THE EVOLUTION OF THE RULE OF LAW

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OVERVIEW[1]

The judgment of the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24 is a powerful illustration of the evolution of the rule of law in South Africa. The court struck down as irrational and thus invalid a decision by President Zuma (who has long sought to defend himself against allegations of corruption: see *Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC)) to appoint Mr Menzi Simelane as National Director of Public Prosecutions. It was the latest in a series of decisions in which the Court held that all exercises of public power – including Presidential decisions, no matter how politically charged – must comply with a substantive, justiciable standard of rationality. Consequently, rationality has become a foundational constitutional principle of very wide potential application, requiring every exercise of public power to be rationally related to a legitimate government purpose. It has become a baseline or safety-net standard of legal validity, which is not connected to any constitutional right, but instead is said to flow from the constitutional value of the rule of law (in terms of section 1*(c)*). The doctrine effectively empowers courts to second-guess *any* governmental decision, act or law. Although the grounds of review are narrow, *Democratic Alliance* illustrates their bite.

At least three questions then arise. First, how if at all can such a constitutional doctrine be theoretically justified? For example, does 'the rule of law' really require that every public discretion be constrained by a judicial value-judgement? Second, what legal criteria ought to guide the application of such a doctrine by the courts? For instance, ought the courts, when deciding whether a given decision is constitutionally rational, to assess the relative institutional competence of the judiciary and the decision-maker? Thirdly, how do – and how should – 'pragmatic' considerations relating to the court's institutional security and support among the political elite or general public affect the application of rationality? If the South African Constitutional Court were to become institutionally insecure, in its political context, should we then predict, or normatively approve, a subsequent watering-down of rationality review to avoid conflict with the popular government? If so, what would that mean for the notion of the rule of law? After all, rationality review in South Africa is said to

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be a local manifestation of the ancient political ideal of a community ruled by its law, rather than by politicians or indeed by its judges.

INTRODUCTION

The judgment of the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, handed down on 5 October 2012, might bear some political significance given the identity of the litigants. Yet the decision is of wider legal importance. For in deciding the case, the Court sought to clarify and further develop a foundational constitutional principle whose scope of application extends far beyond the context of this particular dispute. The principle in question is the baseline or safety-net constitutional requirement of rationality, according to which every exercise of public power must be rationally related to a legitimate government purpose. It is now accepted that rationality is required by the principle of legality, which in turn is a doctrine derived from of the constitutional value of the rule of law (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56-8 and *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* 2000 (2) SA 674 (CC) para 85).

The purpose of this note is twofold: first, to explain how the *Democratic Alliance* judgment developed the law and, secondly, to assess the significance of these developments, including in particular the relationship between legality and rationality review and 'the principle of the separation of powers' (*Poverty Alleviation Network v President of South Africa* 2010 (6) BCLR 520 (CC) para 74). I shall argue that the *Democratic Alliance* decision is but the latest step in an on-going process of gradual evolution of South Africa's conception of the rule of law, which began in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 156, continued in leading judgments like *Pharmaceutical Manufacturers* (supra) at paras 85 and 90 and *Albutt v Centre for the Study of Violence & Reconciliation* 2010 (3) SA 293 (CC) at para 74, and seems certain to evolve further in future. As a result, the constitutional principles of legality and rationality have grown in importance in South Africa's democratic era, both practically – for litigants seeking to hold public functionaries to account, and theoretically – for those seeking to understand and to evaluate a contemporary, local manifestation of an ancient political ideal (see Aristotle, *The Politics* III.15.1286a-IV.4.1292a), namely that of a community ruled by its law, rather than by its politicians or indeed by its judges.

