PROCEDURAL JUSTICE UNDER THE PRINCIPLE OF LEGALITY IN SOUTH AFRICAN ADMINISTRATIVE LAW

by

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STYISA001

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DECLARATION

I, Isabeau Elizabeth Steytler, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

Isabeau Elizabeth Steytler
10 October 2024

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ABSTRACT

The South African Constitution provides everyone with a right to administrative action that is procedurally fair. This right is given legislative effect in the Promotion of Administrative Justice Act (PAJA), under which the requirements of procedural fairness are broad and robust. The application of procedural fairness under the Constitution and the PAJA is however limited to those exercises of public power classified as 'administrative action'. In giving meaning to the concept of administrative action under the Constitution, the Constitutional Court has excluded from its ambit executive, legislative, and judicial action, while the PAJA excludes a multiplicity of additional exercises of public power. There is accordingly a wide range of exercises of public power that is not reviewable as administrative action.

Non-administrative action is, however, not exempt from judicial oversight. It is subject to the principle of legality, which was developed by the Constitutional Court as a safety net to ensure that all exercises of public power are subject to some standards. It has thus far been developed to include review for lawfulness and rationality and it was expected that when the appropriate case arose, it would be developed to include review for procedural fairness. When that case arose, however, the Constitutional Court found that procedural fairness was not a requirement under the principle of legality. The result was an all-or-nothing divide in respect of procedural fairness: while administrative action is subject to the potentially extensive requirements of procedural fairness under the PAJA, non-administrative action is not subject to procedural fairness at all.

When subsequently faced with facts that cried out for the application of procedural fairness, the Constitutional Court did not reverse or limit its finding but found that consultation (usually the remit of procedural fairness) could in certain circumstances be required as a matter of rationality, a ground that became known as 'procedural rationality'. The courts have subsequently relied on procedural rationality as a basis for requiring consultation in certain circumstances. When doing so, they have noted that procedural rationality is not to be conflated with procedural fairness, as it is rooted within the concept of rationality, and that requiring consultation under procedural rationality is therefore not at odds with the inapplicability of procedural fairness under the principle of legality.

The difference between procedural fairness and procedural rationality is significant. Rationality is concerned only with the logical connection between the means and ends of a decision, while fairness is concerned far more expansively with the dignity and fair treatment of affected persons, the value of providing decision-makers with all the facts, and the public importance of justice not only being done but also being seen to be done.

The research question of this thesis is therefore: given the conceptual differences between procedural fairness and procedural rationality, can procedural rationality effectively fill the gap left by the exclusion of procedural fairness from legality review where consultation is necessary to achieve procedurally just outcomes? The conclusion arrived at is that procedural rationality is not capable of fulfilling the role of procedural fairness under the principle of legality for a number of reasons stemming from its conceptual underpinning in rationality rather than fairness. The thesis recommends alternative ways in which this gap could nevertheless be addressed.

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LIST OF ABBREVIATIONS

ADCJ	Acting Deputy Chief Justice
ADJP	Acting Deputy Judge President
AJ	Acting Judge or Justice
AJA	Acting Judge of Appeal
CJ	Chief Justice
Constitution	Constitution of the Republic of South Africa, 1996
DCJ	Deputy Chief Justice
GG	Government Gazette
GN	Government Notice
Interim Constitution	Constitution of the Republic of South Africa, Act 200 of 1993
J	Judge or Justice
JJ	Judges or Justices
JSC	Judicial Service Commission
NDPP	National Director of Public Prosecutions
NIA	National Intelligence Agency
P	President of the Constitutional Court
PAJA	Promotion of Administrative Justice Act 3 of 2000
para(s)	paragraph(s)
SCA	Supreme Court of Appeal
reg(s)	regulation(s)

CHAPTER 1

INTRODUCTION

1. INTRODUCTION

Procedural fairness, whether in the form of natural justice, a duty to act fairly, or due process, is a long-cherished doctrine of public law. It reflects the idea that we care not only about the outcome of public decisions, but also about the process by which they are reached. In most Commonwealth legal systems, it requires that the process by which a public decision is reached must include consultation with persons who could be adversely affected by the decision, and that the decision should be made by a person who is, and appears to be, impartial. The broad application of this doctrine was captured by Lord Loreburn LC, who compellingly described 'listen[ing] fairly to both sides' as 'a duty lying upon everyone who decides anything'.[1]

In South Africa, the Constitution provides everyone with a right to administrative action that is lawful, reasonable and procedurally fair.[2] This right is given legislative effect in the Promotion of Administrative Justice Act (PAJA),[3] under which the requirements of procedural fairness are broad and robust, in a manner befitting a constitutional dispensation founded on the values of openness, accountability, and the rule of law.[4] The application of procedural fairness under the Constitution and the PAJA is however limited to those exercises of public power classified as 'administrative action'.

In giving meaning to the concept of administrative action under the Constitution, the Constitutional Court has excluded from its ambit executive, legislative and judicial action. The definition of administrative action in the PAJA also excludes these actions as well as a multiplicity of other exercises of public power. There is accordingly a wide range of exercises

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[1] *Board of Education v Rice* 1911 AC 179 at 182.
[2] Section 33(1) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution' or 'the 1996 Constitution').
[3] Act 3 of 2000 (hereafter 'the PAJA').
[4] Section 1(c)-(d) of the Constitution.

of public power – commonly referred to in case law and commentary as 'non-administrative action'[5] – that is not reviewable as administrative action.

Non-administrative action is nonetheless not immune from judicial oversight. It is subject to the principle of legality, which was developed by the Constitutional Court as a safety net to ensure that all exercises of public power are subject to certain essential requirements. The principle is derived from the rule of law, as enshrined as a founding value in the Constitution.[6] It has thus far been developed to include review for lawfulness and rationality, and has been described as 'administrative law applied under another name'[7] or a 'parallel universe of administrative law'.[8] It was expected that when the appropriate case arose, the principle would be developed to include review for procedural fairness, particularly as the principle is sourced from the rule of law,[9] of which procedural fairness is considered an essential component.[10]

However, in *Masetlha v President of the Republic of South Africa*,[11] the Constitutional Court took a different view. The facts concerned the President's dismissal of the head of the National Intelligence Agency, Billy Masetlha, without providing him with a hearing. The Court determined that the President did not have a duty to consult with Masetlha before dismissing him. Finding that the President's decision was not administrative action reviewable under the PAJA, but an exercise of public power subject to review under the principle of legality, the Court held that the grounds on which the decision could be reviewed were limited to lawfulness

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[5] See for example, *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* [2017] ZACC 3 para 84; *Public Protector of South Africa v Chairperson: Section 194(1) Committee* [2023] ZAWCHC 73 para 52; Cora Hoexter 'A Rainbow of One Colour? Judicial Review on Substantive Grounds' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 163–93; Michael Tsele 'Rationalising Judicial Review: Towards Refining the "Rational Basis" Review Test(s)' (2019) 136 *SALJ* 328.

[6] Section 1(c) of the Constitution.

[7] Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis, Rhodes University, 2002) at 164.

[8] Hoexter 'A Rainbow of One Colour?' op cit note 5 at 184.

[9] Clive Plasket 'Procedural Fairness, Executive Decision-Making and the Rule of Law' (2020) 137 *SALJ* 698–712; Cora 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 Mathews* (2011) 55–74 at 61–2.

[10] Joseph Raz 'The Rule of Law and its Virtue' *The Authority of Law: Essays on Law and Morality* (1979) 210–28; Joseph Raz 'The Law's Own Virtue' (2019) 39 *Oxford Journal of Legal Studies* 1–15; John Rawls *A Theory of Justice* (1971) at 209–10.

[11] [2007] ZACC 20 ('*Masetlha*').

and rationality.[12] It found that executive actions do not attract the demands of procedural fairness, explaining that '[i]t would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action'.[13] The finding has significant implications: first, that exercises of executive power are not reviewable on procedural fairness grounds, and second, that the principle of legality, under which the exercise of executive power as well as other non-administrative action is reviewable, does not encompass procedural fairness. The result is a sharp divide between administrative and non-administrative action in respect of procedural fairness: while administrative action is subject to the potentially expansive requirements of procedural fairness under the PAJA, non-administrative action is not subject to procedural fairness at all.

The exclusion of procedural fairness as a review ground under the principle of legality has far-reaching ramifications. Non-administrative action encompasses decisions that are of considerable public importance: key executive functions of the President and other members of the Cabinet; the exercise of the Public Protector's powers to investigate, report on and remedy maladministration; decisions of the Judicial Service Commission regarding the nomination, selection or appointment of judges; decisions by the National Prosecuting Authority to institute or continue a prosecution; and the findings of commissions of inquiry. Some, if not all, of these decisions will require the application of procedural standards.

When subsequently faced with facts that cried out for the application of procedural fairness, the Constitutional Court did not back-pedal on the blanket exclusion it had imposed in *Masetlha*. Instead, in *Albutt v Centre for the Study of Violence*,[14] it found that consultation (usually the remit of procedural fairness) could in certain circumstances be required as a matter of rationality, a ground that subsequently became known as 'procedural rationality'. The courts have seized upon procedural rationality as a basis for requiring consultation and other 'procedural' standards under the principle of legality. When doing so, they have been at pains to point out that procedural rationality is not to be conflated with procedural fairness, as it is rooted within the concept of rationality, and that requiring consultation as a matter of procedural rationality is therefore compatible with *Masetlha*.

[12] Ibid para 81.
[13] Ibid para 77.
[14] [2010] ZACC 4 ('*Albutt*').

The difference between procedural fairness and procedural rationality (as developed by the courts) is profound. Procedural rationality is concerned only with the logical connection between the means employed to reach a decision and the purpose of the decision, while fairness is concerned far more expansively with the dignity and fair treatment of affected persons, the value of providing decision-makers with all the facts, and the public importance of justice not only being done but also being seen to be done.

The concern of this thesis is the achievement of procedurally just outcomes under the principle of legality. Given the conceptual differences between procedural fairness and procedural rationality, the research question posed in this thesis is whether procedural rationality can effectively fill the gap left by the exclusion of procedural fairness from legality review where consultation is necessary to achieve procedurally just outcomes. It is my conclusion that procedural rationality is not capable of fulfilling the role of procedural fairness under the principle of legality due to its conceptual underpinning in rationality rather than fairness. It is my recommendation that there are two principal means by which the problem identified in this thesis could be addressed: first, by the Legislature widening the definition of administrative action in the PAJA to include a wider range of exercises of public power; and second, by the Constitutional Court revisiting its finding in *Masetlha* to provide that non-administrative action is subject to procedural fairness under the principle of legality. In both instances, the principle of variability (according to which the content of procedural fairness varies according to the facts) would ensure that the application of procedural fairness does not unduly encroach upon the separation of powers.

In this introductory chapter, I begin by setting out the problem statement more fully (Part 2), followed by my research question and the sub-questions that it encompasses (Part 3), and an overview of my argument (Part 4). I follow this with a literature review, investigating how this problem has been addressed in the literature (Part 5) and a consideration of the research methodology that is suitable to answering my research question (Part 6). I conclude by setting out the structure of my argument in a chapter outline (Part 7).

2. PROBLEM STATEMENT

2.1. The nature, variability, and value of procedural fairness

Procedural justice is the idea that there must be fairness in the procedural steps or standards taken by public authorities as they make their decisions. It has been recognised, in one form or another, from ancient times and across most jurisdictions.[15] Indeed, as its erstwhile designation of 'natural justice' reveals, it was often esteemed as a matter of morality and the law of the divine.[16] In modern public law it is almost universally considered to be an essential component of the rule of law,[17] and as identified by Joseph Raz, one of the 'main features of public accountability'.[18]

Today, in Commonwealth jurisdictions, the implementation of procedural fairness is still guided by two ancient maxims: the right to be heard (*audi alteram partem*) and the rule that no one should be a judge in their own case (*nemo iudex in causa sua*).[19] Practically, these maxims are implemented through procedural standards such as duties to notify an affected person of a pending decision, consult with an affected person, and disclose information before a final decision is made (in respect of the right to be heard), and the requirement that decision-makers must recuse themselves where their decision might affect their own interests (in respect of the impartiality requirement).

The content of procedural fairness is 'infinitely flexible'[20] or variable. This means that the standards it requires differ according to the relevant circumstances.[21] Thus, a just procedure

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[15] The principle of a hearing was recognised in ancient Egypt, and the ancient Greeks recognised the principle that no man is to be judged unheard. It was also recognised in ancient Rome where the Twelve Tables prescribed the death penalty for any judge who allowed his judgment to be influenced by accepting bribes. See Lawrence Baxter *Administrative Law* (1984) at 536–8; Harry Woolf, Jeffery Jowell, Catherine Donnelly & Ivan Hare *De Smith's Judicial Review* 8 ed (2018) at 344–5.

[16] Woolf et al ibid at 345.

[17] See Raz 'The Rule of Law and its Virtue' op cit note 10; Raz 'The Law's Own Virtue' op cit note 10; Rawls op cit note 10.

[18] Raz 'The Law's Own Virtue' op cit note 10 at 8.

[19] Woolf et al op cit note 15 at 367–70.

[20] Ibid at 407.

[21] As stated by Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1993] UKHL 8 para 14, 'The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.'

can take many forms. In respect of an application for a driver's licence, it might require only the completion of a form, while in respect of a decision to expropriate a person's land, face-to-face consultation might be required. The intensity of a particular procedural standard might also differ according to the circumstances. One set of circumstances might, for example, require an hour-long consultation, while another might require a much longer consultation. The variability of procedural standards means that they do not have to be applied in an all-or-nothing manner, but can be applied at different levels of intensity, according to the circumstances.[22]

Important interrelated values are served by the application of procedural fairness. The value most often cited by commentators and courts is that imposing procedural standards leads to more accurate and informed decision-making.[23] Where decision-makers must listen to the representations of persons, groups, or the public, they must take into account more information when making their decision. They may be confronted with information they did not have before, allowing them to make a slightly or completely different decision; or they may be apprised of a previous misunderstanding, leading to the proposed decision being abandoned altogether. As explained by Ngcobo J, '[a] hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered inexplicable to be fully explained.'[24] Thus, decision-makers who are better informed are more likely to make one of the better choices available to them under the circumstances.

Procedural fairness also encourages public confidence in decision-making.[25] This is encapsulated in the well-known dictum that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[26] This is why the rule against bias precludes not only actual bias but also the reasonable perception of bias: accordingly, '[e]ven though the

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[22] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 502.

[23] See Woolf et al op cit note 15 at 342–3; Baxter *Administrative Law* op cit note 15 at 538; Lawrence Baxter 'Fairness and Natural Justice in English and South African Administrative Law' (1979) 96 *SALJ* 607 at 635; Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' *Constitutional Law of South Africa* 2 ed (2017) at 81–2.

[24] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19.

[25] Woolf et al op cit note 15 at 537.

[26] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259.

decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the courts and other decision-making bodies.'[27]

Finally, procedural standards also play a role in respecting human dignity, as 'allowing affected persons an opportunity to influence decisions that affect them affirms their equal worth and human dignity.'[28] As noted by John Rawls, 'respect for persons is shown by treating them in ways that they can see to be justified'.[29] For Jeremy Waldron, allowing a person to be heard is central to our concept of law as 'a mode of governing people that acknowledges that they have a view or perspective of their own to present on the application of the norm to their conduct and situation'.[30] He poignantly explains:

> Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.[31]

These considerations, in any review application, must nevertheless be weighed against the value of administrative efficiency. Administrative efficiency can weigh particularly heavily in the consideration of procedural standards, as the application of *audi* can potentially be time-consuming and costly (in a way that requiring a decision-maker to be reasonable will not).[32] It could, for example, involve oral consultations, hearings and even prolonged public inquiries, creating significant work for public authorities and placing a substantial burden on the public purse. It is for this reason that legal systems must consider methods of limiting the application and content of procedural standards.

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[27] Ibid.
[28] Klaaren & Penfold op cit note 23 at 82.
[29] Rawls op cit note 10 at 513.
[30] Jeremy Waldron 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200–22 at 210.
[31] Ibid.
[32] Hoexter 'Future of Judicial Review' op cit note 22 at 492.

2.2. Natural justice in pre-constitutional South Africa

Together with nearly all of its administrative law, South Africa inherited natural justice as a ground of review from the English common law.[33] Within a system of parliamentary sovereignty and legislative supremacy during the pre-constitutional era, natural justice was understood to apply unless excluded by statute.[34] Where legislation did not make express reference to natural justice, a presumption existed that it was intended.[35] Parliament was, however, free to exclude natural justice, expressly or by implication.[36] As Stratford ACJ observed, '[s]acred though [the maxim of *audi alteram partem*] is held to be, Parliament is free to violate it'.[37]

The application of natural justice was further limited by the 'classification of functions' doctrine.[38] Inherited from English law, the doctrine divided exercises of public power into the categories of 'judicial', 'quasi-judicial', 'legislative', 'purely administrative', and 'executive' decisions, and only the first two categories attracted the application of natural justice. While judicial decisions were clearly identifiable, the definition of quasi-judicial decisions proved more challenging as courts struggled to find criteria for decisions that were '"court-like" but which, somehow, were not quite'.[39] The prevailing approach was to define quasi-judicial decisions as decisions that affected the *existing* rights, liberty and property of an individual.[40] This meant that mere applicants (those *applying* for rights) were not entitled to a fair hearing.[41] It also meant that in cases of multi-level decision-making, preliminary decisions did not attract natural justice, as they did not themselves affect rights adversely.[42] The purpose of the doctrine was to limit the number of cases that would attract natural justice so as to limit the burden on

[33] Baxter *Administrative Law* op cit note 15 at 30–4; Cora Hoexter 'From Pale Reflection to Guiding Light: The Indigenisation of Judicial Review in South Africa' in Swati Jhaveri & Michael Ramsden (eds) *Judicial Review of Administrative Action Across the Common law World* (2021) 171–90.
[34] Baxter *Administrative Law* op cit note 15 at 569–70.
[35] Ibid at 570–2.
[36] Ibid at 569–70.
[37] *Sachs v. Minister of Justice* 1934 A.D. 11.
[38] Baxter *Administrative Law* op cit note 15 at 573–577.
[39] Ibid at 574.
[40] Baxter ibid; Hoexter 'Future of Judicial Review' op cit note 22 at 503–4.
[41] Baxter ibid; Cora Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law* Journal 165 at 169.
[42] Hoexter ibid.

the administration. While the doctrine was widely criticised and eventually abandoned in English law in 1964,[43] it continued to be applied by South African courts.[44]

The application of natural justice during this period has been criticized for being too limited and conceptually confused.[45] As Lawrence Baxter wrote in 1984, 'the danger with the classification process is that legal categories tend to become rigid and inflexible.'[46] He observed that natural justice had been applied in an 'all-or-nothing' manner in terms of which the decision-making process was either 'completely fair' or was 'permitted to be completely unfair.'[47]

Cora Hoexter in 2004 concurred, identifying two judicial tendencies apparent during this period. The first was 'parsimony' or a restrictive application of administrative justice, as judges treated administrative justice as 'something to be carefully hoarded and doled out only grudgingly'.[48] The second tendency was 'conceptualism', which Hoexter defines as a 'reliance on legal concepts as a method of solving legal problems.'[49] Hoexter explains the effect of these two tendencies as follows:

> In South African law of the pre-democratic era, parsimony combined with conceptualism in a way that was not only devastating for the victims of the system, but also for the development of judicial review. The courts' energies were largely directed towards a negative enterprise: finding ways to *restrict* the application of principles of good administration and their obverse, the grounds of review. The results were an all-or-nothing application of those principles, with most victims of official action getting nothing…The courts' focus meant that the most fundamental, helpful and positive question was never asked: What does administrative justice require in this case? It meant, in fact, that hardly any effort went into the essential task of working out the appropriate content of lawfulness, reasonableness and fairness in particular cases.[50]

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[43] The distinction was abandoned in English law in the case of *Ridge v Baldwin* [1964] A.C. 40 at 75-76 where Lord Reid famously found that natural justice could apply simply where someone has a duty to determine 'what the rights of an individual should be.'

[44] Baxter *Administrative Law* op cit note 15 at 576.

[45] Baxter ibid at 13; Hoexter 'Principle of Legality' op cit note 41 at 169–71; Marinus Wiechers *Administratiefreg* (1973) at 129–30.

[46] Baxter *Administrative Law* op cit note 15 at 609.

[47] Baxter ibid at 593.

[48] Hoexter 'Principle of Legality' op cit note 41 at 168.

[49] Ibid.

[50] Ibid at 168–9.

The tendencies towards parsimony and conceptualism were somewhat lessened towards the end of the Apartheid era, as the courts embarked on a new course in their approach to administrative law, 'show[ing] signs of regeneration and adaptation to changed circumstances'.[51] In respect of natural justice, two key cases were *Administrator, Transvaal v Traub*[52] in 1989, and *South African Roads Board v City Council of Johannesburg*[53] in 1991. In *Traub*, the Appellate Division expanded the *audi alteram partem* standard to apply not only where an individual's liberty, property or rights were threatened, but also where, in their absence, an individual nevertheless had a legitimate expectation of being heard. The Court thereby indicated that it was willing to apply procedural fairness, less parsimoniously, to a broader range of public decisions. Corbett CJ reasoned as follows:

> There are many cases which one can visualise in this sphere where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected.[54]

The Court, furthermore, upon consideration of developments in English law, rejected the classification of functions doctrine, endorsing a less conceptual application of *audi alteram partem*. This approach was confirmed and expanded upon in *SA Roads Board,* where Milne JA confirmed that the Appellate Division had 'moved away from the classification of powers as, for example, judicial, quasi-judicial or purely administrative in order to determine whether the *audi* principle applies.'[55] The Court found that natural justice was also applicable to some legislative decisions, and that the decision in question – the declaration of a toll road – despite being legislative in nature, attracted the requirements of natural justice.[56]

Traub and *SA Roads Board* indicated that the courts were now willing to develop natural justice in a way that did away with the previously narrow and conceptually flawed application of the principle and followed the lead of contemporaneous English law in its broad application of a

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[51] Hugh Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* at 30.
[52] 1989 (4) SA 731 (A) ('*Traub*').
[53] 1991 (4) SA 1 (A) ('*SA Roads Board*').
[54] *Traub* supra note 52 at 733A-B.
[55] *SA Roads Board* supra note 53 para 10.
[56] Ibid para 16.

'duty to act fairly'. A new broader duty to act fairly, unencumbered by the classification of functions doctrine, appeared to 'offer an escape from the conceptual mess the courts had got themselves into',[57] and its flexibility meant that it could be applied without impinging upon the separation of powers. As Harry Woolf et al explain in respect of the introduction of the duty to act fairly in English law: '[a]s long as it was remembered that the degree of procedural formality required by the rules was capable of considerable variation according to the context, an extension of the range of situations to which they were applied did not attract the criticism that the courts were "over judicializing" administrative procedures'.[58] The period during which the 'duty to act fairly' was applicable did not, however, last long in South African law, as it was soon superseded by review for procedural fairness in the interim Constitution.

2.3. Procedural fairness under the interim Constitution and the final Constitution

In 1993 the interim Constitution fundamentally altered the South African legal system by declaring the Constitution and its enshrined rights supreme,[59] thereby giving rise to a new constitutional era.[60] This had a momentous transformative effect on South African administrative law.[61] Previously governed by the common law, and subject to the whims of Parliament, a right to administrative justice was now entrenched in section 24 of the interim Constitution. Section 24 provided that:

> Every person shall have the right to-
> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

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[57] Hoexter 'Principle of Legality' op cit note 41 at 171.
[58] Woolf et al op cit note 15 at 363.
[59] Section 4(1) of Act 200 of 1993 (hereafter, 'the interim Constitution' or 'the 1993 Constitution').
[60] See Cora Hoexter *The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000* (PhD Thesis, University of Witwatersrand, 2010).
[61] See Hoexter ibid; Kate O'Regan 'Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law' (2004) 121 *SALJ* 424; Hugh Corder 'Without Deference, with Respect: A Response to Justice O'Regan' (2004) 121 *SALJ* 438;

The provisions of section 24 were regarded as 'remarkably generous and innovative', though somewhat convoluted.[62] Section 24 was replaced by a right to 'just administrative action' in section 33 of the final Constitution, which is similarly broad but more straightforward.

> (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.

Judicial review was now rooted in the Constitution and 'everyone' had the right to administrative action that was lawful, reasonable and procedurally fair. The application of this broad right was, however, suspended until the enactment of national legislation. Until that enactment, a provision in the same terms as section 24 of the interim Constitution was to be applied.[63] The required legislation was enacted in the form of the PAJA, which came into effect in 2000.

2.4. The bifurcation of South African administrative law

In the period between the enactment of the interim Constitution and the enactment of the PAJA, the Constitutional Court set about defining the concept of administrative action. It did so by distinguishing administrative action from executive, judicial, and legislative actions, so as not to overburden the administration.[64] The grounds of review contained in the interim Constitution (lawfulness, rationality, and procedural fairness) were therefore not applicable to all exercises of public power, but only to those that constituted 'administrative action'. The definition given to administrative action under the interim Constitution was later also attributed to

[62] Hugh Corder 'The Development of Administrative Law in South Africa' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 1–26 at 18.
[63] Item 23 of Schedule 6 to the Constitution.
[64] See further Chapter 2 Part 3.1.

administrative action under section 33 of the final Constitution, which was itself further defined by the courts.

When the PAJA was enacted to give effect to section 33 of the final Constitution, it included its own definition of administrative action that would serve as gatekeeper to the protections of the Act. That definition, which was required to be consistent with section 33 of the Constitution to which it gave effect,[65] echoed the Constitutional Court's exclusion of executive, judicial and legislative actions, but also excluded many other public decisions, on the basis of which it is universally criticised as being overly narrow.[66] In fact, it is considered by some to be so narrow that it limits the application of section 33 of the Constitution.[67] Although it is therefore arguable that the definition is unconstitutional,[68] there has been no challenge to it in more than twenty years since its enactment.

The exclusion of non-administrative action from review under section 33 of the Constitution and section 6 of the PAJA seemed to indicate that such action was not subject to judicial review. It threatened a return to the parsimony and conceptualism of the pre-constitutional era if public decisions that amounted to 'administrative action' attracted robust protections while non-administrative action was not reviewable at all.[69] In order to avoid this outcome, the Constitutional Court, while defining what administrative action was and was not, simultaneously developed the principle of legality.

The first cases to introduce the principle of legality were based on the interim Constitution, as this remained in force until the PAJA was enacted in 2000.[70] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[71] Chaskalson P, writing for a unanimous Constitutional Court, stated that '[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the

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[65] *JDJ Properties CC v Umngeni Local Municipality* [2012] ZASCA 186 para 13.
[66] Hoexter 'Future of Judicial Review' op cit note 22 at 495–9; Lauren Kohn & Hugh Corder 'Administrative Justice in South Africa: An Overview of Our Curious Hybrid' *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (2019) 120–50 at 123; JR de Ville *Judicial Review of Administrative Action in South Africa* (2003) at 69.
[67] Cora Hoexter 'Administrative Action in the Courts' 2006 *Acta Juridica* 303.
[68] Hoexter 'Principle of Legality' op cit note 41 at 180–1.
[69] See ibid.
[70] Item 23 of Schedule 6 to the Constitution.
[71] [1998] ZACC 17 ('*Fedsure*') para 58.

principle that they may exercise no power and perform no function beyond that conferred upon them by law', and concluded that the principle of legality was implied by the terms of the interim Constitution.[72] Finding that 'it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful,'[73] the Court recognised the first requirement of the principle of legality: lawfulness.

After *Fedsure* the Constitutional Court affirmed in *President of the Republic of South Africa v South African Rugby Football Union*[74] that while the President's decision to appoint a commission of inquiry did not constitute administrative action in terms of section 33 of the Constitution, the exercise of his power was nevertheless constrained by the principle of legality and by the principles that he must act in good faith and not misconstrue his powers.

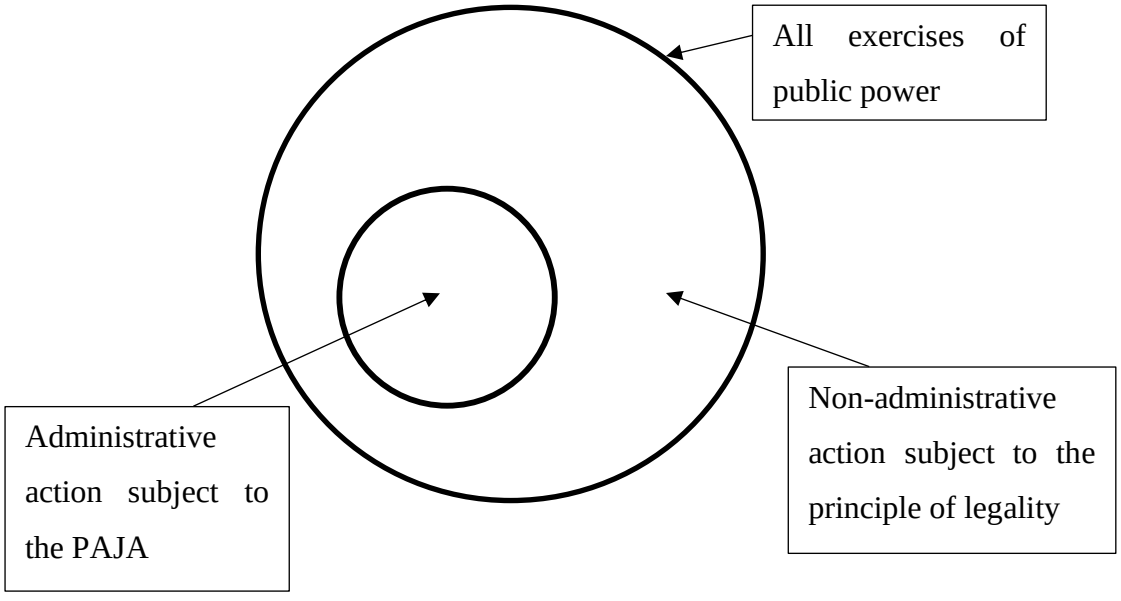
Fedsure and *SARFU* were followed by *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*.[75] The final Constitution was now in force, and the Constitutional Court found that the principle of legality was entrenched in section 1(c) of the Constitution, which identifies the rule of law as a foundational value of the Republic of South Africa.[76] The Court also expanded the principle of legality to include, in addition to lawfulness, a rationality standard, finding that '[i]t is a requirement of the rule of law that the exercises of public power by the executive and other functionaries should not be arbitrary' and that '[d]ecisions must be rationally related to the purpose for which the power was given.'[77] The case concerned a premature enactment of legislation by the President, when the regulations necessary to make the legislation workable had not yet been drafted. Writing for a unanimous court, Chaskalson P observed that 'it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational.'[78]

Since this trio of cases, the principle of legality has been invoked in a wide range of review applications. While initially conceived of as a safety net of minimum standards for non-administrative action, it has become a fully-fledged alternative to PAJA review, with scope for

[72] Ibid para 59.
[73] Ibid para 56.
[74] [1999] ZACC 11 ('*SARFU*') para 148.
[75] [2000] ZACC 1 ('*Pharmaceutical Manufacturers*').
[76] Ibid para 17.
[77] Ibid para 85.
[78] Ibid para 90.

further expansion. Andrew Konstant has convincingly argued that in the early days of legality review, 'the Court's desire to fill the principle of legality with the tools of PAJA review [was] being driven by a need to constrain executive decisions'.[79] He argues that this suggests that the expansion of legality review bears a direct relation to the need to supervise government decision-making. Or, '[i]n other words, the stronger a court's desire to restrain execution decision-making, the more expansive the principle of legality will become.'[80] Equally, we may conjecture that courts will be loath to expand legality review where they wish to show greater deference to executive and legislative decision-making.[81] Whether or not a court – specifically the Constitutional Court – wishes to restrain government decision-making is therefore likely to be determinative of the grounds of review required under the principle of legality.

Figure 1



Source: Author

As can be seen in Figure 1, the effect of these developments is that there are currently two main avenues of judicial review in South Africa.[82] Exercises of public power that are categorised as

[79] Andrew Konstant 'Administrative Action, the Principle of Legality and Deference – The Case of *Minister of Defence and Military Veterans v Motau*' (2015) 7 *Constitutional Court Review* 68–90 at 76.
[80] Ibid.
[81] Ibid.
[82] There are two avenues because section 33 of the Constitution cannot be relied upon directly. The doctrine of subsidiarity requires that the PAJA be relied upon as it gives effect to section 33.

administrative action are subject to the requirements of the PAJA, which provides for review for lawfulness, reasonableness, and procedural fairness, while non-administrative action is subject to the requirements of the principle of legality, which currently provides for review for lawfulness and rationality, with the potential for development to include additional grounds of review.

2.5. The exclusion of procedural fairness from the principle of legality in *Masetlha*

It was expected that when the appropriate case arose, the principle of legality, which after *Fedsure* and *Pharmaceutical Manufacturers* already encompassed review for lawfulness and rationality, would be developed to include procedural fairness.[83] After all, procedural fairness is a long-recognised principle of the rule of law, the constitutional value from which the principle of legality is derived. It was therefore a surprise when in *Masetlha,* the Constitutional Court found that it would be inappropriate to subject executive decisions to the requirements of procedural fairness and that the principle of legality under which the President's decision fell to be reviewed encompassed only lawfulness and rationality standards.

The facts of *Masetlha* concerned President Mbeki's dismissal of the head and Director-General of the National Intelligence Agency, Mr Billy Masetlha, after it came to light that he had been involved in an illicit surveillance operation. Mbeki asserted that his decision to dismiss Masetlha was based on and justified by the irreparable break-down of trust between himself and Masetlha. The High Court had found that 'in order for the President to fulfil his role as head of the national executive, he must subjectively trust the head of a national intelligence service', and consequently that 'the irreparable break-down of the relationship of trust between the President and the head of the Agency constituted a lawful and rational basis for the dismissal'.[84]

Before the Constitutional Court, Masetlha argued that his dismissal was unconstitutional on the basis that he had not been given an opportunity to be heard before being dismissed. The majority judgment was penned by Moseneke DCJ. While he acknowledged that 'the power to dismiss must ordinarily be constrained by the requirement of procedural fairness', he found

[83] Hoexter 'Rule of Law' op cit note 9 at 59–60; Plasket 'Procedural fairness' op cit note 9.
[84] *Masetlha* supra note 11 para 24.

that 'the special legal relationship that obtains between the President as head of the national executive, on the one hand, and the Director-General of an intelligence agency, on the other' distinguishes it from this general principle, particularly as 'the power to dismiss is an executive function that derives from the Constitution and national legislation'.[85]

On the question of consultation, Moseneke DCJ went on to find that '[i]t would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action.'[86] He referred to *Premier, Mpumalanga v Executive Committee Association of State-Aided Schools, Eastern Transvaal*,[87] in which O'Regan J held that '[i]n determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively'.[88] Moseneke DCJ continued by emphasising that executive actions are only reviewable, under the principle of legality, for lawfulness and rationality:

> This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement. The authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.[89]

Returning to the facts, Moseneke DCJ agreed with the High Court's finding that it was not irrational to dismiss the head of an intelligence service based on a breakdown of trust, and upheld the decision. Moreover, he found that '[e]ven if procedural justice was a requirement for the exercise of the power to dismiss, it seems to me that, on the facts, Masetlha has had ample occasion to respond to the allegations that were made against him'.[90]

In a far more deeply reasoned minority judgment, Ngcobo J disagreed with the majority's blanket exclusion of procedural fairness from the principle of legality for a number of reasons.

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[85] Ibid para 75.
[86] Ibid para 77.
[87] [1998] ZACC 20 ('*Premier, Mpumalanga*').
[88] *Masetlha* supra note 11 para 77, quoting from *Premier, Mpumalanga* ibid para 41.
[89] Ibid para 78. See also para 81.
[90] Ibid para 83.

First, he pointed to the long-standing principle that procedural fairness is an essential requirement of the rule of law, arguing that the rule of law 'does not only demand that decisions must be rationally related to the purpose for which the power was given' but that the Constitution requires more as 'it places further significant constraint on how public power is exercised through the Bill of Rights and the founding principle enshrining the rule of law.'[91]

Second, Ngcobo J considered the constitutional scheme within which the rule of law operates. He pointed to the fact that neither section 33 or 34 of the Constitution 'immunise from constitutional review decisions which have been arrived at by a procedure which was clearly unfair' and asked whether the Constitution 'adopt[s] a different attitude when it comes to the exercise of executive power and sanctions the making of decisions arrived at by procedures that are clearly unfair.'[92] Ngcobo J further observed that administrative, legislative, and judicial decisions each invite procedural oversight and public participation where appropriate.[93] In this context, he argued that 'it would be incongruous to free the executive and other functionaries who exercise public power but whose conduct does not amount to administrative action from values of accountability, responsiveness and openness.'[94] My interpretation of Ngcobo J here is that it is incorrect to view procedural fairness as a ground of review unique to administrative action, and that it applies, like a net (though at different intensities), to all public power. The majority's finding that executive action does not have to be procedurally fair is a hole in that net that the majority judgment failed to justify. As Plasket has pointed out, [i]t is far from obvious that those exercising executive power should be free to act in a procedurally unfair manner'.[95]

Third, Ngcobo J drew a link between procedural fairness and arbitrariness, arguing that because fairness gives a decision-maker an opportunity to hear all relevant facts, a fair process will minimise arbitrariness.[96] As such there is 'an inter-relationship' between the two, and the rule of law requirement that decisions should not be arbitrary 'has both a procedural and substantive component'.[97] He explained:

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[91] Ibid para 179.
[92] Ibid para 180.
[93] Ibid para 182.
[94] Ibid.
[95] Plasket 'Procedural fairness' op cit note 9 at 709.
[96] *Masetlha* supra note 11 para 184.
[97] Ibid.

> Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly. To hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review.[98]

He did, however, warn that '[a] reasonable balance must … be maintained between the need to protect the individual from decisions unfairly arrived at by officials exercising public power and the contrary desirability of avoiding undue judicial interference in their administration.'[99]

Ngcobo's reasoning is compelling. Procedural fairness in one form or another has almost ubiquitously been considered an essential requirement of the rule of law,[100] significantly by the leading scholars on the subject.[101] To exclude fairness from the rule of law without any kind of explanation must therefore be considered a major oversight in the majority judgment in *Masetlha.* Moreover, if we consider the legal dispensation that the Constitution creates, in which openness and accountability are considered vital and are applied to the legislature, the judiciary, and administrative action, excluding executive actions from compliance with those values requires potent justification.

Of course, courts must be wary of overburdening the administration with too many procedural hurdles but subjecting executive action and other non-administrative action to procedural fairness does not mean that those actions will always fall short on procedural grounds. In this respect, there is another criticism that can be made of the *Masetlha* exclusion. The majority judgment seemed to ignore the well-established principle that procedural fairness is variable according to the circumstances. In respect of executive decision-making, its content would lessen or intensify depending on the relevant circumstances.[102] In some circumstances it could even attract no procedural standards whatsoever. Ironically, the dictum of O'Regan J in *Premier, Mpumalanga* that was relied on in the majority judgment[103] refers to the importance

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[98] Ibid.
[99] Ibid.
[100] See further Plasket 'Procedural fairness' op cit note 9.
[101] Raz 'The Rule of Law and Its Virtue' op cit note 10; Rawls op cit note 10.
[102] The factors that influence the variability of procedural fairness are considered at length in Chapter 3 Part 2.1.
[103] Supra note 87 para 41, cited in *Masetlha* supra note 11 para 77.

of reducing obligations on government that will reduce its efficiency as a matter of *giving content* to procedural fairness in a particular case, not determining whether it is *applicable*. The courts are thus clearly alive to the variability of procedural fairness, and how its content can be reduced to show appropriate deference to the executive. There was therefore no need to make a blanket exclusion in *Masetlha*. If the majority was intent on finding that the President's decision did not require any consultation, it could have done so without immunizing all executive actions (and, apparently, all non-administrative action) from the application of procedural fairness.

This leads to another important issue raised by *Masetlha*. The majority expressly excluded the application of procedural fairness to *executive* actions and found that executive actions are subject only to review for lawfulness and rationality. Did the majority leave open the possibility that other (non-executive) non-administrative action might be reviewable for procedural fairness under the principle of legality? This seems unlikely. First, the majority limited the review standards under the principle of legality to lawfulness and rationality.[104] Second, the majority's observation that procedural fairness is inapplicable to executive actions as it is 'a cardinal feature in reviewing administrative action'[105] is a strong indication that the exclusion applies to all non-administrative action. Third, in his minority judgment, Ngcobo J clearly proceeded on the assumption that the majority judgment excluded procedural fairness from the ambit of the principle of legality, rather than from the review of a sub-species of non-administrative action under the principle of legality. Ngcobo J stated: 'The crisp question for decision is whether the rule of law, in particular, the doctrine of legality, has a procedural component'[106] and concluded that 'when exercising public power the executive *and other functionaries* have a duty to act fairly'.[107] I address this issue in more depth in Chapter 8 of this thesis, where I consider whether the majority judgment leaves open the question whether non-administrative action not amounting to executive action may be reviewable for procedural fairness under the principle of legality, and the consequences that might follow if a court were to recognise what would amount to yet another avenue of review.

[104] Ibid para 81.
[105] Ibid para 77.
[106] Ibid para 178.
[107] Ibid para 189, my emphasis.

A final criticism of the majority judgment in *Masetlha* is that it was short-sighted. As I have indicated in this Chapter, and explain further in Chapter 2, the exercises of public power that are excluded from the definition of administrative action and thus reviewable under the principle of legality are numerous and diverse.[108] The PAJA expressly excludes the executive decisions of the National Executive;[109] the legislative functions of Parliament;[110] decisions by the National Director of Public Prosecutions (NDPP) to institute or continue a prosecution;[111] and decisions relating to the nomination, selection or appointment of a judge by the Judicial Service Commission.[112] The courts, in determining the scope of 'administrative action', have excluded further exercises of public power from its ambit. These include the President's appointment of a commission of inquiry;[113] the President's decision to bring into force an Act of Parliament;[114] some government regulations;[115] the President's appointment of the NDPP;[116] the NDPP's decision not to prosecute or to discontinue a prosecution;[117] the conduct of commissions of inquiry;[118] and (controversially)[119] a decision by an organ of state that the organ of state itself seeks to have reviewed in its own interest.[120] Some or all of these decisions will certainly require the application of some procedural standards in order to be considered procedurally just. *Masetlha* presented the Constitutional Court with an opportunity to ensure the application of procedural fairness to exercises of public power that required it. Instead, the Court repeated the ill of the pre-constitutional system: like the classification of functions doctrine, *Masetlha* imposed all-or-nothing consequences in respect of procedural fairness. Exercises of public power amounting to administrative actions are subject to a full procedural fairness standard, while those that do not are not subject to procedural fairness requirements at all. The Court seemed not to foresee the far-reaching consequences of its approach.

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[108] This will be fully discussed in Chapter 2 of this thesis.
[109] Section 1(aa).
[110] Section 1(dd).
[111] Section 1(ff).
[112] Section 1(gg).
[113] *SARFU* supra note 74.
[114] *Pharmaceutical Manufacturers* supra note 75.
[115] See further Chapter 2.
[116] *Democratic Alliance v President of South Africa* [2012] ZACC 24 ('*Simelane*').
[117] *Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).
[118] *Corruption Watch v Arms Procurement Commission* [2019] ZAGPPHC 351.
[119] Leo Boonzaier 'A Decision to Undo' (2018) 135 *SALJ* 642–77; Raisa Cachalia 'Resuscitating the PAJA in State Self-review? *Compcare Wellness Medical Scheme v Registrar of Medical Schemes*' (2022) 38 *SAJHR* 70–91; Mitchell De Beer 'A New Role for the Principle of Legality in Administrative Law: *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*' (2018) 135 *SALJ* 613–30.
[120] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

2.6. The introduction of procedural rationality under the principle of legality

It was not long after *Masetlha* that a case arose that cried out for the application of procedural fairness. *Albutt*[121] concerned a special dispensation process established by President Mbeki in terms of which perpetrators could apply for pardons for politically motivated offences committed during Apartheid. The dispensation was a continuation of the work of the Truth and Reconciliation Commission (TRC), allowing persons who did not appear before the TRC to nevertheless apply to be pardoned. Like the TRC, the objectives of the special dispensation process were national reconciliation and national unity. Unlike the TRC, the new dispensation did not provide for the participation of the victims of offences in the process by which the President decided whether to grant a pardon. An application was brought to interdict the President from granting pardons without the victims being provided with the opportunity to be heard.

The matter reached the Constitutional Court, where the principle of legality was applied.[122] The Court could not – without overruling itself – review the decision for procedural fairness, as it had found in *Masetlha* that the standard of procedural fairness was not applicable to executive action reviewed under the principle of legality. Ngcobo CJ, as he now was, found a solution that allowed the Court to require consultation without overruling *Masetlha*. Building on the view he espoused in his minority judgment in *Masetlha* that arbitrariness was both substantial and procedural in nature, he expanded the standard of rationality to include both a substantive and a procedural component. Ngcobo CJ found that 'the President's decision to undertake the special dispensation process, without affording the victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process',[123] and that 'where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved.'[124]

[121] Supra note 14.
[122] The court controversially did not consider whether the decision under review constituted administrative action.
[123] *Albutt* supra note 14 para 50.
[124] Ibid para 51.

Applying this finding to the facts, Ngcobo CJ determined that 'the participation of victims is not only crucial to establish the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation.'[125] He concluded that 'given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity.'[126] Thus, the decision to exclude victims from being heard in the special dispensation process was irrational.[127] An *audi* requirement was required under the guise of rationality.

The Constitutional Court in *Albutt* might have predicted that the assessment of a process as a matter of rationality would be relied on only rarely, perhaps only when consultation was indisputably essential in reaching a procedurally just outcome under the principle of legality. However, demanding process requirements under rationality review became a popular trend in the courts. In *Democratic Alliance v President of South Africa* ('*Simelane*'),[128] the Constitutional Court confirmed the conclusion in *Albutt*, finding that under the principle of legality both the decision and the process by which it is reached must be rational.[129] This, it found, was a matter of procedural rationality, which it considered a subspecies of rationality. The Court, however, made it clear that this was not a matter of procedural fairness:

> The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected.[130]

Since *Albutt* and *Simelane*, procedural rationality has been embraced by the courts with great verve. It is commonly reiterated that rationality has two components, substantive and procedural, and that procedural rationality can be invoked to require consultation as a matter of rationality.

In applying procedural rationality, the courts have been dogged in emphasising that procedural rationality, while it can be used to require consultation, must not be confused with procedural

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[125] Ibid para 59.
[126] Ibid para 69.
[127] Ibid.
[128] Supra note 116.
[129] Ibid para 34.
[130] Ibid para 41.

fairness and accordingly, that requiring consultation under procedural rationality does not contradict the *Masetlha* finding. As stated by the Constitutional Court in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd*,[131] procedural rationality 'has nothing to with the fairness of the process and has no bearing on whether there should have been a pre-decision-hearing.' The fact that in *Albutt* the application of procedural rationality *resulted in a consultation requirement* 'was a mere coincidence' and should not be interpreted to mean that 'in every case where there was no hearing, procedural rationality has been breached.'[132] Understood in this manner, procedural fairness and procedural rationality are fundamentally different and they are achieved in different ways, but their content may in certain circumstances overlap to require consultation.

2.7. The problem

In finding that it would be inappropriate to apply procedural fairness to executive actions, the Constitutional Court made a finding that was contrary to the precepts of our constitutional dispensation and had far-reaching consequences for procedural justice under the principle of legality. In a legal system founded on the rule of law and the values of accountability, responsiveness and openness, the exclusion of procedural fairness from legality review appears incongruous. Its incongruity is further amplified when considering the consequences the finding will have for the wide range of non-administrative action that is subject to the principle of legality, some of which would certainly require the application of procedural fairness.

However, when cases did arise in which the application of procedural fairness was clearly necessary, the Constitutional Court did not back down from its sweeping finding in *Masetlha*. Instead, it developed procedural rationality to fill the gap. Procedural rationality, the Court has found, can require consultation when it is necessary for a decision to be deemed rational. Ostensibly, procedural rationality can provide for those cases that clearly require consultation as a matter of justice, while simultaneously not overburdening the administration in respect of all other non-administrative action.

[131] [2021] ZACC 21 para 49.
[132] Ibid.

This might suggest that procedural rationality has solved the *Masetlha* problem. However, this requires further investigation. As the courts have been keen to point out, procedural rationality has nothing to do with fairness, as it is housed within the very different concept of rationality. While procedural fairness is concerned with giving individuals an opportunity to be heard, ensuring that justice is seen to be done, putting information before a decision-maker, and respecting the dignity of individuals, rationality is concerned only with the logic of decision-making. It is therefore conceivable that procedural rationality will not achieve all that procedural justice requires under the principle of legality.

The problem statement above can be summarised as follows: (i) since *Masetlha*, non-administrative action governed by the principle of legality does not need to be procedurally fair; (ii) the exercises of public power that amount to non-administrative action are numerous and influential and some, if not all, will require some application of procedural standards in order to reach procedurally just outcomes; (iii) in a constitutional dispensation rooted in the values of openness, accountability and public participation, procedural justice is vital; (iv) in order to address the need for procedural standards under the principle of legality, the Constitutional Court did not overturn *Masetlha* but introduced procedural rationality so that consultation will be applicable when necessary; (v) however, procedural rationality has a very different conceptual underpinning to procedural fairness as it is rooted in the fundamentally dissimilar rationality review, making it doubtful whether it can achieve procedurally just outcomes in the absence of procedural fairness under the principle of legality.

