the court's view, referring to the *means*, and the *decision*, the *ends*.[76] In sharp criticism of the majority reasoning in *Masetlha*, the court stated that it was illogical to suggest that decisions made by the President as head of state (i.e. his decision to pardon political prisoners without consulting with the victims of their crimes) should be rational in both process and outcome, whereas the decisions of the President as head of the executive (i.e. his decision to dismiss the director of the NIA) must be rational only in outcome and not in process.[77]

The court in *Simelane* also provided an interesting view on the issue of rationality and separation of powers, which appears to have become a serious sticking point between some members of the national executive and the judiciary in recent years. The serious consequences of this conflict seem to have resulted in a gradual undermining of the judiciary, and of strong (although mostly unsubstantiated) opinions about the independence and integrity of the judiciary that have permeated the public discourse. Importantly, Yacoob ADCJ was of the view that the separation of powers is unlikely to be undermined by a rationality enquiry as '*the only possible connection would be that rationality has a different meaning and content if separation of powers is involved than otherwise'*.[78] He said that the question whether the means adopted are rationally related to the ends in executive decision-making, might then somehow involve a lower threshold (or, as he also referred to it, the 'lowest possible threshold for the validity of executive decisions') than in relation to the same decision involving the same process, but in relation to a legislative or administrative action.[79] With reference to the rationality enquiry as the so-called lowest possible threshold for the validity of executive decisions, the court concluded that 'the rule that executive decisions may be set aside only if they are irrational or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect' and that:

> 'Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a

[76] Ibid 34.
[77] Ibid 35–36.
[78] Ibid 44 (emphasis added).
[79] Ibid.

rational decision if the decision being evaluated is an executive one. The separation of powers has nothing to do with whether a decision is rational'.[80]

The court in *Simelane* seemed to suggest that executive decision-making may in some cases have a lower rationality threshold than others (perhaps with reference to the tension between *Masetlha* and *Albutt)*, and the contradictions regarding procedural fairness were not resolved. *Simelane* seems however, at least in part, to have put paid to the view proffered in *Masetlha* that procedural fairness is a consideration that is distinguishable from the test for rationality. It posited the idea that, perhaps insofar as the nature and extent of procedure that needs to be followed in public decision-making may be fluid and dependent on the context of the facts presented in each case, the process itself still needed to be rational, as the decision should be. However, in so far as the court referred to the 'means' as the procedure, and the 'ends' as the decision, it was not evident whether procedural rationality would constitute a component separate from substantive rationality, or whether procedural rationality and substantive rationality should be seen as two inseparable halves of the same test.

3.2. The giving of reasons

The maintenance of the rule of law is arguably the primary function of the judiciary in a democratic state. The norms that inform democracy include transparency and accountability, which in turn comprise the giving of reasons for the exercise of public power. Two cases that dealt with the giving of reasons are briefly discussed.

3.2.1. Wessels v Minister of Justice and Constitutional Development[81]

The applicant in *Wessels* sought the review and setting aside of the decision by the Minister for Justice and Constitutional Development to appoint a candidate as Regional Court President for the Limpopo province on the basis that reasons for the decision had not been given when requested. The relief was based on s 5(3) of the PAJA.[82] The court

[80] Ibid 42–44.
[81] 2010 (1) SA 128 (GNP) ('*Wessels*').
[82] Ibid 131C.

reviewed and set aside the decision in terms of the PAJA,[83] but also proceeded to confirm that the exercise of a public power is subject to the principle of legality, which includes rationality and accountability, and which 'imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision'.[84]

3.2.2. Judicial Service Commission v Cape Bar Council[85]

In 2013 the Cape Bar Council (CBC) challenged the decision of the Judicial Service Commission (JSC) not to appoint certain candidates to the bench of the Western Cape High Court, resulting in two vacancies remaining vacant. The CBC did so on the basis that the proceedings of the JSC were unconstitutional and unlawful, and the failure to fill the vacancies also unconstitutional and unlawful.[86] One of the legs on which the CBC's application rested, so the court said, was that the JSC had no reason not to recommend candidates for the remaining vacancies, rendering the failure to recommend irrational and unconstitutional.[87]