THE DECISION IN *DEMOCRATIC ALLIANCE*

In *Democratic Alliance* the Constitutional Court had to decide whether President Jacob Zuma's decision as head of the national executive on 25 November 2009 to appoint Mr Menzi Simelane as the National Director of Public Prosecutions of South Africa, in terms of s 179(1)(a) of the Constitution, was irrational and therefore invalid. Such a rationality argument was rejected at first instance (*Democratic Alliance v President of the Republic of South Africa & Others* [2010] ZAGPPHC 194), but upheld on appeal to Bloemfontein (*Democratic Alliance v President of the Republic of South Africa & Others* 2012 (1) SA 417 (SCA)). The Constitutional Court was accordingly asked in terms of s 172(2)(a) of the Constitution to confirm the Supreme Court of Appeal's order invalidating the President's decision. It unanimously did so, concluding that the President's decision was indeed irrational. The majority judgment, written by Yacoob J with the full concurrence of all the Justices but one (Zondo AJ gave slightly differing reasons), reasoned as follows.

First, the President's decision to appoint Mr Simelane was an exercise of executive power, governed by s 179(1)(a) of the Constitution and ss 9 and 10 of the National Prosecuting Authority Act 32 of 1998 (the Act). Therefore, according to *Pharmaceutial Manufacturers* (supra) and the line of judgments following in its wake, the decision had to be rational (paras 12 and 27). Secondly, the constitutional requirement of rationality now has to be understood as extending beyond merely the merits of any impugned decision. Following *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) and *Albutt* (supra), the effect of which is not restricted to presidential pardons, rationality review also encompasses the process or procedure by which an impugned decision is reached, provided that the process is assessed 'as a whole' (paras 33-7). That is because rationality review 'is really concerned with the evaluation of a relationship between means and ends' (para 32) and everything that is done in the process of taking a decision constitutes a part of the relevant 'means'. Furthermore, when assessing whether a given 'means' (encompassing both the decision itself and the decision-making process) is rationally related to a given 'end', courts may also consider whether the decision-maker failed to take relevant considerations into account. (In this regard, Yacoob J drew inspiration from a 'seminal statement' of common law in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A), 152A-D.) A decision is constitutionally irrational if the decision-maker's failure to consider a relevant factor 'had an impact on the rationality of the entire process' or 'colours the entire process with irrationality', which will not be true of every failure to take a relevant consideration in account (para 39).

Thirdly, turning then to the particular circumstances of this case, s 9(1)(b) of the Act provides that the person appointed 'must be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned'. Whether these statutory requirements are satisfied, poses an 'objective' question that the Court is entitled to assess as a matter of its own independent judgement, not a 'subjective' question turning solely on the opinion of the President (paras 14-26). The purpose of the power of appointment granted by the Constitution and Act was for the President to employ a person objectively satisfying these prerequisites, in particular the requirements of honesty and conscientiousness (para 49). Accordingly, the Court had to decide whether the decision taken, including its process considered holistically, was rationally related to that particular end.

Fourthly and finally, applying the rationality principle to the facts in this manner, the President's decision to appoint Mr Simelane was irrational, because he did not take into account several considerations of such relevance and gravity that this tainted the entire decision-making process and thus the decision itself. These considerations arose from evidence given under oath by Mr Simelane at a commission of enquiry headed by Dr Frene Ginwala, the former Speaker of Parliament, to inquire into the fitness to hold office of Mr Vusi Pikoli, the former National Director of Public Prosecutions, after he had been suspended from duty by the then President, Mr Thabo Mbeki. The evidence in question concerned a dispute between Mr Pikoli when he was still in office and Mr Simelane when he was Director-General of the Department for Justice and Constitutional Development. It arose shortly after Mr Mbeki had become aware that Mr Pikoli intended to arrest and prosecute the National Commissioner of the South African Police at the time, Mr Jacob Selebi, and Mr Mbeki had instructed the then Minister for Justice and Constitutional Development, Ms Bridgette Mabandla, to obtain information regarding this from Mr Pikoli. Mr Simelane drafted the Minister's letter to Mr Pikoli requesting the said information and a dispute arose concerning the relative powers of Mr Pikoli, Mr Simelane and the Minister. Mr Pikoli was suspended approximately a week later.

