Judicial review of executive power: Legality, rationality and reasonableness (Part 1)

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Abstract

Early in the life of the South African democratic dispensation, the Constitutional Court distinguished the conduct of the President as the head of the executive branch of government from an administrative action. However, it held that executive conduct was, like all exercise of public power, constrained by the constitutional principles of legality and rationality. So, as a necessary incident of the rule of law, the executive may not exercise powers or perform duties not conferred upon it by the Constitution and the law. The cases decided since then demonstrate in practical and theoretical terms the democratic aphorism that no one is above the law and everyone is subject to the Constitution and the law. In the process, the Constitutional Court has entertained appeals for the review of executive powers such as where, *inter alia*, the President had acted on a wrong advice or terminated the appointment of the head of the National Intelligence Agency; the legality of Ministerial Regulations and of the rationality of the presidential appointment of the Director of the National Prosecuting Authority. The role of reasonableness as a ground of review of executive conduct rather than administrative action has been demonstrated in the many cases where the distinction has been made between the rationality test and the reasonableness test. The conclusion, therefore, is that, through their interpretation of the Constitution and review of executive powers, the courts have developed a code of principles regarding the rule of law, good government, and democracy.

1 Introduction

It is well-known in contemporary constitutional jurisprudence that the institution among the organs of state created by the Constitution as the independent machinery 'vested with the power of judicial review to determine the legality of

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executive [conduct] and the validity of legislation passed by the legislature'[1] is the judicial branch.[2] In the discharge of this arduous task, the courts employ the constitutional principle of legality which, when coupled with that of the supremacy of the Constitution, enables them to ensure that both the legislature and the executive act within the authority of the Constitution and in compliance with the rule of law.

It is thus the province of the court to determine whether, in any given circumstance, the limits of constitutional authority have been transgressed by any organ of State and, where such act or conduct is inconsistent with the Constitution, to declare that act or conduct unconstitutional and invalid.[3]

'Constitutionality' refers to the testing powers of the courts through judicial review as to whether the acts of the legislature or the conduct of the executive conform to the letter and spirit of the powers conferred upon them by the Constitution. The Constitutional Court of South Africa somehow prefers the term 'legality' to embrace the issues of constitutionality which rightly belongs to the enquiry based on the ascertainment of the validity of power exercised on the strength of the constitutional mandate. The term 'legality' has its roots at common law having supplanted the traditional *ultra vires* doctrine as a ground for impugning executive decisions and administrative actions within the administrative law sphere.[4]

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[1]Bhagwati J in *Minerva Mills Ltd v Union of India* AIR (1980) SC 1789 at 1825 and Bhagwati CJ in *Sampath Kumar* v *Union of India* AIR (1987) SC 386 at 388.

[2]Quite apart from the provisions conferring upon the courts the jurisdiction to enforce the fundamental rights in the Constitutions, eg s 38 of the Constitution of the Republic of South Africa, 1996 (1996 Constitution); art 25 of the Constitution of the Republic of Namibia, 1990 and the remedies provisions of s 172(1)(a) of the South African Constitution, the sheer wording of the fundamental rights provisions in themselves constitute an imperative to the executive and the legislature and a command to the courts such that even in the absence of the said enforcement provisions, each and every right thereby entrenched could be enforced in the courts without more ado. In contrast to the foregoing proposition is the wording of the socio-economic rights of ss 26 and 27. This marks a clear exception to the directive and mandatory nature of these rights, hence the difficulties encountered by the courts in directly enforcing the rights to access to health care services in *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) (*Soobramoney*); and the provision of free nevirapine, the anti-retroviral drug, to prevent mother-to-child transmission of HIV/AIDS in *President of the Republic of South Africa v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) (*TAC*); as well as housing and shelter in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (*Grootboom*).

[3]See, eg, ss 2 and 172(1) of the Constitution. Even in Constitutions where no provisions similar to those in the South African Constitution exist, such as the United States and Australia, the courts have assumed jurisdiction to exercise powers of judicial review over the legislation of parliament and executive conduct – *Marbury v Madison* 5 US 137, 2 L Ed 60 (1803); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and *O'Toole v Charles David Pty Ltd* (1990) ALJ 618.

[4]See, eg, *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

Here, reference must be made to the somewhat revolutionary expositions of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex parte the Application of the President of the Republic of South Africa*,[5] where it decidedly wrestled constitutional jurisdiction from the Supreme Court of Appeal which, in turn, had striven in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*,[6] to draw a distinction between judicial review under the Constitution and judicial review at common law, ostensibly to carve out for itself a slice of the constitutional adjudicatory cake. The Constitutional Court's approach is in a sense supported by the fact that in present day South Africa, the law regulating public administration derives from the Constitution, hence it is arguable that judicial review in both the administrative and constitutional spheres has converged with the incorporation of the former as part of the fundamental rights in the Constitution.[7] For that reason, therefore, no clear dividing line could possibly be drawn between the two. But the pronouncements in the *Pharmaceutical Manufacturers'* case were made before the enactment of the Promotion of Administrative Justice Act 2000[8] (PAJA) which has codified the *corpus* of administrative law; spelt out the ground rules for the exercise of administrative action; elaborated on the grounds for judicial review and itemised the remedies available to an applicant for judicial review of administrative action.[9] This enactment has thus restored administrative law to its original place and had

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[5]2000 2 SA 674 (CC) (*Pharmaceutical Manufacturers*) paras 20, 33 and 50 respectively.
[6]1999 3 SA 771 (SCA).
[7]Section 33(1), 1996 Constitution.
[8]Act 3 of 2000.
[9]In the face of this development, the question may be asked whether administrative law could still be described as a body of rules set down by statute governing administrative action, since in the South African context, it is not merely governed by rules emanating from statutory regulations but also by constitutional provisions and interpretation. An alternative argument is that the regulation of administrative behaviour and justice by the statute notwithstanding, should the provisions of the Act deriving their ultimate authority from the Constitution be interpreted or construed as if they were provisions of the Constitution? Another question is whether the Administrative Justice Act has succeeded in creating a separate body of administrative law outside the realm of the constitutional law of South Africa? It is noteworthy that the case of *Minister of Correctional Services v Kwakwa* 2002 4 SA 455 (SCA) paras 35-36 was canvassed on the basis of s 35 fair trial rights and not on the administrative justice provisions of s 33. The Supreme Court of Appeal upheld a complaint against a departmental regulation concerning prisoners' privileges but which distinguished un-sentenced prisoners from the so-called group A prisoners, thus making the former lose numerous privileges which they had enjoyed while group A prisoners retained those privileges. The court based its decision on the principle of legality which was held not only to emanate from the rule of law but also as an implied provision of the Constitution the central conception of which is that both the executive and the legislature were constrained in every sphere by the principle that they could exercise no power and fulfil no function beyond that conferred upon them by law. Thus, whereas in this case, the Commissioner fundamentally misconceived his powers in terms of the Act; disregarded the provisions of the Constitution; and acted beyond his authority, the privilege system designed by him through the Regulations must be invalidated.

given a semblance that, after all, there still is a branch of public law which can be referred to as administrative law.[10]

The foregoing merely introduces the modern origins of the doctrine of legality which governs judicial review of legislation as well as executive conduct. Although it must be said at the outset that while judicial review of legislation was unknown to the common law tradition because of the then overarching principle of sovereignty of parliament, judicial review of the conduct of the executive did not also flourish on account of the doctrine of royal or state prerogative.[11] The coming of the Constitutions of 1993 and 1996 changed all that. For instance, the South African Constitution is founded on specified fundamental values of human dignity, the achievement of equality, the advancement of human rights and freedoms, and the creation of a non-sexist and non-racialist society. South Africa is a state established on the rule of law and the supremacy of the Constitution.[12] In addition, the Constitution embodies certain democratic principles of universal adult suffrage, a national common voters' roll, regular elections[13] and a multi-party system[14] of democratic government designed to ensure accountability, responsiveness and openness.[15] The Constitution also makes provisions for the individual citizen's participation in the decision-making and democratic processes.[16]

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[10]See such leading texts as: Hoexter *Administrative law in South Africa* (2012) (Hoexter *Administrative law*); Burns and Beukes *Administrative law under the 1996 Constitution* (2009) (Burns and Beukes); Quinot *Administrative law: Cases and materials* (2008) (Quinot); Klaaren and Penfold 'Just administrative action' in Woolman *et al Constitutional law of South Africa* (2008) Ch 63 (Klaaren and Penfold); Hoexter 'Just administrative action' in Currie and De Waal *The Bill of Rights handbook* (2013) ch 29 (Hoexter 'Just administrative action').

