THE EXTENT AND SCOPE OF PROCEDURAL FAIRNESS UNDER LEGALITY REVIEW

BY LEHUMO SEJAPHALA

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SUPERVISOR: PROFESSOR DANIE BRAND

Declaration

I, **Lehumo Sejaphala**, declare that the dissertation that I herewith submit for the **Master of Laws** at the University of the Free State, is my independent work, and that I have not previously submitted it for a qualification at another institution of higher education.

Student's signature

28 November 2023

Date

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> “*And the stone that the builders refused in the morning has become the cornerstone*”(1 Peter 2: 7).

Abstract

The prevailing view in administrative law scholarship concerning the relationship between the *Promotion of Administrative Justice Act* (hereafter 'PAJA')[1] and the principle of legality over the last decade has been that these two mechanisms for review of public conduct should not be used interchangeably and that instead, they should be applied separately, within each of their scopes of application. In other words, the prevailing view maintains that PAJA and its grounds of review must be exhausted first before resort can be had to the principle of legality – which serves as a safety net to catch all exercises of public power which fall outside the purview of PAJA.[2] Indeed, this is not just the prevailing view but a constitutional injunction occasioned by amongst others, the principle of subsidiarity which serves to give impetus to the doctrine of the separation of powers.[3] This notwithstanding, a thorough reading of administrative law cases since the enactment of PAJA shows that the courts have not maintained this constitutionally ordained PAJA and legality review distinction consistently. There are indeed cases in which our courts have imported procedural fairness (a separate ground of review under PAJA) into the legality review. However, it is still not clear as to when and under what circumstances a reviewing court will subject public conduct (not administrative in nature, and therefore not subject to PAJA), to procedural fairness as seemingly subsumed into the principle of legality. Against this backdrop, I ask in this dissertation what the unintended consequences of this prevailing approach have been. Second to that, I ask whether the prevailing view has not resulted in the development/broadening of legality as a ground for the review of 'non-administrative' public conduct. And most significantly, whether our courts have managed to develop a cogent substantive approach to the question of whether or not in a given case of legality review, procedural fairness should apply.

[1] *Act* 3 of 2000.
[2] Boonzaier 2018: 655; *State Information Technology Agency Soc Ltd v Giima Holdings* 2017 (2) SA 63 (SCA): par. 37.
[3] *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC): par. 52; *Minister of Defence and Military Veterans v Motau* 2014 (5).
SA 69 (CC): par. 27 at footnote 28.

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CHAPTER 1

1.1 Introduction

It is trite law that the exercise of all public power in our constitutional order is not unfettered. There are constraints that are placed to ensure that public functionaries are not only prevented from abusing their powers but are accountable for the in which they exercise those powers. As the High Court of Australia explained in *Corporation of the City of Enfield v Development Assessment Commission* (*'Enfield')*,[4] accountability refers "to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers".[5] This is also the essence of the Rule of Law which ensures that "those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers".[6] To ensure this accountability, sec. 1 of the South African *Constitution* establishes the *Constitution* as the supreme law of the country and gives impetus to the principle of legality whereas sec. 33 calls into existence the enactment of a national legislation to give effect to the right to justice administrative action. Suffice to say that both the *Constitution* and PAJA imposes constraints on all exercises of public power to prevent the abuse of power by state functionaries that characterised the apartheid era.

It follows from this that the *Constitution*, especially the principle of legality which is implied in it and PAJA have a symbiotic relationship. To be more precise, the principle of legality is generally understand as a safety-net to catch all exercises of public power that are not administrative in nature[7] whereas PAJA can be relied upon to review all exercises of public that are administrative in nature as occasioned by sec. 33 of the Constitution. This is also the prevailing view in administrative law scholarship regarding the relationship between these two mechanisms of judicial review. While this position may be legally sound and constitutionally compliant, a closer reading of case laws since the enactment of PAJA in 2000[8] reveals that the prevailing has

[4] [2000] HCA 5; 199 CLR 135.
[5] *Enfield*: par. 55.
[6] *Clough v Leahy* (1904) 2 CLR 139: 155-156.
[7] Boonzaier 2018: 655; *State Information Technology Agency Soc Ltd v Giima Holdings* 2017 (2) SA 63 (SCA): par. 37.
[8] The President brought PAJA, save for ss 4 and 10, into force on 30 November 2000 in terms of Government Notice R73 dated 29 November 2000.

resulted in unintended consequences. That is to say, the prevailing view can be argued to have led to broadening and development of the principle of legality as a pathway of review to the detriment of PAJA. This has been by the introduction of notions of procedural fairness under some circumstances as part of legality. It seems the courts have done this as a way of bringing all execises of public power under some degree of public law control. Alas, this approach to judicial review has not be consistently followed – there are cases, as shall be seen in chapter 3, in which the courts have imported procedural fairness into legality review and cases in which they refused to do so. This is owing in part, as shall be argued in chapter 4, to the courts' general failure to develop a substantive and principled, rather than a 'technicalist' or formal approach to determining whether public conduct that is not administrative action and is therefore subject only to legality review, may be reviewed on the basis of procedural fairness requirements.

1.2 Assumptions

The dissertation proceeds from a number of assumptions. The first one is that there is a prevailing scholarly view of the preferred relationship between PAJA and the principle of legality, and it requires that the two mechanisms for review not be used interchangeably, but separately, within distinguished spheres of application. The second assumption is that this prevailing view is cogent, but has resulted in the development and broadening of the principle of legality as a channel for review, particularly through the introduction of some notions of procedural fairness into the concept of legality. The third assumption is that our courts have not managed to develop a principled, substantive approach to determining in a given case of legality review, whether procedural fairness should apply or not.

1.3 Research questions

There are also a number of questions that this dissertation will attempt to grapple with. The first one is the question of what the prevailing approach to the relationship between PAJA and the principle of legality is, and what is its rationale? Having grappled with this question, this dissertation will proceed to deal with the question of whether the application of the prevailing approach caused the development and broadening of legality as a channel fairness review, and if so, how and to what extent?

Lastly, the dissertation will attempt to answer the following question of our courts managed to develop a principled, and substantive approach to determining in a given case of legality review, whether procedural fairness should apply and if it does, in what form and to what extent it should apply?

1.4 Title and aim of the dissertation

This dissertation is title "The extent and scope of procedural fairness under legality review". The rationale behind this dissertation is first, to closely assess the extent and scope of procedural fairness review under the principle of legality and ask whether our courts have managed to develop a substantive approach to determining in a given case of legality review, whether procedural fairness should apply and if it does, in what form and to what extent. This is an important question to ask primarily because the expansion of legality review to include procedural fairness (which is a separate ground of review under PAJA) has the potential to not only blur the line between administrative action and executive action reviews, but also erode PAJA as a constitutionally mandated pathway for the review for administrative action. In practice, this would mean that where reviewing courts previously required decision-makers to only show that their exercise of public power was lawful, rational, and exercised in good faith for compliance with the principle of legality;[9] they would now have to show that their decisions are also procedurally fair. The consequences of this would be dire for the prompt, and effective policy formulation and public administration by the executive. This is so because requiring the executive to comply with the requirements of procedural requirements in every decision taken would only serve to undermine the very basic tenets of representative democracy. Unlike other state functionaries, the executive in our constitutional dispensation is primarily concerned with policy formulation – a process which involves thorough public consutations and hearings. Accordingly, to require executive actions to comply with the strict requirements of procedural fairness which include the right to be heard before a decision can be taken amongst others, would amount to requiring procedural fairness twice – that is at the stage of policy formulation and the stage of policy implementation. This is an undesirable outcome which the framers of the *Constitution* would not have envisinged.

[9] *Pharmaceutical Manufacturers of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others('Pharmaceutical Manufacturers')* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000): par. 50.

Moreover, importing procedural fairness into the legality review will also serve to undermine the principle of the separation of powers, subsidiarity, and result in the academically bemoaned "PAJA avoidance".[10] Ultimately, this will also displace PAJA in its rightful place in our constitutional democracy – which is to give effect to the right to just administrative action as enshrined in sec. 33 of the *Constitution*.[11]

The above notwithstanding, it may well be argued that we are already on that trajectory. Legal databases are replete with cases in which the courts have not only bypassed PAJA in reviewing administrative actions but mentioned it as an afterthought. And although subsidiarity demands that PAJA and legality be kept separate, in practice the courts and practitioners keep using these two pathways of review interchangeably if not in the alternative. By way of example, in *N Gagayi v Ingquza Hill Local Municipality and Two Others,*[12] Mbenenge AJ held that a litigant who approaches a court for review invariably has a choice: they could base their review either on PAJA or legality. Despite this, the learned acting judge went on to review the decision in question in terms of legality and granted the relief sought even though the applicant had not exhausted PAJA's internal remedies. A similar approach was followed by the Supreme Court of Appeal (SCA) in the case of *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others ('Democratic Alliance v Acting National Director of Public Prosecutions')*.[13] This was an appeal from the North Gauteng High Court by the Democratic Alliance (DA) in which it sought by way of an application, an order reviewing, correcting, and setting aside the decision of then Acting National Director of Public Prosecution, Mr. Mpshe to discontinue the prosecution of former President Zuma. The SCA was called upon to decide amongst other issues whether a decision to discontinue a prosecution constituted administrative action in terms of PAJA,[14] and if not, whether the decision could be reviewed under the rule of law in terms of sec. 1 (c) of the Constitution.[15] Without going into a thorough discussion about whether PAJA applied in the case, the

[10] Hoexter 2017: https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality/?msclkid=f9cbec4ca2a311ec8bf374433d862dd4 (accessed 7 August 2022).
[11] The *Constitution* of the Republic of South Africa, 1996 ('the Constitution').
[12] (unreported case no 1251/12, 22-6-2012).
[13] 2012 (3) SA 486 (SCA).
[14] *Democratic Alliance v Acting National Director of Public Prosecutions*: par. 10.
[15] Effectively, the DA was reviewing the decision on the ground of legality. See *Democratic Alliance v Acting National Director of Public Prosecutions*: paras. 15-16.

SCA accepted the DA's contention that while the decision to discontinue prosecution is excluded from the definition of "administrative action" in terms of sec. 1(ff) of PAJA, it is nevertheless subject to the rule of law.[16] Moreover, in a clear departure from the well-established principle of subsidiarity, the Court went on to cite with approval its earlier decision in the case of *Democratic Alliance v President of the Republic of South Africa and Others*[17] in which it held that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution.[18]

It is apposite to mention at this point that this was not a new and isolated case. The tendency of the courts to bypass PAJA and seek sanctuary in the principle of legality despite cogent and substantive reasons against it dates as far back as 1997 and the early 2000s. The case of *Premier, Eastern Cape v Cekeshe and Others ('Cekeshe')*[19] is one such example. In this case, the Premier of the Eastern Cape had issued Proclamation 10 of 1997 in terms of s. 13 of the *Corporations Act* 10 of 1985 which effectively dissolved the Transkei Agricultural Corporation (Tracor). Section 13(3) of this Act required the Premier to submit the proclamation to the provincial legislature within 30 days but this was not done leading the employees of Tracor to approach a Provincial Division for an order, setting aside Proc 10 on the grounds, *inter alia*, that the decision taken to dissolve Tracor was procedurally unfair and that the closure of Tracor was an unfair labour practice. The order was granted and the Premier aggrieved by the decision appealed to a full bench of the Provincial Division, contending amongst other things that the proclamation (i) was original legislation and as such not subject to review; (ii) did not constitute administrative action and therefore did not have to comply with the provisions of sec. 33 of the Constitution.

Here again without venturing into a discussion about whether the exercise of the power in question amounted to administrative action or not, the Court per Lock J rejected the Premier's argument and reasoned that Parliament could never be taken to intend to give an official or an administrative body the power to act in bad faith or the power to abuse his, her or its powers,[20] thus reviewing the exercise of public power in question in terms of legality instead of PAJA or at least without giving substantive reasons why

[16] *Democratic Alliance v Acting National Director of Public Prosecutions*: par. 27.
[17] 2012 (1) SA 417 (SCA).
[18] *Democratic Alliance v Acting National Director of Public Prosecutions* par. 27.
[19] 1999 (3) SA 56 (TK).
[20] *Cekeshe*: 72B – C (emphasis added).

PAJA did not apply. Even more concerning was the Court's separate judgment by Madlanga J (Somyalo JP concurring) who further held that it would be a retrograde step in the development of our administrative law to insist that before reliance could be placed on sec. 33 of the Constitution, there had to be a finding that the action in issue was administrative.[21] According to the learned judge, it was/is necessary for the courts to move away from labels and focus primarily on substance rather than form.[22]

Another early case to follow the same approach was the case of *Mafongosi v United Democratic Movement ('Mafongosi').*[23] The applicants in this matter were members of the United Democratic Movement whose membership was terminated by their party on the ground of misconduct. Aggrieved by this decision, the applicants brought an application before the High Court seeking the review and setting aside of the said decision on three grounds namely: (1) that they were not given proper notice requiring them to appear before a disciplinary inquiry and setting out the nature of the charges preferred against them. In other words, the applicants argued that were not informed of the right to appeal against the decision or the right to request reasons for the decision. (2) They further argued that they were not given a hearing before the termination of their membership and therefore their constitutional right to lawful, reasonable, and procedurally fair administrative action was violated. (3) The applicants also contended that the disciplinary procedures prescribed in the first respondent's constitution were breached in material respects. Here again, without venturing into a discussion about whether or not the decision in question was administrative action per sec. 1 of PAJA, the Court per Jafta AJP proceeded by stating that it was unnecessary to express any opinion on whether the provisions of sec. 3 of the PAJA apply to the present case.[24] According to Jafta AJP, "the matter can be disposed of sufficiently by having recourse to the provisions of sec. 33 of the *Constitution* which gives certain rights to the applicants. These rights include the right to a lawful, reasonable, and procedurally fair decision".[25]

[21] *Cekeshe*: 107G - G/H.
[22] *Cekeshe*: 108A/B - B/C.
[23] 2002 (5) SA 567 (Tk).
[24] *Mafongosi*: par. 12.
[25] *Mafongosi*: par. 19.

More recently in the case of *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others ('Eskom Holdings SOC Limited')*,[26] a full bench of the High Court strangely reviewed a seemingly administrative action in terms of sec. 1 of the Constitution. This case concerned an application by Eskom – South Africa's monopoly energy supplier, to review and set aside its unlawful decisions that resulted in payments which were in excess of R1,7 billion to McKinsey and Company Africa (Pty) Ltd, Trillian Management Consulting (Pty) Ltd and Trillian Capital Partners (Pty) Ltd.[27] The impugned decisions related to two contracts concluded with McKinsey and Company Africa (Pty) Ltd, in 2015 and 2016 respectively. From then, the first one endured for a period of three months (2015) while the other known as the Master Services Agreement (MSA) (2016) was between Eskom and McKinsey and was terminated by agreement.[28] Despite the applicability of the *Public Finance Management Act* 1 of 1999 (PFMA), particularly sec. 51 (1) (a) (ii) (which empowers the Eskom board, as an accounting authority, to maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective), thereby making Eskom's decisions reviewable under PAJA, the Court opted instead to source its judicial review powers directly from the Constitution.[29] In the Court's precise words:

> In this application Eskom seeks to review and set aside the two agreements as well as the resultant payments in terms of s1(c) of the Constitution. That this is not a review in terms of the Promotion of Administration of Justice Act 3 of 2000 (PAJA) is clear. The application need not therefore be instituted within a period of 180 days from the date the decision was made. The application is founded on the principle of legality in terms of s1 of the Constitution. It need only be instituted within a reasonable time.[30]

As I will argue in chapter 2, perhaps the circumstances of the case, the public interest and interest of justice demanded that the Court overlooks the strict 180 days PAJA requirement for the institution of review proceedings.[31] Be that as it may, the point about PAJA avoidance is still not lost. Even more concerning, the decision of the court in this case seems to be disapproved by the Constitutional Court's recent case of *Minister of Finance v Afribusiness NPC ('Afribusiness')*,[32] where the Court cited its

[26] (22877/2018) [2019] ZAGPPHC 185 (18 June 2019).
[27] *Eskom Holdings SOC Limited*: par. 2.
[28] *Eskom Holdings SOC Limited*: par. 3.
[29] *Eskom Holdings SOC Limited*: par. 4.
[30] *Eskom Holdings SOC Limited*: par. 4.
[31] See sec. 7 (1) of PAJA.
[32] (CCT 279/20) [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (16 February 2022): par. 78.

earlier decision in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* ('Allpay'),[33] and held that:

> The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.[34]

Most significantly, according to the Court:

> Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.[35]

Against this backdrop, the High Court decision in *Eskom Holdings SOC Limited* also seems to give further credence to what Henrico has called the subversion of PAJA for "judicial expedience".[36] It is a textbook example of what Hoexter has called "PAJA avoidance".[37] Moreover, as argued elsewhere above, the unintended consequences of following this approach have been to denude PAJA as constitutionally mandated legislation as well as to broaden the principle of legality as a pathway of review – which now seems to subsume most of the grounds of review under PAJA. This is indeed not a surprising development: legality has proven to be "simple, general and flexible and can evidently be made to mean whatever the court wants it to mean" whereas "PAJA is far more detailed and less user-friendly".[38] This situation is compounded by the Act's definition of "administrative action" which is overly complicated and tries to exclude too much; and "sec. 7 which contains procedural obstacles in the form of a strict six-month time limit for applications for review and a rather onerous duty to exhaust internal remedies".[39] It remains to be seen whether PAJA will survive these developments and

[33] [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).
[34] *Allpay*: par. 43.
[35] *Allpay*: par. 43-45.
[36] Henrico 2018: 289.
[37] More on this below.
[38] Hoexter 2015: 184.
[39] Hoexter 2015: 184.

what the extent and scope of procedural fairness review under legality will be. I aim to explore all these questions in this dissertation and to add a voice to the long-standing debate about whether it is appropriate for the courts to review exercises of public power in terms of legality before determining if PAJA applies. It is hoped that this dissertation will not only enrich this debate but also contributes to the broader discussion of trying to locate the proper and rightful place of both PAJA and the principle of legality in our constitutional dispensation and judicial review proceedings. That is to say, whether our courts have managed to develop a principled, and substantive approach to determining in a given case of legality review, whether procedural fairness should apply.

1.5 Methodology and approach

This dissertation comprises the results of qualitative desktop research. I rely primarily on both South African and foreign law reports, journal articles, academic books, legislation, LLM dissertations, and Ph.D. thesis of scholars in the field of administrative law. Where relevant, reference is also made to newspaper articles and political statements.

1.6 Chapter outline

Apart from an introduction and conclusion (chapters 1 and 5 respectively), this dissertation consists of three substantive chapters. In chapter 2, I describe the prevailing view on the relationship between PAJA and legality and the rationale for it. After introducing the prevailing view, I then move on to briefly set out the history of judicial review for exercises of public power at common law and under the Constitution. I further attempt to map out the development of the principle of legality and highlight the distinction between judicial review under PAJA and the principle of legality. This is done as a way of demonstrating the critical role that the principle of legality has played in the judicial review of exercises of public before the enactment PAJA and how the courts continued to employ it in the post-PAJA enactment era. It is this continued overreliance on the principle of legality to review almost all exercises of public power that now threatens to displace PAJA from its legimate position in our constitutional order. Chapter 2 also considers what exactly necessitated the court's reliance on the principle of legality and its continuous development thereof.

In chapter 3, I ask the question of whether the application of the prevailing approach has not inadvertently caused the development and broadening of legality as a channel for review, in particular concerning the 'reading in' of procedural fairness in some instances. In other words, by insisting that there should be strict adherence to subsidiarity, has the prevailing approach not inadvertently presented PAJA and legality as mutually exclusive and polar opposites that our courts have not been able to reconcile? And as a result, opting instead to seek sanctuary in the generous and flexible principle of legality, which is then developed unduly?

In chapter 4, I ask whether our courts have managed to develop a principled, and substantive approach to determining in a given case of legality review, whether PAJA or legality should apply. I begin this chapter with a discussion of what deference entails in the judicial review for exercises of public power and how administrative law scholars both in South Africa and other foreign jurisdictions like Canada and Australia have conceptualised it. This is an important question to ask because as I will show, the question of whether an exercise of public power in a given case should be subjected to PAJA or legality review depends very much on the kind of deference theory or approach the review court relies upon. After laying this foundation, I then move on to ask the question of whether our courts have managed to develop a cogent theory of deference that does not border on technicalities to determine in a given case of legality review, whether procedural fairness will apply and therefore whether to intervene or exercise some form of deference. A corollary question to this that is also considered is whether it is possible, in the current judicial review dispensation, for litigants and legal practitioners to know in advance which ground of review a reviewing court will rely upon in reviewing an exercise of public so they can draft their pleadings accordingly. In other words, are there any substantive factors which a reviewing court can be hoped to rely upon in determining whether to intervene and review an exercise of public power, especially those that are executive in nature.

CHAPTER 2

What is the prevailing approach to the relationship between PAJA and the principle of legality and what is its rationale?

2.1 Introduction

In this chapter I describe the prevailing view on the relationship between PAJA and legality and the rationale for it. After briefly introducing the prevailing view and its rationale, I then move on to set out the history of judicial review of exercises of public power at the common law, and under the Constitution. This is then followed by a discussion of the distinction between judicial review under PAJA and the principle of legality to give further impetus to the prevailing approach. Finally, I attempt to map out the history of the development of the principle of legality as a pathway of review with consideration of the criticisms that have been levelled against it, particularly by scholars who propounded the prevailing approach. I do this to interrogate whether this strict insistence that the prevailing approach should be followed to the letter has not inadvertently resulted in the undue development/broadening of the principle of legality since the courts seem to be struggling to develop a principled, substantive approach to determining in a given case, whether the PAJA or legality should apply. I start in 2.2 below by describing the prevailing approach to the relationship between PAJA and the principle of legality. I then proceed with a discussion of judicial review of exercises of public power at common law and under the Constitution in 2.3 and 2.4 respectively. This is followed by a discussion of the history of the development of the principle of legality in 2.5 and a discussion of the difference between judicial review under legality and PAJA in 2.6. Finally, I provide a summary of the discussion in the whole chapter in 2.7.

2.2 The prevailing approach to the relationship between PAJA and the principle of legality and its rationale

One of the most contentious issues in administrative law scholarship since the enactment of PAJA[40] has been the question of whether it is appropriate for a court in

[40] The President brought PAJA, save for ss 4 and 10, into force on 30 November 2000 in terms of Government Notice R73 dated 29 November 2000.

a judicial review application to apply the principle of legality before determining if PAJA applies or exhausting its grounds of review. The prevailing view on this subject so far is that in reviewing exercises of public power, the courts must first determine if PAJA applies before placing reliance on the principle of legality.[41] Many administrative law scholars have since taken issue with the courts' continued reliance on the principle of legality to review exercises of public power before determining if PAJA applies. To be more precise, the Constitutional Court has been criticised as "strangely tolerant of applications based on the principle of legality instead of the PAJA, and has quite often permitted them even when it has not yet been established that the PAJA is inapplicable because the action is not administrative".[42] The case of *Albutt v Centre for the Study of Violence and Reconciliation ('Albutt')*[43] has also been identified as the hallmark of the reversal in the "normal order of things".[44] This is so, the argument continues, because it was in that case that the apex Court held that since the case could be resolved by the principle of legality, there was no need to ask whether PAJA was applicable. Indeed, the Court held in that case that the question of whether PAJA or legality applied was an "ancillary question that should not be reached, as it would be contrary to judicial policy to do".[45] This practice by the Court of exercising its judicial review powers has also been characterised as a "blatant avoidance of the constitutionally mandated PAJA"[46] subversion of sec. 33 of the Constitution"[47] and "administrative law by another name"[48] among other labels. Even more devastating, the Constitutional Court has been criticised for creating "a parallel universe of administrative law; a new common law for the constitutional era".[49] Commenting on this subject in 2012, Hoexter authoritatively proposed that:

[41] See generally Hoexter 2012; Henrico 2018, and Kohn 2013 for further discussion on this.
[42] Hoexter 2015: 183; Hoexter 2012: 134-35.
[43] (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010).
[44] Hoexter 2015: 183.
[45] *Albutt*: par. 82.
[46] Hoexter 2017: https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality/?msclkid=f9cbec4ca2a311ec8bf374433d862dd4 (accessed 7 August 2022).
[47] Hoexter 2011: 65 argues that: "reliance on the principle of legality subverts s 33 of the Constitution. The use of the principle of legality so as to avoid the administrative action inquiry detracts from the entire scheme laid down in s 33, whose purpose is to establish a coherent and overarching system for the review of all administrative action".
[48] Plasket 2002: 164.
[49] Hoexter 2015: 184.