It is worth noting at this point that this thesis is concerned only with the *audi* principle and not the rule against bias. This is because the rule against bias raises different questions from the *audi* principle (or right to be heard) under the principle of legality. Consequently, procedural fairness is used synonymously with the *audi* principle in this thesis, an equation that is often made, significantly in the PAJA.[133]

[133] Under the PAJA, procedural fairness only concerns a right to be heard while the rule against bias is treated as a separate ground of review.

3. RESEARCH QUESTIONS

In light of the problem statement set out above, the research question of this thesis is as follows: given the conceptual differences between procedural fairness and procedural rationality, can procedural rationality effectively fill the gap left by the exclusion of procedural fairness and achieve procedurally just outcomes under the principle of legality?

This central question encompasses several subsidiary questions.

- Which public decisions do not amount to administrative action and are therefore subject to the principle of legality?
- Given that it is considered a subspecies of rationality but is used to require consultation, does procedural rationality make conceptual sense? In other words, can it be applied coherently and predictably?
- Does the decision in *Masetlha* apply only to executive action or to all non-administrative action? In other words, does the finding in *Masetlha* extend to non-administrative non-executive action?
- How does the content of procedural fairness differ from the content of procedural rationality?
- Can procedural rationality adequately protect procedural and broader administrative law values in the absence of procedural fairness?

4. ARGUMENT

It is my overall conclusion in this thesis that due to their different conceptual underpinnings, procedural rationality cannot do the work of procedural fairness under the principle of legality for three reasons. First, procedural rationality is conceptually incoherent, making its application uneven and therefore unpredictable. Second, the courts have thus far given no guidance as to the content of consultation under the principle of legality, creating even greater unpredictability. And finally, because rationality is rooted in the logic of decisions and not fairness to affected persons, it is not able to protect the values enhanced by procedural fairness, leaving a gap that is particularly unacceptable in a legal system founded on openness and responsiveness, and the rule of law.

Based on these findings, I make three recommendations. First, that the definition of administrative action contained in the PAJA should be amended to exclude fewer types of decisions. A wider definition of administrative action would make more decisions subject to the protections of the PAJA and, significantly for this thesis, review for procedural fairness. This amendment could be instigated by the Legislature or enforced by the Constitutional Court finding that the definition is unconstitutional in so far as it is unjustifiably narrower than the definition of administrative action contained in section 33 of the Constitution. Second, it is my view that the Constitutional Court should overturn its finding in *Masetlha.* The Constitutional Court has never before overturned one of its findings, but in this case it is necessary to ensure that our grounds of judicial review are clear and predictable and promote the values of our Constitution. Finally, I consider the possibility of applying procedural fairness only to non-executive non-administrative action. This would have the benefit of broadening the application of procedural fairness to more exercises of public power. However, I warn that this would have the effect of splitting South Africa's already bifurcated system of judicial review into three avenues of review: one for administrative action, one for non-administrative action that does not involve the exercise of executive power, and another for non-administrative action that involves the exercise of executive power. In order to determine the appropriate grounds of review, a court would have to determine, first, whether a decision is administrative or non-administrative; and second, whether non-administrative action does or does not involve the exercise of executive power.

5. LITERATURE REVIEW

Judicial review in South Africa has attracted a substantial volume of academic commentary. Subsequent to the seminal works by Marinus Wiechers[134] and Lawrence Baxter[135] in the pre-constitutional era, there have been five major books in the field of administrative law in South Africa: *Judicial Review of Administrative Action in South Africa*[136] by Jacques de Ville; *Administrative Law and Justice in South Africa*[137] by GE Devenish, K Govender, and D Hulme, *Administrative Law*[138] by Yvonne Burns and Radley Henrico, *Administrative Law in South*

[134] Wiechers op cit note 45.
[135] Baxter op cit note 15.
[136] De Ville op cit note 66.
[137] GE Devenish, K Govender & D Hulme *Administrative Law and Justice in South Africa* (2001).
[138] Yvonne Burns & Radley Henrico *Administrative Law* (2020).

Africa[139] by Cora Hoexter and Glenn Penfold; and *Administrative Justice in South Africa: An Introduction,* edited by Geo Quinot.[140] Each of these works examines the content and application of the grounds of judicial review under the PAJA, but only Hoexter and Penfold provide a substantive examination of review under the principle of legality. Written before the expansion of the principle of legality, De Ville considers the principle only cursorily,[141] as do Devenish, Govender and Hulme.[142] Burns and Henrico consider the principle of legality generally,[143] but do not consider its relationship with procedural standards beyond *Masetlha*.[144] In the procedural fairness chapter in Quinot's book, Melanie Murcott sets out the current state of the law in respect of procedural standards under both the PAJA and the principle of legality, but the latter only by way of introduction.[145]

Hoexter and Penfold provide an overview of procedural standards under the principle of legality[146] and, more specifically, procedural rationality.[147] Hoexter has dealt with the effects of bifurcation on procedural standards under the principle of legality in a number of journal articles and book chapters.[148] She writes that procedural fairness could be adopted as a self-standing ground of review under the principle of legality,[149] particularly as 'it is so firmly established as part of the rule of law itself.'[150] She has been consistently censorious of the majority judgment in *Masetlha,* calling it 'retrogressive'[151] and maintaining that '[f]or

[139] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021).
[140] Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* 2 ed (2021).
[141] De Ville op cit note 66 at 59–60.
[142] Devenish, Govender & Hulme op cit note 137 at 213-214.
[143] Burns & Henrico op cite note 138 at 10-14.
[144] Ibid at 566, where they argue that *Masetlha* is 'limited to the specific context of that case and the power under consideration' and 'does not stand for … the unequivocal position' that procedural fairness is excluded from applying to executive action.
[145] Melanie Murcott 'Procedural Fairness' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* 2 ed (2021) 165–89.
[146] Hoexter & Penfold op cit note 139 at 570–5.
[147] Ibid at 488–93.
[148] Hoexter 'Future of Judicial Review' op cit note 22; Hoexter 'Principle of Legality' op cit note 41; Hoexter 'Administrative Action' op cit note 67; Cora Hoexter 'Clearing the intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209–34; Hoexter 'Rule of Law' op cit note 9.
[149] Hoexter 'Principle of Legality' op cit note 41 at 184.
[150] Hoexter 'Rule of Law' op cit note 9 at 60.
[151] Hoexter 'Labour Law' op cit note 148 at 231.

[administrative lawyers] it is a decision that appears to set the law of procedural fairness back twenty years.'[152]

The subject of procedural standards under the principle of legality has been addressed by other authors. Lauren Kohn and Alistair Price touch on the subject in articles focused on other closely related topics. They have written about the principle of legality from the perspective of the development or 'burgeoning' of rationality review. In their articles they have included discussions on the introduction of procedural rationality but have not dealt with the topic in-depth. Kohn, in 'The Burgeoning Constitutional Requirement of Rationality',[153] considers procedural standards under the guise of rationality insofar as they comprise one of the ways in which the courts have expanded rationality review. In 'The Evolution of the Rule of Law',[154] Price analyses the case of *Simelane*[155] and comments on the *obiter* acceptance of 'procedural rationality' in that case, questioning whether 'such a fine distinction – between procedural fairness and procedural rationality – can be maintained' in light of the scope for development of procedural standards under the principle of legality.

Jonathan Klaaren and Glenn Penfold, in their chapter on 'Just Administrative Action' in the *Constitutional Law of South Africa,*[156] underline the significance of the *Masetlha* judgment. They are the only authors with whom the majority judgment has found favour. They argue that the inclusion of procedural fairness under legality review would have the effect of placing procedural requirements on all exercises of public power and would consequently overburden the administration.[157] They do, however, concede that Justice Ngcobo's minority judgment is 'cogent and powerful' and that '[t]here can be no watertight divide between the concepts of legality and of procedural fairness (as well as that of rationality).'[158] Consequently, they find that 'our courts would in an appropriate case be justified in incrementally expanding the existing jurisprudence to encompass within the principle of legality and rationality an element

[152] Ibid at 210.
[153] Lauren Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *SALJ* 810.
[154] Alistair Price 'The Evolution of the Rule of Law' (2013) 130 *SALJ* 649–61 at 654–6.
[155] Supra note 116.
[156] Klaaren & Penfold op cit note 23.
[157] Ibid at 18.
[158] Ibid.

of procedural fairness.'[159] Klaaren and Penfold provide the best possible defence of the Court's exclusion of procedural fairness in *Masetlha* and its subsequent development of procedural rationality. However, as I aim to show in this thesis, this route is unjustified and unsustainable in South Africa's system of judicial review.

The problem of the absence of procedural fairness and the implications of consultation being included as a matter of procedural rationality under the principle of legality are dealt with more deliberately by Melanie Murcott, Clive Plasket, and Nurina Ally. Murcott, in her article 'Procedural Fairness as a Component of Legality',[160] provides an analysis of the apparent dichotomy between *Masetlha*[161] and *Albutt*[162] on the question of procedural standards under the principle of legality. She finds that the Constitutional Court's failure to overrule (or clarify) its decision in *Masetlha* means that procedural standards are only applicable under the principle of legality where it would be irrational not to apply them.[163] Murcott is of the view that this will lead to procedural standards *not* being applied in many cases, as the circumstances under which they would be required as a matter of rationality are few.[164] She finds that there would be greater scope for procedural standards to be applied if 'procedural fairness were to be acknowledged as a requirement of legality generally (rather than a requirement of rationality) ... since the court would not have to declare conduct irrational in order to impose procedural fairness standards.'[165]

In his article 'Procedural Fairness, Executive Decision-Making and the Rule of Law',[166] Clive Plasket argues that 'the finding in *Masetlha* that executive decision-making is not subject to procedural fairness is based on a mistaken view of the law, and that the claw-back represented by *Albutt* is very much a second-best option.' Plasket's argument is chiefly based on the importance of procedural fairness in decision-making, the flawed logic of *Masetlha*, and the procedural values that are lost when applying procedural rationality instead of procedural

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[159] Ibid.
[160] Melanie Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?' (2013) 130 *SALJ* 260.
[161] *Masetlha* supra note 11.
[162] *Albutt* supra note 14.
[163] Ibid at 272.
[164] Ibid.
[165] Ibid at 273.
[166] Plasket 'Procedural Fairness' op cit note 9 at 699.

fairness. The findings in this thesis are in full agreement with Plasket's argument, though I deal with the issues raised by Plasket in more detail and consider the problem from a number of additional perspectives, including the lack of conceptual coherence of procedural rationality in relation to substantive rationality, and the practical consequences of applying procedural rationality instead of procedural fairness.

Most recently, Nurina Ally and Melanie Murcott, in their article, 'Beyond labels: Executive action and the duty to consult',[167] consider the distinction between procedural fairness and procedural rationality. They also address the need for consultation under the principle of legality and ground this argument in the constitutional values of openness and transparency, and ubuntu. Until this point the findings in this thesis are consistent with their argument. We diverge, however, on the way forward. Ally and Murcott advocate for the expanded use of procedural rationality by linking the constitutional value of participatory democracy with the need for consultation in respect of executive actions. Given the current legal context, they argue that procedural rationality is 'fertile ground' for advancing these values.[168] In contrast, in this thesis I argue that continued reliance on procedural rationality to require consultation is unsustainable because of its lack of conceptual coherence with substantive rationality and the significant ways in which it differs from procedural fairness. While Ally and Murcott argue that, however we achieve consultation, it is most important that consultation is required under the principle of legality, my view is that conceptual precision is important to avoid confusion, uncertainty, and judicial artifice. These arguments will be made clear in chapters 6, 7 and 8 of this thesis. In short, while I fully agree that requiring consultation under the principle of legality is essential and indeed required by our constitutional dispensation, I do not agree that procedural rationality is a sustainable mechanism through which to do so.

6. METHODOLOGY

This thesis adopts a doctrinal methodology, an approach that can be defined as 'solving legal problems through the analysis of legal norms'.[169] This approach was recently defended by

[167] Nurina Ally & Melanie Murcott 'Beyond labels: Executive Action and the Duty to Consult' (2023) 27 *Law, Democracy & Development* 93–122.
[168] Ibid at 96.
[169] Mkhululi Nyathi 'Re-asserting the Doctrinal Legal Research Methodology in the South African Academy: Navigating the Maze' (2023) 140 *SALJ* 365–86 at 386.

Mkhululi Nyathi as the 'gold standard of legal research', distinguishing it from the methodologies typically adopted in other academic disciplines.[170]

In an elucidating analysis, the doctrinal methodology is explained by Jason N E Varuhas as incorporating four distinct methods 'linked by a common concern to state what the law is and to understand the law on its own terms':

> Listed in order of increasing sophistication, they are: (i) description, which may for example involve summarizing a case; (ii) derivation, which involves distilling legal propositions from legal materials; (iii) systematization, which involves organization of interconnected legal propositions into categories, which form part of a wider system; and (iv) interpretivism, which involves interrogating normative justifications which explain legal propositions or categories, and refining one's account of those legal phenomena by reference to those justifications.[171]

Varuhas explains that,

> The relationship of these methods to one another… resembles a Russian Doll, or matryoshka, the outer doll encompassing all the other dolls within. It is also the case that each successive method is more sophisticated and liable to offer deeper insights into the law. Thus, interpretivism is the highest form of doctrinal method, involving interrogation of the normative foundations of given legal propositions or fields, but it is also dependent on the other three methods.[172]

In this thesis, all four of these doctrinal methods are employed. Many pages are spent engaged in description, explaining the facts and findings of case law as well as the obligations imposed by legislation, particularly the Constitution and the PAJA. Concomitantly, derivation is employed to identify legal principles from these descriptions. Systematisation is relied on to identify categories such as administrative and non-administrative actions, and distinct grounds of review, namely procedural fairness, substantive rationality, and procedural rationality. Together, these allow for the employment of interpretivism as I rely on the conceptual underpinnings of these categories as a basis for their evaluation.

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[170] Nyathi ibid. Nyathi defends this approach to legal research by emphasising its usefulness in dealing with law in comparison to the research methodologies adopted in other disciplines.

[171] Jason NE Varuhas 'Mapping Doctrinal Methods' *Researching Public Law in Common Law Systems* (Forthcoming) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4087836.

[172] Ibid page unavailable.

According to Varuhas, interpretivism is mainly concerned with a 'deepened understanding of law'.[173] It 'involves articulation of "second-order", "deep" or "archetypal" propositions, which stand behind, explain and justify first-order propositions'.[174] These 'could simply be referred to as normative justifications and may go by other descriptors such as functions, goals, or values'.[175] Thus, normative goals, encapsulated in the second-order principles, are "mediated" through or "concretized" within more detailed first-order norms.[176] Most fortuitously for this thesis, Varuhas relies on the following example to elucidate this point:

> Standing behind the ground of procedural fairness, might be a fundamental principle of dignity. This principle will simultaneously explain and justify the ground of procedural fairness, and the norms subsumed within that category, such as hearing and bias rules. The second-order norm thus provides a rational basis for grouping detailed norms together under the umbrella of procedural fairness: they share a common normative purpose, which is distinct from normative purposes which underpin other clusters of norms, such as those collected under 'rationality' and 'legality'.[177]

In this thesis, the underlying rationale and mechanics (second-order principles) of procedural fairness, substantive rationality, and procedural rationality (the first-order principles) are relied on to argue that (i) procedural rationality is conceptually incoherent with substantive rationality; and (ii) procedural rationality is a concept that is not capable of filling the role of procedural fairness under the principle of legality. It is also argued that the exclusion of procedural fairness and reliance on procedural rationality are incongruous with the constitutional values that underpin all South African law. Thus, by delving into second-order principles, this thesis aims to provide 'a thicker conception of coherence which enables us to scrutinize whether judges are developing the law consonantly with the law's underlying normative commitments.'[178]

As part of its doctrinal study, this thesis also encompasses some comparative legal study as foreign case law and commentary are relied on to provide additional context for – or comparison to – South African administrative law. My comparative analysis is focused on Commonwealth countries, a grouping that 'still represents a reasonably close and cohesive

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[173] Ibid
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid.

legal family, as far as administrative law is concerned.'[179] As explained by Cheryl Saunders, '[t]he conceptual underpinnings of the system in particular are substantially shared, making exchange of ideas on institutional, doctrinal and theoretical problems both realistic and productive'.[180] I refer mostly to English law and its development of natural justice and a duty to act fairly, as it is this jurisprudence that has most frequently been considered and relied on by South African courts.[181] I also refer to the case law of Canada, Botswana, Australia and New Zealand when dealing with the commissions of inquiry case study. This is an area of the law that is not well-developed in South African law, and extensive reliance on foreign jurisprudence is therefore warranted.

7. THESIS OUTLINE

This thesis comprises eight chapters.

In broad outline, the opening chapters establish the foundation and framework for the analysis and conclusions developed in the later chapters. Chapters 2, 3, 4, and 5 are primarily concerned with setting out the law as it currently stands in respect of the identification of non-administrative actions and the principles of review for procedural fairness, substantive rationality, and procedural rationality. While certain aspects of these subjects are critically analysed, the main purpose of these chapters is to provide a foundation for the analysis and critical findings that are set out in chapters 6, 7, and 8. In these later chapters, the content of procedural fairness is compared to the content of procedural rationality, while the meaning given to substantive rationality is relied on to show that procedural rationality, while presented as a species of rationality, in fact flouts most of its central characteristics.

The content of each chapter is as follows.

Chapter 2: The exercises of public power subject to the principle of legality

[179] See Cheryl Saunders 'Apples, Oranges and Comparative Administrative Law' 2006 *Acta Juridica* at 448.
[180] Ibid.
[181] See further Hoexter's account of the relationship between English and South African law in the pre- and post-constitutional eras in 'From Pale Reflection' op cit note 33.

The concern of this chapter is the identification of those exercises of public power that are subject only to the principle of legality and are consequently not subject to the demands of procedural fairness but only to those of procedural rationality. Currently, the scheme of review applicable to an exercise of public power is determined by whether or not it constitutes an administrative action. I begin this chapter by considering the administrative action threshold as a mechanism for limiting the intensity of judicial review and conclude that its usefulness has much to do with whether administrative action is given a wide or narrow definition. I then set out the definition it has been given under the Constitution, and the far narrower definition it has been given under the PAJA. Relying on this definition, I identify a long and diverse list of non-administrative action that is subject only to the principle of legality.

Chapter 3: The principles of review for procedural fairness

In this chapter I set out the principles according to which procedural fairness is applicable and is given content. In identifying these well-established principles, I rely on the common law, case law under the Constitution, and the provisions of the PAJA. I emphasise the broad application that it has been given and the great variability of its content. I conclude that in its current manifestation, procedural fairness in South African administrative law is comprehensive and robust.

Chapter 4: The principles of review for substantive rationality

In this chapter I set out the principles according to which substantive rationality is applicable and is given content. While it is procedural, and not substantive rationality with which this thesis is concerned, the courts have made clear that procedural rationality is derived from substantive rationality, or more precisely, that they are both a type of rationality review. A comprehensive understanding of substantive rationality is therefore a necessary precursor to an analysis of procedural rationality. In setting out the principles of substantive rationality, I identify a trend towards a particularly strict threshold of substantive rationality, which I point out is at odds with the more expansive application of procedural rationality outlined in the next chapter.

Chapter 5: The principles of review for procedural rationality

This chapter traces the recent development of procedural rationality under the principle of legality. As procedural rationality is a relatively new concept, with its jurisprudence still in its early stages, I consider all the major cases in which procedural rationality has been invoked in order to identify the principles according to which it is applied and the content that it has been given. I leave the criticism to the next chapter.

Chapter 6: The conceptual disjunct between substantive and procedural rationality

With the groundwork covered in the foregoing chapters, Chapter 6 provides a critical analysis of procedural rationality. By taking the analysis of substantive rationality in Chapter 4 and comparing it to the analysis of procedural rationality in Chapter 5, a conceptual disjunct between the two grounds is revealed. That is because the content of procedural rationality goes far beyond mere 'low intensity' rationality review and is far more akin to procedural fairness (as set out in Chapter 3) and even reasonableness, a standard more searching than rationality. It is my conclusion that procedural rationality is therefore conceptually incoherent, as the content it has been given by the courts does not fit within the confines of rationality review. This, I argue, is likely to cause a range of problems in the future, not least of which is a lack of certainty in respect of the application and content of procedural rationality.

Chapter 7: The necessity of procedural fairness and inadequacy of procedural rationality under the principle of legality: three illustrative case studies

In this chapter I consider the necessity of procedural fairness and inadequacy of procedural rationality under the principle of legality through the analysis of three case studies. The case studies are examples of three of the non-administrative actions identified in Chapter 2: first, the findings of commissions of inquiry, second, the interview process of the Judicial Service Commission; and third, executive policy-making. In each case I attempt to predict the different implications of applying procedural fairness on the one hand and procedural rationality on the other, employing the analyses of these grounds of review in chapters 3 and 5 to do so. I also take the opportunity to consider the wider implications of applying procedural rationality instead of procedural fairness, as the case studies reveal that certain procedural values are lost in the absence of procedural fairness.

Chapter 8: Conclusion

In this chapter the findings of this thesis are summarised and recommendations are made. The conclusion can be encapsulated in three findings: first, due to procedural rationality's conceptual incoherence, its lack of clarity has the potential to completely erode its predictability; second, the courts have provided no guidance on determining the content of consultation under procedural rationality, thereby creating even more unpredictability; and finally, procedural rationality, due to its underpinning in rationality, cannot protect the essential values protected by procedural fairness, undermining the Constitution's commitment to accountability, responsiveness, openness, and the rule of law. It is finally recommended that in order to address these problems, the definition of administrative action needs to be amended and the time has come for the Constitutional Court to overturn itself and set aside its finding in *Masetlha.*

CHAPTER 2

THE EXERCISES OF PUBLIC POWER SUBJECT TO THE PRINCIPLE OF LEGALITY

1. INTRODUCTION

The concern of this thesis is the achievement of procedurally just outcomes under the principle of legality. Exercises of public power that do not amount to administrative action (non-administrative action) are subject only to the principle of legality. The administrative action threshold therefore determines which decisions are subject only to legality review. Since *Masetlha v President of the Republic of South Africa*,[1] a hard line has been drawn between administrative and non-administrative action in respect of procedural fairness: administrative action is subject to the full protections of procedural fairness under the PAJA, while non-administrative action is not subject to procedural fairness at all. Thus, the narrower the definition of administrative action, the more decisions fall to be decided under the principle of legality where procedural fairness is unavailable. There is consequently a direct relationship between the definition of administrative action and the significance of the procedural justice problem under the principle of legality.

This chapter is set out as follows. First, in Part 2, administrative action as a limiting device of judicial scrutiny is considered. It is explained that all modern systems of judicial review must find ways of limiting the intensity of judicial review according to certain considerations and how, currently, South African law relies on the administrative action threshold to do this job. It is argued that the success of using administrative action as a limiting device has much to do with the meaning it is given. Therefore, in Part 3, an overview is provided of the meaning that has been given to administrative action, firstly, under the Constitution, and secondly, under the PAJA, which is now applicable. As all academic commentators have found, it is determined that the meaning given to administrative action under the PAJA is problematically narrow as it unnecessarily excludes a large number of decisions from its ambit. In Part 4, using the

[1] [2007] ZACC 20 ('*Masetlha*').

overview in Part 3, a list of types of non-administrative action is identified. The purpose of this list is to identify the nature and range of the decisions that are not subject to procedural fairness and to which this thesis is therefore relevant. Rather than make vague assertions, I wish to directly consider the suitability and implications of applying, alternatively, procedural fairness and procedural rationality, to these types of decisions. In Part 5 state self-review is briefly considered, in terms of which administrative actions that are reviewed by the state itself are also only reviewable under the principle of legality. Finally, in Part 6, it is concluded that the list of non-administrative actions, which is long and diverse, includes a wide range of decisions that require the application of some procedural standards in order to achieve procedurally just outcomes under the principle of legality. This conclusion lays the basis for the main inquiry of this thesis: whether procedural rationality can achieve procedural justice in respect of those decisions to which procedural fairness is not applicable.

2. LIMITING JUDICIAL SCRUTINY AND THE 'ADMINISTRATIVE ACTION' THRESHOLD

In the modern administrative state, public functions and powers are extensive and wide-ranging. While judicial review is premised on exercises of public power requiring judicial supervision, it is also recognised that not all exercises of public power should attract the same 'depth of scrutiny'.[2] Along a spectrum of scrutiny or, as Michael Taggart called it, a 'rainbow' of intensities of review, certain considerations will demand that a decision be supervised with a lighter touch.[3] The types of considerations that might reduce the depth of scrutiny include regard to the separation of powers, the need for government efficiency, the urgency of the matter, and the special expertise of government in making certain decisions. Modifying the depth of scrutiny according to these considerations is a necessary task of a system of judicial

[2] Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (2018) at 1.

[3] As explained by Taggart, 'In judicial review there are two polar-opposite end points. At one end, lies full correctness review on fact and law (the right, correct, or preferable decision), and, at the other, lies no review at all on the ground of non-justiciability in the narrow sense of something that the court cannot (rather than will not) resolve by the application of legal norms. Both ends are off limits on judicial review for different reasons. In between, there is a continuum or spectrum of possible standards of review or intensities of review. I prefer to think of this as a 'rainbow' (without the pot of gold at one end or the other!). As one moves along the rainbow – either towards greater or more intensive judicial review or away from it – the standards or intensities of review imperceptibly blur or merge into one another.' Michael Taggart 'Proportionality, Deference, Wednesbury' (2008) 1–4 *New Zealand Law Review* 423–282 at 451.

review in order to limit the courts' supervision of the government where appropriate. Several broad approaches or 'schematica' have been adopted at different times in different systems of judicial review.[4] As described by Dean R Knight, 'the variation of the depth of scrutiny is ubiquitous but the manner in which the balance between vigilance and restraint is struck varies across time and across jurisdictions.'[5]

Two approaches to limiting judicial scrutiny are particularly relevant to South African judicial review. The first approach, which has influentially been termed 'conceptualism' in the South African context,[6] is a formalist approach in terms of which exercises of public power are sorted into legal categories that determine which grounds of review are applicable.[7] According to this approach, the depth of judicial scrutiny is limited by precluding certain grounds of review from certain categories of decisions. Depending on its classification, an exercise of public power might attract all, some, or none of the grounds of review. This approach therefore carries the danger of all-or-nothing consequences. For example, one decision might require comprehensive in-person consultation, while another will require none whatsoever. The efficacy of this approach depends largely on the utility of its categories, for legal categories are essentially an artificial concept designed to assist in accurately determining the intensity of scrutiny that different public decisions should attract. The categories are therefore rooted in substantive values (the relevant considerations) but can only be useful if they reach outcomes that reflect those values. Whether in a modern state, with such a diverse array of public functions and powers, it is possible for categories to achieve (even roughly) the appropriate

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[4] Based on the work by Stanley de Smith, Knight identifies four schematica for the 'modulation of the depth of scrutiny': '(a) scope of review, based on an array of formalistic categories which determine whether judicial intervention is permissible; (b) grounds of review, based on a simplified and generalised set of grounds of intervention; (c) intensity of review, based on explicit calibration of the depth of scrutiny taking into account a series of constitutional, institutional and functional factors; and (d) contextual review, based on an unstructured (and sometimes instinctive) overall judgement about whether to intervene according to the circumstances of the case.' Knight considers these in respect of England, Australia, New Zealand, and Canada. Knight *Vigilance and Restraint* op cit note 2 at 1.

[5] Dean R Knight 'Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context' (2016) 63 *New Zealand Law Review* 63–94 at 64.

[6] Lawrence Baxter 'Fairness and Natural Justice in English and South African Administrative Law' (1979) 96 *SALJ* 607; Cora Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165–86; Cora Hoexter *The Transformation of South African Administrative Law since 1994 with Particular Reference to the Promotion of Administrative Justice Act 3 of 2000* (PhD Thesis, University of the Witwatersrand, 2010) at 150–87.

[7] See Hoexter 'Principle of Legality' op cit note 6; Cora Hoexter 'Contracts in Administrative Law: Life After Formalism?' (2004) 121 *SALJ* 595–618.

depth of scrutiny in every matter, is doubtful. The conceptual approach is also criticised for being too far removed from the substantive values that underlie it, as it has been argued that it will eventually result in the manipulation of its categories, allowing judges to rely on categories as justification for their decisions rather than being transparent about the substantive considerations that really influence them.[8]

A second approach is to vary the intensity of the different grounds of review. This is a more substantive approach in terms of which judicial supervision is limited by lessening the content of the available grounds of review in certain circumstances.[9] Limitation is therefore not achieved by excluding the application of grounds wholesale but rather by lessening what specific grounds require in particular circumstances. The limitation of scrutiny in this context is predominantly achieved by varying the content of procedural fairness and reasonableness, as these grounds are most capable of malleable content. For example, in matters of urgency, procedural fairness may only require notice to be given. In matters of *extreme* urgency, no consultation at all may be required. Because varying the intensity of grounds of review is far more open-ended and provides courts with considerably more discretion than conceptualism, it threatens a lack of predictability.[10] To address this concern, this approach requires judges to develop principles according to which grounds of review will vary in respect of relevant considerations. This encourages a more transparent jurisprudence as judges are required to justify their decisions with direct reference to substantive values rather than legal categories.[11]

In summary, while conceptualism limits the courts' scrutiny of the government by excluding grounds of review from certain categories of decision-making, variability limits the courts' scrutiny by reducing the content of those grounds of review that are applicable. A legal system might adopt one or the other (or neither) but will likely entrench elements of both to differing degrees.

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[8] As David Dyzenhaus writes, 'Formalism is formal in that it requires judges to operate with categories and distinctions that determine results without the judges having to deploy the substantive arguments that underpin the categories and distinctions. Since those categories and distinctions must take on a life of their own in order to operate in this detached way, they are capable of determining results that contradict the very arguments for these categories and distinctions. In this situation, formalism becomes incoherent.' David Dyzenhaus 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (2002) 27 *Queen's Law Journal* 445–510 at 450.

[9] See Knight *Vigilance and Restraint* op cit note 2 at 147–98.

[10] Ibid at 148.

[11] See Hoexter 'Contracts' op cit note 7.

In the pre-democratic era, South African judicial review took a decisively conceptualist approach to the depth of judicial scrutiny, as it limited the burden on the administration through the classification of functions doctrine. As discussed in Chapter 1,[12] public powers were categorised as either 'legislative', 'executive', 'purely administrative', 'judicial', or 'quasi-judicial', and attracted particular grounds of review depending on their categorisation. While carrying the benefit of a degree of predictability, conceptualism during this period was widely criticised for its all-or-nothing consequences: decisions were either slotted into a category that provided the full application of a ground of review, or they were slotted into a category that provided no recourse to that ground of review whatsoever.[13] It was also criticised for putting form over substance, allowing judges to rely on categories as justifications for their findings rather than being clear about the substantive values that truly motivated them.[14] With the arrival of a new constitutional era, it was hoped that there would be a less formalistic and more substantive approach.

The approach to limiting judicial review in the constitutional era has been determined by the right to just administrative action in the interim and final Constitutions. In both instances, the right is limited to the threshold of an 'administrative action'. Using a category to limit the application of judicial review certainly had the trappings of conceptualism, but the extent to which this would be the case depended on the meaning given to administrative action. Neither Constitution defined it, and it was therefore possible for the courts to define it widely, including most exercises of public power, or narrowly, excluding them.

In a view in which I strongly concur, and which underpins this thesis, Hoexter argues that if administrative action had been defined widely enough, it would have left very few public decisions unsupervised, and the variability of grounds of review could have been relied on to limit the depth of scrutiny on the government. As she explains:

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[12] Chapter 1 Part 2.2.

[13] Baxter 'Fairness' op cit note 6; Hoexter 'Principle of Legality' op cit note 6.

[14] As written by Pius Langa, 'formal reasoning prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society'. 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351–60 at 357.

> My argument has always been that there is only one sensible way in which to [reduce the potential burden on the administration]: by having a wide definition of administrative action and by embracing the variability of the requirements of administrative justice. This would put the emphasis where it ought to be, on the content and extent of the requirement of administrative justice in particular cases. The courts would spend their time working out exactly what reasonableness and fairness means according to the exigencies of the case… The focus of every case would be what administrative justice requires in the circumstances.[15]

This was not, however, the approach adopted by the courts or the legislature. As will be seen in the next section, administrative action was first defined by the courts under the interim and then the final Constitution. They excluded judicial, executive, and legislative decision-making from the ambit of administrative action. Yet, the Constitutional Court simultaneously introduced the 'safety net' of the principle of legality, to ensure that all exercises of public power were subject to some essential grounds of review.[16]

However, the principle of legality has expanded to much more than a safety net, and this has much to do with the meaning given to administrative action under the PAJA. As will be seen below, the PAJA adopted a far narrower definition of administrative action, excluding more types of exercises of public power from its ambit. This, in turn, put more pressure on the principle of legality to expand and cater for exercises of public power that needed more intense review than mere lawfulness and rationality. The narrower the definition of administrative action, the more important the principle of legality becomes, as it has to do more of the work in ensuring that all exercises of public power are reviewed with the appropriate intensity.

Importantly, for this thesis, the threshold definition of administrative action has, since *Masetlha*,[17] had conceptualist, all-or-nothing, consequences for procedural fairness. If a decision is classified as administrative action, it attracts the full (and variable) requirements of procedural fairness (as set out in Chapter 3), while if it is not classified as administrative action, procedural fairness is not applicable at all. The administrative action threshold and how it is drawn is therefore highly significant to the application of procedural fairness to exercises of public power. If it is drawn broadly, the need for procedural fairness under the principle of

[15] Cora Hoexter 'Administrative Action in the Courts' 2006 *Acta Juridica* 303 at 319.
[16] Hoexter 'Principle of Legality' op cit note 6.
[17] Supra note 1.

legality dissipates. However, if it is drawn narrowly, the need for procedural fairness under the principle of legality will increase as it accommodates more public decision-making. It is within this context that the meaning given to administrative action must be considered.

3. THE MEANING OF ADMINISTRATIVE ACTION

The term 'administrative action' was not used as a threshold definition in the pre-constitutional era and accordingly its precise meaning was not given much consideration. It first appeared as a threshold concept in the right to administrative justice in section 24 of the interim Constitution and again in the right to just administrative action in section 33 of the final Constitution. However, neither Constitution provided a definition for this significant term, and it was only given legislative definition upon the enactment of the PAJA. The PAJA only commenced in 2000 and so, in the period between the commencement of the interim Constitution (27 April 1994) and the commencement of the PAJA (30 November 2000), it became the task of the courts – and in particular, the newly established Constitutional Court – to give meaning to the concept.

In this part I consider, first, the meaning given to administrative action by the courts under the interim and final Constitutions (Part 3.1.) and then the narrower meaning given to administrative action under the PAJA (Part 3.2.).

3.1. Administrative action under the interim and final Constitutions

In giving meaning to 'administrative action' under the interim and final Constitutions, the courts went about defining the concept in largely negative terms: rather than saying what administrative action *was*, they focused on what it *wasn't*, and it wasn't legislative, executive, or judicial action.[18] The purpose of these distinctions was to avoid overburdening the new democratic administration and to respect the separation of powers. While the Constitution had provided the courts with ample scope for oversight, the separation of powers also required that

[18] Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' *Constitutional Law of South Africa* 2 ed (2017) at 21.

it restrain itself and show deference[19] to the government where a decision was appropriately within the domain of the legislature or executive.

In the early cases, the Constitutional Court had little trouble distinguishing administrative action from judicial and legislative action. In *Nel v Le Roux NO*[20] the Court had to determine whether a summary sentencing decision could be reviewed under the right to administrative justice and found that the procedure was 'clearly judicial and not administrative action'. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[21] the Court had to determine whether the adoption of a budgetary resolution by the council of an elected local government constituted administrative or legislative action, and found that the enactment of legislation in terms of the Constitution by a deliberative legislative body whose members are elected is a legislative not an administrative power.

Distinguishing administrative from executive and legislative action in subsequent cases proved more exacting. In *President of the Republic of South Africa v South African Rugby Football Union* (*SARFU*)[22] the Constitutional Court considered whether the President's decision, in terms of section 84(2)(f) of the Constitution, to appoint a commission of inquiry into the administration of rugby in South Africa, constituted administrative action. The Court found that the President's decision was 'an adjunct to his policy formation responsibility as President' and amounted to the exercise of an original constitutional power.[23] The decision did not constitute the implementation of legislation and could therefore not be regarded as administrative in nature.[24]

The Court laid down important considerations in the determination whether a decision constitutes 'administrative action'. Notably, it made clear that it is the function performed in

[19] For a discussion on deference in South African judicial review, see Clive Plasket 'Judicial Review, Administrative Power and Deference: A View from the Bench' (2018) 3 *SALJ* 502–23; Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484; Hoexter *Thesis* op cit note 6 at 183–7.
[20] [1996] ZACC 6 para 24.
[21] [1998] ZACC 17 ('*Fedsure*') para 41-42.
[22] [1999] ZACC 11 ('*SARFU*').
[23] Ibid para 147.
[24] Ibid.

the exercise of the power, and not the identity of the institution exercising that power, that is determinative:

> What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be ... that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising. [25]

The Court also set out a number of factors that could be relied on in characterising the exercise of the power. These include the source of the power; the nature of the power; the subject matter of the power; whether it involves the exercise of a public duty; and 'how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.'[26] The Court found that the 'difficult boundaries' between administrative action and other exercises of public power would have to be 'drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration,' and this could 'best be done on a case by case basis.'[27]

Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa[28] concerned an application to review the President's decision to bring an Act of Parliament into force before the regulations that would make the Act effective were in existence. In deciding how to categorise this exercise of public power, Chaskalson P called it 'one of those difficult cases' since, in purporting to exercise the power, 'the President was neither making the law, nor administering it.'[29] As such, '[t]he power vested in the President [... lay] between the law making process and the administrative process.'[30] Chaskalson P was ultimately swayed by the fact that the exercise of the power required political judgement as to when to bring the legislation into force ('a decision that is necessarily antecedent to the

[25] Ibid para 141.
[26] Ibid para 143.
[27] Ibid.
[28] [2000] ZACC 1 ('*Pharmaceutical Manufacturers*').
[29] Ibid para 79.
[30] Ibid.

implementation of the legislation'),[31] and found that '[i]n substance the exercise of the power is closer to the legislative process than the administrative process' and could therefore not be regarded as administrative action.[32]

In *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province v Ed-U-College (PE) (Section21)*[33] an independent school had applied for the review of an annual school subsidy allocation by the MEC for Education. The MEC made this allocation by using a formula. The key question before the Court was whether the determination of the precise formula constituted administrative action.[34] Writing for a unanimous Constitutional Court, O'Regan J drew a distinction between policy formulation in a broad and narrow sense:

> Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.[35]

Returning to the facts, O'Regan J found that '[t]he determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense.' This was 'because the MEC determines not only the formula but also in effect the specific allocations to each school.'[36] While O'Regan accepted that this case 'may be close to the borderline', she was persuaded that 'the source of the power, being the Legislature, the constraints upon its exercise, and its scope point to the conclusion that the exercise of the [power] constitutes administrative action, not the formulation of policy'.[37]

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[31] Ibid.
[32] Ibid.
[33] [2000] ZACC 23.
[34] Ibid para 10.
[35] Ibid para 18.
[36] Ibid para 21.
[37] Ibid.

These seminal cases, among others, laid out a broad and relatively straightforward approach to defining administrative action under the Constitution. Whether an action can be considered administrative depends on the function and not the functionary. It must be of an 'administrative nature', which distinguishes it from judicial, executive, legislative, and other types of public decisions on the basis of specific criteria.

However, since the enactment of the PAJA, the PAJA definition of administrative action has become the threshold for administrative review, as the doctrine of subsidiarity prevents direct access to section 33 of the Constitution when there is subordinate legislation that gives effect to it.[38] As explained by Murcott and Van der Westhuizen:

> PAJA… is the product of the constitutional mandate in s 33(3) and is the codifying and reformative legislation that gives effect to s 33 (1) and (2). The legislation is the conduit for the indirect enforcement of the rights to just administrative action in s 33 and prescribes the specific standards of administrative law. This is why litigants are not at liberty to invoke s 33 directly and must source their cause of action in PAJA when exercises of public power amount to administrative action. [39]

Despite the primacy of the PAJA definition as a threshold of review, the definition of administrative action under the Constitution, as developed by the courts, remains significant. To begin with, 'administrative action' in the PAJA must be interpreted according to the meaning that has been given to the term in section 33 of the Constitution in order to avoid invalidity.[40] As explained by Plasket AJA, '[b]ecause the PAJA is intended to give effect to the fundamental right to just administrative action, it must be interpreted consistently with s 33 and effect must be given to the purpose of s 33'.[41] He concludes that '[t]his means that the PAJA should be interpreted generously and purposively and that austere formalism in its interpretation should be avoided'.[42] Furthermore, section 33 is the standard against which the constitutionality of the PAJA definition of administrative action is to be measured. If the PAJA

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[38] Melanie Murcott & Werner Van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43–67 at 51; Cora Hoexter 'A Rainbow of One Colour? Judicial Review on Substantive Grounds' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 163–93 at 183.

[39] Murcott & Van der Westhuizen ibid at 51.

[40] *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43 ('*Grey's Marine*') para 22.

[41] Ibid.

[42] Ibid.

definition is found to be an unjustifiable limitation on section 33 of the Constitution, it will have to be set aside in so far as it limits the constitutional right. While the PAJA definition of administrative action has therefore taken prominence over the last two decades, the definition of administrative action under section 33 of the Constitution remains vital.

3.2. Administrative action under the PAJA

The PAJA introduced its legislative definition of administrative action in 2000. Section 1(i) of the PAJA provides as follows:

> "administrative action" means any decision taken, or any failure to take a decision, by –
>
> (a) an organ of state, when –
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –
>
> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
>
> (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
>
> (cc) the executive powers or functions of a municipal council;
>
> (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
>
> (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
>
> (ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1);

The difficulties of navigating this definition are by now notorious in South African law. The definition is extensive and contains ambiguous language, overlapping considerations, a long list of exclusions, and terms that are themselves defined elsewhere in the PAJA or in other legislation, extending the definition even further, and at times contradicting it. All academic commentary on the subject agrees that it is overly complex and too narrow.[43] As Hoexter puts it, 'the definition of administrative action in the Act is both extremely narrow and highly convoluted... [i]ndeed, one feels that the legislature could hardly have made it more so.'[44]

In wading through the morass, South African courts and commentators have broken the definition down into a number of key elements. The elements most often relied upon, notably by Khampepe J in *Minister of Defence and Military Veterans v Motau*,[45] are (i) a decision of an administrative nature; (ii) by an organ of state or a natural or juristic person; (iii) exercising a public power or performing a public function; (iv) in terms of any legislation (v) that adversely affects rights; (vi) that has a direct, external legal effect; and (vii) does not fall under any of the listed exclusions. Each of these elements has, in turn, requirements of its own that must be met.

While this delineation may suggest that courts should consider one-by-one whether each element is met and, once they have at long last all been met, exclaim, 'It's administrative

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[43] Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) at 50; Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 195; Hoexter 'Administrative Action' op cit note 15 at 303; Geo Quinot & Petrus Maree 'Administrative Action' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 76–101 at 84; Glenn Penfold 'Substantive Reasoning and the Concept of "Administrative Action"' (2019) 1 *SALJ* 84 at 84; Lauren Kohn & Hugh Corder 'Administrative Justice in South Africa: An Overview of Our Curious Hybrid' in Hugh Corder & Justice Mavedzenge (eds) *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (2019) 120–50 at 126.

[44] Cora Hoexter & Glenn Penfold *Administrative Law* 3 ed (2021) at 247.

[45] [2014] ZACC 18 ('*Motau*').

action!', this is not necessarily the case. As Currie points out, the elements often overlap and inform one another.[46] He argues that '[o]ne should concentrate instead on the "core" of the definition, treating the various qualifications surrounding it as pointers to what the core encompasses and, as far as possible, construing the definition as consistent with the conception of administrative action in s 33 of the Constitution.'[47] Following this approach, a good 'core' to begin with is Nugent JA's definition in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works*:

> Administrative action is ... in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.[48]

The elements to be considered together with this core are as follows.

3.2.1. a decision (or failure to take a decision) of an administrative nature

The definition of administrative action includes the requirement of a 'decision'. This term is further defined in the PAJA as follows:

> "decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-
> (a) making, suspending, revoking or refusing to make an order, award or determination;
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> (d) imposing a condition or restriction;
> (e) making a declaration, demand or requirement;
> (f) retaining, or refusing to deliver up, an article; or
> (g) doing or refusing to do any other act or thing of an administrative nature.

[46] Currie op cit note 43 at 51.
[47] Ibid.
[48] Supra note 40 para 24.

This definition of a decision contains a number of clues as to what administrative action is. First, 'a decision' has been interpreted as indicating a measure of finality.[49] This has the potential to exclude decisions that are preliminary to other, final decisions. This is discussed more fully in respect of the overlapping element of 'direct, external legal effect' below. Second, the definitions of both 'administrative action' and 'a decision' expressly include omissions. Accordingly, where an administrator fails to make a decision, the failure itself may constitute administrative action. Third, the decision must be of 'an administrative nature', highlighting (as in the list of exclusions) that executive, judicial, legislative and some other decisions do not constitute administrative action.[50]

In *Sokhela v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal)*[51] Wallis J found that this last aspect has two important functions. First, it requires the court 'to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character.'[52] Accordingly, 'the determination of what constitutes administrative action does not occur by default on the basis that if it does not fit some other juristic pigeonhole it is administrative action.'[53] Second, it indicates that just because an exercise of public power does not fall within one of the listed exclusions, it does not mean that it is necessarily administrative action.[54] Certain decisions may not be included in the specific exclusions but may nevertheless be excluded from the definition of administrative action because they are not of an administrative nature. The administrative action enquiry should therefore consist of 'a close analysis of the nature of the power or function and its source or purpose.'[55]

Wallis J's findings were endorsed by the Constitutional Court in *Motau*,[56] where Khampepe J noted that the distinction between actions of an administrative and an executive nature essentially comes down to 'how closely the decision is related to the formulation of policy, on

[49] Quinot & Maree op cit note 43 at 86.
[50] JR de Ville *Judicial Review of Administrative Action in South Africa* (2003) at 40.
[51] [2009] ZAKZPHC 30.
[52] Ibid para 61.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] *Motau* supra note 45 para 41.

the one hand, or its application, on the other.'[57] Khampepe J indicated key factors in this determination. First, where a power flows directly from the Constitution it is more likely to be executive power, as administrative power is usually derived from legislation.[58] Second, where more constraints are placed on the power, it is more likely to be an administrative power.[59] Third, 'it should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review.'[60] She noted that in matters of 'high policy', the conducting of foreign affairs, legislative decisions pertaining to politics, and so forth, it would not be appropriate to subject the power to administrative review.[61] It is this third factor which Khampepe J said underpins the enquiry.[62]

While Khampepe J's analysis provides useful guidance to future litigants, the appropriateness of the third factor that she identified is open to doubt. The purpose of the administrative action threshold is to provide guidance: if an action is administrative, the appropriate standards of review are those contained in the PAJA. Khampepe J, however, seems to suggest that one should determine what the appropriate standard of review is in order to determine whether an action is administrative in nature. This puts the cart before the horse. The nature of an action cannot be determined by what the court believes is the appropriate standard of review. This approach ignores the role of 'administrative action' as a threshold to the PAJA, as intended by the legislature. Khampepe J is undoubtedly correct that matters of high policy, the conducting of foreign affairs, and so forth, should not be reviewed under the PAJA; however, they would never be reviewed under the PAJA, being classic examples of executive action. Moreover, deference can be shown to the executive later in the review enquiry, in respect of the intensity of the applicable grounds of review, rather than by modifying the nature of the action in question. [63]

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[57] Ibid para 38.
[58] Ibid para 39.
[59] Ibid para 41-42.
[60] Ibid para 43.
[61] Ibid.
[62] Ibid para 44.
[63] See also Andrew Konstant 'Administrative Action and Procedural Fairness – *Minister of Defence and Military Veterans v. Motau*' (2016) 133 *SALJ* 491–504 where Konstant points out that intensity of review can be varied under both the PAJA and the principle of legality in order to show the appropriate deference to the executive. Therefore, the intensity of review will not necessarily be greater under the PAJA than under the principle of legality. Cf Glenn Penfold *Towards a substantive conception of the scope of administrative-law review in South Africa* (PhD thesis, University of the Witwatersrand, 2020) at 193-194.

3.2.2. by an organ of state or a natural or juristic person

This is one of the more straightforward elements of administrative action. It does, however, require the consideration of other legislation, namely the Constitution, as an organ of state is defined in section 239 of the Constitution as:

> a. any department of state or administration in the national, provincial or local sphere of government; or
> b. any other functionary or institution
>
> i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> ii. exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

3.2.3. exercising a public power or performing a public function

The PAJA's requirement that the decision-maker must have exercised a public power or performed a public function, denotes the importance of the function over the functionary: whether or not a decision-maker is a public one is not determinative of whether they exercise public powers. This holds two implications: (i) public entities may exercise private powers that are not subject to judicial review; and (ii) private entities may exercise public powers that are subject to judicial review.