[11]It was in *Council for Civil Service Unions v Minister for the Civil Service* (n 4) that the then House of Lords curtailed in no uncertain terms the hitherto pervasive influence of the royal prerogatives and held that every exercise of public power, whatever the source, was reviewable by the courts. See further *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215 paras 45-47 and 50; Lord Bingham, *The business of judging* (2000) 208; Hogg *Constitutional law of Canada* (1995) para 1.9.

[12]Sections 1 and 2, 1996 Constitution. See also *Democratic Alliance v Ethekwini Municipality* 2012 2 SA 151 (SCA) (*Ethekwini Municipality*); *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA); *Democratic Alliance v President of the Republic of South Africa* 2012 1 SA 417 (SCA) (*DA v President of the RSA*).

[13]The Constitutional Court held in *ANC v Chief Electoral Officer, IEC* 2010 5 SA 487 (CC) that the dispute concerning the eligibility of a candidate for election to the National Assembly raised a constitutional issue and fell therefore within its jurisdiction.

[14]*UDM v President of the Republic of South Africa* 2003 1 SA 495 (CC).

[15]Section 1 read with s 195, 1996 Constitution.

[16]See, eg, ss 57, 72(1)(a), 74(8) and 118(1)(a), 1996 Constitution. On which see: *Matatiele Municipality v President of the RSA* 2006 5 SA 47 (CC); *Merafong Demarcation Forum v President of the RSA* 2008 5 SA 171 (CC). It was held in *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 6 SA 588 (CC) paras 63 and 68, that by its very nature, representative and participatory democracy requires that a genuine platform be created, even for members of minority parties in the National Assembly, to give practical expression to the aspirations of their

2 Scope of this investigation

This two-part article is not concerned about whether or not the common law principles of administrative law have been immersed in the constitutional jurisprudence in contemporary South African society.[17] Rather, it is an attempt to investigate the role the courts have played in the last two decades of political freedom and democratic transformation in South Africa in relation to the executive performance of its constitutional and statutory duties. Owing to the enormous amount of case law available on the subject, this presentation focuses specifically on how, through their judgments, the courts have kept the executive arm of government in check in exercise of its powers under a Constitution that expressly stipulates the rules of governance as copiously as humanly possible. This two-part article is, to some extent, the tale of five South African cases that contributed meaningfully to the debate on constitutionalism and democratic governance. The discussion is anchored on these five leading cases among other decisions of the Constitutional Court and the Supreme Court of Appeal which formed the materials available for this study. This assertion is borne out by the fact that there is a common thread running through all five cases in terms of the three main legal problems which illustrate the place of judicial review of executive conduct in contemporary South African constitutional jurisprudence.

For instance, each of the five cases deals with the principles of legality and rationality; the distinction between executive conduct and administrative action being the two main focus areas of this series. Analytically, they deal with whether in taking a decision, the President failed to afford the affected party a hearing or, at least, the opportunity of being consulted. The question that has systematically been raised in each case is the extent to which the principle of legality of executive conduct was linked to the right to be heard, or, rather, whether the principle of legality could influence the decision as to whether a hearing should be granted before the decision was taken in the circumstances of each case? All three main legal issues were extensively deliberated upon by the Constitutional Court in four of the cases, and the SCA in the fifth and latest example of the five cases. The deliberations arose against the backdrop of the executive conduct being challenged for unconstitutionality where the President:

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constituencies by playing a more meaningful role in the law-making processes. Therefore, any Rule of the National Assembly that empowers it to impose the permission requirement, or reinforces this requirement, would fly in the face of the meaning and purpose of s 57, read with ss 55(1)*(b)* and 73(2) and to the extent of its inconsistency would be constitutionally invalid.

[17] A more detailed analysis of the triangular relationship between the Constitution, PAJA and the common law has been undertaken by Kohn 'Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law' (2013) 28 *SAPL* 22-39.

(a) appointed a commission of inquiry to investigate the activities of the South African Rugby Football Union;[18]

(b) terminated the appointment of the head of the National Intelligence Agency;[19]

(c) pardoned the perpetrators of politically motivated crimes of the apartheid era without affording victims of those crimes the opportunity to be heard;[20]

(d) determined the percentage increase of the salaries of magistrates without hearing the parties involved;[21] and

(e) where the Director General of the Department of Home Affairs decided to close the Refugee Reception Office in Cape Town in disregard of the principles of procedural fairness.[22]

Part Two will examine the question of vagueness in connection with the making of delegated legislation otherwise referred to as legislative administrative action. This is illustrated by the two controversial Medicines Regulations' cases – *Affordable Medicines Trust v Minister of Health*,[23] and *Minister of Health v New Clicks SA (Pty) Ltd.*[24] There is also the question of whether the President or a member of his executive had failed to perform his or her constitutional obligation and whether such failure violated the principles of cooperative government entrenched in the Constitution as witnessed in *Minister of Police v Premier of the Western Cape.*[25] The final topic of Part Two deals with the problematic issue of prosecutorial discretion and whether it is reviewable by the court. Although aspects of the prosecutorial discretion have been excluded from the application of PAJA, the courts have in *Democratic Alliance v Acting National Director of Public Prosecutions*[26] and *NDPP v Freedom under Law*[27] held that, like the

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[18] *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC).
[19] *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC).
[20] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) (*Albutt*).
[21] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 7 BCLR 762 (CC) (*Association of Regional Magistrates*).
[22] *Minister of Home Affairs v Scalabrini Centre* 2013 6 SA 421 (SCA) (*Scalabrini Centre* case (SCA)).
[23] 2006 3 SA 247 (CC) (*Affordable Medicines*).
[24] 2006 2 SA 311 (CC) (*New Clicks*).
[25] 2014 1 SA 1 (CC).
[26] 2012 3 SA 486 (SCA).
[27] 2014 4 SA 298 (SCA).

exercise of executive powers, the prosecutor is subject to the doctrines of legality and rationality in the exercise of prosecutorial powers.

Owing to space constraints, it is not possible to incorporate into the present discussion aspects of the right to procedural fairness as has been canvassed in relation to the executive decision-making process. The question of whether in taking their decisions, the President and Members of his Executive are bound to comply with the requirements of procedural fairness is therefore the subject matter of a separate article.[28] It is important to draw attention to the fact that in spite of the enormous powers of judicial review and wide remedial options open to the courts, they have not always obliged the complainant with the relief sought where doing so would amount to trespassing unto the domain of the executive. The issue of judicial constraint encompassing those instances where the court denies a party access to court for lack of standing to pursue the matter in dispute[29] is in itself a very broad topic.[30] It involves, in particular, the question of whether certain disputes or issues concerning government policy are justiciable and whether the question brought to court is political in nature. The Constitutional Court's judgments in the highly and widely publicised controversies surrounding the Gauteng e-tolling saga[31] and the Marikana mineworkers' *imbroglio*,[32] where the court declined to make certain restraining orders against executive policy decisions, appropriately fit into this debate. Where the exercise of judicial authority takes the form of judicial ordering – those instances where the court restrains itself from making orders that will bring the government of the nation or a part of it to a standstill – will likewise, because of space constraints, be undertaken elsewhere.[33]

3 Legality and rationality at the heart of review[34]

It was stated by the Constitutional Court in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA*[35] that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and

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[28]See Okpaluba 'Is the right to procedural fairness implicit in the executive decision-making process?' (forthcoming).
[29]The recent cases of *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 2 SACR 443 (CC); *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 3 BCLR 251 (CC).
[30]See Okpaluba, 'The persistent problem of standing to challenge constitutional infringements in own-interest: Reflections on *Giant Concerts*, *Tulip Diamonds* and other cases' (forthcoming).
[31]*National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC).
[32]*Magidiwana v President of the Republic of South Africa* 2013 11 BCLR 1251 (CC).
[33]See Okpaluba 'Constraints on judicial review of executive conduct: The juridical link between the Marikana mineworkers' imbroglio and the Gauteng e-tolling saga' (2015) 2 *TSAR* 286.
[34]See also Hoexter *Administrative law* (n 10) 121; Burns and Beukes (n 10) 287.
[35](N 5).

the doctrine of legality, which is part of that law'.[36] The court further held that it was a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Such decisions must be rationally related to the purpose for which the power was given, otherwise, they would be arbitrary and inconsistent with this requirement. In order to pass constitutional scrutiny, therefore, the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. Failure so to comply would mean that the power was exercised below the standards demanded by the Constitution for such action.[37]

Similar sentiments have been expressed by the court in relation to the principle of rationality of legislative authority. Quite recently, Ngcobo CJ, while reiterating the constitutional imperative that Parliament was bound only by the Constitution and must act in accordance with, 'and within the limits, of the Constitution',[38] stated in *Glenister v President of the Republic of South Africa*[39] that:

> But, like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that 'there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose'.[40] Nor can Parliament act capriciously or arbitrarily. The onus of establishing the absence of legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.[41]

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[36] *Id* para 20. It was emphasised in *Merafong* (n 16) that as much as rationality was an important requirement for the exercise of power in a constitutional state, it did not in anyway, indicate that a court would take over the functions of the other arms of government in the formulation and implementation of policies.