Dr Ginwala said in her report and its executive summary that Mr Simelane's evidence 'left much to be desired', was 'contradictory and without basis in fact or law' and 'in many respects … inaccurate'; that many of his allegations against Mr Pikoli had to be conceded under cross-examination as groundless; and that Mr Simelane exhibited a 'disregard and lack of appreciation and respect for the import' of the presidential enquiry (paras 50-2). These comments, the Constitutional Court held, 'ought to have been cause for great concern' and

> 'represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane's appointment … Any failure to take into account these comments, or any decision to ignore them and to proceed with Mr Simelane's appointment without more, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility' (para 52).

In fact, Mr Enver Surty, who had since succeeded Ms Mabandla as Minister, requested the Public Service Commission (PSC) to investigate Mr Simelane's conduct during the Ginwala Commission; the PSC in a detailed report subsequently recommended disciplinary proceedings against Mr Simelane arising out of his conduct; but the succeeding Justice Minister, Mr Jeff Radebe, rejected the PSC's recommendations, having considered its report, the Ginwala Commission's report, and submissions received from Mr Simelane's legal team. Two days later President Zuma appointed Mr Simelane. Consequently, the Constitutional Court held that the President made this decision without taking into account the concerns of the Ginwala Commission and PSC and the evidence on which they were based. It held that these, at the least, threw doubt on Mr Simelane's honesty, integrity and conscientiousness.

In particular, Mr Simelane failed to disclose to the Ginwala Commission the above-mentioned Minister's letter, drafted by Mr Simelane, to Mr Pikoli concerning the impending arrest of Mr Selebi. The Court held:

> 'It is transparent that the letter, seen in isolation, can be nothing but conduct by Minister Mabandla amounting to improper interference with, as well as hindrance and obstruction of, the National Director of Public Prosecutions in the exercise, carrying out or performance of his powers, duties and functions … in contravention of s 32(1)(b) of the Act' (para 56 including footnote).

Mr Pikoli's replying letter to the Minister was also not disclosed. Mr Simelane was unable to provide a credible justification for this under oath. The significance of the exchange of letters and its non-disclosure is clear given that the Ginwala Commission had to consider, inter alia, whether there had been improper interference with the prosecuting authority contrary to s 32(1)(b). In addition, Mr Simelane failed to disclose to the Commission that he had obtained a legal opinion contradicting his views about the legal relationship between himself and Mr Pikoli which failure, the Court said after examining Mr Simelane's oral evidence, 'was

seemingly aimed at misleading the Commission' and thus raised questions about his honesty (para 73). Finally, Mr Simelane accused Mr Pikoli of dishonesty for the first time during cross-examination which, the Court remarked, 'raises questions that require urgent answers about Mr Simelane's integrity and conscientiousness'. These questions were never properly addressed (para 76).

These were all considerations highly relevant to deciding whether Mr Simelane objectively fulfilled the statutory requirements of fitness for appointment as the National Director of Public Prosecutions. In the Court's view, the questions they raised about his suitability were never satisfactorily answered. The attempt by Mr Radebe, before the Court, to justify his advice to the President to ignore the concerns of the Ginwala Commission and PSC and the evidence on which they were based, 'did not in all circumstances hold any water' (paras 80-5). Accordingly, the President's failure to take them into account was not rationally related to the purpose of appointing a fit and proper prosecutorial head: 'The President's decision to ignore [these matters] was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational' (para 86).

> '[I]gnoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively' (para 89).

The Court concluded its judgment by explicitly refraining from making any finding on whether Mr Simelane was, in fact, a fit and proper person to be appointed or whether the President had an ulterior purpose in deciding to appoint him (para 91).

THE BROADER SIGNIFICANCE OF THE DECISION

The purpose of this note is to assess the wider legal implications of the *Democratic Alliance* judgment concerning rationality as a specific legal precept derived, via the principle of legality, from the constitutional value of the rule of law. So our focus must expand beyond the particular circumstances of this case, which concerned prosecutorial independence and integrity, to encompass all exercises of public power covered by the principle of legality. The following four points arise from the court's 'brief exploration' (from para 28) of some of the wider issues.

