TOPIC

Redrawing the contours of rationality review in South Africa; procedural fairness as a component of rationality requirement of legality

By

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STUDENT DECLARATION

I declare that the mini-dissertation, which I hereby submit for the degree Master of Laws (Constitutional and Administrative Law- Coursework) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

ABSTRACT

The coming into force of the interim Constitution and later, the final Constitution in 1996, ushered, amongst other things, a need to control the exercise of public power. Rationality was introduced as one of the principles necessary to control the exercise of public power and uphold the rule of law. Under the principle, decisions can only be rational if there is a rational link between the exercise of power and the decision itself. This means that the power must only be exercised for the purpose for which it was granted for.

Over time, this principle has developed to include, amongst others, rationality of the process leading to the actual decision being taken. This has become known as procedural rationality. This development brought another aspect; whether considerations on the process should include requirements of procedural fairness. The apex court has given inconsistent rulings on this aspect. Relying on the academic writings, the dissertation has argued that the expansion of procedural rationality should be embraced. Through this expansion, the recognition of procedural fairness advances values that underpin the Constitution such as accountability, openness and transparency.

Although there are valid concerns about the impact of its expansion on subsidiarity and separation of powers, these concerns could be managed if the courts could delineate cases that should be resolved using legality principle and those that can only be challenged through PAJA. This will ensure that legality contributes positively to the values of the Constitution and the development of legality jurisprudence.

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Chapter 1: Introduction

1.1 Introduction and background

The enactment of the Constitution,[1] into law has had a huge impact on the different areas of law in South Africa. In some instances, legislation was repealed. In other instances, a new field of law was discovered and other laws were developed to comply with the values of the Constitution. Administrative law was not spared as the right to just administrative action has been entrenched in the Constitution.[2] This dissertation traces the development of procedural fairness as a component of rationality in legality review. The dissertation explores the concept of procedural fairness, its historical origin, its development during the pre-democratic era and its application by the South African courts in the post democratic era. Exploring different judgments that have been delivered and academic writings on procedural fairness as a component of rationality in legality review, the dissertation argues that as a constitutional democratic state, South Africa has adopted the judicial review of executive power on the basis of rationality. In the review of executive power, it is important to establish legal certainty. As such, the judiciary ought to develop clear guidelines on when and extent where procedural fairness may be included as a requirement of rationality in legality review cases.

The dissertation contends further that whilst the Constitutional Court (CC) has, for some time explicitly excluded procedural fairness as a component of rationality review, it has introduced a new concept, procedural rationality, thus making procedural rationality an 'umbrella' concept that implicitly recognises procedural fairness as a component of rationality in legality review. In doing so, the dissertation attempts to explicate the importance of procedural fairness as a component of rationality in cases of alleged abuse of public power that does not amount to administrative action. The dissertation further examines how procedural rationality has been seen as an

[1] *Constitution of the Republic of South Africa,* 1996
[2] *Section 33* (note 1 above).

expansion of rationality in the jurisprudence of the CC. The analysis will explore writings on how this expansion is seen as posing a threat to the long-held principles of subsidiarity and separation of powers. It is hoped that the dissertation will help in re-drawing the lines on the extending parameters of legality review in South Africa, and thus respond to a pertinent question posed by Hoexter as to 'who knows where legality might go in future'?[3]

1.2. Literature review

1.2.1 Procedural fairness- a common law perspective

Procedural fairness, as an expression of a broad principle of natural justice derives its existence from English common law. In tracing its origin in South African law, Hoexter describes it as a pale reflection of the legacy of English law.[4] According to Hoexter, it has two critical components. The first is a requirement for a fair hearing.[5] The second is that the hearing should be presided over by an impartial decision maker.[6] Both these ideals are reflected in two common law principles, *audi alterem partem* (hear the other side) and *nemo index in sua causa* (no one should be a judge in or her own case). For purposes of the discussion in the dissertation, the focus is on the former principle.

Procedural fairness has been described as a variable concept whose application is dependent on the merits and circumstances of a specific case.[7] Murcott explains the variability of procedural fairness by stating that in some instances, for it to be rational and lawful, exercise of public power that is not administrative in nature, it must follow

[3] Hoexter C The Principle of Legality in South African Administrative *Law Macquarie Law Journal* (2004) Vol. 4 165 184.
[4] Hoexter C (note 3 above) at 167.
[5] Hoexter C *Administrative Law in South Africa*, 2nd Ed 254 362.
[6] Hoexter C (note 5 above) at 362.
[7] Corder C Administrative justice in Van Wyk, Dugard and Davis (Eds) *Rights and Constitutionalism* 1995, 387 397.

a fair process.[8] However, the content and extent of the fairness remains unclear as courts have provided conflicting decisions on this aspect. Murcott has presented instances where procedural fairness could be a component of legality. Firstly, where consultation is a pre-requisite for achieving the purpose for which the rational exercise of public power is connected to.[9] Secondly, where a failure to consult will result in the decision maker excluding information available to him which is rationally connected to the decision he makes.[10] Thirdly, where a statute prescribes a fair procedure to be followed for the exercise of public power that is not administrative action.[11] Whether procedural fairness is a component of rationality in legality reviews in South Africa remains a question. This is because of the extent to which courts have given inconsistent interpretation of the law on this question. To locate the question within the proper context, it is first important to unpack legality as a pathway to judicial review.

1.2.2 The principle of legality in judicial review

The principle of legality, as an aspect of the rule of law prescribes that the exercise of all public power must be in line with the Constitution including the rule of law.[12] As an aspect of legality, rationality demands that when applied to a legislative provision or an exercise of public power, a court must determine whether the provision or conduct is irrational or arbitrary.[13] In cases where the court determines that the provision or conduct is irrational or arbitrary, the court must declare it unconstitutional and invalid.[14] The test for review for rationality as an aspect of the principle of legality was formulated in *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex*

[8] Murcott M *Administrative Justice in South Africa: An Introduction Second Edition* in Quinot G et.al (Eds) 2021, 7.5
[9] Murcott M *Administrative Justice* (note 8 above) at 7.5.
[10] Murcott M *Administrative Justice* (note 8 above) at 7.5.
[11] Murcott M *Administrative Justice* (note 8 above) at 7.5
[12] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49. *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 CC para 56.
[13] Price A Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt Issue 127 Vol. 4 *SALJ* (2010) 580 581.
[14] Price A (note 13 above) at 585.

Parte President of the Republic of South Africa and Others (Pharmaceutical Manufacturers case),[15] where the court held that the exercise of public power should, at a minimum, be required to have a rational relationship with the purpose for which the power was given.[16] Where that rational relationship is non-existent, the exercise of power is irrational, arbitrary, inconsistent with the requirements of the Constitution, and therefore unlawful.[17]

The CC has over time expressed divergent views on whether procedural fairness is required by the rule of law. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU),*[18] whilst the court accepted that a general duty to act fairly rested on those exercising public power, it confirmed the right to be heard not to be a general right but a case-specific right dependent on the circumstances of each case.[19] As a result, the court ruled that in line with the circumstance of the case before it, procedural fairness did not warrant the respondents to be given a hearing before the appointment of a commission of enquiry.[20] Whilst the court was dealing with administrative action in *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal (Premier, Mpumalanga)*,[21] it affirmed procedural fairness as having broader application than only in administrative decision-making, since the obligation to act in a procedurally fair manner was an obligation imposed upon the government.[22] The same court affirmed the pre-democratic era common law position that the rule of law had both the substantive and procedural content that gave rise to fundamental rights.[23]

The use of legality (including its rationality requirement) in judicial review has not been without criticism. Whilst legality review has been commended as an important

[15] 2000 (2) SA 674.
[16] *Pharmaceuticals* (note 15 above) at para 85 and 90.
[17] *Pharmaceuticals* (note 15 above) at para 90.
[18] 1999 (4) SA 147 (CC).
[19] *SARFU* (note 18 above) at para 217-221.
[20] *SARFU* (note 18 above) para 218.
[21] 1999 (2) SA 91.
[22] *Premier, Mpumalanga* (note 21 above) para 1.
[23] *Pharmaceuticals* (note 21 above) para 37.

'pathway to judicial review',[24] the complexities brought by it require scrutiny. One such complexity is an observation made that shows that legality risks becoming too broad and creating a different standard of review.[25] Where decisions are administrative, they are subjected to higher levels of scrutiny in terms of Promotion of Administrative Justice Act (PAJA)[26] and when decisions amount to executive action, they are subjected to less exacting constraints imposed by the principle of legality.[27] The exclusion of procedural fairness as a requirement of rationality in legality review finds resonance with the idea that legality imposes less exacting standards than PAJA. Legality has also been criticized as creating a parallel review thus becoming 'administrative law by another name'.[28] In this regard, courts have been criticised for employing legality review when there is uncertainty about whether the power constitutes administrative action or not.[29] It has thus become an escape route relied upon by litigants to avoid what are perceived to be cumbersome legislative requirements applicable in administrative action review proceedings in terms of the PAJA. This is because where decisions are administrative, they are subjected to higher levels of scrutiny in terms of PAJA and when decisions amount to executive action, they are subjected to less exacting constraints imposed by the principle of legality.[30] Procedural fairness is one of those exacting standards imposed by PAJA. The effect has been an avoidance of PAJA and reliance on legality and thus, legality being criticised as undermining recognised principles relied on is resolving legal disputes, such as subsidiarity and separation of powers.

The CC is alive to the criticism and has cautioned against the use of rationality to review all exercises of public power. The court has said rationality review must be used in selected cases where PAJA is not applicable.[31] Without adhering to the call by the Constitutional Court, the unintended results could be to render the legislative efforts in

[24] Moseneke D Striking a balance between the will of the people and the supremacy of the Constitution (2012) 129 *SALJ* 9 17.
[25] Kohn L The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far? *South African Law Journal* Issue 4 Vol. 130 (2013) 810.
[26] Act 3, 2000.
[27] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 27.
[28] Hoexter C *Administrative Law in South Africa*, 2nd Ed 254.
[29] Konstant A Administrative Action, the Principles of Legality and Deference- The Case of Minister of Defence and Military Veterans v Motau *Constitutional Court Review* 7 (2005) 68 75.
[30] *Motau (*note 27 above) at para 27.
[31] *Electronic Media Network Ltd v e-tv (Pty) Ltd 2017 (9) BCLR 1108 (CC),* para 85.

enacting PAJA, and the constitutional right to administrative justice (section 33 of the *Constitution*) underpinning it, redundant, and undermine the essence of separation of powers which is fundamental to the South African constitutional order.[32] Separation of powers has been heralded as a 'vital tenet for the South African constitutional democracy'.[33] Given the supremacy of the *Constitution*, courts, as its guardian, and as final, independent, and authoritative arbiters of legal issues, are mandated by the *Constitution* to ensure that all branches of government act within the law.[34] The role of courts as guardians of the *Constitution* has been interpreted to mean that courts should, as far as possible, limit their interference with the exclusive terrain of the Executive and Legislative branches of government, unless their intrusion is demanded by the *Constitution*.[35] Rationality, as a requirement of legality review, offers a platform for that intrusion in required cases.

1.3 Objectives of the study

The study is aimed at showing the need for a broad interpretation of rationality as a principle of legality. The study aims to argue that in line with the objectives of the Constitution, including advancing the Bill of Rights, a broad interpretation of legality would include recognition of procedural fairness as a component of rationality review.

1.4 Rationale and problem statement

The South African courts have given different interpretations on procedural fairness as a component of rationality in legality review. In some cases, courts have made a determination that rationality could not be attained without giving due regard to a right

[32] Murcott M and Van der Westhuizen The Ebb and Flow of the Application of the Principle of Subsidiarity- Critical Reflections on *Motau* and *My Vote Counts* (2015) 7 *Const Ct Rev*, 43 54.
[33] *National Treasury v Opposition to Urban Tolling Alliance (OUTA)* 2012 (6) SA 223 (CC), para 44.
[34] *OUTA* (note 33 above) para 44.
[35] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 37-38.

to be heard.[36] In others, the courts have made an unequivocal stance that procedural fairness is not a requirement of rationality in legality review.[37] It is therefore important to embark on a study to attempt to provide certainty on whether and if so, to what an extent, is procedural fairness a component of rationality in legality review?