[37] *Id* para 85. Again, in *Pepcor Retirement Fund v Financial Services Board* 2003 6 SA 38 (SCA) para 47 where the facts were not dissimilar from those in *Pharmaceutical Manufacturers* case (n 5), the question was whether a material mistake of fact should be a basis upon which a court could review an administrative decision taken in the public interest, the Supreme Court of Appeal, per Cloete JA, reiterated the place of the doctrine of legality in the constitutional scheme of things. He held that: 'the doctrine of legality … requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*'. See also *Minister of Public Works v Kyalami Ridge Ratepayers Association* 2001 3 SA 1151 (CC) para 34; *President of the Republic of South Africa v South African Rugby Football Union* (n 18) para 148; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 55-59.

[38] Section 44(4), 1996 Constitution.

[39] 2011 3 SA 347 (*Glenister*).

[40] *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC) para 19 (*New National Party*).

[41] *Glenister* (n 39) para 55. See also *Pharmaceutical Manufacturers* (n 5) paras 86 and 89-90; *New National Party* (n 40) para 24.

As stated in its Preamble, the objective of the South African Police Services Act 68 of 1995 which was impugned in *Glenister*, was to enhance the investigative capacity of the Police Service in relation to national priority and other crimes, by establishing a Directorate for Priority Crime Investigation to combat those crimes. The question that arose in the challenge was whether the Act met, and whether the legislation achieved, that objective. In other words, could the legislature establish a body to exercise public power without securing its independence from political interference?

Although Sachs J had, a decade earlier, said that the principle of legality was an 'evolving jurisprudence' in South African law, 'whose full creative potential will be developed in a context-driven and incremental manner',[42] that jurisprudence appears to have come full circle. The summary provided by Gorven J in *Booysen v Acting NDPP*[43] bears witness to this assertion. Explaining the application of the legality and rationality principles, the trial judge stated first, that 'the principle of legality requires that the exercise of public power "must be rationally related to the purpose for which the power was given".'[44] Secondly, rationality, on the other hand, is a minimum requirement applicable to the exercise of all public power since 'decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement'.[45] Thirdly, a rational connection means that 'objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved'.[46] Finally, the test is therefore twofold: first, the decision-maker must act within the law and in a manner consistent with the Constitution – he or she therefore must not misconstrue the power conferred; and second, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.[47] Having discussed rationality as a constraint on the exercise of public power generally, the next stage is to focus the discussion on those cases which specifically dealt with the principles of legality and rationality in relation to executive conduct.

3.1 Appointment of National Director of Public Prosecutions

The Constitutional Court judgment in *Democratic Alliance v President of the Republic of South Africa*[48] is perhaps the most incisive on the principle of

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[42] *New Clicks* (n 24) para 614.
[43] [2014] 2 All SA 391 (KZD) para 15.
[44] *Affordable Medicines* (n 23) para 75.
[45] *Pharmaceutical Manufacturers* (n 5) para 90.
[46] *Merafong* (n 16) para 62.
[47] *Masetlha* (n 19) para 81.
[48] 2013 1 SA 248 (CC) (*Simelane* case).

rationality of executive conduct in contemporary South African law. It may be recalled that at both the SCA[49] and the Constitutional Court, this case concerned the challenge on the ground of irrationality of the appointment of one Simelane as National Director of Public Prosecutions by the President in exercise of his constitutional powers. The Supreme Court of Appeal had held that the appointment of the NDPP by the President was an executive act that was subject to judicial scrutiny in accordance with the rule of law – a central and founding value of the Constitution. Navsa JA went further to explain that:

> No one is above the law and everyone is subject to the Constitution and the law. The legislative and executive arms of government are bound by legal precepts. Accountability, responsiveness and openness are constitutional watchwords. It can rightly be said that the individuals that occupy positions in organs of State or who are part of constitutional institutions are transient but that constitutional mechanisms, institutions and values endure. To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.[50]

The combined object of the empowering provisions of section 179 of the Constitution and section 9 of the National Prosecution Authority Act 32 of 1998 was to safeguard the independence of the authority. Thus, the appointee to that position must be above reproach, independent, and ready to serve without fear, favour or prejudice. In order to make an appointment to that position, the President must be satisfied that the candidate possessed the qualities of 'experience, consciousness and integrity' required by section 9(1)*(b)* of the Act. These qualities were jurisdictional facts that must be objectively assessed to exist before an appointment could be made, and the President was at the very least required to have regard to the relevant factors that were brought to his attention or which could reasonably be ascertained by him. The President need not have preconceived views regarding the fitness of a candidate, nor rely on personal knowledge of the candidate, nor disregard relevant evidence as to his or her fitness.[51] Failure by the President to undertake a proper enquiry as to whether the candidate satisfied the objective requirements of section 9(1)*(b)* of the Act would render the resulting appointment subject to annulment by the courts.[52]

On the impact of the President's failure to take into account relevant information that would have informed his decision, the Constitutional Court held

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[49] *Democratic Alliance v President, Republic of South Africa* (n 12).
[50] *Id* para 66.
[51] *Id* paras 107-109.
[52] *Id* para 112.

that such failure would constitute part of the means to achieve the purpose for which the power was granted. If the failure made the process irrational, this might render the final decision equally irrational. There was thus a three-stage inquiry where a party had ignored relevant material and gone ahead and made a decision:

(a) was the material ignored relevant?

(b) Was the failure to consider the material rationally related to the purpose? If the failure was not rationally related to the purpose, then,

(c) did the failure to consider the material make the whole process irrational and render the decision irrational?[53]

The court had difficulty understanding the argument that a rationality inquiry would undermine the doctrine of separation of powers[54] whereas the inquiry comprised the minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.[55] The rationale for the test is to achieve a proper balance between the role of the legislature and the courts.[56] The point, however, is that the test involves restraint on the part of a court and respect for the Legislature in its law-making role and the executive in its decision-making powers.[57]

In conclusion, the court held that the difficulties concerning Simelane's evidence before the Ginwala Commission (the findings of which formed the central test upon which his character was based) were highly relevant to his credibility, honesty, integrity and conscientiousness.[58] It was his conduct during that Commission hearing, among other aspects of his conduct that casts doubt about his fitness for the post of National Director. The court further held that the Minister's advice to the President to ignore and disregard this material fact coloured the rationality of the process as a whole and rendered the President's decision to appoint Simelane irrational. This was because the means did not rationally relate to the end: the ignoring of indications of dishonesty was inconsistent with the end of appointing a National Director who was conscientious and credible.[59] In so holding, the court considered the impact on rationality of a

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[53] *Id* para 39.
[54] *Id* paras 41-44.
[55] *Pharmaceutical Manufacturers* (n 5) para 78.
[56] *Affordable Medicines* (n 23) para 83.
[57] *Simelane* case (n 48) para 43; *Affordable Medicines* (n 23) para 86.
[58] *Simelane* case (n 48) paras 75-76.
[59] *Id* paras 88-89.

failure to take into account relevant material;[60] the separation of powers and setting aside of executive decisions for irrationality;[61] whether the failure of the President to take into account certain conduct of the appointee rationally related to the power to appoint a National Director? This included the purpose of the power to appoint a National Director and the basis of the President's decision to appoint Simelane.[62]