> The first question in any administrative-law case ought surely to be whether the most specific and most detailed norm, the PAJA, is applicable, and not whether the problem is capable of being solved by the rule of law, a far more general and abstract constitutional doctrine.[50]

The main argument in support of this position is that, in reviewing exercises of public power, courts should have regard or give due consideration to the principle of subsidiarity. This principle was succinctly explained by the Constitutional Court per Cameron J in *My Vote Counts NPC v Speaker of the National Assembly and Others ('My Vote Counts')*[51] as denoting: "a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail".[52] One important aspect of this principle is that "where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard".[53] While the Constitutional Court in *My Vote Counts* recognised that virtually all issues are, ultimately, constitutional, it cautioned against a "freewheeling or haphazard" resort to constitutional values and rights when more specific rights enshrined in legislation can provide the necessary relief.[54] In the Court's precise words: "the Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law — to which one must look first".[55]

The prevailing approach is further anchored on the understanding that the principle of legality serves as a safety-net and governs the review of all exercises of public power that do not constitute "administrative action" under PAJA.[56] In other words, the principle of legality regulates executive action, while PAJA regulates administrative action.[57] In *Fedsure*, legality was also characterised as the more general constitutional counterpart of the right to lawful administrative action.[58] Accordingly, it has been argued that it is not appropriate for a reviewing court to subject executive actions to

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[50] Hoexter 2012: 134.
[51] 2016 (1) SA 132 (CC).
[52] *My Vote Counts*: para 46.
[53] *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC): par. 51.
[54] *My Vote Counts NPC v Speaker of the National Assembly and Others*: paras. 51-52.
[55] *My Vote Counts NPC v Speaker of the National Assembly and Others*: par. 52.
[56] Boonzaier 2018: 655; *State Information Technology Agency Soc Ltd v Giima Holdings* 2017 (2) SA 63(SCA): par. 37.
[57] Boonzaier 2018: 657.
[58] *Fedsure* par. 56 where the Court held "that the exercise of public power is only legitimate where lawful."

the same exacting constraints that administrative actions would be subjected to under PAJA as that will not accord with the principles of subsidiarity and deference.[59] The principle of deference will be properly distilled in chapter 4. For now, it suffices to simply state that in its basic form, deference is concerned with the question of how courts should reconcile law and politics and how they should determine an appropriate standard of review in relation to the facts of each particular case.[60] Or to put it another way, "what are the proper boundaries to the respective powers of different branches of government, and who decides on where those boundaries are drawn".[61] It requires that all three branches of government respect the exclusive domains of each other and not be found to be encroaching beyond what is permissible. Writing for the majority of the Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[62] O'Regan J held that "deference in the review of administrative power springs from the fundamental principle of separation of powers".[63] The main argument on this aspect is that when the court bypasses PAJA to rely on the principle of legality, it ends up encroaching on the exclusive domains of other branches when it should not have intervened in the first place.

2.2.1 Judicial review of exercises of public power at common law

Owing to its English influence, South African administrative law under the common law rested on the twin pillars of parliamentary sovereinty the rule of law (the *ultra vires* doctrine).[64] The *ultra vires* doctrine meant that no public functionary or body could exercise more power than was vested upon it – doing so would result in the exercise of said power being declared unlawful and invalid.[65] This power of judicial review was not created by statute but was inherent in the courts by virtue of their legal status. The position was succinctly captured by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town*[66] who opined that the power of the court to review and set aside the failure of a public body to comply with statutory obligations imposed upon it is: "not a special machinery created by the Legislature; it is an inherent

[59] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC): par. 27.
[60] Davis 2006: 33.
[61] Davis 2006: 23.
[62] [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC).
[63] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others:* par. 46.
[64] Kohn & Corder 2014: 1.
[65] *New Clicks*: par. 101.
[66] 1903 TS 111.

power in the court".[67] However, this inherent power of judicial review was not unfettered – Parliament had the ultimate authority to determine what was and was not lawful and this power was sourced from the doctrine of Parliamentary sovereignty.[68] In other words, Parliament could limit the level of scrutiny of administrative actions or even ultimately oust the courts' jurisdiction to enquire into the validity of administrative action.[69] This left enough room for the abuses of public power as the courts began to adopt an exaggerated deference towards the legislature and the executive.[70] Administrative justice especially its requirement of reasonableness was accordingly reluctantly invoked for fear of bluring the lines between review and appeal.[71]

Moreover, while the courts generally had inherent powers to review all exercises of public power including those administrative in nature,[72] this power could only be exercised under limited circumstances. They could do so, for example, where there was gross unreasonableness to the extent that one of the established grounds of review could be inferred from such unreasonableness.[73] As Lord Russell CJ explained in *Kruse v Johnson*,[74] a decision could be characterised as unreasonable if the decision-maker who took it was: "found to be partial and unequal in their operation as between different classes", or "if they were manifestly unjust; disclosed bad faith, involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men"[75] or if the decision taken was "so unreasonable that no reasonable authority could ever have come to it".[76] This stand of reasonableness review has become popularly known as the *Wednesbury unreasonableness/doctrine* in administrative law scholarship — and it allows for curial intervention only when the impugned administrative measure is "so unreasonable that no reasonable authority could ever have come to it".[77] Needless to mention, this is also the doctrinal bedrock upon which the "hallowed distinction" between "appeal" and "review" is built, thus ensuring that the court does not concern

[67] *Johannesburg Consolidated Investment Co v Johannesburg Town Council*: 155.
[68] Hoexter 2013: 645.
[69] Klaaren and Penfold: 2006: 2.
[70] Hoexter 2004: 177.
[71] Hoexter 2004: 177.
[72] Hoexter 2013: 645.
[73] *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk)*:* par. 14.
[74] [1898] 2 QB.
[75] *Kruse v Johnson: 91.*
[76] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (CA).
[77] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (CA).

itself with the question of whether the decision of the public functionary is right or wrong in judicial review applications.[78] The word "hallowed" is used sparingly because in reality, the fine line between review and appeal has been significantly blurred.

Moreover, as it shall be seen in chapter 4, the adequacy of judicial oversight thus confined is increasingly questioned both in South Africa and similar common law jurisdictions like Canada and Australia, in part because of the growing emphasis in those jurisdictions on "fundamental rights and values" as entitlements that deserve to be guarded more jealously by courts than bare *Wednesbury* scrutiny would permit. In South Africa, this same concern seems to have informed the Constitutional Court's reproachable jurisprudence of importing procedural fairness into legality reviews in some cases. This reading of procedural fairness into legality review has been done despite sec. 6 (2) (h) PAJA which limits the extent and scope of judicial review under reasonableness.[79] It also demonstrate the Constitutional Court's desire and attempt to jettison the extremely deferential *Wednesbury unreasonableness* standard of review and adopt a substantive approach to judicial review – albeit one that is yet to be properly formulated and fully ventilated. The failure in formulating such an approach is in part due to the failure by the courts to formulate a cogent theory of deference. In other words, whether the courts elect to treat the decisions of other public functionaries with respect or interferes with them will depend very much on its approach to judicial review – do the courts favour "substantive review which embraces legality as well as merits or just the process alone".[80] These two questions seem to be inseparable.

2.3 Judicial review of exercises of public power under the *Constitution*

The advent of South Africa's constitutional democracy did not only mean a break away from the apartheid culture of exaggerated deference by the courts to the public administration but also meant that Parliament was now divested of the final authority to determine what is and is not a lawful exercise of public power; this authority would

[78] Elliot & Wilberg 2015: 3.
[79] This section allows a reviewing court to review administrative action 'where the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function'.
[80] See generally Hoexter 2015.

now rest in the courts.[81] The *Constitution* now gives the courts greater security to scrutinise administrative actions closely in the knowledge that their powers of review are constitutionally mandated and protected. As the Constitutional Court explained in *Pharmaceutical Manufacturers*: "the courts no longer have to claim space and push boundaries to find means of controlling public power."[82] That control according to the Court is now "vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised".[83] By way of another example, sec. 33 of the *Constitution* now specifically provides for the right to judicial review of administrative action and mandates Parliament to enact a national legislation that must give effect to this right.[84] This national legislation is PAJA which now serves as the vehicle through which administrative law reviews must generally be brought.[85] Effectively, this means that:

> litigants can rely directly on sec. 33(1) of the Constitution when seeking to review administrative action only when they allege that the remedies afforded by PAJA are in some way deficient, in which case their challenge on the basis of sec. 33(1) would not be directed at the administrative action in question, but at the offending provisions of PAJA itself, just as it would be when sec. 33(1) is used to challenge the provisions of any other legislation.[86]

The role of sec. 33 of the Constitution is therefore residual in nature. In other words, it is "an interpretative standard against which to assess specialised statutory bases for review of administrative action other than sec. 6 of PAJA".[87] As Chaskalson P explained in *New Clicks*, sec. 33 can only be used as a standard against which to test the constitutional consistency of legislation, including PAJA. The most important sections of PAJA for the purposes of this dissertation are sec. 3 which makes provision

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[81] Section 165 (1)- (2) of the Constitution provides that the judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
[82] *Pharmaceutical Manufacturers*: par. 45.
[83] *Pharmaceutical Manufacturers*: par. 45.
[84] This section provides that: '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must—a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.'
[85] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC*) ('Bato Star Fishing')*: par. 25.
[86] *New Clicks*: par. 237.
[87] Brand 2007: par. 2.2.1 (http://jutastat.juta.co.za/nxt/gateway.dll/jrsa/3/5/10/14?f=templates$fn=default.htm accessed 28 Septemeber 2022).

for the right to procedural fairness, sec. 4 which provides for circumstances under which public participation may be required before an administrative action is taken and section 6 which provides the grounds for review of administrative actions.

2.4 The history of the development of the principle of legality and the criticisms

The principle of legality as it applies in the field of administrative law in South Africa finds its genesis from the first three seminal Constitutional Court cases of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others ('Fedsure')*,[88] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (*SARFU)*[89] and *Pharmaceutical Manufacturers of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others('Pharmaceutical Manufacturers')*[90] respectively. This principle has been held to require that public power be derived from law alone and be exercised in accordance with law;[91] and that, additionally, it be exercised rationally and in good faith.[92] In *Fedsure* for example, the Constitutional Court was called upon to determine whether the passing of the resolutions by the Johannesburg municipal council constituted administrative action under sec. 24 of the interim *Constitution* and sec. 33 of the 1996 *Constitution* and, if not, whether it has the jurisdiction to determine their validity. Introducing the principle of legality to the question, the Court stated that:

> The exercise of such powers, like the exercise of the powers of all other organs of state, is subject to constitutional review which, as we describe later, includes review for legality.[93]

The Court further reasoned that the council was constrained by the principle of legality whose requirement: "exists independently of, and does not depend on, the provisions of section 24 (a)"[94] but is nevertheless enshrined in sec. 24 (a) of the interim *Constitution*.[95] This was an important development in our legal jurisprudence given our history of Parliamentary supremacy under apartheid where both the executive and the legislature had wide powers that the courts did not always have the discretion to

[88] (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374.
[89] (CCT31/99) [2000] ZACC 1.
[90] (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).
[91] See *Fedsure*: par. 56 where the Constitutional Court held that the principle of legality expresses the idea that "the exercise of public power is only legitimate where lawful".
[92] See *Pharmaceutical Manufacturers* case: par. 90 & *SARFU*: par. 148.
[93] *Fedsure:* par. 40 (*emphasis added*).
[94] *Fedsure*: par. 41.
[95] *Fedsure*: par. 59.

subject to judicial review and scrutiny. More importantly, the Court stated that the principle of legality meant that: "the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[96] In other words, although the passing of the resolutions in question by the Johannesburg municipal council did not constitute administrative action under sec. 24 of the interim *Constitution* and sec. 33 of the 1996 *Constitution*, the exercise of such power was nevertheless not unfettered. That is, it could not be exercised arbitrarily or capriciously. It is clear from this that the principle of legality provided the necessary safeguard and a leg for the Court to stand on when reviewing the council exercise of public power in question. The net result of this ruling has been to bring of all exercises of public power under some degree of public law control – thus ensuring that the constitutional values of accountability, responsiveness, transparency and in some instances, public participation are given effect to.

The *SARFU* case, on the other hand, dealt with the President's power in terms of sec. 84 (2) (f) of the *Constitution* to appoint a commission of inquiry to investigate the administration of rugby in South Africa. The Constitutional Court was once again called upon to determine whether the exercise of such public power was executive or administrative in nature. In arriving at its conclusion, the court relied on the wording of sec. 33 of the *Constitution* and found that the use of the adjective "administrative" instead of "executive" to qualify action suggests that:

> The test for determining whether conduct constitutes "administrative action" is not the question of whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function.[97]

The focus of the enquiry as to whether conduct is "administrative action", the Court further held, "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".[98] That being the case, the Court ultimately found that the President's power in terms of sec. 84 (2) (f) of the *Constitution* to appoint a commission of inquiry to investigate the administration of rugby did not constitute "administrative action".[99] However, that was not the end of the enquiry because as the Court held, "the fact that the President's conduct, in this case, did not

[96] *Fedsure*: par. 58.
[97] *SARFU*: par. 141.
[98] *SARFU*: par. 141.
[99] *SARFU*: par. 156.

constitute administrative action did not mean that there were no constraints upon it".[100] One of the constraints on the President's exercise of public power according to the Court was found to be the principle of legality which as we have seen means that: "the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[101] An incisive reading of the Court's ruling in this matter would reveal the Constitutional Court's intention to abandon the apartheid concept of the classification of functions under which the review for exercises of public power was grounded upon the identity of the functionary performing the function and not the function itself. This was an important development given the many instances in modern public administrations under which public functions are delegated to private entities. The concept of the classification of functions would indeed make it difficult for the courts to exercise judicial review of said powers but for the development of the principle of legality in the direction that the Constitutional Court took it.

In *Pharmaceutical Manufacturers,* the President acting under the advice of the Minister of Health issued Proclamation R49 which purported to bring into operation the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998 (the Act). Having done so, it was later discovered that the Act had been brought into operation without the necessary schedules. The Constitution Court was accordingly called upon to determine whether a court has the power to review and set aside a decision by the President to bring an Act of Parliament into force.[102] Relying in part on the authority established in *Fedsure,* the Constitutional Court held that: "the exercise of all public power must accord with the *Constitution*, particularly the principle of legality"[103] and "that a finding that a decision-maker acted *ultra vires* is, in essence, a finding that he/she acted in a manner that is inconsistent with the *Constitution*".[104] These three seminal cases were decided before PAJA came into effect and show the Constitutional Court's creative attempt to break away from the apartheid culture of lack of accountability and justification for exercises of public power by state functionaries. The Court's reliance on the principle of legality to review exercises of public power

[100] *SARFU*: par. 148.
[101] *Fedsure*: par. 58.
[102] *Pharmaceutical Manufacturers*: par. 1.
[103] *Pharmaceutical Manufacturers*: par. 20.
[104] *Pharmaceutical Manufacturers*: par. 20.

was necessary and justifiable then owing to the absence of a formal legislative framework (in the form of PAJA) to review public conduct particularly those administrative in nature. As Sachs J put it in *New Clicks*:

> While the Constitution, like nature, abhors a vacuum, it does have what may appear to be lacunas. One of the tasks of the judiciary is, when called upon, to fill in these apparent gaps. It does so not by a process of invention but by one of completion. The courts use what is there as the foundation for discerning what is not manifest; they render explicit what is implicit. They plumb the overall structure and design of the Constitution and let themselves be guided by the values that the Constitution articulates. Memory of past abuses, sensitivity to social context and appreciation of the goals which the Constitution sets for our society, also serve as pointers.[105]

It may well be that it [the principle of legality] remains a justifiable alternative pathway to the judicial review of exercises of public power today given PAJA's narrow definition of "administrative action" which "threatens to exclude from review many exercises of public power which had been reviewable under the common law".[106] This notwithstanding, it is apposite to note at the outset that the Constitutional Court's creative method of using legality to bring all exercises of public power under some degree of public law control has not been universally welcomed. There are indeed administrative law scholars who have taken issue with the manner in which legality has been used by the Court as a means of "bypassing/avoiding" PAJA even in the review of administrative action. One of the first authoritative scholars to raise alarm about this trend was Cora Hoexter. Commenting on the development of the principle of legality in the *SARFU* case, Hoexter argued that the Constitutional Court had expanded its ambit by adding two more elements to it.[107] These two elements it will be remembered were the fact that the principle of legality required that the President's decision to appoint the rugby commission of inquiry needed to be recorded in writing and signed and that the President had to act in good faith and not misconstrue his powers.[108]

Effectively, Hoexter's argument is that these two factors were not factors to be considered when exercises of public power were reviewed under the principle of legality before the Court's decision in the *SARFU*. The further expansion of the legality principle according to her occurred in *Pharmaceutical Manufacturers*.[109] Here, too Hoexter argues, the Constitutional Court did not classify the President's decision as

[105] *New Clicks*: par. 580.
[106] Kohn & Corder 2014: 19.
[107] Hoexter: 2004: 181.
[108] *Pharmaceutical Manufacturers*: par. 182.
[109] *Pharmaceutical Manufacturers:* par. 16.

administrative action; but still found that there were constraints imposed by the Constitution in general, one which was found to be the standard of rationality.[110] She further takes issue with the fact that the Court expanded the principle of legality to subsume the standard of rationality which is a specific ground of review under PAJA. In developing rationality as a ground of review for "non-administrative actions", Chaskalson P explained that rationality could be understood as "a minimum threshold requirement applicable to the exercise of all public power"[111] and as of "one of the requirements of the rule of law – which requires all exercises of public power by either the executive or other functionaries to not be arbitrary".[112] Accordingly, "while the courts cannot interfere with a decision simply because it disagreed with it, this applied only to rational decisions".[113] In his view, "it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational".[114] Accordingly, a litigant alleging that public conduct is irrational under a legality review will have to prove "objective irrationality"[115] on the part of the decision-maker. Hoexter has characterised the development of the principle of legality in this fashion and the courts' over-reliance on it as "largely a waste of judicial energy and effort".[116]

In addition to this, and using the trilogy cases of *Albutt v Centre for the Study of Violence and Reconciliation('Albutt')*;[117] *Judicial Service Commission v The Cape Bar Council*[118] *and Democratic Alliance* v *The President of the Republic of South Africa,*[119] Lauren Kohn[120] has taken Hoexter's critique of the Constitutional Court's reliance on the principle of legality further by showing how even the constitutional requirement of rationality is apparently now burgeoning to include its own elements.[121] While Kohn has lauded these three judgments for striking a "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

[110] Hoexter 2004: 182.
[111] *Pharmaceutical Manufacturers:*par. 90.
[112] Pharmaceutical Manufacturers: par. 85.
[113] *Pharmaceutical Manufacturers*: par. 90.
[114] *Pharmaceutical Manufacturers*: par. 90
[115] *Kruger v President of the Republic of South Africa* [2008] ZACC 17; 2009 (1) SA 417(CC) ('*Kruger v President of the Republic of South Africa')*: par. 52; more on this below.
[116] Hoexter 2004: 184.
[117] 2010 (3) SA 293 (CC).
[118] 2013 (1) SA 170 (SCA).
[119] 2013 (1) SA248 (CC).
[120] Kohn 2013.
[121] See generally Kohn 2013: 827-836.

imperatives to govern on the other hand"[122] she has nevertheless maintained that these cases represent an equally "dangerous judicial trend".[123] This trend according to her has been 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".[124] Regarding the *Albutt* case*,* Kohn has argued that the Constitutional Court expanded the rationality requirement to include proportionality. This in her view was not in line with the Court's well-established precedent. particularly the Court's ruling in the *Masethla*[125] case in which the majority of the Constitutional Court per Moseneke DCJ found that "procedural fairness is not a requirement of the constitutional principle of legality"[126] and that "it would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action".[127] Indeed, it appears that the Court in the *Albutt* case read procedural fairness into legality review by holding that the failure of the President to hear the views of the victims in question was procedural unfair.[128] To put it as the Court did:

> ("…") the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.[129]

Moreover, commenting on the case of *Judicial Service Commission v The Cape Bar Council,* Kohn further argues that the Supreme Court of Appeal (SCA) had extended the rationality requirement to include the duty to give reasons.[130] She posits that the rationality requirement under the principle of legality was in this case expanded beyond what is required in terms of the rationality test under PAJA.[131] As it shall be seen below, a rationality review under PAJA was couched specifically to empower the courts to engage in a more rigorous review than a rationality review under legality. However, as Kohn has argued, the distinction between these two has since been

[122] Kohn 2013: 812.
[123] Kohn 2013: 812.
[124] Kohn 2013: 812.
[125] *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC).
[126] *Masethla v President of the Republic of South Africa* 2008 (1) SA566 (CC): par. 77.
[127] *Masethla v President of the Republic of South Africa* 2008 (1) SA566 (CC): par. 77.
[128] *Albutt*: par. 71-72.
[129] *Albutt*: par. 72.
[130] Kohn 2013: 833.
[131] Kohn 2013: 832.

blurred. The rationality requirement under legality has now been developed to not only resemble PAJA's rationality but to also require more than what was initially intended.[132] And while this development is laudable and "a victory for our commitment to openness and accountability"[133] it is nevertheless unfortunate, first because "the rationality test itself does not mandate the actual giving of reasons, which is a separate requirement under sec. 5 of the PAJA"[134] and second because "it has been made without any engagement with the requisites of the doctrine of separation of powers and is insufficiently nuanced".[135]

This notwithstanding, it appears that there is a case to be made for the expansion of rationality to include the duty to give a reason, particularly in the *Albutt* case. This is so primarily because it would be difficult to know on what the President had based his decision to deny the victims the right to be heard without giving reasons.[136] More importantly, there is no absolute separation of powers. As the Constitutional Court explained *In re: Certification of the Constitution of the Republic of South Africa ('re-Certification case')*:[137] "in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of the government upon another, there is no separation of power that is absolute".[138] Indeed, it can also hardly be said that requiring the President to provide written reasons for his decision is a usurpation of his function by the judiciary.[139]

Regarding the case of the *Democratic Alliance v The President of the Republic of South Africa,* Kohn argues that the Constitutional Court extended the constitutional requirement of rationality to include proportionality.[140] In this respect, she notes the court's argument that if in arriving at their decisions, public functionaries fail to take into consideration relevant material, that failures would constitute part of the means to achieve the purpose for which the power was conferred. And if those failures had an impact on the rationality of the entire process, then the final decisions will also be

[132] See Hoexter 2015: 179.
[133] Kohn 2013: 833.
[134] Kohn 2013: 833.
[135] Kohn 2013: 833.
[136] More on this in chapter 3.
[137] 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC).
[138] Re-Certification case: par. 108-109.
[139] Sewpersadh & Mubangizi 2017: 211.
[140] Kohn 2013: 834.

tainted and not satisfy the standard of rationality.[141] For her, it is this kind of reasoning that expands the rationality requirement into the ambit of proportionality. It will be recalled that this case concerned an application for confirmation of constitutional invalidity by the Democratic Alliance to the Constitutional Court of an order made by the SCA declaring the appointment of Mr. Simelane as the National Prosecuting Director of Public Prosecutions (NDPP) by the President inconsistent with the Constitution. This application was opposed by the Minister for Justice and Constitutional Development ('the Minister') who contended in the main that neither the Constitution nor the Act[142] prescribes any procedure for the appointment of the NDPP. This according to him meant that the President had a wide, subjective discretion in making the appointment and that the SCA applied the reasonableness standard appropriate for administrative action cases under PAJA instead of testing presidential executive action by reference to rationality alone.[143]

In essence, the Constitutional Court was called upon to determine among other issues whether the failure of the President to consider the adverse findings made by the Ginwala Commission[144] against Mr. Simelane rendered his decision procedurally irrational in terms of the principle of legality.[145] After citing its earlier decision in *Albutt* with approval, the Constitutional Court ultimately held that:

> ("…") the decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.[146]

The net results of this ruling was 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".[147] It was in this case that we saw for the first time the Court's blurring of the thin line between the minimum rationality review threshold under legality and the more rigorous rationality review

[141] *Democratic Alliance v The President of the Republic of South Africa:* par*. 39.*
[142] The National Prosecuting Authority Act 32 of 1998.
[143] *Democratic Alliance*: par. 8-9.
[144] The Report of the Public Service Commission is dated April 2009.
[145] *Democratic Alliance*: par. 12.
[146] *Democratic Alliance*: par. 37.
[147] Kohn 2013: 812.

threshold under PAJA. Moreover, not only was the distinction between these two standards of rationality review dealt a mortal blow but as Kohn argues, the Constitutional Court appears to have expanded legality to subsume proportionality.[148] This according to her is a concerning development because it demonstrates the court's failure to appreciate the limits imposed on judicial review by the principle of separation of powers.[149] Ultimately, Kohn concludes that this notorious practice is due to the court's failure to engage meaningfully with the principle of separation of powers particularly in the review of administrative actions.[150] As a solution to this incorrect approach, she proposes that courts should meaningfully engage and take seriously what the principle of the separation of powers means when reviewing exercises of public power.

Entering the fray on this matter, De Beer has also argued that the expansion of the principle of legality has eroded the distinction between the two pathways of review – the PAJA and legality review.[151] According to him, it is Parliament's role to provide a framework of review for the courts.[152] As such, it is unacceptable for the courts to bypass the PAJA and rely on the principle of legality in order to review the actions of state functionaries. This is because "far from having a 'wider' meaning - as mentioned in aspect (e) of the Court's reasoning in *Gijima,* Parliament elected to narrow the definition of the term [administrative action] with the additional requirements".[153] By the same token, Henrico has characterised the courts' use of the principle of legality to review exercises of public power by state functionaries as a "subversion of the Promotion of Justice Administrative Act".[154] For his part, the reason for such an approach by the Court is what he calls "judicial expedience".[155] Whether the Court's development of legality review in this direction is warranted is a matter I deal with more broadly in chapter 3 below.

[148] Kohn 2013: 836.
[149] Kohn 2013: 836.
[150] See Kohn 2013: 836 where he argues that while the courts' bold use of the principle of legality to review administrative actions is laudable, it is in part also: 'indicative of a lack of sensitivity to the tenets of our doctrine of separation of powers and the type of deference required by it.'
[151] De Beer 2018: 623.
[152] De Beer 2018: 623.
[153] De Beer 2018: 619.
[154] Henrico 2018: 289.
[155] Henrico 2018: 289.

