

THE BURGEONING CONSTITUTIONAL REQUIREMENT OF RATIONALITY AND THE SEPARATION OF POWERS: HAS RATIONALITY REVIEW GONE TOO FAR?*

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This article analyses three recent judgments of our apex courts. Collectively, they illustrate a maximising of the ‘minimum threshold requirement’ of rationality through the seemingly inexhaustible principle of legality. The question sought to be addressed is whether the courts are going too far in extending this baseline requirement to cover procedural fairness, reason-giving and something akin to proportionality, in the context of non-administrative action and in the absence of any meaningful engagement with the doctrine of separation of powers. In addressing this question, the article examines the tenets of the doctrine of separation of powers, and juxtaposes these theoretical tenets with the usefulness of the doctrine in practice. The role of the judiciary, notably through judicial review, is highlighted as the crucial ‘check’ against abuses of state power which gives this doctrine its lasting relevance. In examining how the courts ought to strike the ‘delicate balance’ in exercising their power, the article explores the paradoxes inherent in judicial review and its defensible limits. Against this backdrop, the rationality requirement is elucidated and compared with the more searching requirement of reasonableness. Finally, the analysis of the case law reveals that although the conclusions reached in the judgments are to be hailed, their failure to engage meaningfully with the precepts of the separation of powers in expanding the frontiers of rationality review is indicative of a worrying trend that may ultimately compromise our judiciary’s crucial institutional integrity.

I INTRODUCTION

Writing in 2004, Cora Hoexter predicted the exponential expansion of the constitutional principle of legality — an aspect of the rule of law¹ and supple device for the review of the exercise of all public power — to cover the full scope of quintessential review grounds under administrative law. She noted:

‘The Constitutional Court’s principle of legality does not yet cover procedural fairness, and has not yet been made to require the giving of reasons by an

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¹ *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) para 56.

administrator. Nor does it seem to demand proportionality, which is the other half of reasonableness. . . . Nevertheless the principle is already an extensive one; and who knows where it might go in the future?²

The recent trilogy of judgments — *Albutt v Centre for the Study of Violence and Reconciliation*;³ *Judicial Service Commission v The Cape Bar Council*⁴ and *Democratic Alliance v The President of the Republic of South Africa*⁵ — delivered by our apex courts, appear to answer Hoexter's rhetorical question. In these cases the 'constitutional baseline'⁶ requirement of rationality has been invoked under the principle of legality in order to extend, respectively, the precepts of procedural fairness, reason-giving and an expansive notion of rationality proper (uncannily reminiscent of the justifiability enquiry ('code for the broader notion of reasonableness'⁷) so neatly encapsulated by Froneman DJP in *Carephone (Pty) Ltd v Marcus NO*⁸) in relation to non-administrative action.

In this article I explore these developments in light of the tenets of our 'distinctively South African model of separation of powers'⁹ and in particular, the 'special role'¹⁰ of the courts in exercising their review function in our constitutional democracy. My aim is to determine whether these cases collectively achieve the requisite 'delicate balance' between the competing ideals of ensuring judicial supervision and accountability of the political branches of state on the one hand, and ensuring respect for the 'popular mandate and imperatives to govern'¹¹ on the other. I conclude that these cases are a fair attempt at ensuring the right equilibrium between the tensions inherent in our constitutional order. Indeed, these judgments certainly seem to address the question 'what does justice require in the circumstances?'¹² However, my concern is that they represent equally a dangerous judicial trend. This trend is to dilute the principle of legality, and in particular its requirement of rationality, in a manner reminiscent of the way in which our pre-constitutional administrative law was 'spread too thinly'.¹³ While the

² Cora Hoexter 'The principle of legality in South African administrative law' (2004) 3 *Macquarie LJ* 165 at 184.

³ 2010 (3) SA 293 (CC).

⁴ 2013 (1) SA 170 (SCA).

⁵ 2013 (1) SA 248 (CC).

⁶ Alistair Price 'The content and justification of rationality review' (2010) 25 *SAPL* 347.

⁷ Hoexter op cit note 2 at 172.

⁸ 1999 (3) SA 304 (LAC) paras 31–7.

⁹ *De Lange v Smuts NO* 1998 (3) SA 785 (CC) paras 60–1.

¹⁰ Sandile Ngcobo 'Sustaining public confidence in the judiciary: An essential condition for realising the judicial role' (2011) 128 *SALJ* 5 at 10.

¹¹ Ross R Kriel 'Administrative law' 1998 *Annual Survey* 89 at 96.

¹² Cora Hoexter 'The rule of law and the principle of legality in administrative Law today' in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 55 at 64.

¹³ Hugh Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) 121 *SALJ* 438 at 439.

temptation to use this flexible principle to bring the requirements of administrative justice to bear wherever the circumstances so demand may give effect to our constitutional commitment to ‘accountability, responsiveness and openness’¹⁴ in a manner compliant with the prescripts of variability, it is arguably at the expense of reliability and certainty — which are equally requirements of the rule of law.¹⁵

The concomitant result of the tempting flexibility of this principle, and its seemingly malleable rationality requirement, has not only been a subversion of the Promotion of Administrative Justice Act¹⁶ (‘the PAJA’) and its underlying scheme as laid down in s 33 of the Constitution through trending ‘parallelism’¹⁷ under the principle — it has in addition resulted in a more fundamental concern. The principle concern of this article is that in developing such an expansive *substantive* conception of rationality review¹⁸ — in the absence of *meaningful* engagement with the prescripts of the separation of powers doctrine¹⁹ — and thereby increasing their reservoir of judicial power, the courts may be perceived to be expanding their supervisory review jurisdiction in a manner that amounts to an affront to this doctrine. In particular, given our current political climate and the disconcerting attacks against the judiciary for being counter-majoritarian,²⁰ the extension of the more onerous review grounds, designated for the carefully crafted realm of administrative action to decisions of a discretionary nature in the political realm, may lead to the gradual chipping away of our courts’ fiercely guarded institutional security and thus the ‘authoritative legitimacy’ that lies at the heart of their power.²¹ This concern does not flow from the conclusions reached in these judgments, which accord with both justice and principle, but rather from the courts’ failure — particularly in the *JSC* and *Simelane* judgments — to engage compellingly with the requisites of separation of powers as part of the reasoning process in reaching these conclusions. As Price has noted,

‘the court would do well to develop its conception of the constitutional separation of powers . . . by expressly recognising and reasoning with the

¹⁴ Section 1(d) of the Constitution of the Republic of South Africa, 1996.

¹⁵ See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108 and *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) para 64, regarding the value of reasonable certainty as a formal requirement of the rule of law.

¹⁶ Act 3 of 2000.

¹⁷ See Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 124 where she notes that the principle of legality is evolving into a ‘complete parallel universe of administrative law’. A full discussion of this issue is beyond the purview of this article.

¹⁸ See Alistair Price ‘Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*’ (2010) 127 *SALJ* 580 at 582.

¹⁹ *Ibid.*

²⁰ See for example on this periodical criticism of the judiciary by the African National Congress, Theunis Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106 at 107 and the references at note 6.

²¹ *Ibid* at 108–9.

considerations of democratic principle and institutional competence. This would promote judicial transparency.²²

This has been most apparent in the category of socio-economic rights,²³ but as rationality review burgeons into something quite unlike the ‘minimum threshold requirement’ originally articulated by Chaskalson P in *Pharmaceutical Manufacturers*,²⁴ it seems this level of engagement equally needs to occur in the context of constitutional rationality review of public power that falls short of administrative action. O’Regan recently warned that

‘[i]t is important that the test of rationality remains a “no rhyme or reason test” and is not tightened to require a closer connection between the government purpose and the legislation or action in question. Setting a tighter test for rationality may well constitute an unwarranted intrusion into the legitimate constitutional space accorded to the legislature and the executive.’²⁵

While I do not think the latest trio of cases constitutes such an unwarranted intrusion, it does suggest that the courts should heed this warning by rigorously engaging with the balancing enquiry necessitated by the separation of powers doctrine, particularly where politics seeps into the judicial arena.

I turn now to consider what this enquiry entails given our constitutionally-entrenched version of the doctrine and the related limits to judicial review. I then assess what the ‘minimum’ constitutional requirement of rationality requires, before illustrating how these cases have sought to ‘maximise’ it.

II OUR UNIQUELY SOUTH AFRICAN DOCTRINE OF SEPARATION OF POWERS AND ITS IMPLICATIONS FOR OUR CONCEPT OF REVIEW

(a) *Separation of powers: Theory versus practice*

Barber has described the doctrine of separation of powers as a ‘distinctively constitutional tool’ which enjoins the authors of a constitution to ‘match function to form in such a way to realise the goals set for the state by political

²² Price op cit note 18 at 590.