Distinguishing public from private powers has proved a difficult task for the courts, which have pointed to factors such as whether there is a 'relationship of coercion or power';[64] whether there is a significant impact on the public;[65] whether the source of the power is legislation;[66]

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[64] *Chirwa v Transnet Limited* [2007] ZACC 23 ('*Chirwa*') para 186; see also *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* [2001] ZASCA 56 ('*Cape Metro*'); and *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135 ('*Logbro*').

[65] See *Van Zyl v New National Party* [2003] ZAWCHC 17; *Chirwa* ibid; *Gcaba v Minister for Safety and Security* [2009] ZACC 26.

[66] *Cape Metro* supra note 64; *Police and Prisons Civil Rights Union v Minister of Correctional Services* [2006] ZAECHC 4 ('*POPCRU*').

and whether a public interest is affected,[67]in determining whether a public entity is exercising a public power. Concurrently, courts have pointed to factors such as whether the government retains significant control over the private entity;[68] whether there is a statutory duty to act in the public interest;[69] and whether the private entity makes use of public funds or its decisions affect public finances,[70] to determine that a private entity is exercising public power. More recently, it was also suggested in *Ndoro v South African Football Association*[71] that the 'assumption of exclusive, compulsory, coercive regulatory competence to secure public goods that reach beyond mere private advancement' is indicative of a private entity exercising public power. A thorough overview of these factors is not warranted by this thesis but has been dealt with extensively in other literature.[72]

3.2.4. in terms of any legislation or in terms of an empowering provision

A defining characteristic of administrative action is that it deals with the exercise of a power derived from legislation or another legal source.[73] Organs of state derive their power from the Constitution or other legislation. Natural or juristic persons may derive their power from another kind of 'empowering provision'. 'Empowering provision' is defined in the PAJA as 'a law, a rule of common law, customary law, or an agreement, instrument, or other document in terms of which an administrative action was purportedly taken'. This makes it clear that private bodies acting under a contract, rather than legislation, can also perform an administrative

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[67] *Chirwa* supra note 64 para 186; However, in *POPCRU* ibid para 53, Plasket J clarified that the decision need not have an impact on the public at large because 'what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim.'

[68] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* [2006] ZACC 9 ('*AAA Investments*'); *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] ZASCA 94 ('*Calibre Clinical Consultants*').

[69] *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W); *AAA Investments* ibid.

[70] *Calibre Clinical Consultants* supra note 68; *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ).

[71] [2018] ZAGPJHC 74 para 23.

[72] Lauren Kohn 'Private Sporting Bodies and the "Supervisory Disciplines of Public Law": *Ndoro v South African Football Association* as an Apt Case Study for Line-Drawing within a Four-Quadrant Typology' (2022) 38 *SAJHR* 112–27; Klaaren & Penfold op cit note 18 at 48–58; Quinot & Maree op cit note 47 at 92–6; Hoexter & Penfold op cit note 44 at 274–304; Hoexter 'Contracts' op cit note 7.

[73] Quinot & Maree op cit note 43 at 92.

function.[74] Other sources of empowering provisions may include the code of conduct of a school or university; the constitution of a voluntary association; the guideline documents of state departments; and the circulars or practice notes issued by government.

3.2.5. that adversely affects rights

The 'adversely affects rights' element has been the most contentious aspect of the PAJA's definition of administrative action. It appears to limit the application of section 33 in a number of ways, to the extent that it may be an unjustifiable limitation of section 33.[75]

The verb 'affects' is capable of two meanings, depending on whether a deprivation or determination approach is followed. According to the deprivation approach, only existing rights that are abolished or limited are affected.[76] Under the determination approach, rights that have not yet been created but will be determined are also affected.[77] The use of the word 'adversely' suggests that the PAJA adopts the deprivation approach. This would exclude all persons who are mere applicants for rights, applying for benefits such as permits, licences, or contracts.[78] Hoexter points out that '[i]n practice this is an enormous category'.[79]

The adverb 'adversely' has, however, essentially been erased by the courts. In *Grey's Marine* Nugent JA found that the PAJA's literal meaning could not have been intended:

> For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.[80]

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[74] Hoexter 'Principle of Legality' op cit note 6 at 179.
[75] Klaaren & Penfold op cit note 18 at 69; Quinot & Maree op cit note 43 at 92.
[76] Hoexter & Penfold op cit note 44 at 309.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Supra note 40 para 23.

Nugent JA's judgment in *Grey's Marine* was followed in *Wessels v Minister for Justice and Constitutional Development*.[81] The case concerned an application for the position of Regional Court President. One of the unsuccessful applicants took the decision on review. In considering which approach to take, Van der Merwe J found that Nugent JA's phrase 'the capacity to affect legal rights' constitutes an endorsement of the determination approach and can be considered synonymous with 'determines rights'.[82] Following this approach, Van der Merwe J found that the applicant's rights 'were determined' when another candidate was appointed and, taking into account all other elements, the decision amounted to administrative action.[83] Nugent JA's widening (or rewording) of 'adversely affects rights' to a decision that 'has the capacity to affect legal rights' was also explicitly endorsed by the Constitutional Court in *Joseph v City of Johannesburg*.[84]

Finally, the word 'rights' also has the ability to narrow the scope of administrative action as it appears to exclude mere interests. (Legitimate expectations are dealt with in the next chapter in the context of the application of procedural fairness).[85] The courts have, however, found otherwise. In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*,[86] Moseneke DCJ found that a tender board's decision in awarding or refusing a tender is administrative action, inter alia because the 'decision materially and directly affects the legal interests or rights of tenderers concerned'.

3.2.6. that has a direct, external legal effect

The words 'a direct, external legal effect' are often read together with the words 'adversely affects rights'. This was done in *Grey's Marine*[87] and endorsed by the Constitutional Court in *Joseph*,[88] where Skweyiya J found that 'a finding that the rights of the applicants were

[81] 2010 (1) SA 128 (GNP).
[82] Ibid at 136G-137B.
[83] Ibid at 137D-E.
[84] [2009] ZACC 30 ('*Joseph*') para 26.
[85] Chapter 3 Part 3.1.
[86] [2006] ZACC 16 para 21.
[87] Supra note 40.
[88] Supra note 84 para 26.

materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a "direct, external legal effect" on the applicants'.

This element, like the element of 'a decision', indicates that a decision must have a degree of finality in order to constitute administrative action. This presents a challenge in the case of multi-stage decision-making. A decision that is completely internal to an organ of state (even if it results in a later external decision) is unlikely to have direct, external legal effect on a person.[89] However, just because a decision is not at the end of a multi-stage decision-making process does not necessarily mean that it cannot have the requisite external effect.[90] This may be the case, for example, in respect of investigative action.

In *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga,*[91] the MEC initiated an investigation into a company for contravening the Road Traffic Act. The investigative report found that the company had contravened the Act and recommended the suspension of its business. The company brought an application to review the findings in the report, with the MEC contending that the findings were not administrative action because they were not the final decision and as such had no direct, external legal effect. The Court rejected this argument, finding that just because it was not the last decision, did not mean that it had no direct, external legal effect. As the Court explained, '[e]ven a preliminary decision can have serious consequences, especially where it lays "the necessary foundation for a possible decision" which may have grave results.'[92] Multi-stage decision making is considered further in Chapter 3 Part 3.2. of this thesis, in the context of the application of procedural fairness.

3.2.7. and that does not fall under any of the listed exclusions

The PAJA contains nine express exclusions from the ambit of administrative action. The first five exceptions, (aa) to (ee), echo the Constitutional Court's pre-PAJA jurisprudence, excluding judicial, legislative, and executive actions. The latter four exclusions, (ff) to (ii),

[89] Quinot & Maree op cit note 43 at 94.
[90] Ibid; Klaaren & Penfold op cit note 18 at 75.
[91] 2008 (2) SA 570 (T).
[92] Ibid para 25.

consist of: a decision to institute or continue a prosecution;[93] the Judicial Service Commission's nomination, selection or appointment of a judicial officer;[94] any decision taken in terms of the Promotion of Access to Information Act;[95] and any decision taken in terms of section 4(1) of the PAJA.[96] The last exclusion relates to an administrator's choice of which procedure to adopt in respect of administrative action that affects the public. It has been interpreted to mean that choosing which procedure to adopt is not administrative action, but once a procedure has been adopted, it can be subjected to judicial review.[97]

4. NON-ADMINISTRATIVE ACTIONS

In this section, a range of non-administrative action is identified. The decisions identified are not exhaustive of non-administrative action but have been selected to highlight its range and diversity, encompassing presidential pardons at one end of the spectrum and the findings of commissions of inquiry at the other.

4.1. The President's constitutional powers

The Constitution confers two categories of powers upon the President: those that the President enjoys (i) as Head of State, and (ii) as head of the national executive. The powers conferred upon the President as Head of State are listed in section 84(2) of the Constitution:

a. assenting to and signing Bills;
b. referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
c. referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
d. summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
e. making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
f. appointing commissions of inquiry;
g. calling a national referendum in terms of an Act of Parliament;

[93] Subsection ff.
[94] Subsection gg.
[95] Act 2 of 2000; Subsection hh of the PAJA.
[96] Subsection ii.
[97] Klaaren & Penfold op cit note 18 at 68; De Ville op cit note 50 at 66.

h. receiving and recognising foreign diplomatic and consular representatives;
i. appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
j. pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
k. conferring honours.

Under the common law these powers were known as prerogative powers and while they are sometimes still referred to as such, they now only exist as legislated under the Constitution.[98] Prior to the PAJA, the Court in *SARFU*[99] had to determine whether the power to appoint a commission of inquiry amounted to administrative action. As discussed above in Part 3.1, the Court found that it was close to the policy-making function of the President and was therefore executive in nature.[100] The power, despite its origins in prerogative power, was nevertheless susceptible to review under the principle of legality.

Upon the introduction of the PAJA, most of the President's powers as Head of State have been expressly excluded from the ambit of administrative action. Only two powers in section 84(2) are not expressly excluded: the power to pardon and the power to make any appointment other than as head of the national executive. In *Albutt*[101] the Constitutional Court controversially[102] avoided determining whether the President's power to pardon was administrative action, finding it unnecessary to answer the question on the facts before it.[103] That these two powers are not on the list of exclusions indicates that they would constitute administrative action, but their political nature may suggest otherwise.[104]

The President's powers as Head of the Executive are listed in section 85(2) of the Constitution. They are:

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[98] *President of the Republic of South Africa v Hugo* [1997] ZACC 4 para 8.
[99] Supra note 22.
[100] Ibid para 147.
[101] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4 (‘*Albutt*’).
[102] Melanie Murcott ‘Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?’ (2013) 130 *SALJ* 260 at 266–7.
[103] Ibid paras 79-84.
[104] See Hoexter & Penfold op cit note 44 at 333; Christina Murray & Richard Stacey ‘Chapter 18: The President and the National Executive’ in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* (2018) at 14–6.

a. implementing national legislation except where the Constitution or an Act of Parliament 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 in national legislation.

In *Pharmaceutical Manufacturers*[105] the Constitutional Court found that bringing legislation into force fell somewhere between law-making and its implementation, posing a conundrum. The Court was persuaded, however, that it lay closer to law-making and therefore did not constitute administrative action.[106] This conclusion is echoed in the PAJA, which expressly excludes all section 85(2) powers from the definition of administrative action, except the implementation of national legislation, which is a prototypical example of administrative action. This was confirmed in *Masetlha*[107] where the Constitutional Court found that the President's decision to dismiss the Director-General of the National Intelligence Agency fell under section 85(2)(e) ('performing any other executive function provided for by the Constitution or national legislation') and as the powers referred to in section 85(2)(e) are expressly excluded from the PAJA definition, it did not amount to administrative action.

4.2. Executive policy-making

As seen above, the power to make policy is granted in section 85(2) of the Constitution which provides that 'The President exercises the executive authority, together with other members of the Cabinet, by – … (b) developing and implementing national policy.' The President and cabinet ministers will often source their power to make policy from both the Constitution and relevant legislation.

As discussed above in respect of *Ed-U-College*,[108] the Constitutional Court has drawn a distinction between policy formulation in a broad and a narrow sense. Policy-making in the broad sense is 'formulated by the executive outside of a legislative framework' and 'involve[s]

[105] Supra note 28.
[106] Ibid para 79.
[107] Supra note 1 para 76.
[108] Supra note 33.

a political decision', while policy-making in the narrow sense is 'where a member of the executive is implementing legislation.'[109] Only policy in the narrow sense constitutes administrative action, and policy in the broad sense ('executive policy-making'), as the prototypical example of executive action, constitutes non-administrative action and is therefore subject only to the principle of legality.

4.3. Rule-making

A contentious issue is whether rule-making (or delegated legislation) in the form of regulations, proclamations, public practice notes, or circulars, constitutes administrative action. On the one hand, rule-making involves the making of legislation, but on the other, it also involves the implementation of original legislation, which is a key identifying feature of administrative action. It was hoped that this important question would be answered in the case of *Minister of Health v New Clicks South Africa (Pty) Ltd*,[110] but the Constitutional Court handed down divided opinions on the issue. The case concerned ministerial regulations for a pricing scheme for medicines made under the Medicines and Related Substances Control Act,[111] which the respondents averred could be reviewed under the PAJA. The result was eight judgments differing on various issues. When it came to whether the regulations could be reviewed under the PAJA, the Court split five-five-one. The first five judges agreed that the regulations could be reviewed under the PAJA, with Chaskalson CJ suggesting that this is a general rule. The second group of five judges found that the issue did not have to be dealt with in this case, and the last judge, Sachs J, found that regulation-making could not be reviewed under the PAJA. The Court's failure to resolve this important issue is significant and indicates the difficulties presented by the PAJA's definition of administrative action.

Chaskalson CJ's judgment has often been cited as authority for the proposition that regulation-making is reviewable under the PAJA. However, as it is not a majority judgment, it is not binding. Nevertheless, Chaskalson CJ's reasoning remains pertinent. He first considered the fact that the making of delegated legislation was reviewable prior to the advent of the interim

[109] Ibid para 18.
[110] [2005] ZACC 14 ('*New Clicks*').
[111] Act 101 of 1965.

Constitution, and nothing in either Constitution indicates an intention to limit that power.[112] Moreover, he found regulation-making to be an 'essential part of public administration' and pointed to the fact that the Constitution 'calls for an open and transparent government'.[113] In dealing with the arguments for its exclusion from the PAJA, Chaskalson CJ found that (i) the absence of regulation-making from the list of PAJA exclusions was deliberate;[114] (ii) regulation-making amounted to 'a decision' in terms of the PAJA;[115] and (iii) section 4(1) of the PAJA suggests that rule-making is included.[116]

Since *New Clicks*, regulation-making has continued to be marred by uncertainty. One possible approach is to consider rule-making on a case-by-case basis, taking into account the various elements of an administrative action in determining whether a particular instance of rule-making constitutes administrative action. In *Equal Education v Minister of Basic Education*[117] the Court considered the submission of Advocate Geoff Budlender that 'there is no comprehensive rule on whether or not the making of regulations is automatically an administrative decision', and that it is 'a case specific issue'. Budlender proposed that 'the best approach is to ask whether the making of the regulation negatively affects rights because that is part of the definition of administrative action in PAJA'[118] and argued that 'it is not all regulations that have adverse effect, an example of regulations falling in this category are traffic regulations regulating the direction of the traffic on the road.'[119] The Court did not, however, decide the matter as it considered itself constrained to determine the alternative basis on which the application was brought.[120]

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[112] *New Clicks* supra note 110 para 109.
[113] Ibid para 113.
[114] Ibid paras 122-126. The list of executive exclusions in the PAJA definition exclude most of the executive powers contained in section 85 (subsections b, c, d, and e) but strikingly do not include section 85(a) which is the power to implement legislation. Chaskalson P found that the exclusion of section 85(a) was deliberate and as regulation-making is an example of legislative implementation, it is not excluded by section i(i)(aa) of the PAJA.
[115] Ibid para 128. Chaskalson P dealt with the question of whether regulation-making amounts to 'a decision' despite not being included in the activities listed in subsections (a) to (f) of the PAJA's definition of 'a decision'. He found that regulation-making is nevertheless included by the definition's reference to '*any* decision of an administrative nature' and in the catch-all subparagraph (g)'s 'doing or refusing to do *any* other act or thing of an administrative nature'.
[116] Ibid paras 131-133.
[117] [2018] ZAECBHC 6 para 7.
[118] Ibid.
[119] Ibid.
[120] Ibid para 13.

Most courts, however, have avoided the question altogether. This is striking, as courts are constitutionally mandated to apply the PAJA where it is applicable.[121] Some of the recent High Court judgments in respect of the COVID-19 regulations are indicative of this approach. In *De Beer v Minister of Cooperative Governance and Traditional Affairs*[122] Davis J did not consider whether the regulations were reviewable under the PAJA, jumping straight to a rationality enquiry under the principle of legality. In *Esau v Minister of Co-operative Governance and Traditional Affairs* ('*Esau I*')[123] Allie J made some attempt at considering whether the regulations may amount to administrative action, but, seemingly due to agreement between the parties, applied the principle of legality instead. Finally, in *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa*,[124] which concerned an application for the review of a tobacco ban, a full bench of the High Court also side-stepped the issue. Misconstruing what was required of it, the Court found that because the applicant (i) had not relied on the PAJA; and (ii) had challenged the rationality of the regulations, the regulations amounted to executive and not administrative action.[125] The COVID-19 Regulations trio are just a small selection of cases in which the courts have avoided the administrative action inquiry altogether, while not indicating clearly on what basis they are doing so.[126]

Fortunately, the appeal to the SCA against *Esau I* yielded more decisive guidance. In *Esau v Minister of Co-Operative Governance and Traditional Affairs* ('*Esau II*')[127] Plasket JA, relying on Chaskalson CJ's decision in *New Clicks* and other SCA decisions, found that the making of regulations is administrative action. While Plasket JA also reviewed the regulations in question under the principle of legality, he did so only in the alternative, in the event that he was wrong in his principal finding.[128] His finding that subordinate legislation is administrative action is binding on the SCA and lower courts, in lieu of a Constitutional Court decision on the matter.

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[121] Cora 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 Mathews* (2011) 55–74; Radley Henrico 'Subverting the Promotion of Administrative Justice Act in Judicial Review: The Cause of Much Uncertainty in South African Administrative Law' (2018) 2 *Journal of South African Law* 288–307.
[122] [2020] ZAGPPHC 184.
[123] [2020] ZAWCHC 56.
[124] [2020] ZAGPPHC 246.
[125] Ibid para 15.
[126] See generally, Henrico op cit note 121.
[127] [2021] ZASCA 9 paras 76-84;
[128] Ibid para 101.

It nevertheless remains open for the Constitutional Court to find that rule-making, or a particular instance of rule-making, does not constitute administrative action.

4.4. Decisions of the National Prosecuting Authority

The decision to institute or continue a prosecution is expressly excluded from the definition of administrative action in the PAJA.[129] This exclusion can be justified on two bases: first, accused persons will later be given an opportunity to answer the case against them; and second, the criminal justice system would not be able to operate efficiently if administrative reviews could be brought before criminal proceedings have even started.[130]

There was at first some question as to whether declining to prosecute or discontinuing a prosecution – as opposed to instituting or continuing a prosecution – would constitute administrative action, as it is not expressly excluded by the definition. The issue was determined by the SCA in *National Director of Public Prosecutions v Freedom Under Law*.[131] In determining whether a decision to discontinue a prosecution amounted to administrative action, Brand JA, in a unanimous judgment, relied on developments in English law[132] where judicial review of prosecutorial decisions is possible but very limited due to salient policy considerations, namely safeguarding the prosecutorial authority's independence and recognising the breadth of discretion afforded to the authority in making its decisions. Brand JA reasoned that these considerations inform the exclusion of a decision to institute a prosecution as well as a decision to discontinue a prosecution. As such, these decisions are of the same genus and neither amounts to administrative action.

The finding has been the subject of persuasive criticism. Anmari Meerkotter argues that the Court's equating of the two types of decision is incorrect on a number of bases, including the difference in nature between a decision to institute or continue a prosecution and a decision to decline or discontinue a prosecution.[133] While the former would result in a trial where the

[129] Paragraph ff.
[130] Klaaren & Penfold op cit note 18 at 66–7.
[131] [2014] ZASCA 58.
[132] Ibid paras 25-27.
[133] Anmari Meerkotter 'The Application of the Promotion of Administrative Justice Act 3 of 2000 to Decisions Not to Prosecute' (2016) 27 *Stellenbosch Law Review* 599.

charges would be adjudicated, the latter would not. In other words, as Hoexter and Penfold also argue,[134] there is finality to a decision to discontinue a prosecution, while a decision to institute or continue a prosecution will still be adjudicated in the future. This distinction provides a persuasive basis on which to distinguish between the two types of decisions and apply the greater protections of the PAJA to a decision to decline or discontinue a prosecution. However, at present, decisions to institute, continue, decline, and discontinue a prosecution will all only be reviewable under the principle of legality.

4.5. Decisions of the Judicial Service Commission

The PAJA expressly excludes from its definition of administrative action 'a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission ('the JSC') in terms of any law'.[135] In *Judicial Service Commission v Cape Bar Council*[136] the SCA found that the decision of the JSC to recommend judges to the President was nonetheless reviewable under the principle of legality.[137] Derived from section 174(6) of the Constitution, it was 'undoubtedly a public power'.[138]

4.6. Decisions of Chapter 9 institutions

The decisions of Chapter 9 institutions were not brought under review until recently. In *Minister of Home Affairs v Public Protector of the Republic of South Africa*,[139] the Public Protector had submitted a final report in which she found that the Department of Home Affairs was guilty of maladministration in respect of one of its employees and directed that the Department take specified remedial action. The Department brought an application to review and set aside the report. In a unanimous judgment of the SCA, Plasket AJA began by stating that since the decision in *Economic Freedom Fighters v Speaker, National Assembly*,[140] it is

[134] Hoexter & Penfold op cit note 44 at 344–5.
[135] Para (gg) of the definition of "administrative action" substituted by section 26 of Act 55 of 2003.
[136] [2012] ZASCA 115.
[137] Ibid paras 19-22.
[138] Ibid para 22.
[139] [2018] ZASCA 15.
[140] [2016] ZACC 11.

confirmed in our law that decisions of the Public Protector are binding and not merely recommendations.[141] In determining whether or not these decisions amount to administrative action, Plasket AJA found that (i) the Public Protector is an organ of state;[142] (ii) its decisions are not expressly excluded by the PAJA definition;[143] (iii) the completion of an investigation in which it has found wrongdoing and ordered remedial action will usually adversely affect rights and have direct and external legal consequences;[144] and (iv) its powers are clearly derived from the Constitution and legislation.[145] However, Plasket AJA found that the Public Protector's decisions are not of an administrative nature. He relied on several factors in reaching this conclusion:

> First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. Secondly, it is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, […] it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action.[146]

Accordingly, decisions of the Public Protector are in most circumstances likely not to be considered administrative action. Plasket AJA did, however, find that such decisions are reviewable under the principle of legality,[147] a finding that was confirmed by the Constitutional Court in *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan*.[148]

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[141] Ibid para 5.
[142] Ibid paras 33-34. He confirmed that Chapter 9 Institutions are organs of state under section 239(b) of the Constitution.
[143] Ibid para 35.
[144] Ibid.
[145] Ibid.
[146] Ibid para 37.
[147] Ibid para 56.
[148] [2020] ZACC 10 para 106.

In *Auditor-General of SA v MEC for Economic Opportunities, Western Cape,*[149] the Supreme Court of Appeal considered whether the findings of the Auditor-General amount to administrative action. While the court a quo had found that the Auditor-General differs from the Public Protector because it 'fits squarely into the institutions of public administration',[150] the Supreme Court took into account a number of factors in determining that these types of decisions are in fact administrative action. The factors included that 'the Auditor-General is subject only to the Constitution and the law', '[i]ts function is not to administer or to implement the policies of the executive, but to independently audit and report on the use of public funds', and that this function 'does not involve actions of an administrative nature'.[151] The Court also noted that while '[u]nlike the Public Protector, the Auditor-General does not have a wide discretion to decide whether to audit and report or not', 'that does not detract from her independence and does not, in this context, materially distinguish her from the Public Protector'.[152]

The decisions of other Chapter 9 institutions have not yet been subjected to judicial review. However, the fact that their powers are derived directly from the Constitution, and their independence from other government institutions, certainly suggests that their decisions are unlikely to be considered administrative in nature.

4.7. Procedures and findings of commissions of inquiry

The question of review of the findings of a commission of inquiry arose for the first time in South Africa in the case of *Corruption Watch v Arms Procurement Commission*.[153] In the absence of South African jurisprudence on the reviewability of the findings of commissions of inquiry, the Court considered findings in foreign courts to conclude that commissions of inquiry are subject to judicial review under the principle of legality:

[149] [2021] ZASCA 133 ('*MECEO*').
[150] *Member of the Executive Council for Economic Opportunities, Western Cape v Auditor General of South Africa* [2020] ZAWCHC 50 para 17.
[151] *MECEO* supra note 149 para 32.
[152] Ibid.
[153] [2019] ZAGPPHC 351.

> While a Court must not fail to take account of the purpose of a commission of inquiry and hence the wide discretion given to Commissioners to investigate within the scope of their given terms of reference and to make findings and recommendations that they deem meet, the purpose of a commission, namely to restore public confidence in the situation which is investigated and hence in the process of government, dictates that it must operate within the framework of the principles of legality.[154]

In another High Court judgment, *Korabie v Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State*,[155] the Court found that the report of a commission of inquiry did not constitute administrative action because it did not have the necessary direct external legal effect, but instead of reviewing the report under the principle of legality, determined the review on the basis of ripeness. The Court found as follows:

> It cannot be said that the applicant has suffered prejudice or that it is inevitable that he will suffer prejudice irrespective of whether or not the action is complete. All three decisions entail the recommendation that investigation takes place. These investigations, should they occur, may exculpate the applicant, by establishing that there are no valid grounds on which he may be held culpable.[156]

The Court concluded that due to the 'lack of prejudice suffered by the applicant and the checks and balances in place in the form of further investigations and/or court proceedings,' the application was not ripe for hearing.[157] In making this finding, the Court made no reference to the finding in *Corruption Watch* or any foreign jurisprudence. It likewise made no mention of the public interest in a fair procedure or the significance of reputational damage in the reviewability of a commission's findings. It is noteworthy that in *Korabie*, the applicant did not advance any arguments for the recommendations to be set aside under the principle of legality, and the Court likely did not have all the relevant arguments before it.[158] *Corruption Watch*, which was reasoned on the basis of well-established principles developed in other jurisdictions, is consequently more likely to prevail in the future. This is discussed further in respect of the commissions of inquiry case study in Chapter 7.

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[154] Ibid para 15.
[155] [2022] ZAWCHC 187.
[156] Ibid para 56.
[157] Ibid para 57.
[158] Ibid para 31.

5. THE STATE SELF-REVIEW ANOMALY

As discussed above, South African administrative law depends on the definition of administrative action to determine whether the PAJA or the principle of legality is the appropriate scheme of review. It is essentially the nature of the decision that determines the scheme of review. Accordingly, it is deemed appropriate that administrative actions are subject to the grounds of review under the PAJA, while non-administrative actions (as listed above) are subject only to the grounds of review under the principle of legality. A recent judicial development has, however, complicated this approach.

In modern South African administrative law, where a state entity becomes aware of an administrative defect in its own decision-making, it is obliged to approach a court to have that decision set aside (state self-review).[159] It might be expected that where a state entity seeks to review its own administrative action, that action (meeting the PAJA definition of an administrative action) would be reviewable under the PAJA. However, in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*,[160] the Constitutional Court held that where an administrative action is brought on self-review by a state entity, it is not reviewable under the PAJA but under the principle of legality.

The case concerned a contract concluded between the State Information Technology Agency (SITA) and Gijima Holdings, a private company contracted to provide IT services to particular organs of state. In seeking to terminate one of its contracts with Gijima Holdings, SITA claimed that it had not complied with the applicable constitutional procurement procedures when entering into the contract and applied for the review of that decision. When the matter reached the Constitutional Court, Madlanga J and Pretorius AJ, on behalf of a unanimous court, found that although the decision to conclude the contract amounted to administrative action, the PAJA did not apply. The Court reasoned that section 33 of the Constitution, which states that 'everyone has a right to just administrative action', does not extend to state entities:

[159] Raisa Cachalia 'Resuscitating the PAJA in State Self-Review? *Compcare Wellness Medical Scheme v Registrar of Medical Schemes*' (2022) 38 *SAJHR* 70–91 at 75–7.
[160]2018 (2) SA 23 (CC)('*Gijima*').

> It seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights. This must, indeed, be an indication that only private persons enjoy rights under section 33.[161]

Criticism of this reasoning has been widespread and varied.[162] It is not within the scope of this thesis to consider it at length. What is pertinent is that exercises of public power may now attract a different standard of review, not based on whether they amount to administrative action but based on who brings the review application.[163] This has a number of significant implications. Most importantly, *Gijima* stands for the proposition that decisions that constitute administrative action but are brought on review by the organ of state that made the decision, will not be subject to the PAJA but to the principle of legality. The decisions that are reviewable under the principle of legality thus encompass not only those that I have listed as non-administrative action, but the full gamut of administrative action when the action concerned is brought on review by the state entity that made it.

6. CONCLUSION

The findings of this chapter may be summarised as follows. First, as shown in Part 2, all systems of judicial review must adopt mechanisms for limiting the depth of judicial scrutiny to which government decision-makers are subject. Currently, South African administrative law makes use of the administrative action threshold to determine which decisions are subject to the full range of review grounds under section 33 of the Constitution and the PAJA, and which are subject only to the grounds available under the principle of legality. The results of this method depend on the meaning given to administrative action. A wide definition could make most exercises of public power subject to section 33 of the Constitution and the PAJA, and variability could be employed to apply the appropriate depth of scrutiny in each case. A narrow definition excludes a great many exercises of public power from the protection of section 33

[161] Ibid para 27.

[162] See Leo Boonzaier 'A Decision To Undo' (2018) 135 *SALJ* 642–77; Cachalia op cit note 159; Geo Quinot & Elsabe Van der Sijde 'Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review its Own Decisions?' (2019) 2 *Journal of South African Law* 324–36; Kohn & Corder, op cit note 43 at 139–40; Mitchell De Beer 'A New Role for the Principle of Legality in Administrative Law: *State Information Technology Agency Soc Ltd v Gijima Holdings* (Pty) Ltd' (2018) 135 *SALJ* 613–30.

[163] Kohn & Corder op cit note 43 at 140.

and the PAJA and places pressure on the principle of legality to ensure that those decisions are met with the appropriate level of oversight.

Second, as shown in Part 3, while administrative action under section 33 of the Constitution was defined in a manner that excluded only executive, judicial, and legislative decisions from its ambit, the PAJA definition of administrative action is far narrower, excluding many more exercises of public power from its definition, either through specified elements of administrative action – particularly its requirements that a decision 'adversely affects rights' and has 'direct, external legal effect' – or under the express exclusions. Its narrowing of the concept defined by the courts under the Constitution means that the PAJA definition of administrative action might well be unconstitutional in so far as it unjustifiably limits the right to just administrative action under section 33 of the Constitution. This possibility is considered again in Chapter 8 of this thesis, where a new, wider, and consequently constitutional, definition of administrative action under the PAJA is recommended.[164]

Third, the consideration of specific exercises of public powers in Part 4 reveals that the list of non-administrative actions is very long and diverse. The list includes most of the President's constitutional powers, including the appointment of a commission of inquiry; calling a national referendum; the initiation of legislation; and making certain appointments and dismissals. Other decisions that do not constitute administrative action include the NPA's decision to both institute and discontinue prosecutions; the JSC's decisions in respect of the nomination, selection, and appointment of judges; key findings of the Public Protector, the Auditor-General, and potentially, the decisions of other Chapter 9 institutions; and the findings of commissions of inquiry.

Two other developments have expanded the range of decisions that are reviewable under the principle of legality, irrespective of the administrative action enquiry. The first development was the finding in *Gijima*[165] that exercises of public power will not be reviewable under the PAJA, even if they meet the definition of administrative action, where the application for review is brought by the organ of state that made the decision. The second development is the

[164] Chapter 8 Part 4.1.
[165] Supra note 160.

tendency shown by the courts to skip the administrative action enquiry and move directly to applying the principle of legality. This means that a number of decisions that would amount to administrative action are not dealt with under the PAJA, increasing the importance (or prevalence) of the principle of legality as a scheme of review.

The extent and diversity of the decisions that are left to be dealt with under the principle of legality are significant. Some – if not all – will certainly require the application of procedural fairness. This is examined more closely in Chapter 7 of this thesis, where three of the listed instances of non-administrative action are selected as case studies, namely, the process and findings of commissions of inquiry; the interview process for the selection of judges by the JSC; and executive policy-making. In those case studies it is considered (i) whether, as claimed in *Masetlha*, it would be inappropriate to subject these decisions to procedural fairness; (ii) what procedural fairness would require if it were applicable; and (iii) how this compares to what procedural rationality would require under the circumstances. With that goal in mind, the application and content of procedural fairness are considered in the next chapter of this thesis.

CHAPTER 3

THE PRINCIPLES OF REVIEW FOR PROCEDURAL FAIRNESS

1. INTRODUCTION

This thesis is concerned with the absence of procedural fairness under the principle of legality and the reliance on procedural rationality in its place. In order to (i) consider the consequences of excluding procedural fairness from the principle of legality and (ii) compare the workings and outcomes of procedural fairness and procedural rationality, it is necessary to set out what procedural fairness comprises under South African law. For it is only once the fundamental principles of procedural fairness are identified that the consequences of its absence under the principle of legality can be fully appreciated, and its fundamental difference to procedural rationality – in its mechanics and outcomes – can be critically evaluated. Furthermore, it becomes possible to detect, as I will do in Chapters 5 and 6 of this thesis, when the content given to procedural rationality starts to resemble the principles of procedural fairness far more than those of rationality. The purpose of this chapter is therefore the identification of the fundamental principles of procedural fairness.

As was discussed in Chapter 1,[1] procedural fairness – also referred to as natural justice or a duty to act fairly – is an ancient and nearly ubiquitous value across the Commonwealth. This is because it is understood to promote procedural values such as better informed and therefore more accurate decision-making; public confidence in public decision-making; and respect for the dignity of the persons whose lives are adversely affected by public decision-making. Procedural fairness is usually understood to comprise two principles: a right to be heard (the *audi* principle) and the rule against bias. As explained in Chapter 1, only the former principle is of concern to this thesis and the *audi* principle is therefore treated as synonymous with procedural fairness.

In South African administrative law, the application and content of procedural fairness is currently mediated through the provisions of the Promotion of Administrative Justice Act

[1] Part 2.1.

(PAJA),[2] as informed by the interim and final Constitutions and the common law. The courts have also, both in the pre-constitutional and constitutional era, relied on foreign jurisprudence (particularly English law) to guide their interpretation of procedural fairness. In this chapter I rely on all of these sources, as well as the interpretations of academic commentators, in order to identify the fundamental principles of procedural fairness.

This chapter is structured as follows: In Part 2, the content of procedural fairness is considered. Here, the variability of procedural fairness is discussed, as well as the core standards of procedural fairness, namely, the requirements of adequate notice and a reasonable opportunity to be heard. The variability of procedural fairness to either supplement or depart from these core standards in particular circumstances is also discussed. In Part 3, the application of procedural fairness is considered. While its application is principally determined by the 'administrative action' enquiry, it may still be widened based on (i) the doctrine of legitimate expectations, (ii) the effects of a decision being preliminary in the context of multi-stage decision-making, and (iii) its effect on the public. Concluding remarks are made in Part 4.

2. THE CONTENT OF PROCEDURAL FAIRNESS

2.1. The variability of the content of procedural fairness

Procedural fairness encompasses a wide range of standards. At the bottom end of the range, procedural fairness may not require an authority to engage with affected parties at all (for example, where a matter is urgent), or there might only be a duty to provide notice. In the middle of the range, an affected person may be entitled to make written representations, and towards the top end, an affected person may be entitled to an opportunity to make oral representations, or even to a hearing akin to a hearing in a court of law with legal representation.

Which of these procedures is appropriate is, under the common law, determined by the circumstances of a particular administrative decision. This principle is recognised in the PAJA, which states that '[a] fair administrative procedure depends on the circumstances of each

[2] Act 3 of 2000 ('PAJA').

case'.[3] As famously stated by Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody*,[4] '[t]he principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.' This principle has on many occasions been echoed by the Constitutional Court. In *Zondi v MEC for Traditional and Local Government Affairs*,[5] Ngcobo J found that '[t]he overriding consideration will always be what does fairness demand in the circumstances of a particular case.'

What then are the circumstances that must be considered in determining the appropriate procedure? South African courts have given recognition to the political context in which government actors make decisions. In *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal*,[6] O'Regan J noted that:

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

This approach is well-exemplified in the Constitutional Court's decision in *Minister of Public Works v Kyalami Ridge Environmental Association*.[7] In that case the government had an obligation to house flood victims from the Alexandra township who had up until that point been housed in tents and a church hall, in overcrowded and unhealthy circumstances. The flood victims urgently needed to be provided with appropriate shelter. The government decided to house them in a transit camp on land that it owned next to an area called Kyalami. The residents of Kyalami were not informed of or consulted on this decision. They took the decision on review on the basis that the value of their property had been adversely affected and that they had not been consulted prior to the government's decision. In the Constitutional Court,

[3] Section 3(2)(a).
[4] [1993] UKHL 8 para 14 ('*Doody*').
[5] [2004] ZACC 19 para 114.
[6] [1998] ZACC 20 ('*Premier, Mpumalanga*') para 41.
[7] 2001 JDR 0331 (CC) ('*Kyalami Ridge*').

Chaskalson P found that in considering whether a decision is procedurally fair, the following approach should be followed:

> Where in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon balancing various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it.[8]

On the facts of the case, Chaskalson P took into account the urgency of accommodating the flood victims,[9] the interest of the flood victims to be accommodated close to Alexandra,[10] and the constitutional right of the flood victims to be given access to housing.[11] He also considered the impact on the residents of Kyalami, but stressed that it was 'only a factor' and could not in those circumstances 'stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose.'[12] Chaskalson P concluded that in these circumstances, the government had not acted unfairly in failing to consult the residents of Kyalami.[13] This judgment is notable for its use of variability, as it demonstrates that in appropriate circumstances the content of procedural fairness will require nothing at all.

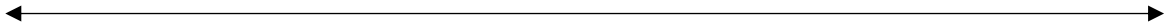
In this and other judgments, a number of factors have been taken into account in determining the appropriate content of procedural fairness in particular circumstances. First, the legislative scheme in which the power is granted must be considered. As per Lord Mustill, '[a]n essential factor of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.'[14] Second, the relevant interests or rights at stake must be considered. A constitutional right might, for example, weigh more heavily than a business interest. In *Kyalami Ridge*,[15] for example, Chaskalson P weighed the interests of the residents of Kyalami in the value of their property

[8] Ibid para 101.
[9] Ibid para 103.
[10] Ibid.
[11] Ibid para 106.
[12] Ibid para 107.
[13] Ibid para 109.
[14] *Doody* supra note 4 para 14.
[15] Supra note 7 para 107.

against the interests of homeless flood victims in being provided with shelter close to their homes. Fourth, the considerations of cost and efficiency need to be considered. As seen in *Premier, Mpumalanga*, a court might take into account that it should be 'slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively'.[16] Fifth, the urgency with which the decision had to be made may be considered. As can be seen from the judgment in *Kyalami Ridge*,[17] urgency can result in a complete absence of consultation being procedurally fair. The weighing up of these factors is evident below in respect of the core standards.

The PAJA gives full effect to the variability of procedural fairness. In addition to its express recognition of the variability of procedural fairness, it also organises its standards into core standards that will ordinarily be applicable – thereby facilitating predictability – but which can nevertheless be departed from or supplemented, according to the circumstances. This is set out schematically in Figure 2, which depicts the spectrum of procedural fairness standards under the PAJA that will be applicable according to the appropriate intensity of review.

Figure 2



Departures from core standards	Core standards	Core standards + discretionary standards

Source: Author

In addition, the PAJA provides for a 'fair but different' procedure[18] that may look completely different to the core standards where this is provided for by an empowering provision such as legislation or a contract. A fair procedure can therefore take on many different guises, the underlying question being whether the procedure, under the circumstances, was fair.

[16] Supra note 6 para 41.
[17] Supra note 7.
[18] Section 3(5).

2.2. The core standards of procedural fairness

Despite the variability of the content of procedural fairness, certain fundamental standards are usually required. The PAJA, for example, sets out certain core standards for administrative actions that will in most cases have to be met:

> 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 (l) —
> (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.[19]

Many academic commentators and courts refer to these requirements as 'minimum' standards.[20] While the term 'must' certainly suggests that they are minimum standards, they can nevertheless be departed from in particular circumstances (as discussed below in Part 2.4.). The term 'core' standards (as used by Currie and Klaaren)[21] is therefore preferred. Below, the first two – and most fundamental – core standards, namely adequate notice and a reasonable opportunity to make representations, are discussed in detail. The other three core requirements in subsections (c)-(d) do not require further discussion in the context of this thesis.

2.2.1. Adequate notice

Under the common law, procedural fairness requires that a person who is adversely affected by an administrative action should generally receive adequate notice of the impending action.[22] This is so that they are able to make representations or appear at a hearing or inquiry, and effectively prepare their own case.[23] The requirement of adequate notice is in most cases part

[19] Section (3)(2)(b).
[20] For example, Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* 3 ed (2021); Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis, Rhodes University, 2002).
[21] Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001).
[22] See Lawrence Baxter *Administrative Law* (1984) at 544.
[23] See Harry Woolf, Jeffery Jowell, Catherine Donnelly & Ivan Hare *De Smith's Judicial Review* 8 ed (2018) at 410.

and parcel of the right to be provided with a reasonable opportunity to make representations, and there are significant overlaps.[24] The PAJA provides that a person entitled to procedurally fair administrative action must be given adequate notice of the nature and purpose of the proposed administrative action.[25] 'Adequate notice' is not defined in the PAJA, but a number of principles have been established by the courts.

First, the adequacy of notice is affected by its timing. No particular time limit can be set and sufficient time will depend on the circumstances. For example, in *Police and Prisons Civil Rights Union v Minister of Correctional Services* (*POPCRU*),[26] Plasket J found that 48 hours' notice of a disciplinary hearing could not, 'by any stretch of the imagination', be said to be 'adequate notice'.[27] 48 hours may, however, be considered adequate where a decision must be taken urgently.[28] Skweyiya J explained in *Joseph v City of Johannesburg* that in essence, notice 'must afford the applicants sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish.'[29] The time consideration is expanded on below, under 'a reasonable opportunity to make representations'.

Second, the adequacy of notice is affected by the method by which it is served. In many cases a letter, email or poster in an appropriate public place will suffice. The language spoken by the affected persons must also be taken into account. However, there are circumstances in which a decision-maker must go further to ensure that notice is effectively communicated to affected persons. For example, in cases where the affected persons are uneducated or illiterate, with limited means to request assistance, a decision-maker may have to be innovative in ensuring that the method of notice is effective. In *Cape Killarney Property Investments (Pty) Ltd v Mahamba*,[30] a case which concerned an eviction order against 542 respondents and their families who were illegally occupying land owned by the applicant, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[31] required notice of eviction to be 'written

[24] There are, however, circumstances in which only notice will be required.
[25] Section 3(2)(b)(i).
[26] [2006] ZAECHC 4.
[27] Ibid para 73.
[28] See below in respect of *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* [2007] ZACC 25 ('*HTF Developers*').
[29] [2009] ZACC 30 ('*Joseph*') para 61.
[30] 2000 (2) SA 67 (C) ('*Cape Killarney*').
[31] Act 19 of 1992.

and effective'.[32] Hlophe DJP held that since most of the occupants were Xhosa speaking, the notice had to be accompanied by a Xhosa translation.[33] Moreover, because a substantial proportion of the occupiers was illiterate, it was necessary for 'the contents of the order to be broadcast, in Xhosa, by a loudhailer throughout the community at certain times when many of the respondents would have been present.'[34] The approach taken in *Cape Killarney* is noteworthy for the Court's refusal to formalistically check the requirements of procedural fairness under the PAJA, but to give effectual meaning to its content.

Third, particular information must be included in the notice. In *Joseph* Skweyiya J referred to the information that needed to be included in a notice informing the occupants of a block of flats that their power was going to be cut:

> For the notice to be "adequate" it must contain all relevant information, including the date and time of the proposed disconnection, the reason for the proposed disconnection, and the place at which the affected parties can challenge the basis of the proposed disconnection…[35]

The information required in a notice is closely related to, and will often overlap with, the information that must be made available in order to afford a person a reasonable opportunity to make representations. This is discussed under the next heading in respect of adequate disclosure.

2.2.2. A reasonable opportunity to make representations

Reflecting the heartland of the *audi* principle, the PAJA provides that 'in order to give effect to procedurally fair administrative action' an administrator must give an affected person 'a reasonable opportunity to make representations.'[36] This provision goes to the very core of the *audi* principle, as the other standards by-and-large exist to prop up and give meaning to this standard. The PAJA does not give content to this standard, leaving much to the common law and the courts' interpretation. A number of established principles are notable.

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[32] Section 4(2).
[33] *Cape Killarney* supra note 30 para 15.
[34] Ibid.
[35] *Joseph* supra note 29 para 61.
[36] Section 3(2)(b)(ii).

First, a reasonable opportunity to make representations does not entitle an affected party to an oral hearing. No such general right exists at common law[37] and the PAJA similarly distinguishes between the core standard of 'a reasonable opportunity to make representations' and the discretionary standard of appearing in person.[38] Accordingly, in the majority of cases an affected party will only be entitled to make written representations to the decision-maker. However, as discussed below,[39] particular circumstances may entitle a person to make representations in person.

Second, a reasonable opportunity to make representations requires that a person is provided with adequate disclosure of the information and factors adverse to their case. Without this, the opportunity to make representations will not be meaningful, as a person cannot effectively represent their case if they are not apprised of the relevant facts motivating the impending decision. As per Theron J in *Gavric v Refugee Status Determination Officer, Cape Town*,[40]

> [A] person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests.