2.5 The difference between judicial review under PAJA and the principle of legality

It is trite that the principle of legality serves as a safety net and governs the review of all exercises of public power that do not constitute "administrative action" under PAJA.[156] In other words, the principle of legality regulates executive action, while PAJA regulates administrative action.[157] Moreover, under sec. 6 (2) (h) of PAJA, the courts are empowered to review and set aside any administrative action that fails to meet the standard of reasonableness. Put slightly differently, the courts can review an administrative action if it is so unreasonable that no reasonable person would have taken it.[158] There are several factors that a reviewing court should consider when determining whether an administrative action meets the standard of reasonableness. These factors include among others: the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected.[159] A reasonable decision in this respect is one that is rational and proportional to the end sought to be achieved.[160]

Moreover, sec. 7 (1) of PAJA provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the impugned decision has been taken. As can be seen, PAJA imposes exacting constraints on those who seek to rely on it to review exercises of public power. This is different from the generous and flexible principle of legality which provides sanctuary in instances where PAJA may impose an undue burden and deny litigants an opportunity to subject *prima facie* unscrupulous exercises of public power to judicial review on technical grounds. By way of an example, in its current structure and formulation, sec. 7 (1) of PAJA suggests that the passage of time can sanitize unlawful

[156] Boonzaier 2018: 655; *State Information Technology Agency Soc Ltd v Giima Holdings* 2017 (2) SA 63
(SCA): para. 37.
[157] Boonzaier 2018: 657.
[158] It is important to note however, that this *Wednesbury* standard of reasonableness review has come under intense scrutiny and has since be reformulated. For example, in *Bato Star Fishing*: par. 44, the majority of the Constitutional Court per O'Regan J defined an unreasonable decision as simply "a decision that a reasonable decision-maker could not reach".
[159] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others:* par. 45.
[160] *Minister of Health v New Clicks:* par. 637.

exercises of public power and render them lawful. In other words, unless the parties to the litigation agree or the court gives an extension beyond the 180 days period, an unlawful exercise of public power cannot be reviewed and therefore remains intact. The net result of this is that those who were prejudiced by the impugned decision remain without any lawful recourse. Factors such as access to court, and the availability of funds to secure legal representation which may have contributed to the delay in instituting legal proceedings are altogether dispensed with – unless the review court exercises its discretion and grants condonation. As the Court held in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd('Passenger Rail Agency of South Africa')*:[161]

> ("…") to hold state institutions too strictly to the prescribed period, and thereby to shield the perpetrators, encourages the commission and concealment of egregious conduct of the nature found in this matter and would discourage prosecution by state institutions. It would also negatively impact on the administration of justice. There is no prejudice to the respondent if the application is heard. The consequences of refusing to hear the application and, as a result, allowing the invalid decision to stand will be borne by the public at large for many future generations. In my view, the hearing of the application will advance the principle of legality and the interests of justice. This is an appropriate case where the time period to have brought the application is extended and should be condoned.[162]

Indeed, none of the above-mentioned grounds of review and jurisdictional factors (reasonableness and 180 days period) are mandatory for the courts to exercise their judicial reviewing power under the principle of legality. In other words, the scope of review under the principle of legality does not extend to include the standard of reasonableness and neither does it include a specific timeframe like the 180 days as provided under PAJA. Unlike under PAJA where the passage of time is the ultimate factor for determining whether an exercise of public power can be reviewed and set aside, an assessment of delay under the principle of legality only requires the courts to engage in a two-pronged test. This test was first established by the Supreme Court of Appeal in the case of *Gqwetha v Transkei Development Corporation Ltd & others* (*'Gqetha'*)[163] and endorsed by the majority of the Constitutional Court per Skweyiya J in *Khumalo and another v Member of the Executive Council for Education*: *KwaZulu-Natal ('Khumalo')*.[164] The test was laid out as follows: (a) whether the delay is unreasonable or undue and if so, (b) whether the court adjudicating the judicial

[161] 2017 (6) SA 223 (GJ).
[162] *Passenger Rail Agency of South Africa*: par.74-79.
[163] [2005] ZASCA 51.
[164] 2014 (3) BCLR 333 (CC).

review proceedings may exercise its discretion to overlook the delay and proceed to make a determination on the review application.[165] If the first question is answered in the negative and the second question in the affirmative, then the reviewing court proceeds to review the alleged abuse of power in question.

Moreover, factors such as the egregious conduct of the senior officials within a public functionary; lack of good faith and fidelity towards the interests of this national asset; the interests of justice and the protection of the foundational basis of the rule of law and constitutionalism may sway a reviewing court to intervene and condone the delay beyond the 180 days requirement when the exercise of public power is reviewed through the principle of legality.[166] More importantly, procedural fairness is not a self-standing ground of review under the principle of legality. This is so because as the majority of the Constitutional Court per Moseneke DCJ held in the *Masethla*: "it would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action".[167] However, as things currently stands, this clear distinction between PAJA and legality review has since become blurred. For example, the supposedly low-intensity rationality test associated with the principle of legality has become far more rigorous in practice, to the extent that it now mimics the harder-look rationality ground listed in the PAJA.[168] Even more concerning, the principle of legality has in some cases been held to require procedural fairness – a clear and separate ground of review under the more exacting PAJA.[169] The conclusion that legality has since been developed to resemble PAJA or require more than it does is becoming difficult to resist. Be that as it may, the development of legality in the manner and direction it has taken seems to be the Constitutional Court's creative attempt to bring all exercises of public power under some degree of public law control[170] – albeit one that creates problems for the formulation of a principled theory of deference and the doctrine of the separation of powers.[171] For example, legality was initiated, interpreted and couched so as to

[165] *Khumalo*: par. 49.
[166] See *Eskom Holdings SOC Limited*: par. 10.
[167] *Masethla v President of the Republic of South Africa* 2008 (1) SA566 (CC): par. 77.
[168] Hoexter 2015: 175.
[169] See for instance, the *Albutt* case. I deal with this aspect more comprehensively in chapter 3.
[170] Hoexter 2015: 176.
[171] I return to this argument in chapter 4.

empower a reviewing court to review exercises of public power for rationality if the impugned decision was "objectively irrational".[172]

This is what the Constitutional Court in *Pharmaceutical Manufacturers* described as "the minimum threshold test of rationality" which is clearly distinguishable from the more rigorous and searching ground of rationality laid down in sec. 6(2) (f)(ii) of PAJA.[173] The idea behind this restrained inquiry according to the Court was to give the legislature and executive the widest possible latitude within the limits of the Constitution.[174] However, in the same judgment, the Court went on to hold that the distinction between rationality under PAJA and legality review is one without a difference. According to the Court, it would be wrong to suggest that 'whether the means are rationally related to the ends in executive decision-making somehow involves a lower threshold' than in the case of administrative action, because ultimately:

> Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one.[175]

According to the Court: "the separation of powers has nothing to do with whether a decision is rational… either the decision is rational or it is not".[176] Moreover, rationality requires that "both the process by which the decision is made and the decision itself must be rational"[177] and that "everything done in the process of taking the decision constitutes means towards the attainment of the purpose for which the power was conferred".[178] It seems the Constitutional Court has since abandoned legality's previous "objective irrationality" standard of review and adopted PAJA's more rigorous rationality standard, thus further blurring the distinction between these two pathways of reviews. The question that remains to be answered is what has necessitated the development of legality in this fashion and direction and what has informed its approach in general. I attempt to provide possible reasons for this development in chapter 3 below.

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[172] *Kruger v President of the Republic of South Africa* [2008] ZACC 17; 2009 (1) SA 417(CC): par. 52.
[173] *Pharmaceutical Manufacturers*: 90; Hoexter 2015: 178.
[174] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248(CC) ('*Democratic Alliance*'): par. 42.
[175] *Democratic Alliance*: par. 44.
[176] *Democratic Alliance*: par. 44.
[177] *Democratic Alliance*: par. 34-36
[178] *Democratic Alliance*: par. 36-37.

2.6 Conclusion

In conclusion, I attempt in this chapter to summarise the prevailing view in administrative law on the relationship between PAJA and the principle of legality – which insists that these two mechanisms of review should not be used interchangeably and that instead, they should be applied separately, within each of their scopes of application. I also by way of summary outline some of the reasons that have been proffered as a justification for the prevailing view. For example, it has been argued that the courts' reliance on the principle of legality before determining if PAJA applies amounts to a subversion and "blatant avoidance' of the latter. It has been argued that such a practice amounts to subversion of the principle of subsidiarity and the separation of powers. It will be seen from the discussion above that the prevailing approach is further anchored on the understanding that the principle of legality serves as a safety net and governs the review of all exercises of public power that do not constitute "administrative action" under PAJA.[179] In other words, the principle of legality regulates executive action, while PAJA regulates administrative action.[180] I have also briefly discuss the history of judicial review both at common law where it was informed and anchored on the twin-pillars of procedural fairness and the *ultra vires* doctrine and under the Constitution where it now rests on sec. 33 which mandates Parliament to enact a national legislation to give effect to the right to the administrative action. More importantly, I also attempt to map the history of the emergence and development of the principle of legality and the reasons for it. I argue that the Constitutional Court's Court creative attempt of using the principle of legality to bring all exercises of power under some degree of public law control has not been widely accepted – indeed it has been criticised as a form of "PAJA avoidance" and "judicial expediency" among other things. This is so because as others have argued, legality has now been developed to not only resemble PAJA but to required more than it does.[181]

[179] Boonzaier 2018: 655; *State Information Technology Agency Soc Ltd v Giima Holdings* 2017 (2) SA 63
(SCA): par. 37.
[180] Boonzaier 2018: 657.
[181] Hoexter 2015: 165.

CHAPTER 3

Has the application of the prevailing approach caused an undue development and broadening of legality as a channel for review?

3.1 Introduction

As discussed in chapter 2 above, the prevailing view maintains that PAJA and legality should be kept as separate pathways of review and not be used interchangeably. This has been said to accord with among other constitutional principles – the principle of subsidiarity and by extension, the principle of separation of powers. In practice, this has also meant that only PAJA can be relied upon to review administrative actions while the principle of legality serves as the pathway to review all exercises of public powers which do not fall under PAJA's definition threshold of 'administrative action'. I ask in this chapter whether the application of this approach has not inadvertently caused an undue development or broadened of the principle of legality as a channel for review of exercises of public power including those administrative in nature which are reviewable under PAJA. This is an important question to ask in light of the fact that due to the undesirability to preclude executive actions from procedural fairness review, the courts have on some occasions subsumed procedural fairness as self-standing ground of review under the principle of legality.

As a result of this nuanced approach, there are now instances in which executive actions have been subjected to the more exacting constraints of procedural fairness that constitute a separate ground of review under PAJA. The development of legality in this manner and direction requires closer attention as it may have far reaching consequences on the effective administration of public affairs by the executive and by extension, the doctrine of the separation of powers as shall be discussed elsewhere in chapter 4. I begin this chapter by looking at some of the cases in which the courts – particularly the Constitutional Court has read procedural fairness into legality when reviewing exercises of public power and those in which the Court refused to do so. As it shall soon become clear, the reasons for this differ from one case to another and are somewhat incoherent. This discussion provides a foundation for my attempt to grapple with the main question posed in this chapter. It will also become clear from this discussion that the question of whether procedural fairness should be imported into

the principle of legality is not yet settled owing in part to the Constitutional Court's reluctance to overturn its previous decisions[182] and the absence of a cogent theory of deference to determine, in a given case of legality review, whether procedural fairness applies or not. I start in 3.2 below by tracing the genesis of the concept of procedural fairness in administrative law review. I then proceed with a detailed discussion of the cases in which procedural fairness was imported into legality review and cases in which the courts refused to do so in 3.3 and 3.4 respectively. This is then followed by a discussion aimed at contrasting procedural fairness review in *Masetlha* and *Speaker of the National Assembly v Public Protector* in 3.5. Finally, I provide a summary of what has been discussed in the chapter in 3.6.

3.2 Procedural fairness and its genesis in administrative law

Procedural fairness owes its genesis to the common law doctrines of natural justice, notably, the *audi alteram partem* principle (the audi principle) and its twin partner, *nemo iudex in sua causa potest*.[183] At the bare minimum, these twin doctrines impose an obligation on the decision-maker to hear the other side of the story and to act fairly – the rule against bias (actual or perceived) when making a decision that either materially and adversely affects rights or legitimate expectations of any individual.[184] However, with the advent of our constitutional democracy, these doctrines have now been subsumed into the *Constitution* which now informs their content.[185] With guidance from the English law authorities, the Appellate Division[186] and subsequently, the SCA explained in *Chairman*: *Board on Tariffs & Trade v Brenco Incorporated ('Brenco')*[187] that the duty to act fairly entails the following:

3.2.1 "Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

[182] The court first ruled in the *Masetlha* case that it will not be appropriate to subject executive power to the requirements of procedural fairness, which is a "cardinal feature in reviewing administrative action". Contrary to this ruling, the court would later hold in *Albutt:* par. 50, 71-72, that the failure of the President to hear the views of the victims in question was procedural unfair without overturning its earlier decision in the *Masetlha* case.
[183] Burns & Beukes 2006: 318.
[184] See sec. 3 (1) of PAJA.
[185] *Pharmaceutical Manufacturers*: par. 33.
[186] *Doody v Secretary of State for the Home Department & Other Appeals* 1993 3 All ER 92 (HL) 106.
[187] 2001 JOL 8274 (A); 2001 4 SA 511.

3.2.2 The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.

3.2.3 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.

3.2.4 An essential feature 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.

3.2.5 Fairness will very often require that the person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

3.2.6 Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer".[188]

This is, however, not a hard-and-fast rule. Goldstone J explained in *Janse van Rensburg v Minister of Trade and Industry,*[189] that procedural fairness is both flexible and context-specific.[190] It is indeed this flexible and context-specific understanding of procedural fairness that has led the courts to import procedural fairness into the principle of legality in some cases and refused to do the same in other cases as will be seen below.

3.3 Cases in which procedural fairness was imported into the principle of legality

Although the courts, more specifically the Constitutional Court has been reluctant to import procedural fairness into the principle of legality as a separate ground of review, there are some cases in which the Court has imported procedural fairness into legality in order to review executive actions. These have been mostly cases in which the applicants were able to show that the inadequate consultation and the failure of the

[188] *Brenco*: par. 13.
[189] 2000 11 BCLR 1235 (CC); 2001 1 SA 29 (CC).
[190] See par. 24 of *Janse van Rendburg.*

decision-maker in the circumstances of the case affected the rationality of the impugned executive decision. For example, in *Wessels v Minister for Justice and Constitutional Development and Others ('Wessels')*,[191] the High Court per Van Der Merwe J held that: "the principle of legality, which includes rationality and accountability, imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision".[192] This case concerned the review of an appointment of a Regional Magistrate Court President by the Minister of Justice and Constitutional Development (the Minister) in terms of sec. 10 of the Magistrates' Courts Act, no 32 of 1944.[193] The applicant challenged the Minister's decision to appoint the second respondent on the basis that the Minister had failed to provide reasons for his decisions in terms of sec. 5 (3) of PAJA. Before the High Court, the Minister contended that the impugned decision was not administrative action as defined in sec.1 of PAJA but executive action and therefore not reviewable on the ground of procedural fairness.[194] Moreover, the Minister argued that, as the Magistrates' Commission's report to the first respondent constitutes reasons, it was not required of the first respondent to furnish any reasons for his/her decision.[195]

The High Court was called upon to determine among other issues the nature of the impugned decision (whether it was executive or administrative) and therefore subject to review. After venturing into a lengthy discussion on this issue,[196] the Court ultimately held that the Minister's action of appointing the second respondent as Regional Court President amounted to the taking of administrative action which is reviewable in terms of PAJA.[197] This conclusion according to the Court is supported by the contents of sec. 1 (gg) of the definition of "administrative action" in PAJA. Curiously, despite finding as it did (that the impugned decision was administrative in nature), the Court nevertheless went on to hold that: "…" the principle of legality, which includes rationality and accountability, imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision".[198]

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[191] (594/09) [2009] ZAGPPHC 81; 2010 (1) SA 128 (GNP) (2 June 2009).
[192] *Wessels*: 27.
[193] *Wessels*: 3.
[194] *Wessels*: 2, 6-7.
[195] *Wessels*: 2.
[196] *Wessels*: 9-14.
[197] *Wessels*: 22.
[198] *Wessels*: 27.

This proposition was subsequently given credence by the Constitutional Court which held in *Albutt,* that executive action had to be taken in a procedurally fair manner by virtue of the existing requirement of rationality.[199] This case concerned an announcement of a special dispensation by former President Thabo Mbeki in terms of which those who claimed to have been convicted for politically motivated offences could apply for Presidential pardon. After making numerous attempts to secure the participation of the victims in this process without success, a coalition of NGOs made an urgent application to the High Court to challenge the President's decision to deny the victims in question an opportunity to be heard. In arriving at its decision, the High Court concluded that the victims of crime have a right to be heard prior to the exercise of the power to grant pardon under s 84 (2) (j) of the Constitution.[200] The High Court further held that sec. 1 of PAJA defined "administrative action" to include the exercise of the power to grant pardon under s 84(2) (j), and the President was therefore subject to the procedural-fairness requirements imposed by PAJA.[201]

The applicant, who had applied for pardon under the special dispensation process, appealed to the Constitutional Court against the order of the High Court, and brought an application for direct access, challenging the constitutionality of sec. 1 of PAJA, should the court find that PAJA defined the exercise of the President's power to pardon as administrative action. Here again without venturing into discussion about whether the President's power to grant pardon under sec. 84 (2) (j) of the *Constitution* amounted to administrative action as defined in sec. 1 of PAJA, the Constitutional Court reviewed the decision by relying on the principle of legality. The Court found that: "it was not necessary for the Court to reach the question whether the exercise of the power under sec. 84(2)*(j)* constitutes administrative action and whether, upon its proper construction, PAJA includes within its ambit the power to grant pardon under sec. 84(2)*(j)*".[202] The Court held further that such questions must be left open for

[199] *Albutt*: par. 50.
[200] See specifically page 27 of *Centre for the Study of Violence and Reconciliation and Others v President of the Republic of South Africa and Others* (15320/09) [2009] ZAGPPHC 35 ('*Centre for the Study of Violence*') where Seriti J held as follows: "I cannot find any justification for allowing victims of crime to be heard prior to a prisoner being released on parole, but to deny the same right to a victim in the case of a pardon".
[201] *Centre for the Study of Violence*: 26.
[202] *Albutt*: par. 83.

another day, when a proper occasion to determine them is presented.[203] Ultimately, the Court held that:

> The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.[204]

Following this line of reasoning, the Court went on to state that:

> ("…") the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.[205]

This is the same conclusion that the SCA arrived at in *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others('Scalabrini').*[206] This case concerned an appeal from the Western Cape High Court in which the Scalabrini Centre of Cape Town ('Scalabrini') – a non-profit organisation established to assist migrant communities and displaced people, challenged the Director-General (DG) of the Department of Home Affairs' decision to close a Refugee Reception Office (RRO) in Cape Town. Before the Supreme Court of Appeal (SCA), Scalabrini argued among other things that the decision of the DG of the Department of Home Affairs to close the RRO in Cape Town constituted administrative action in terms of PAJA and that his failure to consult with organisations representing the interests of asylum seeker before closing the RRO was arbitrary and procedurally unfair.[207] After going into a lengthy discussion about whether the Director-General's decision constituted administrative action,[208] the SCA per Nugent JA (Lewis, Theron and Wallis JJA concurring), ultimately held that the DG's decision was policy-laden and polycentric.[209] This was so because according to the court:

> Where, and how many, offices should be established, will necessarily be determined by matters like administrative effectiveness and efficiency, budgetary constraints, availability of human and

[203] *Albutt:* par. 83.
[204] *Albutt*: par. 50
[205] *Albutt*: par. 72.
[206] (735/12 & 360/13) [2013] ZASCA 134 (27 September) 2013).
[207] *Scalabrini*: paras. 45-47.
[208] *Scalabrini*: paras. 48-57.
[209] *Scalabrini*: par. 56 where the court cites *Doctors for Life International v Speaker of the National Assembly* among other cases as authority for its finding.

> other resources, policies of the department, the broader political framework within which it must function, and the like.[210]

The learned judge went on to state that because of not being in possession of all that information, and not being accountable to the electorate, courts were not properly equipped or permitted to make those decisions.[211] However, instead of leaving the matter there and remitting it to the DG for reconsideration, the learned judge went on to hold that the decision was nevertheless not immune to judicial scrutiny. In other words, it could be reviewed under the principle of legality for want of procedural rationality.[212] Despite reading procedural fairness into legality, the Court rejected the argument on behalf of Scalabrini that there was a general obligation on those who exercise public power to afford a hearing to interested parties. The court reasoned that this takes the matter too far because "the very nature of representative government is that matters of government policy are properly to be ventilated in the appropriate representative forums".[213] However, following the precedent set by the Constitutional Court in *Albutt*, the SCA ultimately agreed with the *court a quo*'s findings and held that the DG's failure to consult with organisations representing the interests of refugee seekers in the circumstances of the case was arbitrary and procedurally irrational.[214] While there is no general duty to consult when exercising public power falling outside the purview of PAJA, the duty to consult in the circumstances of the case arose because of the special knowledge of the organisations to be consulted, of which the DG was aware.[215]

As can be seen, the court has failed to substantively explain why PAJA was not applicable in the circumstances of the case save to say that the function and not functionary is what matters. This ultimately allowed the Court to not only avoid applying PAJA but also fail to identify the nature of the exercised public power in question which could hardly be classified as executive. More recently, the Constitutional Court seems to have extended the obligation of procedural fairness to bodies exercising legislative functions. The case of *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others ('Speaker of the National*

[210] *Scalabrini*: par. 58.
[211] *Scalabrini*: par. 58.
[212] *Scalabrini*: par. 64: 'It is well-established that legality calls for rational decision-making.'
[213] *Scalabrini*: par.67.
[214] *Scalabrini*: par. 70-71.
[215] *Scalabrini*: par. 72.

Assembly v Public Protector')[216] seems to be the authority for that concerning development. This case concerned a direct appeal to the Constitutional Court by the Speaker of the National Assembly and the Democratic Alliance challenging the orders made by the Western Cape High Court, Cape Town (the High Court) which had declared unconstitutional some of the Rules governing the removal from office of heads and commissioners of chapter 9 institutions. In the first instance, the High Court held that it was not desirable to appoint a Judge to the independent panel mandated to consider whether there is prima facie evidence for the removal of a Chapter 9 institution office-bearer (the Public Protector in this case). Second, it held that: "the limitation of legal representation in rule 129AD(3) of the Rules, was irrational".[217] Before the Constitutional Court, the Speaker challenged the second order of the High Court among other things, and argued that the limitation on legal representation was rational because, "when section 181(5) of the Constitution provides that Chapter 9 office bearers are accountable to the National Assembly, it means that they are accountable personally".[218] This was countered by the respondent (Public Protector) who argued that the denial of full legal representation is a denial of the right to legal representation and, thus, of the guaranteed right to procedural fairness. The Public Protector further argued that the denial of full legal representation is irrational as the means selected are not rationally related to the objective sought to be achieved, namely, a fair and transparent process.[219]

In stark contrast to its earlier decision in *Masetlha,* the Constitutional Court unanimously found in favour of the Public Protector on the issue of legal representation and rejected the Speaker's argument that the Public Protector was not entitled to procedural fairness in the form of legal representation because Parliament was not an administrative body.[220] The Court reasoned that on the basis of Rule 129AD(2) (which states that the committee must ensure that the inquiry is conducted in a reasonable and procedurally fair manner), that a reasonable and fair procedure requires full legal representation.[221]

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[216] [2022] ZACC 1.
[217] *Speaker of the National Assembly v Public Protector*: par.3.
[218]*Speaker of the National Assembly v Public Protector*: par. 40.
[219]*Speaker of the National Assembly v Public Protector*: par.41.
[220] *Speaker of the National Assembly v Public Protector*: par. 47.
[221] *Speaker of the National Assembly v Public Protector*: par. 47.

3.4 Cases in which the courts refused to import procedural fairness into the principle of legality

Due to the Court's unwillingness and reservations to overturn its previous decisions, there are also cases in which the Constitutional Court has refused to import procedural fairness into legality review. These are mainly cases in which the court found that doing so will either impede effective and efficient public administration or hamper the executive from acting promptly; or cases in which the Court had found that it will not be in the best "interest of the public" to do so. One of those cases is the *Masetlha* case.[222] This case concerned the constitutional validity of two decisions by former President Thabo Mbeki who had first suspended and later terminated Mr. Masetlha's employment as head and Director-General of the National Intelligence Agency. The President did this by unilaterally amending Mr. Masetlha's term of office so that it expired within two days of the notice and just over 21 months earlier than the original term.[223] In a direct appeal to the Constitutional Court, Mr. Masetlha contended that the decision to dismiss or to alter his employment contract was not taken under sec. 209 (2) of the Constitution as the President had purported, but rather in terms of sec.12 (2) of the Public Service Act (PSA), which according to him does not confer express authority on the President or on anyone else to do so. In the alternative, he argued that if sec. 12(2) of the PSA conferred implied authority to amend or dismiss, then its exercise was the implementation of legislation and thus fell to be reviewed and set aside under PAJA as procedurally unfair.[224] Lastly, Mr Masetlha argued that the manner in which the power to dismiss under sec. 209 of the Constitution was exercised was inconsistent with the principle of legality.[225]

In arriving at its decision, the Constitutional Court first highlighted the exclusion of executive powers or functions of the President referred to in sec. 85(2)(e) from the definition of "administrative action", in sec.1 of PAJA. Having done so, the Court proceeded to hold that the exclusion meant that such powers were clearly not susceptible to administrative review under the tenets of PAJA even if they otherwise constitute administrative action.[226] Rejecting Mr. Masetlha's argument that the

[222] *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007).
[223] *Masetlha*: par. 1.
[224] *Masetlha*: par. 43.
[225] *Masetlha*: par. 45.
[226] *Masetlha*: par. 76.