1.5 Research questions

This dissertation will attempt to answer the following research questions:

1) Whether and to what extent has procedural fairness emerged as an aspect of the rationality requirement of legality?
2) To what extent has procedural rationality burgeoned to include procedural fairness as an aspect of rationality requirement of legality?
3) Has burgeoning of the rationality requirement in legality review impacted on subsidiarity and the separation of powers?
4) How should the contours of procedural fairness as an aspect of the rationality requirement of legality be re-drawn to the extent that the burgeoning of rationality is consistent with subsidiarity and the separation of powers?

1.6 Research methodology

The dissertation will involve a qualitative desktop study of the relevant national and foreign literature concerning legality as a constitutional doctrine. The study will reflect primarily on the South African CC's jurisprudence on how it has answered the question of whether procedural fairness is a component of the rationality review. In answering the first research question, the paper will rely on decided cases to show that procedural

[36] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).
[37] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

fairness has emerged as a controversial aspect of the rationality requirement of legality. It will trace the lack of uncertainty in the Appellate Division that existed in the pre-democratic era. It will show that the uncertainty has transcended into the constitutional era where courts continue to give varying decisions on whether procedural fairness is an aspect of rationality in legality review. The second question will be answered by analysing the trend of cases in the CC which have increased the scope of rationality as a requirement of legality review. The paper reflects on two concepts: procedural fairness and procedural rationality. It asks questions about what rationality of process is, and how it differs from procedural fairness. If it is the same, whether the court uses rationality of process to do what it cannot do with procedural fairness? If it is not the same, whether the development has anything to do with procedural fairness.

The discussion on the third question will examine whether, and if so, how, the expansion of rationality in legality review has impacted established legal doctrine. The principle of subsidiarity and the separation of powers will be discussed in the context of the burgeoning of rationality in legality review. The paper will draw on scholarly literature and judicial precedent to argue that rationality has burgeoned to the extent that legality review is occurring in a manner that is inconsistent with the principle of subsidiarity and the separation of powers. The last question will be answered with reference to an analysis of decided cases to evaluate the journey that fairness as a component of rationality has travelled since early court cases of the CC. The evaluation assists in answering whether the judiciary could re-imagine the principle of rationality to address the challenges associated with its expanding role in legality review.

1.7 Chapter outline

Chapter 1. Introduction and background

This chapter defines procedural fairness and traces its origin in common law. The chapter further traces the journey that procedural fairness has travelled to its current position as part of rationality in legality review. The chapter further provides description of concepts that have had interaction with procedural fairness like procedural rationality, subsidiarity and separation of powers. The chapter further provides an outline of research questions, chapter outline, research methodology and limitation of the study.

Chapter 2. Relationship between procedural fairness and procedural rationality.

The chapter traces the historical context on how South African courts interfaced with procedural fairness, with an emphasis on the *audi alterem partem (audi)* principle. The chapter looks at how the then Appellate division interpreted this right. The chapter further looks at how the introduction of the earlier interim constitution and later final constitution affected the way the courts gave effect to this right.

Chapter 3. The extent of burgeoning procedural rationality to include requirements of procedural fairness as an aspect of rationality requirement of legality.

The chapter explores rulings of superior courts in South Africa and available academic literature to provide an answer to a question on whether the introduction of procedural rationality in legality review presented a separate and distinguishable form of rationality review or whether it encompasses procedural fairness as a component of rationality? The chapter further makes reflection on how the expansion of procedural rationality has laid legitimacy to an argument that procedural fairness should not be seen as a stand-alone requirement but as part of broad requirements of procedural rationality.

Chapter 4. Expansion of procedural rationality and its impact on subsidiarity and separation of powers

The chapter examines how the expansion of procedural rationality has impacted established legal doctrines such as subsidiarity and separation of powers. Where the chapter concludes that it has, the question on how so is answered.

Chapter 5. Re-drawing the contours of procedural fairness as an aspect of rationality in legality review

The chapter discusses how the contours of procedural fairness as an aspect of rationality requirement of legality be re-drawn to the extent that the burgeoning of rationality is consistent with subsidiarity and the separation of powers.

Chapter 6: Conclusion

The chapter provides a summary of the previous chapters and outlines my arguments.

1.8. Limitations of the study

It has been indicated that procedural fairness is a broad and variable concept which includes, amongst others, a right to be heard, right to be given reasons, a right to legal representation, etc. Further, its application cuts across many disciplines of law like criminal law and labour law. Even within administrative law, it is not only limited to legality review but is also found as a requirement in the review of administrative action.

This study is only limited to the study of the review of the right to be heard within the framework of rationality in legality review. The study will not examine procedural

fairness within the context the review of administrative action as provided for in legislation.

Chapter 2:
The emergence of procedural fairness as an aspect of the rationality requirement of legality.

2.1 Introduction

A right to be heard, as a component of procedural fairness has a long history in the South African law. This history spans from the pre-constitutional era, the interim Constitution[38] era and to the post-constitutional order. Although the courts have grappled with its meaning over time, courts have come to different conclusions on its application. It appears that what one observes as uncertainty in the jurisprudence of the CC on whether procedural fairness is an aspect of rationality in legality review, should not be seen in isolation of the trend in South African jurisprudence of administrative law. Although it was applied in a different context, as it will appear in this chapter, the Appellate Division's rulings equally provided uncertainty over the interpretation on application of the right to be heard. This chapter firstly traces the development of procedural fairness in the South African courts. It examines how procedural fairness, as founded in English law was applied by the South African courts in the pre- constitutional era. I will analyse cases that were considered by the courts at the time. Secondly, a discussion of a few cases where procedural fairness arose during the phase where the interim Constitution was applied in South Africa will be held. Thirdly, the chapter will look at how procedural fairness developed in the constitutional era. In doing so, an attempt is made to answer the question on whether and to what extent has procedural fairness emerged as an aspect of rationality requirement of legality?

[38] *The Republic of South Africa Constitution* Act 200 of 1993.

2.2 Procedural fairness in the pre-democratic era

Historically, South African courts adopted a lukewarm attitude towards procedural fairness. Whilst acknowledging its importance, the courts resisted its application as it was believed that its value and significance would be neutralised rather than enhanced if it was applied outside its proper limits.[39] As a result of this approach, the benefits of procedural fairness were narrowly restricted to the judicial and quasi-judicial cases in which existing rights were affected.[40] In addition, applicants who lacked existing rights and hoped to acquire them were not entitled to procedural fairness.[41] The significance of the right to be heard appears in *R v Ngwevela*.[42] An apartheid statute (*Suppression of Communism Act*) was used to ban the appellant from attending a gathering for a period prescribed in the notice without giving him an opportunity to be heard before the notice was issued. Having failed at his appeal attempt in the Cape provincial division, he launched an appeal with the Appellate division. The court ruled in his favour on the basis that he had not been given an opportunity to be heard before the order was served on him. The court reasoned that where a statute empowers an authority to make a decision prejudicially affecting the property or liberty of an individual, such an individual has a right to be heard before such an action is taken against him, unless the court has expressly or by necessary implication excluded that or that there exist exceptional circumstances that would justify the court not giving effect to the rule.[43]

The decision in *Ngwevela* was confirmed in *Publications Control Board v Central News Agency*.[44] The court held that where a statute gives judicial or quasi-judicial powers that prejudicially affects the rights of persons or property, it is always presumed that such power shall be exercised in accordance with the principles of natural justice.[45] One such principle is to afford an affected person an opportunity to be heard. The

[39] *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 549 B-C.
[40] Hoexter C The Principle of Legality in South African Administrative Law *Macquarie Law Journal* Vol. 4 (2004) 165 169.
[41] Hoexter C (note 3 above) at 169.
[42] 1954 1 SA 123 (A).
[43] *Ngwevela* (note 42 above) para 131-133.
[44] 1970 3 SA 479 (A).
[45] *Publications Control Board* (note 44 above) para 488-489.

court held that this principle could only be waived in exceptional circumstances or where there is an express intention to exclude its application.[46] The court's reasoning gave a clear indication that the right to be heard is embodied in a presumption of law in favour of an affected individual and this presumption is only rebuttable by express provision in the statute or by a clear intention of the legislature to exclude it.[47] Whilst the court confirmed the principle, it however introduced a new qualification that an exclusion of a right to be heard could not be implied and that a clear intention of the legislature should have existed.[48] These two decisions have been described as a 'first approach' on the application of the right to be heard in administrative decisions.[49] The court's 'second approach' appears in how the Appellate division restricted the application of the rule as it was developed and applied in its previous decision. In *Laubscher v Native Commissioner, Piet Retief*,[50] an attorney was refused an entry to consult with his client. In terms of the then statute *(Native Trust and Land Act),* any person who intended to enter a native trust area was required to seek permission from the native commissioner, a trustee of such land. Having been refused permission, Laubscher unsuccessfully appealed to the Transvaal provincial division. His appeal to the Appellate division was unsuccessful. The crux of his appeal was that the Native Commissioner had not afforded him an opportunity to be heard before refusing him access to the trust area to carry out his lawful profession.[51]

For two different reasons, the judges dismissed the appeal. Firstly, it was held that the appellant was not entitled to a hearing as he enjoyed no antecedent right to enter the trust land.[52] The court held that the refusal by the commissioner neither prejudicially affected his right to property or liberty nor did it affect any right he already held.[53] The second judgement related to what has been called 'a functionary approach'.[54] The court ruled that the commissioner, bestowed with a discretion to administer

[46] *Publications Control Board* (note 44 above) para 489.
[47] Taitz J The Application of the audi alteram partem rule in South African administrative law (1982) 45 *THRHR* 254 258.
[48] *Publications Control Board* (note 44 above) para 489.
[49] Taitz J (note 47 above) at 258.
[50] 1958 1 SA 546 (A).
[51] *Laubscher* (note 50 above) para 548 E.
[52] *Laubscher* (note 50 above) para 549 E-G.
[53] *Laubscher* (note 50 above) para 549 E-G.
[54] *Pretoria North Town Council v A1 Electric Ice Cream Factory (Pty) Ltd* 1953 3 SA 1 (A) 11.

administrative decisions, was not required to inform the appellant before making the decision.[55] The dissertation does not endeavour to discuss this approach further. The issue about deprivation of a hearing on the basis of lack of existing rights confronted the Appellate division again in *Administrateur van Siudwes-Afrika v Pieters*.[56] The court had to consider an appeal from an attorney who had been refused to practice in South West Africa (now Namibia). The court followed the two approaches it adopted in *Laubscher* and ruled against *Peters*. The court found that Pieters's argument that he was deprived of a hearing before the decision was made lacked merit as he had no existing rights before the decisions was taken.[57] Secondly, the court reasoned that an official carrying out his function had unlimited discretion.[58] This decision has been criticized as not having taken factual context into consideration as Pieters, as an attorney, had an existing fundamental right to practice in South West Africa.[59]

The Appellate division appears to have adopted a further differentiation on the application of the right to be heard when it dealt with a group of people and when the right was applied to individuals. In *Pretoria City Council v Modimola*,[60] a case that pertained to an expropriation of land that belonged to a group of individuals for pursuing a community scheme, the local authority did not give the owners of land an opportunity to be heard before the order was made. The court provided two reasons for its decision. Firstly, the court held that where a decision prejudicially affected rights of a whole community, the principle of natural justice is not violated by a decision taken under statute without affording an opportunity to every individual member of the community to be heard.[61] Secondly, the court reasoned that where an administrative decision is made in the interest of the community as a whole, an affected individual is not entitled to a hearing.[62]

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[55] *Laubscher* (note 50 above) para 554H.
[56] 1973 1 SA 850 (A).
[57] *Pieters* (note 56 above) para 861.
[58] *Pieters* (note 56 above) para 861F.
[59] Taitz J *The Application of the audi alteram partem rule in South African administrative law* (note 47 above) at 260.
[60] 1966 3 SA 250 (A).
[61] *Modimola* (note 60 above) para 261 H.
[62] *Modimola* (note 60 above) para 262 A.

