Assessment of Rationality Review in the Jurisprudence of the Constitutional Court

by

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SUMMARY

The aim of the study is to analyse the extent of the application of rationality review by the Constitutional Court. In conducting this study I will focus on the rationality analysis in the following context:

- Rationality review in a context of equality jurisprudence.
- Rationality review and actions of the president.
- Rationality review in legislative amendments.
- Rationality review and constitutional amendments.

In the discussion of rationality review I have asked and answered the following questions:

1. What is the purpose of rationality review?
2. Was it necessary to introduce rationality review as a ground of review?
3. Whether it has failed or succeeded?

I seek to answer the question whether rationality review as a ground of review has failed or succeeded in making a contribution towards analysing the constitutionality of government actions.

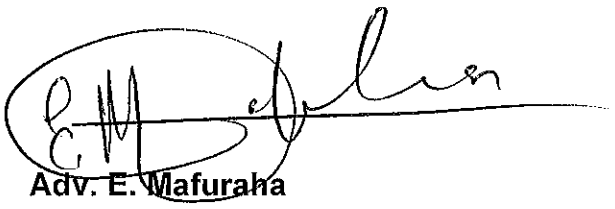
In the first part of the dissertation I discussed the application of rationality review in the equality clause. In the second part of dissertation I discussed the application of rationality test in the acts of the President. In the third part of the dissertation I discussed the application of rationality test in the acts of Parliament. In the fourth part of the dissertation I discussed rationality test in the amendments of the Constitution.

RESEARCH METHODS

This dissertation is library-based. I relied on information that already exists such as journals, case law and legislation. I have accessed my sources via library and internet.

DECLARATION

I declare that the mini-dissertation, which I hereby submit at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Acknowledgements and references in accordance with University requirements have been used where I used secondary material.



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CHAPTER 1

INTRODUCTION TO RATIONALITY REVIEW ANALYSIS

The abandonment of parliamentary sovereignty in favour of constitutional supremacy placed the rule of law and its custodian (the judges) at the apex of the judicio-political order.[1] The rule of law became a foundational value of which South Africa is premised. This foundational value is set out in section 1(c) of the Constitution of the Republic of South Africa. Although the Constitution itself was extensively negotiated, the rule of law was never debated; it was just accepted as a common value by all parties involved and as a result it became one of the cornerstones of the new constitutional order.[2] The Constitution also provides for the Bill of Rights which enlists the rights provided and protected by the Constitution.

The rights in the Bill of Rights cannot be easily limited unless through a process stipulated in section 36.[3] The general rule is that if legislation is capable of more than one interpretation and one of those interpretations is a reasonable interpretation that does not conflict with the Bill of Rights, that reasonable interpretation in conformity with the Constitution must be preferred.[4] This was confirmed in *Bator Star Fishing v Minister of Environmental Affairs*[5] where the Court held that when interpreting any legislation, the Constitution as the supreme law of the country should be the starting point.

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[1] Motha (2011) 113.
[2] Malan (2012) 272.
[3] Section 7(3) of the Constitution.
[4] Rautenbach (2010) 342.
[5] 2004 (4) SA 490 CC.

The Court held further that the interpretation that is placed upon a statute must be one that would advance a value enshrined in the Bill of Rights.[6] It is expected that when the government makes laws it should be mindful of both the rule of law and the Bill of Rights. The Bill of Rights is so important in that it provides for the rights that need to be protected and may only be limited through the application of section 36. The rule of law, on the other hand, places a burden on the state: it requires that decisions of the organs of the state must be rational, prohibits arbitrary decision-making and that *stare decisis* is an incidence of the rule of law[7] and that public power must be sourced from law. In the discussion of rationality review I have asked and answered the following questions:

1. What is the purpose of rationality review?

2. Was it necessary to introduce rationality review as a ground of review?

3. Whether it has failed or succeeded?

I seek to answer the question whether rationality review as a ground of review has failed or succeeded in making a contribution towards analysing the constitutionality of government actions.

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[6] Bato Star supra par 72.
[7] Malan (2012) 275.

CHAPTER 2

RATIONALITY AND EQUALITY JURISPRUDENCE

2.1. Introduction

The right to equality is the first scenario to be discussed here in which the Constitutional Court developed the question of rationality as the basis for testing whether or not this right has been infringed. What the Court basically held is that the right to equality firstly required the state to act rationally in drawing distinction or differentiation.

For the purpose of this discussion I shall discuss the leading decisions in which the Constitutional Court applied the rationality test in determining whether or not the right to equality was infringed.[8] I shall discuss the cases of *Prinsloo v Van der Linde*[9] and *Harksen v Lane NO and Others*[10] which were decided under the Interim Constitution. The rationality principle allows a court to invalidate any law or action for not being rationally related to a legitimate purpose.

The government may wish to differentiate or classify groups or category of persons when it makes schemes intending to benefit its people. However rationality principle requires that the classification measures with potential of impacting adversely on a particular group or class of people should be able to serve the purpose intended by the legislature or administrative rule.

[8] Section 9 of the Constitution.
[9] 1998 (3) SA 1012 (CC).
[10] 1998 (1) SA 300 (CC).

2.2. *Prinsloo v Van der Linde*[11]

For the purposes of the equality clause, the Constitutional Court applies a threshold rational relationship test before the general limitation clause is applied. This case shows how the Constitutional Court applied rationality test in the question of equality. The Court had to decide on the constitutionality of section 84 of the Forest Act (the Act).[12] Section 84 of the Act reads:

> "When in any action by virtue of the provision of this Act or the common law the question of negligence in respect of a veld, forest of mountain fire which occurred on land situated outside a fire control arises, negligence is presumed, until the contrary is proved".[13]

It was argued for the applicant this provision violates the right to be presumed innocent as contained in section 25(3)(c) of the interim Constitution.[14] It must be noted that the applicant was a defendant in a civil trial and not an accused in a criminal trial. This was a difficulty the applicant had to overcome and in order to do that, the applicant argued that the test to be used was an objective one which did not depend on his subjective situation, but depends on the objective reach of the provision.[15]

The applicant argued further that if this provision, objectively speaking, was unconstitutional, it would be of no force and effect for civil as well as criminal trials. He contended that the word "action" was ambiguous and had to be read in its context. According to the applicant, the word "action" was wide enough to include criminal as well as civil proceedings with the consequence that infringed the rights of accused persons as protected by section 25(3)(c). The applicant then submitted that once

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[11] Prinsloo n9.
[12] Act 122 of 1984.
[13] Prinsloo par 2.
[14] Act 200 of 1993.
[15] Prinsloo par 10.

section 84 of the Act was invalid because of its application to criminal trials, it lost its force and effect and as a result, cannot be invoked in civil proceedings.[16]

The Court was not persuaded by the arguments made by the applicant based on the approach provided by section 35(2) of the interim Constitution.[17] Section 35(2) reads as follows:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation".

The Court argued that its task was to prefer an interpretation which is consistent with the interim Constitution rather than to find a "correct" one. According to the Court, ambiguity, which did not help the applicant, must be resolved by favouring the construction which keeps the provision constitutionally alive. The Court found no harm in holding that the word "action" was capable of including criminal proceedings and stated that it would have to declare that the provisions of the section were inconsistent only to the extent that they applied to criminal proceedings.[18]

This finding by the Court was based on the provisions of section 98(5) of the interim Constitution which provides as follows:

> "In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency…"

[16] Prinsloo par 10.
[17] Prinsloo par 12.
[18] Prinsloo par 13.

Coming to the question of rationality as part of the equality analysis the Court considered the differentiation made between persons in veld fire cases and those in other delictual matters. According to the applicant, the differentiation had no rational basis because the object that the legislature sought to achieve by reversing the general rule regarding the incidence of onus that whoever alleges has to prove could have been accomplished by means of common law aids to proof.[19]

It was also raised that a differentiation which related to the fact that the presumption of negligence applies only in respect of fires in non-controlled areas as envisaged in the Act, and not those spreading in controlled areas. The challenge to constitutionality would be based, the Court stated, either on a breach of the right to equality as guaranteed in section 8(1) or on violation of the prohibition of discrimination contained in section 8(2) of the Interim Constitution.

In order to determine the correctness of the challenge in terms of section 8, the Court had to consider the proper approach to be taken to section 8(1) and (2). According to the Court, courts could be called to review the justifiability or fairness of the whole legislative programme and the executive conduct if the differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or constitutional discrimination which had to be shown not to be unfair.[20]

The courts have the duty to review the fairness of any classification of rights or benefits brought by any law. According to the Court there is a need to identify the criteria that would basically distinguish between legitimate differentiation and

[19] Prinsloo par 16.
[20] Prinsloo par 17.

differentiation that has crossed the line of constitutional impermissibility and is unequal or discriminatory.[21]

The concept of equality can be viewed in different ways. According to the Court section 8(1) of the interim Constitution describes the concept of equality as a positive right, a "right to equality before the law" and a "right to equal protection of the law". Section 8(2) of the interim Constitution takes a negative form in that it required that "no person shall be unfairly discriminated against, directly or indirectly". Although section 8(1) provides for "equal protection of the law", this right is not applicable to this present case.