President lacked the authority to dismiss him, the court held that the power to dismiss is a corollary of the power to appoint – and constitutes executive action and not administrative action as Mr Masetlha had argued. According to the Court, it would therefore not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action.[227] These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security.[228] As authority for this decision, the court relied on its earlier decision in *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal ('Premier, Mpumalanga')*[229] in which it held 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.[230]

This is the same caution that O'Regan ADCJ (as she was in that case) opined should be exercised when interpreting sec. 3 (1) of PAJA in her dissenting opinion in *Walele v City of Cape Town ('Walele')*.[231] As she explained in that case, the fact that sec. 3 (1) should be interpreted to promote the realisation of the constitutional right to procedurally fair administrative action, does not mean that a 'knee-jerk' reaction should follow, in terms of which sec. 3 (1) is interpreted so that a hearing is required in each and every case.[232] In her view, there are 'important countervailing factors' which the courts should consider – most evidently the fact that procedural fairness imposes a burden on public officials and that this burden should be managed by courts so that it does not unduly inhibit the ability of public officials to act effectively, efficiently and promptly.[233] Here again, effective and efficient public administration outweighed the requirements of procedural fairness as the appellant had called for.

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[227] *Masetlha*: par. 77.
[228] *Masetlha*: par. 77.
[229] [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).
[230] *Premier, Mpumalanga*: par. 41.
[231] 2008 (6) SA 129 (CC).
[232] *Walele*: par. 123.
[233] *Walele*: par. 123.

Similarly, in *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa ('ARMSA')*,[234] the Constitutional Court refused to import procedural fairness into the principle of legality and found that the President's decision was not reviewable on that ground. This case concerned an appeal to the Constitutional Court by a professional association representing the interests of regional magistrates – Association of Regional Magistrates of Southern Africa (ARMSA) to set aside and have reconsidered a determination made by the President of the annual salary increase of ARMSA's members. Before the Constitutional Court, ARMSA agued among other things that the President's refusal to increase the salary of Magistrates to the demanded percentage constituted administrative action subject to review in terms of PAJA and therefore to procedural fairness requirements in sec. 3 (1) of the Act. In a unanimous judgement, the Constitutional Court per Nkabinde J found on the contrary that the President's decision did not constitute administrative action in terms of PAJA but was rather executive – reviewable only under the principle of legality and therefore not subject to the requirements of procedural fairness.[235] Relying on the Court's decision in *Masetlha,* Nkabinde J proceeded to state that judicial review on the basis of legality can evaluate a decision only against a limited set of requirements – these included lawfulness and rationality.[236] Having held as such, she then went on to hold that "procedural fairness is not a requirement for the exercise of executive powers and ". . ." executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing was required by the enabling statute".[237] Ultimately, the Court refused to read procedural fairness into a legality review and to set aside the President's decision.

Perhaps the closest the Constitutional Court ever came to formulating a substantive and cogent approach to determine, in a given case of legality review, whether procedural fairness should apply was in its recent case of *Law Society of South Africa* cited in subsection 3.4 above. It was in this case that the Court had the occasion to clarify for the first time, the distinction between a procedural fairness review and a procedural rationality review and further attempted to clarify why and how its decision in *Masetlha* was not at variance with its subsequent decision and in *Albutt* and

[234] 2013 (7) BCLR 762 (CC).
[235] *ARMSA*: par. 59.
[236] *ARMSA*: par. 59.
[237] *ARMSA*: par. 45.

Simelane, perhaps in response to the academic opprobrium that those decisions had drawn. Without traversing the facts of this case at length, it suffices for our purpose to simply state that it involved a confirmation of constitutional invalidity from the Gauteng Division of the High Court, Pretoria (High Court) brought by the Law Society of South Africa and six other Zimbabwean landowners (the applicants) who challenged former President Jacob Zuma's decision (in agreement with other Southern African Development Community (SADC) leaders) to suspend the operations of the SADC Tribunal in so far as that decision relates to our President's role in it.[238] In essence, the applicants challenged the constitutionality of the signature he appended to the 2014 Protocol, which sought to take away the Tribunal's power to adjudicate individual disputes against a State party in land expropriation without compensation disputes.

In its majority judgment per Mogoeng CJ, the Constitutional Court first made it clear that it was reviewing the President's decision on the basis of the principle of legality which in that case meant that he may: 'only exercise power that was lawfully conferred on her [him] and in the manner prescribed', which had to be 'exercised in good faith and should not be misconstrued.'[239] More importantly, the Court explained that this was not a procedural fairness review but a procedural rationality review. The difference between these two grounds of review, the Court explained is that: '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 against him or her', while procedural rationality is aimed at 'ensuring that there is a rational connection between the exercise of the power . . . and the purpose sought to be achieved by the exercise of that power'.[240] The question, in that case, the Court further explained was therefore:

> Not whether anybody was heard or not heard or dealt with in terms of a fair or arbitrary and oppressive process. It is whether the procedure for the exercise of the power to suspend the Tribunal and amend the jurisdiction of the Tribunal is rationally related to the realisation of the purpose for which the power to amend the Treaty was conferred and exercised by our President together with other SADC Heads of State and Heads of Government, on behalf of Member States.[241]

The Court asked this question after it had answered it in the affirmative in paragraph 56 where it held that the President acted unlawfully by following an impermissible or

[238] *Law Society of South Africa*: par. 9.
[239] *Law Society of South Africa:* par. 48.
[240] *Law Society of South Africa*: par. 64.
[241] *Law Society of South Africa*: par. 65.

irregular procedure. Even worse according to the Court was that, not only did the President not have the power to not appoint or renew the terms of Members of the Tribunal but also lacked the authority to suspend its operations.[242] Exactly how the Court in its most recent case of *Speaker of the National Assembly v Public Protector* seemed to have taken a retrograde step on this sound and lucid judgment can only be explained by its failure to formulate a substantive theory of deference that will allow it to determine in a given case of legality review, whether to intervene and subject exercises of public power to procedural fairness or exercise deference. I expand on this aspect more broadly in chapter 4 below. For now, it suffices to state that such a substantive theory of deference is required not only to prevent the Court from bypassing PAJA as some scholars have argued but also to keep it focused, disciplined, and far from exceeding its constitutional review mandate – thereby encroaching on the exclusive domain of other branches of government.

3.5 Contrasting procedural fairness in the case of *Masetlha* and *Speaker of the National Assembly v Public Protector*

It will be recalled that in *Masetlha,* the Constitutional Court rejected Mr Masetlha's argument that he was entitled to be heard (a key aspect of the procedural fairness requirement) before his dismissal could be effected. Having found that no employment contract was entered into between Mr Masetlha and the government and that the Labour Relations Act did not apply to the dispute at hand, the Constitutional Court then opted to locate the President's power to appoint and dismiss the head of the National Intelligence Agency broadly in Chapter 11 of the Constitution, more specifically sec. 209 (1) and (2).[243] This was despite the Court's finding that sec. 3 (3) (a) of the Intelligence Services Act (ISA) is the legislation contemplated in section 209(1) of the Constitution and couched in terms similar to section 209(2).[244] I proceed from the premise that the Court's finding on this aspect, seems (with respect), to have been a convenient and expedient approach couched to bypass PAJA in the review of the exercise of public power in question. That is primarily because, had the Court opted to locate the President's power to appoint and dismiss in sec. 12 (2) and (4) of the

[242] *Law Society of South Africa:* par. 56.
[243] *Masetlha*: par. 64.
[244] *Masetlha*: par. 69.

Public Service Act, 1994 (PSA) as Mr Masetlha had contended,[245] it would have been confronted with the often avoided cumbersome task of having to test the decision for PAJA compliance and more specifically, subjecting it to procedural fairness requirements as contained in the Act. Alive to the difficulty of undertaking this exercise, the Court opted instead to seek sanctuary in the generous and flexible principle of legality. This is not to suggest that the President's exercise of power in this case was administrative in nature – it may so be that the exercise of power under review was indeed executive in nature and subject only to legality review as the Court found. The bone of contention here is that the Court's failure to test it under PAJA was another missed opportunity to further clarify what constitutes administrative action subject only to PAJA and executive action, subject only to legality review. This is especially true considering the fact that the public power in question was argued to have been sourced not only from the Constitution but from the national legislation as well (the ISA). This approach to judicial review lends credence to what some scholars have dubbed as "PAJA-avoidance" discussed elsewhere above.[246]

What is even more concerning is how the court found the power to dismiss implicit in sec. 209 of the Constitution but refused to read sec. 12 (2) and (4) of the PSA to imply same. It is also difficult to understand how after finding that sec. 3 (3) (a) of ISA was applicable to the impugned decision, the Court still proceeded to review the President's decision broadly in terms of legality and not PAJA. After all, subsidiarity requires that PAJA which is more specific should be applied first before reliance can be sought on the all-encompassing principle of legality. This then makes it difficult to resist the inference that the court might have followed the said approach out of 'judicial expedience' or simply to avoid PAJA. Moreover, after locating the President's power to dismiss in sec. 209 read with sec. 3 (3) (a) of ISA, the court then proceeded to review the President's decision broadly in terms of legality and refused to read procedural fairness into it. As a justification for this refusal to read procedural fairness into the legality review,[247] the Court held that the power to dismiss was a corollary of

[245] See specifically paragraphs 66-67where the court rejects Mr Masetlha's argument that "the power to dismiss is only found in the context of a contract, envisaged in section 12(4)(c) of the PSA, or may be implied in section 3(3)(a) of ISA. And because the power to dismiss can be found only in a statute, its exercise is administrative action and is therefore susceptible to judicial scrutiny under PAJA".
[246] See for example, Hoexter 2017: https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of legality/?msclkid=f9cbec4ca2a311ec8bf374433d862dd4 (accessed 7 August 2022).
[247] *Masetlha*: par. 77.

the power to appoint and therefore executive in nature – not susceptible to review under PAJA.[248] The Court further reasoned that "It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action".[249] In the Court's own words:

> 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.[250]

The above notwithstanding, the Court also seemed to suggest that the personal rights of the applicant – particularly his right to be heard and consulted before the decision could be made was irrelevant in the case and outweighed by the public interest and national security concerns.[251] These reasons differ in material terms from those which were relied upon for importing procedural fairness into what seemed to be a legality review in *Speaker of the National Assembly v Public Protector.* It will also be recalled that the Court held in this case that commissioners and Heads of Chapter 9 institutions were entitled to legal representation because they may not do a "sufficiently good job in cross-examining witnesses or advancing oral submissions due to anxiety or stress resulting from the pressure of the proceedings".[252] Indeed, one would have hoped that the Court would consider the same factors which informed its decision not to import procedural fairness into the legality review in the *Masetlha* case, namely: "that it would not be appropriate to constrain legislative powers to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action" in *Speaker of the National Assembly v Public Protector* as well.

Alas, the Court proceeded as if from a clean slate. More importantly, the Court's ruling on this matter runs the risk of being interpreted to suggest that the personal interests of the Heads and Commissioners of Chapter 9 institutions outweighed other public interests such as holding them accountable to Parliament personally as the Speaker had argued. This is indeed contrary to the Court's own ruling in *Masetlha* where it held that the public interests – national security vitiated against Mr Masetlha's personal interests. To be fair, this case was not about Parliament's decision to adopt the impugned rules in question but the constitutional validity of the rules themselves. The

[248] *Masetlha*: par. 77.
[249] *Masetlha*: par. 77
[250] *Masetlha*: par. 78.
[251] See specifically *Masetlha*: par. 86.
[252] *Speaker of the National Assembly v Public Protector*: par. 47.

Court was clear that the former (the decision to adopt the rules) is excluded from the definition of administrative action,[253] but was less clear about what it is that it tests the rules themselves against for constitutionality (i.e., whether in terms of sec. 33 of the Constitution or legality). While the Court did not expressly state what it reviews the rules in terms of, it can be reasonably inferred from the judgment that it did so in terms of the principle of legality. This is in part because, such decisions are simply not susceptible to PAJA/sec. 33 review since they are taken through a majority vote by Parliament or one of its committees. More importantly, the separation of powers doctrine would also inform the Court's level of scrutiny if not demand that it exercises deference. This then begs the question: Why did the Court evaluate the rules against procedural fairness, as though that forms part of legality? Because so it seems to say, rationality requires (seemingly referring to the *Albutt* kind of rule) that the rules must be rationally related to the purpose of achieving 'personal accountability');[254] and because the rules already make provision for a very large measure of procedural fairness.[255] This is unfortunately where things get murky. The Court seems, with respect, muddled about what the purpose is of importing procedural fairness into this context. This is also a problematic development and broadening of a legality review.

Moreover, the Court's ruling in this case runs the risk of further being interpreted as conflating procedural fairness with procedural rationality and applying the two interchangeably. This is rather unfortunate, because there is a clear distinction between these two concepts established by the Court in its previous decision. That is to say, procedural fairness is aimed at "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" against him or her, while procedural rationality is aimed at "ensuring that there is a rational connection between the exercise of the power ("…") and the purpose sought to be achieved by the exercise of that power".[256] However, as Hoexter has cautioned, this distinction is indeed a fine one and may be difficult to apply in practice,[257] hence, perhaps, the Court's confusion about it. Second, even if it were to be demonstrated that the Court did not conflate procedural fairness with procedural

[253] *Speaker of the National Assembly v Public Protector*: par. 105.
[254] *Speaker of the National Assembly v Public Protector*: par. 42.
[255] *Speaker of the National Assembly v Public Protector*: par. 43.
[256] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51 ('*Law Society of South Africa*'): par. 64.
[257] Hoexter 2011: 55.

rationality, it nevertheless seemed in some way to suggest that procedural fairness is required to protect the personal rights of the Public Protector (or whatever other Chapter 9 institution head may be involved in impeachment proceedings in future). However, *Masethla* was clear on this aspect: in that kind of high position the personal rights of the incumbent are almost irrelevant, they do not matter. What matters in such an instance according to *Masethla* is the public interest – procedural fairness is supposed to be imported here into legality to protect the public interest, to ensure that the highest level and quality of accountability is exacted. This is, with respect, perhaps where the Court got it all wrong, particularly by importing procedural fairness into legality for the same purpose that it applies in administrative law, to protect individual rights in stark contrast to *Masetlha* and its own previous decisions. Third and lastly, the Court's ruling in this matter has blurred the differences between the "minimum" rationality threshold under the principle of legality and the more rigorous rationality review under PAJA – the requirement of rationality has spawned further duties in the form of procedural fairness and the giving of reasons.[258]

To make matters worse, Ngcobo J held in a dissenting judgment in the *Masetlha* case, that the existing requirement of rationality demanded procedural fairness. This is so because according to him: "hearing both sides tend to minimise arbitrariness, it was irrational for the President not to give Masetlha a hearing before firing him".[259] More recently, procedural fairness was recognised as a stand-alone ground of review under legality in the *Motau* case. In that case, rejecting the Minister's submission who sought to rely on *Masetlha* to advance the argument that procedural fairness was excluded as a stand-alone ground of review for the review of executive action under legality, the Court held that: "procedural fairness obligations may attach independently of a statutory obligation in virtue of the principle of legality".[260] Citing *Albutt,* the Court further held that the 'President was required, as a matter of rationality, to allow some form of participation by interested persons when issuing pardons to prisoners under a special dispensation".[261] The suggestion, of course, is that even the Minister was required to allow some form of participation by the affected party in order for his decision to pass the rationality test. According to the Court, even if procedural fairness

[258] Hoexter 2015: 165.
[259] *Masethla*: par. 184-186.
[260] *Motau*: 82.
[261] *Motau*: 82.

as commonly understood did not apply, "our law has a long tradition – which was endorsed by this Court in *Mohamed* – of strongly entrenching *audi alteram partem* ("hear the other side"), which attains particular force when prejudicial allegations are levelled against an individual"[262] The result of this is that:

> There is little or no advantage today in bringing a review challenge under PAJA rather than under the principle of legality. Indeed, with bland disregard for the principle of subsidiarity, the courts have increasingly allowed the legality track to be used even in respect of decisions that may amount to 'administrative action' and have not actually been shown not to qualify as such.[263]

3.6 Possible reasons for the importation of procedural fairness into legality review

Notwithstanding all the above, there are several substantive factors and cogent reasons which the courts could have relied on or can generally rely on in the future to justify the importation of procedural fairness into legality review legality. First, the Constitutional Court's willingness to import procedural fairness into legality in some cases seems to be necessitated by the undesirability of leaving executive actions completely unchecked and precluded from judicial scrutiny. This is an important consideration given the general loss of public trust in the executive due to allegations of rampant corruption and maladministration.[264] Moreover, there has been a general deprecation directed at the executive in recent times and more reliance placed on the courts to resolve even pollical disputes which should ordinarily be debated and resolved in Parliament.[265] In turn, this has placed the courts in a precarious position – they are generally criticised if they do not intervene and review executive actions by subjecting them to the more demanding procedural fairness requirements and criticised if they do. One can only imagine the deprecation and allegation of "capture" the Constitutional Court would have been subjected to in the public domain had it refused to intervene in the recent matter of *Speaker of the National Assembly v Public*

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[262] *Motau*: 83.
[263] Hoexter 2015: 165.
[264] More recently, this has been brought to light by the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state.
[265] Comaroff & Comaroff 2008: 7 for example, has expressed the view that: "politics itself 'is migrating to the courts [" …"] conflicts once joined in parliaments, by means of street protests, mass demonstrations, and media campaigns, through labour strikes, boycotts, blockades, and other instruments of assertions, tend more and more […] to find their ways to the judiciary".See also the case of *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017) for example of an issue that should have been debated and resolved in Parliament through political lobbying.

Protector and ruled that the suspended Public Protector should be afforded legal representation. After all, social media is replete with examples of such allegations whenever the courts rule against her or any other public figure like former President Jacob Zuma.[266] As a result of this, the temptation to read procedural fairness into legality when reviewing exercises of executive power becomes difficult to resist in such a highly charged and toxified political environment. As I will argue below, great benefits can be derived from the reading of procedural fairness into legality when reviewing executive actions. However, it is incumbent upon the courts to formulate a coherent and cogent approach to determine in each case of legality review, whether procedural fairness will apply – otherwise, the risk of sliding into the slippery slope of judicial activism/overreach is inevitable.[267] Judicial activism/overreach occurs when "judges allow their personal views about public policy, among other factors, to guide their decisions".[268] In South Africa, the emergence of this phenomenon has been attributed to factors such as: "the enforceability of socio-economic rights, the emergence of the doctrine of legality, the power of the judiciary to make structural interdicts and – much more importantly – the theory of transformative constitutionalism".[269] The net effect of this has been to limit the operational space of the political departments of government in favour of the judiciary.[270] The courts are also likely to lose legitimacy because of the general perception that they are increasingly becoming more engaged in public and

[266] Mr Zuma himself has accused the Constitutional Court of 'dictatorship'; See Nkanjani 2021:'I'm a victim in this emerging constitutional dictatorship': Five key takeouts from Zuma's letter (timeslive.co.za) (accessed 19 May 2023); In a Keynote Address to Access to Justice Conference in 2011, former President Jacob Zuma further expressed the view that: "There is no doubt that the principle of separation of powers must reign supreme to enable the efficiency and integrity of the various arms of the State in executing their mandates. Encroachment of one arm on the terrain of another should be frowned upon by others, and there must be no bias in this regard. In as much as we seek to respect the powers and role conferred by our constitution on the legislature and the judiciary, we expect the same from these very important institutions of our democratic dispensation. The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. The powers conferred on the courts cannot be superior to the powers resulting from the political and consequently administrative mandate resulting from popular democratic elections. Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country. This interferes with the independence of the judiciary. Political battles must be fought on political platforms".
[267] See generally Nyane 2020.
[268] Blacks Law Dictionary (8th ed 2004).
[269] Nyane 2020: 321.
[270] Vile 1998: 1.

political affairs than the politicians themselves.[271] Once the courts lose legitimacy, the potential for a constitutional crisis becomes even more pronounced because they ultimately rely on the executive to enforce their own judgments and budget allocations. As the Constitutional Court held in *S v Mamabolo*:[272]

> ("…") In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state.[273]

Judicial activism is also undesirable in a constitutional democratic society like ours where the courts should ideally exercise their power of judicial review with circumspection and deference to other branches of government. Moreover, "the excessive power of the judiciary has the potential to distort the desired balance between the three key branches of government; thereby judicialising the functions of the other two political branches".[274] Indeed, as Justice Sachs once opined: "undue judicial adventurism can be as damaging as excessive judicial timidity".[275] As I will argue in chapter 4 below, the difficulty for the courts has always been to strike a delicate balance between these two.[276] In fact, even the Constitutional Court justices have found themselves at loggerheads on this aspect. For instance in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another ('EFF 2')*,[277] former Chief Justice Mogoeng Mogoeng characterised the majority judgment as "("…") a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament"[278] while the majority of the justices per Jafta J described his views as "misplaced and unfortunate".[279] Second,

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[271] Nyane 2020: 323 "the courts have expanded their province to deal with questions that they were prohibited from dealing with in the past. It is not limited to the courtroom only; it also has implications for the general management of public affairs."
[272] (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001).
[273] *S v Mamabolo*: par. 16.
[274] Nyane 2020: 319.
[275] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC): par. 156.
[276] Mclean 2010: 445 'The notion of constitutional deference has taken root in South Africa, but the real challenge is to maintain the sensitive balance between deference and interference'.
[277] (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017).
[278] *EFF 2*: 223.
[279] *EFF 2*: 218.

there is also a strong sentiment shared by academics, lawyers, and judges that a radical departure from the apartheid culture of 'symptomatic' and 'gross unreasonableness' is required, and that a new 'culture of justification' when exercising public powers needs to be crafted. In other words, the second reason for the Constitutional Court's reading of procedural fairness into legality review is psychological.[280] This can also be seen in the substantial modification of the *Wednesbury*-like reasonableness ground in sec. 6 (2) (h) of PAJA which has been generally viewed as: "too redolent of the past to be acceptable"[281] and therefore since reformulated to only require that the impugned decision simply be one that a reasonable decision-maker could reach[282] to pass the reasonableness review test. As I argue in chapter 4 below, this reformulation of PAJA's more deferential approach to judicial review shows that the Court has some intentions to follow the narrow approach to deference – that is an interventionist approach to judicial review under which the courts exercise deference towards the administration only under limited or exceptional circumstances. Third, as Hoexter has argued "it is difficult to think of a decision whose rationality would not be enhanced by hearing both sides impartially".[283] For example, in *Scalabrini,* the Court reasoned that "the failure to consult with interested parties before making the decision rendered it irrational — more particularly because the authorities had undertaken to consult with organisations including the respondent on any proposal to close the Cape Town office".[284]

Fourth, procedural fairness can be thought of as an important element of the rule of law which by its very nature promotes a number of very important values in a constitutional democratic order.[285] As the Court held in *Janse van Rensburg NO v Minister of Trade and Industry,*[286] one of those democratic values is that procedural fairness improves the quality and wisdom of decision-making and also demonstrates respect for the dignity of the participants.[287] More importantly, procedural fairness also serves to promote the constitutional values of transparency, accountability and

[280] Hoexter 2015: 185.
[281] Hoexter 2015: 185.
[282] See *Bato Star Fishing*: par. 44 where the Court defines an unreasonable decision as one that a reasonable decision-maker could not have reached as opposed to one that this is unreasonable that no reasonable decision-maker could have reached as defined in sec 6 (2) (h) of PAJA.
[283] Hoexter 2015: 181.
[284] *Scalabrini*: 70-72.
[285] Raz 1997: 201.
[286] 2001 (1) SA 29 (CC).
[287] Joseph v City of Johannesburg 2010 (4) SA 55 (CC).

responsiveness to mention but a few.[288] Fifth, the Court's reading of procedural fairness into the principle of legality seems to also accord with Rosalind Dixon's idea of "responsive judicial review".[289] This is the idea that "in engaging in judicial review, courts should be responsive to the distinctive nature of adjudication as a practice, and in particular their responsibility to provide a hearing to individuals, and to justify their decisions to individuals and groups disappointed by the result of a decision".[290]

Responsive judicial review is also understood to have important procedural virtues. One of these is the right to be heard – which is an important determinant of the perceived legitimacy or fairness of a decision, and therefore the willingness of those disappointed by it to abide by relevant outcomes.[291] To repeat the obvious, the right to be heard generally requires three things: (i) the opportunity for an individual to voice a grievance; (ii) a willingness on the part of the tribunal hearing the grievance to engage in "meaningful moral deliberation" or give "good" reasons for the decision; and (iii) for a decision-maker to reconsider its decision, or action, in light of the grievance and that process of reasoning.[292] It provides individual litigants with the right to challenge decisions adversely affecting them, and to make arguments as to why those decisions are not in fact justified.[293] To do so effectively, however, courts must ultimately offer reasons that could reasonably satisfy "the individual that his or her matter has been considered" in a fair and impartial manner.[294] The same is true for a decision taken by an executive decision-maker – his/her decision can only be procedurally fair if the individual whose rights have been adversely affected has been given an opportunity to make arguments as to why that decision is not in fact justified. This not only improves the quality of the final decision taken but confidence in the public administration in general. For example, it has also been held that where a public

[288] See the dissenting judgement in *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) per Ngcobo J; Murcott 2015: 151.
[289] See Dixon 2023.
[290] Dixon 2023: 280.
[291] Dixon 2023: 280.
[292] Dixon 2023: 281.
[293] Cohn 2021: 289.
[294] Harel & Shinar 2018: 17.

functionary fails to provide reasons for his/her impugned decision, it can be assumed that the decision is irrational.[295]

Against this backdrop, it might well be that the importation of procedural fairness into the principle of legality in South Africa is sometimes informed by the courts' recognition of the fact that the right to be heard ensures compliance with court orders, as well as a sense of dignity and respect on the part of citizens. This, however, does not mean that courts must accept the arguments of every individual before them, or group affected by a public functionary's decision, or that courts must directly address all of the arguments a party raises in case. As it shall be seen below, there may be powerful prudential reasons for them not to do so. What is suggested here is that courts must assure losing parties, and those more broadly disappointed by an administrative decision, that their arguments and concerns have been heard and treated with respect.[296] Another substantive reason for importing procedural fairness into legality review is that the approach is inherently democratic and avoids the dangers associated with unscrupulous exercises of public power which may be detrimental to the public. This is so because:

> It adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.[297]

This understanding of judicial review accords with Dyzenhaus' notion of law as a culture of justification – which like the idea of responsive judicial review, seeks to promote the idea that parties are entitled to participate in decisions which affect them and accepts that the role of the judiciary and hence judicial review is to foster a culture of democracy rather than create an environment with exaggerated deference towards the administration of the day.[298] There are several ways for courts to do this beyond directly reading procedural fairness into legality review. Courts can, for example, check if the decision-maker has framed its final decision as a "letter to the loser" in a manner that provides cogent reasons – that is, a reasoning that shows a posture or tone of respect toward the losing party, and a narrative justifying their decision that combines

[295] *Wessels*: 26: "The responsible minister's failure to furnish reasons, seen in the light of the aforegoing, cannot be seen other than proof that the administrative action was taken without good reason".
[296] Dixon 2023: 281.
[297] Dyzenhaus 1997: 305.
[298] Dyzenhaus 1997: 302.

appeals to both universal and national values.[299] Whether judicial review in South Africa is able to achieve this level of scrutiny is beyond the scope of this dissertation.