3.2 Determining the salaries of magistrates

In *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa,*[63] the Constitutional Court held that the determination by the President of the salaries of a certain category of judicial officers in consultation with the Minister of Finance and the recommendation of the Independent Commission for the Remuneration of Public Office-Bearers did not amount to an administrative action.[64] When the President made the determination under section 12 of the Magistrates Act[65], he was exercising a power.[66] Then, it proceeded to determine whether there were merits in the arguments that the presidential determination was irrational as well as lacking the due process of consultations in the decision-making process. The court rejected both arguments regarding the irrationality of the determination of the President as well as the unfairness of the process. The court had no doubt that the exercise of the power by the President in this case required that he conform to the requirements of the relevant legislation, the rule of law which, viewed objectively, must be rationally related to the purpose for which the power was given.[67] The court's response was no doubt influenced by its earlier rulings in *Democratic Alliance v President of the Republic of South Africa*[68] and *Albutt v Centre for the Study of Violence and Reconciliation*[69] as authority for the proposition that 'both the process by which

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[60] *Id* para 39. See also *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (A) at 152A-D.
[61] *Simelane* case (n 48) paras 41-44. See also *Brink v Kitshoff* 1996 4 SA 197 (CC) para 35; *Pharmaceutical Manufacturers* (n 5) paras 78 and 90; *Affordable Medicines* (n 23) paras 73 and 83; *Albutt* (n 20) paras 51 and 86.
[62] *Simelane* case (n 48) paras 47 and 49.
[63] (N 21).
[64] *Id* para 42.
[65] 90 of 1993.
[66] *Simelane* case (n 48) para 44.
[67] *Id* para 49.
[68] (N 48) para 27.
[69] (N 20) paras 49-50.

the decision is made and the decision itself must be rational'.[70] Nkabinde J held that the power to make a determination was vested in the President who was enjoined to do so after taking into consideration the recommendation of the Commission which he was not obliged to follow insofar as he followed the due process laid down in the Act.[71]

The principal basis for contending that the President acted irrationally was that he did not adopt the Commission's 7 per cent increase and thus, reducing that increase to 5 per cent, rendered the determination irrational. The court held that such determination could not be set aside on the ground of irrationality for that determination was based on expert advice about inflation and affordability. Further, the President was only expected to consider the recommendation of the Commission as there was nothing in section 12 of the Magistrates Act 1993 compelling him to accept the 7 per cent recommendation. Accordingly, the processes before the Commission and the President, particularly after the latter had considered the recommendation and consulted the Minister of Finance, were rational.[72]

It was held that the Association failed to show that its representations were not taken into account by the Commission when it made its recommendation to the President.[73] In any event, the procedural fairness challenge of the President's determination was incompetent because the decision he took was not an administrative action. According to Nkabinde J, the ratio of *Masetlha v President of the Republic of South Africa*[74] settled the matter to the effect that executive action could be reviewed on 'narrow grounds' which fall within the ambit of the principle of legality which includes lawfulness and rationality. On the other hand,

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[70]It was held in *Albutt* (n 20) paras 53, 56, 59, and 68-69, that the special dispensation process as outlined by the President had the same objectives as those of the Truth and Reconciliation Commission which were designed for nation-building and national reconciliation. While the TRC process sought to achieve this through amnesty, the special dispensation process sought to achieve these objectives through pardon. Since the twin objectives of the special dispensation process, hence the participation of the victims was crucial to the achievement of these objectives. So, it could hardly be suggested that the exclusion of the victims from the special dispensation process was rationally related to the achievement of the objectives of the special dispensation process. Given the recent history of South Africa, victim participation in accordance with the principles and values of the TRC was the only rational means of contribution towards national reconciliation and national unity. Therefore, the disregard of these principles by the executive was irrational. Even on this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational.

[71]*Id* para 52.

[72]*Id* paras 57-58. See in *Provincial Court Judges' Association of NB v New Brunswick* (2005) 255 DLR (4th) 513 (SCC) where the Supreme Court of Canada held that the Government's reasons for refusal to implement the recommended increase of salary of Provincial Court Judges met the standard of the simple rationality test and had reasonable factual foundation.

[73]*Association of Regional Magistrates* (n 21) para 61.

[74](N 19) paras 23, 78 and 81.

'procedural fairness is not a requirement for the exercise of executive powers – and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute. Section 12 of the Magistrates Act does not require the President to hear Magistrates before determining their salaries'.[75]

3.3 Decision to close Refugee Reception Centre

The High Court had held in *Scalabrini Centre v Minister of Home Affairs*[76] that the decision of the Director General of the Department of Home Affairs (DG) to close the Refugee Reception Centre was unlawful and irrational on the grounds that there was no objective rational relationship between the decision to close and the purpose of section 8(1) of the Refugees Act 130 of 1998; and that the DG failed to consult the standing committee on Refugee Affairs before making the decision. This decision was challenged on appeal by the respondent in *Minister of Home Affairs v Scalabrini Centre.*[77] The SCA held that the determination of whether a decision was rationally related to its purpose was a factual inquiry involving a measure of value judgment. Here, the facts fell short of showing that the decision was irrational in the sense of being arbitrary.[78] On the issue of the illegality of the DG's decision, based on failure to consult interested parties, it was held that the process by which a decision was taken as against a decision on the merits of the matter under consideration, might be impeached for lacking rationality,[79] was affirmed in the *Simelane* case, where it was held that the process as well as the ultimate decision must be rational.[80] The SCA agreed with the trial judge's assessment of the process that had been followed.[81] The High Court had held[82] that the purpose of the power to establish Refugee Reception Offices was to ensure that there were as many as were needed for the purposes of the Act; that in order for the DG to reach a decision as to whether there were sufficient offices, had to follow a process that was rationally connected to attaining the purpose; and that the DG could not achieve the purpose without obtaining the views of organisations representing the interests of asylum seekers, where the asylum seekers' perspective was of obvious importance in reaching a rational conclusion on whether the Refugee Reception Office was needed in Cape Town.

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[75] *Association of Regional Magistrates* (n 21) para 59.
[76] 2013 7 BCLR 819; 2013 3 SA 531 (WCC).
[77] (N 22).
[78] *Id* para 65-66.
[79] *Id* para 69.
[80] *Simelane* (n 48) para 12; *Minister for Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) para 34 (*Chonco)*; *Albutt* (n 20) para 36.
[81] (N 22) para 71.
[82] (N 75) paras 95-96.

Accordingly, the DG's failure to consult such organisations was irrational, and rendered his decision unlawful and must be set aside.[83]

3 Between rationality and reasonableness

The point that reasonableness and rationality were distinct concepts which to some extent overlap was made by the Constitutional Court in *Simelane*'s case.[84] The court explained that reasonableness was generally concerned with the decision itself. For instance, section 33 of the Constitution obliges administrators to act reasonably. That means that if a decision could not have been made by a reasonable administrator, that decision would be reviewable on the ground of unreasonableness.[85] Contrariwise, review for rationality was concerned with whether the means to achieve the purpose for which the power was conferred, were rationally related to that purpose. Courts might not interfere with the means selected simply because they do not like them or because there were other more appropriate means that could have been selected but whether the means selected were rationally related to the objective sought to be achieved.

What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether they are rationally related to the objective sought to be achieved. Objectively speaking, if they were not, then they fall short of the standard demanded by the Constitution.[86] As Yacoob ADCJ stated:

> The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.[87]

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[83] *Scalabrini Centre* (n 75) paras 72-73. Willis JA held (para 88) that there was no legal obligation whatsoever on the part of the DG to have consulted with the Scalabrini Centre before making its final decision on the matter even though this might have been desirable. He would therefore not hold that such failure was not founded on reason or arbitrary as Nugent JA had concluded.

[84] (N 48) 2013 1 SA 248 (CC).

[85] *Simelane*'s case (n 48) para 29. See especially *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) (*Bato Star)* para 44.

[86] Ngcobo CJ in the *Simelane* case (n 48) para 30; *Albutt* (n 20) para 51.

[87] *Simelane* case (n 48) para 32. See also *Chonco* (n 79) para 30; *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 66 (*Poverty Alleviation Network*); *Merafong* (n 16) para 114; and Price 'Rationality review of legislation and executive

The court had to consider whether the process that led to the decision to appoint the National Director needed to be rationally related to the purpose and held that both the process leading to a decision and the decision itself were part of the means to achieve the purpose, and accordingly, the process had to rationally relate to the purpose. If a particular step in the process was impugned, then the inquiry was whether the step was unrelated to the purpose as to taint the purpose and the decision with irrationality.[88] Where it concerns reasonableness and judicial review of legislation, the immediate point of departure is that motive or reason for, or reasonableness is not a ground upon which legislation can be reviewed, but rationality is.[89] There is, however, one particular instance where legislation gets entangled with the reasonableness test. Thus, a distinction is drawn between rationality and the more familiar reasonably justifiable test often associated with laws that purport to derogate from any of the entrenched fundamental rights. These are common features in Constitutions incorporating fundamental rights provisions,[90] and which comes into vogue whenever legislative interference with an entrenched right is in issue. The point was made early in the

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decisions: *Poverty Alleviation Network* and *Albutt'* (2010) 127 *SALJ* 580.