²³ The issue of the role of the separation of powers doctrine in the context of socio-economic rights has been well traversed in our literature and is beyond the purview of this article. See for example, Marius Pieterse ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20 *SAJHR* 383; Redson Edward Kapindu ‘Reclaiming the frontier of constitutional deference: *Mazibuko v City of Johannesburg* — A jurisprudential setback’ (2010) 25 *SAPL* 471; A Govindjee & M Olivier ‘Finding the boundary — The role of the courts in giving effect to socio-economic rights in South Africa’ (2007) 21 *Speculum Juris* 167; and Danie Brand ‘Judicial deference and democracy in socio-economic rights cases in South Africa’ (2011) 22 *Stellenbosch LR* 614.

²⁴ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90.

²⁵ Kate O’Regan ‘Helen Suzman Memorial Lecture. A forum for reason: Reflections on the role and work of the Constitutional Court’ (2012) 28 *SAJHR* 116 at 128.

theory'.²⁶ The doctrine was developed to fulfil two main aims. The first is to curtail the exercise of political power and prevent its abuse, thereby ensuring the maintenance of individual liberty. The second is to enhance efficiency in government functioning.²⁷ Despite it being a guiding principle in almost all democracies,²⁸ our Constitutional Court emphasised in the *Certification Judgment*²⁹ that 'there is no universal model of separation of powers'.³⁰ However, in order to understand the value of our domestic conception of this constitutional norm and to assess just how congruent its practical worth is with its theoretical underpinnings, it is necessary to set out the original basic principles that it originally comprised. Van der Vyver³¹ succinctly summarises these four principles as conceived by the French political philosopher Montesquieu³² — who is credited for expounding the modern formulation of the doctrine — and as supplemented by the American influence initiated by John Adams.³³

The first principle is that of a *trias politica*, in terms of which state authority (or government) is divided up into three distinct components: legislative, executive and judicial authority. Flowing from this principle is the correlative principle of separation of personnel functions pursuant to which each branch of government should be staffed with different officials who may not serve simultaneously for more than one branch. Thirdly, each of these branches is tasked with separate core functions; namely making the law, executing and enforcing the law, and adjudicating on questions of law, respectively. The fourth principle of checks and balances, in terms of which each branch is empowered to exercise some form of oversight over the others, represents John Adams's addition to the Massachusetts Constitution of 1780. The Declaration of Rights proclaimed that 'all people are born free and equal, and have certain natural, essential and unalienable rights'.³⁴ The question Adams faced was how to secure these rights in a structure of government in which an all-powerful parliament and a potent executive would stand in the way of any human right being truly unalienable. The answer he came up with was the

²⁶ N W Barber 'Prelude to the separation of powers' (2001) 60 *Cambridge LJ* 59 at 71.

²⁷ Kate O'Regan 'Checks and balances — Reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8 *PER/PELJ* 120 at 124.

²⁸ Peter Labuschagne 'The doctrine of separation of powers and its application in South Africa' (2004) 23 *Politeia* 84 at 86.

²⁹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

³⁰ *Ibid* para 107.

³¹ J D van der Vyver 'The separation of powers' (1993) 8 *SAPL* 177 at 178.

³² Montesquieu *The Spirit of the Laws Book XI* (1878) 163.

³³ Margaret H Marshall 'The separation of powers: An American perspective' (2006) 22 *SAJHR* 10.

³⁴ *Ibid* at 11.

fundamental notion of an independent judiciary staffed with impartial judges to serve as a crucial check on the political branches of government.³⁵

Pursuant to Adams's influence, 'the judiciary lost its inferior status', and the overarching principle of balanced government was borne.³⁶ The practical value of the doctrine of separation of powers in modern democracies lies in this principle of checks and balances in that the doctrine has come to serve a more useful purpose in ensuring the *supervision* of state power, rather than the *division* thereof. This is because, as De Vries notes,

'[t]he legislature and the executive have not been truly separated in modern history. In most democratic states, executives have direct or indirect input in the legislature. . . . [T]his perpetual fusion . . . is of course contrary to the separation of powers doctrine.'³⁷

The doctrine's value in practice has been further thwarted by the 'rise of national political parties'³⁸ which, as Kurland noted in 1986, '[e]ven the most informed of the Founding Fathers did not anticipate'.³⁹ This has been both caused and perpetuated by the worrying trend of 'creeping' centralisation of executive power.⁴⁰ This reality, and its unfortunate side-effects, is particularly stark in South Africa's political climate given the malady of 'one-party dominance'⁴¹ — a practical outcome that our Constitutional Court did not anticipate, and one which stems, to an extent, from our constitutional design.⁴²

In the *Certification Judgment*, the court had to consider whether Constitutional Principle VI had been breached. This principle required that '[t]here shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.⁴³ The main objection that was raised was directed at the fact that the Constitution enables members of the executive also to be members of the legislature at all three levels of government. This, so it was argued, offended this Constitutional Principle VI since it would result in an increase in the power reserve of the executive, and a concomitant

³⁵ Ibid.

³⁶ Phillip B Kurland 'The rise and fall of the "doctrine" of separation of powers' (1986) 85 *Michigan LR* 592 at 595.

³⁷ ID de Vries 'Courts: The weakest link in the democratic system in South Africa; A power perspective' (2006) 25 *Politeia* 41 at 47.

³⁸ Kurland op cit note 36 at 599.

³⁹ Ibid.

⁴⁰ Catherine Albertyn 'Judicial independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *SAJHR* 126 at 132.

⁴¹ See Sujit Choudhry 'He had a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 1, for an excellent analysis of this pathology.

⁴² Note that a full discussion of all of the constitutional 'design flaws' that have rendered our Parliament impotent at the hand of our executive is beyond the scope of this article. I thus focus solely on the key constitutional design feature that enables a fusion between the legislative and executive branches.

⁴³ *Certification Judgment* supra note 29 para 106.

undercutting of the ‘representative basis of the democratic order’.⁴⁴ Unfortunately, this warning was not heeded, with the Constitutional Court remarking that this blurring of the line would instead ‘make the Executive more directly answerable to the elected Legislature’.⁴⁵ Our practical experience has sadly revealed this to be mere wishful thinking with executive dominance having rendered our Parliament akin to a ‘poodle-like-lapdog which . . . is obsequious and subservient to its (party) master’.⁴⁶ This undercutting of the separation of powers doctrine through a skewing of power in favour of the executive shows the theoretical principles of separation of functions and personnel to be of little significance in practice. To this extent, the practical worth of the doctrine is less than congruent with its theoretical aims. However, it has certainly not been rendered redundant.

Although the constitutional mechanisms for partisan oversight continue to malfunction in practice, the key underlying principle of checks and balances remains practically significant. This principle evolved pursuant to John Adams’s invention⁴⁷ of the third independent and only non-political arm of state: the judiciary.⁴⁸ The judiciary continues to fulfil its vital role as a ‘bulwark against executive excesses and misuse or abuse of power, or transgression of constitutional or legal limitation by the executive as well as the legislature’.⁴⁹ It is the role of the judiciary, as conceived of through the doctrine of separation of powers, which gives this doctrine its value in a constitutional democracy. The judiciary provides the most crucial check against abuses of state power, and this is most obviously done through the ‘potentially awesome power’⁵⁰ of judicial review of legislative and executive action. Pieterse thus notes that judicial review ‘is the most common and dramatic instance of . . . checks and balances’.⁵¹ It is therefore important that our courts ensure that in exercising this expansive power, they aim to strike the ‘delicate balance’ between the need to control government and the need to prevent state power from being diffused ‘so completely [such] that the government is unable to take timely measures in the public interest.’⁵² This balancing act is necessary to preserve the independence of the judiciary — a

⁴⁴ Ibid para 107.

⁴⁵ Ibid para 111.

⁴⁶ Robert Obiyo ‘Democracy and the committee system of the South African Parliament with special reference to the Standing Committee on Public Accounts’ (2007) 26 *Politeia* 60 at 69.

⁴⁷ See De Vries op cit note 37 at 45 where the author notes that Montesquieu did not allocate the same status to the judiciary as the other branches of government. This development was due to the American influence.

⁴⁸ Marshall op cit note 33 at 11.

⁴⁹ Yash Vyas ‘The independence of the judiciary: A third world perspective’ (1992) *Third World Legal Studies* 127 at 132.

⁵⁰ I Mahomed ‘The independence of the judiciary’ (1998) 115 *SALJ* 658 at 660.