The CBC had asked the JSC for reasons why it had decided to leave the positions vacant rather than fill them with candidates whom the CBC considered to be qualified for the position. To this challenge, the JSC responded that none of the candidates received a majority vote (with reference to section 178(6) of the Constitution). The CBC contended that this 'amounted to no reason at all'.[88] The JSC's response was that it was not obliged to give a reason why a candidate was not recommended, that no such duty was imposed upon it by either the Constitution or another legislative enactment, and that it had in any event given reasons for its decision (i.e. that the candidates did not receive a majority vote).[89]

The SCA disagreed with the JSC's position. It held that even though there were no express constitutional or other legal enactments that obliged the JSC to give reasons for its decision not to recommend a candidate, it did not exclude an implied obligation to do so on the bases that the JSC had a constitutional duty to exercise its powers in a way that is not irrational or arbitrary and that, as an organ of state, the JSC is bound by the

[83] Ibid 139C–D.
[84] Ibid 141H–J.
[85] 2013 (1) SA 170 (SCA).
[86] Ibid 3.
[87] Ibid 5.
[88] Ibid 38–39.
[89] Ibid 40 and 42.

constitutional values of transparency and accountability.[90] The court was of the view that the inference of an obligation to give reasons could not be avoided, and that one would be hard-pressed to think of a way to account for a decision other than giving reasons even if the extent of the reasons would depend on the facts and circumstances of each case. It further said, with regard to rationality, that exemption from giving reasons would almost invariably result in immunity from an irrationality challenge.[91]

It appears from this judgment and *Wessels* that the courts have been at least consistent in saying that the giving of reasons is fundamental to ensure transparent public decisions, and it seems that a refusal to do so is almost inevitably irrational.

4. Rationality branches out: A consideration of recent cases

Rationality as an aspect of the principle of legality is now entrenched in South African administrative law. However, a reading of more recent cases seems to suggest that the content and test for rationality are not nearly as certain nor as clear as would be expected at this point. This poses a threat to the rule of law itself, which the test is meant to protect. Some of the recent cases in which rationality was applied are discussed in this section.

4.1. Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others[92]

Scalabrini II was the second application brought (by the same applicants) to challenge the decision by the Director-General of the Department of Home Affairs to close the Cape Town refugee office for the second time, and permanently. The reasons given by the Director-General for the permanent closure included that both the Crown Mines and Port Elizabeth refugee offices had been closed, and that there were legal and practical difficulties with the proposals by various interested parties[93] to use Customs House in Cape Town, that satellite offices be established or that a refugee office be established outside the Cape Town metropolitan area. The Director-General argued that he had tried to identify alternative locations for the refugee office but had been unable to find any,

[90] Ibid 43.
[91] Ibid 44.
[92] *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 SCA (*'Scalabrini II'*).
[93] Including the United Nations High Commission for Refugees, the Legal Resources Centre, Lawyers for Human Rights and the UCT Refugees Unit.

that satellite refugee offices were not permitted in terms of the Refugees Act, 1998, that the majority of refugees utilizing the Cape Town office were job seekers who entered South Africa through its northern borders, and that to this effect the remaining refugee offices in Musina, Durban and Pretoria were considered sufficient to serve their needs.[94]

The court held that the decision to close the refugee reception office constituted executive action, reviewable in terms of the principle of legality.[95] The first ground of review, and ultimately only ground of review considered by the court, was that the decision was irrational and unlawful because it did not comply with section 8(1) of the Refugees Act, the Director-General had ignored relevant considerations and that he had made a material error of law.[96]

At the outset, the SCA stated that section 8(1) of the Refugees Act implied the power for the Director-General not only to establish, but also to disestablish a refugee office provided that the decision is rational. The court held that the closure of other refugee reception offices was not a valid reason for the closure of the Cape Town refugee reception centre – as 'rationality entails that the impugned decision is founded on reason', the court held that the reason was 'inexplicable and irrational'.[97] The facts, according to the court, showed that a refugee reception office in Cape Town was necessary and that it was not rational to close the office and 'do nothing to find alternative premises'.[98] The court also referred to the fact that the Director-General never, as part of his reasons, stated that the Cape Town refugee office was redundant or unnecessary but that the facts provided by the applicants pointed 'precisely the other way'.[99] The Director-General had as a result failed to take into account considerations that were relevant in coming to the conclusion that the refugee office was no longer necessary, which rendered his decision irrational.[100] This irrationality was further reinforced by the fact that, the court held, the Director-General had exercised his power in terms of section 8(1) of the Refugees Act contrary to the purpose for which it was given, that is rather to avoid further litigation aimed at the operation of the refugee centre in Cape Town's urban areas by removing the