The idea of differentiation, the Court noted, appears to be centred in the equality jurisprudence generally and section 8 right in particular. Section 8 provides for the differentiation which does not involve unfair discrimination and differentiation which does not involve unfair discrimination.[22] To emphasise these different forms of differentiations, the Court stated that the state should harmonise the different interests of its people in a regulated manner and that in the process, the state is bound to differentiate or classify people.[23] The differentiation which impacts on people differently does not always result in unfair discrimination.[24]

The Court referred to this differentiation as "mere differentiation" and stated that for this purpose, the constitutional state is expected to act in a rational manner.

[21] Prinsloo par 17.
[22] Prinsloo par 24.
[23] Prinsloo par 24.
[24] Prinsloo par 24.

The Court stated:

> "It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority . . . to a culture of justification".[25]

According to the Court, the aspect of equality is there to ensure that the state acts in a rational manner.[26]

The Court argued that it is important to conclude that section 8 has been infringed without first establishing whether there is rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it or not. The Court held that in the absence of such rational relationship the differentiation would infringe section 8. The mere absence of a rational relationship as a condition for the differentiation not to infringe section 8 is not enough if further element is taken into account.[27]

In order to determine what this further element is, the Court noted, it is prudent to look at section 8(2) without considering the precise ambit or limits of this subsection. This section, the Court noted further, does not deal with all differentiation or discrimination, but deals with unfair discrimination. It makes distinction between two forms of unfair discrimination and also deals with them differently.

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[25] Prinsloo par 25.
[26] Prinsloo par 25.
[27] Prinsloo par 26.

Regarding section 84 of the Act the Court stated that it was necessary to firstly enquire whether the necessary rational relationship existed between the purpose it sought to achieve and the means sought to achieve it.[28] The applicant contended that section 84 lacked rationality because it did not use the least onerous means of achieving its objectives. According to the court the applicant made two misconceptions in their argument.[29]

The first misconception was that it was too early for the applicant to apply a criterion for justification into a test to be applied at the infringement enquiry stage. The question, the Court noted, of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification in terms of the limitation clause, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought. The second misconception was that underlying the argument was an assumption that somehow there should be a "presumption of innocence" in civil matters so that a reverse onus in civil matters should be a vulnerable to impeachment as one in a criminal trial.[30]

If the first misconception were to be followed, the Court noted, a person intending to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way. The fact that the object could have been achieved in a different and better way is irrelevant. The most important thing is that there is a rational relationship between the method and the object.[31] The Court indicated that in any civil dispute one of the parties is expected to bear the onus on each of the factual issues material to the adjudication of such

[28] Prinsloo par 35.
[29] Prinsloo par 35.
[30] Prinsloo par 35.
[31] Prinsloo par 36.

dispute. However, the Court noted further that one of the parties will bear the onus concerning negligence in the case of claim for damages arising from a veld fire. The Court held that there will be no breach of section 8(1), as long as the imposition of the onus is not arbitrary.[32]

The Court, on the second misconception made by the applicant, stated that an onus in a civil case cannot be equated with the overall onus of proof in criminal cases. The Court referred the judgment of *Mabaso v Felix*[33] which gave a description of fundamental difference between the incidence of the onus of proof in civil and criminal cases. The Court held that the common law places the burden of proof on the prosecution so that the accused should not be punished without proof.

However in a civil law, it went further, consideration of policy, practice, and fairness may require that the defendant bear the onus of averring and proving justification for his wrongful conduct.[34] The Court held that nothing is rigid in relation to the question of the incidence of the onus of proof in civil matters and that as long as the rules relating to the onus are rationally based, no constitutional challenge in terms of section 8 will arise.[35]

The Court stated that since the purpose of the Act is to prevent veld fires, there can be no doubt that the state has a legitimate interest in preventing veld and forest fires. The state has chosen to fulfil its responsibility by means of a scheme. In fire control areas, the Court noted, there is compulsory participation in schemes to prevent fires

[32] Prinsloo par 36.
[33] 1981 (3) SA 865 (A).
[34] Mabaso par 872.
[35] Prinsloo par 38.

spreading and specific statutory duties are imposed with penalties for noncompliance.[36]

In non-controlled areas, there are opportunities for joint management on a voluntary basis with no obligation. The cause of fire and its spread will often be peculiarly within the knowledge of the neighbour and the specific duties imposed on landowners in fire control areas are counterbalanced by general inducement contained in section 84.

Although the Court was of the view that a rational relationship is being demonstrated between the purpose sought to be achieved by section 84 and the means chosen, it cannot be enough because despite the existence of such demonstrated relationship, the particular differentiation might still constitute unfair discrimination under the second form of unfair discrimination mentioned in section 8(2).

The differentiation effected by section 84, the Court held, differentiates between owners and occupiers of land in fire control areas and those who own or occupy land outside such areas. According to the Court such differentiation cannot be seen as impairing the dignity of the owner or occupier of the land outside the fire control area. On that note, the Court held that there is no basis for concluding that the differentiation adversely affects the applicant in a serious manner and that a relationship between the differentiation enacted by section 84 and the purpose sought to be achieved by the Act exists.

[36] Prinsloo par 38.

2.3. *Harksen v Lane*[37]

In this case the Court dealt with the application of rationality in the equality dispute in terms of section 8 of the interim Constitution. The Constitutional Court had to determine the constitutionality of the provisions of the Insolvency Act (the Act),[38] section 21(1) in particular. Section 21(1) of the Act reads:

> "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section".

This section was alleged to be inconsistent with certain provisions of the Bill of Rights to the extent that it impact on the property and affairs of a solvent spouse upon the sequestration of the estate of an insolvent spouse and also inconsistent of the equality clause. The trustees caused the property of the solvent spouse, with a value of R6 120.50, to be attached and the applicant was also summoned to subject herself to interrogation at the first meeting of the creditors and produce at such a meeting all documents relating to her financial affairs and financial affairs of her husband.[39] The applicant, through her counsel, in challenging the constitutionality of section 21 of the Act, relied upon the provisions of both section 8 and 28 of the interim Constitution. The first challenge is relevant in the present discussion.

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[37] Harksen n10.
[38] Act 24 of 1936.
[39] Harksen par 24.

The applicant submitted that section 21 of the act violates the equality clause of the interim Constitution. It was contended that the vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them, and that it imposes severe burdens on them beyond those applicable to other persons to whom the insolvent had dealings. The applicant argued that the fact that section 21(10) favours solvent spouses who are not traders, it discriminates against solvent spouses who are not traders. Although section 21(2) entitles a solvent spouse to claim the return of what actually belongs to them, the applicant further argued, it does not save the impugned provision.[40]

The Court stated that attacks on the legislation which are founded on the provisions of section 8 of the interim Constitution poses difficult questions of constitutional interpretation and that a careful analysis of the facts of each case is required. In its development of rationality review jurisprudence the Court referred to its earlier judgment of *Prinsloo*[41] which held that the court should allow equality doctrine to develop slowly and surely and that the issues should be dealt with on a case by case basis with special emphasis on the actual context in which each problem arises.[42]

The Court used, to a larger extent, the approach applied in the *Prinsloo* case in order to give a proper analysis of the equality clause and developing its own jurisprudence. The Court stated that the first enquiry to be made in order to ascertain whether a legislative provision or executive conduct differentiates between people or categories of people is to determine whether the impugned provision does actually differentiate between people or categories of people.[43] Should there be a differentiation, the Court

[40] Prinsloo par 40.
[41] Prinsloo n9.
[42] Prinsloo par 20.
[43] Harksen par 42.

noted, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate government purpose it is designed to achieve.[44]

If the differentiation complained of, the Court argued, bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of section 8(1) of the interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 8(2) particularly to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.[45]

The Court held that a two stage analysis is required to determine whether differentiation amounts to unfair discrimination under section 8(2).[46] First, the Court stated, the question arises whether the differentiation amounts to "discrimination" and, if it does, whether, secondly, it amounts to 'unfair discrimination". These two stages of enquiry should be kept separate because there can be instances of discrimination specified in section 8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, such presumption may be rebutted.[47]

The question was what exactly constitutes discrimination. Section 8(2) contemplates two categories of discrimination. The first is differentiation on one or more of the grounds specified in the subsection. The second is differentiation on a ground not

[44] Harksen par 42.
[45] Harksen par 44.
[46] Harksen par 45.
[47] Harksen par 45.

specified in subsection 8(2) but analogous to such ground which the Court formulated in *Prinsloo* case.[48]

The Court held that section 21 does not violate the provisions of section 8(1) of the interim Constitution because there is a rational connection between the differentiation created by the former provision and the legitimate governmental purpose behind its enactment. Over and above, reasonable procedures were introduced to safeguard the interests of the solvent spouse in his or her property.[49]

The state may not make laws which are arbitrary or lack rational connection. The state may differentiate between groups of people provided that such differentiation is rationally linked to a legitimate purpose. If discrimination is not rational the court will to hold that the right to equality is violated.

[48] Prinsloo par 31.
[49] Harksen par 60.