[88] *Simelane* case (n 48) paras 34, 36-37.

[89] *Ex parte Western Cape Provincial Government: in re DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC) paras 36-40; *United Democratic Movement v President, Republic of SA (African Christian Democratic Party and Others Intervening; Institute for Democracy in SA as Amici Curiae) (No 2)* 2003 1 SA 495 (CC) paras 56-58.

[90] See s 45, Constitution of Nigeria 1999; art 25, Constitution of Namibia 1990; s 36, 1996 Constitution. It must also be mentioned that the Constitution of Namibia marked a departure from the traditional Westminster constitutions in terms of providing some guidelines on how the reasonableness in the limitation clause should be tested. Unlike in the case of other constitutions that leave it open to the courts to figure out whether such limitations were reasonable in a democratic society. Typically, such Constitutions would provide, as in the case of Nigeria (s 45(1)), for restrictions to the freedoms that are 'reasonably justifiable in a democratic society in the interests of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedoms of other persons'. While parts of art 21(2) of the Constitution of Namibia, could be said partially to be close to the Westminster-type Constitution by providing that such restrictions must be 'necessary in a democratic society' and would be required 'in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence'; art 22 of that Constitution further provides that such restrictions: (a) 'shall be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual; (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest'. Section 36(1) of the Constitution of South Africa goes even further. Not only that it provides that a limitation to a right in the Bill of Rights must be in terms of law of general application; it must also be 'reasonable and justiciable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

life of the democratic Constitution[91] and affirmed in recent cases that a rationality enquiry is not linked to infringements of fundamental rights under the Constitution. Rather, it is a 'basic threshold enquiry' designed to ensure that the means chosen are rationally connected to the ends sought to be achieved.[92] It was further explained that a rationality test is less stringent than the reasonableness test which is the standard that comes into play when the fundamental rights in the Bill of Rights are sought to be limited by legislation. It is in this circumstance that the legislator must invoke the reasonably justifiable test of section 36 of the Constitution in order to show that the limitation on the right was constitutionally valid.[93]

There are two other notable aspects of the reasonableness test in the South African Constitution under which executive and administrative decisions, actions or inactions can be tested. The first is the reasonableness that goes with the Government measure to ensure the realisation of the citizen's right of access to social and economic rights. Incidentally, a citizen's constitutional right of access to adequate housing or sufficient water or healthcare services does not require the State upon demand to deliver these services to every person without more resources.[94] Rather, it requires the state to take reasonable legislative and other

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[91] The Constitutional Court held in *New National Party* (n 40) para 24, per Yacoob J, that decisions as to the reasonableness of statutory provisions were ordinarily matters within the exclusive competence of Parliament. This was fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts did not review provisions of Acts of Parliament on the grounds that they were unreasonable. They would do so only if they were satisfied that the legislation was not rationally connected to a legitimate government purpose. In such circumstances, review was competent because the legislation was arbitrary. Arbitrariness was inconsistent with the rule of law which was a core value of the Constitution. If the legislation defining the scheme was rational, the Act of Parliament could not be challenged on the grounds of unreasonableness. Reasonableness would only become relevant if it was established that the scheme, though rational, had the effect of infringing the right of the citizen. The question would then have arisen whether the limitation was justifiable under the provisions of s 36 of the Constitution, and it was only as part of this s 36 enquiry that reasonableness became relevant.

[92] *Ronald Bobroff and Partners Inc v De La Guerre* 2014 3 SA 134 (CC) para 6*; Albutt* (n 20) para 51. It was thus held in *Booysen v Acting NDPP* [2014] 2 All SA 391 (KZD) para 4 that the plaintiff need not show an impairment of a right such as human dignity in order to succeed on the ground of irrationality of the decision to authorise his prosecution or to indict him under s 2(1) of Prevention of Organised Crime Act No 121 of 1998.

[93] *Ronald Bobroff* (n 91) para 8. See also *Gaertner v Minister of Finance* 2014 1 SA 442 (CC) paras 50-75; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) paras 80-101 where the court, after satisfying itself that any right(s) were limited by the impugned enactment, conducted the limitation analysis in terms of s 36 by ascertaining the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and the statutory purpose and whether there was a less restrictive means – the proportionality enquiry.

[94] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 57. See also *Grootboom* (n 2); *TAC* (n 2); *Jafta v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) (*Jafta*); and *Soobramoney* (n 2).

measures progressively to realise the achievement of the right to have access to housing, healthcare services, food, water and social security within its available resources.[95] In this instance, the court's duty is to enforce the State's obligation by requiring it to meet the constitutional standard of reasonableness. As the Constitutional Court held in *Mazibuko v City of Johannesburg,*[96] where the right of access to sufficient water was at issue, that a measure would be unreasonable if it made no provision for those most desperately in need. If the State adopted policies with unreasonable limitations or exclusions, the courts could order that those be removed. In addition, the obligation of progressive realisation imposed a duty on the State continually to review its policies to ensure that the achievement of the right was progressively realised. Thus, the State must clearly set out the targets it wished to achieve.[97]

The second is the reasonableness to which administrative actions and decisions are subjected through the instrumentality of section 33(1) of the Constitution as amplified in section 6(2)*(h)* of PAJA. Both of these provisions have brought with them the intruding elements of judicial review into what was, in the past, the preserve of the executive or the administration – the determination of the merits of executive or administrative action which was, and still is, not the province of judicial review in most Commonwealth jurisdictions. For it stands to reason that if reasonableness is determined as a question of fact and degree based on the evidence as the English courts postulate, then, it means that by the inclusion of reasonableness in these circumstances, the judges have been dragged into weighing executive and administrative decisions on the objective scale as to whether they were culpable, or 'carried to excess, sentimentality, romanticism, bigotry, wild, prejudicial, fatuousness or excessive lack of common sense'.[98]

It was held in *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province*[99] that unreasonableness in section 33 and under PAJA means that a functionary is obliged to make decisions that must be rationally justifiable such that reasonableness is achieved where the functionary

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[95]Sections 26 and 27, 1996 Constitution.
[96](N 94) paras 57, 67 and 70.
[97]*Grootboom* (n 2) para 34; *TAC* (n 2) para 46; and *Jafta* (n 94) paras 31-34.
[98]Per Lord Hailsham LC *Re W (An Infant)* [1971] AC 682 at 699-700. The traditional common-law reasonableness test otherwise referred to as the *Wednesbury* unreasonableness was attributed to Lord Greene MR's judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 229. The historical development of the subject in South African administrative law is documented in Baxter *Administrative law* (1984) 475-534. For the modern approach to reasonableness see Burns and Beukes (n 10) 395-407; Hoexter *Administrative law* (n 10) 340-359; Quinot (n 10) 402-410.
[99]2002 2 SA 215 (T).

exercises his or her discretion in a rational and unfettered manner.[100] It was also held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[101] that what would constitute a reasonable decision would, like what will constitute a fair procedure depend on the circumstances of each case. However, factors that would indicate whether a decision is reasonable or not would include:

(a) the nature of the decision;

(b) the identity and expertise of the decision-maker;

(c) the range of factors relevant to the decision;

(d) the reasons given for the decision;

(e) the nature of the competing interests involved; and

(f) the impact of the decision on the lives and well-being of those affected by it.

In reaching the conclusion that there was neither a reviewable ground nor unreasonableness on the part of the Chief Director in *Bato Star*, the court offered the following reasons. Firstly, the nature of the power entrusted on the Chief Director was discretionary. The power was to be exercised in the light of all the relevant factors and the decision-maker had to strike a reasonable equilibrium between the different factors. Which equilibrium was the best in the circumstances was for the decision-maker to determine. The court's task was merely to determine whether the decision made had achieved a reasonable equilibrium in the circumstances.[102] Secondly, there was evidence that the Chief Director did take all the identified considerations into account. Whether the conclusion which the Chief Director reached might or might not have been the best decision in the circumstances was not for the court to consider. The court would only intervene where the decision failed to strike a reasonable equilibrium between the principles and objectives set out in sections 2 and 18(5) of the Act in the context of the specific facts of the deep-sea hake trawler sector. Thirdly, there was nothing in the evidence to show that the Chief Director's decision was

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[100] See also *Radio Pretoria v Chairperson, Independent Communications Authority of SA* 2008 2 SA 164 (SCA); *Minister of Local Government, Housing and Traditional Affairs v Umlambo Trading 29 CC* 2008 1 SA 396 (SCA); *Standard Bank of Bophuthatswana Ltd v Reynolds NO* 1995 3 BCLR 305 (B); and *Maharaj v Chairman, Liquor Board* 1997 1 SA 273 (N).