[94] Ibid 13–14.
[95] Ibid 28.
[96] Ibid 30.
[97] Ibid 37.
[98] Ibid 39.
[99] Ibid 50.
[100] Ibid 51–52.

refugee centre entirely and not giving effect to the purpose of the Refugees Act by ensuring a refugee centre was established.[101]

The court further held that, for a decision to be rational, it must 'be based on accurate findings of fact and a correct application of the law' and that 'the Director-General wrongly took the position that satellite offices were impermissible under the Act, and thus made an error of law'.[102] The court also said that the Director-General, having acted contrary to the law, acted with 'an ulterior purpose' and 'plainly exercised the section 8(1) power for a purpose contrary to that for which it had been given' and that this, also, rendered the decision irrational.[103]

Hoexter and Penfold highlight that it was the fact that the Director-General ignored 'highly relevant considerations' that rendered the decision irrational.[104] It is indeed interesting that the court comes to the conclusion that the Director-General had also not made accurate findings of fact and law, and had 'acted contrary to the purpose for which' the statute had been intended, all of which informed the finding that the decision was irrational. It is, however, not evident how the means and ends of the Director-General were identified in *Scalabrini II*.

4.2. Law Society of South Africa v President of the RSA[105]

In *Law Society* the Constitutional Court dealt with an application to review and set aside the President's negotiation and signing of the 2014 Protocol on the Tribunal of the Southern African Development Community (SADC) that sought, as the court put it, to 'denude' the SADC tribunal of its jurisdiction over disputes of individuals against SADC member states, on the basis that the action was unconstitutional, unlawful and irrational.[106] The application resulted from former President Zuma's decision to suspend the operation of the tribunal and to deprive it of its jurisdiction to hear individual complaints.[107]

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[101] Ibid 62.
[102] Ibid 59.
[103] Ibid 62-65.
[104] Hoexter & Penfold (note 11 above) 489.
[105] *Law Society of South Africa v President of the RSA* 2019 (3) SA 30 (CC) ('*Law Society*').
[106] Ibid 7.
[107] W Freedman & N Mzolo 'The principle of legality and the requirements of lawfulness and procedural rationality' (2021) *Obiter* 422.

The court re-contextualized the issue of procedural rationality that had been uncertain since *Masetlha*. It emphasized that there is a distinction between procedural fairness and procedural rationality, stating that procedural fairness has to do with affording a party likely to be disadvantaged by the outcome of a decision the opportunity to be fairly presented and fairly heard before the decision is rendered. On the other hand, procedural rationality pertained to whether there is a rational connection between the exercise of power in relation to both process and the decision itself, and the purpose sought to be achieved through the exercise of the power.[108] Accordingly, in *Law Society*, the question would not be whether anyone was heard or not heard or dealt with in terms of a fair or arbitrary and oppressive process, but whether the *procedure* for the exercise of the power to suspend the tribunal and amend the jurisdiction of the treaty was rationally related to the realisation of the purpose for which the power to amend the treaty was conferred and exercised by the President.[109]

The court found that the means followed by the President, that is to undermine the purposefully difficult processes prescribed in the treaty to effect an amendment that would have the effect of 'downgrading' the tribunal, so tainted the decision to amend that it had no rational relationship with the purpose sought to be achieved through the exercise of the power to amend. The court concluded that the suspension of the operations of the tribunal in terms of what it called a 'non-existent power' was unlawful by virtue of the fact that the action that he should have taken, and didn't, was prescribed by law, and irrational.[110]

Freedman and Mzolo argue that the court's conclusion that the President's decision was unlawful was sufficient to render it unconstitutional, and that the court did not need to consider whether it was irrational.[111] However, they say that 'the fact that the court went on to consider the rationality requirement is to be welcomed' as it allowed the court to address the question whether the principle of legality encompasses the requirement of procedural fairness as a separate and self-standing ground of review, and to distinguish the difference between procedural fairness and procedural rationality – a question which, they point out, had not really been given a concrete resolution since *Masetlha*[112] and after cases such as *Albutt* and *Simelane* had left the court's jurisprudence confusing and

[108] Note 105 above 64.
[109] Ibid 65.
[110] Ibid 69–71.
[111] Freedman & Mzolo (note 107 above) 427.
[112] Ibid 428.