The *South African Defence and Aid Fund v Minister of Justice*,[63] introduced a further qualification to the right to be heard. The case dealt with an outlawing of an organisation in pursuit of the objectives of the then *Suppression of Communism Act* of 1950. As an organisation that was established to protect human rights and civil liberties, assist persons thought to have lost such rights or liberties and the collection of funds for these objectives, it was outlawed through a proclamation in line with statutory provisions. The fund unsuccessfully applied to the Cape provincial division for the setting aside of the proclamation. On appeal to the Appellate division, the court dismissed the appeal and introduced a new qualification. The court held that unless the rights of a party are affected by the exercise of delegated power, such an act is not of a 'quasi-judicial' nature.[64] As a result, the individual concerned was not entitled to a hearing.[65] The court further suggested a two-stage enquiry in cases where there was an alleged failure to comply with a right to be heard. It was held that where non-compliance with the rule is alleged, an 'initial enquiry' into the relevant legislative provision must be made by the court.[66] The enquiry would seek to establish whether the right to be heard has been provided for in the legislation either expressly or impliedly.[67] Taitz argued that this necessarily reduced the right to a mere privilege that could only be accorded if it was provided for in legislation either expressly or by implication.[68] Contrary to its decision in *Ngwevela*, the court introduced a contradiction on how it dealt with the right to be heard.

The judgment received a fair amount of criticism. Part of the criticism directed at this judgment was that the view that the right to be heard was only available to the aggrieved party if and only where it has been provided for in legislation, has no foundation in both the Roman-Dutch and English law which, are the foundation of South African law.[69] The stance of the court in this case appears to have been relegated into the forgotten world when one looks at how it later ruled on the similar

[63] 1967 1 SA 263 (A)
[64] *Aid Fund* (note 63 above) para 270 C-G, 271 H.
[65] *Aid Fund* (note 63 above) para 270 C-G, 271 H- 272 C.
[66] *Aid Fund* (note 63 above) para 270 F.
[67] *Aid Fund* (note 63 above) para 270 F.
[68] Taitz J *The Application of the audi alteram partem rule in South African administrative law* (note 47 above) at 267.
[69] Taitz J *The Application of the audi alteram partem rule in South African administrative law* (note 47 above) at 268.

question before it in the *Publications* matter. However, it could not be as it was resurrected in another case that came before the Appellate division. In *Winter v Administrator -in- Executive Committee,*[70] it appears that the court attempted to reconcile the two destructive approaches it took in its earlier decisions in *Ngwevela* and *Aid Fund* cases. The case entailed a challenge to the deportation orders that were issued against members of the Anglican Church in South West Africa. The church members challenged these on the basis that they were never afforded an opportunity to be heard before the deportation orders were issued.

In dismissing the appeal, the court relied on both judgments in *Ngwevela* and *Aid Fund* cases. Although these cases offered different reasons for their decisions, the court sought to reconcile them. The court held that although the proclamation and resultant deportation orders prejudicially affected the liberty and possibly the property of the applicants, the proclamation made no provision for the prospective deportee to be heard before a decision is taken.[71] Despite the court acknowledging that under such circumstances, the maxim *audi alterem partem* would normally be applied, it resorted to the 'stage enquiry' approach that was introduced in *Aid Fund* case. It held that resort must be to the initial enquiry on whether the particular enactment in issue impliedly incorporated the maxim.[72] Further, the court went on and cited its decision in *Ngwevela* that the maxim should be enforced unless it is clear that parliament had expressly or by necessary implication enacted that it should not apply or that there were exceptional circumstances which would justify the court not giving effect to it.[73] It has been pointed out that the attempt by the court to reconcile the mutually destructive decisions of the court was illogical.[74] This is because the court sought to give the same meaning to different court decisions. The two decisions have made it clear that the right to be heard was either available to all persons who are prejudicially affected by an administrative decision with the exception where it was expressly or impliedly excluded by parliament or that the right to be heard is available only where parliament has

[70] 1973 1 SA 873 (A).
[71] *Winter* (note 70 above) para 888 H-889 B.
[72] *Winter* (note 70 above) para 888 H-889 B.
[73] Winter (note 70 above) para 889 C-D.
[74] Taitz J *The Application of the audi alteram partem rule in South African administrative law* (note 47 above) at 269.

expressly or by necessary implication included such right.[75] It is argued that these cannot be seen to mean the same thing.

2.3 Procedural fairness during the Interim Constitution era

The interim Constitution, unleashed a drastic departure from the pre-constitutional era. Through section 24, it recognised and broadened the protection of persons whose rights and interests were affected or threatened.[76] In addition, section 24 (b), codified the principles of natural justice in administrative action decisions and elevated the principles of natural justice as fundamental rights.[77] However, the development did not result in a complete disregard of how the courts dealt with judicial review of administrative actions. Broadly, it can be argued that during this period, three categories prevailed. These included cases where section 24 was merely referred to without having any effect, cases where it was dealt with in some way and those cases where it had a material impact on the results.[78] During this time, the CC expressed divergent views on whether procedural fairness is required by the rule of law. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU),*[79] the CC grappled with the concept of rationality and the question on whether the applicant was entitled to a hearing before the appointment of a commission of enquiry. Whilst the court accepted that a general duty to act fairly rested on those exercising public power, it confirmed the right to be heard not to be a general right but a case-specific right dependent on the circumstances of each case.[80] As a result, the court ruled that in line with the circumstance of the case before it, procedural fairness did not warrant the respondents to be given a hearing before the appointment of a commission of enquiry.[81] Although at face value it appeared that

[75] Taitz J *The Application of the audi alteram partem rule in South African administrative law* (note 47 above) at 269.
[76] Hoexter C The Principle of Legality in South African Administrative Law *Macquarie Law Journa*l Vol, 4 2004 665 172.
[77] Devenish G The Interim Constitution and Administrative Justice in South Africa *Journal of South African Law* Vol. 3 1996 458 460.
Van Wyk D Administrative Justice in Breinstein v Bester and Nev v Le Roux *SAJHR* Vol. 13 (1997) 249 250.
[79] 1999 (4) SA 147 (CC).
[80] *SARFU* (note 18 above) at para 217-221.
[81] *SARFU* (note 18 above) para 218.

there was a substantial departure from how these rights were treated, Hoexter argues that in substance, a determination to limit the application of these rights at all cost remained.[82]

2.4 Procedural fairness in the era of the Final Constitution

2.4.1 *Masetlha* judgment

Whether procedural fairness as a component of rationality, is recognized in the judicial review jurisprudence of superior courts in South Africa, can be traced back to the court's decision in *Masetlha v President of the Republic of South Africa and Another (Masetlha)*.[83] The court had to consider whether an amendment to Masetlha's term of office as Head of National Intelligence Agency (NIA), which resulted in his dismissal, without complying with the requirements of procedural fairness, was lawful.[84] The court had to first decide whether the alleged conduct, that is, the amendment of the term of office, constituted administrative action, for purposes of *PAJA* or if it was an exercise of executive authority in terms of section 85 (2)(e) of the *Constitution*.[85] The court held that the relationship between the President and the Head of NIA was of a special nature and in the circumstances, the conduct of the President was an exercise of executive authority and not administrative action reviewable in terms of *PAJA*.[86] As such, it could only be reviewed based on legality. Following this determination, the court held that procedural fairness was not a requirement of the principle of legality.[87] In a minority judgment it was opined that non-arbitrariness in the rule of law espouses fairness as a broad and fundamental requirement of rule of law.[88] The minority opined that rationality has both substantive and procedural components.[89] Procedurally, it

[82] Hoexter C (note 76 above) at 171.
[83] 2008 (1) SA 566 (CC).
[84] *Masetlha* (note 83 above) at para 74.
[85] *Masetlha* (note 83 above) at para 76.
[86] *Masetlha* (note 83 above) at para 75.
[87] *Masetlha* (note 83 above) at para 78.
[88] *Masetlha* (note 83 above) at para 179.
[89] *Masetlha* (note 83 above) at para 184.

enquires on the manner in which the decision was taken.[90] In line with that requirement, it was argued that fairness, thus elimination of arbitrariness, can only be achieved if the other party that is likely to be prejudiced by the decision is provided with an opportunity to be heard.[91]

The majority judgment received extensive academic criticism. Hoexter regarded the judgement as regressive.[92] She argued that there was no link between denying Masetlha a hearing and maintaining national security or running an effective government.[93] Kruger stresses this point. He argues that whilst national security concerns reside within the realm of the executive, these concerns cannot be viewed as exempt form constitutional standards and judicial scrutiny.[94] Hoexter agreed with the minority judgment that it was inconceivable that the content of the rule of law would be lessened in an era of constitutional democracy than what it was during the apartheid era.[95] She finds it unjustifiable and in conflict with the Constitution, irrespective of the political nature of the appointment, to dismiss anyone, without affording them a hearing.[96] Despite acknowledging it as an authority for the proposition that in general, exercise of executive authority ought not to be constrained by requirements of procedural fairness, Murcott is critical of this proposition.[97] It was suggested that if *Masetlha* is not read with caution, it has the potential of setting a precedent that significantly reduces scrutiny over the exercise of executive power, leading to the erosion of the supremacy of the Constitution.[98]

[90] *Masetlha* (note 83 above) at para 184.
[91] *Masetlha* (note 83 above) at para 184.
[92] Hoexter C Clearing the Intersection: Administrative Law and Labour law on the Constitutional Court, *Constitutional Court Review* 1 (2008) 209 231.
[93] Hoexter C (note 92 above) at 231.
[94] Kruger R The South African constitutional court and the rule of law: the Masetlha judgement, a cause for concern? *PER* (2010) Vol. 13 No. 3 468 486.
[95] Hoexter C (note 92 above) at 231.
[96] Hoexter C (note 92 above) at 232.
[97] Murcott M Procedural Fairness as a Component of Legality: Is a Reconciliation between Albutt and Masetlha Possible? *South African Law Journal Issue* 130, Vol. 2 (2013) 260 271.
[98] Kruger R (note 94 above) at 486.

2.4.2 *Albutt* judgment

The Constitutional Court arguably responded to this criticism when it was called upon to address the same question in *Albutt v Centre for the Study of Violence and Reconciliation*.[99] Unlike in *Masetlha*, the court found it unnecessary to enquire on whether the exercise of the President's pardoning power constituted administrative action, and adjudicated the matter with reference to legality.[100] The court then held that to satisfy legality's rationality requirement, the victims of politically motivated crimes should be heard before the perpetrators of these crimes could be pardoned.[101] Whilst the court did not make an explicit pronouncement about whether procedural fairness is an aspect of legality, it however found that failure to provide hearing was fatal to the requirement of rationality. In principle, the court invoked the variability of procedural fairness. The court's decision in *Albutt* is controversial. The controversy arises in the following ways. Firstly, the decision is in contrast with the earlier decisions of the court where it emphasised a need to first determine the applicability of the provisions of PAJA before invoking rationality.[102] Secondly, it can be argued that the court's approach in relying on variability of procedural fairness has a potential to undermine the need to have legal certainty in the jurisprudence of the CC. Thirdly, it has been correctly argued that the approach of the court left open the question on which standard of procedural fairness was applicable in cases where the review is not based on the provisions of PAJA.[103]

It is contended in this dissertation that viewed from its effect, the court in *Albutt* gave implicit recognition to procedural fairness as an aspect of rationality. It is inconceivable to think that the court did not intend to acknowledge procedural fairness as an aspect of rationality when its decision effectively required compliance to the requirements of procedural fairness. Although the CC appears to be alive to the criticism of its judgment in *Masethla*, it has continued to give mixed messages on whether and to what extent

[99] 2010 (3) SA 293 (CC).
[100] *Albutt,* (note 99 above) at para 83.
[101] *Albutt*, (note 99 above) at para 83.
[102] Murcott M (note 97 above) at 266-267.
[103] Murcott M (note 97 above) at 268.