⁵¹ Pieterse op cit note 23 at 386.

⁵² *De Lange supra* note 9 paras 60–1. See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 26 regarding the crucial role of the courts in ensuring this balance.

vital manifestation of the *trias politica*⁵³ — by preventing the erosion of its institutional security.⁵⁴ I turn now to consider briefly the role of the courts — and in particular the Constitutional Court — in exercising the power of judicial review.

(b) *The adoption of the trias politica as a constitutional principle confirms the 'omnipresent importance of judicial review in South Africa'*⁵⁵

Our Constitutional Court has recently reiterated the importance of the separation of powers doctrine, as a fundamental — albeit implied⁵⁶ — component of our constitutional design, and the crucial review role of the courts in ensuring the maintenance of the right equilibrium of power as contemplated by this doctrine. In the case of *National Treasury v Opposition to Urban Tolling Alliance*,⁵⁷ Moseneke DCJ described the separation of powers as a 'vital tenet of our constitutional democracy'.⁵⁸ This entails that, pursuant to the supremacy of the Constitution, the courts, as its guardians and as the final, independent and authoritative arbiters of legal issues, are mandated to ensure that 'all branches of Government act within the law'.⁵⁹ The proviso to this extensive judicial power is that 'the courts in turn must refrain from entering the exclusive terrain of the Executive and Legislative branches of Government *unless* the intrusion is mandated by the Constitution itself'.⁶⁰ The Constitution is the courts' lodestar and as such, they are duty-bound to give effect to its precepts with both diligence and sensitivity. The Constitutional Court, in particular, must exercise this duty with care, given its 'special place'⁶¹ in our transformative constitutional order. Our apex court in constitutional matters is vested with sweeping and exclusive powers, inter alia, to decide disputes between organs of state,⁶² to have the final say on the constitutional validity of Acts of Parliament and provincial legislation, and to declare legislation and conduct of the President invalid.⁶³ Given the breadth of these powers and their political sensitivity, it is vital that the 'defensible

⁵³ Lourens Du Plessis 'How fragile is constitutional democracy in South Africa? Assessing (aspects of) the Fourteenth Amendment debate/debacle — part 1: Constitutional guarantees of the separation of powers and the independence of the judiciary in South Africa' (2007) 21 *Speculum Juris* 193 at 199.

⁵⁴ See Ngcobo op cit note 10 and Roux op cit note 20 regarding the importance of public confidence in the judiciary to secure its institutional security.

⁵⁵ Labuschagne op cit note 28 at 91.

⁵⁶ Heath supra note 52 para 19.

⁵⁷ 2012 (6) SA 223 (CC).

⁵⁸ Ibid para 44.

⁵⁹ Ibid.

⁶⁰ Ibid, emphasis supplied.

⁶¹ Sandile Ngcobo 'South Africa's transformative Constitution: Towards an appropriate doctrine of separation of powers' (2011) 22 *Stellenbosch LR* 37 at 39.

⁶² Note that crucially the judiciary is excluded from the definition of organ of state in s 239 of the Constitution, which attests to its 'special place' in the separation of powers.

⁶³ Section 167(4) of the Constitution.

limits of judicial review⁶⁴ are carefully delineated and observed by our courts. Before turning to consider what these limits are given our conception of the separation of powers, I address the related issue of the paradoxical nature of judicial review.

(c) *The paradox of judicial review: The courts' 'power' and the counter-majoritarian dilemma*

It is important to note that the limits of judicial review do not detract from its value: it is a corollary of constitutional supremacy. As Moseneke has noted, 'judicial review is a necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing the limits that the Constitution itself imposes on governmental power'.⁶⁵ These aims are laudable but, given the inherent tensions in our constitutional architecture, their attainment is not always an easy feat. This flows from the paradoxical nature of judicial review as a prerequisite of the separation of powers. This paradox is twofold.

First, despite the potential breadth of this power, it is exercised by the branch of government with neither the power of the purse, nor that of the sword, to exercise its will.⁶⁶ The only real power the judiciary possesses is of a more intangible form; it is a kind of moral authority which flows from 'its independence and integrity and . . . the esteem which it generates within the minds and hearts of the people affected by its judgments'.⁶⁷ In this respect, public confidence is an essential condition for realising the judicial role. As Aharon Barak has remarked, 'all [a judge] has is the public's confidence in him [or her]. This fact means that the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content.'⁶⁸ Herein lies the real source of the judiciary's power. However, by virtue of the fact that it is sourced in the public confidence, this somewhat amorphous power can be subverted more easily than that of the sword or purse. The flip-side of the judicial power is that it can, in certain circumstances, be rendered a weakness. It is pursuant to this reality that unwarranted attempts have been made by our executive⁶⁹ to undermine judicial power by relying on the second paradox

⁶⁴ Patrick Lenta 'Judicial restraint and overreach' (2004) 20 *SAJHR* 544.

⁶⁵ Dikgang Moseneke 'Striking a balance between the will of the people and the supremacy of the Constitution' (2012) 129 *SALJ* 9 at 17.

⁶⁶ Mahomed op cit note 50 at 660. See also *S v Mamabolo* 2001 (3) SA 409 (CC) para 16.

⁶⁷ *Ibid* at 661.

⁶⁸ As quoted by Ngcobo op cit note 10 at 6.

⁶⁹ See David Dyzenhaus 'The pasts and future of the rule of law in South Africa' (2007) 124 *SALJ* 734 at 754, who speaks of the dangers of transformation bordering on 'gleichschaltung' and notes that, '[i]ndeed the government seems prepared to use its control over legislation — indeed sometimes over the Constitution, since it commands the numbers to amend the Constitution — to ride roughshod over institutional checks'.

inherent in the notion of judicial review. This paradox essentially takes the form of the ‘democracy versus juristocracy debate’.⁷⁰

On the one hand, by virtue of the separation of powers, the courts are mandated to exercise their review power to hold government accountable to the standards set in the Constitution; yet, on the other hand, this power may be used to ‘thwart the very right to political participation by withdrawing debate from the public arena to the domain of the courts’.⁷¹ This conundrum has been dubbed ‘the counter-majoritarian dilemma’ by constitutional law scholars. The dilemma arises because, by virtue of the power of judicial review, unelected judges are empowered to overturn the decisions of democratically-elected representatives of the majority. Democratic theory and constitutional supremacy thus appear to find themselves in polar opposition. However, as extensive scholarship has shown,⁷² the ‘strength’ of this argument rests on a particularly thin, and thus misguided, notion of democracy — something akin to what Mureinik aptly termed ‘snap-shot democracy’⁷³ — rather than the rich version of democracy necessitated by our ‘[constitutional] culture of justification’.⁷⁴ As Lenta notes, democracy has both a procedural and a substantive component in that it is concerned not only with the idea of popular sovereignty, but also with the protection of substantive rights.⁷⁵ It is concerned not only with listening to the voice of the majority, but also with giving a voice to those in the minority.⁷⁶ As Gandhi put it, ‘democracy is not the “acquisition of authority by a few” but the “acquisition of the capacity by all to resist authority when it is abused”’.⁷⁷ Our constitutionally entrenched version of democracy is thus one which gives effect to the ‘normative constraints on majoritarian politics’ prescribed by the Constitution itself.⁷⁸ It is meant to be truly representative and participatory in nature,⁷⁹ and to give real meaning to our constitutional

⁷⁰ Kirsty McLean ‘Towards a framework for understanding constitutional deference’ (2010) 25 *SAPL* 445 at 447.

⁷¹ *Ibid.*

⁷² See for example, Etienne Mureinik ‘Reconsidering review: participation and accountability’ (1993) 13 *Acta Juridica* 35 and D M Davis ‘Administrative justice in a democratic South Africa’ (1993) 13 *Acta Juridica* 21.

⁷³ *Ibid* at 35.

⁷⁴ Etienne Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *SAJHR* 31 at 32.

⁷⁵ Lenta *op cit* note 64 at 560.

⁷⁶ See the judgment of Oriani-Ambrosini, *MP v Sisulu MP, Speaker of the National Assembly* 2012 (6) SA 588 (CC) para 43, where Mogoeng CJ notes that ‘[o]urs is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless, listen’.

⁷⁷ Cited at Jeffrey Jowell ‘Judicial review of the substance of official decisions’ (1993) 13 *Acta Juridica* 117.

⁷⁸ Moseneke *op cit* note 65 at 17.