3.7 Conclusion

I argue in this chapter that the prevailing view's insistence that PAJA and the principle of legality should not be used interchangeably and that instead, they should be applied separately, within each of their scopes of application, has inadvertently led to the burgeoning of the principle of legality. This principle has now developed to subsume many of the grounds of review of under PAJA such as procedural fairness and procedural rationality. Despite not being in compliance with the principle of subsidiary and eroding PAJA's legitimate position in our constitutional democracy, the development of legality in the manner in which the Court has developed it (to include procedural fairness requirements) can nevertheless be seen as the courts' (particularly the Constitutional Court's) creative attempt to bring all exercises of public power under some degree of public law control (especially executive actions). More specifically, procedural fairness has been argued to improve the quality and wisdom of decision-making and to also demonstrates respect for the dignity of the participants.[300] Importantly, procedural fairness serves to promote among other Constitutional values, accountability, transparency, responsiveness, and public participation.[301] Lastly, the Court's development of legality in that fashion could also be its way of formulating a theory of responsive judicial review as enunciated by Dixon.[302]

Moreover, it can also be seen as a break away from the apartheid culture of lack of justification for exercises of public power and exaggerated deference by the courts to the administration. Justifiable as this development of legality may be, it is nevertheless still prone to criticisms precisely because, the process does not seem to be principled and consistent. For example, there are cases in which procedural fairness has been read into the principle of legality and there are also cases in which the courts have refused to do so. The reasons offered in each case have differed – making it difficult to discern in advance whether a review court will be susceptible to reading procedural

[299] Dixon 2023: 281.
[300] Joseph v City of Johannesburg 2010 (4) SA 55 (CC).
[301] See the dissenting judgement in *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) per Ngcobo J; Murcott 2015: 151.
[302] See generally Dixon 2013.

fairness into legality or not and what reasonable cause would a litigant have to show. Moreover, as I argue in chapter 4, the courts have generally failed to develop a principled, substantive approach to determining in a given case, whether PAJA or legality should apply.

CHAPTER 4

Have our courts managed to develop a principled, and substantive approach for determining in a given case of legality review, whether procedural fairness should apply?

4.1 Introduction

While it is beyond the scope of this dissertation to formulate a principled and substantive approach to determining a given a case of legality review, whether procedural fairness should apply, an attempt is made in this chapter to propose general public law principles and concepts which might inform such an approach. For example, in formulating such an approach, reliance can be placed on the doctrine of judicial deference. This will ultimately ensure that reviewing courts accord the necessary respect to the exclusive domains of other branches of government. This respect for the exclusive domains of other branches of governement is especially important in our current dispensation where the courts are often tempted to import procedural fairness into legality review as was discussed in chapter 3. However, this theory of deference cannot be assumed, it must be demonstrated. Hence, this chapter begins with a discussion of what deference entails and how it has been conceptualized in South Africa. This is then followed by a discussion of deference in similar foreign jurisdictions like Canada, Finland and Australia. The aim of this comparative analysis is to show there are similar foreign jurisdictions from which South African courts can borrow a theory of deference to enrich and inform our own, especially if it is found that ours is not helpful in determining whether, in a given case of legality review procedural fairness should apply. It will nevertheless become clear from this discussion that the courts in the selected foreign jurisdictions have also generally struggled to formulate a theory of deference to inform their approach to judicial review.

Moreover, the concept of representative democracy can also serve as an important element to determining whether in a given case of legality review, procedural fairness should apply. This is so because at the very least, representative democracy recognises that not everyone can occupy public office at the same time and that those who are elected into public are empowered to not speak but act on behalf of the public at large. Effectively, this means that their actions are not only legimate but should also

be accorded some level of respect and not be unduely interfered with. Failure to recognise the centrality of this is likely to result in a situation where executive actions especially those are polycentric in nature are subjected to procedural fairness requirements as we have seen in chapter 3. This is an undesirable outcome as shall be argued elsewhere below.

Having laid this foundation, I then proceed to deal with the question of whether our courts have managed to formulate a substantive and cogent theory of deference that can be relied upon to determine whether in a given case of legality review, procedural fairness should apply. In other words, I ask whether our courts have managed to develop a theory of deference or an approach to judicial review which does not border on technicalities to distinguish what constitutes an administrative action, subject to procedural fairness review under PAJA, and public conduct subject to procedural fairness review under legality. A corollary question to this that I ask is what substantive factors should guide the courts in the exercise of their judicial review powers or in determining whether to intervene or exercise deference. These are important questions to ask because ultimately, the choice that a court makes whether to subject an exercise of public power to procedural fairness review under PAJA or legality is deference in action. This is so because in principle, if a reviewing court elects to apply legality instead of PAJA, it is choosing a less exacting level of review, i.e. it is choosing to be more deferential to the decision-maker in question. The thin line between these two pathways of review gets blurred when a reviewing court elects to review exercises of public power in terms of legality but still subject to procedural fairness requirements (which is a separate ground of review under PAJA). It will be seen from the discussion that follows that, despite their tendency to expand their scope of review in some cases by subjecting non-administrative actions under legality's procedural fairness, the courts in South Africa generally prefer to respect the exclusive domain of other branches of government. In other words, judicial review in South Africa seems to lean more towards what I call the broad conception of deference. This is in contrast to how deference is exercised in other foreign jurisdictions like Finland and Australia where for example, the courts are specifically empowered to exercise deference only under limited or exceptional circumstances. To put it slightly differently, the Courts in both Finland and Australia (a common law jurisdiction like South Africa) favour the narrow approach to deference as they are empowered by the Constitution and legislation to

intervene and protect the fundamental human rights and freedoms of the citizens against abuse of power from public authorities. As mentioned elsewhere above, I refer to these foreign jurisdictions to demonstrate that whether the courts in South Africa elect to formulate a broad approach to deference (as in Canada) or the narrow approach to deference (as in Finland and Australia), they are not without established precedents to follow. They can borrow some elements of the theories/approaches to deference from these foreign jurisdictions to enrich our own – obviously, with some substantial modifications to suit our context.

I start in 4.2 below with a discussion of what deference entails and how some administrative law scholars have conceptualised it. I then proceed with a discussion on how deference has been defined in administrative law scholarship and a further discussion on the question of whether deference should be exercised on questions of law, merits or facts in 4.3 and 4.4 respectively. This is followed by a brief discussion of some of the weaknesses in our courts' attempt to formulate a substantive theory of deference, and a broader discussion of the general themes that can relied upon to formulate such a theory of deference which can be used to determining in a given case of legality review, whether procedural fairness should apply. Having discussed this, the chapter moves on to look at the different approaches to deference in other foreign jurisdictions like Canada, Finland and Australia in 4.5, 4.6, 4.7, 4.8, 4.9, 4.10 and 4.11 11 respectively from which South African courts can borrow to inform and enrich our own understanding of the doctrine of deference. Finally, I provide a summary of the discussion in the whole chapter in 4.12.

4.2 What does deference entail and how have some administrative law scholars proposed it should be understood?

In South Africa, it is trite law that once a court has determined that the impugned exercise of public power is administrative in nature and subject to PAJA, said would be reviewed in terms of sec. 6 (1)-(2) of PAJA - which provides the grounds of review beyond which the courts must be deferential to the decision-maker.[303]By way of an example, this provision allows for the review of administrative action that amongst other things, not rationally connected to: (aa) the purpose for which it was taken; (bb)

[303] The grounds of review under sec. 6 (2) include rationality, reasonableness, abuse of discretion – acting for an improper purpose, fettering, failure to take
account of relevant factors, taking account of irrelevant factors, and bad faith.

the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator.[304] These are some of the grounds of review under PAJA which also determine a court's jurisdiction in administrative law proceedings. tthe In practice, "when the jurisdiction of a court is expressly limited by a law, constitutional or primary, then the court simply lacks jurisdiction".[305] Put slightly differently, a reviewing court does not have a discretion to review an exercise of public power in terms of PAJA once it has been established that none of the grounds of review under sec. 6 (2) of PAJA are applicable, unless of course if such a review is performed under the principle of legality. In such a case, the exercise of public power in question will have to be non-administrative action. Against this backdrop, it is apposite to define what deference entails and outline some of the attempts administrative law scholars have made to propound a theory of deference both in South Africa and other foreign jurisdictions like Canada, Australia and Finland from which South Africa courts can borrow to enrich our own.

4.3 Defining deference

To start off with, deference can be thought of as an element of the principle of separation of powers[306] and can loosely be defined as the weight and respect that the courts should afford to the decisions of other branches of the government. It is concerned with the question of when, why, and how reviewing courts should defer to other branches of government and the standards/grounds courts should adopt when reviewing the public conduct of said branches.[307] In other words, deference is the bulwark against judicial interference into the exclusive domains of those branches – "a recognition of the fact that the law itself places certain administrative actions in the

[304] See sec. 6(2) (f)(ii) of PAJA.
[305] Zhu 2019: 6.
[306] See *Bato Star Fishing*: par. 46 per O'Regan J and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC): par. 66 where the Constitutional Court expressed the view that "the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy ("…") It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature". However, it must be mentioned that the idea of deference as an element of the separation of powers doctrine is not universally accepted. Quinot and Marre 2016: 453 for example, have taken issue with this proposition asked whether deference is an expression of the separation of powers itself, whether deference complements the doctrine, or whether deference merely relies on the separation of powers.
[307] Zhu 2019: 2.

hands of the executive, not the judiciary".[308] It is also concerned with the question of how courts should reconcile law and politics and how they should determine an appropriate standard of review in relation to the facts of each particular case.[309] Or to put another way, "what are the proper boundaries to the respective powers of different branches of government, and who decides on where those boundaries are drawn".[310] Courts generally afford deference for two reasons: "the desirability of respecting decisions made by democratically legitimate decision-makers, and the practical advantages that inhere in relying on the institutional competence and expertise of the other branches of government".[311]

4.4 Deference on questions of law, merits or facts – the narrow or broad approach to deference?

The above notwithstanding, there is an ongoing debate in administrative law scholarship on the question of whether the courts should afford deferential treatment to the decision-maker on questions of law, merits or facts. In other words: "Whose interpretation of statute law should prevail — that of the Judge or that of the administrative decision-maker"?[312] Different jurisdictions adopt different approaches and answers to this question. For example, in Canada, this question was previously thought of as turning into sustantive review – which embraces questions of legality as well as of merits.[313] This is what I call the narrow approach to deference – that is to say, deference only under limited circumstances. In other words, the courts would intervene and review administrative actions on both questions of law and merits. However, recently, the line between legality and merits in this part of the world has increasingly been questioned, and this is part of the background and reasons for the acceptance in that jurisdiction of deference on questions of law as well as on the merits.[314] This being the case, "the usual standard of review on issues of statutory interpretation is now 'reasonableness' — only a few special categories of cases are said to attract a "correctness" standard that involves the court substituting its own

[308] *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd ('Phambili Fisheries')* 2003 (6) SA 407 (SCA): par. 50.
[309] Davis 2006: 33.
[310] Davis 2006: 23.
[311] Henkels 2017: 185.
[312] Taggart 2008: 195.
[313] Elliot & Wilberg 2015: 6.
[314] Elliit & Wilberg 2015: 6.

view".[315] This is another way of saying that the courts in Canada are starting to accept that deference should be exercised on a range of legal disputes involving the public and public functionaries. Simply put, Canada is starting to embrace the broad approach to deference – the idea that courts should generally defer to the decisions of public functionaries. In stark contrast, the topic is rarely even mentioned in the UK, New Zealand or Australia. Courts in those jurisdictions take it as a fundamental constitutional principle, largely without any questioning, that questions of law are questions for courts.[316] For example, in Australian, the High Court passed a dictum in the leading *Enfield* case in which it stated that the Constitution allocates interpretive power exclusively to the judiciary.[317] In South Africa, the Constitutional Court's tendency to read procedural fairness into legality review in some cases seem to place us somewhere between these two approaches to deference – the narrow and broad approach to deference. The matter remains unsettled even though it may be argued that the courts also favour the broad approach to deference.

4.5 How have South African administrative law scholars conceptualised judicial deference – the narrow or broad approach?

The most authoritative attempt to propound a cogent theory of deference in administrative law scholarship in South Africa was made by Professor Cora Hoexter. Writing in her seminal article in 2000, Hoexter authoritatively defined deference as consisting of:

> A judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect, and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.[318]

Having described deference in this light, Hoexter further proposed that there are essentially three themes that should inform any attempt to formulate a theory of deference.[319]These three themes, if applied approapriately, can in turn assist a reviewing court to decide whether to intervene when called upon, and subject an executive action to procedural fairness requirementsr in a given case of legality review

[315] *Dunsmuir v New Brunswick* 2008 SCC (2008) 1 SCR 190.
[316] Elliot & Wilberg 2015: 7.
[317] *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135: par. 60.
[318] Hoexter 2000: 501.
[319] Hoexter 2000: 502.

case or exercise deference towards the executive decision-maker whose decision is impugned. In the first instance, Hoexter identified variability – which is simply the notion that principles of legality (or negatively, the grounds of review) need not be applied in an all-or-nothing fashion, and that the intensity of judicial scrutiny may vary according to the context.[320] In other words, whether a court should intervene in a given case will depend on factors such as the policy content of the decision, the breadth of the discretion, and the degree of expertise of the decision-maker. Other relevant factors include the impact of the decision, the degree of public participation in the decision-making process and the presence or absence of an opportunity for internal reconsideration.[321] This theme was also echoed by the Constitutional Court in *Bato Star Fishing* where the Court explained that the extent to which a court should give weight to these considerations will depend on the character of the decision itself, as well as the identity of the decision-maker.[322] To sum up this position, the Court went on to explain that: "a decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts".[323]

It was in this case that the Court also reformulated the *Wednesbury* like standard of reasonableness as provided in sec. 6 (2) (h) of PAJA. It will be recalled that this section of PAJA allows a reviewing court to review administrative action where the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In limiting the extent and scope of this "exaggerated deference"[324] which characterised much of the apartheid era, the majority of the Constitutional Court per O'Regan J defined an unreasonable decision as simply a decision that a "reasonable decision-maker could not reach"[325] as opposed to the *Wednesbury* standard of unreasonableness review which requires that a decision be

[320] Hoexter 2000: 502.
[321] Hoexter 2000: 502.
[322] *Bato Star Fishing*: paras. 46-48.
[323] *Bato Star Fishing*: paras. 46-48.
[324] See Hoexter 2000.
[325] *Bato Star Fishing*: par. 44.

"so unreasonable that no reasonable person could have so exercised the power or performed the function" In the Court's precise words:

> ("…") even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.[326]

This *ratio* further demonstrated the Court's desire to depart from *Wednesbury* standard of unreasonableness review (the broad approach to deference) and formulate a narrow approach to deference (deference only under limited/exceptional circumstances), with the caution that 'a court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker".[327] In other words, a reviewing court must approach the review with an open mind and not be swayed by technicalities and further be mindful of its primary constitutional mandate which is to apply the law impartially, without fear, favour or prejudice.[328] Accordingly, the Court ultimately held that: "judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency".[329]

The second theme that Hoexter identified relates to the concept of "administrative action" and how the narrow definition of this concept should serve as a factor to guide the courts on the question of whether to intervene or not. On this point, Hoexter opined that the general reluctance of the courts to cast the net of "administrative action" too widely is a healthy development in so far as it suggests a more sophisticated and balanced approach to the role of administrative-law review.[330] This reluctance according to her played out in the trilogy cases of *Fedsure*, *SARFU,* and *Pharmaceutical Manufacturers* discussed elsewhere above. In *Fedsure*, the Court according to her respected the domain of another branch of government when it decided that the budgetary resolutions made by a local authority were legislative and did not constitute administrative action within the meaning of sec. 24 of the interim *Constitution*. In the *SARFU* case, deference came into play when the Court decided

[326] *Bato Star Fishing*: par. 44.
[327] *Bato Star Fishing*: paras. 46-48.
[328] See sec. 165 (2) of the *Constitution*.
[329] *Bato Star Fishing*: par. 53.
[330] Hoexter 2000: 507.

that the special constitutional power in sec. 84(2)(f) of the 1996 *Constitution*, which permits the President to appoint commissions of inquiry, was not administrative action, whereas deference was exercised in *Pharmaceutical Manufacturers* when the Court ruled that a decision by the President to bring an Act of Parliament into force is not administrative action.[331] These court decisions in her view ultimately marked a radical departure from the pre-PAJA and Constitutional era under "which the courts became increasingly willing to subject the conduct of public authorities to judicial review, and even to review the actions of bodies that might reasonably be regarded as private".[332] In other words, an era that was marked by an exaggerated importance of judicial review.[333]

The third theme Hoexter identified is reasonableness. On this theme, she has argued that deference can be exercised by ensuring that the courts adhere to the ordinary definition of reasonable which means "in accordance with reason" or "within the limits of reason", which is precisely what we are entitled to demand of discretionary administrative action.[334] To require less than reasonableness so defined would be to allow capricious decision-making. To require more – that is correctness or perfection – is to allow the courts to substitute their own views for those of the administrator. Some of the factors that should guide the court in deciding whether a decision is reasonable are first, the information before the administrator, second, the purpose sought to be achieved by the decision and third, whether the decision is rationally connected to its purpose, or objectively capable of furthering that purpose.[335] For it is "impossible to judge whether a decision is within the limits of reason (or defensible) without looking carefully at these aspects".[336] Compounded together, all these themes should ideally guide the courts on the question of whether they should intervene in a given case and review an exercise of public power in question or exercise deference towards the decision-maker.

[331] Hoexter 2000: 506.
[332] Hoexter 2000: 505.
[333] Hoexter 2000: 505.
[334] Hoexter 2000: 510.
[335] Hoexter 2000: 512.
[336] Hoexter 2000: 512.

4.6 How far have South African courts come in trying to formulate a substantive and cogent theory of judicial deference?

A review of case law of the past two decades generally indicates that there has not been any serious attempt by South African courts to formulate a substantive and cogent theory of judicial deference beyond citing Hoexter's proposition of judicial deference with approval. As Quinot and Maree have correctly pointed out: "our courts have largely misunderstood Hoexter and seized upon the notion of deference in a manner that was never put forward, instead of a debate on deference, deference has been applied as a *fait accompli"*.[337] The first case in which our courts followed Hoexter's proposition of deference without any substantial modification and applied it as a *fait accompli* was in *Logbro Properties CC v Bedderson NO ('Logbro Properties CC').*[338] This case concerned an appeal to the SCA by the appellant against a decision of the KwaZulu-Natal provincial government (the provincial government) in 1995 to award a tender to one Naidoo. Before the High Court, the appellant challenged the awarding of the tender on the basis that, although Naidoo's tender bid had the highest points, it had not complied with the tender conditions stipulated.[339] The High Court agreed with the appellant (applicant in that case) and remitted the decision to the province's assets committee for reconsideration. However, after its reconsideration, the assets committee decided to award the tender to neither of the bidders which led to the appellant bringing an appeal application before the SCA.[340] The SCA was therefore called upon to determine among other issues whether the committee, in reconsidering the tenders in accordance with the High Court order, had been entitled to take into account supervening considerations, specifically the fact that property values had increased since 1995.[341]

In arriving at its decision, the Court called for a deferential treatment of the asset committee's decision because it was in the Court's view, polycentric in nature.[342] After endorsing Hoexter's description and proposition of judicial deference,[343] the Court went on to hold that "the conclusion is unavoidable" that the decision-maker "acted

[337] Quinot & Maree: 2016: 268.
[338] 2003 (2) SA 460 (SCA).
[339] *Lobro Properties CC*: par. 2.
[340] *Lobro Properties CC*: par. 3.
[341] *Lobro Properties CC*: par. 4.
[342] *Lobro Properties CC*: par. 20.
[343] *Lobro Properties CC*: par. 21.

unimpeachably" in taking supervening circumstances into consideration. Deplorably, the court arrived at this conclusion without any substantial and meaningful engagement on the principle of deference and without trying to formulate one. To put it slightly differently in the words of Quinot and Maree – without explaining why deference is required at polycentric decision-making, why deference is appropriate under the circumstances of the particular case, or what role deference plays in the case.[344] A similar approach was followed in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* ('*Phambili Fisheries*'),[345] again where the SCA applied deference as *fait accompli.* This case concerned an appeal against the judgement of the High Court which had been in favour of the respondents – a group of fishing companies that came from the ranks of historically disadvantaged persons. They had in terms of the Marine Living Resources Act 18 of 1998 (MLRA) applied for, and been awarded, quota allocations in the hake deep sea trawling sector for the 2002-2005 fishing seasons. The companies complained that they ought to have been awarded higher quotas. They further maintained that, in making the quota allocations, the Chief Director: Marine Coastal Management had failed to take transformation into account and that, had he done so, he would have awarded them higher quotas. They did not challenge the procedure the Chief Director followed but the decision itself.

The SCA was therefore called upon to determine among other things the extent to which the Chief Director's decision was susceptible to review under the new constitutional order. Following its previous decision in *Logbro Properties CC* and citing it with endorsement, the SCA once again held that since the Chief Director was giving effect to government policy in the exercise of the public power in question, it was necessary for the court to treat his decision with deference.[346] The Court further characterised the Chief Director's decision as polycentric in nature and cautioned against the temptation to prefer one decision over another on the basis that the one is better than the other.[347] In other words, to substitute the public functionary's decision with their own. Having found as it did, the Court ultimately concluded that:

[344] Quinot & Maree 2016: 272.
[345] 2003 (6) SA 407 (SCA).
[346] *Phambili Fisheries*: par. 47.
[347] *Phambili Fisheries*: par. 51.

> Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational ground.[348]

Accordingly, the Court further found that the application must fail on reasonableness grounds. It was in this case that the following factors: special skills, knowledge and expertise of the decision-maker were for the first time in our new constitutional order identified as relevant factors that should inform a reviewing court's decision on whether to exercise deference or intervene to review an exercise of public power. While the Court did not pronounce itself on whether it was formulating an approach to judicial review and a theory of judicial deference, it goes without saying the factors identified in this case would play a central role in the formulation of such theory. However, aggrieved by this decision, one of the respondents took the SCA's decision on appeal to the Constitutional Court.[349] It was in this appeal case that the Constitutional Court also for the first time made a fairly reasonable attempt and came closer to formulating a substantive theory of judicial deference – albeit under the "reasonableness" ground of review. After assessing the facts of the case, the Constitutional Court acknowledged that both sec. 2 read with sec. 18 of MLRA require that regard be had to the transformational factor in allocating fishing quotas and determining the total allowable catch.[350] Despite this acknowledgment, the apex court nevertheless disagreed with the appellant's contention that the Chief Director's decision was reviewable on that basis.[351] The Court found that the decision in question required deference on the part of the Chief Director and subsequently laid out some factors that should guide the courts in determining whether to intervene or treat the decision-makers' exercise of public with deference. These factors included: the nature or character of the decision itself, the identity of the decision-maker, their special expertise and experience in the field.[352] Against this backdrop, the Court ultimately concluded that courts should guard against usurping the functions of administrative agencies and limit their role only to

[348] *Phambili Fisheries*: par. 53.
[349] Reported as *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).
[350] *Bato Star Fishing*: par. 34.
[351] See Bato Star Fishing par. 35 where the held that the court found that the broad goals of transformation could be achieved in a myriad of ways; that there was not one simple formula for transformation, and that the manner in which transformation was to be achieved was, to a significant extent, left to the discretion of the decision-maker.
[352] *Bato Star Fishing*: par.48.

ensuring that the decisions taken by administrative agencies fell within the bounds of reasonableness as required by the Constitution.[353]

Commendable as this attempt to formulate a theory of deference may be, the Court's development of the reasonableness ground of review in this manner leaves many questions unanswered. For example, is deference only appropriate were the decision-maker can prove that his/her decision was reasonable in whatever sense a reasonable decision is defined? What about the other grounds of review like rationality, fairness and lawfulness which are provided for in sec. 33 of the *Constitution* and PAJA? Are we to conclude that once a reviewing court has determined that the impugned decision was reasonable, that is the end of the matter? This formulation of deference anchored on reasonableness would be unsatisfactory and perhaps even inconsistent with the Constitution. What is even more concerning is that this was not the first time the Court identified the standard of reasonableness as a central feature that should inform judicial intervention in the exercise of public power. For example, reasonableness was also identified as one of the determining factors on the question of whether a reviewing court should exercise deference or intervene to review an exercise of public power in the early case of *Government of the Republic of South Africa v Grootboom ('Grootboom')*.[354] It was in this case that the Constitutional Court marked the contours of a reasonableness review and explained that:

> a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that are adopted are reasonable.[355]

It sounds tautological to suggest that a reasonableness review simply asks whether the impugned decision is reasonable. Be that as it may, this seems to be what the courts generally propose as what deference requires. And as O'Regan J further explained, in treating the decisions of administrative agencies with the appropriate respect, the courts are recognising the proper role of the Executive within the Constitution.[356] In doing so, "they should be careful not to attribute to themselves superior wisdom in relation to matters entrusted to other branches of government".[357] These are exactly the same factors that would later guide the court in arriving at its

[353] *Bato Star Fishing*: par. 45.
[354] 2001 (1) SA 46 (CC).
[355] *Grootboom*: par. 41.
[356] *Bato Star Fishing*: par. 48.
[357] *Bato Star Fishing*: par. 48.

decision in the *Motau* case demonstrating that what the court had laid down in the previous case was indeed its attempt to formulate an approach to judicial review and a theory of deference anchored on reasonableness.

4.7 What, if any are some of the weaknesses in the courts' attempt to formulate a theory of deference and general themes which can inform such a theory?

It is however worth noting, that our courts' general attempt to formulate a substantive and cogent theory of deference has not been beyond reproach. Administrative law scholars Quinot and Maree have taken issue with O'Regan J's approach to derive deference from the principle of the separation of powers.[358] In their view, such an approach is problematic because it does not explain nor address the question of how deference should influence the court's approach to judicial review and the level of the court's scrutiny in cases where both parties are organs of state.[359] They further posit that while "the new terminology of deference might highlight a particular aspect of the separation of powers, deference as such can neither provide integrated solutions to problems associated with the relationship between the administration and judiciary nor describe its nature".[360] Conceptualising deference as an aspect of the separation of powers as the Constitutional Court did in *Bato Star Fishing* is not only obscure, but seems merely to repeat the language of the pure separation of powers.[361] It also threatens to descend into a method characterised by formalism and conceptualism.[362]

The courts according to Quinot & Maree should be grappling with questions such as the appropriate roles of the administration and the judiciary or the content of administrative justice. However, instead of doing that, they invoke deference in a manner that suggests that the notion and its application are straightforward.[363] The Courts according to them, have avoided substantive argument on the implications of the *Constitution* for the judicial and administrative functions.[364] This, the scholars have argued, ultimately hollows out and makes deference empty.[365] The net effect of this is

[358] Quinot & Maree 2016: 274.
[359] Quinot & Maree 2016: 274.
[360] Quinot & Maree 2016: 460.
[361] Quinot & Maree 2016: 460.
[362] Quinot & Maree 2016: 460.
[363] Quinot & Maree 2016: 460.
[364] Quinot & Maree 2016: 460.
[365] Quinot & Maree 2016: 460.

that “by relying on this "empty" version of deference courts evade engagement with principles and considerations that inform their function and relationship with the administration, including extra-legal considerations such as political theory”.[366] As an alternative to the deference approach proposed and propounded by O’Regan J in *Bato Star Fishing*, they propose the following principles and factors as foundational to a substantive theory of deference:

4.7.1 An integrated function for judicial review

This factor according to them entails that judicial review should be viewed as one of a variety of methods to safeguard the right to administrative justice and not the panacea.[367] In other words, courts should be slow to entertain judicial review applications unless the litigant has proven that they have exhausted all internal remedies as demanded by sec. 7 of PAJA. This, however, does not mean that the courts cannot intervene where the administration fails to protect the rights of private individuals – it simply means that the intervention or non-intervention should be informed by the standard of reasonableness as enunciated in *Bato Star Fishing*. Simply put, “judicial intervention or non-intervention turns on the extent to which administrative justice is achieved by the administrative process as a whole”.[368] It will be recalled that one of the things that the Constitutional Court did in *Bato Star Fishing* was to reformulate the patent unreasonableness review standard as provided in PAJA to one that simply asks the question of whether the decision under review is one that a reasonable decision-maker would have taken.[369] However, as I have argued elsewhere above, to reduce deference to a simple question of whether the decision taken was reasonable is problematic, because it leaves so many questions answered. For example, what about the other grounds of review like rationality, fairness and lawfulness, which are provided for in sec. 33 of the *Constitution* and PAJA? Are we to conclude that once a reviewing court has determined that the impugned decision was reasonable, that is the end of the matter? To be fair, unlike the Constitutional Court’s findings in *Bato Star Fishing,* reasonableness is not the only feature that Quinot and Maree identify to be central to the formulation of a theory of deference.

[366] Quinot & Maree 2016: 460
[367] Quinot & Maree 2016: 461.
[368] Quinot & Maree 2016: 461.
[369] See *Bato Star Fishing*: par. 42.

4.7.2 Constitutional context

On this factor, Quinot & Maree maintain that an appropriate theory of deference requires an assessment of deference in relation to considerations such as constitutional supremacy, Mureinik's culture of justification, Klare's transformative constitutionalism, and South Africa's human rights culture.[370] While they accept the exercise of linking the rule of law and equality to deference, as understood by Dyzenhaus, they caution against the temptation to uncritically import his idea of deference as respect. To this end, they argue that “constitutional supremacy implies that the separation of powers, and by implication deference, must be informed by the content of administrative justice; it is not for an undeveloped "theory" of deference to determine the scope of administrative justice”.[371]

4.7.3 Respect for administrative determinations of the law or cogency of reasoning

Not much is said on this factor except for a series of questions that the authors raise particularly regarding Dyzenhaus' “entreaty to take administrative determinations of the law seriously” which they say requires further examination. More importantly, they accept that taking administrative determinations seriously requires at least the capacity to do so but ask how courts are to take administrative determinations seriously if they are unqualified to do so?[372] This second element is, with respect, not helpful to the broader discussion on what deference should entail. To say courts must respect administrative determinations of the law or cogency of reasoning leaves a number of questions unanswered for example, how far should that respect extend and what would be the nature of such legal determinations of the administration that should respected?

4.7.4 Deference as a free-standing principle or informing principle or both.

This fourth factor entails that deference must recognise the distinction between review and appeal so that the reviewing court does not overreach. Another important factor that is foundational to the theory of deference according to the authors is PAJA’s definition threshold of “administrative action” which ultimately limits the purview of the

[370] Quinot & Maree 2016: 461.
[371] Quinot & Maree 2016: 462.
[372] Quinot & Maree 2016: 463.

courts' review scope.[373] It will also be recalled that deference as grounded on PAJA's definition of the concept of administrative action finds its genesis from Hoexter's seminal article in which she argued that: "the general reluctance of the courts to cast the net of "administrative action" too widely is a healthy development in so far as it suggests a more sophisticated and balanced approach to the role of administrative-law review".[374] This reluctance according to her played out in the trilogy cases of *Fedsure*, *SARFU,* and *Pharmaceutical Manufacturers* discussed elsewhere above. Moreover, according to Quinot and Maree, deference is therefore not "a standing legal rule that can be invoked by courts to justify a particular outcome in the case – its role is to inform the development of specific legal rules, for example in the form of grounds of review or of just and equitable remedies".[375] It also "influences the interpretation of legislation, and is constituted by factors external to the facts of the particular case such as expertise, complexity, democratic legitimacy and discretion".[376]

Moreover, some administrative law scholars have generally taken issue with PAJA's narrow definition of the concept of "administrative action". To be more precise, PAJA's definition of the concept of "administrative action" has been criticised for threatening to exclude from review many exercises of public power which had been reviewable under the common law,[377] and for its narrowness and expansive list of excluded "actions" that defeats the very purposes of the Act which is to give effect to sec. 33 of the Constitution.[378] PAJA has also been criticised for defining the concept of "administrative action" in such a way that it excludes executive, legislative, judicial, investigative and preliminary actions thus limiting its own scope of applicability.[379] Moreover, the statutory definition of "administrative action" has also been found to be "parsimonious, unnecessarily complicated and probably ("…") unfriendly to users".[380] Despite this, PAJA's narrow definition of the concept of "administrative action" has also been recognised as a central feature to the formulation of a cogent and substantive theory of deference. It is now becoming clear what the legislature had in mind when it structured and formulated the definition concept of administrative action

[373] Quinot & Maree 2016: 463.
[374] Hoexter 2000: 507.
[375] Quinot & Maree 2016: 463.
[376] Quinot & Maree 2016: 464.
[377] Kohn & Corder 2014: 19.
[378] Hoexter 2006: 307.
[379] Hoexter 2006: 308.
[380] Hoexter 2012: 303.

in the manner that it did. It seems the intention was to mark the contours of administrative law review. Deplorably, that has had unintended consequences – for example, in order to bring all exercises of public power under some degree of public law control, the courts have now developed the principle of legality to include procedural fairness requirements.

4.7.5 Deference and the separation of powers

This factor rejects the link between deference and the separation of power doctrine. While the authors do not refute that the separation of powers doctrine informs deference, they argue that it cannot on its own give content to a fully-fledged theory of deference.[381] According to the scholars, a theory of deference grounded on the principle of separation of powers will present serious difficulties where the parties to the review application before the court are both organs of state. Ultimately, Quinot and Maree conclude that without expanding on these five factors and principles – the content of deference cannot be ascertained.[382] While grounding a theory of deference on the doctrine of the separation of powers may be problematic as the scholars contend, it may nevertheless be necessary for the courts to ground their approach of whether to apply procedural fairness in a given case of legality review on such a doctrine. This is so because at its most basic, the doctrine of the separation of powers "means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence and jurisdiction".[383] Those institutions being, the legislature – responsible for law making, the executive – responsible for the execution of those laws and the judiciary – which is vested with the powers to interpret the laws enacted by the legislature and resolve disputes.[384] An important aspect of this doctrine is the level of respect/deference that each institution should exercise towards the other and how each one of them should generally resist the temptation to encroach into the exclusive domain and competence of the other. It is also assumed that the level of specialisation and expertise that will ensue from this arrangement will ultimately result in effective public administration and good governance.[385]

[381] Quinot & Maree 2016: 464.
[382] Quinot & Maree 2016: 460.
[383] Seedorf & Sibanda 2008: 2.
[384] Seedorf & Sibanda 2008: 2.
[385] Seedorf & Sibanda 2008: 2.

However, as the Constitutional Court observed *In re: Certification of the Constitution of the Republic of South Africa ('re-Certification case')*:[386] "in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of the government upon another, there is no separation of power that is absolute".[387] Another subset of this doctrine is the system of checks and balances which ensures that these "institutions do not become too self-centred in their conduct, even if they are thus impeded in efficiently fulfilling their functions to a certain extent".[388] There is also a recognition of the fact that:

> ("…") Unhindered technocratic rule by experts (not questioning their knowledge of the subject at all) may lead to institutional deafness and ignorance of the plight of others and, in the worst case, to exactly the kind of human rights violations and abuses of power the Constitution aims to prevent.[389]

Be that as it may, a delicate balance must be struck between deference and achieving the constitutional imperative of checks and balances. Because as the Constitutional Court explained in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* (EFF 1):[390]

> ("…") Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.[391]

It is this delicate balance that our courts have generally failed to achieve, and this is owing in part to the failure to formulate a substantive theory of deference in the manner Quinot and Maree have proposed as discussed elsewhere above, and more importantly, the failure to seriously engage with the requisites of the doctrine of the separations of powers.[392] For example, when courts subject executive actions to a procedural fairness review, sight can be lost of the constitutional imperative of affording respect to the exclusive domain and competence of the executive and more so of the fact that executive actions are often value laden and involve political judgments which are best left to the politically elected. The risk of this happening is high given the fact that there is currently no substantive approach to deference as

[386] 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC).
[387] Re-Certification case: par. 108-109.
[388] Seedorf & Sibanda 2008: 2.
[389] Seedorf & Sibanda 2008: 2.
[390] [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).
[391] *EFF* 1: 93.
[392] Kohn 2013: 833.

argued elsewhere above. However, it shall be seen from the discussion below that this problem is not peculiar to South Africa. Courts in other foreign common law jurisdictions like Canada and Australia have generally failed to strike such a balance and formulate a substantive theory of deference over the years.

All the above notwithstanding, it is also clear from the cases discussed above, that the courts have generally found it necessary and appropriate to exercise deference towards other branches where the decision-maker of the impugned decision has been shown to possess the expertise and experience beyond the purview of the reviewing court. These have perhaps been the first two elements that the courts have identified and recognised as been important to the formulation of a cogent and substantive theory of deference. In fact, there are already cases in which they led the reviewing courts to exercise deference. For example, in *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* (‘*Foodcorp’),*[393] Harms JA found that it was appropriate to defer to the decision-maker in question on the basis of the fact that the formula for the allocation of fish quotas was developed by the department of environmental affairs and tourism in terms of the MLR Act[394] with the expert assistance of a mathematician.[395] Similarly, Brand JA found in *Associated Institutions Pension Fund v Van Zyl (Van Zyl)*[396] that it was appropriate to exercise deference towards the decision-maker in the light of the training, skills, experience and intricacies involved in the application of actuarial science.[397] However, placing too much reliance on these two elements in order to determine whether to exercise deference or interfere with an exercise of public power has its own problems. For example, it would not be appropriate for the court to exercise deference to an administrative decision-maker’s judgment where such a judgement has not been exercised. In other words, deference cannot be appropriated in instances where the decision-maker has abdicated his/her discretion to an expert adviser like a mathematician. Moreover, as Allan has posited

[393] 2006 (2) SA 191 (SCA).
[394] 18 of 1998.
[395] *Foodcorp*: par. 8.
[396] 2005 (2) SA 302 (SCA).
[397] *Van Zyl*: par. 39.

"deferring to administrative decision-makers on the basis of expertise or superior access to information compromises judicial independence and neutrality".[398]

It is also becoming necessary for the courts to clarify the level of influence and limits of the expert opinion in the public decision-making process to avoid abdication of discretion by the relevant decision-maker.[399] This is an important consideration in light of the fact that sec. 6 (2) (e) (iv) provides for the judicial review of any administrative action taken because of the unauthorised or unwarranted dictates of another person or body. The courts are yet to clarify the amount of weight to be accorded to such expert opinion and what guiding factors should be considered in determining whether the consultation with the expert (s) by the administrative decision-maker does not amount to abdication of discretion. Moreover, as Davis has posited, deference in South Africa has not been based on clear principles, let alone a recognition that administrative law is now located within the context of a rights culture.[400] This is so because the constitutional role of the courts in South African has largely been determined in isolation such that the rights enshrined in the Constitution play a limited role in informing the courts whether to intervene or differ. In other words, deference in South Africa must be informed by the correct legal context i.e., constitutional democracy and a human rights culture.[401] Otherwise, there is a high risk that more value and emphasis will be placed on expert opinions, and this negates human rights breaches.

Over and above these themes idenfied by Quinot & Maree as been central to the formulation of a theory of deference, the concept of representative democracy is also another theme which can play an important role in determining whether in a given case of legality review, procedural fairness should be apply. This is so because representative democracy generally recognises that it is impractical for the public to directly take part in the daily management of public affairs.[402] In other words, by virtue of being elected into public office, the executive which primarily concerned with the formulation of public policy and public administration is not to consult with the public on every decision taken – especial if the decision is value laden and polycentric in

[398] Allan 2004: 289-290.
[399] Quinot & Maree 2016: 278.
[400] Davis 2006: 39.
[401] Davis 2006: 39.
[402] Nyirabikali 2008: 36.

nature.It is widely accepted that the executive derives its mandate to act on behalf of the public from elections. That said, it is therefore not necessary for the public to be heard on every executive decision taken as the requirements of procedural fairness would require. As the Constitutional Court held in *Merafong Demarcation Forum v President of the Republic of South Africa*[403]:

> ("…") The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.

To insist that the courts should subject executive actions to procedural fairness requirements would seriously undermine the prescripts of both our representative democracy and participatory democracy. In any event, the *Constitution* already calls for the facilitation of public participation in the formulation of public policy[404] and the lawmaking process at all three spheres of government.[405] To further require executive actions to comply with procedural fairness requirements would be tataumount to requiring procedural fairness twice – first at the stage of policy formulation (where the *Constitution* requires the public participation to be facilitated) and second, at the stage of policy implementation (where those affected by the executive decision taken would now have to be heard). This is undesirable outcome which will only serve to hamper effective policy implementation and public administration. There are also foreign jurisdictions from which the courts in South Africa can borrow to enrich and inform our theory of deference for determining whether in a given case of legality review, procedural fairness should apply.

4.8 The Canadian approach to deference: the broad approach or narrow approach to deference?

The Canadian approach to judicial deference on the other hand, requires judges to be satisfied by an answer that is merely reasonable, even on questions of law.[406] The approach to deference does not require the answer given by the decision-maker to be the one the judge would have preferred. This can be characterised as the broad approach to deference. In other words, the courts in Canada can only interfere where

[403] 2008 (10) BCLR 968 (CC).
[404] As Phooko 2014: 41 has argued, this public participation "is with a view to ensuring that laws or policies reflect the views of the public".
[405] See generally ss 59(1), 72(1), 118(1), 42(3) and (4) of the *Constitution*.
[406] Daly 2015: 297.

an interpretation given by the decision-maker "cannot be rationally supported by the relevant legislation".[407] Professor Paul Daly separates the evolution and development of the Canadian deference into four periods: 1949 – 1979, 1979 – 1998, 1998 – 2008 and 2008 – present.[408] It will be seen from this discussion that there are some overlaps between the evolution of a theory of deference in Canada and South Africa. As in South Africa under the apartheid regime, there are periods in Canada during which judicial review was characterised by exaggerated deference towards the administration.

4.8.1 The twilight of judicial deference: 1949 – 1979.

This period was like the period under apartheid in South Africa during which the courts were generally and excessively deferential to administrative decision-makers in part due to the doctrine of Parliament sovereignty but primarily due to the fear of reproach. During this period in Canada, administrative decision-makers were free to make errors within jurisdiction.[409] Administrative decision-makers are argued to have had the right to be wrong[410] during this period as the courts were unwilling to shine a light on certain areas of administrative decision-making.[411] As in South Africa where judicial review under apartheid was informed by the concept of the classification of functions,[412] judicial review in Canada during this period was also informed by the concept of exclusive spheres of authority. Effectively, this meant that stringent jurisdictional limits were placed on the decision-makers and jealously guarded by the courts.[413] For example, in *Toronto Newspaper Guild v Globe Printing*,[414] the Court quashed the decision of the Ontario Labour Relations Board for failure to take into account a relevant factor – that was, whether individuals had resigned from a union between the application for certification and the certification hearing. Similarly in *Labour Relations Board v Canada Safeway Ltd ('Labour Relations Board'),*[415] the Court upheld the

[407] *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation (CUPE)* [1979] 2 SCR 227, 239.
[408] Daly 2015: 299.
[409] Daly 2015: 299.
[410] *R v Nat Bell Liquors* [1922] 2 AC 128 (HL): par. 151-52.
[411] Daly 2015: 300.
[412] Hoexter 2015: 167.
[413] Daly 2015: 300.
[414] [1953] 2 SCR 18.
[415] [1953] 2 SCR 46: 50.

decision of the British Columbia Labour Relations Board because it was correct.[416] Although there were jurisdictional limits placed on the powers of administrative decision-makers, courts were often reluctant to intervene arguing in some cases that: "so long as an administrative authority has acted within its statutory jurisdiction a court will not interfere with its decision".[417]

4.8.2 The New Approach: 1979-1998

This period was characterised by a strong emphasis on the concept of jurisdictional error. The courts had failed to formulate a satisfactory test for distinguishing findings which go to jurisdiction from findings which go to the merits during the previous period[418] and therefore had to formulate one during this subsequent period. The first attempt at formulating this approach was made by Beetz J in *Syndicat des employés de production du Québec et de l'Acadie v Canada Labour Relations Board ('Syndicat des employés')*.[419] This case involved the refusal of the union members of the appellant in question to work overtime. The fact in issue was whether such a refusal to work overtime amounted to an unlawful strike. Before the Canadian Labour Relations Board (the Board), the union argued that the Board lacked jurisdiction on the matter – however, the Board disagreed and dismissed the case on this leg. Aggrieved by this decision, the union took the matter on appeal to the Supreme Court. In applying a *Wednesbury unreasonableness* standard of review, the Supreme Court per Beetz J also rejected the union's argument on jurisdiction and held that: "the question of the existence of a strike and of its legality' fell 'within the special expertise of the Board".[420] According to the Court, in the absence of a "manifestly unreasonable" error, the Board 's answer to these questions could not be disturbed by a reviewing court.[421] On the concept of jurisdictional error, the Court explained that: "such an error, even if committed in the best possible good faith, will nevertheless result in the decision containing it being set aside".[422]

[416] *Labour Relations Board*: par. 54-55.
[417] LeDain 1955: 5.
[418] De Smith, Woolf & Jowell 1995: 255.
[419] [1984] 2 SCR.
[420] *Syndicat des employés*: 422.
[421] *Syndicat des employés*: 425.
[422] *Syndicat des employés*: 421.