contradictory.[113] Hoexter and Penfold agree that the contradictions that had arisen in respect of procedural rationality and fairness in cases such as *Masetlha* and *Albutt* were 'ultimately accounted for in *Law Society,* where the Constitutional Court distinguished between procedural fairness and procedural rationality'.[114]

However, Freedman and Mzolo say that despite the court's attempt to distinguish procedural fairness from procedural rationality in *Law Society*, the manner in which it did so still gives rise to concern as it suggests that procedural fairness and procedural rationality would be two separate aspects of the procedural dimension of rationality.[115] They say that it would be more correct to treat procedural fairness as an aspect of the broader requirement of procedural rationality because the requirements to take relevant factors into account postulated in *Simelane,* and to follow a material and mandatory procedure as stated in *Law Society*, are already encompassed by lawfulness, so that procedural rationality does not enjoy its own independent or separate content, rendering it 'difficult to understand what the purpose of procedural rationality is'.[116] Hoexter and Penfold are of the view that *Law Society* has helped, to an extent at least, to resolve apparent conflicts in the jurisprudence on procedural fairness and -rationality[117]. It is so that apparent conflicts have been resolved but, as Freedman and Mzolo write, it is still not clear whether and to what extent procedural rationality is independent from procedural fairness and substantive rationality themselves.

4.3. Fair-Trade Independent Tobacco Association (FITA) v President of the Republic of South Africa and Minister of Co-operative Governance and Traditional Affairs[118]

In *FITA*, the first challenge to the Covid-19 regulations prohibiting the sale of tobacco during the national state of disaster 'lockdown', the Pretoria High Court reviewed the government decision to promulgate its infamous regs 27 and 45.[119] Of FITA's challenge, the court said:

[113] Ibid 429.
[114] Hoexter & Penfold (note 11 above) 492.
[115] Freedman & Mzolo (note 107 above) 427.
[116] Ibid 429–430.
[117] Hoexter & Penfold (note 11 above) 492.
[118] *Fair-Trade Independent Tobacco Association v President, RSA and Another* 2020(6) SA 513 (GP) ('*FITA*').
[119] Ibid 13.

> '[The challenge] is firmly located in the rule of law concept in that it impugns the rationality underpinning that decision. […] FITA's case, reduced to its bare essentials, is that the ends sought to be achieved by the Minister bear no relationship to the means adopted by her.'[120]

FITA maintained that there was no rational basis for the prohibition, and no consideration given to *proportionality*.[121] The court repeatedly emphasized the principle that in determining whether a link exists between the purpose and the means chosen to achieve the purpose, the *means chosen by the Minister need not be the best or even most suitable means* through which to achieve the purpose, but would be susceptible to review on the ground of rationality *only if the court cannot find a rational link between the chosen means and the objective of the Minister's action*.[122] The court criticized FITA's 'taking issue' with the various expert reports, medical literature and other literature referred to by the Minister as not being countenanced by the principle of legality, saying that the question was not 'whether the evidence, medical literature and research' that the Minister relied on were so conclusive to establish a direct link with higher Covid-19 progression in smokers.[123] The court said that its task was 'to determine whether such evidence provides sufficient rational basis for the Minister to outlaw the sale of tobacco products and cigarettes […] it is not our task, in line with the principle of legality, to undertake an in-depth comparison as to which of the parties' medical research reports and opinions are better or more cogent than that of the other. '[124]

What the court in FITA appeared to say is that the evidence is but a residual issue – what matters is whether, at its most basic, the decision-maker is of the view (i.e. an opinion, not necessarily informed by evidence) that the means, *however arbitrary*, justify the objective. In FITA, the applicants interestingly also introduced a requirement of 'proportionality' in addition to the perceived standard of rationality, that is for means to justify the ends of a decision.

[120] Ibid 13.
[121] Ibid 14 (emphasis added).
[122] Ibid 29 and 70 (emphasis added).
[123] Ibid 41.
[124] Ibid 41.