This does not, however, mean that an affected party is entitled to 'complete discovery', as this might take the requirement too far. Instead, the affected party need only receive as much information as is necessary for them 'to present and controvert evidence in a meaningful way.'[41] While dependent on the circumstances, this will usually mean that the affected party need only be informed of the crux or 'gist' of the case against them. As stated in the often-quoted dictum of Lord Mustill in the English case of *Doody*,[42] '[s]ince the person affected usually cannot make worthwhile representations without knowing what factors may weigh

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[37] For an overview of the position under the common law, see Hugh Corder 'The Content of the Audi Alteram Partem Rule in South African Administrative Law' 43(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 156-177 at 163.
[38] Section 3(3)(c) of the PAJA.
[39] Discussed below at Part 2.3.
[40] [2018] ZACC 38 para 79.
[41] *Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism* [2005] ZAWHC 7 para 79 ('*Earthlife Africa*').
[42] Supra note 4 para 14.

against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

Adequate disclosure will usually entail that the affected party not only be informed of any evidence adverse to their case, but also any legislative provision, contract, or policy. An example of the application of this principle is *Foulds v Minister of Home Affairs*,[43] a case that concerned an application for permanent residence status in South Africa that was rejected by the Immigrants Selection Board. On review, the applicant argued that the Board had relied on both evidence and principles of policy that had not been disclosed, inhibiting him from responding to either. Streicher J found that '[p]roper consideration of an application where adverse information has been obtained from sources other than the applicant requires that, if possible under the circumstances, the response of the applicant be obtained in respect of the adverse information.'[44] Streicher J found that this principle also applies to adverse policy considerations.[45] The Board was obliged 'to disclose to the applicant adverse information obtained and adverse policy considerations and to give the applicant an opportunity to respond thereto.'[46]

Third, a reasonable opportunity to make representations involves sufficient time to prepare and/or make representations. What constitutes sufficient or reasonable time depends on the circumstances. The complexity of the case to be answered may be determinative. In the case of *Turner v Jockey Club of South Africa,*[47] for example, disciplinary action against a jockey was set aside on the basis, inter alia, that the jockey had not had enough time even to read the affidavits supporting the charges against him, much less prepare a defence to those charges. The urgency of the matter may also be determinative. In *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd*[48] a period of 48 hours was deemed sufficient for representations due to the urgency of the matter. The case concerned the clearing of land that would result in serious damage to the environment; the Department of Agriculture consequently indicated its intention to direct the respondent, HTF, to cease the development of

[43] 1996 (4) SA 137 (W).
[44] Ibid at 148-149.
[45] Ibid at 149.
[46] Ibid at 149-150.
[47] 1974 (3) SA 633 (A) at 652-653.
[48] Supra note 28.

the property. Skweyiya J found that 'in light of the serious harm already caused and the threat of continuing harm, the 48-hour notice period, which HTF did not struggle to meet in submitting its representations, was adequate.'[49]

Similarly, in the recent case of *Esau v Minister of Co-Operative Governance and Traditional Affairs*,[50] 48 hours was considered a reasonable period for the public to make representations regarding the relaxation of COVID-19 Regulations. Plasket JA found that the urgency of relieving lockdown regulations made 48 hours reasonable:

> In that weighing-up process, the need to relieve the populace of some of the more draconian economic and social restrictions was an important factor. As the lockdown regulations impacted on the rights of people, their planned amelioration brought with it a measure of urgency that justified the limiting of the time available to members of the public to make representations. As soon as regulations no longer served a legitimate purpose, they had to be repealed or amended as quickly as reasonably possible.[51]

Plasket JA also noted that two days' notice was proven ex post facto to be adequate as the Minister had received 70 000 submissions within that time.[52] Plasket JA concluded:

> When the nature of the process is viewed holistically in the context of the [Disaster Management Act], the circumstances prevailing in respect of this particular disaster, the lockdown regulations that had been in force, and the intention to ameliorate some of the economic and social harshness of the lockdown regulations, I am of the view that the two-day period afforded to members of the public within which to make representations was reasonable.[53]

Fourth, the decision-maker may delegate the task of hearing or reading the representations to a competent person or body. The decision-maker must, however, be apprised of the key content of the representations. In *Camps Bay Ratepayers' and Residents' Association v Harrison*[54] Maya JA found that 'a decision-maker may rely on the expertise and advice of officials within his or her institution as long as he or she is fully apprised of the interested parties'

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[49] Ibid para 49.
[50] [2021] ZASCA 9 ('*Esau*').
[51] Ibid para 98.
[52] Ibid para 99.
[53] Ibid para 100.
[54] [2010] ZASCA 97 ('*Camps Bay Ratepayers*'). The case went on to the Constitutional Court in *Camps Bay Residents' and Ratepayers Association v Harrison* 2011 (4) SA 42 (CC) but the Court did not deal with this aspect of the matter.

representations'.[55] She noted that 'an accurate summary containing a fair synopsis of the relevant evidence and such representations will generally suffice.'[56] In *Earthlife Africa*[57] Griesel J found that on the facts it was appropriate for the decision-maker to rely on the 'assistance and expert advice of others' when making his decision. However, when deciding to do so, 'it is an essential requirement that, before making his or her decision, the decision-maker should be fully informed of the submissions made on behalf of interested parties'.[58] This, Griesel J found, could even be done by reading a summary, though that summary, at a minimum, would have to consists of a fair synopsis of all the relevant points made in the representations.[59]

Fifth, and finally, in a principle overlapping with the rule against bias, the decision-maker must receive the representations made to them with an open mind. In essence, if the right to a reasonable opportunity to make representations is to be meaningful, the decision-maker must be open to being persuaded by those representations.[60] The decision-maker is under no obligation to accept the submissions made by any party, but must give them sincere consideration. This is, of course, a difficult principle for a court to enforce (how does one prove that consideration was insincere?), though at a minimum Woolf et al suggest that a court could, for example, demand that the decision-maker must have had all written representations available to them prior to reaching a decision.[61]

2.3. The discretionary standards that can be required when more intense review is demanded by the circumstances

The variability of procedural fairness allows for its core standards to be supplemented with more intense discretionary standards in circumstances where procedural fairness demands it. The PAJA echoes this principle by stating that an administrator 'may, in his or its discretion' supplement the core standards with further listed standards.[62] First, an administrator may give

[55] Ibid para 28.
[56] Ibid.
[57] Supra note 41 para 76.
[58] Ibid.
[59] Ibid.
[60] See Woolf et al op cit note 23 at 419–20.
[61] Ibid at 420.
[62] Section 3(3).

a person the opportunity to 'obtain assistance and, in serious or complex cases, legal representation.'[63] This is in line with the common law in terms of which there is no general right to legal representation.[64] but the administrator may nevertheless decide that under the circumstances, a person might require assistance. As stated by Baxter in respect of the common law: '[i]n unusually complex cases involving complex evidence or legal issues, legal representation might be regarded as a *sine qua non* of a fair hearing, and the flexibility of natural justice would seem to accommodate this.'[65] Indeed, as noted by Marais JA in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee (1)*,[66] a case concerning procedural fairness under the PAJA, 'with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding.'[67]

Second, an administrator may provide a person with the opportunity 'to present and dispute information and arguments.'[68] Even though this requirement is set out separately in the PAJA, it also forms part of the core standard of a reasonable opportunity to make representations[69] and its separate enunciation is therefore superfluous. However, the argument has been made that it might refer to a right to cross-examine, or the right of reply or rebuttal,[70] which would extend beyond the core standard of a reasonable opportunity to make representations.

Third, the administrator may provide a person with the opportunity to appear in person.[71] This reflects the common law in terms of which persons affected by an administrative action did not have a right to an oral hearing,[72] but circumstances might dictate that it would be unfair not to provide an oral hearing. For example, as Currie and Klaaren point out, 'it may be unfair to require poorly educated or illiterate persons to articulate their position in writing.'[73] Another

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[63] Section 3(3)(a).
[64] Hoexter & Penfold op cit note 20 at 523; Baxter *Administrative Law* op cit note 22 at 555.
[65] Baxter ibid.
[66] [2002] ZASCA 44 ('*Hamata*').
[67] Ibid para 11.
[68] Section 3(3)(b).
[69] Hoexter & Penfold op cit note 20 at 524.
[70] See further ibid at 379–80; Jacque de Ville *Judicial Review of Administrative Action in South Africa* (2003) at 254.
[71] Section 3(3)(c).
[72] Hoexter & Penfold op cit note 20 at 526.
[73] Currie & Klaaren op cit note 21 at 101.

example appears from the case of *South African Jewish Board of Deputies v Sutherland NO*,[74] where the applicant had lodged a complaint regarding the broadcasting of a radio programme in which Holocaust denial was evident. While the applicant had been given many opportunities to make representations, it had made a request for a formal hearing that was refused. On these facts Malan J highlighted that, in requesting a formal hearing, the applicant had made clear 'that it had the intention of adducing evidence at such a formal hearing to demonstrate the kind of harm broadcasts of the kind complained of can and has caused and what its impact on the Jewish community and its members can be.'[75] Malan J found that '[t]he first respondent, by denying the applicant a formal hearing, denied it access to a forum to challenge and debate a matter of considerable gravity.'[76] As a consequence, Malan J found that 'the refusal to convene a formal hearing violated the applicants' right to procedurally fair administrative action.'[77]

The question arises whether a decision can be set aside for procedural unfairness on the basis that an administrator should have included a 'discretionary' standard. The wording of the PAJA certainly suggests that a decision-maker cannot be faulted for failing to make these standards available. However, the approach of the courts in *Hamata*[78] and *Sutherland*[79] suggests that in particular circumstances the more intense discretionary standards will be compulsory in order for a procedure to be regarded as fair. This approach supports the variability of procedural fairness and indicates that the categorisation of 'core' and 'discretionary' standards exists to provide guidelines for determining the content of procedural fairness according to the circumstances.

2.4. Departures from the core standards of procedural fairness

The variability of procedural fairness not only allows for its core standards to be supplemented with more intense discretionary standards but also allows for its core standards to be departed from in particular circumstances and still be considered procedurally fair. Under the PAJA,

[74] 2004 (4) SA 368 (W) ('*Sutherland*').
[75] Ibid para 34.
[76] Ibid.
[77] Ibid.
[78] Supra note 48.
[79] Supra note 74.

despite the fact that the core standards are couched in instructive terms ('must'),[80] a decision-maker may depart from these requirements 'if it is reasonable and justifiable in the circumstances'.[81] This determination is made as follows:

> In determining whether a departure…is reasonable and justifiable, an administrator must take into account all relevant factors, including—
> (i) the objects of the empowering provision;
> (ii) the nature and purpose of, and the need to take, the administrative action;
> (iii) the likely effect of the administrative action;
> (iv) the urgency of taking the administrative action or the urgency of the matter; and
> (v) the need to promote an efficient administration and good governance.[82]

These factors reflect the factors taken into account at common law and in cases decided in respect of section 33 of the Constitution, such as *Premier, Mpumalanga*[83] and *Kyalami Ridge*.[84]

Rogers J, in *Scalabrini Centre, Cape Town v Minister of Home Affairs* ('*Scalabrini I*'),[85] stated that a reasonable and justifiable departure does not necessarily mean that no procedural standards are required by procedural fairness:

> The word 'depart' does not mean that procedural fairness can be thrown overboard altogether in such circumstances (unless, of course, the circumstances of the case are such as to make a complete abrogation of the requirement fair and reasonable). In my view, the extent of departure must be tailored to meet the circumstances which make a departure fair and reasonable; the departure must be no greater than justified in those circumstances. This would generally entail that the decision-maker should follow some other procedure calculated to achieve as far as reasonably possible the right to procedurally fair administrative action.[86]

Based on Rogers J's reasoning, circumstances such as urgency might, for example, nullify the right to an opportunity to make representations but still require adequate notification of the impending action for a decision to be considered procedurally fair.

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[80] Section 3(2).
[81] Section 3(4)(a)
[82] Section 3(4)(b).
[83] Supra note 6.
[84] Supra note 7.
[85] [2013] ZAWCHC 449 ('*Scalabrini I*').
[86] Ibid para 86.

The facts of *Scalabrini I* concerned a decision to close a refugee reception office that was considered an administrative action affecting the public.[87] Rogers J found that if it was impracticable for the Director-General (DG) to conduct a public inquiry (which was potentially too time-consuming) or a notice and comment procedure (where it was not possible for future refugee seekers to comment), then the DG had to create some other procedure.[88] On the facts before the Court, '[t]he obvious course', Rogers J suggested, 'would have been to seek comment from the organisations who would have participated in a public inquiry, had one been held…'.[89] This, he found, could have sufficed as a 'modified form of fair process.'[90] In taking this approach, Rogers J displayed notably substantive reasoning, as the DG's justification for departure from the listed processes was valid and on a formalistic interpretation he therefore did not have to do anything to meet the requirements of procedural fairness. Rogers J's approach, however, is not preoccupied with box-ticking the procedural fairness provisions of the PAJA, but concerned with its overall aim, answering the question: what would be fair under the circumstances?

2.5. Fair but different procedures

In certain circumstances, the principles of procedural fairness might be overridden by a process for consultation set out by the legislature. The PAJA, for example, allows an administrator to follow an alternative procedure '[w]here an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2)'.[91] Therefore, where an empowering provision (such as legislation or a contract)[92] sets out an alternative procedure to the PAJA's core standards (or core procedure), the administrator may apply the alternative procedure. Even though the two procedures may not resemble each other at all, following the alternative procedure can meet the requirements of section 3 of the PAJA. The only qualification is that the alternative procedure be considered 'fair'. What is 'fair' will depend on the circumstances, but 'will be judged against the general requirement

[87] Ibid para 81.
[88] Ibid para 87.
[89] Ibid.
[90] Ibid.
[91] Section 3(5).
[92] 'Empowering provision' is defined in s 1 of the PAJA as 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which administrative action was purportedly taken'.

that the affected person must have a meaningful opportunity to influence the administrative decision.'[93]

3. THE APPLICATION OF PROCEDURAL FAIRNESS

In South African administrative law, the applicability of procedural fairness is determined first and foremost by the threshold definition of 'administrative action' in section 1 of the PAJA, as set out in Chapter 2 of this thesis. There are, however, three additional factors to consider when determining whether the demands of procedural fairness are applicable to a particular decision, namely (i) whether there is a legitimate expectation that can widen the scope of the application of procedural fairness; (ii) whether procedural fairness is applicable where a decision is a preliminary decision made as part of a multi-stage decision-making process; and (iii) whether a decision affects the public and consequently broadens the application of procedural fairness.

3.1. The doctrine of legitimate expectations

While administrative action is understood to constitute decisions that affect the rights of a person or persons, the right to procedural fairness may be extended to persons who do not have a right that is adversely affected before a public decision is taken but nonetheless have a legitimate expectation of an opportunity to be heard prior to the decision being taken. The doctrine of legitimate expectations therefore has the effect of broadening the scope of application of procedural fairness.

As was traversed in Chapter 1, South African courts adopted the English doctrine of legitimate expectations in *Administrator of Transvaal v Traub*,[94] a decision that has proved influential in the constitutional era. Section 24(b) of the 1993 Constitution provided expressly for legitimate expectations, requiring 'procedurally fair administrative action where [a person's] rights or legitimate expectations is affected or threatened'. Mention of legitimate expectations was absent from section 33 of the 1996 Constitution, but that provision in any event remained

[93] Melanie Murcott 'Procedural Fairness' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* 2 ed (2021) 165–89 at 155.
[94] [1989] ZASCA 90 ('*Traub*').

inapplicable until the PAJA came into effect and provided for legitimate expectations.[95] Moreover, as Hoexter writes, 'it is well understood that common law principles and doctrines such as this have been absorbed by the Constitution and that they form part of the "one system of law" that is ultimately governed by the Constitution'.[96]

In *Premier, Mpumalanga*,[97] O'Regan J found that '[o]nce a person establishes that a legitimate expectation has arisen, it is clear from the language of section 24(b) of the interim Constitution that he or she will be entitled to procedural fairness in relation to administrative action that may affect or threaten that expectation'. O'Regan J also noted, like Corbett CJ in *Traub*, that an '[e]xpectation can arise where a person has an expectation of a substantive benefit, or an expectation of a procedural kind,' and that '[t]here are also circumstances in which a legitimate expectation will arise which has inter-related substantive and procedural elements.'[98] On the facts *Premier, Mpumalanga* was such a case, as school governing bodies were deemed to have a legitimate expectation that government bursaries would continue to be paid (a substantive expectation) subject to reasonable notice of termination (a procedural expectation).

Premier, Mpumalanga was followed by *President of the Republic of South Africa v South African Rugby Football Union* (*SARFU*).[99] In that case the Constitutional Court clarified that legitimate expectations are not limited to an express promise or regular practice. It found that there may also be a legitimate expectation where the context of the case requires it. The question is not only whether 'an expectation exists in the mind of the litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate'.[100] The key question is thus 'whether the duty to act fairly would require a hearing in those circumstances.'[101]

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[95] Case law concerning legitimate expectations after the enactment of the interim Constitution and prior to the enactment of the PAJA was therefore based on section 24(b) of the interim Constitution. The omission in the final Constitution therefore had no practical effect.

[96] Cora Hoexter 'The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa' in Matthew Groves & Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (2017) 165–88 at 170.

[97] Supra note 6 para 36.

[98] Ibid.

[99] [1999] ZACC 11.

[100] Ibid para 214.

[101] Ibid.

3.2. Multi-stage decision-making

A complicating factor in the application of procedural fairness is that administrative decisions are often made in stages. Preliminary decisions are followed by final decisions. For example, the recommendation arising from an investigation may be followed by a decision to prosecute. A decision to suspend an employee may, after a hearing, be followed by a decision to dismiss. A perennially difficult question in respect of multi-stage decision-making is which stages of a decision are subject to the standards of procedural fairness and which are not. Hoexter and Penfold write that '[i]n an ideal world fairness would be applied at *every* stage of a multi-staged decision, and not merely by the final decision-maker.'[102] However, this is too great a burden to place on the public administration and a line must therefore be drawn between preliminary decisions that do attract procedural standards and those that do not.

Several elements of the definition of 'administrative action' in section 1 of the PAJA suggest that only final decisions constitute administrative action and therefore need to be procedurally fair: these are the references to 'a decision', 'adversely affects rights', and 'direct external legal effect', each of which is considered in Chapter 2 of this thesis.[103] The confining effect of these phrases was however ameliorated in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works,*[104] where the SCA suggested that 'adversely affected rights' and 'direct, external legal effect' should be interpreted only 'to emphasise that administrative action impact directly and immediately on individuals.'[105] This finding has been significant as it allows for preliminary decisions to qualify as administrative action in particular contexts.

The most significant factor in favour of applying procedural fairness to a preliminary decision is that such a decision can cause substantial harm to an affected party, for instance by affecting that person's reputation or paving the way to an adverse final decision with serious consequences. In the constitutional era, the serious consequences that a preliminary decision may have were recognised in *Director: Mineral Development, Gauteng Region v Save the Vaal*

[102] Hoexter & Penfold op cit note 20 at 597, my emphasis.
[103] Part 3.2.
[104] 2005 (6) SA 313 (SCA).
[105] Ibid para 23.

Environment,[106] where Olivier JA found that '[i]t is settled law that a mere preliminary decision can have serious consequences in particular cases, *inter alia* where it lays "… the necessary foundation for a possible decision …" which has grave results.'[107] In such a case, he found, the *audi* rule applies to the consideration of the preliminary decision.[108]

The question of procedural fairness in respect of preliminary decisions often arises in the case of investigative actions preceding a final decision. Here too preliminary decisions may harm the affected person. This was recognised by Lord Denning in the famous English case of *Re Pergamon Press Ltd,*[109] in relation to inspectors' actions in an investigative inquiry:

> They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. The report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions ... Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly.

In South African law there have been cases in which procedural fairness has been required in investigative actions. A key case was that of *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga*.[110] Oosthuizen's Transport was a company that transported coal from mines to power stations. After numerous overloading offences had been committed by its drivers, the MEC for Road Traffic Matters appointed a team to investigate its activities in terms of the National Road Traffic Act.[111] In its report, the investigative team found that the company was in breach of its duty under the Act and recommended that the operator cards in respect of its vehicles be suspended. Oosthuizen's Transport sought an interim interdict restraining the MEC from suspending its operator cards or making any further decision based on the report. It claimed that the investigation team, in compiling its report, had denied the company the opportunity to know the case against it and to make representations, despite the company having requested the opportunity to do so. Fabricius AJ, noting that '[e]ven a preliminary decision can have serious consequences especially where it "lays the foundation for a possible

[106] [1999] ZASCA 9.
[107] Ibid para 17.
[108] Ibid.
[109] [1970] 3 All ER 535 (CA) at 539D-F.
[110] 2008 (2) SA 570 (T).
[111] Act 93 of 1996.

decision" which may have grave results,'[112] found that the report of the investigation team was administrative action[113] and, under the circumstances, the company had a right to know the case against it and to be heard.[114]

Investigative action will not, however, always be required to be procedurally fair. It depends on the impact of the investigative action on an individual. According to Woolf et al, in determining whether or not investigative action needs to be procedurally fair, notice should be taken of '[t]he degree of proximity between the investigation in question and an act or decision directly averse to the interests of the claimant':

> [A] person conducting a preliminary investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place is not normally under any obligation to comply with the rules of fairness. But such a person may be placed under such an obligation if the investigation is an integral and necessary part of a process which may terminate in action adverse to the interests of a person claiming to be heard before him.[115]

In *Viking Pony Africa Pumps (Pty) Lt t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd*[116] the Constitutional Court considered an investigation into fraud in the public procurement process. Mogoeng J found that '[i]t is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.'[117] He found that it was only where there was a pronouncement of culpability that the affected party would need to be afforded an opportunity to make representations.[118]

A final question is whether, in circumstances where a hearing has taken place prior to a preliminary decision, a hearing must once again be afforded before the making of the final decision. This will usually depend on a consideration of the process as a whole. Where, for example, the final decision-maker must make a decision based only on recorded information

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[112] Ibid para 25, quoting *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A) at 188B-189A.
[113] Ibid para 30.
[114] Ibid paras 33-34.
[115] Woolf et al op cit note 23 at 500-501.
[116] [2010] ZACC 21.
[117] Ibid para 38.
[118] Ibid para 39.

without having to make any enquiry, no further opportunity to make representations need be provided.[119] However, if new evidence or information is placed before the decision-maker, an opportunity to make further representations may need to be provided to any affected persons.

This was the case in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*.[120] Eskom sought authorisation from the Director-General (DG) of the Department of Environmental Affairs and Tourism to construct a demonstration model pebble bed modular reactor at the Koeberg Nuclear Power station close to Cape Town. As part of its application for authorisation, Eskom commissioned an environmental impact report (EIR), a draft of which was made available to the public for comment. A final version of the EIR was then submitted to the DG, who granted authorisation. This decision was brought on review by Earthlife Africa, a group of environmental activists who were concerned about the potential risk that the reactor posed to the residents of Cape Town. Earthlife averred that the decision had been procedurally unfair as it had only been provided with the opportunity to comment on the draft EIR and not on the final EIR, which was substantially different and upon which the DG had made his decision. Griesel J concluded that because new facts had been placed before the DG, Earthlife 'was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the DG on the new aspects not previously addressed in its submission in relation to the draft EIR.[121]

3.3. Administrative action affecting the public

It is not in every conception of procedural fairness that decisions affecting the public attract its demands. In South Africa's pre-constitutional era, for example, administrative decisions affecting the public were labelled 'legislative' and, according to the classification of functions doctrine, did not therefore attract the standards of natural justice.[122] The PAJA, however, introduced a significant innovation in South African administrative law by requiring that

[119] De Ville op cit note 70 at 244.
[120] *Earthlife Africa* supra note 41.
[121] Ibid para 95.
[122] See Lawrence Baxter 'Fairness and Natural Justice in English and South African Law' (1979) 96 *SALJ* 607.

administrative action that 'materially and adversely affects the rights of the public' must be procedurally fair.[123]

The PAJA in section 4 requires that when making a decision that affects the public, the decision-maker must either (i) hold a public inquiry or (ii) follow a notice and comment procedure, two processes designed to cater for public participation in government decision-making. These processes are fundamentally the same as those applicable to administrative action affecting an individual, as they are both aimed at providing persons adversely affected by a public decision with an opportunity to be heard. The requirements for administrative action affecting the public can likewise be departed from in appropriate circumstances[124] and be met by a 'fair but different' procedure where the administrator is empowered by an empowering provision to follow such a procedure.[125]

This addition to South African administrative law has been celebrated for the way in which it buttresses the constitutional values of openness and accountability in respect of another category of public decision-making. As Karthy Govender has explained,

> It fills an important lacuna because the constitutional provisions relating to the legislative process regulate law making by Parliament at the top end and the administrative-law rules of procedural fairness regulate decisions that affect persons at the bottom end. However, neither of these processes effectively regulate the intermediate far reaching decisions made by administrators that are of a general nature and which impact adversely on the rights of the public. Section 4 seeks to remedy this deficiency. In doing so it advances the core constitutional values of participatory democracy and accountable governance.[126]

This innovation thereby expands the application of procedural fairness to more types of public decision-making.

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[123] Section 4(1).
[124] Section 4(4)(a).
[125] Section (4)(1)(d).
[126] Karthy Govender 'An Assessment of Section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa' (2003) 18 *SA Public Law* 404–29 at 406.

4. CONCLUSION

Procedural fairness under South African law is generous in its application to administrative actions: legitimate expectations attract its demands and the courts have found that it applies to some preliminary decisions in multi-stage decision-making. It has also been extended to administrative actions affecting the public, filling a significant 'lacuna' in the judicial supervision of procedural fairness in the exercise of public power.[127]

The variability of procedural fairness has clearly been recognised as inherent to its functioning as a ground of review under the common law, the Constitution and the PAJA. The PAJA also provides an effective framework for giving variable content to procedural fairness in a manner that is roughly predictable. In respect of administrative action affecting individuals, core standards, namely adequate disclosure and an opportunity to make representations, are provided that will generally be applicable but may in appropriate circumstances be departed from or supplemented, depending on the appropriate intensity of review. The fact that the core standards can be departed from illustrates that the content of procedural fairness can be varied to show deference to the government, when appropriate. Consideration of the separation of powers is essentially built into the concept.

It is notable that in giving content to procedural fairness under the Constitution and the PAJA, the courts have been markedly creative and robust, showing no interest in the mechanical application of the PAJA's provisions. In cases such as *Cape Killarney*[128] and *Scalabrini I,*[129] for example, the courts avoided box-ticking the requirements of the PAJA but instead engaged in value-laden inquiries into what procedural fairness required under the circumstances. Providing a meaningful opportunity for parties to influence the decision at hand has superseded any artificial attempt at meeting the demands of procedural fairness under the PAJA. In conclusion, procedural values have been keenly safeguarded by both the legislature and judiciary in respect of administrative action.

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[127] Ibid.
[128] Supra note 30.
[129] Supra note 85.

The principles of procedural fairness, as set out in this chapter, will be relied on later in this thesis in four respects. First, they will be relied on to compare procedural fairness with procedural rationality in Chapter 5 and demonstrate the key differences between the two grounds. Second, they will be used in Chapter 6, where it is argued that procedural rationality, while supposedly a species of rationality, has been given content more akin to procedural fairness than rationality review. Third, they will be relied on in Chapter 7, in the case studies considering how the content of procedural fairness would compare with the content of procedural rationality if applied to selected non-administrative action. Finally, the inherent variability of procedural fairness is essential to my argument in Chapter 8 that procedural fairness should be included as a ground of review under the principle of legality, as it is its variability that would allow it to be applied in a manner that does not encroach upon the separation of powers. The findings in this chapter bear little relevance to Chapter 4, which is concerned with 'substantive rationality' as a foundation for the criticism of procedural rationality in Chapter 6.

CHAPTER 4

THE PRINCIPLES OF REVIEW FOR SUBSTANTIVE RATIONALITY

1. INTRODUCTION

While it is the difference between procedural fairness and procedural rationality that is the focus of this thesis, it is necessary also to analyse the concept of substantive or 'decisional' rationality. For it is the principle of substantive rationality – and not procedural fairness – from which procedural rationality is derived, and it provides the context within which procedural rationality must be understood. Furthermore, procedural rationality's lack of coherence with the principle of substantive rationality forms the basis of critique of procedural rationality in Chapter 6.

Rationality was first recognized as a ground of review under the principle of legality in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*.[1] At its simplest, rationality is concerned with the logic of decisions. Is there a logical or rational connection between a decision and the purpose for which the decision was taken? This is often expressed as: is there a rational link between the means (decision) and ends (purpose)? The open-endedness of this test requires courts to give it further meaning, something that they have often done in contradictory ways.

This chapter is set out as follows. In Part 2, the introduction of rationality review into South African law under the principle of legality is considered. In Part 3, the wide application of rationality review is briefly outlined. In Part 4, the content of rationality review is analysed. In determining its content, three footholds are set out that have been essential to understanding what rationality review is, namely: (i) a minimum standard, (ii) requiring one rational link, and (iii) a standard distinct from reasonableness that does not allow courts to consider any better options that the decision-maker could have made. Two questions regarding rationality that remain unresolved by our courts are then considered. These are: (i) whether rationality under legality is the same as rationality under the PAJA, and (ii) whether rationality is a variable

[1] [2000] ZACC 1 ('*Pharmaceutical Manufacturers*').

concept. In Part 5, three recent Constitutional Court judgments on substantive rationality are analysed, from which it is clear that the Court has clamped down on the standard, giving it a very low threshold. Conclusions are drawn in Part 6.

2. THE INCLUSION OF RATIONALITY REVIEW UNDER THE PRINCIPLE OF LEGALITY: *PHARMACEUTICAL MANUFACTURERS*

Subsequent to the recognition of lawfulness as a ground of review under the principle of legality,[2] rationality was recognised as a further ground of review under the principle of legality in the case of *Pharmaceutical Manufacturers*.[3] The case concerned an error made by the President in bringing the South African Medicines and Medical Devices Regulatory Authority Act into operation prematurely. The President had brought the Act into operation before the necessary regulations had been drafted, rendering the Act unworkable.

Having found that the President's decision did not constitute 'administrative action' under the Constitution,[4] Chaskalson P considered whether the decision nevertheless stood to be set aside under the principle of legality, which at that time had only been relied on to review decisions for unlawfulness. For a unanimous Constitutional Court, Chaskalson P found that the rule of law also requires that all exercise of public power must be rational:

> 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.[5]

Chaskalson P noted that the test for rationality is objective. A decision that is objectively irrational will not be rendered rational because the decision-maker mistakenly and in good faith

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[2] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17 ('*Fedsure*').
[3] Supra note 1.
[4] See Chapter 2 Part 3.1.
[5] *Pharmaceutical Manufacturers* supra note 1 para 85.

believes that they have made a rational decision.[6] Accordingly, the fact that the President believed that he was making a rational decision did not preclude the Court from reviewing his decision for irrationality.

Chaskalson P also highlighted that rationality under the rule of law is 'a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.'[7] He added:

> The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. 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 the irrational decision.[8]

He found that this was such a rare occasion. As there was no rational basis provided for the decision to bring the Act into operation, Chaskalson P concluded that the decision should be set aside for irrationality.

3. THE APPLICATION OF RATIONALITY REVIEW

While Chaskalson P thought it likely that a finding of irrationality would be made only rarely,[9] review for rationality has become very popular since *Pharmaceutical Manufacturers*, in part due to its immensely wide scope of application. It can be used to review original legislation[10] as well as all other exercises of public power, including even the most political cases of executive decision-making that traditionally lay outside the jurisdiction of the courts. This was made clear in *Kaunda v President of the Republic of South Africa*,[11] where the Constitutional

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[6] Ibid para 86.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] See *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3 ('*Affordable Medicines*'); *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10 ('*Merafong*'); *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5 ('*Poverty Alleviation Network*').
[11] [2004] ZACC 5 ('*Kaunda*') paras 78-79.

Court found that even decisions made by the President regarding the conduct of foreign affairs need to be rational in order to pass constitutional muster.

As noted in Chapter 2, another reason why rationality has been frequently applied is the complexity of the 'administrative action' enquiry: despite being required to first consider whether an exercise of public power that is subject to review constitutes administrative action, courts have in many instances skipped that enquiry entirely and decided the matter under the principle of legality.[12] As a result, a number of decisions have been reviewed for rationality under the principle of legality, where they should have been reviewed for rationality or even reasonableness under the PAJA.

4. THE CONTENT OF RATIONALITY REVIEW

The test for rationality under the principle of legality is often described as whether the means (the decision) is capable of achieving the ends (the purpose of the legislation). This formulation is deceptively simple, as the content of rationality is in fact much harder to pin down. In this section I consider what we do know about rationality – (i) that it is a minimum standard; (ii) that it requires a rational link; and (iii) how it is different to reasonableness – before addressing two uncertain questions about the content of rationality (iv) whether it has the same content as rationality under the PAJA; and (v) whether it is variable.

4.1. A minimum standard of review

In *Pharmaceutical Manufacturers* Chaskalson P referred to review for rationality as a 'minimum threshold requirement' and stated that '[a] decision that is objectively irrational is likely to be made only rarely'.[13] This was recently reemphasised in the case of *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd*,[14] where Jafta J and Victor AJ found that 'rationality is the lowest threshold required for the exercise of public power.'

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[12] See Lauren Kohn 'Our Curious Administrative Law Love Triangle: The Complex Interplay Between the PAJA, the Constitution and the Common Law' (2013) 18 *Southern African Public Law* 22–39; Radley Henrico 'Subverting the Promotion of Administrative Justice Act in Judicial Review: The Cause of Much Uncertainty in South African Administrative Law' (2018) 2 *Journal of South African Law* 288–307.

[13] Supra note 1 para 90.

[14] [2021] ZACC 21 ('*Sembcorp Siza*') para 60.

The reasoning behind these findings is based on the separation of powers. As rationality delves somewhat into the merits of the decision (the domain of the decision-maker), the courts have reiterated over and again that this must be done minimally in order to uphold the separation of powers. The courts therefore show a particularly high degree of deference when dealing with exercises of public power that do not amount to administrative action.

4.2. A rational link

While the courts have not expressly articulated it in this way, Price usefully describes the rationality enquiry as consisting of two steps.[15] The first step asks whether in making a decision, the decision-maker had a legitimate objective. Where there is no legitimate objective or purpose, the decision will be irrational. This step is, however, usually easily satisfied and not the stumbling-block for public decision-making. The second step asks whether the decision made is rationally related to that objective, or 'whether the law *serves* the purpose sufficiently well to merit the description of bearing a "rational connection" or "relationship" to it.'[16] As Price points out, this step is vague as it does not specify *how* rational a decision needs to be, or rather how closely connected the decision must be to the objective.[17] If a decision is not at all capable of reaching the objective, it will clearly be irrational. An example of this would be the decision reviewed in *Pharmaceutical Manufacturers*,[18] as the President's decision to implement the relevant legislation prematurely could not possibly result in a workable Act. However, decisions that are not clearly incapable of reaching the objective raise the question of intensity. How well must the decision serve the purpose?

Due to the minimum-threshold interpretation of rationality, the courts have given content to rationality in a way that suggests that the decision does not have to serve the purpose particularly well. It must just serve the purpose in some way. In a helpful formulation, Du Plessis and Scott suggest that rationality requires only that 'the option selected brings the state

[15] Alistair Price 'The Content and Justification of Rationality Review' (2010) 25 *Southern African Public Law* 346 at 354–5, emphasis in original.
[16] Ibid at 358.
[17] Ibid, my emphasis.
[18] Supra note 1.

closer to its purpose.'[19] Rationality therefore does not require that the decision-maker select the best, or even one of the better, available options for reaching a particular objective. This is particularly apparent when comparing rationality with reasonableness.

4.3. Rationality as a standard lower than reasonableness

Under the PAJA a decision may be substantively reviewed for reasonableness, as well as rationality. The PAJA defines reasonableness in an unhelpfully circular manner (a decision 'so unreasonable that no reasonable person could have so exercised the power or performed the function').[20] However the decisive test for reasonableness was set out by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[21] where she found that '[w]hat will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.' She found that the relevant circumstances that need to be taken into account include:

1. The nature of the decision;
2. The identity and expertise of the decision-maker;
3. The range of factors relevant to the decision;
4. The reasons given for the decision;
5. The nature of the competing interests involved; and
6. The impact of the decision on the lives and well-being of those affected.[22]

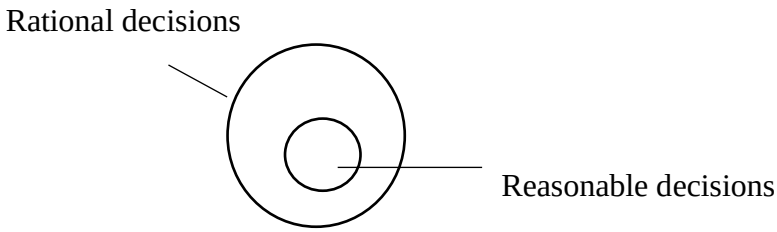
O'Regan's factors entail a balancing exercise in which each factor is attributed appropriate weight. The test recognises the variability of reasonableness. Murphy J found that it 'confirms the inherent variability of the concept and the need for flexibility in its application'.[23] Hoexter agrees that there is great scope for variability in this test as 'each of the six factors mentioned

[19] Max du Plessis & Stuart Scott 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 *SALJ* 597–620 at 602.
[20] Section 6(2)(g) of the PAJA.
[21] [2004] ZACC 15 ('*Bato Star*') para 45.
[22] Ibid.
[23] *Free Market Foundation v Minister of Labour* [2016] ZAGPPHC 266 para 97.

seems capable of making a real difference to the court's assessment of reasonableness in a particular case'.[24]

Reasonableness formulated in this way is a more searching standard than rationality, sometimes referred to as encompassing rationality plus proportionality (reasonableness = rationality + proportionality).[25] If reasonableness encompasses rationality, all reasonable decisions will also be rational but not all rational decisions will be reasonable. Stated in another way, if there is an absence of a rational link between a decision and its purpose, it is not a decision that a reasonable decision-maker could reach. However, if there is a rational link, it is still possible that the decision-maker did not weigh up the relevant considerations appropriately, therefore rendering the decision unreasonable. This distinction is illustrated in Figure 3.

Figure 3



Source: Author

Another way in which to appreciate the difference between rationality and reasonableness is that reasonableness allows the court – in appropriate circumstances – to determine whether the decision-maker could have made a better decision. As Kohn writes, reasonableness 'essentially requires that it be shown that the means chosen were the most appropriate, or "suitable", in the circumstances.'[26] This is not so with rationality, which only asks whether the means adopted are rationally connected to the purpose for which the power was conferred, and not whether

[24] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) at 496.
[25] Hugh Corder 'Without Deference, with Respect: A Response to Justice O'Regan' (2004) 121 *SALJ* 438 at 443; Lauren Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *SALJ* 810 at 826; Hoexter & Penfold ibid at 471–9.
[26] Kohn ibid at 826–7.

there was another approach the decision-maker could or should have taken. As Ngcobo CJ stated in *Albutt v Centre for the Study of Violence and Reconciliation*[27] in respect of rationality:

> Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected … the purpose of the inquiry 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.

Consider the following. When a Minister is faced with an issue that requires a decision, there may be a number of possible decisions, some of which are rational and some of which are irrational. Some of the rational decisions are, however, more appropriate than the others. In order to make a rational decision, the Minister need only pick one of the rational options. In order to make a reasonable decision, on the other hand, the Minister must pick an option that is both rational and appropriate, having weighed up the competing considerations. Accordingly, 'the range of rational laws and acts in a particular context will be wider than the range of reasonable laws and acts.'[28]

Therefore, while reasonableness allows the court to be more intrusive, telling government in appropriate circumstances that it should have picked a better available option, rationality is non-prescriptive. The court is limited to considering whether the means that were in fact chosen are capable of achieving the established ends.

The distinction between rationality and reasonableness is well-exemplified by the recent spate of judgments concerning the review of COVID-19 regulations. In determining whether a particular COVID-19 regulation made under the Disaster Management Act was rational, the question was whether the regulation (the means) was capable of curbing the spread of COVID-19 and saving lives (the purpose for which the power to make COVID-19 regulations was given).

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[27] [2010] ZACC 4 ('*Albutt*') para 51.

[28] Price 'Content and Justification' op cit note 15 at 359.

In *De Beer v Minister of Cooperative Governance and Traditional Affairs*,[29] the High Court applied the wrong test. In respect of regulation 35, which permitted funerals with up to 50 attendees but prohibited night vigils, Davis J found as follows:

> Random other regulations regarding funerals and the passing of persons also lack rationality. If one wants to prevent the spreading of the virus through close proximity, why ban night vigils totally? Why not impose time, distance and closed casket prohibitions? Why not allow a vigil without the body of the deceased? Such a limitation on a cultural practice would be a lesser limitation than an absolute prohibition.[30]

This is, however, precisely the misapplication of the test for rationality that the Constitutional Court in *Albutt* warned against. As the SCA pointed out on appeal:

> …[T]he high court regarded the prohibition of night vigils as irrational because, in the court's opinion, there were more appropriate (ie less restrictive) ways of achieving the lawmaker's purpose. That is not an application of the rationality test. It engages in the very enquiry that the rationality test precludes, that is, whether the court can craft a better regulation than the Minister did. The high court should have asked itself whether prohibiting night vigils is rationally related to the purpose of restricting the spread of the virus, not whether a more limited restriction might also have achieved that purpose.[31]

Davis J had thus engaged in a test akin to a reasonableness enquiry, rather than the minimal and deferential rationality test.

The High Court fared better in *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa*,[32] which concerned the ban of tobacco products introduced by the Minister of Health during the first wave of COVID-19. A full bench of the High Court found that the question before it was whether there was a rational link between the banning of tobacco products and the purpose of stopping the spread of COVID-19 and saving lives. Stopping the spread of COVID-19 was clearly a legitimate government purpose, but was the tobacco ban rationally related to that purpose? The opposing sides relied on contradictory expert evidence

[29] [2020] ZAGPPHC 184.
[30] Ibid para 7.5.
[31] *Minister of Cooperative Governance and Traditional Affairs v De Beer* [2021] ZASCA 95 para 105.
[32] [2020] ZAGPPHC 246 ('*Fair-Trade Tobacco*').

regarding the link between the use of tobacco products and the spread and effects of COVID-19.

The Court determined that it was not required to evaluate the evidence relied upon by the opposing parties: '[i]t 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.'[33] The Court explained: '[t]he question before us is not so much whether the Minister could have adopted less restrictive means. The question that is before us is rather whether the means used were rational and not whether other or better-suited means could have been adopted by the Minister.'[34] The Court concluded that as there was *some link* between a tobacco ban and saving lives, the decision was rational.

4.4. An uncertainty: Is rationality under the principle of legality the same as rationality under the PAJA?

It is well-established that lawfulness under the principle of legality has the same content as lawfulness under the PAJA.[35] However, there has been uncertainty as to whether rationality under the principle of legality is the same as rationality under the PAJA, or whether the latter is more searching, both in terms of intensity and the rational links required. Section 6(2)(f)(ii) of the PAJA provides that a court may review an administrative action where that action is not rationally connected to –

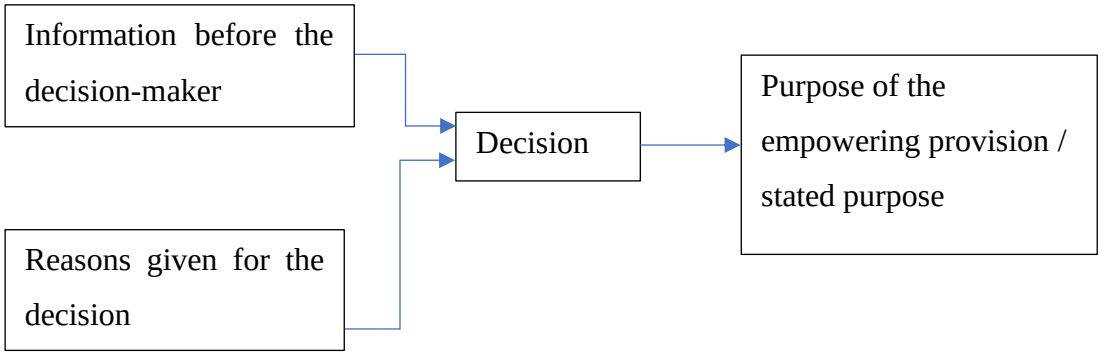
> (aa) the purpose for which it was taken;
> (bb) the purpose of the empowering provision;
> (cc) the information before the administrator; or
> (dd) the reasons given for it by the administrator.

Subsections (aa) and (bb) are concerned with means-ends rationality, that is, whether a decision or action is capable of achieving its intended purpose. The decision reviewed in *Pharmaceutical Manufacturers* – while not being subject to the PAJA – would fall into this

[33] Ibid para 41.
[34] Ibid para 50.
[35] Hoexter & Penfold op cit note 24 at 357.

category, as the President's decision to implement the legislation was not capable of reaching the purpose of regulating medicines in South Africa. The distinction between subsections (aa) and (bb) is born from the recognition that the purpose of the decision and the purpose of the empowering legislation may not necessarily be one and the same. Subsections (cc) and (dd) provide other necessary links for a decision to be considered rational. Subsection (cc) requires that the information before the decision-maker forms a justifiable basis upon which to make a decision, while subsection (dd) requires that the reasons the decision-maker provides for the decision are rationally linked to the decision itself. Schematically, as set out in Figure 4, all the following rational links are required.

Figure 4



Source: Author

Is the test for rationality under the PAJA the same as the test for rationality under the principle of legality? The courts and academics have expressed contradictory views in this regard. Wallis JA opined that the ground of rationality review under the principle of legality is 'a narrow one' and 'not necessarily the same as that applied in a review under s 6(2)(f)(ii) of the PAJA'.[36] Hoexter and Penfold agree, suggesting that PAJA rationality 'goes further, and involves more intensive scrutiny of the merits, than the conception of rationality that forms part of legality review.'[37]

[36] *Minister of Defence v Xulu* [2018] ZASCA 65 para 50.
[37] Hoexter & Penfold op cit note 24 at 465.

In contrast, in *Democratic Alliance v President of South Africa* ('*Simelane*'),[38] Yacoob ADCJ found that '[r]ationality does not conceive of differing thresholds' and that '[i]t cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one.'[39] Plasket AJA seemed to echo this sentiment the following year in finding that 'where the attack on the decision is based on a lack of authority and irrationality, the 'gateway' to review – the PAJA or s 1*(c)* of the Constitution – will make no difference to the result'.[40]

Despite Yacoob ADCJ's binding finding for a unanimous Constitutional Court that rationality under the PAJA and the principle of legality is the same, the courts have continued to reiterate that rationality under the principle of legality only requires means-ends rationality. In other words, that the only rational link that is required under the principle of legality is that between the decision and the purpose. For example, in *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* ('*SARIPA*'),[41] Jafta J reiterated that '[a]ll that is required for rationality to be satisfied is the connection between the means and purpose.'

It is my view that the approach of Yacoob ADCJ is compelling. Having rationality mean different things, depending on whether it is being evaluated under the PAJA or the principle of legality, creates confusion in an already open-ended rationality test. Using the test set out in the PAJA under the principle of legality would also go a long way towards clarifying the rationality test. Currently, judges speak about means and ends, or the relationship between decision and purpose, but then determine rationality based on other connections like the rational connection between the information before the decision-maker and the decision.

In my view there is no reason why the other connections should not form part of the rationality test under the principle of legality as they do not in and of themselves introduce a higher threshold of review. A good example is the case of *Fair-Trade Tobacco*, discussed above, where the Court had to determine the rationality of the tobacco ban. The Minister justified the

[38] [2012] ZACC 24 ('*Simelane*').
[39] Ibid para 44.
[40] *JDJ Properties CC v Umngeni Local Municipality* [2012] ZASCA 186 para 23.
[41] [2018] ZACC 20 ('*SARIPA*') para 55.

ban by arguing that there was a rational connection between the ban and the medical information before her. While the Court refrained from comparing that information to alternative information, it did take into account that there was clear information before the Minister that showed that there could be a link between smoking and COVID-19 deaths, in finding that the decision was rational. In the judgment rejecting leave to appeal,[42] the Court explained as follows:

> The Minister, in our view, persuasively demonstrated that the medical literature that she relied upon established a firm basis upon which to impose the ban in order to save lives and prevent a strain on the country's healthcare system. It is acknowledged in the judgment that, although no study as yet exists demonstrating a conclusive link between smoking and COVID-19 progression, the studies and literature considered by the Minister nonetheless provided her with a sufficient basis to demonstrate a rational connection between smoking and COVID-19 progression to justify the means adopted by her, namely, the ban.[43]

This clearly indicates a rationality test encompassing subsection (cc) of the PAJA test. It also shows that subsection (cc) does not introduce a higher threshold – the Minister's questionable decision was still deemed rational. There is therefore no reason why this test should not form part of the rationality test under the principle of legality.

The requirement of a rational connection between a decision and the reasons provided can also be included under the principle of legality. While under the principle of legality reasons will not always be required,[44] where reasons are provided, there is no reason why the court should not assess whether there is a rational connection between the decision and the reasons provided for it. This is particularly so because of the natural overlap between means-ends rationality and decision-reasons rationality.[45] Even in *Pharmaceutical Manufacturers*,[46] which was a clear case of means-ends irrationality, Chaskalson P relied on the absence of a justifiable basis (i.e. a reason for the decision) in his finding of irrationality.

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[42] *Fair-Trade Tobacco* supra note 32.
[43] Ibid para 15.
[44] Reasons under the principle of legality are only required where it would be irrational not to provide reasons. See *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115.
[45] See further Michael Kidd 'Reasonableness' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2021) 190–213.
[46] Supra note 1.

4.5. An uncertainty: Is rationality variable?

The open-endedness of the rationality inquiry has led to wide-ranging differences in the courts' approach to the intensity of rationality review and even the test itself. Notably, in *Poverty Alleviation*[47] and *Merafong,*[48] the Constitutional Court applied more deferential rationality tests, while in *Albutt*[49] and *Zealand v Minister for Justice and Constitutional Development*,[50] it applied far more searching standards of rationality. The Court in *Zealand*, for example, applied a test more akin to that of reasonableness, as it seemingly introducing a proportionality requirement into what it called review for rationality.[51]

The incongruity between these cases led some academic commentators to suggest that review for rationality is variable.[52] In two articles published in 2010, Alistair Price suggested that rationality is a variable concept that changes in intensity depending on the circumstances.[53] He suggested that reference to 'democratic principle' and 'institutional competence' could justifiably be relied on in determining the appropriate intensity of review. Price explained as follows in relation to executive decision-making:

> [W]hen courts assess the rationality of decisions lying close to the heart of executive power (eg those concerning foreign relations, national security, economic policy, and so forth), the court is bound to exercise considerable deference when deciding whether the purpose of the decision is legitimate and whether the decision is likely to serve that purpose. In such contexts, the considerations of democratic principle and institutional competence are particularly pressing and consequently oblige the court to pay a higher degree of respect to the empirical and normative judgment of the executive. This extra respect should be reflected in the way the court exercises its discretionary judgment, when specifying the law or conduct in question more or less widely, discerning and evaluating its purpose at a narrower or wider level of abstraction, and choosing how well the law or conduct ought to have served the purpose – how 'closely connected' to its end it should have been.[54]

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[47] Supra note 10.
[48] Supra note 10.
[49] Supra note 31.
[50] [2008] ZACC 3 ('*Zealand*').
[51] See Du Plessis & Scott op cit note 19 at 606–7.
[52] Alistair Price 'Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580–91; Price 'Content and Justification' op cit note 15; Du Plessis & Scott op cit note 19.
[53] Price '*Poverty Alleviation* and *Albutt*' ibid; Price 'Content and Justification' op cit note 15.
[54] Price 'Content and Justification' op cit note 15 at 363.