In the landmark decision of *Union des employés de service local 298 v Bibeault (‘Bibeult’),*[423] the Supreme Court per Beetz J again went even further to mark the contours of the concept of jurisdictional error and the factors that should inform it. The starting point in determining a jurisdictional error according to the Court is to ask the question of whether “the legislator intend the question to be within the jurisdiction conferred on the tribunal”, rather than asking the question of whether this is “a preliminary or collateral question to the exercise of the tribunal’s power”.[424] Having held as it did, the Court then found it necessary to formulate a test for determining whether or not in a given case of judicial review, the question that must be answered is jurisdictional in nature. To this end, the Court identified four “pragmatic and functional” factors that should guide the courts in determining whether to exercise deference or intervene in a given case of judicial review (the jurisdictional question). These factors were set out as follows:

1. “The presence or absence of a privative clause or statutory right of appeal (or any other statutory scope of review indicator, including, in the case of discretionary authority, the width of the discretion and the language in which it is conferred).
2. The expertise of the reviewing court relative to that of the statutory authority in relation to the matter in issue.
3. The purposes of the legislation and the relevant provision(s) in particular.
4. The nature of the question in two senses. Is it a question of law, mixed law and fact, fact, or discretion? Is the question one that relates to the very reasons for the conferral of the statutory authority and the core of that authority's expected area of expertise?”[425]

Of these four factors, the Court identified “expertise” as the determining factor on the question of whether to exercise deference or interfere with decision-makers’ exercise of public power. Put slightly differently, the central question therefore is always whether the reviewing court is prepared to recognize its comparative lack of expertise in relation to the particular issue on which review is being sought.[426] This notwithstanding, the Court proceeded to apply those ‘pragmatic and functional’ factors

[423] 1988 2 SCR: 1048.
[424] *Bibeult*: 1087.
[425] *Bibeult*: 1088.
[426] Mullan 2006: 51.

to the dispute before it, and ultimately held that the Labour Board lacked jurisdiction on the matter. According to Beetz J: "the decision-makers had 'no special expertise' in defining and applying 'the concepts of alienation and operation by another' because these were 'civil law concepts' falling within the judicial domain".[427] Moreover, 'the legislative context continued Beetz J "and the area of expertise of the labour commissioner clearly indicate that the legislator did not intend the commissioner's decision as to the existence of an alienation or operation by another of an undertaking to be conclusive".[428] Cogent as the "pragmatic and functional" test and approach to determining whether the court should intervene or show deference formulated in this case may seem, it has not failed to draw opprobrium. For example, some commentators have characterised it as "simply just a wolf in sheep's clothing – a more complicated way to reach results which achieved the end of strictly confining the limits of administrative decision-makers' authority".[429]

Despite having drawn this kind of opprobrium, the "pragmatic and functional" test/approach has also been welcomed in some quarters and even sometimes juxtaposed with the broad but narrowly defined concept of jurisdictional error. By way of an example, Daly has taken the view that "Judges could no longer simply incant the magic words 'jurisdictional error' and proceed to quash a decision with which they did not agree".[430] They were now required to apply the pragmatic and functional analysis to determine questions of jurisdictions. This according to him had the benefit of requiring them to justify their decisions to intervene in light of the language of the whole of the statute and the relative competence of the administrative decision-maker in question.[431] More importantly, the "pragmatic and functional" test/approach to judicial review seems to also align with Dyzenhaus's concept of the "culture of justification".[432] In a seminal article published in 1997, Dyzenhaus made a serious attempt at formulating a substantive theory of deference in Canada.[433] He primarily sought to enquire on the limits of judicial review in a democratic state and what he termed the "the politics of judicial deference".[434] Dyzenhaus began his inquiry into these issues

[427] *Bibeult*: 1097.
[428]*Bibeult*: 1098.
[429] Wildeman 2013: 334-335.
[430] Daly 2015: 308.
[431] L'Heureux-Dubé: 1994; Daly 2015: 308.
[432] Dyzenhaus 1997: 303.
[433] Some South Africa courts and administrative law scholars have borrowed from him to enrich ours.
[434] Dyzenhaus 1997: 279.

by distinguishing between submissive deference – a Diceyan model of deference which requires of judges to submit to the intention of the legislature,[435] and deference as respect – which requires not submission but respectful attention to the reasons offered or which could be offered in support of a decision, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency.[436] He went on to reject a positivist notion of deference as propounded by Dicey – that is deference as submissiveness and argued that only deference as respect can rearticulate the proper relationship between the legislature, administrative agencies and the courts.[437] Moreover, according to Dyzenhaus, judges are required to "determine the intention of a statute not in accordance with the idea that there is some prior (positivistic) fact of the matter, but in terms of the reasons that best justify that statute".[438] The substantive reason for adopting deference as respect is therefore that the approach is inherently democratic and avoids the dangers of judicial activism. This is so because:

> It adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.[439]

This understanding of deference accords with his notion of law as a culture of justification – which seeks to promote the idea that parties are entitled to participate in decisions which affect them and accepts that the role of the judiciary and hence judicial review is to foster a culture of democracy rather than create rule by juristocracy.[440] The Canadian approach to deference has not been beyond reproach. One sceptic of this approach is Trevor Allan – who views deference as fact dependent and context specific and cautions against the prevailing tendency to lay down factors and principles which are said to be foundational to the question of whether a court should intervene or not in a particular case.[441] His central argument is that a "freestanding doctrine of deference is not only undesirable, but virtually a theoretical impossibility".[442] This is so

[435] Dyzenhaus 1997: 286; According to Dicey, Parliament reflected the will of the people and hence its legislative wishes needed to be given effect to by the courts.
[436] Dyzenhaus 1997: 286.
[437] Dyzenhaus 1997: 286.
[438] Dyzenhaus 1997: 303.
[439] Dyzenhaus 1997: 305.
[440] Dyzenhaus 1997: 302.
[441] Allan 2006: 688.
[442] Allan 2006: 688.

because the boundaries of the sphere of autonomy between the three branches of government:

> Cannot be settled independently of all the circumstances of the particular case; for only the facts of the particular case can reveal the extent to which any individual right is implicated and the degree to which relevant public interests may justify the right's curtailment or qualification. The balance of judgment, as between judicial opinion and that of the legislature or public officials, will depend on the range of discretion applicable in all the circumstances.[443]

However, this context-specific approach proposition to judicial review is equally qualified. According to Allan "judges should 'defer' to the conclusions of other persons only to the extent that the reasons offered in support of those conclusions prove persuasive".[444] Factors, such as the relative expertise of the decisionmaker, are relevant in the determination of constitutional boundaries but only have meaning in relation to the particular facts of a case.[445] This formulation of deference as anchored on the heading of reasonableness echoes that in South Africa discussed elsewhere above. Mullan, for example has explained that "deference requires the reviewing court to inquire not whether the decision reached by the decision maker is right or wrong but whether it was unreasonable or patently unreasonable".[446] Moreover, he has also argued that despite the doctrine of separation of powers, deference in Canada can be justified on those grounds.[447] However, such a reliance according to him will require a substantial theory of deference given Canada's constitutional tradition of a strong executive with broad prerogatives over policy-making.[448]

4.8.3 Interventionism prevails on jurisdictional questions and questions of law: 1998-2008

Despite the apparent triumph of the pragmatic and functional analysis,[449] this was a period during which questions that would traditionally have been seen as jurisdictional started to attract judicial intervention, and jurisdictional error began to resurface but in a shadowy form.[450] Generally speaking, this period can be characterised as the period during which Canadian courts were leaning more towards the narrow approach to deference. That is, deference only under exceptional or limited circumstances. For

[443] Allan 2006: 676.
[444] Allan 2006: 676.
[445] Allan 2006: 673.
[446] Mullan 2006: 43.
[447] Mullan 2006: 47.
[448] Mullan 2006: 47.
[449] Daly 2015: 311.
[450] Mullan 2011: 97.

example, *Chieu v Canada (Minister of Citizenship and Immigration) ('Chieu'),*[451] the applicant who was an immigrant to Canada misrepresented himself when he applied for immigration status and claimed that he was single when he was in fact married and had kids. Upon discovering this, his deportation from Canada was ordered at the behest of the Minister of Citizenship and Immigration. He then tried to appeal this decision before the Immigration Appeal Division, but his appeal was denied. In clear departure from the understanding of the concept of jurisdictional error and 'pragmatic function analysis' formulated in the previous periods, the Supreme Court intervened on the matter and held that: "administrative bodies generally must be correct in determining the scope of their delegated mandate" and that despite the "considerable expertise" the Division had in weighing up the relevant factors, "the scope of this discretionary jurisdiction itself is a legal issue ultimately to be supervised by the courts".[452]

Despite the hardship that would have been suffered by the appellant upon deportation, this case seems to have involved policy-laden issues which should have been left to the specialised expertise of the Immigration Appeal Division. Indeed, as Daly puts it: "one would have thought that whether foreign hardship could be taken into account by the Division in exercising its discretion was a question best answered by the administrative decision-maker".[453] However, applying the traditional tools of statutory construction, the Court per Iacobucci J held that foreign hardship could be taken into account by the Division.[454] The Court's intervention seems to have been a knee jerk reaction to some perceived injustice. Despite its apparent abandonment as a pathway of judicial review in the previous periods, and the dominance of the "pragmatic and functional analysis", the concept of jurisdictional error continued to exert a significant influence. This is perhaps because the Canadian Supreme Court like the Constitutional Court in South Africa, had the same desire of bring all exercises of public power under some degree of public law control.

[451] 2002 SCC 3, [2002] 1 SCR 84.
[452] *Chieu*: 24.
[453] Daly 2005: 311.
[454] Daly 2015: 311.

4.8.4 The battle for reasonableness: 2008-present

This period according to Daly has been characterised by a yearning to formulate an appropriate standard of reasonableness review to which administrative action can be subjected. The courts have been struggling to determine whether such exercises of public power should be subjected to the strict "patent unreasonableness standard" which naturally requires that a decision be "so flawed that no amount of curial deference can justify letting it stand".[455] Or in the alternative, the standard of reasonableness *simpliciter* – which requires a reviewing court to simply ask whether the decision-maker had produced "reasons that can stand up to a somewhat probing examination" and "deferential self-discipline".[456] This struggle to formulate an appropriate standard of a reasonableness review is the same struggle that has confronted the courts in South African. It will be recalled that the Constitutional Court in *Bato Star Fishing* reformulated the PAJA's standard of reasonableness review – which required that a decision be so unreasonable that no reasonable decision-maker could have reached to one which simply requires an unreasonable decision to be one that a reasonable decision-maker could not reach.[457] In Canada however, the Supreme Court's attempt to reformulate the reasonableness review standard and draw a line between patent unreasonableness and reasonableness *simpliciter* has not been universally welcomed.

In fact, the distinction between these two standards of reasonableness review has been characterised as one without a difference. For example, in *Canadian Association of Industrial, Mechanical and Allied Workers Local 14 v Paccar of Canada Ltd ('Canadian Association of Industrial, Mechanical and Allied Workers Local 14'),*[458] the Court questioned: "how helpful it is to substitute one adjectival phrase for another and define patent unreasonableness in terms of rational indefensibility".[459] This according to the Court, seemed to: "simply inject ("…") one more opportunity for ambiguity into a test which is already fraught with ambiguity".[460] Moreover, in *Miller v Workers'*

[455] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 ('*Law Society of New Brunswick*'): 52.
[456] *Law Society of New Brunswick*: 46.
[457] See *Bato Star Fishing*: par. 44.
[458] [1989] 2 SCR 983 , 1003.
[459] *Canadian Association of Industrial, Mechanical and Allied Workers Local 14:* 1022.
[460] *Canadian Association of Industrial, Mechanical and Allied Workers Local 14:* 1022.

Compensation Commission (Newfoundland)('Miller'),[461] Barry J metaphorically observed that:

> Attempting to follow the [Supreme] Court's distinctions between 'patently unreasonable', 'reasonable' and 'correct', one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects at all.[462]

Against this backdrop of confusing a reasonableness standard of review, in *Dunsmuir v New Brunswick ('Dunsmuir')*,[463] the Court took the view that the time had come for a reassessment of the "troubling question" of judicial review of administrative action, since indeed the courts had generally failed to identify "solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges'.[464] In providing such a solution, the Court per Bastarache and LeBel JJ redefined the reasonableness standard of review as requiring the "existence of justification, transparency and intelligibility within the decision-making process in which a reviewing court should ask the question whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[465] However, even this standard of reasonableness has been qualified. For example, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*[466] the Court explained that *Dunsmuir*'s reference to "justification, intelligibility and transparency" was not an invitation to reviewing courts to conduct a 'line-by-line treasure hunt for error" in which it would pick apart the reasons offered to support a decision.[467] The question for the reviewing court, when examining the reasoning of an administrative decision-maker, is simply whether the court could "clearly understand" the reasons given.[468]

This "clearly understand" the reasons given reasonableness standard of review suggests that where a review court cannot "clearly understand the reasons given" by decision-maker, intervention will be justified with little room left for deference. This is not only a radical departure from the "pragmatic and functional analysis" approach of

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[461] (1997) 154 Nfl d and PEIR 52.
[462] *Miller:* par. 57-58.
[463] 2008 SCC 9,[2008] 1 SCR 190.
[464] *Dunsmuir*: 1.
[465] *Dunsmuir:* 47.
[466]2013 SCC 34.
[467] *Communications, Energy and Paperworkers Union of Canada, Local 30*: 54.
[468] *Agraira v Canada (Public Safety and Emergency Preparedness) 2013 SCC 36*: par. 89.

the previous period which took into account the specialised expertise of the decision-maker but an approach that will make it difficult to discern precisely what a reasonableness review standard that goes to the heart of deference entails and mark its contours. Even more concerning, this “clearly understand” the reasons given standard of reasonableness review is more intrusive and exacting than the “patent unreasonableness” review standard of the previous era. It is interventionalist in nature and seems to accord more with what I have called the narrow approach to deference. As Daly has put it: “In determining the outer limits of the "range" it appears that the reasonableness of administrative interpretations of law is adjudged by reference to judicial principles of statutory interpretation, such that little separates modern reasonableness review from prior interventionist approaches”.[469]

It will be clear from the above discussion that like in South Africa, deference in Canada remains a hotly contested topic and unsettled issue. It seems the courts and administrative law scholars are also at loggerheads regarding the correct approach to be followed on the standard of judicial review – that is whether such review should go to the merits of the decision or be limited to questions of law. Moreover, it is also not clear which standard of reasonableness review exercises of public power should be subjected to and the extent and scope of such a review. In other words, the question remains in common law jurisdictions like Canada and South Africa whether exercises of public powers should be subjected to the strict “patent unreasonableness” review standard, reasonableness *simpliciter*, the “clearly understand’ the reasons given reasonableness review standard or “outside the range of reasonable outcomes” review standard.[470] In attempting to formulate a cogent and substantive theory of deference, the courts in these two common law jurisdictions have oscillated between these reasonableness review standards without any degree of certainty as to which they really prefer.

[469] Daly 2015: 320.
[470] The Court held in *Communications, Energy and Paperworkers Union of Canada, Local 30*: par. 54 that “in the absence of finding that the decision, based on the record, *is outside the range of reasonable outcomes*, the decision should not be disturbed. In this case, the board’s conclusion was reasonable and ought not to have been disturbed by the reviewing courts’ (emphasis added).

4.9 The Finnish approach to judicial deference: The broad or narrow approach?

Despite having a legal system that is based on the civil law tradition, specialised administrative courts, and the fact that deference, as a legal concept has failed to gain recognised status in Finnish legal doctrine,[471] there are some important elements from the Finnish approach to deference which can be imported into South Africa to help formulate a cogent theory of deference with the necessary modifications to suit our specific context. This is so for a number of reasons:

1. The Finnish legal system shows only limited judicial deference to administrative discretion, and instead, attaches more value to effective judicial protection, adequate access to a court, *guarantees of procedural fairness*, the sufficiently broad scope of judicial review, effective remedies and a relatively active role for the administrative courts.[472]

These "guarantees of procedural fairness" are already an integral part of judicial review in South Africa where we have seen the courts importing procedural fairness requirements (a separate ground of review under PAJA) into legality review to bring executive actions under some degree of public law control. The manner in which procedural fairness is dealt with in Finland can also be of value to South African courts especially as they try to formulate a cogent and substantive theory of deference.

2. The courts exercise judicial power and play a central role in offering legal protection to individuals affected by administrative decision-making.[473]

The welfare state, public administration and administrative agencies play a central role in all the Nordic countries. The same applies in South Africa where the majority of citizens rely on social grants for their daily subsistence and often approach the courts to have their socio-economic rights to be vindicated by the courts.[474]

[471] Mäenpää 2019: 188.
[472] Mäenpää 2019: 181 (own emphasis added).
[473] Mäenpää 2019: 181.
[474] See for instance, the *AllPay and Grootboom* cases among others.

3. With respect to public administration, the rule of law requires that the executive powers of any administrative authority must have an express basis in law, and the exercise of public power must be justified on grounds laid down by law.[475]

In South Africa, this is not only a requirement of sec. 33 of the *Constitution* but the principle of legality.

4.9.1 The Finnish elements of deference which can be imported into South Africa

Against the above background, there some important elements of Finnish deference which can be imported into South Africa especially if our courts intend to follow the narrow approach to deference (deference only under limited or exceptional circumstances). First, the Finnish administrative courts have (and use) the power to investigate whether the authority in question has complied with general administrative principles (e.g. objectivity, equality, impartiality, proportionality, the protection of legitimate interests and the prohibition on abuse of power) when exercising its discretionary powers.[476] Thus, even if the administrative authority has wide discretionary powers, it is within the courts' remit to evaluate how the use of those powers conforms to said administrative legal principles.[477] A similar approach is already followed in South Africa where judicial review of administrative actions for these grounds of review (proportionality, abuse of discretion etc) is sourced from PAJA, and by extension, sec. 33 of the Constitution. In fact, the courts in South Africa have in some cases expressed the view that the fact that the decision-maker may have a discretion to exercise does not mean that such a discretion is unfettered and can be exercised capriciously.[478] For example, in *Kemp v Van Wyk*,[479] the SCA per Nugent JA summarised this position broadly as follows:

> A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding

[475] Mäenpää 2019: 182.
[476] Mäenpää 2019: 182.
[477] Mäenpää 2019: 188.
[478] See *Kemp v Van Wyk* 2008 1 All SA 17 (SCA): par. 1
[479] *Kemp v Van Wyk* 2008 1 All SA 17 (SCA).

> with the result that no discretion is exercised at all. Those principles emerge from the decision of this court in Britten v Pope 1916 AD 150 and remain applicable today.[480]

A capricious decision on the other hand, has been held to be the result of "a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles".[481] The point being made here is that, unlike the current trajectory of the Constitutional Court in South Africa which shows a clear intention by the Court to formulate a theory of deference grounded on the reasonableness ground of review alone, other general administrative principles (e.g. objectivity, equality, impartiality, proportionality, capriciousness, the protection of legitimate interests and the prohibition on abuse of power) can also assist in the formulation of such as theory as it is the case in Finland.

Second, the main duty of an administrative court is to provide effective judicial protection to the private party. The courts are first and foremost obliged to implement the constitutionally guaranteed right to an effective remedy.[482] This second Finnish element of deference is similar to sec. 172 of the South African Constitution, specifically, subsection 1 (a) –(b) which states that: "when deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable". The just and equitable remedy that the South African Constitution refers to in this section must naturally be effective in that it should protect the rights of the individual/groups from unnecessary state encroachment. Despite being interventionist in nature like the Finnish element under discussion, this constitutional provision calls for some degree of deference. More specifically, it requires a reviewing court to first undertake an assessment of whether there has been encroachment into the constitutionally protected rights of an individual/group by the impugned exercise of public power before it declares it (a) inconsistent with the Constitution and invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable'.

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[480] *Kemp v Van Wyk:* par. 1.
[481] *Northwest Townships* (*Pty*) *Ltd v Administrator*, *Transvaal* 1975 4 All SA 184 (T); 1975 4 SA 1 (T) 8G.
[482] Mäenpää 2019: 188.

Third, as a constitutional right, fair trial also sets limits to deference. Due process denotes the equal rights and duties of the parties involved, but it also imposes duties on the court. Since the rule of law also applies to courts, due process is a guarantee of both the procedural equality and fairness of the proceedings.[483] This third element is not clearly explained and would therefore not be particularly relevant for informing the formulation of a theory of deference in South Africa. Fourth, the element of human rights and fundamental freedoms. The Finnish administrative courts have recently adopted an approach to domestic legislation that favours human rights and basic rights at the expense of traditionally strict adherence to the letter of the law.[484] A strong emphasis has also been placed on the decision-maker's general duty, where possible, to interpret and apply statutes in a way that promotes basic and human rights. In a situation calling for interpretation, this principle thus requires authorities to choose the alternative best conducive to the implementation of human rights.[485] For example, in the recent ruling of *KHO 2017:151*, the Finnish Supreme Administrative Court relied on this fourth element to intervene and review the decision of the Police Department which forbade a public artistic performance on the grounds of it being a potential affront to decency and public morality. More specifically, the Supreme Administrative Court reasoned that out of all the legally valid interpretations of the Act on Public Meetings, the administrative agency concerned must select the one that best promotes the realisation of basic rights. This is an important element which gives credence to the idea that deference should not be exercised in a vacuum. In South Africa, the majority of the Constitutional Court per O'Regan J expressed this view in *Bato Star Fishing* when it explained that: "a court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker".[486] In short, these four Finnish elements of deference can play an important role in South Africa should our courts elect to formulate a narrow theory of deference – that is deference only under exceptional circumstances or to a limited extent. This is so because, these elements are inherently interventionist leaving very little room for judicial deference.

[483] Mäenpää 2019: 189.
[484] Mäenpää 2019: 189.
[485] Mäenpää 2019: 189.
[486] *Bato Star Fishing*: paras. 46-48.

4.10 The Australian approach to deference: The narrow or broad approach?

To understand deference and how it is approached in the Australia common law context, it is apposite to first briefly set out the structure of judicial review in Australia and discuss how the courts in that jurisdiction are empowered to exercise the power of judicial review. It will be seen from the discussion that follows that there are many similarities between the structure of judicial review in Australia and the one in South Africa and further similarities on how the courts in both jurisdictions are empowered to exercise their power of judicial review. This then makes it easier for the Courts in South Africa to import certain elements of deference from that jurisdiction to inform our own to the extent that it is practically possible to do so. Of particular interest is how Australian courts are empowered to subject executive actions to procedural fairness review – an approach to judicial review which has not found full expression in South Africa. Despite said similarities, it will also become clear that, unlike in South Africa where the courts generally prefer to exercise deference towards other branches of government and respect their exclusive competence (the wide/broad approach to deference), deference in Australia is exercised under exceptional or limited circumstances (the narrow approach).

4.10.1 Judicial review of administrative action in Australia

Despite being part of the common law world, there are some unique features that sets the Australian approach to judicial review apart from its counterparts. For example, the High Court of Australia still adheres to the concept of jurisdictional error.[487] This is despite the fact that the distinction between jurisdictional and non-jurisdictional errors of law has long been abandoned in other common-law jurisdictions. Moreover, the High Court of Australia still applies a strict form of the separation of judicial power.[488] In practice, these principles support a relatively limited conception of judicial power which, in turn, is invoked to define and confine the limits of judicial review.[489] Another unique feature of the Australian jurisdiction is the fact that the rights held by Australian citizens and residents are creatures of the common law.[490] Moreover, while

[487] Groves & Weeks 2015: 133.
[488] Groves & Weeks 2015: 133-134.
[489] Groves & Weeks 2015: 134.
[490] Groves & Weeks 2015: 134.

intensification of qualitative review beyond the *Wednesbury* standard in other common law jurisdictions has gone hand in hand with statutory or constitutional rights protection,[491] no such rights protection currently exists at Commonwealth level in Australia.[492]

These unique features notwithstanding, there are also some similar features that the Australian jurisdiction shares with other common law jurisdictions. For example, although the Commonwealth Constitution[493] makes no specific provision for the right to just administrative action like the South African Constitution does, it nevertheless contains a similar provision that empowers the courts to review administrative actions and exercises of public power in general.[494] However, unlike in South Africa where judicial review of administrative actions is governed by a single law and broadly speaking, the Constitution, judicial review of administrative actions in Australia is mainly governed by the Commonwealth Constitution, the *Administrative Decisions (Judicial Review)) Act* 1977 (hereafter, the *AD (JR) Act*) and the *Judiciary Act*.[495] This is notwithstanding the fact that each state has its own legislation governing administrative actions and by extension exercises of public power.

4.10.2 Judicial review of administrative actions under the Commonwealth Constitution

The general jurisdiction of the Australian High Court to engage in the judicial review of exercises of public power and more specifically, administrative actions is sourced from sec. 75 (v) of the Commonwealth *Constitution*. This section states that: “in all matters— (v) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction”. The scope of this section extends to all Commonwealth officers both judicial and non-judicial.[496] Sec. 75 (v) is of critical importance to ensuring the supervision of all public officials by the High Court. It is also equally central to the rule of law since it entrenches the judicial power to protect people from unlawful official

[491] Mason 2009: 183.
[492] Groves & Weeks 2015: 134.
[493] The Commonwealth of Australia Constitution Act.
[494] See specifically s. 75 (v) of the Commonwealth Constitution.
[495] The *Judiciary Act 1903* (Cth).
[496] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* [No 1] (1914) 18 CLR 54.

action, whether the illegality involves a violation of the Constitution or otherwise,[497] and whether the unlawful action be in Australia or overseas.[498] The power of judicial review by the Australian High Court in terms of sec. 75 (v) cannot be abrogated or curtailed by any statute of Parliament.[499]

It is equivalent to the inherent power of judicial review under the common. More importantly, unlike sec. 33 of the South African *Constitution* which specifies the grounds of review for an administrative action and mandates Parliament to enact a national legislation to give effect to the right to just administrative action, sec. 75 (v) of the Commonwealth *Constitution* does not specify the grounds for the remedies which it empowers the court to grant.[500] It is therefore assumed that where a litigant seeks a High Court mandamus, prohibition or injunction against an officer of the Commonwealth, the ground will be that the officer acted *ultra vires*, or beyond or in excess of jurisdiction, or committed a jurisdictional error.[501] This flexibility leaves the courts with the discretion to decide whether to review an administrative action without having to engage in a checklist exercise or mechanical formulas. More importantly, it gives credence to the characterisation made in this section of Australia leaning more towards the narrow approach/theory of deference.

4.10.3 Judicial review of administrative action under the *AD(JR) Act*

The *AD(JR) Act* confers judicial review jurisdiction upon the Federal Court and the Federal Circuit Court. Like its South African PAJA equivalent, the *AD(JR) Act* not only introduced a statutory procedure for judicial review which was designed to provide a better alternative to judicial review at common law but also codified the common law grounds of review.[502] It also introduced important new rights such as the right to reasons for decisions amenable to review under it.[503] It further served as a model of reform for several states and territories, which enacted judicial review statutes such as the state of Tasmania, Queensland and the Australian Capital Territory, where it

[497] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651: paras. 668–669; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146: paras. 171–172.
[498] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514: par. 600.
[499] *Plaintiff SI57/2002 v Commonwealth* (2003) 211 CLR 476: par. 5.
[500] Aronson, Dyer & Groves 2004: 44.
[501] Aronson, Dyer & Groves 2004: 44.
[502] Groves 2010: 736.
[503] Groves 2010: 736.

was adopted without substantial modifications.[504] Most significantly, the *AD(JR) Act*'s introduction of a general right to reasons including a procedure to rectify inadequate reasons without the need to commence a substantive application for review, marked an important development in Australian administrative law at the federal level. This is so especially considering the High Court's emphatic refusal to recognise a common law right to reasons for administrative decisions.[505]

Like its South African PAJA equivalent, the *AD(JR) Act* suffers from the same deficiencies – that is to say, it has been difficult for the courts and Australian administrative scholars alike to mark its contours and define the extent of its scope. Put slightly differently, there is a general uncertainty as to the precise scope of this Act as it is with PAJA.[506] By way of an example, according to ss. 5, 3 (1), and ss. 6, and 3 (5), the Act applies to "decisions" of "an administrative character" made "under an enactment", as well as 'conduct engaged in for the purpose of making "such a decision". This, like PAJA's definition of "administrative action", is a convoluted description of what the Act applies to, encompassing as it does, concepts that require their own definition. Further muddying the waters is the distinction in the *AD(JR) Act* drawn between "decisions" and "conduct engaged in for the purpose of making decisions" which has led to a technical body of law that seeks to distinguish one from the other.[507] The distinction drawn between "conduct" and "decision" has been described as "very technical" and "absurd".[508] It does indeed seem to be one without any substantial difference. The Act further complicates matters by providing for review of decisions under sec. 5 and review of conduct related to decisions under sec. 6 – both of which are subject to the same grounds of review. What this points to is the general difficulty in common law jurisdictions to enact a single law that can effectively control administrative action, let alone adequately define what constitutes said action. In South Africa for example, this has given rise to the burgeoning of the principle of legality which seems to have now developed to require more than PAJA does. This then makes it difficult for the courts to exercise deference towards public functionaries.