4.4. e.tv (Pty) Limited and Others v Minister of Communication and Digital Technologies and 11 Others[125]

In the second *e.tv* matter, the Constitutional Court found that the Minister of Communications and Digital Technologies' power to determine the date to switch off analogue television transmission was executive, but emphasized that this did not mean there were no constraints on the power.[126] The court held that the Minister's decision was not 'a mechanical determination', but that important interests were at stake so that, with reference to *Albutt*, it was not procedurally rational for the Minister to set a date to switch off analogue transmission without notice to the industry and affected parties and that the Minister's decision not to do so was unlawful.[127]

The court considered that the rationality of the process applied by the Minister should be measured after a fixed date was set for the switch to digital television.[128] To this effect, the court said there was insufficient evidence before it that the process leading up to the deadline set by the Minister provided adequate opportunity for affected households to register for set-top boxes, and that the procedure was therefore 'tainted with procedural irrationality'.[129] As a consequence of the defective process, the court held (with reference to *Simelane*) that the Minister did not have the information that she required to, substantively, make a rational decision[130] as the Minister's failure to provide an opportunity for persons to be informed about the need to register for set-top boxes before the deadline was not rationally connected to a successful migration process.[131] Even though the Minister argued that a flawed process did not 'colour the entire process with irrationality', the court disagreed.[132] From this conclusion it appears as if the court replaced the substantive rationality enquiry with that of procedural rationality – that is to say that without procedural rationality (even though imprecisely defined) a decision cannot be substantively rational.

[125] 2022 (9) BCLR 1055 (CC) ('*e.tv*').
[126] Ibid 33 and 36.
[127] Ibid 52–53.
[128] Ibid 67.
[129] Ibid 72.
[130] Ibid 74.
[131] Ibid 77.
[132] Ibid 78.

5. Rationality and legal uncertainty

In its early days, rationality review in terms of the principle of legality appeared to be a possible way of 'saving . . . administrative law as it is applied in the courts'.[133] Hoexter, with reference to the principle of legality and to rationality review as applied in lieu of or in the absence of application of the PAJA, held that 'without [the principle of legality] we seem doomed to suffer from two closely linked tendencies that bedevilled judicial review in administrative matters from the start: parsimony and conceptualism'[134] and that it was a way to overcome the all-or-nothing results dictated by threshold concepts (such as those of the PAJA).[135]

The view early on was, arguably, that the principle of legality would be a way of ensuring the accountability of public officials without having to confine their action in some way or another to the narrow prescripts of what would constitute administrative action in terms of the PAJA and s 33 of the Constitution. In principle, legality as a minimum threshold for public power was welcomed.

However, perhaps as a result of its normative minimalism and lack of formalism, the principle of legality has grown into a concept that, as alluded to above, seems to change its shape according to the facts of each case and set of facts in which it is applied by the courts.

Freedman and Mzolo write that:

> 'From its relatively modest beginnings in *Fedsure* […] where the Constitutional Court held that the exercise of public power is only legitimate when it is lawful, the principle of legality has expanded in leaps and bounds […] today, it encompasses several other grounds of review, including lawfulness, rationality, undue delay and vagueness.'[136]

As far as the ground of rationality is concerned, so Freedman and Mzolo say, it comprises a number of other grounds of review such as procedural fairness, (with reference to *Albutt*), procedural rationality (with reference to *Simelane*), relevant and irrelevant considerations (also *Simelane*), non-jurisdictional mistake of fact[137] and the giving of

[133] Hoexter (note 8 above) 166.
[134] Ibid.
[135] Ibid.
[136] Freedman & Mzolo (note 107 above) 421.
[137] Ibid (with reference to *Pepcor Retirement Fund v Financial Services Board* 2003(6) SA 38 (SCA)).

reasons (*Judicial Service Commission* referred to above).[138] It may be said that, if one considers the recent arguments in *FITA*, proportionality may become a further ground of review, whereas from *e-tv* it appears as if procedural rationality has usurped rationality itself.

Rationality is established as 'catch-all principle' to ensure review of public decisions where they may have escaped the PAJA.[139] The wide and often uncertain scope of rationality review, however, while broadening the net to catch all errant public officials, may in some cases go a stretch too far, and undermine the constitutional principles and the rule of law that it was meant to protect.

From a conceptual point of view, and considering the cases discussed above, it is difficult to define the elements of 'rationality' if one were to try and explain it to a lay person. Certainly, the rule of law is a foundational constitutional value. But what does it mean to have a 'minimum threshold' to uphold the force of such an important value? Is it cut down to its barest to avoid offending the separation of powers? And if so, does it then still fulfil its function? Despite advances made in *Law Society*, it appears as if the courts have yet to differentiate definitively between procedural fairness and procedural rationality, leaving the two concepts mostly conflated and indistinguishable. The starting point of this conflation was *SARFU*, where a variable threshold for procedural fairness was introduced, and the variability further compounded in *Masetlha* and *Albutt*. This has, for example, resulted in *FITA*, where the court in what seemed to be an act of deference, suggested that the consideration of evidence and information is not necessarily an ingredient of rationality. On the other hand, in *e.tv*, the court held that failure to consider information and evidence 'taints the decision with procedural irrationality.'[140]

As Wade and Forsyth write, in general terms: 'What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should control its exercise.'[141] However, rationality review in administrative law seems to be expected to balance precariously between the issues of separation of powers and judicial deference, and democracy and constitutionalism, while having to fulfil the much-needed purpose of ensuring the accountability of those who are servants of the public.