CHAPTER 3

RATIONALITY AND ACTIONS OF THE PRESIDENT

3.1. Introduction

South Africa is a constitutional state founded on the value of the rule of law.[50] The powers of the president are derived from the Constitution and subject to judicial review. In this chapter I will discuss different cases which the Constitutional Court reviewed the acts of the President.

3.2. President *of the Republic of South Africa v Hugo*[51]

The Court dealt with the issue of presidential powers. The respondent in this case was a prisoner who had a minor child with his deceased wife. He commenced serving his sentence of fifteen and half years in 1991. In 1994 the President, acting in terms of section 82(1)(k) of the interim Constitution, signed a Presidential Act which granted special remission of sentences to certain categories of prisoners.

The Presidential Act provided, *inter alia*, the following:

> "In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of the sentences to:
>
> - all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who have escaped and are still at large)
> - all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years;
> - all disabled prisoners in prison on 10 May 1994 certified as disabled by district surgeon.

[50] Section 1(c) of the Constitution of the Republic of South Africa, 1996.
[51] 1997 (4) SA 1 CC.

Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiring to commit such an offence:

- murder;
- culpable homicide;
- robbery with aggravating circumstances;
- assault with intent to do grievous bodily harm;
- child abuse;
- rape;
- any other crimes of sexual nature; and
- trading in or cultivating dependence producing substances".

The Presidential Act provides for the special remission of sentences to certain categories of prisoners. In terms of the Presidential Act minors under the age of 18, mothers with children under the age of 12 and disabled prisoners who have been in prison on 10 May 1994 qualify for such special remission. The male prisoners with children under the age of 12 were excluded from the special remission. Two groups of people have been affected by the Presidential Act: mothers of young children have been afforded an advantage: early releases from prison; and fathers have been denied that advantage.[52]

It was that part which provides that "all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years" which prompted the respondent to approach the Durban and Coast Local Division of the Supreme Court (the Supreme Court) seeking an order declaring the Presidential Act unconstitutional.

The responded alleged that the Presidential Act was in violation of the provisions of section 8(1) and (2) of the interim Constitution because it unfairly discriminated against him on the ground of sex or gender and indirectly against his son in terms of section 8(2) because his incarcerated parent was not a female. The Supreme Court found in

[52] Hugo par 47.

favour of the respondent and held that the Presidential Act discriminated against the respondent and his son on the ground of gender.[53]

Before the Constitutional Court the respondent submitted that the power of pardon granted to the President in section 82(1)(k) is subject to the provisions of the Bill of Rights, section 8 in particular. The Court had to determine whether in the exercise of presidential powers in terms of section 82(1)(k), the president is indeed subject to the provisions of the interim Constitution.

As a point of departure, the Court looked at the supremacy of the interim Constitution. Section 4 of the interim Constitution reads:

> "The Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
>
> (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government".

Section 75 of the interim Constitution stipulates how the President should exercise his/her powers. Section 75 reads:

> "The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his/her powers and functions in accordance with this Constitution".

Section 8(1) and (2) outlines the responsibilities of the President as the head of state as follows:[54]

> "(1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall as head of state defend and uphold the Constitution as the supreme law of the land.

[53] Hugo supra par 3.
[54] Section 76 of the interim Constitution refers to the President as the Head of State.

> (2) The President shall with dignity provide executive leadership in the interest of national unity in accordance with this Constitution and the law of the Republic".

The Court then held that the provisions of section 82(1) provide for the President's competence to perform powers. According to the Court these powers flow from the Constitution and do not depend upon legislative enactment.[55] The powers of the President, the Court noted, are executive powers because he/she acts as an executive organ of government.[56] The exercise of presidential power should not be above the Constitution and should be subject to the discipline of the Bill of Rights.[57] The Court indicated that under the interim Constitution the jurisdiction of courts would always be there in all cases in which the presidential powers under section 82(1) are exercised.

The Court also held that the Presidential Act did not fundamentally impair the rights of dignity or sense of equal worth and that the impact upon the affected fathers was not unfair. The Court noted that the Presidential Act merely deprived the fathers of early release to which they had no legal claim and that they were not prevented from applying directly to the President for remission of sentences given their individual circumstances. The Court held that it would not hesitate to review the decision of the President if the President misconstrued the powers.[58]

Although the Court did not necessarily discuss the rationality principle, it made it clear that the president is an organ of state and consequently bound by the provisions of the Constitution and the Bill of Rights.[59] The Court, through this case, set a stage for

[55] Hugo par 10.
[56] Hugo par 11.
[57] Hugo par 28.
[58] Hugo par 29.
[59] Hugo par 49.

rationality review.[60] The requirement that the presidential power "should not be above the Constitution" is in line with the rule of law. In order to comply with the rule of law the President must source his/her powers from the law, which is the Constitution.

3.3. *President of the Republic of South Africa v SARFU*[61]

The case raised the questions of legal principle concerning the basis on which the courts may review the exercise of presidential powers. The President had appointed a commission of inquiry to probe the administration of rugby in South Africa.

In dispute was the constitutional validity of two presidential notices which announced the appointment of a commission of inquiry and declaring the provisions of the Commission Act[62] applicable to the commission and promulgated regulations for its operation respectively.

The South African rugby under the administrative body South African Rugby Football Union (SARFU), like many other sports in South Africa, had a history of racial exclusion. One of the results of this racism was that support for South African rugby teams was generally to be found only amongst white people which opened hostility to racially exclusive South African teams was felt by many black people.[63] After the Rugby World Cup, there was controversy concerning the management and administration of rugby in South Africa. SARFU is a private voluntary association whose members are the rugby unions constituted in provinces and regions throughout South Africa.[64]

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[60] Rautenbach (2010) 772.
[61] 2000(1) SA 1 CC.
[62] Act 8 of 1947.
[63] SARFU par 5.
[64] SARFU par 6.

In October 1996 Brian van Rooyen, a vice-president of the Gauteng Lions Rugby Union, handed a dossier to the Department of Sport and Recreation (the Department) enumerating a list of complaints concerning the administration of rugby in South Africa. The Minister handed the contents of the dossier to Mervyn King, a prominent financier and former judge, for evaluation. Mr King reported that while the dossier contained no proof of misconduct, it contained allegations which warranted further investigation. The Minister, therefore, decided to appoint a task team to undertake that investigation.[65]

However, in July 1997, after auditors assisting in the investigation had called for disclosure of detailed financial records of SARFU, SARFU's attorneys wrote a letter to the Department summarily suspending further co-operation.[66] It was this suspension that led the Minister to comment to journalists that if SARFU continued to refuse co-operation, he would ask the President to appoint a commission of inquiry. The task team concluded that the continuation of their investigation was impossible and recommended to the Minister that he applies to the President for the appointment of a commission.[67] The President appointed the commission of inquiry on 22 September 1997.[68]

SARFU responded by asking for the President's reasons as well as all information and documents which led to the decision. The President answered explaining in great detail how he viewed his powers, how he had deliberated on the matter and why he had decided to appoint the commission.[69] The Constitutional Court had to examine the constraints upon the President's powers relating to commissions and whether the

[65] SARFU par 6.
[66] SARFU par 8.
[67] SARFU par 9.
[68] SARFU par 11.
[69] SARFU par 12.

President was obliged to afford the respondents a hearing before appointing such commission.

The Court held that a commission of inquiry is a mechanism whereby the President can obtain information and advice.[70] In appointing the commission, the Court noted, the President was not implementing the legislation, but he was exercising the original constitutional power vested in him and such exercise of power did not constitute administrative action within the meaning of section 33 of the Constitution.[71] However, the exercise of such powers must not infringe any provision of the Bill of Rights and it is constrained by the principle of legality. In addition the President must act in good faith.[72]

The respondents contended that the proclamation should be set aside because the President did not observe the *audi* principle.[73] They argued that they had a legitimate expectation of such hearing arising out of the terms of the agreement between SARFU and the Department.[74] The Court found that the respondents had no legitimate expectations to a hearing before the President decided to confer powers under the Commission Act.[75]

It is noted from this judgment that actions of the president to exercise the executive powers in section 82(1) do not amount to administrative action. According to the Court, exercising such powers does not involve the execution of legislation because the powers flow directly from the Constitution and not any ordinary legislation. The actions of the president are nonetheless subject to judicial review because they may not

[70] SARFU par 147.
[71] SARFU par 147.
[72] SARFU par 148.
[73] SARFU par 184.
[74] SARFU par 184.
[75] SARFU par 215.

infringe the provisions of the Bill of Rights and that their exercise is constrained by the principle of legality.[76] Like in *Hugo*, the Court did not discuss the principle of rationality, but paved a way for its development. The Court required the actions of the President to conform to the principle of legality. The principle of legality is an aspect of rationality test.