First, Yacoob J reaffirmed rationality and reasonableness as distinct standards of constitutional review (paras 29-32). This is undoubtedly correct. (A theoretical defence of

the distinction is advanced in Alistair Price 'The content and justification of rationality review' (2010) 25 *Southern African Public Law* 346 at 357–65). While rationality is the constitutional baseline applicable in principle to every exercise of public power, the standard of reasonableness applies to a more limited range of cases, for example, to decide whether a limitation of a constitutional right is 'reasonable and justifiable' in terms of s 36 of the Constitution; whether legislatures have complied with their constitutional obligation to 'facilitate public involvement' in the legislative process in terms of ss 59, 72 and 118 of the Constitution; or whether an administrative official has complied with the right to just administrative action and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Secondly, although rationality and reasonableness are distinct legal concepts, Yacoob J acknowledged that 'there may be some overlap' in the evaluations they require when applied in particular cases (para 30). This too is correct, since constitutionally irrational conduct is necessarily also unreasonable, although merely unreasonable conduct may nevertheless be constitutionally rational (see Price, supra, 359). The overlap is deepened, moreover, by the novel finding (at paras 38-40) that a failure to consider a relevant factor may render a decision constitutionally irrational. This ground of review – ignoring relevant considerations – has in administrative law traditionally been considered a kind of abuse of discretion, that is, a variant of unreasonableness rendering the decision in question liable to be set aside on review (Lawrence Baxter, *Administrative Law* (1984), 501f and H.W.R. Wade & C.F. Forsyth, *Administrative Law* 10 ed (2009), 321f). Indeed, review for rationality – extended in this manner – starts to resemble rather closely what Baxter (supra, 485f) described as review for 'dialectical' unreasonableness, which asks whether an impugned decision is supported by reference to considerations that a third party can accept as legitimate even if she disagrees with the ultimate decision itself. A complete resemblance is avoided, however, by the important condition that ignoring a relevant consideration must 'render the entire decision irrational' or 'colour the entire process with irrationality' to justify its invalidation (paras 39-40). It is noteworthy that Yacoob J bolstered this particular extension of the constitutional principle of rationality by referring to *Johannesburg Stock Exchange* (supra), decided in 1988, since this illustrates the enduring value of pre-democratic, administrative law judgments at common law for the interpretation and development of constitutional and administrative law under the 1996 Constitution and PAJA.

Thirdly, the *Democratic Alliance* judgment confirms that judicial review under the principle of legality sometimes extends to include the decision-making *process* and its *procedure* (paras 34-6). This point was first established as binding law in *Albutt* (supra),

where it was held that the President's refusal to grant a hearing to the victims of certain crimes, when considering whether to pardon the convicted perpetrators under a special scheme dealing with 'unfinished business' of the Truth and Reconciliation Commission, was irrational and thus contrary to the principle of legality and invalid. In this regard, *Albutt* and *Democratic Alliance* appear to stand in tension with the majority judgment's findings in *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) that '[i]t would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action' (para 77) and that executive authority 'must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement' (para 78). (These dicta were recently reapproved in *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* [2013] ZACC 13 para 59.) In that case, Mr Billy Masetlha unsuccessfully sought to challenge his effective dismissal by the President, from the position of head of the National Intelligence Agency, without being afforded a hearing.

One way to resolve this apparent tension is to draw a distinction between 'procedural fairness' and 'procedural rationality' (see Michael Bishop 'Vampire or Priest? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* (2009) 2 *Constitutional Court Review* 313, 336; Melanie Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masethla* Possible?' (2013) 130 *SALJ* 260; *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134 paras 68 to 72). On this approach, while procedural fairness is not a general requirement of the principle of legality (as established in *Masetlha* in the context of executive functions), procedural fairness is *sometimes* required by the narrower principle of rationality, depending on the particular 'means' and 'end' under consideration (as established in *Albutt* and confirmed in *Democratic Alliance* in the context of presidential powers). This solution is attractive because it creates a degree of flexibility: the executive and president need not *always* act with procedural fairness, but *must* do so if it would be irrational not to. It also finds support in the following dictum in *Democratic Alliance* at para 41:

> 'The rule that executive decisions may be set aside only if they are irrational and may not *ordinarily* be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected'. (Emphasis added.)