⁷⁹ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 110–17.

commitment to responsiveness, accountability⁸⁰ and openness.⁸¹ The courts have been tasked with preserving these constraints through the mechanism of judicial review, which is thus in fact a necessary tool for achieving the prerequisites of democracy, as the Constitution itself conceives. The recent Constitutional Court judgment of *Ramakatsa v Magashule*⁸² serves as an apposite, and indeed welcome, illustration of how the courts preserve these prerequisites — in this case, the element of meaningful participation, which was held to be lacking within the internal democratic processes of the African National Congress (‘ANC’) through the ‘disenfranchisement of several members of [various] branches’⁸³ of the party. This judgment epitomises how the power of judicial review can be used to enhance democracy. However, it must be emphasised that it can equally be exercised in a manner which is destructive for our democracy. This power must therefore be invoked with sensitivity to the inherent tensions within our constitutional order. This sensitivity translates not only into the formal limits of judicial review, but also into the level of scrutiny the courts apply within these limits in terms of the twin notions of deference and variability.

(d) The defensible limits of judicial review: Formal and flexible ‘rules of restraint’

The first formal limit to judicial review is an age-old remnant in our law which stems from our Diceyan heritage of the rule of law or ‘watchdog’ theory of government.⁸⁴ This limit flows from review’s definitional demarcation from the process of appeal. Both of these court processes are ways in which to reconsider a decision. However they flow from contrary premises and thus have fundamentally different aims. In terms of this dichotomy, the appeal process is about determining the correctness of a decision, through an assessment of its substantive merits. It is thus meant to be a more searching process in that it requires a court to make a finding as to whether the decision-maker in question was right or wrong. Review, on the other hand, is intended to be a less exacting procedure in terms of which the court considers solely the decision-making process in order to determine whether the outcome was arrived at in an acceptable fashion, for example, in an unbiased and rational manner. In 1982 Lord Brightman, writing for the House of Lords in *Chief Constable of the North Wales Police v Evans*,⁸⁵ highlighted the reason for this distinction as follows: ‘Unless [this] restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.’⁸⁶

⁸⁰ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) paras 74–6.

⁸¹ *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) para 110.

⁸² 2013 (2) BCLR 202 (CC).

⁸³ *Ibid* para 112.

⁸⁴ Hoexter op cit note 17 at 109.

⁸⁵ [1982] 3 All ER 141 (HL).

⁸⁶ *Ibid* at 154d.

The review/appeal dichotomy is therefore plainly a manifestation of the separation of powers. Kriel cautioned in 1998 that ‘a collapse of the distinction between appeal and review is a most radical step which, if it were to be done properly, would require a fundamental rethinking of our notion of separation of powers’.⁸⁷ In the light of this concern, the courts ritually recite their purportedly modest role in review proceedings,⁸⁸ notwithstanding recurrent recognition of the fact that review in our constitutional dispensation has a (subtle) ‘substantive as well as a procedural ingredient’.⁸⁹ For what it is worth, this definitional distinction continues to serve as a limitation on the courts’ powers of review.

The second formal limit to the courts’ review jurisdiction flows from their constitutional ‘job description’, which is primarily twofold: it requires the courts to uphold zealously the tenets of our Bill of Rights, and it demands that every exercise of public power be subjected to constitutional control.⁹⁰ In scrutinising the conduct of the other arms of state, and public power more generally, these are the courts’ guiding principles. They ought to do no more and no less — this much is demanded by the separation of powers. With this in mind, prior to the enactment of the PAJA, the Constitutional Court tackled the daunting task of giving meaning to the administrative justice right (in both its constitutional guises⁹¹) in a way that would accord with this doctrine. The court made a trailblazing effort in this regard. Through something akin to a process of elimination, the court began concretising a constitutional concept of administrative action in the seminal trilogy of cases — *Fedsure*,⁹² *SARFU*⁹³ and *Pharmaceutical Manufacturers*.⁹⁴ The court premised this concept on the separation of powers, by circumscribing acts (such as acts of a legislative and executive nature) which fall outside this definition. This was done because it was recognised that a more searching form of review should be applied to acts of the public administration (especially given the constitutional commitment to the democratic values and principles that govern the administration⁹⁵) rather than to those exercises of public power that are of a highly discretionary nature and involve the formulation of policy rather than its mere implementation.⁹⁶ The latter category of public power is not,

⁸⁷ Kriel op cit note 11 at 96.

⁸⁸ See Hoexter op cit note 17 at 109n11–12.

⁸⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45.

⁹⁰ O’Regan op cit note 25 at 126.

⁹¹ Under s 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the Interim Constitution’) and s 33 of the Constitution, respectively.

⁹² *Supra* note 1. On these three cases see Lauren Kohn ‘Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law’ (2013) 28 *SAPL* 22.

⁹³ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

⁹⁴ *Supra* note 24.

⁹⁵ Section 195 of the Constitution.

⁹⁶ *SARFU supra* note 93 para 143.

however, above reproach. A crucial feature that has emerged from this trio of cases is the supple constitutional principle of legality, which has proven to be a significant safeguard for the review of non-administrative action.⁹⁷ O'Regan recently emphasised the two main constitutional constraints that flow from this principle: legality and rationality.⁹⁸ However, as the case law discussed below indicates, the principle of legality has come to require so much more, which makes one wonder whether the initial efforts of the Constitutional Court — which were in essence subsequently mirrored in the PAJA exclusions — were all in vain. I deal with this issue below, but first I briefly elucidate the second form of constraint on the power of judicial review.

The second constraint is not formal in nature. It is essentially self-imposed by the courts and is thus somewhat intangible. It flows from the 'D word':⁹⁹ deference. There is no formula for precisely what it entails in every case, despite academic pleas for such a guiding 'theory of deference'.¹⁰⁰ As Sachs put it:

'There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but when; I would love to see a theory of when. . . .'¹⁰¹

The oscillation in the conception of deference — as either strict restraint (in the sense of submission) or simple respect — flows from the democracy versus juristocracy debate and is an inescapable consequence of our legal and socio-political heritage. Thus, as O'Regan remarked, during the darkest days of apartheid, the courts showed a 'supine attitude . . . in the face of domineering state power'.¹⁰² This attitude was illustrated in the majority judgment of Rabie CJ in *Omar v Minister of Law and Order*¹⁰³ on the question whether regulations, to the extent that they prevented detainees from consulting their legal advisors, were ultra vires. He held, deciding that they were not:

'This indicates that Parliament contemplated the need to ensure the safety of the public . . . might necessitate the taking of extraordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by individuals.'¹⁰⁴

⁹⁷ Hoexter op cit note 12 at 56.

⁹⁸ O'Regan op cit note 25 at 126.

⁹⁹ Corder op cit note 13 at 441.

¹⁰⁰ See for example Dennis M Davis 'To defer and then when? Administrative law and constitutional democracy' (2006) *Acta Juridica* 23.

¹⁰¹ Cited in Lenta op cit note 64 at 555.

¹⁰² Kate O'Regan 'Breaking ground: some thoughts on the seismic shift in our administrative law' (2004) 121 *SALJ* 424.

¹⁰³ 1987 (3) SA 859 (A).

¹⁰⁴ *Ibid* at 892A.

This set the tone for judicial complicity in the massive curtailment of human rights during the emergency era, ultimately culminating in the notorious *UDF* case,¹⁰⁵ which represents the ‘lowest point of our pre-democratic jurisprudence’.¹⁰⁶ Given this unfortunate history, it is not hard to see why judicial deference got a bad reputation for being synonymous with a form of complaisance indicative of collusion with the political arms of state. This notion of deference is thus plainly inappropriate. Yet deference, if too loosely conceived, will enable the courts to overreach in ‘no-go areas’ in breach of the separation of powers and, given the need for the judiciary to ‘insinuate itself institutionally’,¹⁰⁷ it needs to avoid being ‘castigated for overreaching’.¹⁰⁸ The courts thus find themselves in the unenviable position of having to strike the right balance: of having to ensure that they neither display a ‘failure of nerve’,¹⁰⁹ nor too eager a form of judicial activism. A ‘theory of deference’ has been posited as the solution to this dilemma.

The particular notion of deference adopted is a direct correlative of how expansive a role the court will play in a given case.¹¹⁰ Corder noted in 2004 that the theory of deference adopted will ‘animate the drawing of the line between executive action and administrative action’.¹¹¹ In this respect, this ‘theory’ will either serve to limit or to expand the frontiers of judicial review. Fortunately, we need not fuss too much about the notion of deference anymore. The Constitutional Court in *Bato Star* confirmed what Corder called for in the very same year: ‘let us just call it respect’.¹¹² O’Regan J’s lucid judgment in *Bato Star* echoed these exact sentiments:

“Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function”. . . . The use of the word “deference” may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference *or respect* flows not from judicial courtesy or etiquette but *from the fundamental principle of separation of powers itself*.¹¹³

O’Regan J then formulated a flexible two-pronged litmus test for determining the degree of deference required in a particular case. The first key element involves the recognition of the proper role of the executive and legislature within the Constitution.¹¹⁴ This is akin to what has been called the

¹⁰⁵ *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).