3.4. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*[77]

The Court was faced with a question whether it (a court) has the power to review a decision by the President issuing a proclamation which purported to bring into operation the South African Medicines and Medical Devices Regulatory Authority Act (the Act).[78] Before the Act was passed, the registration and control of medicine for human and animal use were governed by the Medicines and Related Substances Control Act.[79]

For convenience purposes, I will refer to the Medical and Related Substances Control Act as the 1965 Act. The Act repealed most of the provisions of the 1965 Act. The Act makes provision for the determination of new schedules and the making of regulations by the Minister.[80] Proclamation Notice, purporting to bring the Act into force, was published in the Gazette in April 1999.[81]

It was alleged that regulations necessary to give effect to other provisions of the Act were not made and that the Proclamation Notice purporting to publish the schedules

[76] SARFU par 148.
[77] 2000 (2) SA 674 CC.
[78] Act 132 of 1998.
[79] Act 101 of 1965.
[80] Pharmaceutical Manufacturers par 3.
[81] Pharmaceutical Manufacturers par 4.

was invalid.[82] It was argued that the effect of the absence of schedules and regulations would be that the entire regulatory structure relating to medicines and the control of such medicines, has been rendered unworkable by the promulgation of the Act.[83] With a fear of the consequences of bringing the Act into force prematurely, the applicants applied for an order declaring that the Proclamation and the Government Notice were invalid.[84]

The Court noted that the power of the President is derived from legislation and is close to the administrative process; however, the decision to bring the law into operation did not constitute administrative action. According to the Court, when he purported to exercise the power the President was neither making the law, nor administering it.[85] It was, however, the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power.[86]

According to the Court the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.[87] Any finding that the President acted *ultra vires* would mean that he acted in a manner that was inconsistent with the Constitution.

The Court stated that the rule of law requires that the exercise of public power by the executive and other functionaries should not be arbitrary and the decisions must be rationally related to the purpose for which the power was given, otherwise they are in

[82] Pharmaceutical Manufacturers par 6.
[83] Pharmaceutical Manufacturers par 7.
[84] Pharmaceutical Manufacturers par 8.
[85] Pharmaceutical Manufacturers par 79.
[86] Pharmaceutical Manufacturers par 79.
[87] Pharmaceutical Manufacturers par 20.

effect arbitrary and inconsistent with this requirement.[88] In order to pass constitutional scrutiny the exercise of public power by the President must comply with this requirement and if it does not, it falls short of the standards demanded by our Constitution for such action.[89]

The Court noted that the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.[90]

3.5. *Masetlha v President of the Republic of South Africa*.[91]

Masetlha who was a director general of the National Intelligence Agency (the Agency), was challenging his dismissal by the President. Masetlha was appointed in December 2004 in terms of section 3(3)(a) of the Intelligence Services Act (ISA)[92] read with section 3B(1)(a) of the Public Service Act (PSA)[93] for a period of three years.[94] Masetlha contended that the President dismissed him without affording him an opportunity to be heard. Masetlha submitted that the President had no power to neither suspend nor dismiss him.[95]

The Court found that section 209(2) of the Constitution does confer on the President an implied power to dismiss a head of the Agency and that the President has the

[88] Pharmaceutical Manufacturers par 85.
[89] Pharmaceutical Manufacturers par 85.
[90] Pharmaceutical Manufacturers par 86.
[91] 2008 (1) SA 566 CC.
[92] Act 65 of 2002.
[93] Act 103 of 1994.
[94] Masetlha par 7.
[95] Masetlha par 4.

power to amend the term of office of the incumbent of the Agency in such a manner as to end the term.[96] The Court found that the purpose of section 12 of the PSA is not to confer the power to appoint but to regulate the manner of appointment and of dismissal.[97]

In terms of section 85(2)(e) of the Constitution, the President exercises executive authority by performing "any other executive function provided for in the Constitution or in national legislation." The Court argued that section 1 of Promotion of Administrative Justice Act (PAJA)[98] expressly excludes, from the purview of "administrative action", executive powers or functions of the President referred to in section 85(2)(e).[99] In other words, the Court held, presidential decisions which constitute the exercise of executive powers and functions under section 85(2)(e) are clearly not susceptible to administrative review under the tenets of PAJA even if they otherwise constitute administrative action.[100]

The Court held that it would not be appropriate to constrain executive power to requirements of procedural fairness.[101] Although the Court held that procedural fairness is not a requirement, it noted that the authority conferred upon the President must be exercised lawfully, rationally and in a manner consistent with the Constitution.[102] According to the Court, the authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive

[96] Masetlha par 58.
[97] Masetlha par 73.
[98] Act 3 of 2000.
[99] Masetlha par 76.
[100] Masetlha par 76.
[101] Masetlha par 77.
[102] Masetlha par 78.

functions and should not be constrained any more than through the principle of legality and rationality.[103]

Although the majority held that fairness is not a procedural fairness is not a requirement for the exercise of the presidential power, Ngcobo J in a minority judgment, had a different view. Ngcobo J argued that even though the rule of law demands that decisions of the president must be rationally related to the purpose for which the power was give, such decisions should also be procedurally fair and the right to just administrative action is one of the constitutional constraints on the exercise of public power.[104]

Ngcobo J argued that the principle of legality should not be limited to decisions that are not rational only and stated that:

> "In the context of our Constitution, the requirement of the rule of law that the exercise of public power should not be arbitrary is not limited to non-rational decisions. It refers to a wider concept and a deeper principle: fundamental fairness. It does not only demand that decisions must be rationally related to the purpose for which the power was given. The Constitution requires more; it places further significant constraint on how public power is exercised through the Bill of Rights and the founding principle enshrining the rule of law".[105]

According to Ngcobo J the *audi alterm partem* principle is an aspect of the rule of law. This principle prohibits condemnation of people without a hearing. Ngcobo J argued that the maxim expresses a principle of natural justice and imposes a duty to act fairly.[106] Ngcobo J held that the affected parties should be consulted before a decision is made. The consultation, he argued, is essential to rationality.[107]

Ngcobo J's decision suggests an additional requirement the Court should look at when considering the acts of state organs. The rule of law requires that a decision must be

[103] Masetlha par 78.
[104] Masetlha par 172.
[105] Masetlha par 179.
[106] Masetlha par 87.
[107] Masetlha par 87.

must be consistent with the Constitution and just administrative action is guaranteed in the Bill of Rights. This decision by Ngcobo J implies that when enforcing the constitutional provisions, courts must do so in totality and not selectively.

3.6. *Albutt v Centre for the Study of Violence and Reconciliation*[108]

This case concerns the power of the President to grant pardon under section 84(2)(j) of the Constitution to people who claim that they were convicted of offences which they committed with a political motive. Section 84(2)(j) provides that the President is responsible for "pardoning or reprieving offenders...". The question the Court had to decide was whether the President is required, prior to the exercise of the power to grant pardon to this group of convicted prisoners, to afford the victims of these offences a hearing.

The President announced, in 2007, a special dispensation and the establishment of a multiparty Pardon Reference Group (the PRG) which would assist him in the discharge of his constitutional responsibility to consider the requests made for pardons by offenders who fall within the special dispensation process. Persons who qualify for pardon under the process were persons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 1999 and who had not applied for amnesty by the Truth and Reconciliation Commission.

The respondents contended that the victims of the offences in respect of which pardons are sought under the special dispensation process should be heard. They challenged the decision of the President to exclude the victims from participating in the special dispensation process on three grounds. Firstly, they contended that the decision to exclude the victims from participating in the special dispensation process

[108] 2010 (3) SA 293 CC.

was irrational.[109] They submitted that it is not rationally related to the objectives which the dispensation seeks to achieve, namely, national unity and national reconciliation.

Secondly, they contended that the context-specific nature of the special dispensation process requires the President to give the victims an opportunity to be heard prior to making a decision to grant a pardon. Thirdly, they contended that the exercise of the power to grant pardon constituted administrative action under section 1 of PAJA and that this attracts the duty to afford the victims a hearing.[110]

The Court stated that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.[111] The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the "principles and values underpin the Constitution",[112] including the "principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process".[113]

The Court held that once it is accepted that the twin objectives of the special dispensation processes are nation-building and national reconciliation and that participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process.[114]

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[109] Albutt par 38.
[110] Albutt par 38.
[111] Albutt par 49.
[112] Albutt par 53.
[113] Albutt par 53.
[114] Albutt par 58.

The Court argued that victim participation in accordance with the principles and the values of the Truth and Reconciliation Commission was the only rational means to contribute towards national reconciliation and national unity. The Court concluded that the subsequent disregard of these principles and values without any explanation and the decision to exclude and values without any explanation and the decision to exclude the victims from participating in the special dispensation process was irrational.[115] The Court did not consider the question whether the exercise of the power to grant pardon constitutes administrative action.

It is clear from this judgment that the President derives the power to grant pardon from the Constitution which defines the limits of such powers. To pass constitutional muster, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.