is procedural fairness an aspect of rationality. Further, as will be discussed in chapter 3, challenges on the basis of a lack of 'procedural rationality' are increasingly raised in legality reviews. In *Minister of Defence and Military Veterans v Motau and Others*,[104] the court gave a clear indication that its decision in *Masethla* should be viewed as specifically applicable to the facts of that case and should not be seen as an 'unequivocal' proposition.[105] Without giving its view on this question, the court acknowledged an entrenched history of the *audi* principle in the jurisprudence of the court.[106]

Given the lack of certainty on the question of whether the *audi alterem partem (audi)* principle forms part of legality, it would have been expected for the CC to provide certainty on this question in its future decisions. However, it would appear that the CC has revived its approach in *Masethla* and ignored the criticism levelled against that judgment. It further appears that the court is regressing from its position as expressed both in *Albutt* and *Motau* decisions. The recent judgment by the Constitutional Court in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd (Sembcorp)*,[107] gives credence to this observation. The matter concerned the unequal implementation of the cost of potable water by a Water Board. Umngeni Water Board charged municipalities less than private bulk consumers that had been contracted by the municipality to provide water to certain areas. The increase made by the board was submitted to the Minister of Water and Sanitation for approval. The Minister, approved a differentiated increase of 37,9 % on Siza (a private bulk consumer) and only 7.8 % to other bulk water customers. The court was required to determine whether the decision approving the differentiation was rational.[108]

Both the High Court and Supreme Court of Appeal (SCA) had found in favour of Siza and held that the tariff increase was unfairly discriminatory and irrational as Umngeni did not impose a similar tariff on its other non-municipal customers.[109] The CC saw it

[104] 2014 (5) SA 69 (CC).
[105] *Motau* (note 104 above) at para 81.
[106] *Motau* (note 104 above) at para 83.
[107] [2021] ZA CC [21].
[108] *Sembcorp* (note 107 above) at para 2-3.
[109] *Sembcorp* (note 107 above) at para 11.

necessary to revisit the test of rationality as provided for in its previous rulings. It held that the court aquo had wrongly applied rationality test. Instead of enquiring on the rational connection between the increase and the purpose it sought to achieve, the court a quo focused on whether the reason to treat Siza differently was cogent.[110] The court corrected the application of the test and as such, the appeal succeeded. The court made an interesting observation regarding procedural rationality and procedural fairness. It held that these two concepts should not be conflated as they meant different things.[111] It delinked procedural rationality from procedural fairness as the court held that procedural rationality 'had nothing to do with fairness of process'.[112] It held further that procedural rationality could only be violated if the purpose for which the power was exercised could not be achieved without a pre-decision hearing.[113] Surprisingly, the court did not only delink procedural fairness from procedural rationality, but it also went on and held that

> "The fact that in *Albutt* the procedure followed related to a failure to give a hearing to the families of the victims of crime was a mere coincidence. It did not mean that in every case where there was no hearing, procedural rationality had been breached."[114]

It is difficult to see the reasoning of the court in *Albutt* as a 'mere coincidence' as the court in this case reasons. The court in *Albutt* dedicated sufficient time to explain its reasoning as to the necessity of a hearing being given to the victims. In addition, as the court held in *SARFU*, the extent, content and application of procedural fairness are variable and always dependent on the circumstances of each case.[115] Variability of procedural fairness demands that its application be made not as a 'blanket approach' but rather on the merits of each case. It is therefore argued that the court erred in completely delinking fairness of process from procedural rationality.

Unfortunately, this approach appears to be followed by lower courts without any reference to decisions in, for example, *Albutt* and *Motau*. One recent decision of the High Court in Gauteng division require reflection. *Fair Trade Independent Tobacco*

[110] *Sembcorp* (note 107 above) at para 56.
[111] *Sembcorp* (note 107 above) at para 49.
[112] *Sembcorp* (note 107 above) at para 49.
[113] *Sembcorp* (note 107 above) at para 49.
[114] *Sembcorp* (note 107 above) at para 49.
[115] *SARFU* (note 18 above) para 219.

Association v President of the Republic of South Africa and Another (FITA),[116] dealt with a challenge to the validity of Covid-19 regulations which prohibited the sale of tobacco. The applicants argued that there was a requirement to consult them and members of the public before a decision that was made. The court held that the review of executive decision is only required to be procedurally rational and not fair.[117] The court relied on the *Masethla* judgment that procedural fairness is not a requirement of rationality to justify its decision. However, there is hope that the CC has not abandoned its reasoning in *Albutt*. In *Public Protector and Others v President of the Republic of South Africa and Others*,[118] the court was required to, amongst others, make a determination on whether a failure by the Public Protector to give the President, as an implicated party, an opportunity to be heard before issuing a report with the remedial action, vitiated the remedial action.[119] The Public Protector had, after an investigation found that the President of the Republic had committed a breach of Executive Members Ethics Act,[120] for failure to disclose donations made to a 'CR 17 campaign'. The Public Protector argued that by virtue of his then position as the Deputy President, he acquired a benefit form these donations and was required to disclose them.[121]

It was argued that the court could not make this determination without ruling on whether remedial action constituted administrative action or not. The court found it unnecessary to decide whether the findings of the public protector constituted administrative action.[122] The court reasoned that it was unnecessary to do so as the application of the *audi* principle does not depend on whether the exercise of power constitutes administrative action. With regards to the Public Protector, it is argued that if the court intended to constrain the application of the audi principle only to cases of administrative action and exclude it from legality review, it would have done so. The

[116] 2020 (6) SA 513 (GP).
[117] *FITA* (note 116 above) para 60.
[118] [2021] ZACC [19]
[119] *Public Protector and Others v President of the Republic of South Africa and Others (*note 118 above) para 54 and 120.
[120] Act 82, 1998.
[121] *Public Protector and Others v President of the Republic of South Africa and Others* (note 118) para 41.
[122] *Public Protector and Others v President of the Republic of South Africa and Others* (note 118 above) para 120.

dissertation argues that this reasoning supports the view that as a principle, the audi principle forms part of legality review.

Two observations can be made from a historical link between the approach of Appellate division and that of the CC. Firstly, there is a clear pattern from both courts on lack of consistency on the interpretation and application of procedural fairness. CC seems to be following on the footsteps of the Appellate division on these inconsistencies and many qualifications on the right to be heard in cases that it has decided. Secondly, considering how the Appellate division dealt with the right to be heard, it appears that the Constitutional court in *Albutt* did what the Appellate division could not achieve in *Publications* case. The *Publications* case sought to relegate the court's previous decision in *Defence Aid Fund* which took a view against a generous availability of the right to be heard. Instead, as argued in the dissertation, the stance of the court in *Defence Aid Fund* would later be resuscitated in later cases like Pieters. Similarly, whilst the court in Albutt was seen as responding to the criticism levelled against Masetlha, the principles laid down in Masetlha about procedural fairness not as a component of rationality, have continued to be relied upon by the courts in subsequent rulings.

2.5 Conclusion

This chapter has discussed the development of procedural fairness in South Africa. The chapter examined how procedural fairness, as expressed in the maxim *audi alterem partem*, was applied by the Appellate division as it then existed. The chapter observed the contradictory manner in which the court decided cases on the question of whether the right to be heard was applicable or not. The chapter reflected on the right to procedural fairness as introduced by the Interim Constitution and later the final Constitution. Whilst the Interim Constitution and later the final Constitution provided that the right was applicable within the context of administrative actions and introduced a difference between a review of administrative action and of executive action (through rationality review), the dissertation has argued that the right to be heard is applicable

to rationality review. The chapter further discussed how the CC has responded to a question on whether procedural fairness was a component of rationality in legality review. Whilst the court has taken a firm view that procedural fairness was not part of rationality in legality review cases, the next chapter will look at how the CC introduced procedural rationality as an 'all catch' phrase in legality review.

Chapter 3:

The burgeoning procedural rationality: relationship between procedural fairness and procedural rationality.

3.1 Introduction

The previous chapter focused on how the courts have given interpretations on whether procedural fairness is a separate requirement for rationality requirement in legality review. Over time, the apex court has seen the development of legality principle as a ground of review. Whilst the development of rationality in legality review is most welcome, it has not been without challenges. One development in this area of law was the introduction of rationality of process which has become commonly known as procedural rationality. This chapter traces the origin of the concept of procedural rationality in the legality jurisprudence in South Africa. Firstly, the chapter reflects on the CC judgments which ushered procedural rationality as a requirement of rationality. Secondly, the chapter traverses how the concept has been applied by the courts in subsequent decision. In doing so, the chapter examines how, from its conception, procedural rationality has expanded. By looking at academic evaluation of its impact on the scope of legality review, the chapter attempts to answer the question of whether rationality review should be seen as a new stand-alone ground or whether it should be seen as a ground encompassing procedural fairness as a requirement for rationality review? In conclusion, the chapter briefly reflect on the concerns raised about how the expansion of procedural rationality has impacted other doctrines in law.

3.2 Procedural rationality

The CC has expanded the content of rationality in *Democratic Alliance v The President of the Republic of South Africa.*[123] The CC considered an appeal against the ruling of the SCA. The core of the dispute was whether the President acted rationally in not

[123] 2013 (1) SA 248 (CC).

considering the findings of a commission tasked to investigate the fitness to hold office of the then National Director of Public Prosecutions, Simelane. The court introduced a new concept that has become known as procedural rationality or rationality of process. The court held that rationality in the sense of a link between means and ends is not only required in the substance of a decision, but applies equally to the entire process by which the decision is made.[124] The court held 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 for which the power was conferred".[125]

The court introduced a three-staged enquiry that provides for facts to be considered to decide on whether the process has met rationality requirements. Firstly, it must be considered whether relevant factors have been ignored.[126] If they have, whether the failure is rationally related to the purpose for which the power was conferred must be assessed, and lastly where the failure is not rationally related to the purpose, whether such failure contaminates the process with irrationality must be assessed.[127] In effect, *Democratic Alliance* entails that where there has been a failure to consider relevant material, the failure will constitute part of the means to achieve the purpose, rendering a decision irrational in process.

The bounds and scope of procedural rationality have not been made clear in the *Democratic Alliance* case. The judgment has confirmed that at times, the principle of legality, extends to include an assessment of the decision-making process and its procedure.[128] A question arises on whether procedural rationality should be seen as a distinctive concept with no relationship with procedural fairness? Alternatively, whether procedural rationality has more to do with other requirements, including some of the requirements of a broad concept, procedural fairness. Or are procedural fairness and procedural rationality merely labels whose effect or application does not make a difference?

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[124] *Democratic Alliance* (note 123 above) para 36.
[125] *Democratic Alliance* (note 123 above) para 36.
[126] *Democratic Alliance* (note 123 above) para 36
[127] *Democratic Alliance* (note 123 above) at para 39.
[128] Price A 'The evolution of the rule of law' *South African Law Journal* Issue 4 Vol. 130 (2013) 649 654.