¹⁰⁶ Hoexter op cit note 17 at 270n110.

¹⁰⁷ Heinz Klug quoted in Carol Steinberg ‘Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence’ (2006) 123 *SALJ* 264 at 274.

¹⁰⁸ Lenta op cit note 64 at 544.

¹⁰⁹ *Ibid.*

¹¹⁰ Anashri Pillay ‘Reviewing reasonableness: An appropriate standard for evaluating state action and inaction’ (2005) 122 *SALJ* 419 at 420.

¹¹¹ Corder op cit note 13 at 442.

¹¹² *Ibid* at 441.

¹¹³ *Bato Star* supra note 89 para 46. Emphasis added.

¹¹⁴ *Ibid.*

requirement of ‘democratic principle’,¹¹⁵ in terms of which the decisions of these arms of state ought to be respected in so far as they are ‘clothed with democratic legitimacy’.¹¹⁶ The second element is that of ‘comparative institutional competence’¹¹⁷ — essentially the so-called ‘polycentricity’ concern¹¹⁸ — which O’Regan J explains as follows: ‘[A] Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to the other branches of government.’¹¹⁹ As Hlophe warned at the dawn of our constitutional era, ‘[a] court cannot be a jack of all trades’.¹²⁰

The particular considerations invoked by these two elements in light of the facts of a case will determine the appropriate balance to be struck and thus the extent of the court’s review jurisdiction. In this regard, deference’s twin aspiration of ‘variability’ will ensure that the intensity of the judicial scrutiny varies according to the context.¹²¹ Variability has come to play a crucial role in the development and application of the prescripts of the principle of legality. In particular, ‘[t]he application of the constitutional principle of rationality varies in intensity depending on the context in which it is applied’.¹²² However, as the cases discussed below indicate, the ‘malleability’¹²³ of rationality review can be both a virtue and a vice. I turn now to consider briefly what the rationality requirement is meant to entail.

III RATIONALITY: A ‘MINIMUM THRESHOLD REQUIREMENT’?

What does rationality require? One would think this a simple question that warrants a simple answer. However our case law, particularly the recent trilogy of cases under discussion, seems to suggest otherwise.¹²⁴ Despite being a requirement that is advanced as ‘the most minimal of constitutional limitations’¹²⁵ which applies across the board to ‘[a]ll exercises of public

¹¹⁵ See, for example, Price op cit note 18 at 588.

¹¹⁶ Ibid.

¹¹⁷ Michael Taggart ‘Proportionality, deference, *Wednesbury*’ (2008) 43 *New Zealand LR* 423 at 457.

¹¹⁸ O’Regan op cit note 102 at 436. The phrase was coined by Lon L Fuller in ‘The forms and limits of adjudication’ (1978) *Harvard LR* 353 at 395.

¹¹⁹ *Bato Stars* supra note 89 para 48.

¹²⁰ John Hlophe ‘Judicial control of administrative action in a post-apartheid South Africa — Some realities’ (1993) 13 *Acta Juridica* 105 at 114.

¹²¹ Cora Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117 *SALJ* 484 at 502.

¹²² Price op cit note 18 at 588.

¹²³ Michael Bishop ‘Rationality is dead! Long live rationality! Saving rational basis review’ (2010) 25 *SAPL* 312 at 335.

¹²⁴ For a comprehensive discussion on the confusing case law dealing with rationality review see Price op cit note 6 and Bishop op cit note 123.

¹²⁵ Robert W Bennett ‘“Mere” rationality in constitutional law: judicial review and democratic theory’ (1979) 67 *California LR* 1049.

power',¹²⁶ irrespective of the context, rationality is becoming 'an accordion term'¹²⁷ that invokes a variable level of judicial scrutiny pursuant to a 'value-judgment'¹²⁸ based on the circumstances. It is therefore, somewhat incongruously, accruing a sweeping breadth of application. This is not necessarily a bad thing — in fact some authors have readily anticipated this development¹²⁹ — but it does create confusion and uncertainty. The other complication is that, on the whole, our jurisprudence represents a frustrated grappling with the slippery and confusing labels of the interrelated concepts of reasonableness, proportionality and justifiability.¹³⁰ Although a full discussion of these concepts is beyond the purview of this article, it is useful to discuss them briefly in explaining what rationality review is *not*. In doing so, I focus solely on the meaning of these terms in the administrative law, and broader public power review, context. But let us first return to the first principles of rationality review under the umbrella principle of legality. Chaskalson P in *Pharmaceutical Manufacturers* authoritatively confirmed that

[i]t 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.¹³¹

Rationality is thus in essence the very converse of arbitrariness — a concept which, particularly given our apartheid past, is abhorrent to our constitutional democracy. According to Chaskalson P, '[r]ationality in this sense is a *minimum* threshold requirement applicable to the exercise of all public power'¹³² — irrespective of the fides of the decision-maker — and it therefore does not offend the separation of powers.¹³³ It is 'bounded rationality'¹³⁴ and its test involves 'restraint on the part of the Court'.¹³⁵ This test is a 'relatively low one',¹³⁶ the purpose of which is to determine whether there is a rational connection, or nexus, between the purpose sought to be achieved (the 'end') and the decision or conduct pursued to achieve this purpose (the 'means'). It necessitates a basic two-staged objective enquiry that focuses on the *structure* of the decision-making *process* rather than the

¹²⁶ *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 164.

¹²⁷ Geoff Airo-Farulla 'Rationality and judicial review of administrative action' (2000) 24 *Melbourne University LR* 543 at 560.

¹²⁸ Price op cit note 18 at 582.

¹²⁹ See, for example, Hoexter op cit note 2.

¹³⁰ See for example, regarding the conflation of rationality and reasonableness in the administrative law context, the cases of *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) and *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA).

¹³¹ *Pharmaceutical Manufacturers* supra note 24 para 85.

¹³² *Ibid* para 90, emphasis supplied.

¹³³ *Ibid*.

¹³⁴ Airo-Farulla op cit note 127 at 570.

¹³⁵ *Affordable Medicines* supra note 15 para 86.

¹³⁶ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 67.

decision itself.¹³⁷ First, it requires an assessment of whether the conduct or decision in question furthers a legitimate government purpose, and secondly it requires an assessment of whether the means chosen to achieve this purpose are objectively capable of furthering it based upon the information before the administrator and any reasons given for the decision.¹³⁸ This test does not require an assessment of the correctness of the decision itself, nor an analysis of whether the means chosen serve the purpose ‘sufficiently well’.¹³⁹ It requires solely that the decision was made pursuant to a constitutionally legitimate ‘rhyme or reason’.¹⁴⁰

On the other hand, reasonableness (or ‘justifiability’ as it was termed under the Interim Constitution¹⁴¹), which is specifically reserved for the realm of administrative action,¹⁴² requires something more. Despite some initial judicial timidity in hammering out precisely what this ‘something more’ is (given the review/appeal dichotomy) it is by now fairly well-settled that this supplementary enquiry is one of proportionality.¹⁴³ This more vigorous judicial assessment requires more than a simple determination of whether the means are rationally linked to the ends: it demands an assessment of whether the chosen means actually justify the ends pursued. It essentially requires that it be shown that the means chosen were the most appropriate, or ‘suitable’, in

¹³⁷ Cora Hoexter ‘Unreasonableness in the Administrative Justice Act’ in C Lange & J Wessels (eds) *The Right to Know: South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 148 at 153.

¹³⁸ This test was explained by Van der Westhuizen J, in the context of legislative action, in *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) as follows: ‘What is required, in so far as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved.’ This test was then again endorsed in *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) paras 65–6.

¹³⁹ Cf Price op cit note 6 at 355, who calls this ‘the effect requirement’ by which he means that the the law or conduct in question ‘serve . . . that purpose sufficiently well to merit the description of bearing a “rational connection” . . . to it’. With respect, this explanation conflates the rationality test with that of proportionality in so far as it is the latter that is concerned primarily with the actual effects of the conduct and thus involves a rigorous balancing analysis.

¹⁴⁰ O’Regan op cit note 25 at 127.

¹⁴¹ Cora Hoexter ‘Standards of review of administrative action — Review for reasonableness’ in Jonathan Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 61 at 63n12: “Justifiable” may have sounded safer than “reasonable”, but in fact it was widely thought to mean exactly the same thing.’