On the other hand, one wonders whether such a fine distinction – between procedural fairness and procedural rationality – can be maintained. Professor Cora Hoexter is surely correct to emphasise the 'tremendous scope for the further development of procedural fairness as a requirement of the principle of legality and rationality' in future (Cora Hoexter, 'The rule of law and the principle of legality in South African administrative law today', in Marita Carnelley & Shannon Hoctor (eds), *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011), 61).

Finally, consider the following dictum of Yacoob J at para 44, which was advanced to rebut the President's argument that invalidating his appointment of Mr Simelane would disrespect the constitutional separation between judicial and executive power:

> '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.'

This may be at odds with the statement of Nkabinde J, made for a unanimous court in *Poverty Alleviation Network* (supra) at para 74, that any judicial interference, on the basis of constitutional rationality, 'should be guided by the principle of separation of powers'. In a previous note ('Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580), I explained and defended the latter approach, arguing that (1) constitutional review for rationality does and should vary with intensity depending on the context in which it is applied and (2) when engaging in rationality review, courts should be guided by two considerations that underpin the Constitution's separation of powers, namely 'democratic principle' and 'institutional competence'. At stake here, it may be argued, are two different interpretations of, and approaches to applying, the constitutional principle of rationality. On the one hand is a 'varying intensity' approach, where the court keeps the separation of powers directly in mind. Indeed, Professor Theunis Roux has gone further by arguing that judges reviewing the exercise of legislative and executive power also take into account 'pragmatic' considerations, like the need to protect and build the institutional security and independence of the judiciary ('Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7(1) *International Journal of Constitutional Law* 106). On the other hand is a more rule-centric method where the separation of powers is relevant only as a justification for adopting the applicable standard of

scrutiny in any given case – whether rationality or reasonableness – but is not relevant to ('has nothing to do with': para 44) its actual application to the facts. It would be valuable for the Constitutional Court to clarify which, if either, is the correct approach in our law. If the 'varying intensity' approach is indeed correct, it would be valuable for the Court to articulate the criteria that should guide the application of this standard of review (see Max du Plessis & Stuart Scott 'The variable standard of rationality review: suggestions for improved legality jurisprudence' (2013) 130 *SALJ* 597).

TAKING STOCK

Notwithstanding this last point, the judgment in *Democratic Alliance* in fact takes several steps to clarify and further develop the constitutional principle of rationality, based on the principle of legality. Most importantly, it confirms that rationality review extends to the procedure of public decision-making as well as to the decision-maker's process of reasoning (regarding taking relevant considerations into account). In addition, it should be noted that the *Democratic Alliance* decision is but the latest step in an on-going process of gradual evolution of South Africa's conception of the rule of law. That is because the legality principle (and all that it now entails, including rationality) has been explicitly based on the constitutional value of the rule of law (see for example *Pharmaceutical Manufacturers* (supra) para 85; *Albutt* (supra) para 49). In fact, an examination of the cases leaves little doubt that the constitutional principle of legality is developing inexorably into 'a complete parallel universe of administrative law' (Cora Hoexter, *Administrative Law in South Africa* 2 ed (2012), 124).