3.3 Bounds of procedural rationality

It appears that the ruling made by the courts on this aspect have been subjected to different interpretations in the academia. Murcott argues that the ruling in *Democratic Alliance* should be seen within the context of the need to comply with well-established requirements of lawfulness, and not as an extension of the ruling in *Albutt.*[129] The court appears to share the same sentiment with Murcott. In *Regional Magistrates of Southern Africa v President of the Republic of South Africa (ARMSA)*,[130] the court sought to lay the debate to rest. The court held that

> "With regard to the decision of the President, a procedural fairness challenge is not competent because the decision he took did not amount to administrative action. As it was pronounced in *Masetlha*, executive action may be reviewed on narrow grounds which fall within the ambit of the principle of legality. These grounds include lawfulness and rationality. Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute".[131]

However, it seems that this view, as expressed by the CC was not a universally accepted stance. This is reflected by the stance of the same court on the same question. When the court dealt with this question in *Minister of Defence and Military Veterans v Motau and Others,*[132] the court held that procedural fairness obligations do not solely derive from statute and do arise from the principle of legality.[133]

In *Law Society of South Africa v President of the RSA*,[134] the court was required to determine whether a decision by the former President, Zuma, to suspend South African Development Community (SADC) Tribunal operation and to deprive the Tribunal of its existing jurisdiction to hear individual complaints, was unlawful and irrational and therefore unconstitutional.[135] In clarifying the interface between procedural fairness and procedural rationality, the court held that

[129] Murcott M (note 103 above) at 273.
[130] 2013 (7) BCLR 762 (CC)
[131] *ARMSA* (note 130 above) para 59.
[132] 2014 (5) SA 69 (CC)
[133] *Motau* (note 132 above) para 82.
[134] 2019 (3) SA 30 (CC)
[135] *Law Society* (note 134 above) para

> "The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt* and *Democratic Alliance*. But it is not. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power"

The court's decision has been interpreted as articulating that procedural fairness and procedural rationality are two distinct and separate aspects of the procedural dimension of rationality.[136] Secondly, procedural fairness imposes an obligation on the President to consult an affected party an opportunity to make representations before he takes a decision that affect that party.[137] Lastly, where an enabling legislation provides for a specific procedure to be followed and a less onerous procedure is followed to give effect to the legislative requirements, the decision to follow the less onerous procedure would not be rationally related to the purpose for which the power was conferred.[138]

The CC has compounded the debate and made a determination that the two concepts are different and should not be conflated. In the *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd (Sembcorp)* matter,[139] the court held that procedural rationality has nothing to do with the fairness of process and has no bearing on whether there should have been a consultation before the decision was taken.[140] The court justified its reasoning by relying on the fact that both *Democratic Alliance* and *NERSA* were not about fairness since the issues in both cases did not relate to pre-hearing.[141]

[136] Mzolo N and Freedman W ' The principle of legality and the requirements of lawfulness and procedural rationality: Law Society of South Africa v President of the RSA (2019 (3) SA 30 (CC) *Obiter* Vol. 42 No. 2 2021 421 429.
[137] Mzolo N and Freedman W (note 136 above) at 429.
[138] Mzolo N and Freedman W (note 136 above) at 429.
[139] [2021] ZA CC [21].
[140] *Sembcorp* (note 139 above) para 49.
[141] *Sembcorp* (note 139 above) para 52.

3.4 Critique on the CC rulings on procedural rationality

It appears that the CC was alive to the debate created by *Democratic Alliance*, and sought to provide certainty on the concept of procedural rationality. The court held that the two concepts of procedural fairness and procedural rationality are distinct and do not proffer the same meaning. Whereas procedural fairness entails the hearing of a party who is likely to be affected by the decision to be taken, procedural rationality tests whether there is a rational connection between the exercise of power to the process and the decision itself and the purpose sought to be achieved through the exercise of that power.[142]

The decisions by the court that suggest that procedural rationality does not incorporate procedural fairness elements, can be criticised on two fronts. Firstly, the reasoning by the court misses a critical aspect of the nature of rationality as a variable concept. This means that its application, will vary according to the circumstances of each case. In certain cases, the scrutiny may intensify, for example in cases dealing with fundamental rights, or when the principle demands compliance to the requirements of procedural fairness.[143] In addition, the CC has conceded that procedural rationality does have an aspect of consultation, which forms part of the content of procedural fairness. In *Electronic Media Network Ltd v Etv (Pty) Ltd,*[144] the court sought to clarify the requirements of a consultative process under legislative provisions. The court held that any consultation, including that which is provided for in legislation, must meet the standard of procedural rationality.[145] The dissertation argues that it would be inconceivable that procedural rationality would set a standard of consultation when itself does not provide for that standard. As argued earlier, that standard would be determined by the circumstances of the particular case. Hoexter and Penfold have described the approach of the court in *Law Society* on the differentiation as being an artificial way to give distinctive meanings to procedural fairness and procedural

[142] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) para 64.
[143] See *Zealand v Minister of Justice and Constitutional Development* 2008 (4) 458 (CC) para 38 and *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) .
[144] 2017 (9) BCLR 1108 (CC).
[145] *Electronic Media Network* (note 144 above) para 66.

rationality such that the purpose of consultation is lost since it must be attributed to either procedural rationality or procedural fairness.[146] In doing so, the court minimizes the central role that is played by the audi principle as central to the realisation of justice.[147]

Tsele, argues that for the CC to say procedural fairness is not a component of legality but go on to say that procedural rationality, which at times contains requirements of audi principle is, gives credence to a proposition that the court is maintaining an untenable and false distinction.[148] To compound the criticism, he cites the reasoning of Mpati P, in *Grintek* where the court "referred to procedural fairness in decision making as being the rationality of the process by which the decision is made".[149] Given this, he makes a proposition that courts have not seen a difference between procedural fairness and procedural rationality and criticizes the insistence by the CC that these are distinct terms when there has not been consistency in its jurisprudence, on the extent of the difference.[150]

Mzolo and Freedman, argue that instead of seeing procedural fairness and procedural rationality as separate aspects, procedural fairness should be seen as one aspect of a broader requirement of procedural rationality.[151] Relying on the articulation of the High Court in *Democratic Alliance v Minister of International Relations*,[152] where the court found the failure by the Minister to consult Parliament before delivering a certificate of withdrawal from the Rome Statute, to be procedurally irrational and invalid, they argue that the duty to consult is not separate but an integral part of the requirements of procedural rationality.[153] The two writers further make an interesting observation on what appears to be the content of procedural rationality.

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[146] Hoexter C and G Penfold Administrative Law in South Africa (3rd edition) (2021) 574.
[147] Hoexter C and G Penfold (note 146 above) at 574.
[148] Tsele M 'Rationalizing Judicial Review: Towards Refining the Rational Basis Review Test(s)' *SALJ,* Vol 136, Issue 2 (2019) *328* 357.
[149] Tsele (note 148 above) at 357.
[150] Tsele (note 148 above) at 357.
[151] Mzolo N and Freedman W (note 136 above) at 429.
[152] 2017 (3) SA 212 (GP) para 64-70.
[153] Mzolo N and Freedman W (note 136 above) at 430.

They argue that if procedural fairness and procedural rationality are different aspects of the procedural requirements of rationality, it appears that procedural rationality only imposes two obligations on the executive; the first being to take relevant factors into account and secondly, to follow a material and mandatory procedure.[154] They make an assertion that if their observation is correct, it would mean that procedural rationality does not have its own separate content and requirements as both these requirements are already encompassed by lawfulness.[155] The dissertation argues that procedural rationality has requirements of consultation, depending on the circumstances of a particular case, hence it is different from the requirements of lawfulness.

This proposition is supported by an *obiter* comment of the SCA. In *Minister of Home Affairs v Scalabrini Centre*,[156] The court, argued that whilst legality does not impose a general duty on decision-makers to consult organisations or individuals with an interest in their decisions (i.e. comply with *audi*), such a duty will arise where the decision-maker is aware of the special knowledge of the person or organisation to be consulted but takes that decision without consulting them. In such circumstances, the decision would be irrational and subject to be set aside on review on the basis that it is inconsistent with the requirements of legality.[157]

Murcott and Ally make interesting observations on the nature and reach of procedural rationality. They argue that procedural rationality should be utilized as a basis for a duty to consult in order to advance values that underpin the Constitution such as accountability, transparency and responsiveness in executive decision-making.[158] They argue that whilst consultation may, as a matter of procedural fairness advance rational decision-making, it will only fulfil the requirements of procedural rationality only where it is a requirement for decision-making to be rational.[159] This view finds resonance with the CC's view on the importance of consultation as a component of

[154] Mzolo N and Freedman W (note 136 above) at 430.
[155] Mzolo N and Freedman W (note 136 above) at 430.
[156] 2013 (6) SA 421 (SCA).
[157] *Scalabrini* (note 156 above) at para 72.
[158] Ally N and Murcott M 'Beyond labels: Executive action and the duty to consult' *Law, Democracy and Development* Vol. 27 (2023) 93 96.
[159] Ally N and Murcott M (note 158 above) at 104.

procedural rationality. In *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others (Electronic Media Network)*,[160] the court highlighted the importance of consultation as it explained that it was not an 'inconsequential process' since it provided a platform for different views which are canvassed in order to influence policy formation for the benefit of all citizens.[161] Murcott and Ally further give a different perspective on the meaning and scope of these two concepts. They argue that unlike procedural fairness, procedural rationality does not always offer inherent process-orientated values of dignity and legitimacy.[162] In their view, a decision can still meet the required standard of procedural rationality even though it would fail to meet the requirements of procedural fairness.[163] It would appear that this logic revives the reasoning of *Masethla*. The court had reasoned that procedural fairness sets a higher threshold and should not be used to evaluate executive decision.[164]

However, this reasoning appears to ignore the stance of the court on the rationality requirement. The court had assertively reasoned that rationality does not conceive of different thresholds. The court held that it could not be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one.[165] The dissertation argues that a suggestion that presents procedural fairness as imposing a higher standard than that of procedural rationality is problematic. Rather, it should be seen as one standard that demands its application to vary based on the circumstances of each case. Former Chief Justice, Mogoeng has expressed similar sentiments. Looking at the requirement of consultation, he asserted that the South African law does not proffer two different levels of the law, one found in statute with inferior requirements and another empowered by a constitutional principle of procedural rationality. He continued and held that no law may sufficiently provide for a consultative process unless that process meets the procedural rationality test.[166]

[160] 2017 (9) BCLR 1108 (CC).
[161] *Electronic Media Network* (note 160 above) para 38.
[162] Ally N and Murcott M (note 158 above) at 103.
[163] Ally N and Murcott M (note 158 above) at 103.
[164] *Masethla v President of the Republic of South Africa* 2008 (1) 566 (CC) para 77-78.
[165] *Simelane* (note 123 above) para 44.
[166] *Electronic Media Network* (note 160 above) para 58.

Whilst the cases canvassed in this section show a contradiction in how the Constitutional Court has approached rationality, it has been suggested that the contradiction should be resolved by distinguishing procedural fairness and procedural rationality.[167] While the former, is not viewed as a general requirement of the principle of legality, it is sometimes required by the narrower principle of rationality, depending on the description of the rational relationship under consideration.[168] The latter focuses on the presence of a rational connection between the exercise of power to the process and the decision itself and the purpose sought to be achieved through the exercise of that power.[169]

The dissertation argues that the court has deliberately expanded rationality as an 'umbrella' concept to includes considerations of rationality of process. The paper further argues that rationality of process includes at least some of the requirements of procedural fairness, some of the time. Put differently, in certain circumstances a process will not be rational if it fails to comply with requirements of procedural fairness such as giving a hearing to the party that will be affected by the decision. As the court reasoned, rationality in process and substance is directly related to and is at the heart beat of a constitutional democracy based on accountability, responsiveness and openness.[170] This argument finds resonance with the reasoning of the Supreme Court of Appeal in its majority judgment in *Esau & Others v Minister of Co-Operative Governance and Traditional Affairs & Others*.[171] The case concerned the so called "level 4" regulations in response to the Covid pandemic in 2020 in South Africa. One of the central issues that the court dealt with was the adequacy of consultation period. The court decided this point on the basis that promulgation of subordinate legislation is an administrative action and governed by section 4 of PAJA.[172]

[167] Price A (note 128 above) at 654.
[168] Price A (note 128 above) at 655.
[169] Price A (note 128 above) at 655.

[170] *Electronic Media Network* (note 160 above) para 97.
[171] 2021 (3) SA 593 (SCA)
[172] *Esau* (note 171 above) para 101.

Plaskett JA relied on the requirements of procedural fairness as outlined in PAJA to conclude that even if he was wrong to rely on PAJA in deciding the question, and made an assumption that the making of subordinate legislation constituted executive action which does not require to be procedurally fair, the decision would be compliant with the requirements of procedural rationality.[173]. *Esau* suggests that the courts sometimes use the concepts of procedural fairness and procedural rationality interchangeably. It is submitted that the court does not see the requirements and standard of assessing procedural fairness under PAJA as different to that of procedural rationality under rationality review. It appears that this reasoning flows from rationality jurisprudence which has emphasised the importance of procedural requirements in rationality. In *Earthlife Africa, Johannesburg v Minister of Energy (Earthlife)*,[174] the court had to adjudicate on whether the section 34 decision made by the Minister of Energy and NERSA complied with the requirements of procedural fairness under PAJA. The applicant had argued that the failure to conduct public participation contravened the requirements as provided for in section 9 and 10 of ERA which are similar to procedural requirements is section 3 and 4 of PAJA.