3.7. *Democratic Alliance v President of the Republic of South Africa and Others*[116]

In this case the Court did not only consider the decision taken, but went further to consider the process for arriving at the decision. The President appointed Simelane as the National Director of Public Prosecutions in terms of the National Prosecuting Authority Act (the Act).[117] The Act requires that the National Director "must...be a fit

[115] Albutt par 59.
[116] 2013 (1) SA 248 CC.
[117] Act 32 of 1998.

and proper person, with due regard to his or her experience, consciousness and integrity, to be entrusted with the responsibilities of the office concerned".[118]

The main issue before the Court was whether the decision of the President to appoint Simelane was rational, and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred. The question is whether the decision should be rational or the process resulting in the decision should also be rational for an executive decision to stand the constitutional muster. The Democratic Alliance submitted that the irrationality ground covers irrationality in process as well as on the merits.[119]

The Court agreed with the Democratic Alliance's submission and noted that it is not easy to escape the fact that the process must also be rational in that it must rationally relate to the achievement of which the power is conferred. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. The Court argued that not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose from which the power was conferred.[120]

The Court took a step further in its application of rationality test. According to the Court, the rationality of the steps taken have implications for whether the ultimate executive decision is rational and the decision of the President can be successfully challenged on the basis that a step in the process bears no rational relation to the purpose for which the power is conferred. The courts must look at the process as a

[118] Section 9 of the National Prosecuting Authority Act.
[119] Democratic Alliance par 33.
[120] Democratic Alliance par 36.

whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step is unrelated to the end as to taint the whole process with irrationality.

CHAPTER 4

RATIONALITY IN LEGISLATIVE PROVISIONS AND EXECUTIVE ACTION

4.1. Introduction

In this chapter I am going to discuss case law in which it was argued that legislative provisions allegedly fell short of the rationality standard.

4.2. New National Party v Government of the Republic of South Africa.[121]

The New National Party was challenging section 1(xii) and section 6(2) read with section 38(2) of the Electoral Act[122] prescribing the documents which qualified voters must possess in order to register as voters and to vote. Section 1(xii) provides:

> "'identity document' means an identity document issued after 1 July 1986, in terms of section 8 of the Identification Act, 1986 (Act No. 72 of 1986), or a temporary identity certificate issued in terms of the Identification Act, 1997 (Act No. 68 of 1997); (vii)"

Section 6(2) provides:

> "For the purposes of the general registration of voters contemplated in section 14, an identity document includes a temporary certificate in a form which corresponds materially with a form prescribed by the Minister of Home Affairs by notice in the Government Gazette and issued by the Director-General of Home Affairs to a South African citizen from particulars contained in the population register and who has applied for an identity document."

Section 38(2) provides:

> "A voter is entitled to vote at a voting station-
> (a) on production of that voter's identity document to the presiding officer or a voting officer at the voting station; and

[121] New National Party.
[122] Act 73 of 1998.

(b) if that voter's name is in the certified segment of the voters' roll for the voting district concerned."

The Electoral Act provides that South African citizens entitled to vote may:

"(a) Register as voters and have their names included in the common voters roll provided that they possess the bar-coded ID, a temporary identity certificate or a temporary registration certificate.

(b) Vote only if they are registered on the common voters roll and in possession of the bar-coded ID".

The complaint was that these provisions infringe the right enshrined in section 19(3)(a) of the Constitution. Section 19(3)(a) reads:

"Every adult citizen has the right-

(a) to vote in elections for any legislative body and to do so in terms of the Constitution, and to do so in secret...".

The impugned provision provides for the way in which citizens must register and vote. The question is whether the requirement laid down by these provisions constituted an infringement of the right to vote. The right to vote is fundamental to our democracy; however this right cannot be properly exercised without control measures in place. The Constitution also provides for the right to free and fair elections which underlies the importance of the right to vote.[123]

The free and fair requirement in section 19(2) of the Constitution implies that the deserving voters will exercise this right once and those who are not entitled to vote must not be allowed to do so. It therefore goes without saying that the regulation of the exercise of the right to vote is necessary in order to ensure the proper implementation

[123] Section 19(2) of the Constitution of the Republic of South Africa, 1996.

of the right to vote. The details of the right to vote contemplated by section 19(3) are therefore left for Parliament. The Electoral Act provides for those details.

The Court stated that it is for Parliament to determine the means by which voters must identify themselves and this was not the function of a court. However, the Court noted, this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured.[124] There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right.

The constitutional constraint placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose.[125] Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.[126]

O'Regan J, in minority judgment, approached this issue on the reasonableness grounds. She argued that it is important to consider the question of whether Parliament acted reasonably in determining what documents would be required for registration and voting in the elections.[127] O'Regan J concluded:

> "In my view, given the obligation upon Parliament to seek to facilitate the right to vote so as to build a culture of participation in the political process in our fledgling democracy, those

[124] New National Party par 19.
[125] New National Party par 19.
[126] New National Party par 19.
[127] New National Party par 141.

purposes are inadequate to render Parliament's insistence on the bar-coded ID reasonable."[128]

Yacoob J, for the majority, disagreed with this approach and held that decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament and that it is fundamental to the doctrine of separation of powers and the role of courts in a democratic society.[129] He argued that it is not the role of courts to review provisions of Parliament on the grounds that they are unreasonable. The reasonableness approach can only be applied if the courts are satisfied that the legislation is not rationally connected to a legitimate government purpose.[130]

According to Yacoob J should this connection lack, the review will be competent because the legislation is arbitrary and arbitrariness is inconsistent with the rule of law which is a value of the Constitution. Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote.[131]

Yacoob J held that the question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution, and it is only as part of this section 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of enquiry that the question of reasonableness has to be considered.[132]

The Court argued that the necessary component of a free and fair election is a reliable form of identification. The Court argued further that it was necessary for Parliament to

[128] New National Party par 156.
[129] New National Party par 24.
[130] New National Party par 24.
[131] New National Party par 24.
[132] New National Party par 24.

provide that valid identification was required in order to register and to vote. According to the Court the purpose of the legislation is the legitimate and compelling purpose that voters require lawful and valid identification in order to vote.[133]

The Court held that the requirement of the bar-coded ID as the principal method of identification is, on the face of it, rationally connected to the legitimate governmental purpose of enabling the effective exercise of the vote.[134] The bar-coded ID contains the photograph of the holder, the holder's name and particulars from which the age of the person to whom it was issued can be readily established.

4.3. *Affordable Medicines Trust and Others v Minister of Health and Another*[135]

The applicants were challenging section 22C (1)(a) of the Medicines and Related Substances Control Act (the Medicines Act)[136] which permitted the Director-General to issue licences "on the prescribed conditions". Prior to the introduction of section 22C, the authority of the medical practitioners to dispense or compound medicines was governed by section 52 of the Health Professions Act.[137]

Under the Health Professions Act, all that was required of a medical practitioner who desired to compound or dispense medicines as part of his or her practice, was to inform the Health Professions Council of South Africa of his or her intention to compound or dispense medicines. Upon registration, a medical practitioner became

[133] New National Part par 142.
[134] New National Party par 26.
[135] 2006 (3) SA 247 CC.
[136] Supra n120.
[137] Act 56 of 1974.

entitled personally to dispense medicines prescribed by him or her or by any medical practitioner or dentist with whom he or she was in partnership with.[138]

The respondents argued that prior to the licensing scheme, the compounding and the dispensing of medicines by medical practitioners and other health practitioners, were either not adequately regulated or not regulated at all.[139] The respondents argued that there were no measures in place to ensure that dispensers of medicines adhered to good dispensing and compounding practices.[140]

The lack of adequate measures, the respondents submitted, resulted in inappropriate prescribing and dispensing of medicines.[141] The applicants argued that bad dispensing practices compromise and place in jeopardy the health of patients and the licensing scheme is directed at addressing these bad dispensing and compounding practices and their consequences.[142] The applicants contended that section 22C(1)(a) gave the Minister wide and unlimited arbitrary legislative powers. They submitted that this is in breach of the principle of legality.[143] The applicants argued further that the Minister exceeded her powers when making regulation 18 and therefore breached the principle of legality.[144]

Section 35 of the Medicines Act empowers the Minister to make regulations. It confers wide powers on the Minister to make regulations relating to the safety, quality and efficiency of medicines. The Court stated that the exercise of powers to make regulations is subject to constitutional constraints. The Court held that there must be a

[138] Affordable Medicines par 12.
[139] Affordable Medicines par 19.
[140] Affordable Medicines par 19.
[141] Affordable Medicines par 20.
[142] Affordable Medicines par 21.
[143] Affordable Medicines par 24.
[144] Affordable Medicines par 25.

rational connection between the legislation and the achievement of a legitimate government purpose.[145] The Constitution places significant constraints upon the exercise of public power through the Bill of Rights and the founding principles enshrining the rule of law. The exercise of such powers must be rationally related to the purpose for which the power was given.[146]

The Court argued that the conditions under which medicines are kept and stored are essential to the safety of medicines. The Court noted that requirement that dispensing medical practitioners must dispense medicines from particular premises facilitates regular inspection of those premises for compliance with good dispensing practice.[147] The Court noted further that the storage of medicines and the appropriateness of the premises from which medicines are dispensed require regulation and control in the public interest.[148]

The Court concluded that linking the licence to dispense medicines to particular premises is rationally connected to the government objective to increase access to medicines that are safe for consumption by the public.[149] The Court held that the regulations fall within the purview of section 22 of the Medicines Act.[150]

4.4. *Glenister v President of the Republic of South Africa*.[151]

This case deals with the relocation of the Directorate of Special Operations (DSO) from the National Prosecutions Authority (NPA) to the South African Police Services

[145] Affordable Medicines par 74.
[146] Affordable Medicines par 75.
[147] Affordable Medicines par 96.
[148] Affordable Medicines par 97.
[149] Affordable Medicines par 99.
[150] Affordable Medicines par 99.
[151] 2011 (3) SA 347 CC.