[101] (N 84).

[102] *Id* paras 48-49.

caught by any of the alleged causes in sections 6(2)*(e)*(iii), *(h)* and *(i)* of PAJA. There was therefore no indication of unreasonableness, or of relevant factors having been ignored, or irrelevant factors having been taken into account.[103]

Rationality, legality and reasonableness were at issue in *Democratic Alliance v Ethekwini Municipality,*[104] a case involving a politically motivated decision to change street names for which the municipality was accountable politically. It was held that PAJA did not apply to the legislative acts or executive conduct of a municipal council, because decisions taken by the council in a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted did not constitute administrative action.[105] But, did the decisions of the council comply with the principles of legality and rationality within the context of *Fedsure Insurance;*[106] *Pharmaceutical Manufacturers*[107]and *Affordable Medicines?*[108] The SCA held that municipal councils were constrained to facilitate public participation in the performance of their executive and legislative functions. The constraint derived, first, from their general constitutional obligation to 'provide democratic and accountable government for local communities' under section 152(1)*(a)* of the Constitution which, by implication required public involvement.[109] Second, there were several enactments that imposed the obligation on the municipalities to establish mechanisms which would facilitate local community participation in municipal affairs such as sections 17(2) and 51(1)*(e)* of the Local Government: Municipal Structures Act 32 of 2000.[110] Incidentally, the council had not complied with its own policies in respect of phase 1 of the renaming process thus it failed to satisfy its own demands of reasonableness. In relation to phase 2,[111] what the council did could not be said to be unreasonable as the rationality threshold was not high; all it required was that the impugned decision must be aimed at achieving a legitimate government objective and a rational relationship between the chosen method and that object. 'The standard does not require that the decision is reasonable, fair or even appropriate. It is of no consequence that the object could have been achieved in a different or better way'.[112]

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[103](N 84) paras 53-54.
[104](N 12).
[105] *Id* para 20. See also *Mazibuko v City of Johannesburg* (n 94) para 130; *Steele v South Peninsula Municipal Council* 2001 3 SA 640 (C) 644D; and *Van Zyl v New National Party* 2003 10 BCLR 1167 (C) paras 48-54.
[106](N 37) para 56.
[107](N 5) para 85.
[108](N 23) paras 74-75.
[109] *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 145.
[110] *Ethekwini* (n 12) para 23.
[111] *Id* para 29.
[112]Per Brand JA, para 37; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 36; and *Pharmaceutical Manufacturers* (n 5) paras 32-35.

The attitude of the SCA in respect of the rationality challenge and the argument that the municipal council decisions in renaming some 99 streets out of the many that were in their control was a matter reviewable in terms of PAJA because that constituted administrative action, comes to this: the determination of just which streets should be renamed, and what the new names chosen should be, 'admits of no right answer and is inherently political'.[113] Accordingly, it was not for the SCA or any other court in the land to interfere in the politically motivated decisions taken by: a deliberative assembly of the council in the exercise of its direct, not delegated, authority, with its origin in the Constitution; politically elected members of the council in open plenary session; a majority vote as contemplated by section 160(3)*(c)* of the Constitution; a council politically accountable to the electorate.[114]

4 Distinguishing executive conduct from administrative action

By the use of the term 'executive conduct' in section 172(2)*(a)* and 'administrative action' in section 33, the 1996 Constitution evidently intended to draw a distinction between the functions of the President as the head of the national executive and those others exercising public power in terms of a national legislation. While section 172(2)*(a)* as amended by section 7 of the Constitution Seventeenth Amendment Act 2012 makes it mandatory that any order of invalidity of legislation or executive conduct made by the Supreme Court of Appeal, the High Court of South Africa or a court of similar status, must be confirmed by the Constitutional Court for that order to have constitutional validity, section 84 identifies the powers and functions of the President upon which he or she could exercise his executive authority in terms of section 85 of the Constitution. On the other hand, what constitutes administrative action was not identified or defined in the Constitution but, national legislation – PAJA – made in terms of section 33(3), has since filled that gap. Quite rightly and expectedly, the definition of 'administrative action' in terms of section 1*(i)(aa), (bb)* and *(cc)* excludes executive powers or functions of the national executive including powers or functions specifically referred to in several sections of the Constitution, the executive powers or functions of the Premier of the Provincial Executive including powers or functions specifically referred to in several sections of the Constitution and the executive powers or functions of the municipal council.[115] Further illustration may be taken from the cases discussed below.

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[113] *Ethekwini* (n 12) para 38.

[114] *Id* para 19.

[115] The Constitutional Court recognised the new status of local government councils conferred on them by the new dispensation as early as the *Fedsure Insurance* case (n 37) para 26 and this was affirmed in the judgment of O'Regan J in *Mazibuko v City of Johannesburg* (n 94) para 130 where

4.1 SARFU (3)

Even before PAJA was enacted, the Constitutional Court had referred to the distinction between administrative action and executive conduct in its celebrated judgment in *President of the Republic of South Africa v South African Rugby Football Union.*[116] The question was whether the exercise of the power to appoint commissions of inquiry conferred on the President under section 84(2)*(f)* of the Constitution constituted 'administrative action'.[117] Further, the focus of such an inquiry as to whether conduct was 'administrative action' was not on the arm of government to which the relevant actor belonged, but on the nature of the power he or she exercised.[118] Thus, as much as the implementation of legislation may ordinarily constitute administrative action, the constitutional responsibilities of the President and Cabinet members to develop policy and to initiate legislation may not fit into administrative action within the contemplation of section 33 of the Constitution. So, while some acts of members of the national and provincial spheres of government will constitute administrative action, not all acts of such members will do so.[119] By the nature of the President's power to appoint a commission of inquiry, the court held that it did not constitute administrative action and was therefore not bound by the procedural fairness requirement of section

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it was held that the decision to implement Operation Gcin'amanzi was authorised by a resolution of the City Council after receiving a full proposal from Johannesburg Water. Accordingly, where a decision is taken by a municipal council in pursuance of its legislative and executive functions, such decision was not administrative in character. See also *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 58. The SCA had regard to the constitutional status of the municipal council when, in *Ethekwini Municipality* (n 12) paras 17-20, it considered whether the municipal council's decisions to change street names amounted to administrative action and therefore governed by PAJA. It was held that since PAJA excluded the executive and legislative function of the municipality from the definition of administrative action, the question would be whether the impugned decisions constituted the exercise of executive or legislative function by the council, on the one hand, or administrative action, on the other. The court had to determine the nature of the impugned decisions and the source of the council's authority under which the decisions were taken. It held that the source was to be found in the Constitution; the Local Government: Municipal Structures Act 117 of 1998; and the Local Authorities Ordinance 26 of 1974. The import of the provisions was to vest the control over streets within a municipal area – and the authority to name and rename the streets – in the council of the municipality. The impugned decisions were taken by the council in the exercise of direct authority and were influenced by political considerations for which the elected members were politically accountable to the electorate. The fact that a particular decision was not incorporated in a bylaw did not in itself exclude it from the category of 'legislative functions'. A decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted did not constitute administrative action. Since all the decisions challenged in this case bore all these hallmarks, they did not constitute administrative action under PAJA, with the result that PAJA did not apply.

[116] *SARFU* (n 18).

[117] *Id* para 140.

[118] *Id* para 141.

[119] *Id* para 142.