The court determined that a rational and a fair decision-making process required provision for public input to allow both interested and potentially affected parties to make their views and present relevant facts to NERSA.[175] Whilst the court made its decision on the basis of ERA and PAJA, it held that

> "The NERSA failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons, I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone (my emphasis)."[176]

It is the assertion of the writer that whilst executive action may not require procedural fairness requirements, to give effect to rationality, procedural rationality contains procedural requirements which can, in relevant circumstance include a duty to consult and thus giving effect to procedural fairness requirements.

[173] *Esau* (note 171 above) para 101.
[174] 2017 (5) SA 227 (WCC).
[175] *Earthlife* (note 174 above) para 45.
[176] *Earthlife* (note 174 above) para 50.

3.5 Procedural rationality and its future in South African law

The jurisprudence of legality has noted an expanding scope of procedural rationality in South Africa. The expansion has attracted both appreciation and concern. One of these concerns in some circles, is that it is becoming limitless. Former Chief Justice Mogoeng captures the concern when he says

> "Rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds… Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regards to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously".[177]

Tsele submits that the sentiments expressed by Mogoeng are a clear sign of the CC's dissatisfaction about an increasing reliance on the readily available principle of rationality to impugn decisions of the executive and legislature.[178] It is clear that the court wants to curb reliance on rationality and stem the tide since it was becoming clear that the courts have gone far, exceeding the limits of rationality and risking trampling on separation of powers.[179] It has also been suggested that the trend on the expansion of rationality review, has a potential to dilute the principle of legality, particularly its rationality requirement and thus equating it to the 'thin' application of administrative law, which was a major feature of pre-constitutional era.[180] Whilst the variable content of rationality has been acknowledged as necessary to bring accountability, openness and responsiveness, it has been argued that these should not be achieved at the expense of reliability and certainty which are equally the requirements of the rule of law.[181]

[177] *Electronic Media Network* (note 160 above) para 85.
[178] Tsele (note 148 above) at 348.
[179] Tsele (note 148 above) at 348.
[180] Kohn L 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality gone too far? SALJ (2013) 130 (4) 810 812.
[181] Kohn L (note 180 above) at 812.

3.6 Conclusion

The chapter discussed the concept of procedural rationality and how it has over time expanded to include some requirements of procedural fairness. The chapter relied on the rulings of the courts and academic writing to show that there is no consensus on whether procedural rationality and procedural fairness are two different concepts with different requirements or whether procedural rationality, incorporates some of the requirements of procedural fairness. Whilst the dissertation has highlighted the different views in the academia on the subject, it has argued that rationality, as a broad concept espouses variability. This means that its application is, at times determined by the circumstances of the particular case.

The chapter has further argued that there is a single standard of rationality review and that standard includes procedural rationality. In light of this, the dissertation has argued that procedural fairness and procedural rationality do not espouse of different standards. Rather, given that procedural rationality requirements may, in appropriate circumstances incorporate procedural fairness requirements, the dissertation argued that procedural rationality does incorporate requirements of procedural fairness and that these concepts should not be interpreted to require different requirements.

The chapter argued that the comment by the court in *Scalabrini* expands procedural rationality to include considerations of views of interested parties in certain circumstances. The extension of the right to be heard before a decision is made to interested parties with particular expertise falls within the requirements of procedural fairness. Viewed from this angle, the expanding procedural rationality includes procedural fairness as a component of rationality review. The paper briefly reflected on the concerns of the constitutional court on the expansion of procedural rationality. In the next chapter, the dissertation delves deeper into how the expansion may threaten long-held constitutional doctrines of separation of powers and subsidiarity.

CHAPTER 4:

The expanding rationality review and its impact on subsidiarity and separation of powers.

4.1 Introduction

The South African constitutional democracy is founded on the doctrine of separation of powers where there is separation between the executive, legislature and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.[182] Amongst other things, the separation of powers imposes an obligation on the three different arms of the state to respect the different mandates imposed on them by the Constitution. Within the context of subsidiarity, the principle demands that in judicial review proceedings, courts should respect the mandate of the legislature by giving effect to the provisions of legislation, unless that legislation is inconsistent with the constitution.[183] In doing so, the judiciary promotes the objectives of a constitutional democracy.

The previous chapter discussed how courts have expanded the scope or legality in rationality review. It reflected on the different court judgment meted out by the superior courts in South Africa. It argued that legality appears to have increasing scope with no delineation of what its boundaries are. This chapter focuses on the two important principles of the constitution. These are the principle of subsidiarity and separation of powers. Firstly, the chapter gives a brief outline of the requirements of the subsidiarity principle. Secondly, it discusses how subsidiarity is related to the concept of separation of powers. Thirdly, the chapter reflects on the trend of decided cases in higher courts which show both the adherence to subsidiarity and non-adherence. In doing so, the chapter argues that, without setting clearly defined limits on the use of legality in judicial review cases, the expansion of legality review in South Africa poses

[182] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 106.
[183] Murcott M and van der Westhuizen W 'The Ebb and Flow of the Application of the Principle of Subsidiarity- Critical Reflections on Motau and My Vote Counts', *Constitutional Court Review*, 7, 2015 43 52.

a threat to separation of powers. The chapter notes that courts have been inconsistent in their application of PAJA and legality to judicial review, resulting in them straying too far into the constitutional spheres of the executive and legislative branches of the state.[184] It will be argued that promotion of separation of powers is necessary in order to preserve South Africa's constitutional democracy.

4.2 Subsidiarity in perspective

As a doctrine permissible under the Constitution, subsidiarity demands that the adjudication of substantive issues be determined with particularity to specific constitutional norms, as contained in legislation rather than broad and general constitutional values.[185] In this way, courts are required to determine certain threshold questions before engaging cases that seek to vindicate constitutional rights.[186] In judicial review proceedings, courts are required to apply the provisions of PAJA first before exploring whether legality principle could be applied.[187] Whilst legality functions as a 'safety net' in reviewing the exercise of public power that does not amount to administrative action, PAJA gives content to the right to administrative action and provides a framework for the judicial review for actions that amount to administrative actions.[188]

The position as described above is the most desirable to give effect to the need to acknowledge the role of the legislature in enacting legislation as required by the Constitution. However, the jurisprudence of superior courts in South Africa reflects a trend where legality is resorted to without even making a determination on whether PAJA is applicable or not. To show this point, it is important to look at the history of subsidiarity within the context of the CC and other superior courts.

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[184] Price A ' The evolution of the rule of law' (2013) 649 657.
[185] Murcott M and van der Westhuizen W (note 183 above) at 44.
[186] Klare K 'Legal subsidiarity and constitutional rights: a reply to AJ van der Walt: lead essay/ response, Constitutional Court Review, Vol1, Issue 1, Jan 20008, 138 139.
[187] Murcott M and van der Westhuizen W (note 183 above) at 45.
[188] Murcott M and van der Westhuizen W (note 183 above) at 44.

4.3 Application of subsidiarity

The recognition of the doctrine of subsidiarity in the jurisprudence of the CC dates as far back as the last two decades. In *S v Mhlungu and Others*,[189] the court enunciated the principle of subsidiarity when it held that courts should strive to resolve legal disputes, where this is justified by the circumstances of the case, without invoking a constitutional issue.[190] In the context of review of administrative actions cases, the principle was confirmed by the court in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,[191] when it held that a litigant should not be allowed to bypass the provisions of PAJA and rely directly on the Constitution as that would undermine the Constitution's instruction for the legislation to be enacted to give effect to the rights contained in section 33 of the Constitution.[192]

The principle was further expressed by the CC in *South African National Defence Union (SANDU) and Others v Minister of Defence and Others*,[193] where the court held that where a litigant relies on the infringement of a right contained in the Constitution, the litigant should rely on the legislation to enforce that right and not circumvent it and place direct reliance on the Constitution, unless the challenge includes the inconsistency of legislation with the Constitution.[194] Relying on its previous rulings on the question of subsidiarity, the CC confirmed the principle laid above in *Mazibuko and Others v City of Joburg and Others*.[195]

The question arises as to what ought to be made of the relationship between PAJA as legislation governing administrative law and the legality principle? Hoexter argues that in any administrative law case, the preliminary step should be to determine whether the specific and detailed norm, PAJA, is applicable and not whether the problem could

[189] 1995 (3) SA 867 (CC).
[190] *Mhlungu* (note 189 above) para 215-223.
[191] 2006 (SA) 311 (CC).
[192] *New Clicks* (note 191 above) para 96.
[193] 2007 (5) SA 400 (CC).
[194] *SANDU* (note 193 above) para 34.
[195] 2010 (4) SA 1 (CC) at para 73.

be resolved by a general and broad constitutional norm, the legality principle.[196] The legality principle is important as it provides a 'safety net' and imposing standards of constitutional accountability in cases where the conduct does not amount to administrative action.[197] However, the principle of legality is subsidiary to PAJA and the court must first apply the threshold provisions of PAJA to determine whether the conduct in question amounts to administrative action.[198] As such, to vitiate his right, an applicant, cannot rely directly on section 33 of the Constitution without challenging the constitutionality of PAJA which is the legislation giving effect to this right. Although the principle of legality was introduced to serve as a means of curbing excesses of executive authority, thus holding the executive accountable for its actions that would not be reviewable under PAJA,[199] its application has not been consistent with this objective. Whilst the expectation was that the legality principle would only be applied where the exercise does not fall within the purview of PAJA and thus in line with subsidiarity,[200] the practice has not met such expectation.

The challenges associated with the expanding role of legality and a diminishing role of subsidiarity is reflected accurately in the *Albutt* case. As it was indicated in the previous chapters (see chapter 1), the court decided the case on the basis of legality principle. The concerning aspect is the fact that the court felt it unnecessary to make a determination on whether the conduct of the president constituted administrative action. The court argued that to do so would undermine judicial wisdom which requires the court to only dispose matters before it and that such a question was not before the court. Murcott and van der Westhuizen have criticized this approach, arguing that it flouts subsidiarity as it invokes a general norm (legality) despite the existence of a specific norm (PAJA) which could be applicable.[201] It has also been argued that there is nothing compelling that justified the court's approach to avoid the act as a route to judicial review of the exercise of executive authority.[202] Considering that procedural

[196] Hoexter C Administrative Law 134.
[197] Murcott M and van der Westhuizen W (note 183 above) at 53.
[198] Murcott M and van der Westhuizen W (note 183 above) at 52.
[199] Radley H Subverting the Promotion of Administrative Justice Act in Judicial Review: The Cause of Much Uncertainty in South African Law, *J S Afr L* 288 291.
[200] Radley H (note 199 above) at 293.
[201] Murcott M and van der Westhuizen W (note 183 above) at 54.
[202] Radley H (note 199 above) at 298.

fairness which was at the core of litigation in the case, is fully catered for in PAJA, the CC veered off from the principle of subsidiarity without any good justification.[203]

Hoexter argues that whilst the record of the CC indicates that it has affirmed subsidiarity, from its earlier inception, there was resistance to the use of PAJA due to its elaborate requirements and that courts easily allowed litigants to bypass PAJA.[204] The chapter argues that the expansion of legality should be seen within this context. The next section reflects on how the non-adherence to the principle undermines the doctrine of separation of powers when the enacted legislation is not given effect to.