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[138] Ibid.
[139] R Henrico 'Subverting the Promotion of Administrative Justice Act in judicial review: the cause of much uncertainty in South African administrative law' 2018(2) *TSAR* 288.
[140] Note 125 above para 72.
[141] Wade & Forsyth (note 13 above) 286.

Price says that the over-reliance on and unstoppable growth of review for legality and rationality are cause for concern as it not only poses the danger of circumventing the PAJA, but also tempts the courts to 'stray too far into the legitimate constitutional spheres of the executive and legislative branches of government'.[142] The examples of courts' pronouncements in avoidance of the PAJA in their apparent over-reliance on what appears to an increasingly weak rationality review are manifold. An example of this is *Albutt*, where the court was of the view that it was not necessary for it to answer the question whether the proposed Presidential pardons constituted administrative action, as going beyond what was *strictly* necessary (i.e. testing the rationality of a decision) was not what was required of 'sound judicial policy'.[143]

Du Plessis and Scott, recalling *Fedsure*, *SARFU* and *Pharmaceutical Manufacturers*, and with reference to Hoexter,[144] differentiate rationality review in terms of the principle of legality from the higher standard of reasonableness review in terms of the PAJA.[145] They note that while proportionality applies in reasonableness review, it does not apply in rationality review (even though it was hinted at in *FITA*). One of the central features of rationality review is that it merely demands a 'rational connection' between the means and ends, not a 'perfect or ideal rationality'.[146] The imperfection of this rationality has resulted in variable conclusions by the courts which, in turn, have been said to cause a variable standard of rationality (an oxymoron). Du Plessis and Scott argue, however, that even though a variable standard may be advantageous or even necessary if one considers, for example, the separation of powers, and assist the courts in navigating the complex position that the courts occupy under the Constitution, the advantages of variability could be rapidly undermined if it is combined with a lack of clear guidance on how the standard ought to be applied, and what factors govern the variability – which 'runs contrary to the principle of the rule of law'.[147] The variable standard is evident in *Masetlha*, where the President was not held to the principles of procedural fairness on the basis that his executive function should not be interfered with, whereas in *Albutt*, the absence of consultation by the President rendered his decision

[142] Price (note 4 above) 657.
[143] Note 16 above 82.
[144] Hoexter (note 25 above) 125.
[145] M du Plessis & S Scott 'The variable standards of Rationality Review' *SALJ* (2013) 130 601.
[146] Ibid.
[147] Ibid 607–608.

wholly irrational. The danger in these contradictions is further borne out by Krüger's analysis of rule of law theories detailed above.[148]

Rationality review appears to have become whatever a litigant needs it to be, provided that the decision meets the minimum threshold requirement. Rationality, even though it fulfils an important function as a 'safety net' of administrative law review, thus endangers the function and constitutional purpose of administrative law review.

It is as a consequence possible that rationality review, which in essence should protect democracy and the rule of law by keeping public officialdom accountable for its decisions, may have the effect of undermining that which it is designed to protect.

Pretorius has argued that a deferential rationality standard is problematic as it can lead to what he calls 'a narrow instrumentalist perspective for the evaluation of governmental objectives'.[149] He argues that properly conceived substantive standards of constitutional review of government action are a democratic necessity which should enhance public accountability through deliberative participation.[150] He notes that aggregative political processes, which is how democracy is often perceived (i.e. subjective political preferences exercised through a vote), normally produce elected officials who make administrative decisions by applying instrumental or strategic reasoning in realising their objectives. He says that such an 'aggregative' model offers no way to evaluate the moral authority of decisions and offers only a weak motivational basis for accepting the outcomes of a democratic process as legitimate.[151] Without certainty on rationality, and in the politically charged administrative-law review matters that have made their way to our courts in recent years, the danger is certainly that even if the courts do not intend to offend the separation of powers in their decisions, they can be perceived to do so if they utilize a 'strict' application of, for example, procedural rationality. On the other hand, should they not take a strict interpretation of the elements of rationality (on their variable scale), the courts' decisions may be perceived as weak and ineffectual.