[504] Groves 2010: 737.
[505] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
[506] *Griffith University v Tang* (2005) 221 CLR 99: par. 29; the Court noted at the time that: "the resultant uncertainties generated by the case law on the ADJR Act have continued for more than 25 years".
[507] Groves 2010: 742.
[508] Cane & McDonald 2008: 57.

Moreover, the *AD(JR) Act* expressly excludes from its ambit review of the decisions of the Governor-General.[509] This is in stark contrast to state and territory judicial review statutes which have no equivalent exclusion.[510] It also differs from similar common law jurisdictions in which judicial review of administrative action is determined by reference to the function being performed rather than the identity of the decision-maker.[511] Another weakness of the *AD(JR) Act* is that, like its South Africa PAJA equivalent, it has codified the common law grounds of review without any substantial modification.[512] As Mason J explained in *Kioa v West ('Kioa')*,[513] the grounds of review codified under sec. 5 of the *AD(JR)* Act are not new. In his view:

> They are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. The section is therefore to be read in the light of the common law and it should not be understood as working a challenge to common law grounds of review, except in so far as the language of the section requires it.[514]

However, unlike its PAJA equivalent, the *AD(JR) Act* allows some form of flexibility to the courts to exercise judicial review beyond the codified common law grounds of review. For instance, it includes two innovative and open-ended grounds that enable review of a decision that is "otherwise contrary to law" or is an "exercise of a power in a way that constitutes abuse of the power".[515] This is perhaps one of the most important aspects in which the *AD(JR) Act* differs from PAJA – which limits judicial review to only decisions that are administrative in nature. By providing for the review of judicial review of a decision that is "otherwise contrary to law" or is an "exercise of a power in a way that constitutes abuse of the power", the *AD(JR) Act* not only expands the scope of judicial review but also mitigates against the Act's technicalities as enshrined in its statutory definition. This is perhaps one important aspect which can be imported into PAJA in order to rescue it from the remote fate that it now faces – abrogation through disuse.

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[509] Groves 2010: 750.
[510] Groves 2010: 750.
[511] The function and not the functionary is the determining factor in South Africa, for example.
[512] See specifically s. 5 of the *AD(JR) Act*.
[513] (1985) 159 CLR 550.
[514] *Kioa* par. 14.
[515] See ss. 5(1)(j), 6(1)(j) (otherwise contrary to law) and ss. 5(1)(e), (2)(j), 6(1)(e), (2)(j) (abuse of power) of the *AD(JR) Act*.

4.10.4 Judicial review of administrative action through the *Judiciary Act*

The Judiciary *Act* applies at the federal level – it grants the Federal Court judicial review jurisdiction which is almost identical to the High Court's jurisdiction under sec. 75(v) of the Constitution. This jurisdictional power is provided for in sec. 39B (1) which provides that: "the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth". Unlike the *AD (JR) Act* which excludes from its ambit the review of the decisions of the Governor-General, the *Judiciary Act* is broad enough to make provision for the review of such decisions. It is also unconstrained by the *AD(JR) Act*'s requirements that there be an "administrative" "decision" or "conduct" made "under an enactment".[516] Equally central to this Act is subsection (1A) which was inserted into sec. 39B of the Act with effect from mid-1997. This subsection provides that:

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter: (a) in which the Commonwealth is seeking an injunction or a declaration; or (b) arising under the Constitution, or involving its interpretation; or (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Paragraph (c) of this subsection is broad enough to enable judicial review applications to be brought in the Federal Court, even where *AD(JR) Act* or the other components of sec. 39B do not apply.[517] More importantly, sec. 39 of the *Judiciary Act* explicitly stipulates that the federal jurisdiction it confers on State courts overrides State jurisdiction. These are probably some of the reasons why sec. 39B is often pleaded cumulatively and in the alternative, when an applicant sues in the Federal Court under the *AD(JR) Act*.[518]

4.10.5 Judicial review of exercises of public power under the principle of legality

Notwithstanding all of the above, judicial review of administrative actions in Australia is further anchored on the notion that all exercises of public power are subject to implicit limits.[519] Put slightly differently, this is the idea that the power of parliament

[516] Aronson, Groves & Weeks 2017: 52.
[517] Aronson, Groves & Weeks 2017: 54.
[518] Aronson, Groves & Weeks 2017: 52.
[519] Aronson, Dyer and Groves 2004: 85-93.

and the officials who act under the authority of laws enacted by parliament is subject to unspoken limits.[520] The implicit nature of these limits upon public power is useful to judicial review as it enables the courts to enforce those limits even when not expressly included within legislation (which is usually the case).[521] The net result of this is that Australian courts will typically read statutes which purport to interfere with judicial review narrowly, so as to preserve the supervisory jurisdiction of the courts to the greatest extent possible, within the realms of constructional choice.[522] This is the foundation upon which the Australian version of the principle of legality is based – which is used to presume that unless expressly stated in clear and unambiguous language, the courts should not impute to the legislature an intention to interfere with fundamental rights or interpret legislation in a manner that abrogates or curtails fundamental rights, freedoms or immunities.[523] Legality in this context further expresses the idea that: "Parliament is assumed to know that the powers it grants will be interpreted wherever possible in conformity with fundamental common law, constitutional, and rule of law values".[524] The manner in which legality is applied in the Australian context seems to expand the scope of judicial review as it is the case in South Africa. Indeed, this approach to judicial review presents Australia as leaning more towards the narrow approach to deference (deference only under exceptional/limited circumstances).

4.10.6 Judicial review of administrative law under the principle of jurisdictional error

In the Australian context, 'jurisdictional error' is the label that encompasses all the grounds of judicial review so far as they result in invalidity.[525] It is said to be implicit in sec. 75 (v) of the Commonwealth Constitution which grants the Hight Court its irrevocable power of judicial review. There is jurisdictional error when the decision-maker makes a decision outside the limits of the functions and powers conferred on her or him or does something which he or she lacks power to do.[526] The centrality of

[520] Groves & Lee 2007: 4.
[521] Groves & Lee 2007: 4.
[522] Lisa Burton Crawford: Jurisdictional Error and the Principle of Legality – Administrative Law in the Common Law World (adminlawblog.org) (accessed on 05 August 2022).
[523] Coco v The Queen (1994) 179 CLR: 437.
[524] Aronson, Groves & Weeks 2017: 189.
[525] Aronson, Groves & Weeks 2017: 184.
[526] *Ex parte Aala* [2000] HCA: 163.

this principle as it applies to the judicial review of administrative actions was reaffirmed by the High Court in *Kirk v Industrial Court (NSW) ('Kirk')*,[527] where the Court held that the generic grounds of judicial review have been collected and grouped under a number of headings which are sometimes indeterminate, always context-dependent, and only serve as examples.[528] Expressed in this manner, this principle becomes so flexible that it is not possible to mark its contours and the extent of its application. As the Court further explained in *Kirk*, it has no "rigid taxonomy".[529] Effectively, this means that unlike under the *AD(JR) Act,* the court has no box ticking exercise to engage in when reviewing administrative actions under this principle. The court's jurisdiction is established if it can be shown that the decision-maker made a decision outside the limits of the functions and powers conferred on her or him or did something which he or she lacks power to do. Incidentally, this further extends the scope of judicial review and raises questions about the Australian approach to deference.

4.11 The Australian approach to deference the broad approach: The broad or narrow approach?

As shown elsewhere above, the High Court of Australia is empowered to intervene and review the decision of other public functionaries only under limited circumstances. Incidentally, this seems to accord very well with the broad approach to deference – that is to say, deference on a wide spectrum of legal issues and disputes. In fact, Australian judges conceive their position and function by reference to constitutional principles that both entrench and limit their role.[530] This is in part because of the strict Australian version of the separation of powers doctrine which has long served to distinguish and limit the constitutional role of courts and administrative tribunals and officials.[531] In practice, this has meant that judicial bodies and their officers are precluded from exercising any substantial non-judicial functions.[532] This doctrine also places similar restrictions on the exercise of judicial functions by non-judicial bodies such as tribunals or officials.[533] The nature and limits of judicial review of administrative action was succinctly captured by His Honour Brennan J in *Attorney General (NSW)*

[527] (2010) 239 CLR 531.
[528] *Kirk:* par. 573.
[529] *Kirk*: par. 574.
[530] Groves & Weeks 2015: 136.
[531] Groves & Weeks 2015: 136.
[532] Groves & Weeks 2015: 136.
[533] Groves & Weeks 2015: 136.

v Quin ('Quin'),[534] who drew reference from the old landmark US case of *Marbury v Madison*,[535] and held that:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction to simply cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[536]

In a word, Australian courts make a distinction between merits and legality review so that in the end, the settlement of disputes on questions of law remains the exclusive preserve of the courts which are nevertheless not empowered to encroach onto the "lush field of policy".[537] However, this distinction between merits and legality review has not been an easy one to maintain in practice. The net result of this has been an increasing tendency of Australian courts to explain decisions by reference to concepts and processes that fit most comfortably within the well-settled constitutional realm of the courts.[538] Another factor that is indicative of this departure from the strict merits/legality divide is the High Court's apparent abandonment of *Wednesbury* unreasonableness in *Minister for Immigration and Citizenship v Li ('Li')*.[539] The High Court held in that case that:

> The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it — nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in Wednesbury.[540]

The Court also took a step further in this apparent departure from *the Wednesbury unreasonableness* and read procedural fairness into sec. 357A (3) of Migration Act 1958 (Cth). In so doing, the High Court per French CJ rejected the Minister for Immigration and Citizenship's argument that the matter before the Court was not about procedural fairness and held that such an interpretation was "antithetical to the legislative direction and facultative purpose of section 353 and indeed that of section 357A(3)".[541] For context, these two sections empowered the Migration Review Tribunal (MRT) in the following manner: sec. 353 provided that "(1) The Tribunal shall,

[534] (1990) 170 CLR 1.
[535] 5 US 137 (1803).
[536] *Quin*: par. 35 – 36.
[537] Brennan 1986: 111.
[538] Groves & Weeks 2015: 139.
[539] (2012) 202 FCR.
[540] *Li:* 364: par. 68
[541] *Li*: 346 –47: paras. 19 – 20.

in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. (2) The Tribunal, in reviewing a decision: (a) is not bound by technicalities, legal forms or rules of evidence; and (b) shall act according to substantial justice and the merits of the case" whereas sec. 357A provides that "(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". The case itself involved one Ms Li who had applied for a visa under the Migration Act 1958 (Cth) but had supplied false information about her employment history in support of her application, which caused the MRT to set aside her skills assessment. She later attempted to undertake a new skills assessment but was refuse an adjournment by the MRT on the basis that she was given ample opportunity to make out her case. On the facts of the case, Ms Li's claim would indeed not have met the *Wednesbury unreasonableness* standard of review which required that a decision had to be so unreasonable that no reasonable decision-maker could have taken it before it can be declared unlawful and set aside.[542]

The Court's reading of procedural fairness requirements – more specifically, the right to give reasons into this exercise of public power seems to have expanded the scope of judicial review and lean more towards the narrow approach to deference. What further gives credence to this is the Court's employment of the concept of jurisdictional error to interfere with the decision of the MRT. As Basten JA reasoned in *L & B Linings Pty Ltd v WorkCover Authority of New South Wales ('L & B Linings Pty Ltd'),*[543] if the tribunal had provided a fully reasoned justification, the High Court would not have been able to infer that the MRT had acted unreasonably in the sense amounting to jurisdictional error even if its reasons were illogical or contained errors of fact.[544] The concern that Groves and Weeks have raised with this departure from the *Wednesbury unreasonableness* and the general approach of the Court to judicial review and deference is that it seems to be grounded on 'fundamental values' and not clearly defined legal principles.[545] According to them, any attempt to justify judicial intervention based on the infringement of values naturally suffers from two essential flaws: 1) it is inevitably an ex post facto exercise in generalising what judges think that

[542] Groves & Weeks 2015: 141.
[543] [2012] NSWCA 15.
[544] *L & B Linings Pty Ltd*: par. 57.
[545] Groves & Weeks 2015: 151.

Australian values might be, which is necessarily conducted on shifting sands; 2) the use of values rests on the unlikely assumption that there are core values which are both widely shared and also understood in the same way by those who share them.[546] This also begs the question: How are values, even those to which the adjective 'fundamental' is appended, able to be identified, and subsequently applied, in the event that they are contested?[547] This is the same concern there has been raised by the Constitutional Court in South Africa in *My Vote Counts* where the Court cautioned against a 'freewheeling or haphazard' resort to constitutional values and rights when more specific rights enshrined in legislation (s) can provide the necessary relief.[548] It seems Australian courts are also relying on undefined 'fundamental values' to expand the scope of their judicial review and exercise less deference towards public functionaries in the same way that South African Courts are relying on the principle of legality to expand the scope of judicial review.

The principle of legality is also another avenue through which the scope of judicial review has been expanded and the scope of judicial deference limited beyond the *Wednesbury unreasonableness* in Australia. As explained elsewhere above, this principle expresses the idea that:

> ("…") the legislature does not intend to make any alteration in the law beyond what it explicitly declares …either in express terms or by implication; or, in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[549]

The primary objective of employing this principle has be expressed as the need to make the legislative branch politically accountable for any retraction of fundamental rights or freedoms, with the judicial branch purporting not to know what the legislature intended unless its intentions were politically visible.[550] However, like in South Africa where the use of the principle of legality by the courts has been criticised as another avenue for bypassing PAJA, the use of this principle in judicial review has also not been universally accepted in Australia. This is in part because of its modern version

[546] Groves & Weeks 2015: 151.
[547] Groves & Weeks 2015: 151.
[548] *My Vote Counts*: par. 51-52.
[549] *Potter v Minahan* (1908) 7 CLR 277: par. 304.
[550] Groves & Weeks 2015: 153.

which subsumes "fundamental values".[551] This reference to "fundamental values" has drawn opprobrium with some administrative law scholars arguing that "what is fundamental in one age or place may not be regarded as fundamental in another age or place",[552] while others have taken the view that the common law principles which are protected by the principle of legality are broader than the "types of rights that might be the subject of a Bill of Rights".[553] The problem with this reliance on fundamental values is further compounded by the fact that "Australia is a multi-cultural society, which is constantly undergoing rapid social and economic change. It is extremely difficult for present-day judges to know what the permanent or enduring values in contemporary Australian society are".[554] The same criticisms have been levelled at the principle of legality which some scholars have argued as providing a more fragile protection of rights in Australia than they are provided in countries which have statutory or constitutional protection of enumerated rights.[555] Ultimately, it is not possible to characterise Australia as either leaning more towards the narrow approach to deference or broad approach to deference. Despite this difficulty, there are some important elements which can be adopted from Australia to enrich our own formulation of a theory of deference (broad or narrow). For example, the Australian version of the principle of legality which protects fundamental rights or freedoms can be useful. Equally, the concept of jurisdiction error which was abandoned in South Africa with the advent of our constitutional democracy.

4.12 Conclusion

In conclusion, in this chapter I grapple with the concept/theory of judicial deference, how it has developed in South Africa and similar common law jurisdictions like Canada and Australia and how administrative law scholars have proposed it should be approached. More broadly, I argue in this chapter that no substantive and cogent theory of judicial deference exists in any of the common law jurisdictions I have

[551] For example, in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252: par: 15, His Honour Gageler J extensively explained that: 'Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extend to the protection of fundamental principles and systemic values.'
[552] McHugh 1999: 46.
[553] D Pearce AO: 2013.
[554] McHugh 1999: 46.
[555] Meagher 2011: 456-457.

discussed including Finland which is not part of the common law world. Despite this weakness, there are some elements that both courts and administrative law scholars in those jurisdictions have identified as being central to the formulation of a cogent and substantive theory of deference. In South Africa for example, the Constitutional Court has grounded its formulation of a judicial theory of deference under the heading of reasonableness while the lower courts have applied Hoexter's proposition of a theory of deference as a *fait accompli*.[556] For example, in her seminal article at the turn of the century, Hoexter authoritatively defined deference as consisting of:

> a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect, and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.[557]

Having described deference in this light, Hoexter further proposed that there are essentially three themes that should inform any attempt to formulate a theory of deference – which will in turn assist a reviewing court decide whether it should intervene and review an exercise of public power in a given judicial review case or exercise deference towards the decision-maker whose decision is impugned. Indeed, instead of seriously engaging with her proposition, the courts in South Africa have generally applied her proposition as a *fait accompli.* Similarly, attempts to formulate a theory of deference in Canada have been fraught with many challenges. For example, administrative law scholars in Canada have over the years grappled with the question of whether deference should be grounded on 'patent unreasonableness', a culture of justification, the so called 'reasonableness *simpliciter'* or just generally, the concept of jurisdictional error. Australia on the hand seems to follow the narrow approach to deference as judges conceive their position and function by reference to constitutional principles that both entrench and limit their role.[558] This is also in part due to the strict Australian version of the separation of powers doctrine which has long served to distinguish and limit the constitutional role of courts and administrative tribunals and officials.[559] However, the courts' reliance on the concept of jurisdictional error and the principle of legality in Australia seems to be expanding the scope of judicial review as it is the case in South Africa. In short, I have engaged in comparative analysis of how

[556] Quinot & Mareee: 2016: 268.
[557] Hoexter 2000: 501.
[558] Groves & Weeks 2015: 136.
[559] Groves & Weeks 2015: 136.

deference is conceptualised in Canada, Finland and Australia only to propose that whether South Africa courts elect to formulate a theory of deference that is either narrow or broad in scope, they are not without recourse or point of reference – they can borrow from those foreign jurisdictions to enrich our own with any necessary modifications to suit our context.

Chapter 5

5.1. Conclusion

I argue in this dissertation that the prevailing view in administrative law on the relationship between PAJA and the principle of legality – which insists that these two mechanisms of review should not be used interchangeably has resulted in an undue development and the broadening of the principle of legality as a pathway of review. Legality has been developed in this manner to include procedural fairness review – which is a separate ground of review under PAJA. This development of legality to include procedural fairness review can be attributed to the courts, particularly the Constitutional Court's desire to bring all exercises of public power under some degree of public law control. It can further be justified on the basis that procedural fairness can be thought of as an important element of the rule of law which by its very nature promotes a number of very important values in a constitutional democratic order.[560] As the Court held in *Janse van Rensburg NO v Minister of Trade and Industry,*[561] one of those democratic values is that procedural fairness improves the quality and wisdom of decision making and also demonstrates respect for the dignity of the participants.[562] More importantly, procedural fairness also serves to promote the constitutional values of transparency, accountability and responsiveness to mention but a few.

Be that as it may, the courts' propensity to read procedural fairness into legality has neither been substantive nor principled. This, as I have argued, is in part due to the courts' failure to formulate a substantive and cogent theory of deference. Such a theory as I have argued can, among other things, be grounded on the standard of *reasonableness* as conceptualised by the South African Constitutional Court in *Bato Star Fishing.* It will be recalled that the Court in this case redefined an unreasonable decision as one that a "reasonable decision-maker could not reach".[563] In the alternative, a theory of deference can be grounded on reasonableness as conceptualised by the Canadian Supreme Court per Bastarache and LeBel JJ who defined the standard of *reasonableness* as requiring the "existence of justification, transparency and intelligibility within the decision-making process' in which a reviewing

[560] Raz 1997: 201.
[561] 2001 (1) SA 29 (CC).
[562] Joseph v City of Johannesburg 2010 (4) SA 55 (CC).
[563] *Bato Star Fishing*: par. 44.

court should ask the question whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[564] In essence, this means that instead of subjecting executive actions to procedural fairness review under legality, the courts will now only have to determine whether the executive decision taken "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"[565] before it can intervene. This is not only desirable but substantive, and principled as it will ensure that executive actions are not left unchecked while at the same time ensuring that the courts do not encroach into the domain of the executive beyond what is constitutionally permissible. This standard is also less exacting than the standard of procedural fairness to which some executive actions have been subjected, as discussed in chapter 3, 3.3 above. Requiring all exercises of public of power to not only be rational but reasonable should not be problematic as there can be reasonable justification for public functionaries to exercise their powers unreasonably. In other words, the standard of reasonableness should run like a golden thread throughout all exercises of public power – irrespective of whether they are executive, legislative, or administrative in nature.

Moreover, a theory of deference can be grounded on the 4 factors as identified by Quinot & Maree. The first factor being an integrated function for judicial review – which requires judicial review to be viewed as one of a variety of methods to safeguard the right to administrative justice and not the panacea.[566] In other words, this factor holds that courts should be slow to entertain judicial review applications unless the litigant has proven that they have exhausted all the internal remedies as demanded by sec. 7 of PAJA. The second factor being Constitutional context – which holds that an appropriate theory of deference requires an assessment of deference in relation to considerations such as constitutional supremacy, Mureinik's culture of justification, Klare's transformative constitutionalism, and South Africa's human rights culture.[567] The third factor being deference as a free-standing principle or informing principle or both – which states that deference must recognise the distinction between review and appeal so that the reviewing court does not overreach.[568] As I have argued, courts are

[564] *Dunsmuir*: 47.
[565] *Dunsmuir*: 47.
[566] Quinot & Maree 2016: 461.
[567] Quinot & Maree 2016: 461.
[568] Quinot & Maree 2016: 461.

more likely to lose their legitimacy if they are perceived to be overreaching.[569] A constitutional crisis is likely to ensue once the courts have lost legitimacy since they ultimately rely on the executive to enforce their judgments.[570]

Moreover, to formulate a principled approach to determine whether in each case of legality review procedural fairness should apply, the courts will in the second instance, have to seriously engage with the requisites of the doctrine of the separation of powers on their exercise of judicial power. This is so because at its most basic, the doctrine of the separation of powers "means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence and jurisdiction".[571] In other words, this doctrine imposes limits on the extent to which a reviewing court can intervene with the decisions of other branches of government. The need to respect these limits becomes even more pronounced where the exercise of public is executive in nature – such exercises of public power are generally polycentric and therefore require political judgement; they are indeed better left to politicians than unelected judges. It remains to be seen whether South Africa courts will manage to formulate a substantive and principled approach to determine in each case of legality review whether procedural fairness should apply.

However, South African courts are not alone in their struggle to formulate such an approach. As I have argued, the same struggle has confronted administrative law scholars and courts in other foreign common law jurisdictions like Canada and Australia. This notwithstanding, I have also argued that whether our courts elect to formulate a theory of deference that is either broad or narrow in scope – they are not without recourse. As argued in the antecedent chapter, they can borrow certain

[569] Nyane 2020: 322 for example, has argued that ("…")while the position of the courts under apartheid was clearly undesirable, today there is a genuine concern about judicialisation. Just as democracy suffers when the judiciary is in slumber, so too is there a huge danger to democ-racy when the judiciary is in overdrive".

[570] *S v Mamabolo*: par. 16 ("…") In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state".

[571] Seedorf & Sibanda 2008: 2.

important elements from those jurisdictions to enrich our own – albeit with the necessary modifications to suit own context.

5.2. Recommendations

Given the number of judicial review applications into exercises of public power that end up in almost court every day, it is recommended that the legislature considers passing legislation to establish an Administrative Law Review Court (ALRC) and Administrative Law Tribunals. As in the case of Finland, the Administrative Law Review Court can be tasked and legislatively empowered to investigate whether the authority in question has complied with general administrative principles (e.g. objectivity, equality, impartiality, proportionality, the protection of legitimate interests and the prohibition on abuse of power) when exercising its discretionary powers.[572] Thus, even if the administrative authority has wide discretionary powers, it is within the courts' remit to evaluate how the use of those powers conforms to said administrative legal principles.[573]

The Administrative Law Tribunals on the other hand can take form and structure of the Australian Migration Review Tribunal (MRT) which is empowered by sec. 357A (3) of Migration Act 1958 (Cth) in the following manner: sec. 353 provides that "(1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. (2) The Tribunal, in reviewing a decision: (a) is not bound by technicalities, legal forms or rules of evidence; and (b) shall act according to substantial justice and the merits of the case' whereas sec. 357A provides that "(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". This will not only ensure that constitutional injunction of just administrative action is given effect to but also the speedy resolution of administrative law disputes. Moreover, this dissertation calls for more debate into the formulation of a theory of judicial deference. The time has come for both administrative law scholars and judges to answer the question of whether procedural fairness should be read into legality and the circumstances under which this should be done.

[572] Mäenpää 2019: 182.
[573] Mäenpää 2019: 188.

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