Du Plessis and Scott agreed with this view, finding that 'despite involving the application of a single constitutional standard, the rationality enquiry varies in intensity depending on what is reviewed and the context of the dispute.'[55] They suggested that in addition to democratic principle and institutional competence, the 'impact on the rights of the applicant' is another factor influencing the variability of rationality.[56] They pointed to *Zealand* as an example of a case where the impact on the applicant's rights would have influenced the Court to increase the intensity of review for rationality.[57] The matter concerned a prisoner awaiting trial who was treated like a convicted prisoner as he was placed in a maximum security prison block, thus contravening his constitutional right not to be deprived of his freedom arbitrarily, as well as his right to be presumed innocent. The purpose of the impugned decision was to ensure that he attended his trial. Under low-threshold rationality, being housed in a maximum security prison block would strictly speaking be rational as it would accomplish the purpose of ensuring that he attend his trial. It was, however, disproportionate, as there were lesser means available for attaining this purpose, namely housing him in the medium security prison block. The Court determined that '[t]he 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.'[58] Du Plessis and Scott thus observe that 'the reasoning in *Zealand* is evidence of proportionality being used as part of the rationality enquiry when fundamental rights are affected.'[59]

On the other hand, Michael Tsele disagrees with the view that rationality is variable.[60] He argues that the discrepancies in the content of the rationality test do not mean that the ground is inherently variable, but rather that 'the inconsistencies in judicial outcomes do no more than show the fallibilities, inarticulate premises, or natural biases of judges, or the imperfections of any principle or test in law.'[61] He argues that 'the intensity, content and scope of rationality

[55] Du Plessis & Scott op cit note 19 at 607.
[56] Ibid at 614–5.
[57] Ibid at 614.
[58] *Zealand* supra note 50 para 44.
[59] Du Plessis & Scott op cit note 19 at 607.
[60] Michael Tsele 'Rationalising Judicial Review: Towards Refining the "Rational Basis" Review Test(s)' (2019) 136 *SALJ* 328.
[61] Ibid at 336.

should theoretically be the same.'[62] He also points out that one standard of rationality review will advance legal certainty in an area of the law so prone to unreliable outcomes.[63] Tsele's interpretation is the one preferred by the Constitutional Court in its recent rationality jurisprudence, discussed below.

5. CLAMPING DOWN ON RATIONALITY REVIEW IN THE CONSTITUTIONAL COURT'S RECENT JURISPRUDENCE

In this part, three recent Constitutional Court cases concerning substantive rationality are discussed. The purpose of this part is to identify the current trend in the Constitutional Court's jurisprudence, to clamp down on or limit the content of review for rationality.

5.1. *e.tv I*: Rationality is not a 'master key'

Electronic Media Network Limited v e.tv (Pty) Limited ('*e.tv I*')[64] concerned the government's decision to migrate television signals in South Africa from analogue to digital format. A large number of older televisions in South Africa were not capable of unscrambling digital signals, and the decision was therefore taken to provide government-issued set-top boxes (STBs) that would enable older televisions to unscramble digital signals, thereby enabling persons who owned older televisions to continue watching television from the date when the government switched off analogue signals.

The policy for providing STBs went through a number of phases, involving consultation with a number of interested parties, including broadcasters like e.tv. The initial policy made provision for the STBs to have decryption capabilities. This meant that STBs would be manufactured in such a way that they were capable of decrypting encrypted television signals (in addition to their capability to unscramble digital signals). At a later stage, the Minister of Communications published an amendment to the policy in terms of which decryption capability was excluded from the manufacture of STBs in order to save costs. e.tv, which had a financial interest in the inclusion of decryption capability, took this decision on review on the basis that

[62] Ibid.
[63] Ibid.
[64] [2017] ZACC 17 ('*e.tv I*').

they were not consulted before the amendment was made. They averred that consultation with them was crucial as they would have offered to pay for the extra cost of equipping the STBs with decryption capabilities, thereby taking on the costs that the Minister sought to avoid.

In the Constitutional Court the majority judgment was delivered by Mogoeng CJ,[65] who found that the decision made by the Minister was rational. Mogoeng CJ's judgment laid great emphasis on rationality as a minimum standard:

> It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. *It is not a uniquely designed master key that opens any and every door, any time, anyhow.* Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers.[66]

Mogoeng CJ continued on a similar track:

> It bears repetition that policy-formulation is the exclusive domain of the executive arm of the State. The judicial arm would do well to resist the enticement or urge to inadvertently, yet impermissibly, encroach on the Executive's national policy-determination space on some *elasticised rationality* or other constitutional basis that purportedly justifies judicial intervention.[67]

Mogoeng CJ's reference to 'elasticised rationality' suggests a variable conception of rationality, in terms of which its content may be stretched to be more searching than a minimum conception. This, Mogoeng CJ suggested, constitutes an impermissible judicial encroachment into the domain of the executive.

Mogoeng CJ went on to apply a minimum standard of rationality to the Minister's decision, finding that as the Minister's stated purpose was to save costs and the decision to remove decryption capabilities from the STBs would achieve this aim, the decision must be considered

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[65] Nkabinde ADCJ, Mojapelo AJ and Zondo J concurring. A second (dissenting) judgment was written by Cameron J and Froneman J (Khampepe J and Pretorius AJ concurring), and a third (concurring) judgment was written by Jafta J.

[66] *e.tv I* supra note 64 para 6, my emphasis.

[67] Ibid para 52, my emphasis.

rational.[68] Mogoeng CJ further clarified that what e.tv was saying was that there was a *better* option available to the Minister that was not adopted. Mogoeng CJ stated adamantly that this is not the domain of the courts: 'What courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available, on the other arms of the State.'[69]

The Chief Justice's approach in *e.tv I* suggests an intention to restrict rationality review, reinstating it as a minimum standard that will only in rare circumstances be found not to have been met. It indicates that the Court wished to clamp down on the ever-expanding manner in which rationality has been relied upon, perhaps even responding to the criticism of courts for their approach to rationality.[70] Or, as Tsele puts it, the judgment can be interpreted as 'an attempt to stem the rationality tide, perhaps in recognition that courts have "gone too far" and begun trenching on separation of powers'.[71] It also clearly rejects the notion that rationality is a variable concept by stating that rationality is not an 'elasticised' concept, perhaps in response to those academics who have suggested that it is,[72] and almost certainly in response to the second judgment.

The second judgment, written by Cameron and Froneman JJ,[73] reached a different conclusion, rooted in a different conception of rationality. The justices wrote that rationality 'must be determined in the context of our brand of constitutional democracy.'[74] This brand 'is one of a participatory democracy, designed to ensure accountability, responsiveness and openness.'[75]

> So, when one determines whether consultation as a prerequisite to the determination of policy by the Executive has been complied with, one must ascertain whether the consultation has been done in a manner that rationally connects the consultation with the constitutional purpose of accountability, responsiveness and openness. No superimposed judicial stratagem of undermining separation of powers is at work here. To the contrary, rationality in process and substance is umbilically linked to the pulse-

[68] Ibid paras 80–84.
[69] Ibid para 85.
[70] For example, Kohn 'Burgeoning rationality' op cit note 25.
[71] Tsele op cit note 60 at 331.
[72] Price '*Poverty Alleviation* and *Albutt*' op cit note 52; Price, 'Content and Justification' op cit note 15; Du Plessis & Scott op cit note 19.
[73] Khampepe J and Pretorius AJ concurring.
[74] *e.tv I* supra note 64 para 96.
[75] Ibid.

> beat of our constitutional democracy, one based on accountability, responsiveness and openness.[76]

Cameron and Froneman JJ thereby seem to suggest that the content of rationality is linked to the context of the case and is not just a fixed low threshold linking means and ends. In other words, that the constitutional values of accountability, responsiveness and openness will intensify the content of the rationality test where appropriate. Their comments show that unlike the majority, their conception of rationality is capable of flexibility according to particular values and circumstances. Their approach has not, however, prevailed, as can be seen below in *SARIPA.*

5.2. *SARIPA*: Rationality is 'a standard lower than arbitrariness'

The matter of *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* ('*SARIPA*')[77] concerned the adoption of a policy that regulated the Master's powers to appoint trustees under the Insolvency Act. The policy required that insolvency practitioners eligible to be appointed must appear on the Master's list, where they would be divided into racial and gender categories and treated with differing preference, in order to promote transformation. Oddly, the policy categorised practitioners, not only on the basis of race and gender, but also on the basis of whether or not they were South African citizens before 27 April 1994, with the practical effect that all persons of colour and all women were placed in the same category as white men if they became citizens of South Africa (i.e. were born) after 27 April 1994, extinguishing their chance for preferential selection.

The majority judgment, written by Jafta J,[78] first found that the policy needed to be set aside as it contravened the equality clause. He then considered whether the policy was also arbitrary and irrational. Surprisingly, he considered these to be separate grounds, contradicting the long-established usage of the terms as interchangeable or of arbitrariness as a sub-category of rationality. In respect of arbitrariness, Jafta J echoed the known usage of the ground, stating

[76] Ibid para 97.
[77] Supra note 41.
[78] Zondo ACJ, Cameron J, Kathree-Setiloane AJ, Mhlantla J, Theron J and Zondi AJ concurring. Madlanga J dissenting (Kollapen AJ and Froneman J concurring).

that "[i]f action is taken for no reason or no justifiable reason it is arbitrary.'[79] In applying the ground to the facts he found that '[i]n the absence of reasons justifying it, the unequal operation of the policy is arbitrary and leads to impermissible differentiation.'[80] He concluded that '[t]he failure by the Minister to provide reasons justifying why disadvantaged people should be treated differently, on account of the date on which they became citizens, establishes the arbitrariness of the policy.'[81] He emphasised that:

> Every action or decision taken in the exercise of public power must be supported by plausible reasons. Those reasons must show that power was exercised to achieve a legitimate government purpose, for which that specific power was conferred. It is those reasons which may insulate the exercise of power against a challenge on the ground of arbitrariness.[82]

Up to this point, Jafta J's treatment of arbitrariness was in keeping with the Court's established jurisprudence. However, having found that the policy was arbitrary, he then departed from established jurisprudence by considering, in addition, whether the policy was also irrational, thereby separating the two concepts. He explained what he considered to be the difference between rationality and arbitrariness as follows:

> While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. *Rationality does not speak to justification of the action* but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. *It is a standard lower than arbitrariness*. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose.[83]

There are a number of contentious issues in this statement. First, Jafta J goes against the established precedent by referring to arbitrariness as a standard distinct from that of rationality. As pointed out by Steven Budlender and Michael Mbikiwa, the Constitutional Court has in the

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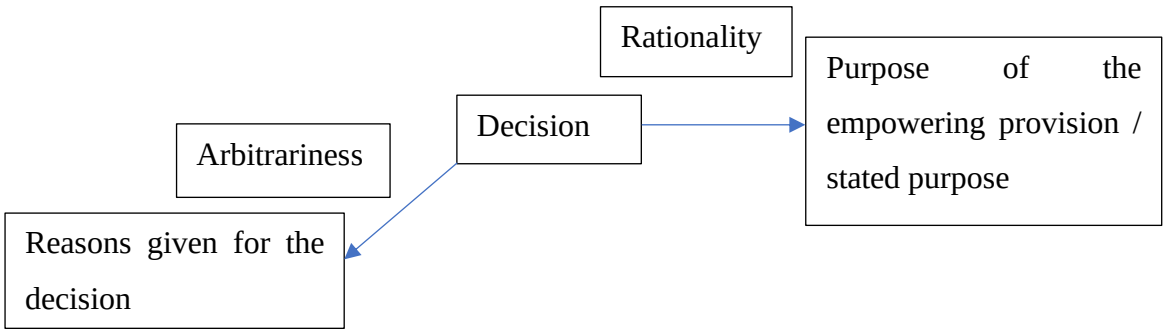
[79] *SARIPA* supra note 41 para 49.
[80] Ibid para 52.
[81] Ibid para 54.
[82] Ibid.
[83] Ibid para 55, my emphasis.

past 'always either regarded arbitrariness and irrationality as synonyms, or regarded arbitrariness as a species of irrationality'.[84]

Second, by describing rationality as 'a standard lower than arbitrariness', Jafta J not only goes against established precedent but creates a logical inconsistency when rationality under the principle of legality is compared with rationality under the PAJA. As will be recalled, section 6(2)(f)(ii)(dd) of the PAJA requires a rational link between a decision and the reasons given for it, in order for a decision to be considered rational. While this link is sometimes referred to as arbitrariness, in the PAJA it is referred to as one of the rationality links and therefore is an *aspect* of rationality. Thus, while under the PAJA arbitrariness is an aspect of rationality, Jafta J's statement means that what is considered an aspect of rationality under the PAJA morphs into something greater than – and separate to – rationality under the principle of legality. Schematically, in Figure 5, Jafta J's judgment stands for the following:

Figure 5



Source: Author

In other words, the link between a decision and the reasons given for it is part of the rationality enquiry under the PAJA but separate to and greater than the rationality enquiry under the principle of legality. This is not only logically incoherent, but also contradicts Yacoob ADCJ's finding in *Simelane* that rationality under the PAJA and rationality under the principle of legality are the same thing. As stated by Yacoob ADCJ in that case, '[i]t cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a

[84] Steven Budlender & Michael Mbikiwa 'Arbitrariness, Rationality and Reason: The Case of *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association*' (2019) 2 *South African Judicial Education Journal* 73–82 at 75.

rational decision if the decision being evaluated was an executive one.'[85] According to *SARIPA*, a decision that is irrational under the PAJA (based on the absence of reasons) could mutate into a rational decision under the principle of legality (if means-ends rationality is met), though it could still be set aside as an arbitrary decision.

Third, in excluding justification from the ambit of rationality under the principle of legality, the Court seemed to be trying to emphasise that rationality is a very low threshold test, in effect saying that only means-end rationality, as set out in subsections (aa) and (bb) of the PAJA, are applicable. However, Budlender and Mbikiwa point out that means-ends rationality and justification rationality are not so easily separated. They ask: '[w]hat is an end, if it is not a reason that seeks to justify the means adopted?'[86] They offer the following example:

> The government implements a policy regarding the provision of social grants. In its policy, it differentiates between rich and poor. It justifies the differentiation on the basis that the policy was made to pursue the legitimate goal of redistributing wealth from rich to poor. The key question in determining the rationality of the provision is whether there is a rational connection between such a differentiation and a social grants policy. That, of course, is just another way of asking whether the differentiation is justified by the reasons for it.[87]

They argue convincingly that while rationality is a minimum standard, it is a minimum standard not because it does not take justification into account, but because of the *intensity* of review:

> What distinguishes rationality from any other ground of review is not that it is unconcerned with the reasons justifying an action. Instead, what distinguishes it from, say, reasonableness, is the threshold or intensity of scrutiny to which those reasons are subjected. Reasonableness requires a court to consider a range of factors, including the availability of less restrictive means. In the social grants example, if reasonableness were the standard, a court would ask whether policies that were less restrictive of the rights of those excluded were available. If rationality were the standard, a court would not ask that question.

[85] *Simelane* supra note 38 para 44.
[86] Budlender & Mbikiwa op cit note 84 at 78.
[87] Ibid.

This supports my view that rationality under the principle of legality should include all four of the rationality links under the PAJA, as it is the intensity of review and not the (often overlapping) number of rationality links that makes rationality a minimum standard.

A number of key points can be taken from the judgment in *SARIPA*. First, the judgment has introduced a great measure of uncertainty into an already complicated area of the law. Do we now have another ground of review under the principle of legality? Does it now encompass lawfulness, rationality, and arbitrariness? Second, the judgment has endorsed a categorisation of review grounds that does not make sense. Third, the Court clearly wished to circumscribe the content of rationality, emphasising that it is only a test of means and ends. It did so by limiting the number of rational links required, rather than limiting the intensity of review. But if the intention was to limit rationality review, why go about doing so by ostensibly introducing another ground of review (arbitrariness) that covers the same ground that a correct rationality test would cover?

5.3. *Sembcorp Siza*: Rationality is not concerned with the cogency of reasons

Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd[88] concerned the relationship between three parties: (i) the Umgeni Water Board, which supplied water to municipalities and private entities, including (ii) Sembcorp Siza, a company which provided water to (iii) the Illembe Municipality. Because Sembcorp Siza supplied water to Illembe Municipality, the Umgeni Water Board had previously given Sembcorp Siza a tariff increase equal to that of a municipality (instead of a private entity). In 2014 the Umgeni Water Board applied a new costing model that resulted in a 41.4% tariff increase for Sembcorp Siza, in comparison to the 8.3% increase for municipalities. Sembcorp Siza took the decision on review on the basis, inter alia, that it was irrational to increase its tariff as a private entity when its only client was a municipality.

[88] Supra note 14.

In the SCA,[89] Wallis JA and Weiner AJA,[90] finding that the PAJA was applicable, asked whether there was a rational basis for the differentiation in tariffs between a municipality like Illembe and Sembcorp Siza, when Sembcorp Siza was performing the same function as a municipality and obtaining water from the same source.[91] The Umgeni Water Board had proffered two key reasons for the differentiation: namely the desire to end cross-subsidisation between municipalities (it had been providing water to rural municipalities like Illembe at a loss) and the fact that Sembcorp Siza was not a municipality, but a company operating for profit. Neither of these reasons was accepted by the Court as valid. Wallis J and Weiner AJA found, firstly, that there was no evidence of any attempt to end cross-subsidisation and, secondly, that there was no rational basis upon which to differentiate Sembcorp Siza from municipalities, when it was performing the function of a municipality. They concluded that 'there was no rational connection between the purpose for which the power to fix a tariff was conferred and the exercise of that discretion.'[92]

In the Constitutional Court, the majority judgment written by Jafta J and Victor AJ[93] took issue with the SCA's application of the rationality standard. They held that the SCA's approach of 'evaluating and showing that the reasons for imposing a higher tariff upon Siza were not satisfactory' was incorrect. [94] They found that:

> … when it comes to rationality the issue is always whether there was a rational connection between the decision taken or procedure followed and the purpose for which the power was granted. If there is such connection, the review challenge based on this ground must fail, regardless of the cogency of reasons furnished for the decision in question. This is because rationality is the lowest threshold required for the exercise of public power.[95]

Returning to the judgment of the SCA:

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[89] *Umgeni Water v Sembcorp Siza Water (Pty) Ltd; Minister of Water & Sanitation v Sembcorp Siza Water (Pty) Ltd* [2019] ZASCA 133 ('*Umgeni Water*').
[90] Ponnan, Dambuza and Mokgohloa JJA concurring.
[91] *Umgeni Water* supra note 89 para 54.
[92] Ibid.
[93] Mogoeng CJ, Mathopo AJ, Mhlantla J and Tsjiqi J concurring.
[94] *Sembcorp Siza* supra note 14 para 58.
[95] Ibid para 60.

> [The] test for irrationality of this kind does not require the reviewing court to evaluate reasons underlying the differentiation, as the courts below have done here. Instead, the test is to establish whether there is a rational link between the differentiation concerned and a legitimate purpose sought to be achieved by the differentiation.[96]

The finding of the Constitutional Court on rationality review raises some questions, particularly as the Court did not specify whether it was referring to rationality under the PAJA or rationality under the principle of legality. While the SCA had decided the matter under the PAJA, and the matter had been argued under the PAJA, the Court did not deem it necessary to determine the matter and referred mostly to case law decided under the principle of legality. It also, upon finding that the impugned decision was rational, did not consider whether (as had been submitted) the decision might nevertheless be unreasonable, a logical next step under the PAJA. All things considered, it seemed either to be applying a conception of rationality that was the same under the PAJA and the principle of legality, or a conception of rationality unique to the principle of legality.

Whichever is true, the conception adopted by the Court was again a very low-intensity standard. The Court highlighted that it 'is the lowest threshold required for the exercise of public power'[97] and restricted the courts' scope for testing the justifications provided by decision-makers for their decisions. How far that restriction goes is unclear. The Court seemed to be saying that where rationality requires a rational link between the reasons given for the decision and the decision itself, it doesn't allow the court to interrogate those reasons. If the reasons given can be rationally linked to the decision, then the decision must be deemed rational. This is clearly a very low-intensity conception of rationality review and makes clear the courts' intention of clamping down on rationality review by restricting the instances in which exercises of public power can be set aside for irrationality.

6. CONCLUSION

This chapter has shown that the concept of rationality under the principle of legality is riddled with complexity, inconsistency, and uncertainties. Is it the same thing as rationality under the PAJA? Does it have the same intensity? Is it variable, or has it simply been applied

[96] Ibid para 68.
[97] Ibid para 60.

inconsistently? What is the relationship between rationality and arbitrariness? Is arbitrariness a new ground of review under the principle of legality? These are questions that the Constitutional Court must answer with haste in the interests of certainty.

What is clear from the Court's recent jurisprudence, however, is that the Court has sought to clamp down on substantive rationality review. It has emphasised over and again how low a standard rationality is. The notion of variability has been rejected. It has even seemingly restricted rationality to only means-ends rationality under the principle of legality, ostensibly excluding the decision-information and decision-reasons rationality links available under the PAJA.

However, during the same period in which the Court has repeated emphatically how low a standard substantive rationality is, it has simultaneously been developing procedural rationality with fervour. How can substantive rationality have been restricted while procedural rationality has been developed and expanded? This question is considered next, with the development and content of procedural rationality analysed in Chapter 5, so as to compare it, in Chapter 6, with substantive rationality.

CHAPTER 5

THE PRINCIPLES OF REVIEW FOR PROCEDURAL RATIONALITY

1. INTRODUCTION

Procedural rationality is a new ground of review that was not applied under the common law or referred to in either the Constitution or the PAJA and is not known in other Commonwealth jurisdictions.[1] It was first introduced by the Constitutional Court in 2010 in *Albutt v Centre for the Study of Violence and Reconciliation*,[2] and later cemented as a ground of review in *Democratic Alliance v President of South Africa* ('*Simelane*').[3] It has since been applied in a number of cases to impose a range of demands on the process followed by decision-makers in making their decisions. As a recent innovation in South African judicial review, its development warrants close examination.

Within the structure of this thesis, the purpose of this chapter is to outline the development of procedural rationality with regard to its application and content. The bulk of this chapter analyses the cases in which procedural rationality has been considered. In this analysis I have two aims. The first is to outline the development of procedural rationality: why it was introduced and how the courts have built on preceding judgments to flesh out the concept in different contexts. The second is to identify the legal principles according to which procedural rationality might be understood to operate, to establish a cohesive theory regarding its application and content. The identified principles are used as a basis for critique in subsequent chapters.

The principal focus of this thesis is the courts' reliance on procedural rationality as a basis for requiring consultation before the exercise of certain public powers. This chapter will nevertheless consider other applications of procedural rationality so as to provide an

[1] Harry Woolf, Jeffery Jowell, Catherine Donnelly & Ivan Hare *De Smith's Judicial Review* 8 ed (2018).
[2] [2010] ZACC 4 ('*Albutt*').
[3] [2012] ZACC 24 ('*Simelane*')

understanding of procedural rationality in its entirety and to understand the context within which it operates and has developed.

The chapter is structured as follows. In Part 2, I consider the origins of the concept in *Masetlha v President of the Republic of South Africa*[4] before analysing its introduction in *Albutt* and *Simelane.* In Part 3, I consider, chronologically, the significant subsequent judgments in which procedural rationality has been considered by the High Courts, Supreme Court of Appeal, and Constitutional Court. In Part 4, I rely on the analysis in Parts 2 and 3 to identify the key features of the application and content of procedural rationality, as determined in those judgments. Part 5 concludes the chapter with a number of concerns in respect of procedural rationality that require further consideration.

2. ORIGINS AND INTRODUCTION OF THE CONCEPT: *Masetlha, Albutt* and *Simelane*

2.1. *Masetlha*: The exclusion of procedural fairness from the principle of legality

As will be recalled from Chapter 1 of this thesis,[5] *Masetlha*[6] concerned the President's dismissal of the head of the National Intelligence Agency, Billy Masetlha, after evidence emerged that he had been involved in illicit spying operations. Masetlha brought an application to review his dismissal on the basis that he had not been given an opportunity to be heard. The majority judgment of the Constitutional Court held that the President did not have to consult with Masetlha before dismissing him, finding that (i) the dismissal was an exercise of executive power subject to review under the principle of legality; (ii) executive actions are not constrained by the requirements of procedural fairness;[7] and (iii) the grounds on which the decision could be reviewed were limited to lawfulness and rationality.[8]

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[4] [2007] ZACC 20 ('*Masetlha*').
[5] Part 2.5.
[6] Supra note 4.
[7] As discussed in Chapter 1 Part 2.5., procedural fairness was described as a 'cardinal feature in reviewing administrative action' in para 77, suggesting that procedural fairness is not applicable to a review application under the principle of legality.
[8] *Masetlha* supra note 4 para 78.

While procedural rationality was not mentioned in the judgment – indeed it would only be recognised several years later – its introduction in *Albutt* and its subsequent development have their roots in *Masetlha* for two reasons. The first is that *Masetlha* excluded procedural fairness from (i) the grounds on which executive actions may be reviewed and (ii) the grounds of review under the principle of legality. It is this exclusion that subsequently compelled the Court to explore other means by which consultation could be required for non-administrative action. If the Court had made a narrower finding in *Masetlha*, recognising the application of procedural fairness under the principle of legality under appropriate circumstances, there would have been no need for the subsequent expansion of the rationality standard to include a consultation requirement.

The second reason is that the reasoning in *Albutt*, penned by Ngcobo CJ, draws on his previous minority judgment in *Masetlha*. In that minority judgment, which was discussed at length in Chapter 1 of this thesis,[9] Ngcobo J (as he then was) found that the rule against arbitrariness is not limited to the rule against irrational decisions but 'refers to a wider concept and a deeper principle: fundamental fairness'.[10] He found further that 'the rule of law imposes a duty on those who exercise executive power not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual.'[11] He explained that '[a]cting fairly provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision' and thereby 'enables the decision-maker to make a decision after considering all relevant facts and circumstances'.[12] This, Ngcobo J argued 'minimises arbitrariness'.[13]

He also maintained that there is 'an inter-relationship between the failure to act fairly and arbitrarily':

> In this sense, the requirement of the rule of law that the exercise of public power should not be arbitrary, has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason

[9] Part 2.5.
[10] *Masetlha* supra note 4 para 179.
[11] Ibid para 180.
[12] Ibid para 184.
[13] Ibid.

> for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly.[14]

Ngcobo J concluded that '[t]o hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review'.[15] This reasoning was drawn on again in *Albutt* to introduce procedural requirements under review for rationality, though it was somewhat modified, with consultation being included, not as an aspect of non-arbitrariness, but of rationality.

2.2. *Albutt*: The inclusion of a procedural component under review for rationality

Albutt[16] was the first case in which a decision was reviewed on the ground of 'procedural rationality', although it was not yet expressly referred to by that name. The matter concerned a special dispensation established by President Mbeki in terms of which perpetrators of politically motivated offences committed during Apartheid could apply to be pardoned. The dispensation was essentially a continuation of the work of the Truth and Reconciliation Commission (TRC), allowing persons who did not appear before the TRC to nevertheless apply to be pardoned. Like the TRC, the objectives of the special dispensation were national reconciliation and national unity. Unlike the TRC, there was no provision for the participation of the victims of offences or their families in the process by which the President decided whether or not to grant a pardon. An application was brought to interdict the President from granting pardons without the victims being provided with an opportunity to be heard.

When the matter reached the Constitutional Court, the principle of legality was applied (without consideration of whether the decision under review was administrative action). The Court could not – without overruling itself – review the decision for procedural fairness, as it had found in *Masetlha* that the standard of procedural fairness was not applicable to executive action reviewed under the principle of legality.

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[14] Ibid para 184.
[15] Ibid.
[16] Supra note 2.

Ngcobo (now) CJ, who had dissented from the exclusion of procedural fairness in *Masetlha*, found a solution that allowed the Court to require consultation without overruling *Masetlha*. He expanded the standard of rationality to include both (i) a substantive, and (ii) a procedural component. Noting that 'the President's decision to undertake the special dispensation process, without affording the victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process',[17] Ngcobo CJ found that 'where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved.'[18]

Ngcobo CJ held that the decision to exclude victims from being heard in the special dispensation process was irrational.[19] While recognising that the participation of victims was 'crucial to the twin objectives of nation-building and national reconciliation,'[20] he underscored the critical role that consultation would play in establishing the facts relevant to the President's decision.

> Before the President decides whether to grant pardon, he must establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive. To establish the facts the President must hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought. It is difficult to fathom how the President can establish the truth about the motive with which a crime was committed without hearing the victim of that crime…It is not inconceivable that a victim may want to make representations to demonstrate that the crime committed was not of a political nature, but due to other motives.[21]

Ncgobo CJ concluded that the features of the special dispensation required, '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.'[22] The link between process and facts, as an incident of rationality, was further developed in *Simelane.*

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[17] Ibid para 50.
[18] Ibid para 51.
[19] Ibid para 69.
[20] Ibid paras 59 and 69.
[21] Ibid para 70.
[22] Ibid para 72.

2.3. *Simelane*: The inclusion of procedural rationality under the principle of legality

Simelane[23] concerned President Zuma's appointment of Menzi Simelane as the National Director of Public Prosecutions (NDPP). The Democratic Alliance brought an application for review on the basis that the decision was constitutionally invalid. Simelane had previously given evidence at the Ginwala Commission of Inquiry concerning the conduct of then-NDPP, Vusi Pikoli. The report of the Commission had been scathing of Simelane's testimony, calling into question his credibility and integrity. The President's appointment of Simelane was made in terms of the Constitution[24] and the National Prosecuting Authority Act, which provides that the NDPP must be a fit and proper person.[25]

The question before the Constitutional Court was whether, given the Commission's report, President Zuma's decision to appoint Simelane had been rationally related to the purpose of appointing a fit and proper person. This raised a number of issues relating to rationality, among them the question of procedural rationality. Yacoob ADCJ, writing for a unanimous Court, confirmed the finding in *Albutt* that 'both the process by which the decision is made and the decision itself must be rational.'[26] He explained:

> The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only 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.[27]

Yacoob ADCJ further addressed the question of whether each step in the process must be rationally related to the purpose. He concluded that it is necessary to consider the steps in a process together:

> 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

[23] Supra note 3.
[24] Section 179.
[25] Act 36 of 1998, section 9(1)(b).
[26] Supra note 2 para 34.
[27] Ibid para 36.

> 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.[28]

Turning to the challenge before the Court, Yacoob ADCJ accepted that a decision-maker's disregard of relevant factors could render their decision, and the process by which it was reached, irrational.

> 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 irrationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.[29]

Yacoob ADCJ set out a three-stage enquiry in respect of executive decisions where certain factors have been ignored.

> 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.[30]

Applying this test to the facts, Yacoob ADCJ found that the evidence that appeared from the records of the Ginwala Commission was 'highly relevant to Mr Simelane's credibility, honesty, integrity and conscientiousness'[31] and the President's decision to ignore it 'was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational'[32] 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.'[33]

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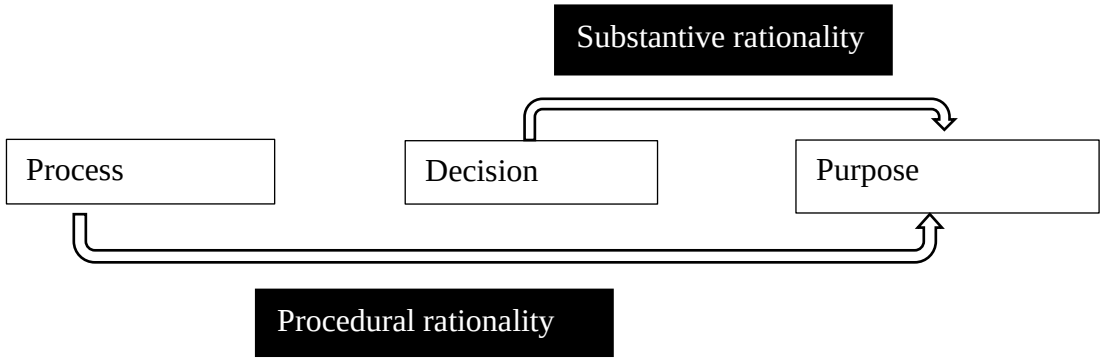
[28] Ibid para 37.
[29] Ibid para 39.
[30] Ibid.
[31] Ibid para 86.
[32] Ibid.
[33] Ibid para 89.

In *Simelane* the Court thus expanded procedural rationality to require not only consultation (where necessary) but also the consideration of relevant information. Why it decided to expand procedural rationality in this way is unclear, as the requirement that the NDPP be a fit and proper person was required by legislation, and the failure to meet this requirement could therefore have resulted in the decision being set aside on the more established ground of unlawfulness.

Nonetheless, the judgment confirmed that rationality has two components – substantive and procedural – and requires two rational links: a rational link between the decision and the purpose and a rational link between the procedure followed in making the decision and the purpose. Schematically, this is set out in Figure 6.

Figure 6



Source: Author

3. THE DEVELOPMENT OF PROCEDURAL RATIONALITY

Subsequent to *Albutt* and *Simelane,* the High Court, SCA, and Constitutional Court have applied procedural rationality in a number of judgments. In doing so they have recognised several different procedural requirements and have attempted to develop and finesse the principles governing the application of the ground. As will be seen, the clarity with which the courts have executed this (admittedly challenging) task varies substantially. The cases are set out chronologically.

3.1. *Scalabrini II* and *Somali Association*: Failure to consult and arbitrariness

Minister of Home Affairs v Scalabrini Centre, Cape Town ('*Scalabrini II*')[34] involved an appeal in the SCA against the judgment of Rogers J in *Scalabrini I*,[35] which concerned a decision by the Director-General of Home Affairs (DG) to close the Cape Town refugee centre. Rogers J had found that the decision was administrative action reviewable under PAJA and that the failure to consult with certain refugee organisations rendered the decision procedurally unfair. In the SCA, Nugent J, for the majority, found that the decision was not subject to the PAJA but only to the principle of legality. Reliance on procedural fairness was therefore not possible and Nugent JA turned to rationality.

Nugent JA first considered whether the decision was substantively rational. Based on the information before the Court, he found that the decision to close the refugee centre was rational. Alive to the distinction between reasonableness and rationality, he found that while 'one might indeed find it unreasonable to close the Cape Town office' he thought that the facts '[fell] far short of showing the decision was irrational, in the sense of being arbitrary.'[36]

Nugent JA then considered whether the decision was nevertheless procedurally irrational due to the absence of consultation, stating that while there is no general obligation on those who exercise public power to afford a hearing to interested parties, 'there are indeed circumstances in which rational decision-making calls for interested persons to be heard'.[37] Nugent JA expressed agreement with the finding of the court a quo that the DG 'could not achieve the statutory purpose [of section 8(1) of the Refugees Act] without obtaining the views of the organisations representing the interests of asylum seekers.'[38] The arbitrariness of the DG's failure to consult was underscored by the DG's failure to give any explanation for failing to consult with the relevant organisations.[39]

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[34] [2013] ZASCA 134 ('*Scalabrini II*').
[35] *Scalabrini Centre, Cape Town v Minister of Home Affairs* [2013] ZAWCHC 49 ('*Scalabrini I*')**.** Discussed in respect of procedural fairness in Chapter 3.
[36] Supra note 34 para 66.
[37] Ibid paras 67 and 68
[38] Ibid para 71.
[39] Ibid para 70.

Nugent JA was at pains to point out that this conclusion should not be interpreted as meaning that there is a general duty on decision makers to consult organisations or individuals *having an interest* in their decisions: '[s]uch 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.'[40] The focus, in other words, is on the information that is required for a rational decision to be made, and not what is required out of fairness to an interested person.

A similar finding was made by the SCA in *Minister of Home Affairs v Somali Association of South Africa Eastern Cape,*[41] which also concerned the DG's decision to close a Refugee Reception Office, this time in (the then named) Port Elizabeth. Following the reasoning in *Scalabrini II*, Ponnan JA accepted 'that a duty to consult will arise only in circumstances where it would be irrational to take a decision without such consultation, because of the special knowledge of the person or organisation to be consulted.'[42] Taking into account that '[t]he relevant authorities were aware that the respondents had close links to refugee communities and experience and expertise in dealing, not just with asylum seekers in Port Elizabeth, but also with the challenges that confronted them', Ponnan JA concluded that the failure to consult with the respondents before deciding to close the Port Elizabeth office 'was not founded on reason and was arbitrary and thus unlawful.'[43] The judgment in *Somali Association* thereby reinforced the principles espoused in *Scalabrini II.*

3.2. *Kubukeli*: A procedurally rational absence of consultation

The National Treasury v Kubukeli[44] concerned an investigation by a National Treasury team into allegations of financial irregularities in the hiring of luxury cars by a municipality. The executive mayor of the municipality and the key officials in the mayor's office were notified of the investigation and requested to make themselves available on proposed dates to be interviewed by the investigating team. The executive mayor advised that the investigation was

[40] Ibid para 72, my emphasis.
[41] [2015] ZASCA 35 ('*Somali Association*').
[42] Ibid para 15.
[43] Ibid para 17.
[44] [2015] ZASCA 141 ('*Kubukeli*').

premature and that he and the officials in his office would not participate on the proposed dates. Despite the lack of participation from the mayor's office, the Treasury team continued with the investigation and compiled a report in which one of their findings was that Mr Kubukeli, a bodyguard in the executive mayor's office, was liable for the costs occasioned by damage to rented vehicles as a result of his gross negligence.

Kubukeli challenged the report of the Treasury team on the basis that he had not received notice of the request to avail himself for an interview and had not been afforded an opportunity to make representations to the investigators. The court a quo considered the investigation and report to be 'administrative action' under the PAJA and set it aside for the absence of procedural fairness, as Kubukeli had not been afforded an opportunity to make representations before adverse findings were made against him.

In the SCA, however, Van der Merwe AJA found that the court a quo had erred in reviewing the findings against Kubukeli under the PAJA instead of the principle of legality. Since the principle of legality was applicable, the failure to consult with Kubukeli prior to making adverse findings against him had to be considered in terms of rationality. Citing *Masetlha*[45] and *Scalabrini II*,[46] Van der Merwe AJA confirmed that under the principle of legality '[t]here is no general duty on decision-makers to consult interested parties for a decision to be rational under the rule of law' but that 'there are circumstances in which rational decision-making requires consultation with interested parties.'[47]

Van der Merwe AJA found that the National Treasury exercises the power to investigate financial mismanagement in municipalities in order to secure the sound and sustainable management of the fiscal and financial affairs of a municipality.[48] He therefore asked 'whether on the particular facts of this case, the conducting of the investigation and the making of recommendations to the municipality without the participation of Kubukeli, were rationally

[45] Supra note 4.
[46] Supra note 34.
[47] *Kubukeli* supra note 44 para 16.
[48] Ibid para 24.

related to the purpose for which the power [was given]'.[49] Van der Merwe AJA found as follows:

> The purpose for which the power was given was not to investigate the conduct of any particular person and to make final findings in respect thereof. What a particular person did or did not do, was incidental to the object of the power. It follows that the request that Mr Kubukeli and others attend interviews, did not constitute recognition of a right to be heard, but was intended to assist the National Treasury to achieve its purpose. The Treasury team was in no way to blame for the absence of that assistance.[50]

Van der Merwe AJA concluded that 'the purpose for which the power was given, was achieved'[51] and the investigation, report and recommendations of the National Treasury team were procedurally rational, despite Kubukeli not having been provided with an opportunity to be heard.

The *Kubukeli* judgment is a valuable illustration of the distinction between procedural fairness and procedural rationality. On these facts, procedural fairness, as applied in the court a quo, required Kubukeli to be consulted before an adverse finding was made against him. In contrast, procedural rationality, as applied in the SCA, did not necessitate that he be consulted. Thus, while procedural fairness will usually require a person adversely affected by a decision to be consulted before that decision is taken, procedural rationality will only require consultation where the purpose of the decision cannot be achieved without consultation. *Kubukeli* therefore recognises a material limitation of procedural rationality and highlights a significant gap in outcome between it and procedural fairness.

3.3. *ICC Withdrawal*: Irrationality by virtue of an impermissible procedure

Procedural rationality filtered down to the High Court in *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* ('*ICC Withdrawal*').[52] The matter concerned the South African government's decision to withdraw from the Rome Statute, the treaty governing the members

[49] Ibid para 23.
[50] Ibid para 24.
[51] Ibid para 25.
[52] [2017] ZAGPPHC 53 ('*ICC Withdrawal*').

of the International Criminal Court (ICC). The withdrawal followed a legal dispute over South Africa's failure to arrest then-President of Sudan, Omar Al-Bashir, for whom the ICC had issued an arrest warrant. Following the dispute, the South African national executive notified the United Nations of its intention to leave the ICC. It did so without first obtaining parliamentary approval, despite the Rome Statute having been domesticated in the Implementation Act.[53]

A full bench of the High Court found that the national executive did not have the power to unilaterally issue a notice of withdrawal to the United Nations without first obtaining the approval of parliament and attaining the repeal of the Implementation Act.[54] The Court therefore concluded that the notice of withdrawal had been invalidly delivered and must be revoked (implicitly as a matter of lawfulness). The Court could have concluded matters there but went on to consider whether the notice of withdrawal complied with the demands of procedural rationality.

The Court reiterated that '[t]he principle of legality requires that both the process by which the decision is made and the decision itself must be rational.'[55] It found that '[i]n the present case, the procedural irrationality lies in the finding that the national executive did not consult parliament, as it was obliged to, before delivering the notice of withdrawal.'[56] This suggests that where an impermissible procedure is adopted, the resulting decision will not only be procedurally unlawful but also procedurally irrational. It could therefore be set aside on the basis of either or both grounds of review, and accordingly presents an overlap between the two.

The Court also considered that the process adopted by the executive purported to extinguish its international obligation under the Rome Statute while the domestic obligation continued to exist, which together with the possibility that parliament might reject the repeal of the Implementation Act, held 'undesirable and embarrassing outcomes for South Africa' as '[i]t

[53] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[54] *ICC Withdrawal* supra note 52 para 53.
[55] Ibid para 64.
[56] Ibid.

would have given different and confusing signals concerning its withdrawal from the Rome Statute.'[57]

Finally, the Court lamented the executive's failure to explain the urgency of its process: '[t]he question should be: what is so pressing for the national executive about the withdrawal from the Rome Statute which cannot wait for our legislative processes (and possible judicial pronouncements) to take their course?'[58] Since the respondents had not provided any explanation for the urgency of withdrawing from the Rome Statute, the Court concluded that the notice of withdrawal was procedurally irrational, finding that '[t]his unexplained haste, in our view, itself constitutes procedural irrationality.'[59] This finding, like *Scalabrini II*, suggests that the failure of a decision-maker to explain why it adopted a particular process can itself result in a finding of procedural irrationality.

3.4. *SADC Tribunal*: Another unlawful procedure

Like *ICC Withdrawal*, the case of *Law Society of South Africa v President of the Republic of South Africa* ('*SADC Tribunal*')[60] also concerned an attempt by the Zuma government to avoid its treaty obligations by an improper procedure. The case concerned the Tribunal of the South African Development Community (SADC), which was brought into being through the SADC Treaty for the purpose of interpreting that treaty. In 2008, the Tribunal found that Zimbabwe had violated the SADC Treaty by its policy of expropriation without compensation. In response, the SADC Summit – comprising SADC heads of state – issued a resolution that suspended the operations of the Tribunal. This decision was supported by President Zuma, who subsequently also signed a Protocol that in practical terms removed the Tribunal's jurisdiction to hear matters between states and their citizens.[61] This was a controversial decision as the Tribunal's jurisdiction is determined by the SADC Treaty, which itself sets out a procedure for its amendment, namely by three-quarters of SADC member states.[62] That process had been circumvented by the SADC Summit through the protocol, as the protocol route only required

[57] Ibid para 70.
[58] Ibid.
[59] Ibid.
[60] [2018] ZACC 51 ('*SADC Tribunal*').
[61] Protocol on the Tribunal in the Southern African Development Community adopted on 21 February 2014.
[62] Article 35(1).

the support of ten member states.[63] An application was brought in South Africa to review the President's role in the resolution and the Protocol, on the basis that they were both unlawful and irrational.

In the Constitutional Court Mogoeng CJ found that by following an impermissible procedure, the President had acted unlawfully.[64] In addition (and seemingly unnecessarily), he also considered the procedural rationality of the President's actions. Again, the Constitutional Court emphasised that '[t]he evolution of our constitutional jurisprudence culminated in a principle that recognises that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at.'[65]

The Court also took the opportunity to clarify the relationship between procedural rationality and procedural fairness. Citing *Albutt*, *Simelane* and *Masetlha*, the court explained as follows:

> The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt* and *Simelane*. But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that 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 that power.[66]

In this manner, Mogoeng CJ sought to reconcile *Masetlha*, *Albutt*, and *Simelane*.

Returning to the facts before the Court, Mogoeng CJ considered whether the procedure adopted by the President in order to suspend the Tribunal and amend its jurisdiction was rationally related to the purpose for which the power to amend the Treaty was conferred.[67] Mogoeng CJ identified the purpose of this power as 'do[ing] what is in the best interests of the people of SADC,' and noted that it therefore needed 'to be exercised in a manner consistent with the seriousness of its consequences to ensure that the invaluable gains and interests of the people

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[63] Article 53.
[64] *SADC Tribunal* supra note 60 para 56.
[65] Ibid para 61.
[66] Ibid para 64.
[67] Ibid para 65.

of SADC are preserved.'[68] He concluded that '[t]he procedure for the amendment through the Protocol that was followed is not only unavailable to the Member States, but also frustrates the purpose for giving them the power to amend the Treaty.'[69] Mogoeng CJ therefore found that the procedure adopted to suspend and alter the jurisdiction of the Tribunal had no rational relationship with the purpose for which the power was granted.[70] As he concluded:

> It is not only unlawful to suspend the operations of the Tribunal in terms of non-existent power but also irrational. And this is one more ground for the invalidation and setting aside of the President's participation in the decision to suspend the operations of the Tribunal and amend its jurisdiction.[71]

As in *ICC Withdrawal*, Mogoeng CJ's judgment thereby suggests that where a decision-maker adopts a process that is procedurally unlawful, the decision may also be procedurally irrational. It is not, however, apparent that this overlap has any practical significance.

3.5. *NERSA*: Failure to consider a relevant consideration

The next case in which procedural rationality was employed was the Constitutional Court judgment in *National Energy Regulator of South Africa v PG Group (Pty) Limited* ('*NERSA*').[72] In terms of the Gas Act,[73] the National Energy Regulator (NERSA) is required to regulate tariffs for the transmission of gas and promote competition in the gas industry. Where there is inadequate competition, the Gas Act requires that NERSA sets a maximum gas price. The purpose of this power is to set a price as close as possible to the price that would have been charged in a competitive market; in other words, to mimic a competitive price. On the facts, NERSA determined that Sasol Gas had a monopoly over the gas market and it was consequently required to set a maximum gas price. In doing so, however, NERSA set a price that was even higher than Sasol's monopolistic price, never mind one that mimicked a competitive price.

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[68] Ibid para 68.
[69] Ibid para 69.
[70] Ibid para 70.
[71] Ibid para 71.
[72] [2019] ZACC 28 ('*NERSA*').
[73] Act 48 of 2001.

In a unanimous judgment, Khampepe J focused on the fact that in setting the maximum gas price, NERSA had failed to take into account Sasol's marginal costs. Despite the applicability of the PAJA, the Court considered the issue under procedural rationality, a ground that hitherto had only been relied upon under the principle of legality. It did so, moreover, without any express recognition of procedural rationality as a ground of review under the PAJA. This decision has been criticised on the basis that the Court could have relied on a different review ground,[74] namely, section 6(2)(e)(iii) of the PAJA, which provides for the review of a decision that was taken 'because… relevant considerations were not considered.' Thus, there was a clear PAJA ground of review available, and there was no need to introduce procedural rationality into PAJA review.

Nevertheless, Khampepe J applied the three-stage test set out in *Simelane*, finding that *Simelane* 'developed the test for rationality by explaining that an absence of a sufficient link can arise for procedural reasons'.[75] She found that '[t]his is not a new or different type of irrationality, but rather a way of evincing a broken or missing link between the means and the ends'.[76] Khampepe J found that on the facts NERSA's decision was irrational, as consideration of Sasol's marginal costs was a necessary factor in setting a maximum price.[77]

The judgment in *NERSA* is indicative of the Constitutional Court's zeal for developing procedural rationality. Despite having found that the PAJA was applicable and the express ground of ignoring a relevant consideration therefore being available, the Court nevertheless took the far less established route of applying procedural rationality. This is also despite the fact that this resulted in the complicated question of whether the Court read in procedural rationality under the PAJA, thereby amending the legislation, which is discussed further below.[78] The only feasible explanation for this decision is that the Constitutional Court wished to go about further establishing procedural rationality, so that it could more easily be relied on in future matters.

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[74] Michael Kidd 'Reasonableness' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2021) 190–213 at 199; Michael Tsele 'Rationalising Judicial Review: Towards Refining the "Rational Basis" Review Test(s)' (2019) 136 *SALJ* 328 at 359.
[75] *NERSA* supra note 72 para 64.
[76] Ibid.
[77] Ibid.
[78] Part 4.1.

3.6. *Esau*: Adequate consultation with the public

The case of *Esau v Minister of Co-Operative Governance and Traditional Affairs* ('*Esau II*')[79] was discussed in Chapter 3 in respect of procedural fairness. The matter concerned COVID-19 regulations and the adequacy of the Minister's consultation with the public before issuing new regulations. In the SCA, Plasket JA was in favour of deciding the matter under the PAJA and found that the Minister had acted in a procedurally fair manner when making the regulations.[80] However, because the Constitutional Court had not yet pronounced on whether regulation-making always amounts to administrative action, he also briefly considered whether the Minister's decision was procedurally rational.[81]

Plasket JA held that procedural rationality under the circumstances did require consultation. He took into account the broad power of the Minister to make regulations, as well as the effect of the regulations on the rights, lives and livelihood of every person subject to them,[82] and found that the Minister 'could not have taken decisions on the content of those regulations without having afforded members of the public an opportunity to make representations'.[83] Having found that the opportunity afforded to the public to make representations was adequate, Plasket J concluded that the procedure followed by the Minister had been rational.[84] Plasket JA's brief consideration of procedural rationality in this judgment is significant as it suggests that the potential impact on the rights and interests of affected persons is a factor in determining whether procedural rationality requires consultation in particular circumstances.