(SAPS) through the National Prosecuting Authority Amendment Act[152] and the South African Police Services Amendment Act[153] respectively. The DSO was established in 2001 to supplement the efforts of existing law enforcement agencies in tackling organised crime.

In due course, concerns were raised within the criminal justice system and the intelligence community relating to the role and functioning of the DSO. In 2005 the President appointed Judge Khampepe to chair a commission of inquiry (Khampepe Commission) to investigate and report on aspects of the DSO, including the rationale for its establishment, its mandate, its location within the NPA as opposed to the SAPS, and the relationship between the SAPS and the DSO.[154]

The Khampepe Commission Report (Khampepe Report) recommended that the DSO should continue to be located within the NPA, albeit with certain adjustments. Other recommendations related to the President's power to transfer oversight and responsibility over the law enforcement component of the DSO to the Minister for Safety and Security and the need to tackle the unhealthy relationship between the DSO and the SAPS.[155]

However, the African National Congress (ANC), the ruling party, at its 52nd national conference held in Polokwane in December 2007, adopted a resolution calling for a single police service and the dissolution of the DSO (Polokwane Resolution).[156] In 2008, the Presidency issued a statement to the effect that Cabinet had approved the National Prosecuting Authority Amendment Bill and the General Law Amendment Bill,

[152] Act 56 of 2008.
[153] Act 57 of 2008.
[154] Glenister par 6.
[155] Glenister par 6.
[156] Glenister par 8.

later renamed the SAPSA Bill (the Bills).[157] Among other things, these Bills proposed to dissolve the DSO and replace it with the Directorate of Priority Crime Investigation (DPCI). The stated purpose of the Bills was to strengthen the country's capacity to fight organised crime and to give effect to the decision to relocate the DSO from the NPA to the SAPS.[158]

The applicant's constitutional complaint is the disbandment of the DSO, which, as indicated above, was located within the NPA and its replacement by the DPCI, which is located within the SAPS. The applicant contended that the scheme of the impugned laws which brought about these changes is unconstitutional. He submitted that it is irrational, unreasonable, and unfair and undermines the structural independence of the NPA.[159]

The respondents contended that the scheme of the impugned laws is rational. The respondents submitted that the scheme was put in place to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes, including corruption.[160] The respondents argued that this is a legitimate governmental purpose to pursue and that the means by which this purpose is sought to be achieved are logical, rational and consistent with the Constitution.[161]

Under the Constitution, national legislative authority vests in Parliament.[162] However, in the exercise of its legislative authority, Parliament is bound only by the Constitution, and must act in accordance, and within the limits of, the Constitution.[163] Like all

[157] Glenister par 10.
[158] Glenister par 10.
[159] Glenister par 17.
[160] Glenister par 20.
[161] Glenister par 20.
[162] Section44(1) of the Constitution.
[163] Section 44(4) of the Constitution.

exercise of public powers, there are constitutional constraints that are placed on Parliament. One of these constraints is that there must be a rational relationship between a scheme which it adopts and the achievement of a legitimate government purpose.[164]

As long as there is a relationship between the decision to disband the DSO and establish the Directorate of Priority Crime Investigation and the government to enhance the investigative capacity of the South African Police Services in relation to national priority crimes, it is irrelevant that the governmental purpose could have been achieved by retaining the DSO.[165]

According to the Court, strengthening the ability and the capacity of the SAPS to address the scourge of corruption and other national priority crimes is unquestionably a legitimate governmental purpose. The Court argued that establishing a separate division in the SAPS, the DPCI, for that purpose is rationally related to the achievement of that purpose.[166]

According to the Court, the decision by Parliament to disband the DSO and establish the DPCI within the SAPS is entirely consistent with objects of the police service set out in section 205(3) of the Constitution. Section 205(3) of the Constitution states:

> "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

The Court held that the decision to locate the DPCI within the SAPS is designed to give effect to section 205(3) of the Constitution and that was a legitimate governmental

[164] Glenister par 55.
[165] Glenister par 55.
[166] Glenister par 58.

purpose and the means by which the impugned laws sought to achieve that purpose were rationally related to the governmental purpose.[167] The Court added that it was irrelevant that the governmental purpose could have been achieved by retaining the DSO.

4.5. Bel Porto School Governing Body v Premier of the Western Cape[168]

This case dealt with rational decision-making as a requirement of the rule of law. It concerns the validity of the policy pursued by the government of the Western Cape in attempting to give effect to the constitutional imperative to introduce equity into its educational system.[169]

Before the interim Constitution came into force education in South Africa was conducted at racially segregated schools managed by different departments of education. In the Western Cape there were four education departments reflecting these divisions. They were the departments of the House of Assembly (HOA), the House of Delegates (HD), the House of Representatives (HR) and the Department of Education and Training (DET). There were great disparities in the system. The HOA schools had better buildings, better grounds, better equipment, and better pupil teacher ratios than schools in the other departments had. There were also disparities between the other departments and conditions in the DET schools were the worst of all.[170]

After the interim Constitution came into force the Western Cape Education Department (WCED) was established to take over responsibility for all schools in the province and

[167] Glenister par 68.
[168] 2002 9 BCLR 891 (CC).
[169] Bel Porto par 1.
[170] Bel Porto par 8.

there were teaching and non-teaching staff at the various schools. Most were employees of the former departments but some were employees of the schools. The South African Schools Act[171] (the Schools Act) continues to sanction this distinction and permits schools to supplement their teaching and non-teaching staff by employing additional teachers and assistants out of their own funds.[172] There are special schools that provide education for disabled pupils and referred to as Elsen schools. The appellants are Elsen schools that were formerly HOA schools established to meet the educational needs of white disabled children. They were administered by the HOA education department.[173]

The appellants do not dispute the validity of the goal to which the policy is directed, nor do they dispute the core aspects of that policy which make provision for a programme of rationalisation within the education system in order to ensure that education in the province is conducted on a fair and proper basis. Their complaint is that the manner in which the rationalisation programme is to be implemented imposes an unfair burden on them. They further complain that they were neither informed adequately of the details of the rationalisation programme and the impact that it would have on them, nor were they consulted in regard to such matters.

The applicants submitted that Elsen schools need teachers with special skills. They also need general assistants for various purposes, including class assistants to help the teachers attend to the children during classes and drivers to transport the children to and from schools. When the appellant schools were administered by the HOA education department, the policy of that department was that the general assistants

[171] Act 84 of 1996.
[172] Bel Porto par 9.
[173] Bel Porto par 10.

would be employed by the schools themselves. They received a special subsidy from the department to assist them to meet the costs of employing such assistants. It was up to the schools to decide how to use that subsidy.[174]

It was clear, the Court noted, that the policy had been followed for several years before the interim Constitution came into force. As a result, when the WCED was established and took over responsibility for the administration of the schools in the province, the general assistants at the appellant schools were all employees of the schools themselves.[175] It should be noted that the other departments of education had different policies. They employed the general assistants at the Elsen schools in their departments, though there were apparently fewer assistants per pupil than was the case in the HOA schools.

Schools in the other departments were also disadvantaged in other respects as compared with HOA schools.[176] The appellants argued that the WCED policy concerning the employment of general assistants differentiated between the appellants and other Elsen schools and that there was no rational basis for such differentiation

The Court found that the difference between the appellants and the other Elsen schools existed before the WCED was established. It was one of many differences between schools which the WCED found when it took over the administration of the schools that had previously been administered by the different departments of education. It was one of the differences that had to be taken into account in the process of rationalisation and reconstruction that was required in bringing the four

[174] Bel Porto par 12.
[175] Bel Porto par 13.
[176] Bel Porto par 14.

departments together as one department. What has to be decided on this aspect of the case is whether the way in which the WCED dealt with this difference infringed the constitutional rights of the appellants under section 9 of the Constitution.[177]

In order to deal with these matters the WCED took advice from experts and engaged in negotiations with the unions representing its employees. The appellants do not suggest that the scheme for the allocation of posts to the various schools in the WCED, and the arrangements made concerning the number of general assistants to be employed at each of the various Elsen schools is irrational or that it infringes the equality provisions of the Constitution.

Their complaint is that the scheme makes provision for the new posts created at the appellant schools to be filled by general assistants employed by the WCED, rather than the general assistants employed by the appellants. They say that this will impose a financial burden on them because they will have to retrench their employees and carry the cost of the retrenchment, and that the scheme is also prejudicial to the learners at their schools who will have to adjust to new and possibly inferior assistants.[178]

In support of their argument the appellants submitted that the Eastern Cape Education Department, which had been faced with a similar problem, had treated the employees of the schools on the same basis as it had treated its own employees. The Court rejected this submission and said the following:

> "That is irrelevant to the rationality enquiry. The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather

[177] Bel Porto par 36.
[178] Bel Porto par 40.