¹⁴² As opposed to non-administrative action such as executive action, which invokes a ‘lighter touch’ review. See Hugh Corder ‘Reviewing “executive action”’ in Klaaren (ed) op cit note 141 at 75.

¹⁴³ Hoexter op cit note 17 at 343–4 and 349 regarding the *Bato Star* factors giving ‘scope to the element of proportionality’. See further on proportionality J R de Ville ‘Proportionality as a requirement of the legality in administrative law terms of the new Constitution’ (1994) 9 *SAPL* 360, esp at 365ff. See also Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (unpublished PhD thesis, Rhodes University, 2002).

the circumstances. This test is aimed at avoiding ‘an imbalance between the adverse and beneficial consequences of an action and to encourage . . . [the decision-maker] to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end’.¹⁴⁴ It is often explained using the metaphorical claim that a sledgehammer should not be used to crack a nut.¹⁴⁵ The proportionality ingredient is what distinguishes review for reasonableness from rationality review simpliciter. As Corder notes, ‘rationality plus (at least) proportionality equals reasonableness’.¹⁴⁶ These concepts, despite overlapping and both flowing from the animating constitutional principle of accountability, thus cannot mean the same thing. Or so one would think.

IV A TRILOGY OF CASES THAT REVEALS RATIONALITY IN A NEW GUISE

The principle of legality evolved as a constitutional safety net to enable the review of the exercise of public power that falls short of administrative action. It was intended to, and indeed has, served as a crucial ‘backstop’ in this regard.¹⁴⁷ But it was never intended to become ‘administrative law by another name’.¹⁴⁸ This would not only render the legislative efforts in enacting the PAJA as well as the constitutional right underpinning it redundant, but it would also run counter to the essence of our doctrine of separation of powers. What is the point of carefully delineating a realm of action subject to a higher standard of review if in fact all forms of public power, irrespective of their discretionary and policy content, stand to be reviewed in terms of the same standards? What is the point of having carefully crafted ‘limits’ to judicial review anchored within the tenets of our constitutional order? The answer is of course that the separation of powers is but one tenet of this order with all its inherent tensions — accountability, transparency and, according to Ngcobo J, the principle of ‘fundamental fairness’¹⁴⁹ — and these principles require a more rigorous rationality analysis when the circumstances so demand in accordance with the notion of variability. This may be so, and it is not necessarily a bad road to be heading down. In fact, given that our courts¹⁵⁰ and academics alike have embraced this path, it clearly has its benefits. That said, it is equally a path not free of potholes. It is not the yellow brick road. This ‘parallel universe’¹⁵¹ of administrative law results in uncertainty for lay persons and civil servants alike. The purported

¹⁴⁴ Hoexter in Klaaren (ed) op cit note 141 at 64.

¹⁴⁵ *S v Manamela* 2000 (3) SA 1 (CC) para 34.

¹⁴⁶ Corder op cit note 13 at 443.

¹⁴⁷ Hoexter op cit note 17 at 248.

¹⁴⁸ Plasket op cit note 143 at 164.

¹⁴⁹ *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 179.

¹⁵⁰ Hoexter op cit note 17 at 356 describes the principle as ‘the judges’ darling’.

¹⁵¹ *Ibid* at 124.

simplicity of this additional ‘pathway to review’¹⁵² results in its own form of complexity. Its failing is the opposite of the PAJA: where the latter has proven too narrow in scope, the principle of legality risks becoming too broad. Given this risk, when engaging it to extend the rationality requirement to cover the more onerous quintessential administrative-law grounds, the courts must *at the very least* engage in the requisites of reasoning from separation of powers as canvassed above. The factors necessitated by this enquiry (‘democratic legitimacy’ and ‘institutional competence’) must at least meaningfully form part of the court’s analysis. After all, ‘our climate of constitutional justification requires justification for the exercise of judicial power as much as any other sort of power.’¹⁵³ Against this backdrop, I turn now to consider the maximising of this so-called ‘minimum’ requirement of rationality, in the recent trilogy of apex court judgments.

(a) *An extension of rationality to procedural fairness: Albutt v Centre for the Study of Violence and Reconciliation*¹⁵⁴

Before I turn to discuss the *Albutt* judgment, it is useful to canvass briefly the salient aspects of its precursor, in which Ngcobo J laid the groundwork for what was to come. Justices Moseneke and Ngcobo appear to be at loggerheads regarding the link between rationality and procedural fairness. Writing for the majority of the court in the 2008 decision of *Masethla* — a case which concerned then President Mbeki’s decision to dismiss Mr Masethla from his position as head of the National Intelligence Agency — Moseneke DCJ emphasised that ‘procedural fairness is not a requirement [of the constitutional principle of legality]’¹⁵⁵ and thus the President’s decision could not be reviewed on this basis. He insisted 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’.¹⁵⁶ How then did Ngcobo J, writing for the minority, find the very opposite to be the case? He employed the founding constitutional value of the rule of law, which he construed as having a ‘procedural component’¹⁵⁷ by virtue of its implicit requirement of non-arbitrariness. This latter requirement, so he reasoned, which ‘is not limited to non-rational decisions . . . refers to a wider concept and deeper principle: fundamental fairness’.¹⁵⁸ According to Ngcobo J, this argument is supported by the use of the notion of fairness throughout our Constitution, which notion he purportedly elevated to a free-standing requirement. With respect, although this approach may accord with what justice demands in a given case, and it is certainly strengthened in the public

¹⁵² *Ibid* at 114.

¹⁵³ Hugh Corder ‘Administrative Justice: A cornerstone of South Africa’s democracy’ (1998) 14 *SAJHR* 38 at 41.

¹⁵⁴ *Albutt* *supra* note 3.

¹⁵⁵ *Masethla* *supra* note 149 para 78.

¹⁵⁶ *Ibid* para 77.

¹⁵⁷ *Ibid* para 178.

¹⁵⁸ *Ibid* para 179.

law context, it is not water-tight. Our courts have emphasised (albeit in a different context) that although fairness ‘runs like a golden thread throughout the Bill of Rights’,¹⁵⁹ it is used merely as an adverb or adjective and ‘is not an independent or substantive constitutional right’.¹⁶⁰ Fairness is at best an overarching constitutional norm rather than a specific stand-alone constitutional requirement.¹⁶¹ Nonetheless, Ngcobo J — an avid supporter of the principle of legality, frequently at the expense of the PAJA¹⁶² — boldly sought to use principle to further justice. Reasoning in the language of the common law he used the ‘obverse facet’¹⁶³ of the principle of legality — the ultra vires doctrine — to read in the common-law requirements of natural justice, thus concluding that the maxim of audi alteram partem, ‘is essential to rationality, the sworn enemy of arbitrariness’.¹⁶⁴ This principle is triggered, so he reasoned, ‘whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual’.¹⁶⁵

This is common-law parlance in its truest form. While its application in this case may seem to accord with the so-called ‘interests of justice test’, one cannot but wonder whether this approach is appropriate given our fully-fledged and carefully crafted Bill of Rights, and Chaskalson P’s stern reminder in *Pharmaceutical Manufacturers* that the dawn of the constitutional era was a ‘legal watershed [that] shifted constitutionalism, and with it all aspects of public law, from the realm of the common law to the prescripts of a written constitution which is the supreme law’.¹⁶⁶ Ngcobo J’s judgment is arguably indicative of a judicial tendency to hover in a ‘common-law time warp’. He was, however, adamant and concluded that ‘the rule of law imposes a duty on those who exercise executive powers, not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual’.¹⁶⁷

In *Albutt* Ngcobo, now Chief Justice, adopted a more restrained approach. This case also concerned an executive decision of then President Mbeki, who, acting pursuant to s 84(2)(j) of the Constitution sought to introduce a special pardoning dispensation to enable political prisoners to apply for a presidential pardon. The dispensation was aimed at addressing the ‘unfin-

¹⁵⁹ *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) para 78. Note that this case arises out of the distinguishable factual setting of an employment contract dispute.

¹⁶⁰ *Ibid.*

¹⁶¹ See *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), which also arises in the contractual context, and echoes the views expressed in *Nyandeni* supra note 159 by emphasising that fairness is a mere overarching principle in our Constitutional order; it is not a free-standing requirement.

¹⁶² Hoexter op cit note 17 at 136.

¹⁶³ *Ibid* at 122.

¹⁶⁴ *Masethla* supra note 149 para 187.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Pharmaceutical Manufacturers* supra note 24 para 45.