3.7. *e.tv II*: Failure to consult and to consider a relevant consideration

e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa v e.tv (Pty) Limited ('*e.tv II*'),[85] like *Electronic Media Network Limited v e.tv (Pty)*

[79] [2021] ZASCA 9 ('*Esau II*').
[80] Ibid paras 76-100.
[81] Ibid para 101
[82] Ibid para 103.
[83] Ibid.
[84] Ibid.
[85] [2022] ZACC 22 ('*e.tv II*').

Limited ('*e.tv I*')[86], concerned the South African government's policy of migrating television signals from analogue to digital. As part of the digital migration process there was a period during which both analogue and digital transmissions were used. During this period people who did not have modern television sets capable of unscrambling digital signals could register for state-sponsored set-top boxes (STBs) that would enable older television sets to unscramble digital signals. Registration for STBs opened in 2015 and no closing date for registration was specified. The STBs would allow households with older televisions to continue watching television when the analogue signals were eventually switched off, completing the digital migration process.

In order to complete the digital migration process, the Minister of Communications determined that the analogue switch-off date would be 31 March 2022. She also announced a deadline for STB registration, 31 October 2021, for those who wished to have an STB installed before the switch-off date. In other words, those who registered before 31 October 2021 were guaranteed to have their STB installed before the switch-off date, so that their reception of television signals would be uninterrupted.

e.tv, which was still broadcasting on analogue, brought an urgent application in the High Court arguing that the analogue switch-off date would prevent millions of people who did not possess STBs from watching free-to-air television on their analogue televisions. They were unsuccessful and the High Court granted the Minister of Communications permission to complete the digital migration process, i.e. to switch off the analogue transmission, but extended the switch-off date to 30 June 2022. The High Court's decision was appealed directly to the Constitutional Court, where judgment was delivered by Mhlantla J for a unanimous court.

In her judgment Mhlantla J reviewed two separate decisions for procedural irrationality under the principle of legality.[87] The first decision that she considered was the determination of the analogue switch-off date ('analogue switch-off decision') which she found was executive action and subsequently reviewable under the principle of legality.[88] e.tv argued, inter alia, that

[86] [2017] ZACC 17 ('*e.tv I*').
[87] Mhlantla J determined that the decisions under review constituted executive action in paras 29-36 and para 44.
[88] *e.tv II* supra note 85 paras 33-36

the Minister had a duty to consult the public before setting the analogue switch-off date. The Minister had argued that she was not under an obligation to consult with interested parties regarding the determination of the analogue switch-off date as there was no general duty to consult with the public under the principle of legality.[89] Mhlantla J disagreed, finding as follows:

> … her decision in relation to the analogue switch-off date must comply with the Constitution in order to be lawful. I emphasise, lawfulness demands compliance with the Constitution. It cannot be denied that switching off analogue transmission is an integral part of digital migration; more than being connected to it, it is part of it. *Therefore*, digital migration policy discussions must include an opportunity where the affected parties are given notice and afforded an opportunity to make representations on the analogue switch-off date.[90]

In light of *Masetlha*, the 'therefore' in this statement does not make sense. Of course, an executive decision is subject to the constitutional principle of legality. However, *Masetlha* excluded procedural fairness as a ground on which executive decisions could be reviewed under the principle of legality. An obligation to provide notice and an opportunity to make representations therefore did not automatically follow from an obligation to comply with the Constitution.

Mhlantla J went on to state that her finding was made on the ground of procedural rationality. She explained as follows:

> The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. *Important interests are at stake.* Following *Albutt*, it was not procedurally rational for the Minister to set the analogue switch-off date without notice to the *industry and affected parties*… to obtain their views on the matter. In the result, the Minister's decision not to give notice and take account of the representations received regarding the analogue switch-off date with the public or affected parties is unlawful.[91]

This reasoning begs a range of questions. Mhlantla J seems to have been saying that because important interests were at stake, the Minister was obliged to provide notice of the impending

[89] Ibid para 47.
[90] Ibid para 51, my emphasis.
[91] Ibid paras 52-53, my emphasis.

decision and to provide interested parties with an opportunity to be heard. This seems a clear example of the courts applying an obligation based on procedural fairness but calling it procedural rationality. The reasoning suggests the application of procedural fairness (it even required both notification and an opportunity to be heard, the full set of *audi alteram partem*!) but uses the label of procedural rationality, a ground that does not take into account the interests at stake but is only concerned with the link between the means and purpose. The Court relied on *Albutt*, but *Albutt* made very clear that consultation may only be required where, without consultation, it would not be possible to reach the purpose of the decision.[92] While it is arguable that in many cases the courts have used the rationale of procedural fairness to set aside a decision and called it procedural rationality, in this case the Court did not even purport to apply the reasoning of procedural rationality: there was no mention of a connection between a process and the purpose of a decision. It was procedural fairness dressed up unconvincingly as procedural rationality.

Elsewhere in the judgment Mhlantla J alluded to information that she considered the Minister should have had before making her decision. She referred to 'critical questions' that could have been raised in consultation and that could have determined 'the number of persons who qualify to receive STBs, who would like to register for STBs before the analogue switch-off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such.'[93] Mhlantla J could therefore have reasoned that, in accordance with *Albutt*, *Somali Association*, *Scalabrini II*, and *Esau*, there was crucial information that the Minister needed before making the decision and that she could have obtained that information only by providing for consultation with interested parties. Unfortunately, she did not do so, resulting in reasoning that was unnecessarily convoluted and difficult to follow.

The second decision reviewed for procedural rationality was the decision to determine 31 October 2021 as the deadline to register for an STB in order to receive the STB before the switch-off date (the 'STB deadline'). Here, it was not the absence of consultation that was at issue, but rather the failure to take into account a relevant consideration. e.tv, along with two

[92] *Albutt* supra note 2 para 75.
[93] *e.tv II* supra note 85 para 48.

non-profit organisations, argued that the Minister had not taken into account the millions of people who would be left without access to television as a result of the STB registration deadline.

In determining whether the setting of the deadline was procedurally rational, Mhlantla J applied the three-part test set out in *Simelane* and found that, '[i]n applying the first enquiry, it is clear that the number of households which qualify for STBs, which have not registered but wish to do so before the analogue switch-off date, is a relevant consideration.'[94] In applying the second enquiry, she found that the Minister's failure to obtain this information meant that she 'was not in a position to determine an analogue switch-off date that would mitigate the harm caused by such a switch off'.[95] Finally, in applying the third enquiry, Mhlantla J concluded that '[i]f a central purpose of the analogue switch-off decision is to mitigate the adverse impact of switch-off, a process that failed to provide guidance on the number of households requiring STBs is inevitably coloured with irrationality.'[96] Mhlantla J clarified her decision as follows:

> I emphasise that what I am saying is not whether another means to achieve the end should have been used. That enquiry goes beyond what this Court is empowered to do. What I do hold is that the means employed by the Minister meant that her decision was made without any reliable indication of the households requiring STBs, and that she therefore failed to take a relevant consideration into account. *The Minister was at large to determine how such information was obtained.* What she could not do, however, and what tainted her decision with irrationality, was to adopt a process which meant that the analogue switch-off date was determined without considering the numbers of households which would be adversely affected by such switch off.[97]

The Minister's assertion in respect of the registration deadline that '[t]he Minister was at large to determine how such information was obtained' is correct but contradicted her finding in respect of consultation before the setting of the switch-off date. In respect of that decision, she did not allow the Minister the discretion to obtain the information in any way she saw fit, but instead prescribed to her how to obtain the information, namely by consulting interested parties (an exercise that would not necessarily yield the necessary information!). This is a central issue that is considered in Chapter 6 of this thesis.

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[94] Ibid para 75.
[95] Ibid para 77.
[96] Ibid para 78.
[97] Ibid para 79, my emphasis.

4. APPLICATION AND CONTENT OF PROCEDURAL RATIONALITY

Through analysis of the above cases, the following features of the application and content of procedural rationality can be distilled.

4.1. Application of procedural rationality

Since procedural rationality was first recognised as a ground of review in *Albutt*, it has been applied in a wide range of cases. From tentatively being introduced in *Albutt* and *Simelane*, it is now 'settled law that both the process by which the decision is made and the decision itself must be rational.'[98]

Indeed, procedural rationality has been applied by the courts with great zeal, including in matters where there was no need to rely on it. In both *ICC Withdrawal* and *SADC Tribunal*, for example, the matters had already been resolved in terms of lawfulness, yet the Court added a determination based on procedural rationality. The courts have also applied procedural rationality where there were more appropriate or more established grounds available. In *Simelane*, for example, there was no need to develop procedural rationality to encompass a failure to consider a relevant consideration as the decision in question could have been set aside on the ground of unlawfulness, as the decision-maker had failed to appoint a 'fit and proper person' as mandated by the relevant legislation. An even more striking example was *NERSA*, where a review that could have been determined under section 6(2)(e)(iii) of the PAJA was determined on the basis of procedural rationality. These cases indicate that the courts are eager to apply and develop procedural rationality when given the opportunity.

Like lawfulness and substantive rationality, review for procedural rationality is applicable to all exercises of public power subject to the principle of legality, even those at the highest level of executive decision-making. Indeed, of the cases considered above in which review for procedural rationality was successful, three concerned decisions made by Presidents (both in

[98] For example, *e.tv II* supra note 85 para 61.

their capacity as head of state and head of the executive)[99] and another three were decisions made by cabinet ministers.[100]

A more difficult question arises when we ask whether procedural rationality is a ground of review restricted to legality review or whether it is also applicable under the PAJA. No express reference is made to procedural rationality in the PAJA grounds of irrationality. However, in *NERSA*, the majority judgment of Khampepe J ostensibly applied procedural rationality under the PAJA (despite not linking it to any provision of the PAJA). Kidd writes that it appears that *NERSA* is binding and that procedural rationality will now also be applicable to review under the PAJA.[101] If necessary, procedural rationality could be interpreted as forming part of the means-ends rationality link required by sections 6(2)(f)(ii)(aa) and (bb) of the PAJA. Why procedural rationality would ever be relied upon under the PAJA when lawfulness, procedural fairness, and reasonableness are available grounds of review is, however, questionable. (Indeed, why it was relied on in *NERSA* is perplexing.) However, this interpretation would at least accord with Yacoob ADCJ's finding in *Simelane* that the rationality standard has the same content under PAJA as it does under the principle of legality.[102]

4.2. Content of procedural rationality

The test for procedural rationality is, as its core, whether the process adopted by the decision-maker, in reaching their decision, is rationally linked to the purpose for which the decision-making power was conferred. Stated another way, is the adopted process capable of reaching the legislative or stated purpose?

In answering this essential question, the courts have in the above cases identified particular procedural defects that in certain circumstances will have the effect of rendering the process irrational. In doing so, the courts have not always been clear or cohesive. There have been some indications that a failure to justify a process can result in a finding of procedural irrationality,[103]

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[99] *Albutt* supra note 2; *Simelane* supra note 3; *SADC Tribunal* supra note 60.
[100] *ICC Withdrawal* supra note 52; *Esau II* supra note 79; *e.tv II* supra note 85.
[101] Kidd op cit note 74 at 199.
[102] Supra note 3 para 44.
[103] In *Scalabrini II* supra note 34 and *ICC Withdrawal* supra note 52, the courts suggested that the decision-makers' failure to justify the adopted process contributed to the procedural irrationality of the process. In

and that an improper or unlawful process is tantamount to procedural irrationality.[104] These suggestions were not, however, fully reasoned and would require further development before they could be relied on with confidence.

By contrast, two other procedural defects that may render a decision procedurally irrational have been developed in a more principled manner. These are (i) a failure to consult with particular parties or the public at large; and (ii) a failure to consider a relevant consideration, i.e. the *Simelane* test. These grounds are considered in more detail below.

4.2.1. Failure to consult

From the above considered cases, consultation was required as a matter of procedural rationality in *Albutt, Somali Association, Scalabrini, Esau* and *e.tv II*. In each of these cases the Court found that the purpose of the decision could not be achieved without consulting with particular parties (in *Albutt, Scalabrini II*; *Somali Association)* or with the public at large (*Esau* and *e.tv II)*.

While procedural rationality has been used to require consultation in certain circumstances, the Constitutional Court has been at pains to point out that procedural rationality should not be conflated with procedural fairness. As stated obiter in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd*,[105] '[procedural rationality] has nothing to do with the fairness of the process and has no bearing on whether there should have been a pre-decision hearing.' The Court in *Sembcorp Siza* further clarified that '[t]he fact that in *Albutt* the procedure followed related to a failure to give a hearing to the families of the victims of crime was a mere coincidence' and that '[i]t did not mean that in every case where there was no hearing,

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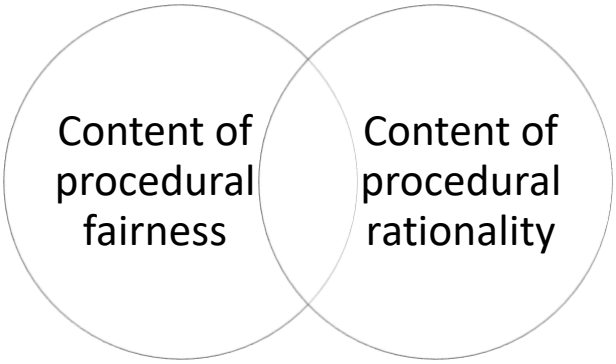
Scalabrini II, the failure to consult was deemed procedurally irrational, inter alia, because the Director-General had undertaken to consult interested parties and could not explain why that consultation had not taken place. In *ICC Withdrawal*, in addition to finding that the executive had followed an impermissible procedure, it was found that the process was procedurally irrational because the executive had failed to explain why the process had been so urgent that it could not take place according to the prescribed procedure.

[104] In *SADC Tribunal* supra note 60 and *ICC Withdrawal* supra note 52, the court reviewed the exercise of public power for procedural rationality on the basis that the decision-makers had followed the incorrect procedure. In both cases decisions were first set aside for procedural unlawfulness and then in addition, the courts found that the procedural unlawfulness meant that the decision was also procedurally irrational. This approach is logical as an unlawful process is not capable of achieving the legislative purpose.

[105] [2021] ZACC 21 para 49.

procedural rationality had been breached.'[106] This means that while the content of procedural fairness might, as shown in Figure 7, at times overlap with the content of procedural fairness, their content is not determined in the same way.

Figure 7



Source: Author

While procedural fairness requires consultation with affected parties as a matter of fairness, procedural rationality only requires consultation where the purpose of the decision could not be achieved without it. As stated in *Sembcorp Siza*, '[t]here will be a violation of procedural rationality only if the purpose for which the power was exercised could not be achieved without a pre-decision hearing.'[107] This finding in *Sembcorp Siza* was echoed by the Constitutional Court in *SADC Tribunal*:

> Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, 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 that power.[108]

The courts have therefore made very clear that procedural fairness and procedural rationality are fundamentally different grounds of review, based on very different tests. While the test for procedural fairness takes into account the nature of the decision, the rights affected by it, and

[106] Ibid.
[107] Ibid.
[108] *SADC Tribunal* supra note 60 para 64.

other circumstances under which the decision was made,[109] procedural rationality is concerned only with whether a rational connection can be drawn between the adopted process and the purpose of the decision. Consequently, procedural rationality cannot be considered a watered-down version of procedural fairness, but rather a fundamentally different concept that sometimes overlaps with procedural fairness in requiring consultation prior to a decision being made.

The courts have emphasised that consultation will not always be required for a process to be considered procedurally rational. The test for determining whether consultation is necessary for a process to be procedurally rational is whether the adopted process is capable of achieving the purpose for which the power was granted without providing for consultation. If the absence of consultation means that the purpose for which the power was granted cannot be reached, then the process must be considered irrational.

But what are the circumstances in which a failure to consult will render the process irrational? In the earlier cases the courts limited the duty to consult (as a matter of rationality) to specific persons or organisations having particular information that was deemed necessary for the decision-maker to have before them in order to make a decision that could achieve the purpose of the decision. In *Albutt* the victims of political offences had to be heard to determine the facts on which the President granted pardons, in particular to 'establish the truth about the motive with which a crime was committed'.[110] In *Scalabrini II* Nugent JA found that organisations dealing with asylum seekers were to be consulted due to their 'long experience and special expertise'.[111] In *Somali Association*, it was held that 'the duty to consult will arise only in circumstances where it would be irrational to take a decision without such consultation, because of the special knowledge of the person or organisation to be consulted.'[112] This suggested that consultation will be required as a matter of procedural rationality where a particular party possesses unique information that the decision-maker (i) can only obtain by consulting with that party, and (ii) needs to be aware of in order to reach a rational decision.

[109] See Chapter 3 Part 2.1.
[110] Ibid para 70.
[111] *Scalabrini II* supra note 34 para 70.
[112] *Somali Association* supra note 41 para 15.

In the later cases of *Esau* and *e.tv II*, however, procedural rationality was expanded to include a duty to conduct a broad public participation process, indistinguishable from the requirements of section 4 of the PAJA.

In requiring consultation as a matter of rationality, the courts have generally not considered that the information they identified as key to the decision could have been obtained by means other than consultation or, where consultation with particular parties has been required, by consultation with other parties.

Kubukeli[113] is one case where the Court accepted that consultation with an affected person was not required when the information required for a rational decision had been obtained by other means. This is a key basis for excluding consultation and arguably one that could have excluded the need for consultation in *Scalabrini, Somali Association*, *Esau*, and *e.tv II*, as in each of these cases, the special information identified by the Court could arguably have been obtained by other processes. This point is expanded on in Chapter 6 of this thesis.

A final issue in respect of consultation is that when courts have found that consultation is required as a matter of procedural rationality, they have not specified what the content of that consultation must be. As will be recalled from Chapter 3 of this thesis, the *audi* principle applicable to administrative action can require a wide range of procedures, including simple notice, in-person consultations or extensive inquiry procedures. Which of these can or should be applicable under procedural rationality? In *Albutt,* for example, having determined that consultation with the victims was required by rationality, the Court failed to determine what the content of that consultation needed to be. As noted by Murcott:

> Nothing was said about the nature of the hearing to be afforded to the victims. If the PAJA had been the basis for the decision in *Albutt* it would have been reasonably clear — from detailed legislative provisions — what were the parties' respective rights and obligations. The judicial inquiry in *Albutt* began and ended with whether victims were entitled to a hearing, and 'fizzled out' at the stage of considering the content of procedural fairness.[114]

[113] Supra note 44.

[114] Melanie Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?' (2013) 130 *SALJ* 260 at 268.

Little has changed since *Albutt*, as the courts have provided no guiding principles to assist in determining the content of consultation under procedural rationality. One can only speculate that, in accordance with the courts' general approach to the rationality ground, the consultation required as a matter of procedural rationality constitutes the most minimal procedure necessary for the decision to be rationally connected to its purpose. In other words, the nature of the consultation need only include those procedures without which the purpose of the decision could not be achieved. Its content would therefore not need to be as extensive as the content of procedural fairness, as it is not aimed at ensuring fairness to affected parties or other *audi* values.

4.2.2. Failure to take a relevant consideration into account (the Simelane test)

In *Simelane*, *NERSA* and *e.tv II*, an exercise of public power was set aside for procedural rationality in instances where the decision-maker failed to take relevant considerations into account. The three-step enquiry designed by Yacoob ADCJ can be relied on in future cases where it is alleged that an executive decision failed to take into account relevant information with the effect of rendering the decision-making process irrational. Paraphrased, they are: [115]

1. Are the factors that were ignored relevant?
2. If so, is the failure to consider the factors (the means) rationally related to the purpose for which the power was conferred?
3. If the answer to the second question is no, does ignoring the relevant factors colour the entire process with irrationality, thus rendering the final decision irrational?

The rationality ground can likely also be invoked where a decision-maker is swayed by an irrelevant consideration. The invasiveness of this ground under rationality review is, however, criticised in the next chapter on the basis that it resembles a test for reasonableness far more than a test for low-intensity rationality.

[115] Ibid para 39.

5. CONCLUSION

Since its introduction in 2010, procedural rationality has been developed with enthusiasm, as the courts have set about applying it not only in circumstances where no other ground was available (*Albutt*; *Scalabrini II; Somali Association*; e.*tv II*) but also *instead* of other available grounds (*Simelane*; *NERSA*) and *in addition to* lawfulness grounds (*ICC Withdrawal*, *SADC Tribunal*). The application of procedural rationality in these cases has not always been coherent, consistent, or accurate, often seemingly motivated by factors relevant to other grounds of review such as procedural fairness.

It is however possible to discern some principles that may guide the application and enhance the predictability of procedural rationality. Significantly, consultation may be necessitated due to special information that an interested party possesses, and a relevant consideration that is ignored can have the effect of tainting the entire process with irrationality. These principles do, however, require further investigation as they appear far more invasive that the minimum rationality that the courts have espoused under substantive rationality.

In the next chapter procedural rationality is compared to substantive rationality. While both grounds derive from the principle of rationality, it is argued that the limits within which substantive rationality has been applied have not been maintained in the application of procedural rationality.

CHAPTER 6

THE CONCEPTUAL DISJUNCT BETWEEN SUBSTANTIVE AND PROCEDURAL RATIONALITY

1. INTRODUCTION

In Chapter 4 it was shown that in its recent jurisprudence, the Constitutional Court has sought to clamp down on review for rationality, adopting a rationality test that has a particularly low threshold. It was also shown that the Court has arguably limited this low threshold to means-ends rationality, excluding the necessity of rational links between a decision and the reasons for it.[1]

In essence, the Court's curbing of rationality review seems to indicate that it wants to rein in what has been referred to as 'burgeoning'[2] rationality and return to a minimum threshold conception of rationality, as first envisaged in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*.[3] In the context of a difficult relationship with the executive, in which the courts have been accused of overstepping and impinging upon the separation of powers,[4] the Constitutional Court has emphasised that rationality is a minimum standard of review and that the Court will not overstep into the domain of the executive. This has taken shape in the common judicial iteration that it is not for the courts to prescribe to the government how to do its job.

During the same period that the Constitutional Court began clamping down on rationality under the principle of legality, it and other courts began to develop and apply procedural rationality with enthusiasm. In Chapter 5 it was shown how, starting with *Albutt v Centre for the Study of Violence and Reconciliation*,[5] and *Democratic Alliance v President of South Africa and Others*

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[1] *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20.
[2] Lauren Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *SALJ* 810.
[3] [2000] ZACC 1 ('*Pharmaceutical Manufacturers*').
[4] Expanded on below in Part 3.
[5] [2010] ZACC 4 ('*Albutt*').

('*Simelane*'),[6] the Constitutional Court, Supreme Court of Appeal, and High Courts started to apply procedural rationality both where there was no other ground to rely on,[7] and in addition to the successful review of decisions on other grounds.[8] The courts developed procedural rationality to set aside decisions where consultation with affected parties was absent and where a relevant consideration was ignored, where that failure had the effect of rendering the process procedurally irrational.[9] This is not a closed list, as any conduct that renders the process irrational can result in a decision being set aside for procedural irrationality.

At first glance, there would seem to be nothing conceptually wrong with these two developments. Procedural rationality, the courts claim, is simply another way of testing rationality. As per Khampepe J, '[t]his is not a new or different type of irrationality, but rather a way of evincing a broken or missing link between the means and ends.'[10] A defective procedure (means) that is not capable of achieving the desired aim (ends), must be considered irrational. So far this seems logical.

However, as I will demonstrate in this chapter, the respective content given to substantive rationality and procedural rationality are at odds with one another. While substantive rationality had been restricted to means-ends rationality with a very low intensity, procedural rationality has been markedly more invasive. It has become common practice for courts to reiterate that substantive rationality must be applied strictly in order to respect the separation of powers but then go on to set aside the impugned decision on the basis of an invasive conception of procedural rationality.[11] Substantive rationality has been applied at a low intensity while procedural rationality has been applied at a high intensity.

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[6] [2012] ZACC 24 ('*Simelane*').
[7] For example, in *Albutt* supra note 5; *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134 ('*Scalabrini II*'); *e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa v e.tv (Pty) Limited* [2022] ZACC 22 ('*e.tv II*').
[8] For example, *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53; and *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51.
[9] Chapter 5 Part 4.2.
[10] *National Energy Regulator of South Africa v PG Group (Pty) Limited* [2019] ZACC 28 para 64 ('*NERSA*').
[11] See *Scalabrini II* supra note 7; *e.tv II* supra note 7.

Not only has procedural rationality been given wider content than substantive rationality, but its content flouts the key principles of rationality review. This is glaring in two respects. First, while the principles of rationality warn courts against prescribing to the government how it should do its job, the courts have not hesitated, when applying procedural rationality, to prescribe to government decision-makers what their decision-making process should look like, even when other rational processes are available. This is discernible where the courts require decision-makers to consult with affected parties in order to obtain specific information even where there are other means by which the information may be obtained. Second, while rationality is routinely distinguished from reasonableness on the basis that reasonableness requires the appropriate balancing of various relevant factors, while rationality requires only one rational basis, the courts have found decisions to be procedurally irrational for failing to take into account a single relevant consideration. This contradicts the principle that rationality only requires one rational link between means and ends.

This chapter is structured as follows. In Part 2, the conceptual disjunct between substantive rationality and procedural irrationality is set out. The conceptual disjunct is apparent from an analysis of two discrepancies: first, the court's application of non-prescriptive substantive rationality and prescriptive procedural rationality; and second, the application of one-rational-basis substantive rationality and a balancing test under procedural rationality. Through this analysis, I reach the conclusion that in giving content to procedural rationality, the courts have not remained within the conceptual confines of rationality review but have applied a standard that is more akin to the grounds of procedural fairness and reasonableness. This, I argue, is significant, as the courts assert that they are applying low-intensity rationality review, while they are in reality applying a more invasive standard. In Part 3, I consider why this disjunct has developed, focusing on judges' desire to achieve administratively just outcomes within a formalistic and limited framework for judicial review under the principle of legality. In Part 4, I identify the problems that this disjunct brings about. Concluding remarks are made in Part 5.

2. THE DISJUNCT BETWEEN SUBSTANTIVE AND PROCEDURAL RATIONALITY

In this section I consider the difference between substantive rationality and procedural rationality under the principle of legality, specifically how procedural rationality has not

remained within the established principles of rationality review. Two disjuncts are considered: first, the manner in which substantive rationality is non-prescriptive while procedural rationality – when consultation is required – is prescriptive; and second, the manner in which substantive rationality only requires one rational basis for a decision to be rational while procedural rationality has been used to set aside decisions where a specific consideration has not been taken into account.

2.1. Non-prescriptive substantive rationality v prescriptive procedural rationality

As shown in Chapter 4 of this thesis,[12] it is a feature of rationality review that when making a decision, decision-makers will usually have a number of rational decisions open to them. Judges observe, now almost as a matter of course, that it is not for the court to decide which of these rational decisions the decision-maker should have taken.[13] That election is for the decision-maker, as the separation of powers prevents courts from judging which is the best decision to make. Thus, substantive rationality may be satisfied by any number of rational decisions.

Equally, one would think, procedural rationality should also be able to be satisfied by a number of rational processes. In other words, there are likely a number of processes available to the decision-maker that are capable of reaching the purpose of the decision. Following the principle of rationality, it would not be for the courts to prescribe to the decision-maker which of these rational processes they should have adopted, or what exactly that process must look like. If the process is capable of reaching the purpose of the decision, it should pass the rationality test.

However, in the cases in which the courts have required consultation as a matter of procedural rationality, they have contravened this principle. This is because, by requiring consultation with particular parties in the decision-maker's process, the courts have prescribed to the decision-

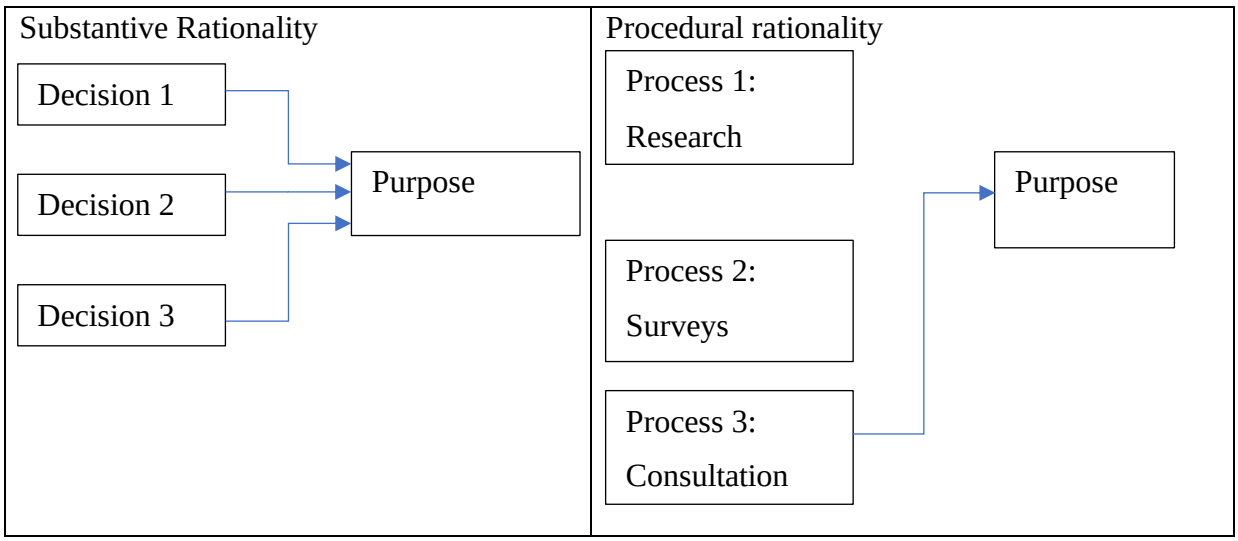
[12] Part 4.

[13] For example, as stated by Mogoeng CJ in *Electronic Media Network Ltd v e.tv (Pty) Ltd* [2017] ZACC 17 ('*e.tv I*') para 85: 'What courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available, on the other arms of the State. Separation of powers forbids that. Again we say, that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so.'

maker exactly what process must be followed. The courts have generally justified the requirement of consultation under procedural rationality in these circumstances by citing special information that the decision-maker needed in order to reach a rational decision. However, in doing so, they have ignored the possibility that the information in question could have been attained by alternative methods. In other words, there were other processes that the decision-maker could have adopted to attain that information, but the courts prescribed to the decision-maker which of these processes they should have selected.

There is therefore a conceptual disjunct between the workings of substantive rationality and procedural rationality. While under substantive rationality, courts are prevented from prescribing which rational decision the decision-maker should have made, under procedural rationality, the courts have not hesitated to determine which, out of a range of possible rational processes, a decision-maker should have followed. As seen in Figure 8, under substantive rationality, a rational link between any decision and the purpose will suffice, while under procedural rationality, only consultation (and in some cases consultation with a specified party) will render the decision procedurally rational.

Figure 8



Source: Author

This disjunct is evident from an analysis of the case law. Consider the difference between the substantive rationality review conducted in *Electronic Media Network Limited v e.tv (Pty)*

Limited ('*e.tv I*')[14] and the procedural rationality review conducted in *e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa v e.tv (Pty) Limited* ('*e.tv II*').[15] These cases concerned many of the same actors and the same process of digital migration, and were decided within five years of one another by the same court, making them useful comparators.

In *e.tv I*[16] the Court applied substantive rationality and found that the Minister's decision to exclude decryption capabilities from STBs was substantively rational, as it was rationally connected to the purpose of cutting costs. The Court found that it could not investigate why the Minister did not consult with e.tv (who would have paid for the decryption costs) as this would constitute telling the Minister which decision to make. Both decisions would result in cutting costs, and both would therefore have been rational: the Minister was at liberty to make either decision. Mogoeng CJ made it clear that '[w]hat courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available on the other arms of the State.'[17]

This hands-off approach in the application of substantive rationality in *e.tv I* can be contrasted with the intrusive application of procedural rationality in *e.tv II* in the same saga just five years later. In *e.tv II*,[18] it will be recalled, the Court had to determine whether the Minister of Communications had to consult with interested parties before setting an analogue switch-off date. The Court found that the Minister's process in determining the switch-off date had to include notice to and consultation with interested parties. The most forgiving interpretation of the Court's finding is that certain information (such as the number of persons who still required STBs) was necessary in order for the Minister to make a rational decision. However, if it was the case that that information was necessary in order to make a rational decision, surely the Minister should have been at liberty to decide for herself the process that she would follow to obtain that information. In other words, there are a number of processes that the Minister could have followed in order to obtain the information necessary to make her decision rational. She

[14] Supra note 13. Discussed in Chapter 4 Part 5.1. in respect of substantive rationality.
[15] Supra note 7. Discussed in Chapter 5 Part 3.7 in respect of procedural rationality.
[16] Supra note 13.
[17] Ibid para 85.
[18] As discussed in Chapter 5.

could have decided to conduct a survey, employ a researcher, or consult with interested parties. By requiring that the Minister's process must involve consultation, the court was – contrary to the tenets of rationality – *prescribing* the process that the Minister must follow.

These two judgments lay bare the difference in the Constitutional Court's approach in applying substantive rationality versus procedural rationality. In respect of substantive rationality, the Court emphasises how important it is not to prescribe to the executive which decision to make, as long as the decision is rationally connected to the relevant purpose. In respect of procedural rationality, on the other hand, the Court will prescribe to the executive, not only what information it needs to make a decision, but *specific features of the process* that it must follow in order to obtain that information. In *e.tv II,* the application of procedural rationality is therefore not only more invasive than the application of substantive rationality in *e.tv I,* but conceptually different, as procedural rationality does not adhere to the non-prescription principle of rationality review.

The same disjunct is evident in *Minister of Home Affairs v Scalabrini Centre, Cape Town* ('*Scalabrini II*').[19] As will be recalled from Chapter 5,[20] in this matter the SCA reviewed the decision of the Director-General to close the Cape Town refugee reception office. The Court considered both whether the decision was (i) substantively and (ii) procedurally irrational. On the first question, noting that 'courts are enjoined not to stray into executive territory', the Court determined that while the closing of the office might be unreasonable, it could not be considered substantively irrational.[21] The Court then considered whether the absence of consultation with certain NGOs rendered the process by which the decision was made procedurally irrational. The SCA emphasized that consultation is not a general requirement of procedural rationality and will only be required where a person or organization has 'special knowledge' that the decision-maker needs in order to make their decision.[22] On the facts, it was held that the Director-General required the perspective of asylum seekers, but instead of requiring him to obtain that perspective in *any* appropriate manner, he was required to obtain

[19] Supra note 7.
[20] Part 3.1.
[21] *Scalabrini II* supra note 7 para 66.
[22] Ibid para 72.

it by consulting with specific NGOs that were before the Court.[23] Because the Director-General could not explain not having consulted with the NGOs, the court was 'left to infer that the Director-General's failure to hear what they might have to say when deciding whether that office was necessary for fulfilling the purpose of the Act, was not founded on reason and was arbitrary'.[24]

Again, this finding is prescriptive. There are a number of processes that the Director-General could have followed in order to achieve the purpose of the Act. Finding that the process *must include consultation* with relevant NGOs in order to be rational did not allow the Director-General to choose between those processes. On the rationality principle, a process should only be considered irrational '[i]f the procedure followed is such that it could not result in achieving the purpose for which the power was conferred'.[25]

It is noteworthy that in both *e.tv II* and *Scalabrini II*, the content given to consultation under procedural rationality looked remarkably like the content of procedural fairness. In *e.tv II*, it was determined that in order for the Minister to have made a procedurally rational decision, the process needed to 'include an opportunity where the affected parties [were] given notice and afforded an opportunity to make representations'.[26] The parties that needed to be given notice included the industry, the NGO Media Monitoring Africa, and the broadcasting coalition SOS,[27] in other words, interested and affected parties. In *Scalabrini II* the Court found that 'an equitable order would be one that allows the Director-General an opportunity to consider afresh, after consulting with the interested parties, what is to become of the Cape Town office.[28]

If, as demonstrated above, the courts have strayed outside the conceptual bounds of rationality review when requiring consultation as a matter of procedural rationality, the question arises whether procedural rationality is also being used to include the content of another ground of review, namely, procedural fairness. The Court's reasoning was transparent in *e.tv II*, where Mhlantla J stated that consultation was needed due to there being '[i]mportant interests… at

[23] Ibid para 70.
[24] Ibid.
[25] *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* [2021] ZACC 21 ('*Sembcorp Siza*') para 47.
[26] Supra note 7 para 51.
[27] Ibid para 52.
[28] Supra note 7 para 79.

stake'.[29] This is one of the key factors in determining the content of both procedural fairness and reasonableness but not of rationality. Thus, the motivation of procedural fairness informed the content of procedural rationality. Mhlantla J was (duly) concerned over the right of the millions of people who would lose access to television signals. However, that concern cannot give rise to a right to consultation as a matter of rationality. Only procedural fairness takes account of the interests of affected parties in necessitating consultation.

2.2. One rational basis under substantive rationality v the *Simelane* test under procedural irrationality

The second conceptual disjunct between substantive rationality and procedural rationality concerns those instances in which the failure to consider a relevant consideration has resulted in a finding of procedural irrationality (i.e. the *Simelane* test).

As discussed in Chapter 4 Part 4.2. in respect of substantive rationality, a key principle of review for rationality is that decision-makers need only one rational basis or 'a rational link' for a decision in order for it to be deemed rational. This feature of rationality is often used to distinguish it from reasonableness.[30] As Price has usefully explained, '[w]hereas a law or act is reasonable if the reasons for it defeat the reasons against it, that law or act is merely rational if, notwithstanding the reasons against it, there is at least one reason or rationale for it.'[31]

In Figure 9 below, the difference between substantive rationality and reasonableness is shown schematically. Under substantive rationality, 'reason 1' is sufficient if it bears a rational link to the purpose of the decision. Under reasonableness, 'reason 1' will only be sufficient if together with the other reasons for a decision, it outweighs the reasons against the decision.

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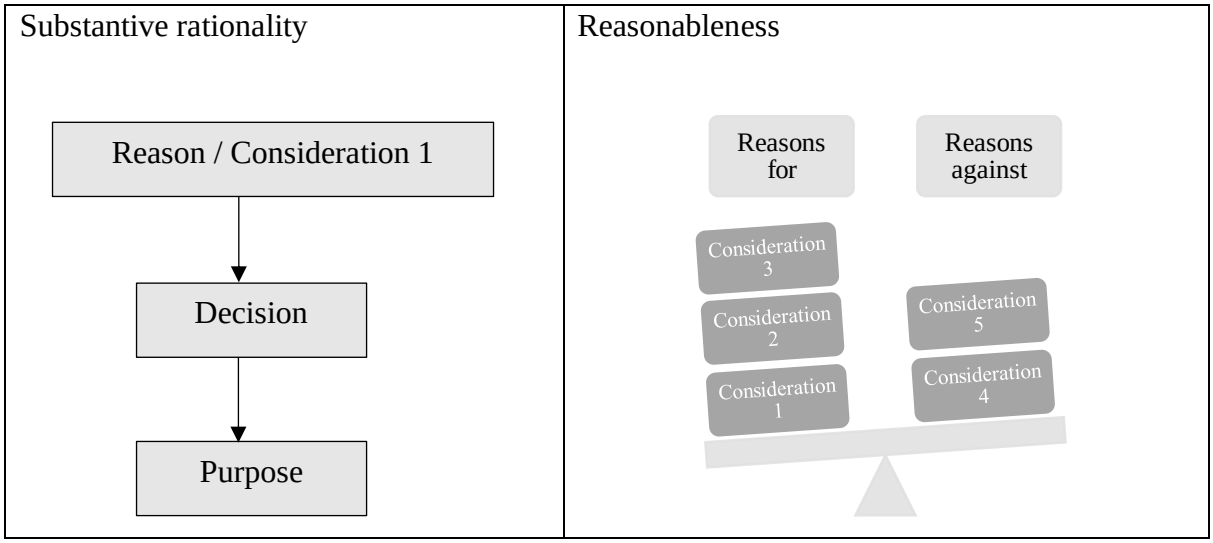
[29] Supra note 7 para 52

[30] See Chapter 4 Part 4.3.

[31] Alistair Price 'The Content and Justification of Rationality Review' (2010) 25 *Southern African Public Law* 346 at 359.

Figure 9



Source: Author

A good example of this principle in respect of rationality review is *Fair-Trade Independent Tobacco Association v Presidents of the Republic of South Africa.*[32] It will be recalled from Chapter 4[33] that the case concerned the ban on tobacco products during the first wave of COVID-19. The Court had to determine whether there was a rational link between the decision to ban tobacco products and stopping the spread of COVID-19. Both parties provided expert evidence on the question whether there was a link between smoking and more serious COVID-19 health implications. The High Court found that it was not its job to determine which party's evidence was more convincing.[34] Instead, because the Minister, in making the ban, had relied on *some* expert evidence in reaching her decision, it was found that there was a rational link between the ban and saving lives.[35] As the Court explained:

> [T]he means adopted by the Minister in ensuring that smokers ceased smoking may not have been the most effective or the best means possible, but the test for rationality is not concerned with this. In terms of the rationality inquiry, there merely needs to be a rationally objective basis justifying the conduct of the Minister. Once this hurdle is overcome, the conduct of the Minister is deemed rational.[36]

[32] [2020] ZAGPPHC 246 ('*Fair-Trade Tobacco*').
[33] Part 4.3.
[34] *Fair-Trade Tobacco* supra note 32 para 41.
[35] Ibid para 43.
[36] Ibid para 50.

This case indicates just how low the threshold is, as substantive rationality requires only *some* rational basis for a decision to be considered rational, and strong reasons militating against the decision are not to be taken into account.

Under procedural rationality, however, it has become possible to set aside a decision where there is a failure to take into account a relevant consideration that 'taints the entire process' with irrationality.[37] As discussed in Chapter 5,[38] in the test set out in *Simelane* a decision can be set aside for procedural irrationality if, in making the decision, the decision-maker's disregard of a relevant consideration had the effect of colouring the entire process with irrationality.[39]

These principles of substantive rationality and procedural rationality are at odds with one another. If rationality only requires one 'rationally objective basis justifying' a decision,[40] surely one or more reasons against an adopted process cannot render that process irrational? The *Simelane* test seems to be saying that if a relevant consideration would have an impact on the decision, it must be taken into account. If in balancing that consideration with other considerations, it has the effect of tainting the entire process with irrationality, it must be set aside. But according to the court's own jurisprudence, rationality does not require a balancing of considerations. The *Simelane* test therefore does not fit within the limitations of rationality, but echoes the test for reasonableness, as seen in Figure 9 above. As Price has argued in respect of substantive rationality, 'the wider the range of factors a court takes into consideration, the more closely the test comes to resemble one of reasonableness.'[41]

This is exemplified by the facts in *Simelane*. As will be recalled,[42] the case concerned the President's decision to appoint Mr Simelane to the position of NDPP despite the fact that there was evidence of his untrustworthiness. The Court deemed this fact a relevant consideration that, when ignored, tainted the entire process with irrationality. However, if a strict rationality test were to be applied, the President's decision to appoint Mr Simelane could have been

[37] *Simelane* supra note 6.
[38] Part 2.3.
[39] Ibid para 39.
[40] *Fair-Trade Tobacco* supra note 32 para 50.
[41] Price 'Content and Justification' op cit note 31 at 385.
[42] Chapter 5 Part 2.3.

rationally linked to other considerations: a particular qualification, experience in similar work, or his success in some other project. Rationality did not place the President under an obligation to weigh up all relevant factors. *Reasonableness* might require a decision-maker to weigh up all the factors appropriately, but rationality does not. The three-step *Simelane* test, in other words, introduces a balancing exercise (a key feature of reasonableness) into the test for rationality.

It is useful here to consider English law. Under English law, a decision may be set aside for having a defective process, including where a relevant or irrelevant consideration is given disproportionate weight. However – crucially – this is done as a matter of procedural *unreasonableness*. As such, it is framed as a weighing up exercise, a clear instance of reasonableness. As stated by Woolf et al,

> [W]here undue weight is given to any particular consideration, this may result in the decision being held to be unreasonable and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.[43]

This shows how a process value, such as the decision-maker's treatment of relevant considerations, can in fact fit properly under the umbrella of merits review. It does not, however, fit within the conceptual strictures of low-intensity rationality review. The broader balancing exercise of reasonableness review (or perhaps variable rationality review)[44] was necessary for the decision in *Simelane* to make conceptual sense.

This discrepancy between substantive rationality and procedural rationality is also evident in the other cases in which decisions have been set aside for procedural irrationality on the basis of a failure to take into account a relevant consideration. *National Energy Regulator of South Africa v PG Group (Pty) Limited* ('*NERSA*'),[45] it will be recalled from the previous chapter,[46] concerned a clearly illogical decision to set the maximum gas price higher than Sasol's monopolistic price, when the purpose of the decision-maker's power was to mimic a

[43] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan *De Smith's Judicial Review* 8 ed (2018) at 602.
[44] See Chapter 4 Part 4.5.
[45] Supra note 10.
[46] Chapter 5 Part 3.5.

competitive price and thus promote competition in the gas industry. The Court set aside the decision on the basis that the energy regulator had failed to take into account Sasol's marginal costs in setting the maximum gas price. This again stretches rationality far beyond its conceptual strictures.

In this case, it was again wholly unnecessary to stretch review for rationality in this way because there were three other available grounds which could have been relied on. First, as has already been discussed,[47] the PAJA was applicable and NERSA's failure to take Sasol's marginal costs into account could have rendered the decision reviewable under section 6(2)(e)(iii) for a failure to take a relevant consideration into account. Second, the Court could have relied on *substantive* rationality. The decision to set a gas price that was higher than the monopolistic price (means) could not possibly reach the purpose of promoting competition in the gas industry (ends). The decision was not capable of achieving its purpose and as such rationality at its simplest was not present. No weighing up of considerations under procedural rationality was necessary in order to set aside this blatantly illogical decision. Third, procedural rationality could have been relied on without applying the *Simelane* test. It could simply be argued that the methodology relied on by the decision-maker (process) was not capable of achieving the purpose of the decision, i.e. setting a competitive price to promote competition in the gas industry. If the *Simelane* test is excluded, it is therefore still logically possible to rely on procedural rationality without reaching into the realm of reasonableness.

The third case in which there has been reliance on the *Simelane* test was *e.tv II*.[48] After finding that the setting of an analogue switch-off date was procedurally irrational due to a lack of consultation, the court also set aside the determination of the deadline to register for a STB on the basis that the Minister had failed to consider a relevant consideration, namely the number of people who were likely to lose access to television signals as a result of the deadline. Mhlantla J found that 'what tainted her decision with irrationality, was to adopt a process that meant that the analogue switch-off date was determined without considering the number of households which would be adversely affected by such switch off'.[49] This quote reveals the way in which the application of procedural rationality crosses the boundary into

[47] Chapter 5 Part 3.5.
[48] Supra note 7.
[49] Ibid para 79.

reasonableness. A decision-maker need not take into account how many persons are adversely affected by a decision in order to make a rational decision. It is only under O'Regan's reasonableness factors[50] that the adverse effect on certain individuals needs to be taken into account and balanced against other factors. As in *Simelane*, the decision in this matter intrudes into the domain of reasonableness. While the outcome in *e.tv II* was administratively just, it is only so because of our concern with the interests of the affected parties, something that only the ground of reasonableness, and not the rationality ground, requires a decision-maker to take into account.

3. THE REASON FOR THIS DISJUNCT

Why have the courts adopted this conceptually dissonant approach, in terms of which procedural rationality exceeds the conceptual limitations of rationality review? One possible explanation is as follows: judges wish to arrive at administratively just outcomes, but two developments in our law have prevented them from being able to do so without applying procedural rationality beyond its conceptual limits.

The first development in our administrative law jurisprudence that has hampered the courts in achieving just outcomes is the blanket exclusion of procedural fairness from the principle of legality in *Masetlha v President of the Republic of South Africa*.[51] Due to this finding, there are decisions to which procedural fairness is inapplicable in circumstances where it is clearly desirable, if not essential. In certain cases, the facts make clear that as a matter of administrative justice, affected persons should have an opportunity to make representations. For example, in *Scalabrini II*, it would seem wholly inapposite for a vulnerable group of people such as refugees to lose access to a refugee reception office without them, or some representative of their interests, being heard. If procedural fairness were applicable, in terms of which the content of notice and consultation is determined by considerations of fairness to the affected persons, there clearly would have had to be such consultation for the decision to pass muster.

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[50] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15 para 45. Discussed in Chapter 4 Part 3.2.3.

[51] [2007] ZACC 20 ('*Masetlha*'). As discussed in Chapter 1 Part 2.5 and Chapter 5 Part 2.1.

However, because procedural fairness is inapplicable under the principle of legality, the courts' desire to treat parties fairly (the remit of procedural fairness) has led them to expand the meaning of rationality (in which fairness plays no part) to cater for those instances in which people need to be heard. In other words, they are motivated by the rationale for applying procedural fairness when stretching the scope of rationality beyond what it should be – a ground concerned only with logic – in order to achieve administratively just outcomes. The content of procedural fairness is therefore funnelled through an expanded notion of procedural rationality in order to arrive at an administratively just (though conceptually incoherent) outcome.