Kohn raises the concern with rationality review that it tends to dilute the principle of legality and the requirement of rationality, 'in a manner reminiscent of the way in

[148] Note 48.
[149] JL Pretorius 'Deliberative democracy and constitutionalism: the limits of rationality review' (2014) 29 *SAPL* 408.
[150] Ibid 411.
[151] Ibid 413.

which our pre-constitutional administrative law was spread too thinly'.[152] She says that, while a flexible principle of rationality might bring the requirements of administrative justice to bear when the circumstances demand it to give effect to the constitutional commitments to accountability, responsiveness and openness in a manner that is compliant with the prescripts of variability, this occurs at the expense of reliability and flexibility – which are equally prescripts of the rule of law.[153] Furthermore, in an attempt to be deferential, the courts may even tend to lean towards a too-timid approach to rationality review, undermining the very role of the judiciary. According to Kohn, the courts have to strike a balance between ensuring that they neither 'display a failure of nerve' nor a too-eager form of judicial activism.[154] This criticism is certainly borne out to an extent by *Masetlha*. However, in so far as Kohn warns of a danger that the courts may adopt a too timid or 'thin' approach to rationality review, this seems not to have come to pass just yet.

The importance of the achievement of certainty in rationality review can, however, not be emphasized enough if one considers what has been called the ongoing 'lawfare' in political disputes, that was particularly prevalent in the era of the Zuma presidency and generally persists today, even if to a lesser extent. As Corder and Hoexter have held: 'This barrage of lawfare has been especially dangerous because it has drawn the judiciary into the public arena and thrust it into a relationship of constant tension with the political branches. … [T]he judiciary has become the primary casualty of this ongoing battle'.[155]

It may very well be that rationality review has to some extent been the champion of ensuring the setting aside of decisions by unscrupulous public officials which would otherwise not have been subject to review. Its gradual perceived dilution may also be partly a response to the 'undermining of (the judiciary's) authority, independence and legitimacy'[156] through the consistent criticism by certain political proponents that the judiciary is unfair, that it habitually overreaches and disregards the separation of powers and that it is inherently biased towards certain political factions. The problem with the uncertainty and unpredictability of rationality review is that in some cases, even

[152] L Kohn 'The burgeoning Constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 310 *SALJ* 811.
[153] Ibid 823.
[154] Ibid.
[155] H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' *Afr. J Legal Stud*. 10 (2017) 126.
[156] Ibid 121.

inadvertently, these public and political criticisms of the judiciary may very well become true.

6. Conclusion

Since *Pharmaceutical Manufacturers*, the principle of legality and rationality review under this principle have evolved into indispensable tools with which to hold those in public power to account for their decisions. They have successfully filled the void that the PAJA is unable to fulfil, that is to be able to review governmental decisions that do not constitute administrative action in terms of the PAJA.

Rationality has been lauded for its pliability, its flexibility and as being a safety net for administrative law review. Its appeal lies exactly in the fact that it is so broad, and that it does act as a safety net – but therein also lies its danger. The courts have not been consistent about applying or defining the apparent elements of rationality, that may include procedural fairness, procedural rationality, the giving of reasons, relevant legal and factual considerations or even the recent mention in *FITA* of proportionality. While these elements are not clearly defined, they are also not given equal weight (nor do they necessarily apply) in each instance. It is so that the facts and circumstances that underlie each case will dictate which elements will apply, and to what extent they should apply. However, inconsistency and uncertainty with regard to the content of rationality review may have the effect of undermining and eroding the rule of law. In turn, the gradual erosion and 'thinning' of the rule of law, as explained by Krüger and discussed above with reference to rule of law theory[157], may cause a government to turn administrative decisions into a box-ticking exercise that could permit an abuse of democracy and human rights, as long as it ensures that its decisions pass the lowest bar of legality. When the rule of law is eroded, the discretion that is afforded to public functionaries in exercising their decision-making powers, and which is required by the separation of powers, may be exercised in an increasingly arbitrary manner.

In consequence, certainty in respect of rationality is required more than ever in view of not only the political 'lawfare' that has become so prevalent in our courts in recent years but also to preserve the rule of law, legality and constitutional democracy.

[157] Note 48.

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