4.4 Legality review and separation of powers

The doctrine of separation of powers has been described as a constitutional tool that empowers its authors to strike a balance between the different arms of the state.[205] The doctrine functions to fulfil two objectives. The first is to protect individual freedom by preventing the abuse of the exercise of political power.[206] The second is to promote the functioning of the state.[207] The doctrine flows from the philosophy which presents three components in describing its contents. These include the concept *of trias politica*, which advocates for the division of state authority into three different arms; the executive, legislature and the judiciary.[208] Each arm is required to have its separate personnel who only serve the arm to fulfil its mandate. Lastly, each arm is responsible for a different core function, namely, the making of the law, executing and enforcing the law and adjudicating on questions of the law.[209] Although these arms of the state

[203] Radley H (note 199 above) at 298.
[204] Hoexter C 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court (2015) 132 SALJ 207 221.
[205] Kohn L 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone too far? 2013 (130) SALJ 810 813.
[206] Kohn L (note 205 above) at 814.
[207] Kohn L (note 205 above) at 814.
[208] Kohn L (note 205 above) at 814.
[209] Kohn L (note 205 above) at 814.

execute different core functions, through the principle of checks and balances, each of the branches exercise some form of oversight over other arms.[210]

Kohn sums up the important objective that the doctrine of separation of powers serves in a modern democracy. He argues that the doctrine ensures the supervision of state power rather than its division.[211] It is within this context that the judiciary plays a vital role in providing checks through judicial review against executive excesses and misuse of power and infringement of constitutional or legal limitation by both the executive and legislature.[212] In the South African context, despite the Constitution having no provision on separation of powers, its import as a value of the constitutional order emanates from the founding principles of the Constitution. Principle IV of the founding principles of the Constitution, provides that 'there shall be a separation of powers between the legislature, executive and judiciary with checks and balances, to ensure accountability, responsiveness and openness.[213] Given the importance of judicial review, a caution was made that in doing their work, courts must refrain from encroaching on the exclusive terrain of the executive and legislature, unless such intrusion has constitutional grounds.[214] A question arises as to what the limits of judicial review should be so that it does not extend to other spheres? Put differently, how does the expanding role accorded to legality, as an aspect of rationality path to judicial review violate separation of powers?

The jurisprudence of the CC appears to have a contradictory approach to the doctrine of separation of powers. In delivering the majority judgement in *Albutt v Centre for the Study of Violence and Reconciliation and Others (Albutt),*[215] Ngcobo CJ appears to have contemplated the doctrine of separation of powers when he opined that the executive had a wide discretion to choose its means to achieve its constitutional objectives and that courts may not disregard them because of dislike or thinking of

[210] Kohn L (note 205 above) at 815.
[211] Kohn L (note 205 above) at 815.
[212] Kohn L (note 205 above) at 816.
[213] Kohn L (note 205 above) at 815.
[214] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 44.
[215] 2010 (3) SA 293 (CC).

more appropriate means that could have been selected.[216] However, it has been suggested that the decision of the court to require victim participation in prisoner pardon process was contrary to the advice it had given and that it may have violated the doctrine of separation of powers as the court had more appropriate means in mind than those contemplated by the president.[217]

Addressing the question of the nature of the relationship between rationality and separation of powers, Yacoob ADCJ he had this to say:

> "It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not."[218]

The majority judgment has been criticised as having engaged superficially with the doctrine of separation of powers. Whilst the court's decision was commended as showing boldness to strike down abuses of political power, there is a concern that such boldness indicates a worrying trend of lack of sensitivity to the tenets of the doctrine of separation of powers and the nature of deference required by it.[219]

Looking at the ruling of the SCA which extended rationality to include the duty to give reason in *Judicial Services Commission(JSC) v The Cape Bar Council,*[220] Kohn argues that whilst this is commendable, it extended rationality requirement under the principle of legality beyond to what it requires under rationality test in terms of PAJA.[221] He further argues that whilst the decision gives more effect to the principles of openness and accountability, its failure to engage with the doctrine of separation of

[216] *Albutt* (note 215 above) para 51.
[217] Kohn L (note 205 above) at 831.
[218] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC)para 44.
[219] Kohn L (note 205 above) at 833.
[220] 2013 (1) SA 170 (SCA).
[221] Kohn L (note 205 above) at 833.

powers is concerning.[222] Kohn argues that the formulation of the body of JSC is evidence of its policy formulation function hence its exclusion from the purview of PAJA.[223] Given this, it would have been expected that the court would observe a level of deference and not impose a high level of scrutiny.

Although rationality was described as imposing a minimum threshold for the exercise of public power and that it did not violate separation of powers,[224] over time, the principle of legality has evolved to become the safety net for the review of all exercises of executive actions that fall short of administrative action.[225] However, it was never intended to be administrative law by another name.[226] It was eloquently stated that were legality to become administrative law by other means, that would not only undermine the legislative efforts in enacting PAJA and the constitutional right that underpin it, it would also violate the doctrine of separation of powers.[227] The chapter argues that imposing more requirements of the rationality principle than what is required by PAJA contributes to the less recognition of subsidiarity and undermines the doctrine of separation of powers.

The CC appears to have sought to correct its earlier view and aligned its jurisprudence with the doctrine of subsidiarity on the question of whether PAJA and legality as an aspect of rationality, imposes different levels of threshold. *In Minister of Defence and Military Veterans v Motau and Others (Motau),*[228] the court held that it was important for it to answer a question on whether the Minister's decision amounted to administrative or executive action.[229] It reasoned that if the decision amounted to administrative action, it was subject to higher levels of scrutiny in terms of PAJA.

[222] Kohn L (note 205 above) at 833.
[223] Kohn L (note 205 above) at 833.
[224] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 90.
[225] Kohn L (note 205 above) at 827.
[226] Kohn L (note 205 above) at 827.
[227] Kohn L (note 205 above) at 828.
[228] 2014 (5) SA 69 (CC).
[229] *Motau* (note 228 above) para 27.

Furthermore, if it amounted to executive action, it was subject to less demanding constraints imposed by the principle of legality.[230]

4.5 Reflections on the support and criticism of subsidiarity

Subsidiarity entrenches the implicit notion of separation of powers. It allows the judiciary to give due judicial deference to the democratically elected parliament whilst upholding the constitution and recognising other arms of the state which may be more suitable to legislate and implement more policy laden objectives.[231] It is within this context that the court's approach to subsidiarity has in *Motau* has been commended as a best way to exercise judicious avoidance.[232] The court's judgment has received support as it was regarded as having correctly used the enacted law, the Companies Act, thus upholding the principle of democracy. It did this by affirming that the legislative enactment sets the required standard of procedural fairness that is required where shareholders remove directors from office and that such standard should be exhausted before resort to the constitutional principle of legality.[233] In addition, it was suggested that the court's approach to subsidiarity reflects it giving due consideration to the doctrine of separation of powers because the legislature is better suited to determine the demands of natural justice in relation to the removal of directors from office.[234]

Reflecting on both the majority judgment and the minority judgment in *My Vote Counts NPC v Speaker of the National Assembly and Others*,[235] Murcott and van der Westhuizen have lauded the decision as reflecting a 'classical case' of the application of subsidiarity theory and a step by the court to address its failures in *Motau*.[236] In the case, the court had confirmed *Promotion of Access to Information Act* (PAIA) as legislation enacted to give effect to the sect 32 (1) constitutional right despite its perceived shortcoming and

[230] *Motau* (note 228 above) para 27.
[231] Cachalia R 'Botching procedure, avoiding substance: a critique of the majority judgment in My Vote Counts (2017) 33 *S Afr J on Human Rights* 138 143.
[232] Murcott and van der Westhuizen (note 183 above) at 59.
[233] Murcott and van der Westhuizen (note 183 above) at 59.
[234] Murcott and van der Westhuizen (note 183 above) at 59.
[235] [2015] ZACC 31 (30 September 2015).
[236] Murcott and van der Westhuizen (note 183 above) at 59.

doubts about its constitutional validity. Although they support the view of the minority judgement that subsidiarity principle was not applicable since the validity of PAIA was not at issue, they support the court's articulation of subsidiarity principle. They deem it as an extension of the SANDU principle that where a litigant challenges a legislative branch for its failure to give effect to a constitutional right contained in the Bill of Rights, the litigant should attack the constitutional validity of the enacted legislation.[237]

Cachalia argues that subsidiarity does not enjoy automatic application in all cases where there may be a legislation that gives effect to the rights in question.[238] It has been suggested that in some cases, legislation only gives partial protection to the rights in question and that in such instances, that should have a bearing on whether the litigant should rely directly on the Constitution to challenge the legislative gaps and demand protection on those aspects of the rights that are not covered by the existing legislation.[239] Cachalia questions the notion that the enactment of legislation giving effect to a right contained in the Constitution is sufficient to trigger the subsidiarity principle. Relying on the argument made by van der Walt, Cachalia argues that it does not, as what is important is not what the enacted legislation purports to do, but what it actually does.[240] Cachalia argues that where there gaps not covered by the an existing legislation, subsidiarity would not apply automatically in the presence of existing legislation and that direct reliance on the Constitution should be allowed.[241] He further argues that although the enacted legislation should prevent litigants from relying directly on the Constitution, the deficiency of the legislation where it does not cover some aspects, should disqualify the automatic trigger of the principle of subsidiarity.[242]

Cachalia has also criticised the court for avoiding to deal with substantive issues in *My Vote Counts* and relying heavily on procedural issues (application of subsidiarity principle). He argues that there existed legitimate grounds that necessitated the court to interpret the rights in question instead of avoiding them due to procedural

[237] Murcott and van der Westhuizen (note 183 above) at 64.
[238] Cachalia R (note 231 above) at 143.
[239] Cachalia R (note 231 above) at 143.
[240] Cachalia R (note 231 above) at 145.
[241] Cachalia R (note 231 above) at 145.
[242] Cachalia R (note 231 above) at 147.

considerations.[243] By doing so, the court limited itself to a judgment of form as if the case did not engage substantive issues but only limited to procedural issues. The court appears to commit what Hoexter had warned about.

4.6 Conclusion

The chapter has discussed how the expansion of rationality as a path to judicial review has impacted on the principle of subsidiarity and the consequent doctrine of separation of powers. It was argued in the chapter that although legality review has been progressively used by the courts to curb excesses of executive power and to guard against abuse of power by both the executive and legislature, its limitless boundaries may cause problems for a constitutional democracy. This is because a limitless legality review has a potential to undermine the use of enacted legislation, thus eliminating the role of subsidiarity and lessen the historic role played by the doctrine of separation of powers.

The chapter has further discussed cases that reflect instances where subsidiarity has been acknowledged and applied as well as cases where the courts decided not to apply it. The chapter has argued that, the refusal by the courts to make a determination on whether PAJA was applicable in cases before it, does not auger well for legality jurisprudence and has contributed in expanding the scope of legality. Although there are cases where courts have been commended for upholding subsidiarity, the chapter has reflected that subsidiarity is not without shortcomings. These include the focus on procedural issues at the expense of substantive issues that might require attention. The chapter concludes that although it is desirable for the courts to apply subsidiarity and uphold separation of powers, the courts must heed a call made by Hoexter against the application of law in a formalistic and technical manner where legal problems are pigeonholed.[244] The next chapter will reflect on how procedural fairness should be viewed as a requirement of rationality review. In doing so, the chapter will argue on how contours

[243] Cachalia R (note 231 above) at 149.
[244] Hoexter C ' Contracts in administrative law: life after formalism' 2004 *SALJ* 595 597.

of legality review should be withdrawn in South Africa. This will shape legality so that it promotes the values of transparency, accountability and openness as demanded for by the Constitution.

Chapter 5:

Redrawing the contours of procedural fairness as a component of rationality review in South Africa

5.1 Introduction

In its previous chapters, the dissertation traced the development of procedural fairness as a component of rationality in legality review. The dissertation explored the concept of procedural fairness, its historical origin, its development during the pre-democratic era and its application by the South African courts in the post constitutional democratic era. Exploring different judgments that have been delivered and academic writings on procedural fairness as a component of legality in review for rationality, the dissertation argued that as a constitutional democratic state, South Africa has adopted the judicial review of executive power on the basis of rationality. This allowed the courts, through judicial review, to scrutinize the exercise of both legislative and executive authority to ensure that they adhere to the rule of law as demanded by the Constitution.[245]

The dissertation has argued further that whilst the CC has, for some time explicitly excluded procedural fairness as a component of rationality review, it has introduced a new concept, procedural rationality, thus making procedural rationality an 'umbrella' concept which implicitly recognises procedural fairness as a component of rationality in legality review. In doing so, the dissertation attempted to explicate the importance of procedural fairness as a component of rationality in cases of alleged abuse of public power that does not amount to administrative action. The dissertation further examined how procedural rationality has been seen as an expansion of rationality in the jurisprudence of the CC. The analysis explored writings on how this expansion is seen as posing a threat to the long held principles of subsidiarity and separation of powers.