¹⁶⁷ *Masethla* supra note 149 para 180.

ished business' of the Truth and Reconciliation Commission ('TRC') to promote nation-building and national reconciliation and 'make a further break with matters which arise from the conflicts of the past'.¹⁶⁸ Notwithstanding these commendable aims, none of the relevant documents made reference to the victims of the crimes and in particular their right to be heard in the process.¹⁶⁹ In fact, correspondence from the President's Office indicated that he had decided that 'the victims were not going to be allowed to make representations'.¹⁷⁰ The Constitutional Court had to decide whether the tenets of procedural fairness found application in this instance and, if so, whether they had been breached. Unsurprisingly, given his judgment in *Masethla*, and building on the foundations laid in the case of *Chonco*,¹⁷¹ Ngcobo CJ held this to be the case, although he was more conservative than in *Masethla* in that he strictly limited *audi alteram partem* as an element of rationality to the unique factual matrix in question.

Without engaging the PAJA enquiry — unapologetically and unwarrantably¹⁷² — Ngcobo CJ employed the principle of legality, and in particular its rationality requirement, to subject the President's decision to what he felt was the appropriate level of scrutiny in these specific circumstances. This level of scrutiny was more onerous than that required by the 'minimum threshold test' of rationality in two key respects. Hence, Ngcobo CJ expanded the rationality requirement in two ways. First, rationality was expanded to include procedural fairness. Ngcobo CJ reached this conclusion by reasoning, in essence, as follows. He began by appealing to the constitutional values of accountability, responsiveness and openness. He then highlighted the context-specific features of the special dispensation which was analogous to the TRC process.¹⁷³ Given the foregoing, he found that victim participation was essential and therefore, 'as a matter of rationality . . . the victims . . . [had to] be given the opportunity to be heard in order to determine the facts on which pardons are based'.¹⁷⁴ Secondly, Ngcobo CJ expanded the rationality to encompass what seems like a type of proportionality assessment by examining both the 'means' and the 'end' in question. He reasoned that, given the specific purposes of the special dispensation, which were evidently similar to those of the TRC process,¹⁷⁵ *the means* chosen to pursue these ends had, at the very least, to involve victim participation. Ngcobo CJ therefore held:

'The principles and the spirit that inspired and underpinned the TRC amnesty process *must inform* the special dispensation process. . . . As with the TRC

¹⁶⁸ *Albutt* supra note 3 para 4.

¹⁶⁹ *Ibid* para 7.

¹⁷⁰ *Ibid* para 45.

¹⁷¹ *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) para 30.

¹⁷² Hoexter op cit note 17 at 136.

¹⁷³ *Albutt* supra note 3 para 71.

¹⁷⁴ *Ibid* para 72.

¹⁷⁵ *Ibid* para 55.

process, the participation of victims and their dependents is fundamental to the special dispensation process.¹⁷⁶

This type of reasoning is more akin to a fully-fledged proportionality analysis rather than a mere ‘rhyme or reason enquiry’. In this respect the rationality requirement appears to have been further extended. Hoexter therefore argues that, ‘the focus on the means selected apparently extends the notion of rationality to process as well as outcome’.¹⁷⁷ Although Ngcobo CJ engages the separation of powers issue, his doing so seems superfluous given his reasoning on the merits. He notes:

‘The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. 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.’¹⁷⁸

This reasoning notwithstanding, Ngcobo CJ does not practice what he preaches, for in mandating victim participation he seems to have more ‘appropriate means’ in mind than those contemplated by the presidency. Again, it should be emphasised that although the outcome in this case accords with our constitutional commitment to a ‘culture of justification’, Bishop’s concern seem apt: ‘[T]here is a massive gap between the rhetoric of courts which emphasises the mechanical nature of the [rationality] test, and the degree of discretion courts in fact exercise. The lack of transparency is an evil in itself.’¹⁷⁹ Ngcobo CJ did not, however, have the last word on procedural fairness in the context of rationality review. In the case of *Law Society of South Africa v The Minister for Transport*,¹⁸⁰ which was handed down by the Constitutional Court a few months later, Moseneke DCJ again reiterated that, ‘fairness is not a requirement in the rationality enquiry’.¹⁸¹

(b) *An extension of rationality to the duty to give reasons: The Judicial Service Commission v The Cape Bar Council*¹⁸²

In this appeal from the Western Cape High Court (‘WCHC’),¹⁸³ the Supreme Court of Appeal had to tackle, inter alia, the question whether the rationality requirement under the principle of legality entails a general duty to give reasons. This question arose because of the JSC’s failure to produce reasons for its decision not to recommend any of the unsuccessful candidates for appointment to the two remaining vacancies on the bench of the WCHC. This decision was made despite the fact that the shortlisted candidates were strongly supported by the General Council of the Bar on the basis

¹⁷⁶ Ibid para 61, emphasis supplied.

¹⁷⁷ Hoexter op cit note 12 at 61.

¹⁷⁸ *Albutt* supra note 3 para 51, emphasis supplied.

¹⁷⁹ Bishop op cit note 123 at 337.

¹⁸⁰ 2011 (1) SA 400 (CC).

¹⁸¹ Ibid para 39.

¹⁸² *JSC* supra note 4.

¹⁸³ *Cape Bar Council v Judicial Service Commission* [2012] 2 All SA 143 (WCC).

that they were 'fit and proper' persons as contemplated by s 174(1) of the Constitution.¹⁸⁴ In a strongly worded unanimous judgment delivered by Brand JA, the court answered this question in the affirmative, thereby heeding Hoexter's plea 'to generate' the duty to give reasons 'in respect of non-administrative action'.¹⁸⁵ In reaching this conclusion, the court proceeded as follows. First, it noted that the JSC's powers flow from, inter alia, the Constitution itself and as such it is under a 'constitutional duty to exercise its powers in a way that is not irrational or arbitrary'.¹⁸⁶ Secondly, by virtue of the fact that the JSC is an organ of state in terms of s 239(b) of the Constitution, it is bound to fulfil its important public function in accordance with the 'values of transparency and accountability' as contemplated by s 195 of the Constitution.¹⁸⁷ Given these two premises, the inescapable 'inference of an obligation to give reasons'¹⁸⁸ could not be avoided: a 'constitutional right' to rational decision-making is redundant if one is unable to know the reasons for such decisions and 'it is difficult to think of a way to account for one's decisions other than to give reasons'.¹⁸⁹ Thus, the twin aspirations of rationality and accountability respectively, necessitated the recognition of a 'general rule' in terms of which the JSC is 'obliged to give reasons for [a] . . . decision not to recommend a particular candidate if properly called upon to do so'.¹⁹⁰

The court was fortified in adopting this approach based on the reasoning in two earlier cases which dealt with the duty to give reasons *in the context of administrative decision-making*. First, the court referred with approval to the minority judgment in *Bel Porto* in which the duty to give reasons was hailed as 'an indispensable part of a sound system of judicial review'.¹⁹¹ Secondly, the court relied upon the lucid three-pronged analysis of Schutz JA in *Transnet Limited v Goodman Brothers (Pty) Ltd*,¹⁹² in which it was emphasised that 'the duty to give reasons entails a duty to *rationalise* the decision'.¹⁹³ The JSC's meek assertions that none of the candidates obtained a majority vote¹⁹⁴ and that its voting procedure necessitated voting by secret ballot¹⁹⁵ could not avail the JSC, for, so Brand JA held, this crucial public body 'is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment'.¹⁹⁶ It is

¹⁸⁴ JSC supra note 4 paras 37–9; this was accepted as common cause between the parties.

¹⁸⁵ Hoexter op cit note 12 at 62.

¹⁸⁶ JSC supra note 4 para 43.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid para 44.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid para 45.

¹⁹¹ *Bel Porto* supra note 126 para 159.

¹⁹² 2001 (1) SA 853 (SCA) para 5.

¹⁹³ Ibid, emphasis supplied.

¹⁹⁴ JSC supra note 4 para 38.

¹⁹⁵ Ibid paras 47–50.

¹⁹⁶ Ibid para 51.

thus, as a ‘matter of general principle’, obliged to give reasons for its decision not to do so and its failure, in this case, to do so was irrational and unlawful.¹⁹⁷

The rationality requirement under the principle of legality has thus been further expanded — interestingly beyond what is required in terms of the rationality test under the PAJA.¹⁹⁸ This development of the constitutional rationality requirement to include the general duty to give reasons is a laudable one and a victory for our commitment to openness and accountability. It is unfortunate, however, that it has been made without any engagement with the requisites of the doctrine of separation of powers and is insufficiently nuanced. The unique and ‘pivotal’¹⁹⁹ public power exercised by the JSC is of a hybrid nature: its process is one of ‘adjudication of the highest order’,²⁰⁰ yet aspects of this process (evidenced in part by the composition of this body) are clearly linked to the policy formulation function of the executive. It is surely for this reason that our legislature saw fit to exclude its functions from the purview of the PAJA.²⁰¹ Given this reality, the court should at least have engaged with the elements of our ‘theory of deference’ as canvassed above. Its failure to do so undermines its own commendable conclusion.