The second development preventing courts from reaching administratively just outcomes without distending review for rationality, is the restriction of substantive rationality review to a very low intensity without being able to rely – when necessary – on reasonableness. The inadequacy of low-threshold rationality for dealing with all non-administrative actions is evident in a case like *e.tv II*.[52] The case dealt with decisions that require more intensive oversight than low threshold substantive rationality. Sometimes greater intensity of substantive review *is* necessary under the principle of legality in order to arrive at just outcomes. In *e.tv II*, it would not be administratively just for millions of poor people to lose access to television signals because the Minister had not acquired the requisite information. Again, the balancing of factors required under reasonableness was necessary to make that missing information relevant to the decision and to allow the Court to set that decision aside. These cases show that the courts have sometimes, in order to reach just outcomes, had to introduce aspects of reasonableness into the review test under the principle of legality.

How did the courts end up in this situation? While there is no way of definitively determining why the courts decided to exclude procedural fairness from the principle of legality or limit review for rationality to such a low intensity, it may be speculated that they aimed to quell executive concerns. These findings were reached during a period in which accusations of judicial over-stepping were rife, after the Constitutional Court had made a number of findings against an executive that was making unlawful and unconstitutional decisions.[53] In retaliation,

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[52] *Simelane* supra note 6; *Scalabrini II* supra note 7.

[53] See Michelle Le Roux & Dennis Davis *Lawfare: Judging Politics in South Africa* (2019); Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and Its Effects on the Judiciary' (2017) 10 *African Journal of Legal Studies* 105–26; Dan Mafora *Capture in the Court: In Defence of Judges and the Constitution* (2023).

members of the executive accused the courts of intrusion into the sphere of the executive. In order to dispel this notion, the courts could plausibly have chosen to show exaggerated deference to the executive (in cases that did not involve the most egregious executive failing) by finding that they did not have the power to review decisions for procedural fairness or higher intensity rationality under the principle of legality. As Theunis Roux has argued, in a young democracy, a constitutional court will sometimes have to compromise on principle in favour of pragmatism, in order to shore up its institutional security.[54] Cases such as *Masetlha*, *e.tv I*, and *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd*,[55] in which deferential findings were made, were not cases in which it was essential to hold the executive to account (at least, not in comparison to some other cases before the Constitutional Court at the time), and were therefore opportunities in which to demonstrate the Court's deference to the executive.

If this is the case, while most understandable, the courts' compromise on principle in favour of pragmatism in these cases has had far-reaching consequences. By completely excluding procedural fairness and limiting rationality review only to low intensity review under the principle of legality, these cases have left courts with a conspicuously light toolbox. Equipped only with lawfulness and low-intensity rationality review, courts adjudicate all the non-administrative actions that come before them under the principle of legality. As shown in Chapter 2, decisions to be reviewed under the principle of legality are numerous and diverse, and some will inevitably require more intensive review than mere lawfulness and low-intensity rationality review in order to achieve administratively just outcomes.

Caught between an obligation to reach administratively just outcomes in respect of all public decisions, but without the tools to do so directly, the courts have developed procedural rationality in a way that bears very little resemblance to rationality review. Through an expanded (and conceptually incoherent) notion of procedural rationality, they have smuggled in the content of procedural fairness and reasonableness review where these are necessary to achieve just outcomes. In effect, procedural rationality means whatever a court needs it to mean to arrive at a just outcome.

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[54] Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106–38.

[55] Supra note 10. Discussed in Chapter 4 Part 5.3.

4. THE PROBLEM WITH THIS DISJUNCT

To some, procedural rationality might seem like a relatively slick solution: it shows deference to the executive by purporting to be a low-intensity standard, while allowing courts to intervene and apply a higher intensity standard in those cases in which it is essential for the achievement of administrative justice. Thus, one might ask, if it is successful in tempering the all-or-nothing consequences of *Masetlha* and low-level rationality, and achieves administratively just outcomes, why does its conceptual incoherence matter? To answer this question, in this part, I set out four interrelated reasons why, despite procedural rationality's ostensible usefulness, giving it content beyond the scope and strictures of rationality review makes continued reliance on this ground undesirable and unsustainable.

The first problem is one of transparency. For it is undesirable for courts to be saying that they are doing one thing – excluding procedural fairness from legality review and clamping down on rationality review – while in fact engaging in more intensive scrutiny akin to procedural fairness or reasonableness review under the guise of procedural rationality. Whether they are doing so knowingly or unknowingly, if courts are setting non-administrative actions aside on the basis of procedural fairness and reasonableness, they should say so. To do otherwise is to engage in judicial artifice and flout the Constitution's commitment to transparency.

The second problem is a lack of justification. If, as I have argued, the courts are demanding some of the contents of procedural fairness and reasonableness under the principle of legality, they must not only acknowledge that they are doing so, but also justify the application of these more intense standards. The courts are currently giving procedural rationality content far more invasive than low-intensity rationality review, without explaining why this is justifiable under the circumstances. This emphasises the importance of calling a standard by its proper name. Where judges require more intensive standards such as consultation and the failure to consider a relevant consideration under the principle of legality and call it procedural rationality, they are less likely to provide the necessary justification for those standards. Such justification is undoubtedly possible in these scenarios, but it remains essential that it is clearly articulated so that the courts develop cohesive principles governing the appropriate intensity of scrutiny in particular circumstances.

The third problem is unclear reasoning. If consultation and the *Simelane* test do not fit within the strictures of rationality review, courts will struggle to develop a coherent jurisprudence regarding procedural rationality. For example, where judges are motivated by the impact that a decision has on a person's rights to find that consultation was required or a consideration needed to be taken into account, they are relying on a factor that is irrelevant to rationality. While this factor would be taken into account as a matter of both procedural fairness and reasonableness, it is not a concern of rationality, which is concerned only with the relationship between means and ends. Therefore, we find judgments in which judges refer to the significance of a decision and its impact on people before making an unsubstantiated jump to finding that it must therefore be procedurally irrational. It can only weaken the coherence of our jurisprudence if procedural rationality is not applied according to determinable principles.

These three problems lead to the fourth problem, which is a lack of predictability. If procedural rationality is applied in a manner that is not transparent, is not properly justified, and does not operate according to clearly identifiable principles, we cannot predict when it will apply or what its content will be. The principles developed around substantive rationality cannot be relied on, as I have shown that the content given to procedural rationality either far surpasses those principles or shirks them entirely. Nor can reliance be placed on the principles of procedural fairness, as those have been excluded by *Masetlha,* or the principles of reasonableness, as the courts have rejected a variable conception of rationality review.

Thus, it appears that procedural rationality is applicable when a court needs it to be. In a number of cases where it was argued that consultation was required as a matter of procedural rationality, this argument was simply disregarded with reference to the *Masetlha* finding or the observance of low-intensity rationality.[56] In other cases, consultation was considered an essential component of procedural rationality.[57] One sympathises with the Department of Communications which, in *e.tv I*, was told that due to *Masetlha* there was no duty to consult as low-level rationality review was 'not a master key to open all doors', and then told in *e.tv II* that it should have consulted with affected parties as a matter of procedural rationality.

[56] For example, *e.tv I* supra note 13.
[57] For example, *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; *e.tv II* supra note 7.

5. CONCLUSION

In this chapter I have shown that when the courts have set aside decisions for a failure to (i) consult and (ii) take into account a relevant consideration, as a matter of procedural rationality, they have given content to procedural rationality that does not fit within the conceptual limitations of low-intensity rationality review. These standards contradict the principles of rationality review and fit far more comfortably within the concepts of procedural fairness and reasonableness, respectively. In effect, the courts have been purporting to adhere to strict rationality review, while straining the concept of rationality by applying some of the standards of procedural fairness and reasonableness review.

I have argued that this disjunct is likely due to individual judges' desire to arrive at administratively just outcomes, when armed with limited tools for supervision under the principle of legality. However, it is not a desirable state of affairs for courts to be saying that they are doing one thing (excluding procedural fairness and restricting review for rationality) while they are doing another (applying more invasive review through procedural rationality). This leads to conceptual incoherence and a lack of predictability for public decision-makers as well as those persons adversely affected by public decisions. However, it would also clearly be undesirable for courts to apply only low-intensity rationality review and arrive at outcomes that are administratively unjust. The continued application of procedural rationality is certainly the lesser of the two evils. However, given the problems with the conceptual incoherence of procedural rationality, it is my view that alternatives need to be considered.

In the next chapter, I consider whether procedural fairness should be applicable to non-administrative action under the principle of legality through the analysis of case studies. Through these case studies I demonstrate that there is little justification for excluding the application of procedural fairness to non-administrative action and that even if the courts continue to adopt the conceptually incoherent conception of procedural rationality identified in this chapter (and referred to in the next chapter as a 'wide' or 'strained' conception), it is not a concept capable of fulfilling the role of procedural fairness under the principle of legality.

Finally, while in this chapter I have argued that when setting aside decisions for a failure to take into account a relevant consideration, the courts have de facto been applying

reasonableness, it is beyond the scope of this thesis to consider whether the principle of legality should be developed also to include review for reasonableness (or perhaps a version of rationality capable of variation). The cases in which the consideration of relevant information has been required certainly suggest that in some cases more intensive substantive review may be required under the principle of legality. However, I leave open the question of including reasonableness under the principle of legality and consider only the inclusion of procedural fairness.

CHAPTER 7

THE NECESSITY OF PROCEDURAL FAIRNESS AND INADEQUACY OF PROCEDURAL RATIONALITY UNDER THE PRINCIPLE OF LEGALITY: THREE ILLUSTRATIVE CASE STUDIES

1. INTRODUCTION

The research question in this thesis is whether, given their different conceptual underpinnings, procedural rationality can fulfil the role of procedural fairness to achieve procedurally just outcomes under the principle of legality. In the previous chapter, it was argued that because the content given to procedural rationality exceeds its scope as a species of rationality, it has been applied in a manner that is conceptually incoherent and unpredictable. In this chapter I consider whether there is therefore a need for procedural fairness to be applicable under the principle of legality by comparing what the outcomes would be of applying procedural fairness, as set out in Chapter 3, and the outcomes of applying procedural rationality, as set out in Chapter 5, to the same non-administrative actions.

For the purposes of this argument, I have selected three of the non-administrative actions identified in Chapter 2,[1] and analyse a particular case in respect of each. The first is the findings of commissions of inquiry, in respect of which I consider a possible review of the State Capture Commission of Inquiry on procedural grounds (Part 2 of this Chapter). The second non-administrative action is the nomination and appointment of judges by the Judicial Service Commission (JSC), with a case study on the interviews of Judges Dhaya Pillay and Dunstan Mlambo for positions on the Constitutional Court (Part 3). The third non-administrative action is executive policy-making, in respect of which my case study is the Minister of Communication's amendment of a digital migration policy that was the subject of *Electronic Media Network Limited v e.tv (Pty) Limited* ('*e.tv I*')[2] (Part 4).

[1] Part 4.

[2] [2017] ZACC 17 ('*e.tv I*'). I previously discussed this case in respect of substantive rationality in Chapters 4 and 6. Here I discuss it in respect of consultation.

These three categories of decisions have been selected from the long list of non-administrative actions, as they represent three markedly different exercises of public power. While further classification of functions is generally to be discouraged for being unhelpful, broadly speaking, the process and findings of a commission of inquiry represent an investigative-type action; the interviews of the JSC represent an adjudicative-type action; and executive policy-making is a prototypical example of an executive action. They are therefore representative of the range of decisions that do not amount to administrative action.

Through these case-studies I wish to answer three pertinent questions. First, how do the requirements of procedural fairness and procedural rationality compare in circumstances in which some consultation is clearly necessary? Second, would it be inappropriate to subject these types of actions to the requirements of procedural fairness? Third, if procedural rationality does require consultation, does it also protect the procedural and broader administrative law values associated with procedural fairness? By asking these questions in respect of specific case studies, I wish to present clear examples of the types of decisions that courts will be faced with in the future and determine whether procedural rationality can do the work of procedural fairness when required to do so.

Having asked these questions in respect of the selected case studies, it is my conclusion (in Part 5) that where a narrow, low-intensity conception of procedural rationality is adopted, the ground is not capable of requiring adequate consultation, revealing a significant gap between the two concepts. Procedural rationality is only capable of playing this role where a wider (and as argued in Chapter 6, strained) conception of rationality is adopted. While this wider conception of rationality might be required in order to achieve just outcomes, it carries with it a number of difficulties, which the courts will have to grapple with head-on if they are to apply the separate grounds of procedural fairness, substantive rationality, procedural rationality and reasonableness in a manner that is theoretically coherent. It is moreover my conclusion that the exclusion of procedural fairness under the principle of legality is likely to result in a scheme of review that does not protect and promote procedural and broader administrative law values to the same extent.

2. THE REVIEW OF THE PROCESS AND FINDINGS OF COMMISSIONS OF INQUIRY

2.1. Introduction to commissions of inquiry

Commissions of inquiry, or 'royal commissions' as they are called in some countries, have their roots in English law going as far back as the 11th century, and have waxed and waned in popularity over the centuries.[3] Royal commissions are now seldom held in the United Kingdom, though similar types of public inquiries are conducted frequently.[4] Commissions have, however, taken root in various Commonwealth jurisdictions, being conducted regularly in New Zealand, Australia, Canada and South Africa.

Modern commissions of inquiry are appointed by the head of state to investigate matters of public concern such as failures of government or disasters, or to gather information needed for the formulation of policy. To promote public confidence in the investigation, commissioners are selected from outside the executive, usually from the judiciary. Commissioners are granted wide powers in their roles, often being granted the power to subpoena evidence as well as to call and cross-examine witnesses. Commissions of inquiry conclude with the issuing of a report, in which the commission publishes its findings and recommends a particular course of action to the executive.

2.2. Reviewing commissions of inquiry in the Commonwealth

Before dealing with commissions of inquiry in the South African context, it is instructive to consider the jurisprudence that exists in other Commonwealth countries. This is because there are very few instances in which commissions of inquiry have been reviewed in South Africa, and the rich jurisprudence that exists elsewhere is therefore of particular value in considering the applicability and content of procedural fairness in respect of commissions of inquiry.

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[3] Mike Rowe & Laura McAllister 'The Roles of Commissions of Inquiry in the Policy Process' (2006) 21 *Public Policy and Administration* 99–115 at 100.
[4] Ibid.

2.2.1. Competing factors in the reviewability of commissions of inquiry

By their very nature, there are several competing factors that impact on the reviewability of the decisions of commissions of inquiry. To begin with, the findings of commissions, usually in published reports, are merely the statement of opinions that underpin recommendations of a particular governmental course of action. They are therefore not legally binding and have no adverse legal effect on the rights and liberty of the persons they concern. The findings of commissions might lead to binding decisions, such as convictions and sanctions for crimes, but they do not themselves have these outcomes. The principle of administrative law that only a decision with direct legal effect may be reviewed therefore militates against the review of the process and findings of commissions of inquiry.

However, there are important counter-factors that have generally outweighed this principle. First, the public has a vested interest in the conduct and outcome of commissions. Commissions often investigate events of the utmost gravity and importance to the public. Seeing these commissions conducted according to established legal procedures and reaching rational outcomes is therefore of great importance to the public. Second, while commissions of inquiry do not directly affect the rights and liberty of persons implicated in their hearings and reports, there is significant scope for those persons to suffer reputational damage. The reports of commissions may and often do implicate individuals and businesses in criminal dealings or responsibility for events such as national disasters. As a commission of inquiry is not a court of law, its findings cannot be appealed to a higher court. Nor can an implicated person invoke the protections of defamation law.[5] Implicated persons therefore have none of the usual protections available to persons suffering reputational damage.

Across the Commonwealth, the public interest in seeing commissions of inquiry conducted lawfully, and the potential for their findings to cause reputational damage, have resulted in courts finding that their process and findings can be subjected to judicial review. As stated by the New Zealand Court of Appeal in *Peters v Davison*,[6] '[w]hatever the technical legal characterisation might be, the public interest in this unusual, serious, official process plainly

[5] A commission of inquiry is under a legal duty to make findings in the public interest and will therefore have the defence of qualified privilege under the law of delict.
[6] [1999] 2 NZLR 164 (CA) ('*Peters*') para 66.

calls for carefully prepared and applied rules of law designed both to produce a report of real value and to protect the rights and interests of those involved.' Similarly, in *Re Erebus Royal Commission (No 2),*[7] the same Court found as follows:

> Findings made by Commissioners are in the end only expressions of opinion […] In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice.

Thus, despite being mere opinion, it is widely accepted that the findings of commissions of inquiry may be reviewed. As concluded in *Peters*, '[t]he real as opposed to the technical force of the reports of commissions appears in the growing acceptance over recent years and in this case that commission reports or parts of them can be reviewed on certain grounds.'[8]

2.2.2. The link between reputational damage and procedural fairness

In several jurisdictions, a link has been recognised between potential damage to a person's reputation and the applicability of procedural fairness. This is because *audi* allows a person publicly to provide evidence to rebut any evidence that may lead to a finding against them before a commission of inquiry. In *Ainsworth v Criminal Justice Commission,*[9] the Australian High Court judgment of Mason CJ, Dawson, Toohey and Gaudron JJ found that '[i]t has long been accepted that reputation is an interest attracting the protection of the rules of natural justice.'[10] In *Re Pergamon Press Ltd,*[11] the English Court of Appeal found in respect of investigators under the Companies Act as follows:

> They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers.

[7] [1981] 1 NZLR 618 at 653.
[8] Supra note 6 at 56.
[9] [1992] HCA 10.
[10] Ibid para 27.
[11] [1970] 3 All ER 535 (CA).

> Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions . . . Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly.[12]

The link was similarly emphasized by the Supreme Court of Canada in *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)* (‘*Krever III*’),[13] where it found that ‘[f]or most, a good reputation is their most highly prized attribute’ and that ‘[i]t follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.’

2.2.3. The content of procedural fairness applicable to commissions of inquiry

In determining the content of procedural fairness applicable to commissions of inquiry, courts have stressed the variability of procedural fairness, both in the context of commissions of inquiry generally, as well as in the circumstances of a particular commission. As stated in *Canada (Attorney General) v Krever* (‘*Krever I*’),[14] ‘[t]he characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right [to procedural fairness]’. Similarly in *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* (‘*Krever II*’),[15] Justice Décary noted that ‘[t]he concept of procedural fairness is a shifting one; it changes depending on the type of inquiry and varies with the mandate of the commissioner and the nature of the rights that the inquiry might affect.’

Given the variability of procedural fairness, its content will be determined with reference to several factors. The most significant factor prompting a lower intensity of review is the power granted to commissions of inquiry to choose their own procedure. As found in *Krever II*, ‘a commissioner has broad latitude and discretion, and the court will question his procedural choices only in exceptional circumstances’.[16] It must also be taken into account that the

[12]Ibid at 539.
[13] [1997] 3 SCR 440 (‘*Krever III*’) para 55.
[14] 1996 CanLII 11757 (FC) (‘*Krever I*’) para unavailable.
[15] 1997 CanLII 6327 (FCA), [1997] 2 FC 36 (‘*Krever II*’) para unavailable.
[16] Ibid.

procedural rules of a commission of inquiry are not as strict as a court of law. While commissioners are often judges, their role is very different in the context of a commission, where they fulfil an investigative rather than a judicial function.

These considerations have been weighed against the rights of individuals who are investigated by or appear before commissions of inquiry, as '[t]he search for the truth does not excuse the violation of the rights of the individuals being investigated.'[17] Rather, '[t]he considerable powers of commissions and the ready, numerous and often tempting opportunities for abuse make it particularly necessary that the courts be vigilant.'[18] The individual right or interest at stake before commissions of inquiry is usually that of reputation. The high value that the courts have attached to reputation calls for a higher intensity of procedural fairness. As the Canadian Federal Court observed in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities*),[19] '[r]ecognizing the importance of one's reputation and the potential damage that may be caused to one's reputation as a result of the Commission's findings, it follows that this factor suggests that a high content of procedural fairness is required.'

The process and findings of commissions of inquiry have been subjected to a full spectrum of procedural requirements. It is well-established that persons implicated in wrongdoing must be notified that they may be implicated and given the opportunity to be heard. For example, in *Kwelagobe v Kgabo,*[20] the Botswana High Court set aside the findings of a commission of inquiry on the basis, inter alia, that the applicants had been investigated without being informed of the nature of the allegations against them:

> Where, as in the case of the two applicants, the commission turned out to be investigating their conduct without advising them that they were in any way in jeopardy, and without informing them of the nature of any allegations made against them, there could only have been a failure of natural justice. Not only were the applicants placed at a disadvantage in being unable to deal properly with such allegations but they were also never informed of the nature of, and were not given access to other evidence given by witnesses in secret, and in their absence. Such

[17] Ibid.
[18] Ibid.
[19] 2008 FC 802 (CanLII), [2009] 2 FCR 417 para 56.
[20] 1994 BLR 347 (HC) ('*Kwelagobe*') at 354 paras D-E.

> evidence may have adversely affected them, or may have been related to a matter to which they might have been able and entitled to reply.

Accordingly, the Court held that the commission had failed to observe the rules of natural justice and its proceedings and reports were set aside. Similarly, in *Mahon v Air New Zealand Limited*,[21] the Privy Council[22] found that as a rule:

> any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.[23]

In other words, even though procedural fairness does not guarantee that an implicated person's submissions will convince the decision-maker, the very real consequences that the adverse finding might have on the person demand that they are at the very least afforded an opportunity to influence the decision-maker.

2.3. The review of commissions of inquiry in South Africa

In South Africa, the question of reviewing the findings of commissions of inquiry first reached the courts in 2019 in *Corruption Watch v Arms Procurement Commission.*[24] The matter concerned an application to review the findings of the Arms Procurement Commission, which had been appointed to investigate allegations of fraud and corruption in the government's procurement of weapons systems. After an investigation, the Commission controversially found that there was no evidence of corruption. The applicants approached the court to set aside the Commission's findings on the basis that it had failed to carry out its investigative function in a lawful and rational manner. Their particular concern was the Commission's failure to gather relevant material, admit evidence material to the investigation, and test the evidence put before it with an open and enquiring mind.

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[21] [1983] NZPC 3 ('*Mahon*').
[22] On appeal from the New Zealand Supreme Court.
[23] *Mahon* supra note 21 para 13.
[24] [2019] ZAGPPHC 351 ('*Corruption Watch*').

In the absence of any South African jurisprudence on the reviewability of the findings of commissions of inquiry, the Court considered the findings in foreign cases, including *Peters*[25] and *Krever III*.[26] Finding the dicta in these judgments applicable in South African law, a full bench of the High Court concluded that commissions of inquiry were subject to judicial review under the principle of legality:

> While a Court must not fail to take account of the purpose of a commission of inquiry and hence the wide discretion given to Commissioners to investigate within the scope of their given terms of reference and to make findings and recommendations that they deem meet, the purpose of a commission, namely to restore public confidence in the situation which is investigated and hence in the process of government, dictates that it must operate within the framework of the principles of legality.[27]

The finding in *Corruption Watch* indicates that, as in the rest of the Commonwealth, commissions of inquiry may be subjected to judicial review. As the findings of commission of inquiry are not reviewable as administrative action under the PAJA, they must be reviewed under the principle of legality.[28] The question that arises is whether they are reviewable for procedural fairness. While setting aside the commission's findings on the ground of unlawfulness,[29] the Court in *Corruption Watch* made an *obiter* finding that the Commission's duty to act within the confines of legality meant that 'it could not, for example, perform its tasks by demonstrating bias, [or] breach fundamental principles of fairness'.[30] This sharply raises the question whether the Court recognised that legality review encompasses the standard of procedural fairness and, if so, how a distinction would be drawn between those non-administrative exercises of public power that are subject to procedural fairness review and those that are not, or whether the Court simply erred in expanding the standards of review under the principle of legality.

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[25] Supra note 6.

[26] Supra note 13.

[27] *Corruption Watch* supra note 24 para 15.

[28] See Chapter 2 Part 4.7.

[29] *Corruption Watch* supra note 24 para 70. The court concluded that while the review of the proceedings of a commission must be undertaken cautiously so as not 'to subvert the flexible nature of a commission's choice of procedure', *in casu* the commission had made so many errors of law that the principle of legality dictated that it had to be set aside.

[30] Ibid para 51.

The issue is likely to come to the fore in the near future. South Africa has recently seen the appointment of a slew of commissions tasked with investigating allegations of corruption and mismanagement at various public institutions. Many of the persons implicated have challenged or will challenge the findings against them in court. As the law stands, they may be entitled only to procedural rationality – and not procedural fairness – under the principle of legality. What implications does this hold for the process of commissions of inquiry? Below, I consider this question in respect of the proceedings of the State Capture Commission.[31] I first set out the relevant circumstances of the Commission before considering the rights of a person who hypothetically had not been afforded an opportunity to be heard by the Commission before a finding was made against them.

2.4. Case study: The State Capture Commission

The State Capture Commission was appointed in January 2018 to investigate the findings of the Public Protector's 'State of Capture' report,[32] which implicated various state officials in corrupt dealings that had the effect of 'capturing' various public institutions and businesses. Then Deputy Chief Justice, Raymond Zondo, was appointed chairperson of the Commission.

The power to appoint commissions of inquiry is a constitutional power granted to the President as head of state.[33] When appointing a commission, the President may declare that the provisions of the Commissions Act apply to the commission.[34] This was done in respect of the State Capture Commission.[35] The Commissions Act grants a commission powers equal to those of High Courts, including the power to summon witnesses, examine them under oath, and call for the production of documents.[36] It also dictates that all evidence and addresses heard by the commission must customarily be heard in public.[37] The President may issue regulations applicable to a particular commission of inquiry. In respect of the State Capture Commission,

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[31] The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector.
[32] Thuli Madonsela State of Capture, 14 October 2016, 6, Public Protector of South Africa, available at: http://www.saflii.org/images/329756472-State-of-Capture.pdf, accessed 9 July 2022.
[33] Section 84(2)(f).
[34] Section 1 of the Commissions Act 8 of 1947.
[35] Proc R3 GG 41403 of 28 January 2018.
[36] Section 3(1).
[37] Section 4.

the regulations issued by the President stated that '[t]he Commission may determine its own procedures'.[38]

The State Capture Commission issued a comprehensive set of rules.[39] These rules included the requirement that persons implicated through witness testimony *had to be notified* in writing within a reasonable time before the witness gave evidence.[40] If the implicated person wished, they *could apply to* (i) give evidence themselves; (ii) call any witness to give evidence on their behalf; or (iii) cross-examine the witness.[41] The Commissioner would then decide the application.[42] The grant or refusal of such applications was thus within the Chairperson's discretion.[43] The rules state that 'there is no right to cross-examine a witness before the Commission but the Chairperson may permit cross-examination should he deem it necessary and in the best interests of the work of the Commission to do so'.[44] These rules broadly echo the elements of *audi*. The notice requirement 'must' be met, and a failure in this regard may therefore be reviewed on the ground of lawfulness. The opportunity to make representations was, by contrast, at the discretion of the Commissioner.

The hearings of the Commission commenced in August 2018 and, due to numerous extensions, continued for three years. During this period, the Commission heard the testimony of over 300 witnesses.[45] The last instalment of the findings of the Commission was published in June 2022 ('State Capture Report').[46] The report found evidence of corruption in several state institutions and implicated a large number of individuals in enabling the capture of those entities and participating in corrupt dealings. Where the Commissioner did not grant a request for an opportunity to make representations (including a request to submit an affidavit; provide

[38] Regulation 15.
[39] Rules Governing Proceedings of the Judicial Commission of Inquiry into Allegation of State Capture, Corruption and Fraud in the Public Sector Including Organs of State, Department of Justice and Constitutional Development, GN 396 *GG* 411772 of 13 July 2018.
[40] Ibid rule 3.3.
[41] Ibid rule 3.3.6.
[42] Ibid rule 3.3.7.
[43] Ibid rule 3.6.
[44] Ibid rule 3.7.
[45] Nomsa Maseko 'South Africa's Zondo commission: Damning report exposes rampant corruption' *BBC News* available at: https://www.bbc.com/news/world-africa-61912737, accessed 5 August 2024.
[46] Judicial Commission of Inquiry into State Capture Report (2022).

testimony in person; and cross-examine), the question arises whether such a decision may be reviewed for procedural fairness or procedural rationality.

2.5. Analysis

2.5.1. Would the outcomes of procedural fairness and procedural rationality overlap?

In line with the foreign jurisprudence set out above, if procedural fairness were applicable to the State Capture Commission, its content would be determined by weighing up several factors. First, the Commission performs an investigative rather than an adjudicative function, suggesting a lighter intensity of procedural fairness. Second, the Commission was granted the power to choose its own procedure, indicating that the courts should resist intervention in the means by which the Commission chose to conduct itself. Third, unique constraints on the Commission could be taken into account. The Commission went about its work under extreme public scrutiny, over a prolonged period, and had to process a significant volume of information, including the testimony of over 300 witnesses. Within this context, it would be inappropriate for a court to nit-pick over small errors made in the context of a 'long, arduous and complex inquiry,'[47] where the Commission was under immense pressure to conclude its work expeditiously. These factors would, however, have to be balanced against, fourth, the public's particular interest in the Commission being conducted fairly, and fifth, weighing particularly heavily, the possible damage to the reputation of a person who was implicated in wrongdoing by the Commission.

Where a person is implicated in wrongdoing by a commission of inquiry, it appears that in foreign jurisdictions, as a matter of procedural fairness, they will always be entitled to be heard, with the exact extent of that entitlement depending on the particular circumstances. It can be expected that where a person is implicated in criminal wrongdoing, as would likely be the case in the findings of the State Capture Commission, the devastating consequences that such a finding could have on their reputation would entitle them to appear before the Commission in person, with a right to cross-examine certain witnesses and with the aid of legal representation.

[47] As in *Beno v Canada (Somalia Inquiry Commission)* [1997] 2 F.C. 527 para 27.

The content of procedural rationality under the same circumstances is more difficult to determine. The issue has not yet been determined by the courts and no guidance can be found in foreign case law as procedural rationality is a uniquely South African ground. Reliance must be placed on the principles of rationality, the starting point of which is the purpose for which the decision-maker's power was granted. The State Capture Commission was granted its powers in order to inquire into, make findings, report on and make recommendations concerning allegations of state capture in certain public institutions and with regard to certain persons.[48] Where the Commission failed or declined to provide an implicated person with a hearing, or an opportunity to cross-examine or adduce further evidence, the question is whether, despite that omission, it was possible for the Commission to achieve the purpose for which its powers had been granted.

The answer to this question depends on whether a narrow or wide conception of rationality is adopted. In the previous chapter, I suggested that a narrow conception of rationality is the appropriate one if procedural rationality is to be conceptually coherent with substantive rationality. Accordingly, the test is whether consultation is necessary to achieve the purpose for which the power was granted. In the proceedings of the State Capture Commission, hearing from an implicated person might not have been necessary to achieve the purpose of identifying instances of state capture, corruption, and fraud in the public sector that required further investigation. It is possible to envision circumstances in which the Commission has ample evidence of wrongdoing from multiple sources and would not need to hear from an implicated person to conclude that that person's conduct should be investigated further. This would, of course, not be fair to the implicated person whose reputation might be damaged, but fairness to an individual is not a relevant factor in the test for rationality.

This was the approach adopted by the SCA in *The National Treasury v Kubukeli*.[49] As will be recalled,[50] the case concerned an investigation by the National Treasury into allegations of financial irregularities in the office of an executive mayor. The Treasury team undertook to interview those members of state relevant to the investigation but were told by a political

[48] Proc R3 GG 41403 of 28 January 2018.
[49] [2015] ZASCA 141 ('*Kubukeli*').
[50] Chapter 5 Part 3.2.

advisor that members of staff would not avail themselves to be interviewed. The Treasury team nevertheless continued their investigation, issuing a report in which, among other things, they made adverse finding against Kubukeli, the mayor's bodyguard. Kubukeli took the findings against him on review on the basis that he had not received any notice that he would be implicated in the report, nor was he afforded an opportunity to make representations to the investigators.

In the court a quo, it was found that the investigation and report constituted 'administrative action' under the PAJA and fell to be set aside for procedural unfairness, as Kubukeli had not been afforded an opportunity to make representations in circumstances where the report adversely impacted upon his rights to reputation and employment. In the SCA, however, Van der Merwe AJA found that the investigation and report did not constitute administrative action and that the principle of legality was applicable. The review application therefore had to be grounded in rationality rather than procedural fairness. Despite recognising that procedural rationality will sometimes require consultation, [51] he found that this was not such a case.

On the facts, Van der Merwe AJA found that the National Treasury exercises the public power to investigate financial mismanagement in municipalities for the purpose of securing sound and sustainable management of the fiscal and financial affairs of the municipality.[52] The question was therefore 'whether… the conducting of the investigation and the making of recommendations to the municipality without the participation of Kubukeli, were rationally related to the purpose for which the power [was given].'[53] Van der Merwe AJA held that since 'the purpose for which the power was given was not to investigate the conduct of any particular person and to make final findings in respect thereof…[w]hat a particular person did or did not do, was incidental to the object of the power'.[54] He concluded that '[v]iewed objectively, the purpose for which the power was given, was achieved'[55] and the investigation, report and recommendations of the National Treasury were rational, despite not having provided for the participation of Kubukeli.

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[51] *Kubukeli* supra note 49 para 16.
[52] Ibid para 24.
[53] Ibid para 23.
[54] Ibid para 24.
[55] Ibid para 25.

Kubukeli exemplifies the difference in outcome that can arise depending on whether procedural fairness or procedural rationality is applied to the same facts. Where a narrow conception of procedural rationality is applied to investigative proceedings, it is clearly possible for a court to find that allowing an implicated person an opportunity to be heard is not essential to the rationality of the findings. Only on a wider (strained)[56] conception of procedural rationality, in terms of which it is argued that the implicated person possessed special information that the inquiry needed to hear in order to make a rational decision, could a court find that an investigative body like a commission of inquiry must afford an implicated person an opportunity to be heard. To make this argument a court would, however, have to adopt a particularly strained conception of rationality, while its true motivation would be the principles of fairness.

2.5.2. Would it be inappropriate to subject commissions of inquiry to the demands of procedural fairness?

The well-established applicability of procedural fairness in other jurisdictions means that it cannot be said that it would be 'inappropriate' to apply the standards of procedural fairness to commissions of inquiry. Indeed, the demonstrable variability that has been applied in those cases shows that procedural fairness is undoubtedly capable of being applied in a manner that respects the separation of powers and does not impinge upon the domain of the executive.

2.5.3. Can procedural rationality promote the procedural values and broader administrative values associated with procedural fairness?

If a narrow conception of procedural rationality is adopted, and it is found that persons implicated by testimony before a commission do not have a right to be heard before adverse findings are made against them, key values associated with procedural fairness would be lost. The findings of the commission would likely (i) be less accurate, for the commission would have less information before it; (ii) engender a lack of public confidence; and (iii) fail to show appropriate deference to the dignity of the affected person.

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[56] See Chapter 6.

Even if an opportunity to be heard were to be required as a matter of procedural rationality, if we consider administrative law values more broadly, the substitution of procedural fairness with procedural rationality holds another disadvantage. Foreign Commonwealth jurisdictions have developed a rich jurisprudence regarding the review of commissions of inquiry for procedural fairness. The effect of excluding procedural fairness from the principle of legality is that South African courts cannot draw on that jurisprudence, as it is firmly entrenched in the principles of fairness. South African courts must instead find the tools for disciplining the process followed in investigations and commissions of inquiry in the standard of rationality, with very few points of reference, and consequently far more room for error and less principled and predictable reasoning.

3. THE REVIEW OF THE NOMINATION AND APPOINTMENT OF JUDGES BY THE JUDICIAL SERVICE COMMISSION FOR PROCEDURAL DEFECTS

3.1. Overview

The tasks of the Judicial Service Commission (JSC) include the nomination, selection, and appointment of judges. Prior to the enactment of the Constitution, judges were appointed at the sole discretion of the President in consultation with the senior judge of the court where the appointment was to be made.[57] The JSC was established in the interim and final Constitutions to address the lack of transparency and accountability in the previous process, and include more voices in the decision-making process.[58] Accordingly, the constitutionally required members of the JSC include judges, political party representatives, members of the legal profession and an academic.[59]

The work of the JSC in nominating judges has almost since its inception been the subject of controversy. In the early years the controversy mainly concerned *who* was appointed, with the political representatives in the JSC resisting the appointment of progressive candidates who

[57] Alison Tilley & Zikhona Ndlebe 'Judicial Appointments in South Africa' (2021) 10 *British Journal of American Legal Studies* at 460.
[58] Section 105 of the 1993 Constitution and section 178 of the 1996 Constitution.
[59] Section 178 of the 1996 Constitution.

were more likely to interfere with government decision-making.[60] More recently the controversy has extended to the *manner* in which the JSC conducts the interviews of prospective judges. The interview processes of the JSC in April 2021, March 2022, April 2022, and October 2023 have been scrutinized for a litany of ills, including bias, blatant animus towards candidates, sexism, inconsistent questioning, and the ambushing and humiliation of candidates,[61] to the extent that concern has been raised that potential candidates for appointment now refuse to submit themselves to a process regarded as partisan, disrespectful and potentially damaging to their reputation.[62]

The descent into this state of affairs is by-and-large due to political representatives, and legal representatives affiliated to political parties, using the JSC interviews as an arena for political point-scoring. Candidates deemed to have certain political leanings or affiliations to particular non-governmental organisations have been attacked by political factions, sometimes to promote political agendas, sometimes to prevent the appointment of judges who are considered likely to decide against their interests in the era of lawfare.[63] Whatever the motivations governing the approach of some members of the JSC, the interview process has become a matter of considerable concern.

While questions have been raised over the constitutionally mandated composition of the JSC, questions also arise regarding the grounds upon which the process and decisions of the JSC

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[60] See Chris Oxtoby 'Managing a Fraught Transition: The Practice of the South African JSC' in Hugh Corder & Jan van Zyl Smit (eds) *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (2017) 152–75; Cora Hoexter 'The Judicial Service Commission: Lessons from South Africa' in Graham Gee & Erika Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (2017) at 94–5.

[61] See for example, Judith February 'Improved JSC under Zondo is more dignified, but still has a road to travel to find judges with intellectual heft' *Daily Maverick* available at: https://www.dailymaverick.co.za/opinionista/2022-04-11-improved-jsc-under-zondo-is-more-dignified-but-still-has-a-road-to-travel-to-find-judges-with-intellectual-heft/, accessed 5 August 2024; Dan Mafora 'Dan Mafora: A requiem for the Judicial Service Commission' *news24* available at: https://www.news24.com/news24/analysis/analysis-dan-mafora-a-requiem-for-the-judicial-service-commission-20220210, accessed 5 August 2024; Rebecca Davis 'JSC plumbs new depths in Chief Justice interview derailed by anonymous rumours' *Daily Maverick* available at: https://www.dailymaverick.co.za/article/2022-02-04-jsc-plumbs-new-depths-in-chief-justice-interview-derailed-by-anonymous-rumours/, accessed 5 August 2024.

[62] Tilley & Ndlebe op cit note 57 at 468; Hoexter, 'Judicial Service Commission' supra note 60 at 99; Chris Oxtoby 'The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission' (2021) 56 *Journal of Asian and African Studies* 34–47 at 41.

[63] See further Michelle Le Roux & Dennis Davis *Lawfare: Judging Politics in South Africa* (2019); Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and Its Effects on the Judiciary' (2017) 10 *African Journal of Legal Studies* 105–26.

may be reviewed by the courts. As the JSC's interview process amounts to non-administrative action,[64] what are the requirements that govern it under the principle of legality? While it has previously been reviewed for (substantive) rationality,[65] it has not yet been reviewed on procedural grounds.

3.2. The law governing the Judicial Service Commission's nomination of judges

The JSC is established by the Constitution, which sets out the composition of its 23 members,[66] and specifies that the Chief Justice of the Constitutional Court (or a listed alternative)[67] will preside at its meetings.[68] The Constitution provides that the JSC may determine its own procedure.[69] The JSC is further regulated by the Judicial Service Commission Act, 1994, which requires that the JSC must by notice in the Gazette make known the particulars of its procedure.[70]

The most recent Regulation Gazette sets out the procedure for the nomination and appointment of judges as follows.[71] When a vacancy arises in one of the courts, the JSC advertises the position and shortlists candidates who are consequently interviewed by the JSC. The interviews are held in public, and candidates are asked questions by members of the JSC. Subsequent to interviewing all shortlisted candidates for vacancies, the JSC holds deliberations in private. During its deliberations, the JSC selects candidates for appointment or makes a recommendation to the President, depending on the type of vacancy.

It is noteworthy that the only statutory requirement for the conduct of the JSC's interviews of judicial candidates, is that interviews be held in public. As the JSC's interview process is not subject to the PAJA, oversight of this process must be established under the principle of legality.

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[64] See Chapter 2 Part 4.5.
[65] *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115.
[66] Section 178(1).
[67] Section 178(7) states that where the Chief Justice is unavailable, the President of the SCA, Deputy Chief Justice of the Constitutional Court, or Deputy President of the SCA may preside.
[68] Section 178(1)(a).
[69] Section 178(6).
[70] Section 5.
[71] GN No. 423 *GG* 24596 of 27 March 2003.

3.3. Case studies: The JSC interviews of Judges Pillay and Mlambo

The JSC's inappropriate treatment of candidates came to a head in the interviews of Judges Dhaya Pillay and Dunstan Mlambo in April 2021 and February 2022, respectively. While these interviews canvassed different issues, they featured the same procedural flaw, namely, the questioning of the candidates in respect of adverse allegations that had not previously been disclosed to them.

In April 2021 Judge Dhaya Pillay, a judge of the Labour Court and the KwaZulu-Natal High Court, was interviewed for a vacancy at the Constitutional Court. During her interview – which lasted almost 3 hours –[72] Judge Pillay was subjected to a range of accusations, the most serious of which concerned her friendship with cabinet minister Pravin Gordhan, a known adversary of a faction of the African National Congress (ANC) known as the Radical Economic Transformation faction (RET) and the Economic Freedom Fighters (EFF). Questions on this subject derailed a large portion of Judge Pillay's interview. Questioning by Commissioner Malema of the EFF included accusations that Gordhan had captured the judiciary:

> Malema: …You are a friend of a politician called Pravin Gordhan who is alleged to have captured judiciary. And I'm asking you, does that help to enhance the image of the judiciary. And you never answered the question on your practices whether this practices are helping to boost the confidence of our people on the judiciary […]
>
> Pillay: […] As far as Gordhan capturing the judiciary. As you say it's allegations. If there's allegations they must be tested, put up the evidence, bring it to a process, let's investigate it, I'd be happy to participate. Allegations out there is just allegations.
>
> Malema: No, I'm saying, you being a friend of a politician. Does that help to boost the good image of the judiciary? … And you are saying, you will never terminate your relationship with Gordhan because it comes from a long way, even if it damages the good image of the judiciary. Because from that friendship an impression can be created that Gordhan is influencing you and you are influencing others to rule in the favour of his faction.
>
> Pillay: Commissioner Malema you asked me what my relationship was and in the broad nature of defining a relationship I used the word friendship. Yes we are, have been

[72] JSC interviews are scheduled to last 1 hour.

> friends. But my association, and it has never impacted on my work as a judge for the past 21 years and it will not impact on my work going forward.[73]

Commissioner Malema continued by questioning her over a judgment in which she had found against former President Jacob Zuma. Malema concluded his questioning by stating:

> Malema: Judge, I'm going to argue in this, in the closed session, that you are nothing but a political activist. You are no judge and you deserve no high office. If anything, you also factional and belong to Pravin's faction and you are pursuing factional battles using the Bench.[74]

Surprisingly, then-Chief Justice Mogoeng, who was chairing the interview, concluded Judge Pillay's interview by continuing the discussion about Pillay's relationship with Pravin Gordhan. He did so by recounting an event that had not been disclosed to Judge Pillay. He stated that after a previous interview process, he had had a request from Pravin Gordhan for a meeting.

> Mogoeng: He asked me a question, he said how did my friend, Dhaya Pillay perform and we had just caused the spokespersons to announce the results and I told him, because it was public knowledge that you did not make it. And the thing has stayed with me… why did the Honourable Minister make an effort to meet me, we are not friends. I don't know him from anywhere except from television, why did he make a trip to seek and audience with me just to ask me how did my friend, Dhaya Pillay perform. So it is in that context that the concern regarding your relationship with Honourable Minister Gordhan arises and my concern regarding your initial response which didn't seem to admit or acknowledge friendship arises.[75]

Without prior disclosure of this concern, Judge Pillay could not properly respond to what was clearly a serious allegation: that Pravin Gordhan had sought to influence the decision of the JSC in respect of her previous application for judicial appointment.

Subsequent to the JSC's deliberations, Judge Pillay's name was left off the list of nominations submitted to the President for appointment. The interviews held in April 2021 were the subject of a review application by the Council for the Advancement of the South African Constitution

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[73] Judges Matter 'SA Constitutional Court JSC Interview of Judge D Pillay - Judges Matter (April 2021)' available at: https://www.youtube.com/watch?v=sajOJx03EUI&t=1748s accessed 5 August 2024.
[74] Ibid.
[75] Ibid.

in which it identified concerns regarding the interviews of Judges Pillay and Unterhalter. Before the matter was argued, a settlement was reached in terms of which all interviews for the Constitutional Court would be re-run.[76] Judge Pillay, however, did not make herself available for the fresh interview process.

In February 2022 the JSC interviewed Judge Dunstan Mlambo, the Judge President of the Gauteng Division of the High Court, for the position of Chief Justice of the Constitutional Court. Judge Mlambo had in the past made a number of decisions that went against members of the RET-faction of the ANC and the EFF. His interview included consistent attacks on his work and his character, based on unsubstantiated allegations.

The most serious attack was initiated by Commissioner Mpofu (a former National Chairperson of the EFF), who referred to an alleged 'whispering campaign' involving allegations of sexual harassment by Judge Mlambo.[77] Mpofu admitted, in asking his question, that he was raising the issue despite the fact that no complaint had been made.[78] Judge Mlambo responded that any such rumour was false. Nevertheless, Commissioner Malema followed up, stating that the rumour concerned women who wanted to be judges.[79] The issue of the rumour, despite being wholly unsubstantiated, and despite the absence of any notice to Judge Mlambo that he would be asked about it, was raised by various commissioners and dominated the interview.

Ultimately the matter had to be cleared up by the candidate himself after Commissioner Lamola, citing Mlambo's previous experience as a member of the JSC, asked what the convention of the JSC was regarding such allegations. It fell to Judge Mlambo (the interviewee) to explain:

> Well, from where I sit and having participated in the affairs of this commission, if there is no complaint in writing against a candidate, or if there is nothing in writing and the

[76] Tania Broughton 'High Court sets aside 'politicised JSC ConCourt recommendations' *Times Live* available at: https://www.timeslive.co.za/news/south-africa/2021-08-18-high-court-sets-aside-politicised-jsc-concourt-recommendations/, accessed 5 August 2024.
[77] Judges Matter, 'Chief Justice Interviews: JSC Interview of Justice Dustan Mlambo - Judges Matter (Feb 2022)' available at https://www.youtube.com/watch?v=uUAvbN2MbMw, accessed 5 August 2024.
[78] Ibid.
[79] Ibid.

> candidate has not been warned that an issue of that nature will be raised with her, it is never raised with the candidate.[80]

Mpofu took issue with the suggestion that Mlambo could not be questioned over a rumour and it once again fell to Mlambo to explain further:

> The issue is the fairness of that. If the Commission is aware of things like that, it's only fair that the candidate is warned beforehand to say these issues are going to be raised with you and when they are raised, it's only fair that these issues are documented properly from a member of the public or an identifiable whistle-blower. It's a question of fairness, Advocate Mpofu.[81]

It was only subsequently, after a break, that Deputy President Petse, who was chairing the interview, said the following with regard to the allegations:

> Although Judge President Mlambo elected to answer those allegations, and in fact refuted them, given the fact that he was not forewarned that those rumours would be raised with him during his interview, and coupled with the fact that we have nothing concrete by way of writing, submitted to the Commission, it is my view that fairness dictates that we should not have regard to those rumours, so in effect, my view is that the questions and answers, questions posed to him and answers given by Judge President Mlambo, should be regarded as *pro non scripto* and be expunged from the record.[82]

Petse's post-hoc attempt to ensure that the Commission adopted a fair procedure came too late, as the damage to Mlambo's reputation was already done and his interview for the highest judicial office in the country had already been dominated by an issue that should not have been raised in the first place.

3.4. Analysis

3.4.1. Would the outcomes of procedural fairness and procedural rationality overlap?

[80] Ibid.
[81] Ibid.
[82] Ibid.

Does the JSC have to disclose adverse allegations to candidates prior to their interviews for questions based on those allegations to be procedurally fair? Under a standard of procedural fairness, the conduct of the interviews of Judges Pillay and Mlambo could clearly be challenged. As discussed in Chapter 3 of this thesis,[83] it is a longstanding principle of natural justice and procedural fairness that if prejudicial allegations are made against a person, they will normally be entitled to have the particulars of those allegations provided to them before the hearing, so that they have time to prepare an answer or explanation.[84] The person must essentially be placed in a position where they can meaningfully 'controvert, correct or comment on' any information relevant to the decision.[85] The level of disclosure required is, of course, variable, depending on the type of hearing to which it is applied. The key point is that the decisionmaker should not 'keep anything up its sleeve'.[86]

While disclosure is not mentioned explicitly in section 3 of the PAJA, it is regarded as a necessary component of a 'reasonable opportunity to make representations'.[87] Theron J recently reiterated, in the context of a review application under the PAJA, that –

> a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests.[88]

If procedural fairness were to be applied to the interviews of Judges Pillay and Mlambo, the allegations raised with them would have had to be disclosed to them before being put to them in a public interview or considered during the JSC's private deliberations. Any instances of 'ambushing' candidates would be deemed procedurally unfair and require the process and recommendations of the JSC to be set aside.