33. Notwithstanding that holding, the court however hastened to add that the exercise of executive power was bound, like the exercise of every other public power, by the doctrine of legality. Accordingly, the President must act in good faith and must not misconstrue his or her powers.[120] The court noted that in the past when parliamentary supremacy held sway, the major constraints upon the exercise of public power had emanated from administrative law whereas in present times, and under the constitutional dispensation, the constraints were to be found throughout the Constitution itself. The court therefore emphasised that:

> It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)*(f)* does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under 84(2) are clear. The President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; until 30 April 1999, the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality[121] and, as implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.[122]

4.2 Presidential termination of the appointment of the 'Spy Chief'

In contemporary South Africa, an employee is entitled to procedural fairness, firstly, in terms of section 188(1)*(b)* of the Labour Relations Act 1995 before dismissal from employment, but the type of employment held by the plaintiff in *Masetlha v President of the Republic of South Africa*[123] was expressly excluded from the application of that Act. Secondly, section 33(1) of the Constitution guarantees the right to an administrative action that is procedurally fair. The plaintiff was the Director-General and head of the National Intelligence Agency, appointed by the President of the Republic of South Africa in terms of section 209(2) of the Constitution and section 3(3)*(a)* of the Intelligence Services Act 65 of 2002 read with section 3B(1)*(a)* of the Public Service Act 1994[124] for a period of 3 years. The President dismissed him from that position without assigning any reason(s) or asking the applicant for an explanation in respect of any allegations of misconduct that might have been made against him.

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[120] *Id* para 148.
[121] *Fedsure Life Insurance* (n 37) paras 56-58.
[122] *SARFU* (n 18) para 148. See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras 6-8.
[123] (N 19).
[124] Act 103 of 1994.

But, it must be emphasised that it is only acts of an administrative nature that are subject to the just administrative action (administrative justice) right of section 33 even if an organ of state might have performed that act.[125] Here, simply and clearly, an act or conduct of the executive is not categorised as administrative action by the Promotion of Administrative Justice Act. None of these sources would have assisted the plaintiff for the Constitutional Court held earlier that the powers of the President emanating from section 84 of the Constitution could not be impugned by way of review under the administrative justice clause in the Constitution. The court however pointed out that the conduct of the President would be subject to the general principles of legality, irrationality and constitutionality.[126] It reiterated that the executive powers or functions of the President in section 85(2)*(e)* and the presidential decisions taken under that subsection were not susceptible to administrative review under PAJA.[127] It is clear that the Constitution and the legislative scheme gave the President a special power to appoint and that it would only be reviewable on narrow grounds and constitutes executive action and not administrative action. Thus, the power to dismiss, being a corollary of the power to appoint, is similarly executive conduct and does not constitute administrative action. As much as the requirements of procedural fairness is a cardinal feature in reviewing administrative action, it would not be appropriate to constrain executive power in this case where the pursuit for effective national security was involved.[128] Moseneke DCJ held that:

> The power and indeed obligation of the President to appoint the head of an intelligence service is not sourced from a private law relationship. It is a public law power. In other words, this dispute between the parties is not merely about a breach or wrongful termination of an employment contract. It is rather about whether public authority has been exercised in a constitutionally valid manner.[129]

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[125]In *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC), Ngcobo J held (para 142) that the employee of a statutory corporation held an employment contract such that its termination by the corporation did not in any way constitute administrative action. The mere fact that Transnet performs public functions and exercises public power did not detract from the fact that the relationship was a labour and employment relationship which had no application of employment relationship to which s 33 of the Constitution had no application. Having concluded that since the High Court had no concurrent jurisdiction in the matter, Skweyiya J held (para 73) that it was unnecessary to consider whether the dismissal of the plaintiff by Transnet constituted administrative action. If, however, that question properly arose in the case, he would concur with Ngcobo J. Langa CJ held (para 194) that the applicant's dismissal did not constitute the exercise of a 'public' power or the performance of a 'public' function, and therefore was not administrative action under PAJA.

[126]*Masetlha* (n 19) para 78.

[127]*Id* para 76 per Moseneke DCJ, Langa CJ and five other members of the court concurring.

[128]*Id* para 77.

[129]*Id* para 63.

Accordingly, there was no basis in law for a decision that the President's exercise of his public power was unlawful in the circumstances of this case. The question was left open in *Albutt.*[130] Having answered the question whether the victims of the crimes where the application for pardon were brought under the special dispensation were entitled to be heard prior to the decision to grant pardon in the affirmative in the light of the fact-specific features of the special dispensation, the court did not find it necessary to consider whether the exercise of the power to grant pardon under section 84(2)*(j)* of the Constitution constituted administrative action. The court thought that the proper moment to make such a determination may have to await a more appropriate circumstance.

4.3 The Association of Regional Magistrates

The preliminary question that arose in *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa*[131] was whether the challenge by the Association (ARMSA) was executive conduct for the purposes of the decision of the High Court being confirmed by the Constitutional Court in terms of section 172(2)*(a)* of the Constitution. The President had, in consultation with the Minister of Finance, announced his intention to set the annual remuneration increase of all public officers at 5 per cent whereas the Independent Commission for the Remuneration of Public Office-Bearers had recommended a 7 per cent increase for public office-bearers for 2010/2011. The Association challenged the decision of the President on the grounds:

(1) that decision of the President constituted a reduction in salary in violation of section 12(6) of the Magistrates Act 90 of 1993 which states that 'the remunerations of magistrates shall not be reduced except by an Act of Parliament';

(2) ARMSA and its members were not afforded a fair opportunity to make representations to the President or the Commission;

(3) the approach of adopting a uniform increase across-the-board for all public office-bearers resulted in an unfair and unlawful determination because the particular circumstances of ARMSA's members were not considered; and that

(4) the decision was therefore rendered unreasonable and irrational.

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[130](N 20) paras 81-83.
[131](N 21).

The High Court upheld the challenge to the decision based on the ground that a 'one-size-fits-all' approach was impermissible in terms of the relevant legislation. It held that if a blanket adjustment of all public office-bearers' salaries were to be decided upon the President was obliged to consider the circumstances of the individual categories of public office-bearers and their particular claims.[132] Having criticised the President for not giving reasons for his determination, the court held that the decision was irrational and thus failed the legality test.[133] The court set aside the President's decision, ordered remittal to the President for the matter to be considered by him in the light of the court's judgment. It was further ordered that the decision of the President would remain in force and effect until a decision was made afresh by the President. ARMSA approached the Constitutional Court seeking confirmation of the portions of the High Court order setting aside the decision of the President and ordering that it continue in force until a fresh decision on the matter was made. It also sought leave to appeal against the portion of the order remitting the matter for reconsideration, asking that it be varied by replacing it with an order remitting the matter to the President subject to a direction that the President should invite and consider representations by members to the President before deciding the matter afresh.

In the Constitutional Court, it was contended that the President's decision constituted 'administrative action' under PAJA hence there was a failure of procedural fairness and that the decision was irrational. Two preliminary questions arose from the contention, namely: (a) whether the proceedings were subject to confirmation in terms of section 172(2)*(a)*; and, if not, (b) whether leave to appeal should be granted.[134] In respect of the confirmatory question, the court observed that section 172(2)*(a)* was couched in wide language. It contemplated that disputes concerning the constitutional validity of a statute or 'any conduct' of the President may be considered, in the first place by the Supreme Court of Appeal, a High Court or a court of similar status. Those courts were empowered to declare law or 'any conduct' of the President that was inconsistent with the Constitution invalid and subject to confirmation by the Constitutional Court.[135] Nkabinde J reiterated the court's judgment in *Pharmaceutical Manufacturers Association* to the effect that:

> The section is concerned with the law-making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of the State and head of the Executive, is the highest functionary within the State. The use of the

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[132] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* [2012] ZAGPPHC 186 para 44.
[133] *Id* paras 45-46.
[134] (N 21) para 28.
[135] *Id* para 33.