(c) *Rationality as proportionality: Democratic Alliance v The President of the Republic of South Africa*²⁰²

This Constitutional Court judgment has brought a close to the soap-opera-like saga and disturbing sequence of events surrounding the ejection of Mr Pikoli from his seat as National Director of Public Prosecutions (‘NDPP’) and President Zuma’s dubious appointment of Mr Simelane in his stead, notwithstanding the broad factual matrix irrefutably pointing to the latter’s lack of fitness for the office. Aside from bringing this debacle to a close, it is a benchmark judgment for all kinds of reasons. A discussion of all these reasons is beyond the purview of this article. It suffices to note that this judgment epitomises the vital role that our courts have to play in holding the executive to account. It serves as a firm reminder that corruption is abhorrent to our constitutional ethos and will not be tolerated, and it elucidates a litmus test for determining fitness and propriety for the purposes of the appointment of the NDPP.²⁰³ For present purposes, this case is salient in so far as it addresses various key aspects of the constitutional requirement of rationality under the principle of legality. Yacoob ADCJ — in something of an about-face given

¹⁹⁷ Ibid.

¹⁹⁸ Section 6(2)(f)(ii) of the PAJA requires, inter alia, that the administrative action be rationally connected to ‘the reasons given for it by the administrator’. The rationality test itself does not mandate the actual giving of reasons, which is a separate requirement under s 5.

¹⁹⁹ *Certification Judgment* supra note 29 para 120.

²⁰⁰ *Cape Bar Council* supra note 183 para 90.

²⁰¹ *JSC* supra note 4 para 19.

²⁰² *Simelane* supra note 5.

²⁰³ Ibid paras 21–6.

his highly deferential approach to rationality in the *New National Party* case²⁰⁴ — tackles four issues pertaining to rationality. In assessing whether the President's decision to appoint Mr Simelane was rational — which he holds it was not — he addresses '(i) the distinction between reasonableness and rationality and the relationship between means and ends; (ii) whether the process as well as the ultimate decision must be rational; (iii) the consequences for rationality if irrelevant factors are ignored; and (iv) rationality and the separation of powers'.²⁰⁵

Regarding the first issue, Yacoob ADCJ notes that, 'it is useful to keep the reasonableness test and that of rationality conceptually distinct'²⁰⁶ despite the inevitable overlap between these two enquiries. Where reasonableness review is generally concerned with the decision itself, rationality review requires a mere 'evaluation of a relationship between means and ends' in order to determine whether a link exists between the two which evidences 'a rational relationship'.²⁰⁷ This is all that is required for an executive decision to be constitutional in this regard. This conclusion notwithstanding, as to whether the irrationality ground covers 'irrationality in process and in merits',²⁰⁸ Yacoob ADCJ somewhat incongruously — given the foregoing conclusion — holds that it indeed does: 'It follows that both the process by which the decision is made and the decision itself must be rational.'²⁰⁹ He relies on the *Chonco*²¹⁰ and *Albutt*²¹¹ decisions in support of this finding. However, it is by no means apparent how the extract he quotes from *Chonco* shows that this conclusion necessarily follows. This superficial reasoning is disappointing. Interestingly, Yacoob ADCJ takes this conclusion one step further by holding that in assessing whether the process or means chosen are rational 'everything done in the process of taking that decision'²¹² stands to be assessed and if a single step in the process 'as a whole' bears no relation to the purpose for which the power is conferred, the absence of this connection will colour the entire process (and hence the ultimate decision) with irrationality.²¹³

Regarding the question whether a failure to ignore relevant considerations vitiates the decision with irrationality, Yacoob ADCJ boldly continues to expand the frontiers of rationality review. He held:

'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

²⁰⁴ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC).

²⁰⁵ *Simelane* supra note 5 para 12b.

²⁰⁶ *Ibid* para 29.

²⁰⁷ *Ibid* para 32.

²⁰⁸ *Ibid* para 33.

²⁰⁹ *Ibid* para 34.

²¹⁰ *Supra* note 171.

²¹¹ *Supra* note 3.

²¹² *Simelane* supra note 5 para 36.

²¹³ *Ibid* para 37.

for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the *process as a whole*.²¹⁴

Finally, in dealing with the how the separation of powers affects rationality review, Yacoob ADCJ, oddly, holds that it does not. Despite having developed a constitutional rationality test uncannily familiar to the justifiability (ie proportionality)²¹⁵ test propounded by Froneman J in *Carephone*²¹⁶ he nonetheless holds that 'it is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions'.²¹⁷ On this basis he concludes that it is 'difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry'.²¹⁸ Given the content he actually gives to this enquiry this conclusion seems, with respect, unwarranted, rather than 'evident'. He reaches this conclusion in so far as the case is premised on mere irrationality grounds, yet they have clearly been 'dressed up in proportionality clothes', which cannot be done without 'making them look more than faintly ridiculous'.²¹⁹ Yacoob ADCJ then proceeds to refute the claim that the rationality enquiry in the context of executive decision-making involves a lower threshold than in the administrative context and concludes that '[r]ationality does not conceive of differing thresholds'.²²⁰ This finding seems counterintuitive given his initial conclusion, based on our 'rhyme or reason' rationality jurisprudence; that this 'minimum threshold test' aims to achieve the proper balance between the role of the courts and that of the political arms of state.²²¹ Hoexter has noted that we should pay attention to what judges do rather than what they say.²²² What Yacoob ADCJ appears to do is expand the rationality requirement to something more akin to the 'hard look review of reasonableness',²²³ despite initially holding that they are conceptually distinct, in a way which clearly ought to invoke meaningful engagement with the separation of powers. Yet what he says is quite the contrary. Perhaps we should therefore simply see this judgment for what it truly is: an expansion of the rationality requirement to include a form of proportionality, but disappointingly, in the absence of a rigorous justificatory analysis necessitated by the separation of powers.

²¹⁴ Ibid para 39, emphasis supplied.

²¹⁵ Corder op cit note 13 at 442.

²¹⁶ *Carephone* supra note 8 paras 31–7.

²¹⁷ *Simelane* supra note 5 para 42.

²¹⁸ Ibid para 44.

²¹⁹ Tom Hickman 'Problems for proportionality' (2010) 45 *New Zealand LR* 303 at 323.

²²⁰ Ibid.

²²¹ Ibid para 42.

²²² Hoexter op cit note 121 at 512.

²²³ Michael Asimow 'Towards a South African Administrative Justice Act' (1997–1998) 3 *Michigan Journal of Race & Law* 1 at 6.

V CONCLUSION

Over a decade ago and in the wake of the ‘lost opportunity’²²⁴ of the PAJA, Hoexter predicted the following: ‘The judicial control of public power is likely to flourish . . . in spite of the narrow definition of administrative action: one way or another, the courts will be able to impose principles of legality on officialdom.’²²⁵ I have sought to illustrate that this prediction has come to pass due to the burgeoning and seemingly inexhaustible principle of legality through its rationality requirement, and the corresponding expansion of the frontiers of judicial review. On the one hand, the cases I have discussed show this to be a blessing: abuses of political power cannot seep through the cracks and will be struck down with boldness in the name of constitutional supremacy. In this respect, they highlight the significant role of our courts within the separation of powers to serve as the vital check against such abuses, particularly given the worrying trend of creeping executive dominance. Yet, on the other hand, the irony of this boldness is that it is in part indicative of a lack of sensitivity to the tenets of our doctrine of separation of powers and the type of deference required by it. Such laudable outcomes ought not to be coloured by penetrable judicial reasoning. Particularly where politics seeps into the courtroom, an effort must be made to ensure that the court shows it is engaging with the requisites of striking the ever-delicate balance and not engaging the ‘jurisprudence of exasperation’.²²⁶ A year ago, O’Regan cautioned that such a jurisprudence ‘might result in the requirements of rationality being unduly tightened’.²²⁷ The cases canvassed above indicate that these requirements have indeed been tightened, and arguably not unduly, but in the absence of the kind of rigorous and honest separation-of-powers analysis that our Constitution demands. Do the means justify the ends? We shall have to wait and see.

²²⁴ Hoexter *op cit* note 121 at 495.

²²⁵ *Ibid* at 519.

²²⁶ O’Regan *op cit* note 25 at 133.

²²⁷ *Ibid*.