The current state of the law may be summarised as follows. Constitutional legality requires that public functionaries must act within their powers (*Fedsure* (supra) para 58); must act in good faith and must not misconstrue their powers (*President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ('*SARFU*') para 148 read with *Masetlha* (supra) para 81); and must act rationally (*Pharmaceutical Manufacturers* (supra) para 85). Rationality, in turn, requires public functionaries to exercise their powers so as to serve the legitimate purposes of those powers: they must not act arbitrarily, for no purpose, with an ulterior motive (*Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* 2013 (5) SA 24 (SCA) para 47)al, or for an improper purpose; they must not ignore relevant considerations (*Democratic Alliance*); and they must act with procedural rationality (*Albutt* (supra); *Scalabrini* (supra)). Moreover, in *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115 the

Supreme Court of Appeal held that rationality can, on occasion, require the giving of reasons. In *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) the same court held (at para 32) that the rationality principle required decisions to be made 'on the basis of true facts'. Further development seems likely. If ignoring a relevant consideration can render a decision constitutionally irrational, the same may be true of taking account of irrelevant considerations or material errors of law (see *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* [2012] ZAGPPHC 61 paras 19 and 29; and *Freedom Under Law v National Director of Public Prosecutions and Others* [2013] ZAGPPHC 271 para 128). And is it not irrational to adhere to policies or guidelines blindly – a vice known as 'fettering by rigidity' (Hoexter (2012) (supra), 319)? Sachs J has also suggested that the principle of legality may on occasion extend to require a proportionality analysis in yet-to-be-identified classes of case (*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 637).

The growth of judicial review for constitutional legality and rationality is of significant value. It enables courts to hold publicly accountable those who exercise public power in a manner that does not qualify as 'administrative action' in terms of s 33 of the Constitution. And it enables litigants to escape some of the technical limitations on the right to just administrative action introduced by PAJA. It is heartening that the courts have been willing to innovate in order to promote public accountability and adherence to public reason. On the other hand, over-reliance on, and unstoppable growth of, review for legality and rationality would be cause for concern. Professor Hoexter has already drawn attention to the dangers of (1) circumventing and subverting the ordinary administrative-law system established in s 33 and PAJA – a concern pertinently illustrated by *Albutt* (paras 81-4), *Democratic Alliance* (para 12), and *Southern African Litigation Centre* (supra para 18); (2) potential procedural anomalies, where judicial review of administrative action in terms of PAJA is to comply with that Act's specific requirements in s 7, including a 180-day time limit possibly together with new procedural rules in future, whereas procedures for constitutional review for legality may continue to be regulated by rule 53 of the Uniform Rules; as well as (3) significant unpredictability in what the principle of legality requires in different contexts (see Hoexter (2011) (supra), 65-8; Hoexter (2012) (supra), 133f).

The most significant concern raised by the growth of constitutional legality and rationality, however, is that courts may be tempted to stray too far into the legitimate constitutional spheres of the executive and legislative branches of government. In her 2011

Helen Suzman Memorial Lecture, Justice Kate O'Regan said that the requirement of rationality –

> 'is not onerous, for it requires only that there be *some* nexus or link between the purpose sought to be achieved by the relevant action or legislation and the terms of the legislation or character of the conduct. It perhaps might be called the "some rhyme or reason" rule. As long as there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.'

It may be asked, however, whether the growing list of legal rules derivable from the rationality principle – which now includes review for ignoring relevant considerations and for procedural irrationality – can easily be reduced to a deferential 'some rhyme or reason' rule. If so, then it is crucial for judges to take care to avoid overreaching on the grounds of legality and rationality. For similar reasons, Justice O'Regan emphasised in her lecture 'the importance of judicial modesty and restraint' and the need to avoid a 'jurisprudence of exasperation'. The point, after all, is to guard against arbitrariness and to uphold 'the rule of law' in terms of s 1(c) of the Constitution, not a rule of courts. One way to help, I suggest, is for judges to keep in mind the variable weight of considerations of democratic principle and institutional competence when engaging in judicial review in different contexts.

JUSTIFYING EXTENDED RATIONALITY REVIEW

The continuing evolution of South Africa's conception of the rule of law as a justiciable constitutional master-principle, which is repeatedly invoked to support a growing range of sub-principles, raises a deeper question. How is judicial review of legislation and executive conduct, specifically on the basis of extended rationality, to be justified?