> than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable".[179]

It is clear from this decision that the state is required to make decisions which are rational in order to pass the constitutional muster. Whenever the executive formulates policies, such policies should be rational in order to satisfy the principle of legality. As long as the rationality principle lacks from the conduct of the executive in formulating its policies, the courts will have no choice but to declare such conduct unlawful.

[179] Bel Porto par 45.

CHAPTER 5

RATIONALITY AND CONSTITUTIONAL AMENDMENTS

5.1. Introduction

This chapter discusses how the Constitutional Court applied the rationality test in the constitutional amendments. The cases of the *United Democratic Movement*, *Merafong Demarcation Forum* and *Poverty Alleviation Poverty* are discussed below.

5.2. *United Democratic Movement v President of the Republic of South Africa*[180]

The Court had to deal with the validity of the Constitution of the Republic of South Africa Amendment Acts of 2002 (Amendment Acts). The Amendment Acts were aimed at allowing members of national, provincial and local government to change parties without losing their seats.

Once Parliament amends the Constitution in accordance with the requirements of section 74 of the Constitution, it becomes part of the Constitution and once it becomes part of the Constitution, it cannot be challenged on the grounds of inconsistency with other provisions of the Constitution.[181] The Amendment Acts were passed in accordance with the special majority prescribed by section 74(3) of the Constitution and the special procedures for constitutional amendments prescribed by sections 74(4) to (9).

[180] 2003 (1) SA 495 CC.
[181] UDM par 12.

The Amendment Acts were as a result of the following Acts passed by Parliament:

- the Constitution of the Republic of South Africa Amendment Act[182] ("the First Amendment Act");
- the Constitution of the Republic of South Africa Second Amendment Act[183] ("the Second Amendment Act");
- the Local Government: Municipal Structures Amendment Act[184]("the Local Government Amendment Act"); and
- the Loss or Retention of Membership of National and Provincial Legislatures Act[185] ("the Membership Act").[186]

The First Amendment Act and the Local Government Amendment Act both relate to floor crossing in the local government sphere. The First Amendment Act establishes limited exceptions to the rule that a member of parliament that ceases to be a member of the party that nominated him or her loses his or her seat. It provides for a fifteen-day period during the second and fourth year after an election, during which party allegiances may be changed without the councillors concerned losing their seats.

This is subject to certain requirements being met, primarily that at least 10% of the representatives of a party must leave if this is to apply. It also puts in place a once-off fifteen-day period immediately following the commencement of the legislation during which party allegiances may be changed without the councillors concerned losing their seats – even if less than 10% of a party's representatives leave.[187]

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[182] Amendment Act 18 of 2002.
[183] Amendment Act 21 of 2002.
[184] Amendment Act 20 of 2002.
[185] Amendment Act 22 of 2002.
[186] UDM par 3.
[187] UDM par 4.

It was contended that the amendments are inconsistent with the founding values of the Constitution set out in section 1, which can only be amended in accordance with the provisions of section 74(1) specifically the founding value which states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (c) Supremacy of the Constitution and the rule of law."

This founding value has an important place in our Constitution. It informs the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid. It is specially protected by section 74(1) of the Constitution which provides that section 1 may only be amended with the support of at least 75% of the members of the National Assembly, and six of the provinces in the National Council of Provinces.[188]

The Court stated that the Constitution requires legislation to be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.[189] The purpose of the disputed legislation was to make provision for members of legislatures to change their party allegiances without losing their seats in the legislature.[190] The enactment of such legislation is specifically contemplated by item 23A introduced by Annexure A of Schedule 6 to the Constitution, but in any event, it is within the power of Parliament to deal with matters related to elections and the membership of the various legislatures.[191] This power must be exercised subject to the provisions of the Constitution itself.[192]

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[188] UDM par 19.
[189] UDM par 55.
[190] UDM par 57.
[191] UDM par 57.
[192] UDM par 58.

The Court held that given the fact that the purpose of the legislation is to accommodate mid-term shifts in political allegiances and the limited term for which a defecting member will remain a member of the legislature it seems neither irrational nor inconsistent with multi-party democracy to provide that the seat should be regarded as the seat of the new party for the remainder of that member's term.[193] The Court concluded that the objection to the Amendment Acts on the grounds that they are inconsistent with the founding values and the Bill of Rights must fail.[194]

5.3. *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*[195]

The Constitutional Court considered the constitutionality of the Twelfth Amendment Act of 2005 which changed provincial boundaries, including the boundary between the provinces of Gauteng and North West. One part of the Merafong City Local Municipality (Merafong) was thus relocated from Gauteng Province to North West Province.

The applicants asked the Court to declare that the Gauteng Provincial Legislature failed to comply with its constitutional obligation to facilitate public involvement in its process leading up to the approval of the Twelfth Amendment Bill. In the alternative they sought declaration that the Legislature failed to exercise its legislative powers rationally when it voted in support of the Bill.

The latter challenged by the applicants is relevant to this discussion. The applicant is an organisation which consisted of members of the community drawn from political

[193] UDM par 74.
[194] UDM par 75.
[195] 2008 (5) SA 171 CC.

organisations, taxi associations, the women's movement, students, trade unions, churches, businesses and professionals, including teachers, nurses and lawyers.[196]

In 2000 the Merafong City Local Municipality was established within the West Rand District Municipality. The smaller part of Merafong, the southern part, fell in North West Province, whilst the larger part fell in the Gauteng Province. Therefore both Merafong and the West Rand District Municipality were cross-boundary municipalities. The applicants allege that 74% of Merafong's inhabitants live in Gauteng Province.[197]

Written memoranda were submitted by a number of stakeholders, including political parties and community organisations. The submissions were directed to the Gauteng Provincial Legislature, as well as to the National Council Of Provinces (NCOP) and other governmental role-players.[198] Public hearing was held in November 2005 and the Merafong community agreed in principle with the phasing out of cross-boundary municipalities. However, the overwhelming majority of people were opposed to the incorporation of Merafong into North West.[199]

In the NCOP Gauteng voted in support of the Bill and it was passed and came into force in March 2006. Thereafter the Demarcation Board demarcated the whole of Merafong into the Southern District Municipality in the North West Province.[200]

The respondents argued that it is eminently rational to do away with cross-boundary municipalities. The applicants agree with the idea of abolishing cross-boundary

[196] Merafong par 2.
[197] Merafong par 29.
[198] Merafong par 32.
[199] Merafong par 33.
[200] Merafong par 39.

municipalities and do not attack the rationality of the Twelfth Amendment as a whole, but only the part of it that locates Merafong in the North West Province.[201]

The Court held that the exercise of public power has to be rational. In a constitutional state arbitrariness or the exercise of public power on the basis of naked preferences cannot pass muster.[202] There must merely be a rationally objective basis justifying the conduct of the legislature. As long as a legitimate public purpose is served, the political merits or demerits of disputed legislation are of no concern to a court.

The Court stressed that the fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. The Court argued that if more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial because there must merely be a rationality objective basis justifying the conduct of the legislature.[203]

In respect of the rationality of the actions of the provincial legislature, the Court held that the mandate of the Provincial Legislature was rational and as far as the outcome of the amendment, the Court held that the amendment served improved service delivery and governance.[204] According to the Court, the outcome was rational and it was the role of the court to decide in which province Merafong Municipality should fall under.[205]

[201] Merafong par 65.
[202] Merafong par 63.
[203] Merafong paras 62-63.
[204] Merafong par 114.
[205] Merafong par 114.

5.4. *Poverty Alliance Network v President of the Republic of South Africa*[206]

The Constitutional Court considered the constitutionality of the Constitution Thirteenth Amendment Act,[207] the Cross-boundary Municipalities Laws Repeal and Related Matters Act[208] and the Cross-boundary Municipalities Laws Repeal and Related Matters Amendment Act.[209] The effect of these amendments was to alter the boundary of the Eastern Cape and KwaZulu-Natal border and to regulate the transfer of Matatiele Local Municipality from KwaZulu-Natal province to the Eastern Cape Province.

The applicants argued that the National Assembly and the National Council of Provinces (NCOP) exercised their legislative powers to amend the Constitution in a manner that was irrational and unconstitutional.[210] The applicants submit that in exercising their legislative powers to enact the Thirteenth Amendment Act, Parliament and the KwaZulu-Natal Legislature merely went through the motions of public participation without considering, in good faith, what was submitted in that process.

They contend that the enactment of the impugned legislation was a product of a politically dictated, pre-determined decision.[211] The Court held that the principle that every law and every exercise of public power should not be arbitrary sets rationality as a necessary condition for legal validity that every law or act of organs of state should fulfil.[212]

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[206] Poverty Alleviation Network.
[207] Amendment Act 23 of 2007.
[208] Act 23 of 2005.
[209] Amendment Act 24 of 2007.
[210] Poverty Alleviation Network par 4.
[211] Poverty Alleviation Network par 18.
[212] Poverty Alleviation Network par 55.