In this chapter, the dissertation makes an argument about re-drawing the lines on the extending parameters of legality review in South Africa, and thus respond to a

[245] Constitution of the Republic of South Africa,1996.

pertinent question posed by Hoexter as to 'who knows where legality might go in future'?[246] Given the challenges associated with the conflicting judgments of the superior courts in South Africa on whether procedural fairness is a requirement of legality, the expanding role of rationality review and its impact on subsidiarity and separation of powers, this chapter addresses a question of whether the judiciary could re-imagine the principle of rationality to address the challenges associated with its expanding role in legality review. As the dissertation argued in chapter one, a re-imagined legality review will help in ensuring that there is legal certainty on whether procedural fairness is a requirement for legality. The chapter will argue that legal certainty is important for observance of the rule of law.

5.2 Legal certainty and the rule of law

The rulings of the courts discussed in the previous chapters have reflected inconsistency by the courts on whether procedural fairness is a requirement of legality. Whilst it may appear that the inconsistency is contrary to legal certainty that is required by the rule of law, it was argued that the variable nature of rationality is compatible with the rule of law. However, variability of rationality review that was argued to be as necessary to give effect to procedural fairness has been criticised. Part of the criticism is that it is pursued at the expense of reliability and legal certainty which are the tenants of the rule of law.[247] However, as the court indicated in *Affordable Medicines Trust v Minister of Health,*[248] the rule of law requires reasonable certainty and not perfect lucidity.[249] It is within this context that the dissertation supports the use of variability to infuse rationality with the requirements of procedural fairness where this is required by the circumstances of the case.

[246] Hoexter C The Principle of Legality in South African Administrative *Law Macquarie Law Journal* (2004) Vol. 4 165 184.
[247] Kohn L The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review gone too far? 2013 (130) *SALJ* 810 812.
[248] 2006 (3) SA 247 (CC)
[249] *Affordable Medicines Trust* (note 248 above) para 108.

The chapter further argues that what appears as an expansion of rationality review in *Albutt* should be seen within the context of hopes and aspirations of a transformative Constitution in South Africa in terms of which a call was made for the judiciary to take part in shaping and realising the transformative aspirations of the Constitution.[250] This means that as part of a constitutional framework with transformative aspirations, in interpreting the law, judges have to transcend their role from the conventional liberal terms where they merely applied and interpreted the law on the books.[251] It is within this context that the court's decision to require victim participation should be seen as a response to the constitutional aspirations of holding executive to account where there is history of abuse of executive authority.[252] Viewed from this perspective, it is clear that granting procedural fairness rights to the victims is not only a determinant factor of the role and content of the rule of law in a transformative setting. The court was effectively playing its role to review the exercise of pardon power and hold the president to the court's standard of rationality.[253]

One of the challenges noted in the previous chapters is the fact that what appeared to be a progressive judgement in *Albutt* has not been followed by courts in subsequent rulings. Courts have opted to remain with the *Masethla* principle that procedural fairness is not a component of rationality. The chapter agrees with the view that by excluding procedural fairness from rationality, the approach adopted in the *Masethla* judgment risks setting a wrong precedent and reducing the constraints on the exercise of executive power significantly, thus eroding the supremacy of the Constitution.[254] It is argued in this chapter that such a move would be contrary to the aspirations of a transformative constitution.

[250] Motha S Rationality, the Rule of Law and the Sovereign Return (2011) 4 *CCR* 113 122.
[251] Motha S (note 250 above) at 123.
[252] Motha S (note 250 above) at 123.
[253] Motha S (note 250 above) at 123.
[254] Kruger R 'The South African Constitutional Court and the Rule of Law: The Masethla Judgment, a Cause for Concern? (2010) 13 *PELJ* 467 485.

5.3 Subsidiarity and separation of powers

The rulings of the courts are instructive on the requirements of the doctrine of separation of powers. The courts have acknowledged that separation of powers implies a certain level of balance of power that should prevail in that in cases where the Constitution or legislative provision entrusts specific powers and functions to a specific branch of government, courts should not usurp that power by making decisions of their preference.[255] It was further opined that separation of powers must give due consideration to the popular will as expressed by the legislature.[256] However, this does not mean that decisions of the organs of state are immunized from judicial review as the exercise of all public power is subject to the Constitution.[257] It must be noted though that whilst separation of powers recognizes the functional independence of each arm and avoids the intrusion of one branch on the terrain of another, it was inevitable that intrusion would at times occur. The intrusion is necessitated by the reality that there is no constitutional scheme that envisages a complete separation; it is always that of partial separation.[258]

The dissertation supports subsidiarity as a principle that ensures observance of the doctrine of separation of powers. It is argued in the chapter that in cases where procedural fairness standards are at stake, the enquiry on whether PAJA[259] is applicable bears significance to the outcome of the case and therefore shows that the enquiry is not ancillary but primary.[260] It is therefore argued that to show a level of deference in such cases, courts should attempt to always engage on this enquiry.

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[255] *National Treasury v Opposition to Urban Tolling Alliance (OUTA)* 2012 (6) SA 223 (CC) para 63.
[256] *International Trade Administration Commission (ITAC) v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 91.
[257] *OUTA* (note 255 above) para 64.
[258] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 109.
[259] Promotion of Administrative Justice Act, 3, 2000.
[260] Murcott M 'Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masethla* Possible' 130 (2) SALJ (2013) 260 270.

5.4. Future of judicial review

The extent to which courts should intrude on policy laden matters in resolving legal disputes in judicial proceedings has not been settled. An argument against formalism has been made that even in a case dealing with an appeal against an interim relief, the CC should have seized an opportunity to address the substantive issues as there were serious implications for human rights and other constitutional considerations in the matter.[261] This is further justified by the suggestion that as a court of last resort, it should not only see itself in a narrow judicial prism but it should view itself as a court in a democratic sense, with an ability to exercise influence over policy.[262] It is argued that this is necessitated by the nature of South Africa's democracy where courts are continuously relied upon to resolve political disputes rather than legal disputes.[263] In addition, it is argued that the dominance of one political party in both the legislature and executive, has effectively meant that neither the legislature nor the opposition parties have enough support to challenge executive power.[264]

Another critic against the separation of powers and a limited scope of the judiciary in policy related matters pertains to the legitimacy of representative democracy. From this perspective, it is argued that it was not correct to see representative democracy as the only legitimate system of democracy and view other alternative human rights protection approaches as undemocratic.[265] An activist judiciary that intervenes in policy laden decisions is therefore justified and necessary when there is a lack of responsiveness on the part of 'democratic' branches of the state.[266] It was further argued that the jurisprudence of the superior courts indicates that although the courts proffer not to interfere in policy related decisions, they nevertheless interfere.

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[261] Swart M and Coggin T 'The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in *National Treasury v Opposition to Urban Tolling* [2015] *CCR* 14 346 347.
[262] Swart M and Coggin T (note 261 above) at 357.
[263] Swart M and Coggin T (note 261 above) at 357.
[264] Swart M and Coggin T (note 261 above) at 357.
[265] Swart M and Coggin T (note 261 above) at 357.
[266] Swart M and Coggin T (note 261 above) at 358.

It is within this context that Swart and Coggin disagreed with the decision of the CC in *OUTA* matter. They argued that the court should have ruled in favour of OUTA as that would not have involved an intrusion per se on policy but would have meant an exercise of the court's constitutional responsibility to take a stance on policies that have a negative impact on the rights of those affected by such policies.[267] The chapter does not support this view. In its call for the redrawing the contours, it argues that whilst it is important for the courts to intervene through judicial review, this must only happen on justifiable basis and that courts should not use judicial review to intrude on the scope of other arms of the state. Courts should observe constitutional principles like subsidiarity so that they give recognition to the long recognized doctrine of separation of powers.

5.5 Conclusion

The chapter has discussed the reflections of the dissertation in its previous chapters. It has argued that it is important for the CC to set legal certainty on the question of procedural fairness as a component of rationality. The chapter has argued that legal certainty is a crucial aspect of the rule of law. The chapter has argued that for future reference, it is important that the superior courts in South Africa apply the provisions of PAJA before resorting to the question on whether legality principle should be applied.

The next chapter summarizes the findings of the study and make recommendations on actions that should be taken. It is hoped that through such recommendations, the application of legality will improve, enhance subsidiarity and provide respect for the doctrine of separation of powers.

[267] Swart M and Coggin T (note 261 above) at 358.

CHAPTER 6:
Conclusion

6.1 Findings

6.1.1 Procedural fairness as a component of rationality review

The dissertation has argued that the jurisprudence of the superior courts in South Africa show an inconsistency on the question of whether procedural fairness is an aspect of legality review. The CC had, in earlier cases, taken a firm stance that it was. These cases were later followed by cases that sought to apply the notion of procedural fairness being a variable concept to reach a conclusion that in different circumstances, procedural fairness may be a requirement. This was welcome as it was seen to be consolidating and developing the common law principle of natural justice as required by the Constitution.[268] The dissertation has found that the recent cases in the CC, appear to abandon the position of a variable concept and have resorted to the rigid stance that procedural fairness is not a requirement of rationality. Unfortunately, high courts appear to follow this rigid position. The dissertation argued that this is contrary to the aspirations of a transformative constitution.

6.1.2 Boundaries of rationality review

The dissertation has noted an expansionary role given to the meaning of rationality by the courts. Whilst this is a welcome development, it risks undermining PAJA which was enacted to give effect to sect 33 rights in the Constitution. The dissertation argued that without setting clear contours, rationality may be resorted to in order to avoid to apply the onerous requirements of PAJA.[269] Although resort to rationality is justified on the basis of procedural fairness as a variable concept, the dissertation has argued

[268] *Constitution of the Republic of South Africa,*1996.
[269] *Promotion of Administrative Justice Act,* 3, 2000.

that the contours of procedural fairness as a requirement for legality could be set using applicable principles, such as subsidiarity.

6.1.3 On separation of powers

The dissertation discussed subsidiarity and separation of powers. It reflected on how the two doctrines have been impacted by the expanding role of legality in judicial review. The chapter relied on the jurisprudence and academic writings to argue that the expanding scope of legality review has a potential to undermine subsidiarity principle. As a result, it lessens the importance of the doctrine of separation of powers. The dissertation argued that it is crucial to observe separation of powers so that each arm of the state is accorded a space to fulfill its constitutional obligations.

6.2 Recommendations

It is clear that courts will continue to preside over judicial review matters that rely on rationality as a pathway to judicial review. It is recommended that courts should depart from the unequivocal position of the *Masethla* judgement, which found procedural fairness not being a requirement of rationality. Rather, through the application of variability, it is recommended that courts should enquire on whether the circumstances of each case require it to consider procedural fairness as a requirement.

It is recommended that the CC should attempt to set the boundaries of rationality review such that it does not become a ‘key that opens all the doors’. The court could do this through the subsidiarity principle. Before resort is made to the general norm, legality, the specific norm, PAJA should be applied. This would mean that in each case, the court must first enquire on whether PAJA is applicable or not. This will ensure that the legislative efforts, in giving effect to the provisions of the legislation, and the Constitutional rights underpinning it, is respected. It will further protect the doctrine of separation of powers that is necessary in a liberal democracy like South Africa.

6.3 Conclusion

The chapter has discussed its primary findings in the study on whether procedural fairness is a component rationality review in South Africa. The dissertation has argued that procedural fairness is a variable concept and its applicability should be determined by the circumstances of each case. The chapter has made recommendations on how the contours of rationality review should be re-drawn in South Africa. It has argued that courts should, as a matter of process first enquire whether PAJA is applicable before they resort to the legality principle.

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