Does the JSC have to disclose adverse allegations to candidates prior to their interviews in order for questions on those allegations to be procedurally rational? Procedural rationality has

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[83] Part 3.2.
[84] Harry Woolf, Jeffery Jowell, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review* 8 ed (2018) at 421.
[85] Ibid.
[86] *Sullivan v Wheat Industry Control Board* 1946 TPD 194 at 206.
[87] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) at 514–5.
[88] *Gavric v Refugee Status Determination Officer, Cape Town* [2018] ZACC 38 para 79.

not yet been relied on by the courts to set aside exercises of public power for a lack of disclosure. Could the JSC make a procedurally rational decision despite a lack of disclosure?

The starting point of review for rationality is the purpose for which the JSC was given the power to select judges. The Constitution states that a person who is appointed as a judicial officer must be 'appropriately qualified' and a 'fit and proper person'.[89] It also states that the 'need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'[90] Since it is the implicit task of the JSC to select the best candidates, the purpose for which the power is given can be interpreted as being to select the best 'appropriately qualified' and 'fit and proper' person, taking into account the need for the judiciary to 'reflect broadly the racial and gender composition of South Africa'.

Is it possible to achieve this purpose while not disclosing in advance adverse allegations that will be put to candidates? It is likely that it is, on a narrow as well as a wide conception of rationality. On a narrow conception of rationality, the JSC might be able to meet its purpose by relying on some other fact(s) before it to find that a candidate does *not* meet the applicable requirements. On both a narrow and a wide conception of rationality, the purpose might be met if a candidate is at least afforded an opportunity, during their interview, to respond to an adverse allegation, albeit that they have been given no prior notice of the allegation.

3.4.2. Would it be inappropriate to subject the JSC to the demands of procedural fairness?

In my view, it would not be inappropriate to subject JSC interviews to the requirements of procedural fairness. In fact, procedural fairness appears essential. It goes to the core of a judicial candidate's right to dignity that they should be treated *fairly* by the public decision-maker, particularly as it has the potential to have severe consequences for their reputation. Furthermore, JSC interviews are held publicly in order to select the highest arbiters of South African law; as such, the public has a vested interest in seeing the interview process take place

[89] Section 174(1).
[90] Section 174(2).

in a manner that is fair. Procedural fairness in the conduct of the JSC interviews also does not intrude upon the government's executive power, nor does it carry substantial cost or efficiency implications. If a review application were brought to set aside a future JSC decision on procedural grounds, it would surely be difficult for a judge to conclude that a candidate before the JSC is not entitled to procedural fairness, the *Masetlha* finding notwithstanding.

3.4.3. Can procedural rationality promote the procedural and broader administrative law values associated with procedural fairness?

The absence of procedural fairness in these examples illustrates the role that procedural fairness plays in promoting the procedural values of (i) public confidence in public decision-making; and (ii) respecting the dignity of persons affected by public decisions. In respect of the first value, the unfair manner in which these and other interviews were conducted resulted in a public outcry, and certainly went a long way in eroding the public's confidence in public decision-making. In respect of the second value, the manner in which the interviews were conducted evidently did not respect the dignity of the persons before it. Relatedly, they also did not respect the fact that the reputation of the persons before it could be damaged by the allegations made in public, and to air these allegations without providing the interviewees with a fair opportunity to rebut them is particularly egregious.

If, in the future, procedural rationality is stretched to require adequate disclosure before interviews, it would also be capable of promoting these procedural values. However, there are two broader administrative law reasons why this would practically be an inferior choice to the application of procedural fairness.

First, procedural fairness has a long history both in South African and in foreign jurisdictions. The principles of natural justice have been applied and developed for centuries, resulting in a rich jurisprudence that can be relied upon to deal with fresh cases. On the issue of adequate disclosure, regard can be had to a large body of judicial decisions on this very point. In contrast, procedural rationality has been applied in a comparatively miniscule number of cases and has never been invoked on this point. While judges may rely on their own reasoning based on rationality, there is a greater risk of error when judges cannot rely on the prior reasoning of other judges, in South Africa and in foreign jurisdictions, in reaching their conclusions. In

reviewing the process of the JSC, a court would have limited points of reference if it could not rely on procedural fairness.

Second, it is my view that procedural fairness makes it easier to determine in advance what the procedural requirements of a public decision would be. In respect of the JSC, for instance, were procedural fairness applicable, candidates would always be entitled to adequate disclosure before any interview commences. This is not equally true of procedural rationality. While the requirements of procedural fairness can be ascertained in advance, procedural rationality is more backward-looking. The test for procedural rationality is whether a step in the process was so irrational as to taint the entire process with irrationality. Whether a step is irrational cannot therefore be determined in advance. It can only be determined once the entire process has been completed.

This difference could have real consequences in terms of the JSC understanding its mandate. While the JSC's process could potentially be set aside for procedural irrationality, procedural fairness is better equipped to play a *normative* role in guiding the JSC in how it does its work. This would arguably prevent the JSC from continuing to make the same procedural error in further interviews. Notably, two months after the interview of Judge Mlambo, prejudicial allegations were once again raised without prior disclosure in the interview of Judge Unterhalter.[91]

If the JSC was unambiguously subject to the requirements of procedural fairness, the JSC would be aware that adverse allegations could not be put to a candidate without adequate disclosure. Any questions based on an undisclosed allegation would be disallowed immediately, allowing the interview to proceed in a procedurally fair manner. If, however, such a question is not struck down, due to uncertainty as to whether it amounts to procedural irrationality (because it is uncertain whether the question would prevent the JSC from achieving its purpose), the entire interview, as well as all other interviews conducted in respect of the same vacancy, might have to be conducted afresh after a review application, with obvious implications for the time and resources of the JSC.

[91] Judges Matter 'Constitutional Court: JSC Interview of Judge D N Unterhalter - Judges Matter (April 2022)' available at: https://www.youtube.com/watch?v=5PSfT0SOItI, accessed 5 August 2024.

4. THE REVIEW OF EXECUTIVE POLICY-MAKING FOR PROCEDURAL STANDARDS

4.1. Overview of executive policy-making

While the previous two case studies provided examples in which affected persons (i) should undoubtedly be afforded an opportunity to be heard, and (ii) in the interests of public confidence and the dignity of the affected person, that opportunity should be a robust version of consultation, this case study is not quite as clear-cut. For policy-making lies at the heartland of executive decision-making, and there is a much stronger impetus for courts to review these decisions with a lighter touch. However, policy-making can also vary considerably, and the intensity of review that is appropriate to one policy will be quite different to the intensity of review appropriate to another. The analysis of the review of executive policy-making therefore requires more nuance in determining (i) whether consultation would be appropriate, and if so, (ii) what the appropriate content of that consultation should be.

As set out in Chapter 2,[92] most policy-making by the President and cabinet ministers is considered the prototypical example of executive action and is therefore not subject to the PAJA. The exception, as per O'Regan J, is where policy is 'formulated in a narrow sense where a member of the executive is implementing legislation' in which case the formulation of policy may be administrative action.[93] Policy in the broad sense ('executive policy-making'), however, is where policy is formulated and 'involves a political decision' and will therefore usually be considered executive action.[94]

In South Africa, the exclusion of procedural fairness from executive actions in *Masetlha v President of the Republic of South Africa*[95] means that procedural fairness has unequivocally been excluded from all executive policy-making. In doing so, the courts have shown deference

[92] Part 4.2.
[93] *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE)(Section21)* [2000] ZACC 23 para 18.
[94] Ibid para 18.
[95] [2007] ZACC 20 ('*Masetlha*').

to the executive arm of government, by making policy-making immune from review for procedural fairness. Only lawfulness and rationality are available. In making this finding the Constitutional Court expressly stated that it would be inappropriate to subject executive action, which includes executive policy-making, to procedural fairness. It does not allow that some executive policy-making should be subject to procedural fairness. Only those requirements of procedural fairness that overlap with the requirements of procedural rationality are therefore applicable.

In Chapter 4 of this thesis,[96] the case of *e.tv I*[97] was analysed in respect of substantive rationality. In another argument that was dismissed by the majority judgment in that case, it had also been argued that the Minister of Communication's failure to consult before amending an executive policy[98] resulted in its procedural irrationality. The facts provide a useful case study for analysing the differing applicability and content of procedural fairness and procedural rationality in respect of executive policy-making.

4.2. Case study: The Ministry of Communication's amendment of its digital migration policy

As will be recalled, *e.tv I* concerned the policy decision of the Minister of Communications to migrate South African television broadcasting signals from analogue to digital ('digital migration policy') in keeping with global technological developments. The digital migration process was complicated by the fact that many South Africans possessed television sets that were old and did not possess the technology to unscramble digital signals. South Africa's digital migration process therefore needed to include the allocation of set-top boxes (STBs) that could be attached to older televisions to unscramble digital signals. STBs are expensive and it was determined that millions of South Africans would not be able to afford them. The government consequently undertook to provide STBs for free to those who needed them.

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[96] Part 5.1.

[97] Supra note 2.

[98] In the Constitutional Court, no party argued that the decision amounted to administrative action and the matter was therefore argued on the basis that it was as an executive policy-making power. The amendment therefore fell to be reviewed under the principle of legality. As Cameron and Froneman JJ noted in the second judgment at para 119, the inapplicability of the PAJA 'may well be correct, for, in general, making policy does not constitute administrative action'.

Digital migration was overseen by a number of different Ministers of Communications who were empowered by the Constitution[99] and the Electronic Communications Act (ECA),[100] to determine policy in respect of broadcasting. The ECA requires that when issuing a policy, the Minister must follow a process that is in essence the same as a notice and comment procedure, publishing a draft policy in the Government Gazette and inviting interested persons to submit written representations, 'in order to obtain the views of interested persons'.[101] Interested parties were afforded several opportunities to make submissions regarding different aspects of the digital migration process.

A key issue on which parties disagreed in their submissions was whether the STBs should, in addition to the technology to unscramble digital signals, also be equipped with encryption technology that would enable broadcasters to encrypt their television signals if they wished to do so. e.tv, a commercial broadcaster, and two NGOs concerned with encouraging competition in broadcasting, wanted the STBs to have this capability while other stakeholders did not. A succession of Ministers of Communications took different views on the matter. The original draft policy did not include encryption. In 2014, however, then-Minister Carrim proposed that STBs should include encryption technology, the cost of which would be covered by the government upfront but claimed back from broadcasters who made use of this technology. In the ensuing consultations, the proposal was well-received by e.tv, which was willing to cover the cost of encryption technology, but rejected by other broadcasters. However, when a new Minister of Communications, Minister Muthambi, replaced Minister Carrim, she published an amended digital migration policy that expressly precluded the incorporation of encryption technology in the STBs.

e.tv objected, inter alia on the basis that it was not consulted prior to the amendment being published. e.tv also stated that had it known that this amendment was being considered, it would have offered to cover the cost of adding the decryption technology to the STBs upfront. The Minister said that she did not know whether e.tv was willing to pay for the costs upfront and wanted to save costs, and therefore simply amended the policy to exclude the encryption

[99] Section 85(2).
[100] Section 3(1) of Act 36 of 2005.
[101] Section 3(5) of the ECA.

capability. The ECA did not require the Minister to consult with interested persons before amending a policy on which consultation had already taken place. The crucial question for determination was whether, as a matter of procedural rationality, the Minister was obliged to consult with e.tv prior to publishing the amendment.

4.3. Analysis

4.3.1. Would the outcomes of procedural fairness and procedural rationality overlap?

If procedural fairness had been applicable to this decision, the process required by the ECA would have to be followed as a matter of lawfulness, but this would not mean that the principles of procedural fairness could not be applied to the decision. In English law, the principles of procedural fairness may supplement statutory procedural requirements that do not on their own constitute a fair process.[102] This principle is also recognised in the PAJA which allows an alternative legislative process to be followed, *as long as it is fair*.[103] A court would therefore have scope to consider whether the absence of consultation prior to the amendment of the policy was in keeping with the principles of procedural fairness.

Does procedural fairness require fresh consultation in respect of a policy amendment? In general, whether there is a duty to re-consult depends on whether there is a significant difference between the proposal or policy in respect of which consultation initially took place and the proposal which is later adopted.'[104] For example, in the English case of *Smith, R (on the application of) v East Kent Hospital NHS Trust & Anor*,[105] the High Court of Justice found as follows:

> A matter of crucial importance in determining whether the defendants in this case should have re-consulted on the proposals under challenge was the nature and extent of the difference between what was consulted on in the consultation paper and the proposal accepted in the March 2002 decision. Clearly, if all the fundamental aspects of the decision under challenge had not been consulted on but ought to have been, that

[102] Woolf et al op cit note 84 at 391.
[103] Sections 3(5) and 4(1)(d).
[104] Woolf et al op cit note 84 at 418-419.
[105] [2002] EWHC 2640 ('*East Kent Hospital*').

> would indicate a breach of the duty to consult, while at the other extreme, trivial changes do not require further consideration.[106]

The Court concluded that 'there should only be re-consultation if there is a *fundamental difference* between the proposals consulted on and those which the consulting party subsequently wishes to adopt.'[107]

Another English case, *R (on the application of Carton and another) v Coventry City Council*,[108] provides useful guidance. The matter concerned a charging policy for day care services for disabled persons. A few months after the City Council had conducted extensive consultations with interested persons, it amended the policy without affording interested parties another opportunity to make representations. The Council submitted that 'there was no major structural change' from its previous policy, that 'consultation had taken place in the recent past […] and that views expressed on that occasion were taken into account when considering what they describe[d] as adjustments to the former scheme'.[109] The Court disagreed, finding that the amendments to the policy constituted 'fundamental changes to the charging structure'.[110] It found that '[t]he changes adopted are more than a mere uprating: they constitute changes to the policy'.[111] It was therefore concluded that the amendments had been 'introduced unfairly, without the consultations which the claimants could justifiable, reasonably or legitimately have expected.'[112]

In South Africa, the principle that a fundamental change in a public decision requires fresh consultation found application in *Kouga Municipality v Bellingan*.[113] The matter concerned a by-law that determined liquor trading hours. The applicable legislation required a draft by-law to be published for comment 'in a manner that allows the public an opportunity to make representations' prior to its promulgation.[114] A first draft of the by-law was published for comment in 2004 in the provincial gazette and two national newspapers. A second draft, which

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[106] Ibid para 43.
[107] Ibid para 45, my emphasis.
[108] [2000] Lexis Citation 4249 ('*Coventry City Council*')
[109] Ibid para 4.
[110] Ibid para 18.
[111] Ibid.
[112] Ibid.
[113] [2011] ZASCA 222 ('*Kouga*').
[114] Local Government: Municipal Systems Act 32 of 2000.

differed from the first, was published for comment in 2006, but only in one local newspaper. The municipality subsequently promulgated the 2006 draft. In defence of its failure to properly publish the 2006 draft, the Municipality submitted that 'the 2004 and 2006 publications were part of one continuous process'.[115] The SCA, however, disagreed, finding that the changes to the first draft were 'far-reaching'.[116] While recognising that 'not every change has to be advertised otherwise the legislative process would become difficult to implement', it found that in the present case 'the two sets of proposed by-laws were so *markedly different* that re-publication of the second draft was necessary to meet the legislative requirements.'[117] While this matter concerned the promulgation of a by-law and not the making of a policy, it applied the same principle as the English cases cited above, that consultation must be conducted afresh where a new policy or law is fundamentally or 'markedly' different from the previous one.[118]

In respect of the digital migration policy of the Minister of Communication, the difference in the policy proposed by Minister Carrim and the policy published by Minister Muthambi cannot be considered 'trivial'[119] or mere 'adjustments'.[120] While Carrim's proposed amendment was for encryption technology to be included in the STBs at the cost of the commercial broadcasters who made use of that technology, Muthambi's policy expressly precluded the STBs being equipped with encryption technology. The new policy was therefore 'fundamentally' and 'markedly' different from the previous proposal, and if procedural fairness had been applicable, the Minister would have had to consult again. Moreover, there would be a particularly weighty obligation to consult with e.tv again, as it was the only party whose stated commercial interest would be adversely affected by the amendment.

Did Minister Muthambi have to consult with e.tv prior to making the amendment in order for the decision to be procedurally rational? The first and second judgments in *e.tv I* provide different approaches to the applicability and content of procedural rationality in this context. They respectively exemplify a narrow and wide approach to review for procedural rationality.

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[115] *Kouga* supra note 113 para 9.
[116] Ibid.
[117] Ibid, my emphasis.
[118] Ibid.
[119] *East Kent Hospital* supra note 105 para 43.
[120] *Coventry City Council* supra note 108 para 4.

In the first (majority) judgment, Mogoeng CJ held that the amendment was procedurally rational because the Minister had fulfilled the consultation requirements of the ECA when providing an opportunity for interested parties to make submissions earlier on in the consultation process. This finding rested on an interpretation of the ECA in terms of which the legislation only required consultation when issuing a policy and not when it was amended. Mogoeng CJ found that the ECA's consultation requirements were 'not inferior' to that of procedural rationality as '[b]oth processes owe their legitimacy and completeness to the Constitution'.[121] He therefore found that if the process in the ECA was met, 'that would be so precisely because it is rational.'[122] He concluded that where the consultation demands of the ECA have been met, 'no room exists for exploring the…procedural rationality avenue…' for '[t]hat avenue may only be appropriately pursued where no statutory or other provision has been expressly made for consultation.'[123] Mogoeng CJ's finding therefore stands for the proposition that where legislation provides for consultation, and that legislation is lawful, procedural rationality can never require more intensive consultation than the legislation. This proposition creates a potential gap in outcome between procedural rationality and procedural fairness, as the latter allows for consideration of whether fairness requires more than the consultation required by legislation.

In the second judgment, Cameron and Froneman JJ found that the Minister could not 'attain rationality in outcome if the means she employs to get there is irrational.'[124] 'This' they found, 'means that the process she follows in formulating policy must be rationally connected to the purpose for which the power to issue policy is conferred.'[125] They found that the Minister's decision had been procedurally irrational for a number of reasons, though the argument most reminiscent of the principles set out in other case law is as follows:

> The Minister did not have the information that was critical to make her decision rational – that is whether e.tv was prepared to cover the costs in advance. This after e.tv had already made it clear that the costs could be recovered from it. For it was only if e.tv was not prepared to cover the costs in advance that the Minister could rationally conclude that dumping decryption would in fact save government costs (in the form of

[121] *e.tv I* supra note 2 para 65.
[122] Ibid.
[123] Ibid para 67.
[124] Para 124.
[125] Ibid.

> immediately required funding). Instead, irrationally, she decided to save costs by dumping decryption without knowledge or consultation.[126]

They later concluded that while the Minister 'sought to save costs', 'the means she pursued to attain the end of cost-saving was so glaring – so irrationally unrelated to that end – that the whole process she adopted in promulgating the amendment was tainted by irrationality'.[127]

These judgments show the starkly different interpretations that may be given to procedural rationality. As is also evident in the other case studies, whether procedural rationality requires consultation depends on whether the court adopts a narrow or wide approach to procedural rationality. Which conception will be adopted in a particular case is unpredictable.

4.3.2. Would it be inappropriate to apply procedural fairness to executive policy-making?

In *Masetlha* the majority claimed that it would be inappropriate to subject executive actions to review for procedural fairness, yet did not justify why these types of decisions, which include executive policy-making, should not be procedurally fair. Justifications certainly exist for reviewing executive decisions with a lower intensity. As Woolf et al point out in the context of English law:

> The principle of the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. It is not for judges to weigh utilitarian calculations of social, economic or political preference.[128]

Yet, Woolf et al find that this does not 'excuse the courts from any scrutiny of policy decisions'.[129] They argue that, '[c]ourts are able, and indeed obliged, to require that decisions, even in the realm of "high policy" are within the scope of the relevant legal power or duty, and arrived at *by the legal standards of procedural fairness*.'[130] This suggests that it is substantive

[126] Para 130.
[127] Para 150.
[128] Woolf et al op cit note 84 at 21.
[129] Ibid at 22.
[130] Ibid, my emphasis.

considerations that should not be considered in respect of policy, rather than procedural ones. Indeed, the English High Court has had no qualms applying procedural fairness to policy-making.[131]

There is no good reason why procedural fairness should apply differently in South Africa. In an article published in 2020, in which he criticised the exclusion of procedural fairness from the principle of legality in *Masetlha*, Clive Plasket found that 'it is far from obvious that those exercising executive power should be free to act in a procedurally unfair manner.'[132] He finds that previous decisions of South African courts certainly do not suggest this and that '[e]ven the pre-democratic common law recognised a right to be heard when executive power was exercised, and there were even suggestions that this was the case when at least some prerogative powers were exercised.'[133]

The example of the digital migration policy in *e.tv I* indicates that it will certainly not always be inappropriate to apply the principles of procedural fairness to executive policy-making. It would not have required significant resources for the Minister of Communications to consult with affected parties, like e.tv and the NGOs, prior to issuing the amendment to the policy, to find out whether they would cover the costs of encryption. Nor would the Minister's hand have been forced by any submission of e.tv, as procedural fairness does not require that a decision-maker be persuaded by the submissions of interested persons. Reviewing the Minister's policy-making decision for procedural fairness would not have violated the separation of powers.

That is not to say that consultation should be required of every policy decision undertaken by the executive. If procedural fairness were applicable to policy-making, its content would be variable. It would in most instances be inappropriate to require consultation when the President or a Minister makes foreign policy. Nor would it be appropriate to require consultation in matters of national security. In such cases reliance must be placed on the variability of procedural fairness to be responsive to the circumstances. In other words, in matters of high

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[131] See for example, *R. (on the application of Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516*; R. (on the application of Greenpeace Ltd v Secretary of State for Trade and Industry* [2007] [EWHC] 311.

[132] Clive Plasket 'Procedural Fairness, Executive Decision-Making and the Rule of Law' (2020) 137 *SALJ* 698–712 at 709.

[133] Ibid.

policy, procedural fairness could be applicable but its content reduced to no (or a very limited) requirement of consultation in order to show deference to the executive. Making procedural fairness applicable to all kinds of policy-making therefore does not risk contravention of the separation of powers if its variability is fully recognised and developed to require a higher or lower intensity of scrutiny depending on the relevant factors.

Finally, it is worth noting that in the *e.tv I* example, the Minister's policy could only be made lawfully if it followed the process set out in the ECA, which was essentially a notice and comment procedure. Thus, when making policy to regulate broadcasting, the *legislature* demanded that this executive policy-making power needed to be procedurally fair, as it prescribed the same process that the PAJA requires for administrative actions affecting the public. It is common practice for executive policy-making to be hemmed in in this manner,[134] which suggests that it is obvious to the legislature, if not the judiciary, that some executive policy-making needs to be subject to the principles of procedural fairness.

4.3.3. Can procedural rationality promote the procedural and broader administrative law values associated with procedural fairness?

In respect of procedural values, the application of procedural fairness would have the effect of better or more accurate decision-making. If the Minister in *e.tv I* had been under a clear duty to consult with particular parties or the public at large, she would have had more information before her. In particular, she would have found out that e.tv was willing to bear the cost of adding the decryption capability to the STBs. Equipping the STBs with decryption capability at the cost of a commercial entity was objectively the better decision. As pointed out by Cameron and Froneman JJ, 'the Minister seems to have missed an opportunity to facilitate provision of access to encrypted signals for the poor at no cost to government – while at the same time fulfilling the objects of the ECA by encouraging the development of multi-channel distribution systems.'[135] This would have the effect of reducing monopolisation and encouraging competition. Furthermore, they point out that the Minister was aware that the SABC, a *public broadcaster*, 'might in future also want to use these capabilities'.[136]

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[134] For example, the National Environmental Management Act No. 107 of 1998.
[135] *e.tv I* supra note 2 para 161.
[136] Ibid para 145.

While the application of procedural fairness provides no guarantee that a decision-maker will adopt the better decision, providing the decision-maker with more information certainly makes it more likely that an objectively better decision will be adopted. Rationality cannot play this role to the same extent, as it is not concerned with encouraging a decision-maker to make a better decision; it is concerned only with whether a decision that has been taken is rational.

In respect of broader administrative values, procedural fairness holds the advantage of greater predictability than procedural rationality. It has well-developed principles according to which its application and content can be determined. By contrast, when procedural rationality will be applicable and what its content will be is much more difficult to determine. This is likely because, as was argued in Chapter 6, the content it has been given strays outside of the bounds of rationality review, and it is therefore difficult to apply it in a principled manner. This is evident in the *e.tv I* where such different conceptions of the ground of review were adopted by the first and second judgments.

5. CONCLUSION

Arising from the above case studies, it can be generally accepted that procedural fairness is highly desirable within the context of commissions of inquiry, interviews of the JSC, and at least some instances of executive policy-making. Indeed, within a constitutional dispensation based on the values of accountability, responsiveness, and openness, appropriate procedural review of these exercises of public power is arguably a constitutional requirement.

It is noteworthy that in considering a range of different types of non-administrative actions and case studies, various procedural defects were raised: the State Capture Commission raised the question of applicability and content of the right to be heard; the JSC interviews raised the issue of adequate disclosure; and the digital migration policy raised the issue of fresh consultations in respect of changes to public decisions. If we consider the various procedural defects that these case studies raise, the range of problems that procedural rationality might have to be developed to cover becomes conspicuous.

Could procedural rationality be stretched to cover the kinds of defects in these scenarios in order to arrive at the same outcomes as procedural fairness? In my analysis, I found that where a narrow, low-intensity and principled conception of procedural rationality is applied, it cannot. For rationality was not designed to apply to these kinds of defects. However, if a wider, strained approach to procedural rationality is applied, then it can in certain circumstances arrive at the same outcomes as procedural fairness. For if procedural rationality can mean whatever the court needs it to mean, it can be manipulated to arrive at a procedurally just outcome.

Is it necessary to strain rationality to do this work? In my case studies I found that it would not be 'inappropriate' to subject non-administrative actions to review for procedural fairness. In fact, the first two case studies instinctively demanded the application of procedural fairness in order to protect the reputations of the individuals adversely affected by public decision-making. Furthermore, none of the case studies raised separation of powers concerns, particularly if it is recognised that procedural fairness can vary in its content to accommodate such concerns. This calls starkly into question the finding in *Masetlha*[137] that it would be inappropriate to apply procedural fairness to executive action, and its implication that procedural fairness is unavailable to all non-administrative actions under the principle of legality, and raises the issue whether that finding should be overturned. This is a question to which I return in the concluding chapter.

Finally, I examined what effect the difference between the grounds has on procedural values as well as broader administrative values. In respect of procedural values, I found that where procedural fairness and procedural rationality do not overlap, there is likely to be a loss of (i) more accurate decision-making (ii) public confidence in public decision-making; and (iii) the state's recognition of the dignity of persons adversely affected by public decisions. The last value is also related to the possible failure to protect a person's interest in their reputation, if procedural rationality does not allow for them to be heard when adverse accusations are made against them publicly.

If procedural rationality were to be stretched to overlap with procedural fairness in terms of outcome, the case studies show that this would still have negative implications for broader

[137] Supra note 95.

administrative law values. First, it was shown that if courts had to apply procedural rationality instead of procedural fairness, they would not be able to draw on the rich jurisprudence developed in respect of procedural fairness, locally or in foreign jurisdictions, making mistakes or the uneven application of the principle more likely. The loss of foreign comparison was particularly glaring in respect of the review of commissions of inquiry. Second, I found in respect of the JSC case study that procedural rationality is more backward-looking, while procedural fairness is more capable of being applied in advance. Therefore, I argued, procedural fairness is more capable of playing a normative role in improved decision-making than procedural rationality, which is more likely to result in an application for review.

In the next and final chapter, I summarise the problem statement and research question posed in Chapter 1 of this thesis and set out my findings and recommendations.

CHAPTER 8

CONCLUSION

1. INTRODUCTION

In this concluding chapter, a short review of the problem statement and research question is set out in Part 2. In Part 3 the finding of this thesis is identified, namely that the conceptual underpinnings of procedural rationality prevent it from fulfilling the role of procedural fairness under the principle of legality. Three reasons for this finding are identified from the preceding chapters, namely, (i) procedural rationality's conceptual incoherence; (ii) the lack of guidance setting out its content in respect of consultation; and (iii) the loss of procedural values that procedural rationality is not capable of fostering in the absence of procedural fairness.

In light of this finding, in Part 4, three ways forward are considered. These are (i) the amendment of the definition of administrative action in the PAJA; (ii) the Constitutional Court setting aside its finding in *Masetlha v President of the Republic of South Africa*[1] excluding procedural fairness from the principle of legality; and (iii) the Constitutional Court finding that non-executive non-administrative action is not subject to the *Masetlha* exclusion under the principle of legality and attracts the demands of procedural fairness.

2. AN OVERVIEW OF THE PROBLEM STATEMENT AND THE RESEARCH QUESTION

South Africa's constitutional dispensation is based on accountability, responsiveness, and openness. It is founded on the rule of law, of which procedural fairness is a long-established component. The Constitution's provision for the participation of the public in the decisions of the state and opportunities for individuals or groups to make representations in the decisions that concern them, is almost all-encompassing: courts must afford persons whose interests it will determine a fair opportunity to make their case; the legislature must allow for public

[1] [2007] ZACC 20 ('*Masetlha*').

comments before passing legislation; and exercises of public power amounting to administrative action must be made procedurally fairly whether they affect individuals, groups, or the public at large. Within this context, the blanket exclusion of procedural fairness from exercises of public power subject only to the principle of legality is a hole in the net of the Constitution's commitment to public participation, openness, and accountability.

It is a particularly glaring omission when it is considered just how numerous and diverse the decisions are that attract only the supervision of the principle of legality (as shown in Chapter 2). While some highly political executive action might not require consultation to be considered administratively just, other non-administrative action, including some executive action, certainly would. It must not have been apparent to the Constitutional Court in *Masetlha* that the scope of non-administrative action meant that facts would inevitably arise that cried out for affected parties to be afforded an opportunity to be heard before a public decision is made. However, when those decisions arose, the Court did not set aside its finding in *Masetlha*, but instead, adopting 'tortuous reasoning',[2] determined that consultation could be required as an aspect of rationality, thereby developing a new ground of review, procedural rationality.

As set out in Chapter 5, the test for procedural rationality purports to be whether the process adopted by a decision-maker is rationally linked to the purpose for which the decision-making power was granted. Procedural rationality has been used to introduce a range of procedural standards, including consultation, under legality (and even PAJA) review. The courts have reiterated that procedural rationality is not to be conflated with procedural fairness. Accordingly, consultation is not a general requirement under procedural rationality but can be required in certain circumstances; for example, when there is a person or party that possesses information that the decision-maker needs in order to achieve the purpose for which they were granted the power to make the decision. To some, it might have seemed a deft solution, tempering the all-or-nothing results of exercises of public power falling outside the ambit of the PAJA, while also apparently respecting a strict separation of powers.

[2] Malcolm Wallis 'Book Review: Administrative Law in South Africa. By Cora Hoexter & Glenn Penfold. Third Edition. (2021)' (2022) 139 *SALJ* 946.

Yet, how could a ground housed in the conceptually very different ground of rationality review (as set out in Chapter 4) play the role of procedural fairness (as set out in Chapter 3)? The research question posed in this thesis was therefore: given the different conceptual underpinnings of the two concepts, can procedural rationality effectively fill the gap left by the absence of procedural fairness under legality review to achieve procedurally just results?

3. WHY PROCEDURAL RATIONALITY CANNOT FILL THE GAP LEFT BY PROCEDURAL FAIRNESS UNDER THE PRINCIPLE OF LEGALITY

The conclusion I have reached in this thesis is that due to their different conceptual underpinnings, procedural rationality is not a concept capable of fulfilling the role of procedural fairness under the principle of legality. This conclusion is based on three findings: (1) procedural rationality's lack of conceptual coherence; (2) the uncertain content of consultation under procedural rationality; and (3) the loss of procedural and broader administrative law values in the absence of procedural fairness.

3.1. Procedural rationality's lack of conceptual coherence

In Chapter 6 it was argued that procedural rationality lacks conceptual coherence, as the content it has been given far exceeds the conceptual limitations of rationality review. While the Constitutional Court has emphasized that substantive rationality is a low-threshold minimum standard and even circumscribed the rationality links required under legality review, it has applied procedural rationality far more expansively.

It is not suggested that this disjunct arose for any reason other than that judges wish to arrive at just outcomes. Because achieving a just outcome under the principle of legality will sometimes involve greater oversight than mere lawfulness and low-level rationality review can provide, judges have (knowingly or intuitively), through the guise of procedural rationality, applied a standard that incorporates elements of procedural fairness and reasonableness.

While it is understandable that courts have taken this route in the pursuit of just outcomes, it is undesirable and unsustainable for a number of reasons. First, it is undesirable for courts to articulate adherence to low intensity rationality review while they are applying another

standard, encompassing elements of procedural fairness and reasonableness. This is at odds with the constitutional values of accountability, responsiveness and openness, and contributes to conceptual uncertainty.

Second, and relatedly, judges should be explicit about what it is that motivates their decisions. It is apparent from key judgments in which procedural rationality was applied that what has motivated the outcome is not the irrationality of the decision but rather its procedural unfairness. Thus, judges in a number of cases have referred to the interests of 'affected parties' and even 'fairness' (considerations that have no place in review for rationality), before concluding that a decision was procedurally irrational. It is understandable that judges are motivated by the precepts of fairness, with natural justice so long having been regarded as a central tenet of the rule of law. It is nevertheless undesirable for judges not to be clear about the values motivating their decisions. In Hoexter's words, '[t]he constitutional aspiration towards a culture of justification, compellingly described by Etienne Mureinik, means little or nothing if we remain content with a style of adjudication in which judges are expected to distract their audience with legalistic patter instead of relying explicitly on the reasons that really move them.'[3]

Third, conceptual incoherence is the antithesis of clarity. In an already highly complicated area of the law, it is near impossible for judges and practitioners to understand and apply a concept that inherently does not make sense. The Constitutional Court, which itself developed the principle, strains to give it coherent meaning. How are judges in other courts supposed to apply and give content to this ground of review? Even more importantly, how are public decision-makers supposed to identify the procedural standards to which they are beholden?

Fourth, and derived from the first three problems, the conceptual incoherence of procedural rationality erodes its predictability. If courts are saying they are applying a particular standard while applying another, which will be applicable in the future? If a concept does not have clear principles for its application and content, how can one predict how a judge will interpret it? Thus, while procedural rationality introduces some variability under the principle of legality, tempering the all-or-nothing consequences of the administrative action definition in the PAJA

[3] Cora Hoexter 'Contracts in Administrative Law: Life After Formalism' (2004) 121 *SALJ* 595 at 599.

and the implications of *Masetlha*, and allowing just outcomes to be reached, it does so at the cost of predictability. This is also apparent when considering the content of consultation under procedural rationality.

3.2. The uncertain content of consultation under procedural rationality

In 2013, commenting on *Albutt v Centre for the Study of Violence and Reconciliation*,[4] Murcott pointed out that '[t]he judicial inquiry in *Albutt* began and ended with whether victims were entitled to a hearing, and "fizzled out" at the stage of considering the content of procedural fairness.'[5] The same is true of all subsequent matters in which consultation has been required as a matter of procedural rationality. Courts have not specified what the content of that consultation needed to be or provided any guidance on how to determine the content of consultation under procedural rationality. As shown in Chapter 3, consultation is a variable concept that can encompass a range of different procedures. Guidance on what is required under procedural rationality is therefore essential.

Because procedural fairness and procedural rationality are such fundamentally different concepts, the extensive jurisprudence that exists on the content of *audi* under procedural fairness cannot be relied upon. Nor can the PAJA, which usefully differentiates between core standards, supplementary discretionary standards, and the circumstances under which the core standards may be departed from.[6] This is a significant loss as decades of case law have developed conceptually cohesive principles that can be relied upon to reach administratively just outcomes.

In giving content to procedural rationality, courts also cannot rely on the jurisprudence of foreign jurisdictions, as procedural rationality is a uniquely South African ground that is not known in other jurisdictions. This will have particular consequences when South African courts consider the application of procedural standards to decisions that have not yet been dealt with in South African law but have been considered in other Commonwealth jurisdictions. The

[4] [2010] ZACC 4.
[5] Melanie Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?' (2013) 130 *SALJ* 260 at 268.
[6] See Chapter 3 Part 2.

commissions of inquiry case study in the previous chapter highlights this problem. If procedural fairness were applicable to the findings of commissions of inquiry in South Africa, foreign jurisprudence from Canada, Botswana, and New Zealand could assist our courts in determining the appropriate content of consultation before a commission. Principles such as the specific link between the possible damage to a person's reputation and their right to natural justice would provide useful guidance when a review application, inevitably, reaches our courts. As things stand, however, such a principle could not be adopted, as the rationality standard does not include consideration of the interests of persons affected by a decision.

Another problem, raised in respect of the JSC case study,[7] is determining in advance the content of consultation under procedural rationality. Procedural fairness has basic standards that must nearly always be met and are therefore easily ascertainable in advance. It would, for example, be clear that candidates before the JSC would be entitled to disclosure of the issues that would be raised in their interviews, allowing the Chairperson to immediately quash a question for which a candidate was unprepared. In contrast, procedural rationality is essentially backward-looking, as it is determined by asking after the event whether a step in the process *was* so irrational as to taint the *entire process* with irrationality.[8] This eradicates the normative role that judicial review can play in guiding decision-makers through their decisions, rather than only setting their decisions aside after the fact.

The lack of guidance to determine the content of consultation under the principle of legality again raises the problem of predictability. There is currently no way of predicting when the content of consultation under procedural rationality must be extensive, and when it must be minimal. Public decision-makers currently have insufficient means of ascertaining what might be expected of them when exercising non-administrative public power.

3.3. Loss of procedural values

In Chapter 1 of this thesis, I started my problem statement by considering the nature of natural justice and the rationale for its application as a ground of review. I identified a number of values

[7] Chapter 7 Part 3.
[8] See Chapter 7 Part 3.4.1.

that natural justice is understood to promote. These included more accurate and informed decision-making; public confidence in decision-making; and respecting human dignity by allowing persons to influence the public decisions that affect them. While the ground of procedural fairness is designed to protect these values, that is not the case with procedural rationality, rooted as it is in the rationality enquiry. Thus, as Plasket points out, 'if a rational decision can be taken without a hearing being given, both the dignity-value and process-value of procedural fairness are lost.'[9]

This is most apparent in respect of the dignity of individuals who are affected by an exercise of public power. Procedural rationality does not, as a rule or even a baseline standard, require decision-makers to consult with affected parties before making their decisions. It is only in exceptional cases that consultation will be required if it is needed to achieve the purpose for which the decision-maker's power was granted. As the rationality test is regarded as a very low threshold test, this means that in most cases consultation will not be required, or where it is required, the content of consultation may be so minimal that it does not allow for an affected person to have a real chance of affecting the outcome of the decision. In these cases, the dignity value in allowing persons to participate in the decisions that affect them is lost.

An absence of procedural fairness is also likely to undermine the legitimacy of public decisions. Where public decisions are made in a manner that is conspicuously unfair, the public is far less likely to support those decisions or have confidence in its government. The JSC case study in Chapter 7 is a case in point. The JSC interviews of Judges Pillay and Mlambo were met with significant public disapproval. The JSC's practice of ambushing judges with lines of questioning about which they had not been given prior notice, flouted the principles of *audi alteram partem*. Even to a layperson, the JSC interviews of Judges Pillay and Mlambo smacked of *unfairness*. For viewers, seeing public power exercised in this way eroded trust in the South African legal system and government. Justice was not seen to be done.

The loss of these values in respect of non-administrative actions surely impoverishes our administrative law system. A system in which exercises of public power can be exercised in a

[9] Clive Plasket 'Procedural Fairness, Executive Decision-Making and the Rule of Law' (2020) 137 *SALJ* 698-712 at 710.

way that does not respect the dignity of an affected person and is manifestly unfair, is not a system acquainted with the values prized by the drafters of the Constitution. In a constitutional dispensation founded on the values of 'human dignity', 'the rule of law', and 'accountability, responsiveness and openness',[10] the application and content of procedural fairness must be widely applicable and robust, not gatekept by a narrow definition of administrative action or substituted with a whimpering version of fairness snuck in through the back door.

4. THE WAY FORWARD

The argument that I have made in this thesis should not be construed as condemning courts for expanding procedural rationality beyond its conceptual limits. With the dearth of tools available under the principle of legality, it is currently the only way in which they can reach procedurally just outcomes.

However, in light of the problems that have been identified, changes need to be made if we want a system of judicial review that is predictable, transparent, workable, and promotes cherished values of administrative law. Specifically, judges need to be given the tools to provide procedural oversight in respect of non-administrative actions. Below, I suggest that this may be done by (i) the legislature amending the PAJA definition of administrative action; (ii) the Constitutional Court overturning its decision in *Masetlha*; or (iii) at the very least, the Constitutional Court applying procedural fairness to non-administrative non-executive action.

4.1. Amending the PAJA definition of administrative action

Since the enactment of the PAJA, many authors have suggested that the definition of administrative action is unconstitutional.[11] This, as detailed in Chapter 2, is due to the restrictiveness of the definition. If the definition unjustifiably excludes more actions than the

[10] Sections 1(a), (c), (d) of the 1996 Constitution.
[11] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) at 353; Hoexter 'Principle of Legality' in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165–86; Cora Hoexter 'Administrative Action in the Courts' 2006 *Acta Juridica* 303; Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' *Constitutional Law of South Africa* 2 ed (2017); Raisa Cachalia 'Resuscitating the PAJA in state self-review? *Compcare Wellness Medical Scheme v Registrar of Medical Schemes*' (2022) 38 *SAJHR* 70–91.

courts excluded from the meaning of administrative action in section 33 of the Constitution, the definition restricts the constitutional right under section 33 and must be declared unconstitutional and set aside.

This is an attractive argument, as the restrictiveness of the PAJA definition lies at the core of many of the problems in modern South African administrative law. It is at the heart of the divide between administrative and non-administrative actions and its restrictiveness has resulted in many decisions that might have been reviewed as administrative action being relegated to the grounds of review under the principle of legality.

If the current PAJA definition were to be replaced with a new, wider definition, more exercises of public power would attract the standards of review under the PAJA. The findings of commissions of inquiry, some decisions of the JSC, the decision of the NDPP to prosecute, and so forth, could all be made subject to the PAJA. A wider definition could arguably even correct the error made by the Constitutional Court in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited,*[12] if it were to expressly include self-review within its ambit.

There might be reticence about adopting a particularly wide definition of administrative action, due to concerns of impinging on the separation of powers. This is, however, unlikely, as the grounds of review that would become applicable under the PAJA, namely procedural fairness and reasonableness, are inherently variable.[13] In matters in which the separation of powers requires courts to defer to the role and expertise of government, these grounds can be pared down and reviewed with the lightest touch. How to determine the correct level of intensity under the circumstances would be for the courts to determine, though principles according to which these grounds vary are already well established and can be further finessed. As has been persuasively argued by Hoexter, a wider definition of administrative action would shift the work of the courts from determining whether a decision constitutes administrative action, to determining the appropriate content of a ground of review.[14]

[12] [2017] ZACC 40.
[13] See Chapter 3 Part 2.1. for a discussion on the variability of procedural fairness.
[14] Hoexter 'Administrative Action in the Courts' supra note 11 at 319.

While it is unlikely that the legislature would itself decide to amend the PAJA definition of administrative action, it would have to do so if the definition were found to be unconstitutional. In the more than twenty years since its enactment, and despite the academic support for this argument, the unconstitutionality of the PAJA definition has never been raised before the Constitutional Court. This legal argument does, however, remain valid, and it is possible that it might find favour in the Constitutional Court if it is raised.

While a new definition of administrative action is likely necessary and would carry with it a number of benefits, it has a limitation in respect of procedural justice. A new definition of administrative action would likely (though not necessarily) still exclude executive actions from the PAJA, as the Constitutional Court has distinguished administrative action under the Constitution from executive action. While legislators are at liberty to expand upon the right granted in the Constitution and include executive action, this is unlikely, and perhaps also undesirable. Since there are executive decisions that would likely require procedural oversight, *Masetlha* would have to be overturned for procedural fairness to become applicable.

4.2. Overturning *Masetlha*

In the nearly 30 years since it opened its doors, the Constitutional Court has never overruled itself. It is of course undesirable for the highest court in a country to overrule itself regularly. The doctrine of precedent expresses the rule that courts are bound by the findings of previous decisions of higher courts and by their own previous decisions. As per Cameron J, precedent is intrinsic to the rule of law '[b]ecause without precedent, certainty, predictability and coherence would dissipate' and 'courts would operate without map or navigation, vulnerable to whim and fancy.'[15]

These considerations are however less compelling if the Constitutional Court has made a clear error. As has been shown in this thesis, the Constitutional Court's decision in *Masetlha* has had a widespread effect on the development of law and underlying legal principles. Where the

[15] *Ruta v Minister of Home Affairs* [2018] ZACC 52 para 21.

Court has made a mistake, particularly one with far reaching implications for the development of South African law, there are good reasons why it should recognise and address that error.[16]

The Constitutional Court has itself considered the possibility of overturning its own decisions. While emphasising the importance of the doctrine of precedent ('To deviate from this rule is to invite legal chaos'), the Constitutional Court has found that courts of final jurisdiction 'can depart from a previous decision of their own only when satisfied that that decision is clearly wrong.' [17]

Could the Constitutional Court be persuaded that the finding in *Masetlha* (that executive action need not be procedurally fair) is clearly wrong? Commentators have certainly criticised the judgment, and Plasket has expressly called for the decision to be overturned, stating in 2020:

> *Masetlha* is obviously wrong, retrogressive and at odds with the Constitution. The *Albutt* solution is very much a second-best option. The proper solution lies in the hands of the Constitutional Court. One would hope that when the opportunity arises, it will correct matters by overruling *Masetlha* and reverting to a principled approach to the duty that rests on everyone who decides anything in the exercise of public power to act fairly. [18]

I strongly concur with this view and believe that it is the best option for addressing the problems identified in this thesis. Overturning *Masetlha* and introducing procedural fairness under the principle of legality would give judges the tools they need to achieve procedural justice in reviewing non-administrative actions under the principle of legality. Reliance on procedural rationality is unsustainable and procedural fairness must be included under the principle of legality in order for procedural standards to be applied in a way that is clear, intelligible, and predictable. Moreover, overturning *Masetlha* would allow courts to rely on procedural rationality in a manner that is conceptually coherent without overburdening rationality review with content that it was not designed to encompass.

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[16] See further Jason Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79–109.

[17] *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19 para 28. Reiterated more recently in *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37 para 133.

[18] Plasket op cit note 9 at 712.

4.3. Applying procedural fairness to non-executive non-administrative actions

In *Masetlha* the Court did not expressly state that non-administrative action other than executive action do not attract the standard of procedural fairness, although this seems to have been implicit in its finding that the principle of legality encompasses only lawfulness and rationality.[19] There is therefore some scope for the Court to find that non-administrative action other than executive action may be reviewed for procedural fairness under the principle of legality.

It is of course desirable that these types of decisions should be procedurally fair. In fact, it would seem untenable for some of these decisions, such as the process of commissions of inquiry and the interviews of the JSC, not to be procedurally fair. It would be very difficult for a court to find that a person whose reputation is damaged by a commission of inquiry is not entitled to procedural fairness.

However, making this kind of finding without also overturning *Masetlha* would lead to an even more complicated and divided system of judicial review. It would have the effect of splitting South Africa's already bifurcated system of judicial review into three: (i) the grounds of review applicable to administrative action under the PAJA; (ii) the grounds of review applicable to non-administrative executive action under the principle of legality; and (iii) the grounds of review applicable to non-administrative non-executive action under the principle of legality. This would clearly be calamitous for South African judicial review, as judges would have to consider not only whether a decision constitutes administrative action, but if it does not, what type of non-administrative action it is. It would essentially revive the classification-of-functions doctrine.

Therefore, while it is infinitely desirable that non-administrative actions like the findings of commissions of inquiry and JSC decisions should attract the demands of procedural fairness, this kind of finding should not be made without at the same overturning *Masetlha*, as this would have the effect of making procedural fairness applicable to all exercises of public power. In fact, contemplation of the application of procedural fairness to non-administrative non-

[19] *Masetlha* supra note 1 paras 78, 81.

executive actions might provide the impetus for overturning *Masetlha*. For example, if faced with a review application in respect of a finding of a commission of inquiry, a court would have to decide between (i) finding that commissions of inquiry may be conducted unfairly while stretching procedural rationality far beyond its conceptual limitations in order to reach a just outcome; (ii) creating a new sub-category of non-administrative non-executive action under the principle of legality to which procedural fairness is applicable, thereby splitting judicial review into three; or (iii) overturning *Masetlha* and finding that procedural fairness is applicable to all exercises of public power. Perhaps, faced with this choice, the Constitutional Court might be emboldened to overrule itself for the first time.

5. CONCLUDING REMARKS

In the decade and a half since the Constitutional Court, in *Albutt*, sought to limit the effect of its decision in *Masetlha* by expanding the rationality review ground to encompass a procedural component, the jurisprudential shortcomings of the 'solution' – as it has been embraced, bolstered and expanded beyond its conceptual boundaries – have become apparent. Bold measures are required to ensure the coherence of the grounds of review that govern exercises of public power and to restore procedural fairness to its place at the heart of the rule of law. I submit that such decisive action should follow broadly the findings and recommendations that I have set out above.

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