The Court noted that a court cannot concern itself with the individual motives of legislators because if the court preoccupies itself with what precedes the passing of the legislation (the motive), to the exclusion of its actual purpose, it would fail to focus on the proper object of the enquiry, which is the rationality of the legislation.[213] The Court held further that the amendment was rational because doing away with cross-boundary municipalities was desirable and although Matatiele Municipality was not a cross-boundary municipality and the purpose of the amendments was to make Matatiele Municipality economically viable and to improve its governance.[214]

[213] Poverty Alleviation Network par 73.
[214] Poverty Alleviation Network par 69.

CHAPTER 6

CONCLUSION

We have seen from the series of judgments discussed above how the Constitutional Court developed the rationality review. The Constitutional Court, in dealing with various aspects of the rule of law, indicated that the rule of law requires organs of state to make rational decisions and if the rule of law is duly acknowledged, arbitrary decisions and vague legislative provisions would be avoided.[215]

Owing to the development of this principle, the courts are now able to assess the rationality of any provision in the legislation and all conduct of the executive and other organs of state. They have done so, and hopefully continue to do so, by deciding whether the law or conduct in question is rationally connected to a legitimate government purpose. If this rational connection cannot be traced, the law or conduct is unconstitutional.

It is a common cause that, save for this principle of legality, powers of organs of state are constrained by the same principle that they refrain from exercising any power or perform any function that is not bestowed to them by law. Equally, it is expected of government to have well-structured legal rules to avoid ambiguity. Malan argues, and correctly so, that arbitrary conduct is the greatest enemy of the rule of law and he notes that the rule of law provides for an opportunity for the boundaries for conduct of organs of state to be defined.

When these boundaries are so defined, the citizens benefit since their rights will be protected from arbitrary actions by the state. In his analysis, Malan indicates that 'legal

[215] Malan (2012) 275.

decision-making is premised on a corpus of law' which consists 'legal rules, principles and precedents' and submits that legal decision-makers must always visit these sources.[216] However in some instances decision-makers deliberately ignore the well-structured rules in favour of "feasibility". According to Malan feasibility is one of the non-law sources that is distinguished from a corpus of law.

In his discussion of the conduct of the JSC on the dispute surrounding Judge President Hlophe, Malan notes that the findings by the majority appear to be best in terms of what he terms decisionism, but at the expense of the rule of law.[217] The JSC disregarded the clear rules available to them to deal with the complaints. The Supreme Court of Appeal eventually ordered the JSC to conform to the rule of law by holding a formal enquiry.[218] The conduct of the JSC was found in the final analysis to be irrational and it was contrary to the rule of law.

Every conduct of decision-maker must be tested in terms of the law. In *S v Makwanyane*[219] Ackermann J held that 'the idea of the constitutional state presupposes a system of whose operation can be rationally tested against or in terms of the law and arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.[220] A few years later the Constitutional Court made it clear in *Prinsloo* case that the state must operate in a rational manner.[221]

The rationality requirement calls for and ensures that decision-makers justify for the laws that they make and acquaint themselves with the possible effects before making

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[216] Malan (2012) 276.
[217] Malan (2012) 295.
[218] Freedom Under Law par 58. (The inquiry must be held in terms of rule 5 of the Rules Governing Complaints and Enquiries in terms of section 177(1)(a) of the Constitution).
[219] 1995 3 SA 391 (CC).
[220] Makwanyane supra par 156.
[221] Prinsloo (n9) par 25.

such laws.[222] Bishop argues that rationality is not 'simply a requirement that the purpose of a statute be articulated by government' during litigation, adding that this justification by government would not necessarily solve the problem.[223]

Bishop believes that justification focuses on persuasion instead of logic with persuasion depending on the observer to which it is addressed and claims that because of rationality-basis review, those who are adversely affected by a law will demand that government explain such law and convince judges that the law serves some public purpose.[224] Although he proposes a modified rationality test, he concedes that it will not make much difference. Bishop warns that the notion of rationality may be unjustified as it could place a burden on government and gives courts a leeway to interfere with the business of the government.[225]

Bishop's construction of the proposed test requires that the onus should be on the litigant challenging the rationality of government conduct to show that the law differentiates between groups, government must assert what the purpose of the law is, the meaning and effect of the law must be understood and the government must show a connection between the law and its purpose.[226] However, in his proposed test, Bishop still requires the government to identify the purpose that the law is intended to serve.[227] This requirement demands that government must explain its choices to differentiate groups of people.

The rational basis test is basically meant to ensure that government shy away from making laws and engaging in conduct based on "naked preferences" and all laws with

[222] Bishop (2010) 338.
[223] Bishop (2010) 339.
[224] Bishop (2010) 340.
[225] Bishop (2010) 340.
[226] Bishop (2010) 342.
[227] Bishop (2010) 343.

the prospect of disadvantaging a particular group of people should serve a public purpose.[228] Rational review promotes a "culture of justification" and where the government must come before courts to justify its treatment of its people.[229] Justification, in Bishop's view, emphasises that the government must be able to articulate and defend its own vision of good and how each law fits into that vision.

However, Bishop argues that rationality review does not achieve the ends it is meant to achieve because it is weak or uncertain hence its need to be saved.[230]

It is difficult to agree with this argument. Perhaps a doubt is casted by the differentiation between reasonableness and rationality approaches the Constitutional Court makes in considering cases. This differentiation helps us to understand the duty of courts, when applying the rationality test; they must not second-guess the wisdom of the legislature and executive. Price puts as follows:

> "This, it will be recalled, is convenient shorthand for various judicial statements to the effect that rationality review does not concern the political merits or demerits of the law or conduct in question, nor does it involve the making of policy choices, nor the substitution of the court's opinions as to what is correct or appropriate for the opinions of the relevant political branch of the state".[231]

Judges hold a significant degree of power when they draw the boundaries of legitimate political decision-making by applying the rationality principle and the Constitutional Court has applied the rationality principle in a sensible manner. It is clear that the Constitutional Court has been sensitive to the need to specify the challenged law or conduct in an appropriate way, taking into consideration the broader

[228] Bishop (2010) 335.
[229] Bishop (2010) 339.
[230] Bishop (2010) 338.
[231] Price (2010) 51.

legislative and policy context.[232] For example *Prinsloo* was assessed in the light of the legislative scheme as a whole.[233]

There is no reason to believe that the Constitutional Court has applied the purpose requirement in an inappropriate way. The Constitutional Court has also shown, through the discussed cases, a willingness to subject all laws and every exercise of public power to the scrutiny of rationality review. The approach to rationality review as developed by the Constitutional Court is defensible one which proves to be working, although it should be followed in good conscience in the future.[234]

The Constitutional Court has, through its development of rationality principle, asserted considerable power to decide whether the law or conduct of any organ of state is rationally connected to a legitimate government purpose. The Court has developed this principle from the interim Constitution's dispensation to the present Constitution.[235] In *Prinsloo* the Court held that in a differentiation the constitutional state is expected to act in a rational manner.[236]

After *Prinsloo* judgment, the Court has been consistent in applying the rationality principle in challenges emanating from section 9 of the Constitution to differentiating legislation. In extending its scope when considering the *New National Party*, the Court held that all legislative schemes must bear a rational relationship to the achievement of a legitimate government purpose and that Parliament should not act arbitrarily.[237]

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[232] Supra.
[233] Prinsloo pars 39-40.
[234] Price (2010) 73.
[235] In terms of section 8 of the interim Constitution and section 9 of the present Constitution.
[236] Prinsloo par 25.
[237] New National Party par 19.

Since *New National Party*, the Court has applied rationality principle to legislative schemes outside the context of section 9 of the Constitution. In *UDM* the Court, when rejecting the argument that a legislative scheme was arbitrary, it held that legislators' motives when voting for legislation were irrelevant to rationality review and that the scheme was rationally connected to the legitimate purpose.[238] In *Merafong*, the Court expanded its application of rationality principle to cover the process leading to the decision to pass a Bill.[239]

The rationality principle was also applied as a minimum standard to the conduct of the executive branch of the state. In the *Pharmaceutical Manufacturers* the Court held that as a requirement of the rule of law, the exercise of public power by the executive should not be arbitrary.[240] When considering the constitutional amendment, the Court went further to cover the procedural fairness in its application of rationality principle. In *Albutt* the Court held that a procedural right to be heard can, in certain instances, be based on the principle of rationality.[241]

It should be noted that there are other means of tests the courts may apply in the judicial review. These means of tests are reasonableness, proportionality and arbitrariness. Reasonableness involves an evaluation of competing considerations. It may require balancing of the relevant considerations against each other and it is more stringent standard that the courts apply less frequently.[242] Proportionality principle is used to solve conflicts between individual rights and public interests.[243] The constitutional court has used this principle in the interpretation of the limitation

[238] UDM par 56.
[239] Merafong Demarcation Forum paras 254 – 258.
[240] Pharmaceutical Manufacturers par 85.
[241] Albutt par 69. See also Masetlha par 179.
[242] Price (2010) 50.
[243] Barak (2012) 175.

clause.[244] Arbitrariness, on the other hand, is identical to irrationality. A law is arbitrary if it fails to serve a legitimate purpose.[245] Rationality review is meant to guard against arbitrariness and a law or act that serve no legitimate purpose should be viewed as arbitrary.

[244] This principle was used in S v Makwanyane.
[245] Price (2010) 57.

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