> words 'any conduct' of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State. The purpose would be defeated if an issue concerning the legality of conduct of the President, which raises a constitutional issue of considerable importance, could be characterised as not falling within s 172(2)*(a)* and thereby removed from the controlling power of this Court under the section.[136]

Nkabinde J then held that in making a determination under section 12 of the Magistrates Act, the President exercised a public power which was constrained by the principle of legality which was part of the rule of law under the Constitution.[137] The High Court had made an order concerning the lawfulness of the decision of the President. It reviewed and set aside his decision on the basis that he failed to consider the particular circumstances of the members of ARMSA as required under section 8(6)*(i)* of the independent Commission for the Remuneration of Public Office-Bearers Act 93 of 1997. This amounted to 'conduct' of the President in terms of section 172(2)*(a)* of the Constitution. It, therefore, follows that the decision of the High Court was susceptible to confirmation by the Constitutional Court under section 172(2)*(a)* of the Constitution and that the proceedings were confirmatory proceedings of which the parties had an automatic right of appeal against the order sought to be confirmed.[138]

On ARMSA's contention that the High Court erred in not holding that the decision of the President constituted administrative action within the context of PAJA, and that there was no duty on the President to offer ARMSA and its members the opportunity to make representations before the decision was taken, the court unanimously held that deciding which conduct should or should not be characterised as administrative action could only be undertaken on a case-by-case basis. It could not be done merely by asking whether a public power was being exercised or a public function being performed, and then considering whether it fell within one or other of the exceptions. In determining whether particular conduct constituted administrative action, the focus had to be on the power (function) rather than upon the functionary. The fact that section 33(1) used the word 'administrative' to qualify 'action' is significant for, the test for

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[136] *Pharmaceutical Manufacturers Association* (n 5) para 56.
[137] *Association of Regional Magistrates* (n 21) para 36. See also *Albutt* (n 20) para 27; *DA v President of the RSA* (n 12) para 49.
[138] *Association of Regional Magistrates* (n 21) paras 36-38.

determining what action was administrative was not based on who performed the act but the nature of the action itself.[139]

It was further held that section 12 of the Magistrates Act revealed that different functionaries were involved at different levels of the process of making a decision. The statutory scheme for the determination of the remuneration of public office-bearers (through mandatory consultations, recommendations and approvals) involved various functionaries in formulating the ultimate determination. Furthermore, the determination related to the remuneration of judicial officers, something that relates to the independence of the judiciary which is of fundamental constitutional importance. Adequate remuneration is an aspect of judicial independence which also forbids a situation where judicial officers engage in negotiations with the executive over their salaries.[140] Having set up such a particular scheme to determine an issue as sensitive as salaries of judicial officers, the role of the President, located at the heart of such a scheme, could not be regarded as conduct of the bureaucracy in carrying out the daily functions of the State. The determination the President made in this matter had to be approved by Parliament which could approve, partially approve or disapprove the determination proposed by the President.[141] In rejecting ARMSA's argument of the President's conduct being an administrative action taken in the process of implementing a national legislation, Nkabinde J held that the scheme was such that when the President made the determination he was exercising a power which impacted on a matter of importance to the independence of the judiciary, in terms of a particular constitutional and legislative scheme, subject to clear statutory checks, balances and standard of review. That rendered the presidential conduct 'executive' rather than 'administrative' in nature and did not, therefore, constitute 'administrative action' for which PAJA was applicable.[142]

4.4 The Scalabrini Centre (SCA) *case*

If the Constitutional Court decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[143] is authority for holding that in the circumstances of that case the decision of the Chief Director with regard to the allocation of fishing quotas in the deep-sea-trawler-sector of the hake-fishing industry was an administrative action in terms of PAJA, does it then follow that every decision made or action taken at that level of the state bureaucracy must of essence be administrative in nature? This question arises following the

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[139] *Id* para 41.
[140] *Id* para 43.
[141] *Ibid*.
[142] *Id* para 44. See also *Masetlha* (n 19).
[143] *Bato Star* (n 84).

dissenting opinion of Willis JA in *Minister of Home Affairs v Scalabrini Centre*[144] where he expressed the view that *Bato Star* 'provides the lodestar by which to navigate one's way through this case'. The reasoning being that when the *Bato Star* premise is applied to the present case, it becomes clear that the decision of the Director General of Home Affairs to close the Refugee Reception Office constituted administrative action under PAJA.[145] On the contrary, Wallis JA, concurring in the leading majority judgment of Nugent JA, disagreed with the minority view that *Bato Star* disposes of the matter before court. The fundamental ground of the disagreement was that the issue in the *Scalabrini Centre* case concerned the application of the Refugees Act 130 of 1998 and the court could not determine whether it was an administrative action by 'referring to another case dealing with a different decision taken in terms of a different statute about different subject-matter'.[146] Wallis JA whose concurring judgment was solely to explain why he was unable to follow the *Bato Star* approach, held that what the Constitutional Court had enjoined the courts to do, in the determination of what was administrative action, was to enquire into the nature of the very power under consideration in the particular case.[147] There was therefore no doubt that *Bato Star* was not determinative of the question whether the DG's decision constituted administrative action.[148]

For the four-member majority of the court (including Wallis JA), Nugent JA held[149] that the trial court had erroneously held that the decision of the Director General adversely affected rights and hence constituted an administrative action, whereas it is not all exercise of public power that translates into administrative action. The High Court also failed to consider the requirement of such action that the decision involved must be of an administrative nature which was an element of the definition of a 'decision' as articulated by the SCA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works.*[150] The majority further held that other fact-specific cases dealing with what was administrative action were unhelpful, but that guidance could be obtained from cases concerning separation of powers,[151]

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[144](N 22) para 82.
[145]*Ibid*.
[146]*Id* para 93.
[147]*Id* para 93.
[148]*Id* para 99.
[149]*Id* paras 50-51.
[150]2005 6 SA 313 (SCA) para 23.
[151]By this is meant, according to the US Supreme Court in *Springer v Government of Philippine Island* 277 US 189 (1928) 201 that 'unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power'. See also *Meyers v US* 272 US 52, 71 L Ed 160 (1926), *Shoe-Maker v US* 37 L Ed 170 at 185-6. The courts always emphasise that they cannot, in the guise of constitutional

where there had been consideration of the distinction between administrative action and other forms of government action.[152] These cases have stated that decisions heavily influenced by policy generally belonged in the domain of the executive and that they were to be deferred to by the courts. 'The more a decision is to be driven by considerations of executive policy the further it moves from being reviewable under PAJA'.[153] These were not the only elements to be considered in determining what administrative action was, but it was sufficient for the purposes of deciding the question at hand. Nugent JA concluded this aspect of his judgment by holding that:

> The question whether a Refugee Reception Office is necessary for achieving the purpose of the Act is quintessentially one of policy. 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 other resources, policies of the department, the broader political

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interpretation or in the exercise of their judicial review powers, take over the law-making function. One example in this regard is the courts' resistance whenever they are persuaded to read down a statute that ordinarily contravenes the provisions of the Constitution in such a manner as to save them from unconstitutionality. For instance, in *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (Nm SC) at 987E-F, the court refused to read down provisions of an over-inclusive police regulations so that the phrase 'comment in public upon the administration of the force' should be 'amputated' to preserve the protectable core by inserting after the word 'force' the following: 'in a manner calculated to prejudice discipline within the force'. The court construed this as an invitation to legislate which is within the constitutional domain of parliament. See also *Coetzee v Government of the RSA* 1995 4 SA 631 (CC) para 31; *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) para 76; *Mistry v Interim Medical and Dental Council of SA* 1998 4 SA 1127 (CC) para 32; and *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC) para 80. *Contra* however, the attitude of the same Constitutional Court where it has actually read in words in under-inclusive statutes so as to render them constitutional. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1; and *S v Manamela* 2000 5 BCLR 491 (CC). But even in these cases the court was mindful of the principle of separation of powers and, as it were, they were exercising their constitutional mandate (s 172(1)(b)) which empowers them 'to make any order that is "just and equitable"' where they find that a law or conduct is inconsistent with the Constitution. Article 25(3) of the Namibian Constitution which deals with remedies for infringement of fundamental rights does not speak in terms of 'just and equitable' orders; it speaks of 'such orders as shall be necessary and appropriate'. On the question of reading in words into statutes and the factors influencing the choice of remedies, see: Okpaluba, 'Of "forging new tools" and "shaping innovative remedies": Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa' (2001) 12 *Stellenbosch LR* 462; and on the meaning of 'appropriate relief' and 'just and equitable' order see also, the same author: 'Extraordinary remedies for breach of fundamental rights: Recent developments' (2002) 17 *SAPR/PL* 98.

[152] *Scalabrini Centre* (n 22) para 54. See, eg, *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 95; *National Treasury v Opposition to Urban Tolling Alliance* (n 31) para 63; *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 37.

[153] *Scalabrini Centre* (n 22) para 57. See also *SARFU* (n 18) para 143.

framework within which it must function, and the like. I do not think courts, not in possession of all that information, and not accountable to the electorate, are properly equipped or permitted to make those decisions.[154]

(To be continued)

[154] *Scalabrini Centre* (n 22) para 58. See also Sachs J *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 180, Jowell 'Of vires and vacuums: The constitutional context of judicial review' (1999) *Public Law* 448 at 451; Hoexter *Administrative law* (n 10) 148.