Consider that the issue of justifying judicial review, in general, has generated considerable, on-going debate among scholars and judges in England. To oversimplify somewhat, the traditional view there is that judicial review is justified by parliamentary intent, in accordance with the constitutional principle of parliamentary sovereignty. A rival view is that principles of administrative law are nothing other than the common-law creation of judges, who over time simply developed and imposed on public authorities the legal controls that they (the judges) believed were normatively justified. A variety of middle-ways have been proposed, including the view that 'the legislature and the courts are engaged in a sort of joint enterprise of creating and controlling the exercise of public powers' (Peter Cane,

Administrative Law 2 ed (2004) 410). (Many important contributions to this debate are contained in C.F. Forsyth (ed), *Judicial Review and the Constitution* (2000).)

In South Africa, however, the consensus since the enactment of the 1993 and 1996 Constitutions seems to be that we need not grapple with this issue of deeper justification. Whatever may have been the position in the pre-democratic era, where administrative law developed at common law in a legal system characterised by a sovereign (albeit unrepresentative) parliament, today the constitutional right to just administrative action may appear sufficient to explain and justify judicial review. Indeed, Professor Hoexter asserts that 'South Africans are fortunate in being able to avoid this controversy about justification almost entirely' (Hoexter (2012), 130).

But the striking growth of judicial oversight on the alternative basis of constitutional rationality – that is, the emergence of a 'parallel universe' of review at the level of supreme constitutional principle – suggests otherwise. The courts' growing power in this regard cannot, by definition, be justified by the constitutional right to just administrative action, because the principles of legality and rationality were developed by the Constitutional Court specifically in order to regulate exercises of public power that did *not* amount to 'administrative action' in terms of s 33. Can an alternative justification be found? Contemplating this question is not a purely theoretical matter. Litigants will continue to argue that the doctrine of rationality in constitutional law should be developed and expanded, and different answers to the deeper normative question seem likely to support different judicial responses. In short, the boundaries of judicial review for rationality ought to be shaped, at least in part, by the ultimate justification for this doctrine.

I shall not, in the rest of this note, defend any particular justification (although see Price 'The content and justification of rationality review' (supra) for an initial attempt that appeals to the ideal of public reason), but instead will briefly mention some of the issues that any plausible justification must take into account. First, the range of possible answers to this question in South Africa is likely to differ from those explored in England, given our abandonment of parliamentary sovereignty on 27 April 1994. For instance, one generally cannot invoke Parliamentary intent to justify striking down national legislation on the grounds of constitutional rationality (as, for example, in *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC)). Secondly, rationality review is already partly justified by the constitutional right to equality before the law and equal protection and benefit of the law in terms of s 9(1). In fact, the rational basis standard was first developed by our courts in the context of challenges on equality grounds to 'mere differentiations' that fell short of 'unfair

discrimination' (see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25). However, it is now established that review for legality and rationality stands on its own two feet, extending beyond s 9(1), applying in principle to any exercise of public power, not only to differentiations between classes of people. Consequently, equality-based arguments alone will be insufficient. Thirdly, the kind of justification required goes beyond theories of judicial deference and respect. Whereas these seek to guide judicial intervention and non-intervention when applying constitutional rights, for example rights to just administrative action and to receive socio-economic benefits, we are here concerned with disputes where no constitutional right need be at stake.

Three final considerations arise in the following way. Earlier Constitutional Court judgments argued that the principle of legality was 'implied' or 'implicit' in the interim 1993 Constitution (*Fedsure* (supra) para 58; *SARFU* (supra) para 148), whereas later judgments have held that the principle is based on the founding value of the 'rule of law' in terms of s 1(c) of the 1996 Constitution (see for example *Pharmaceutical Manufacturers* (supra) paras 20 and 85; *Albutt* (supra) para 49). These lines of judicial argument raise at least three additional issues. The first is the notion of 'implicit constitutional law' as developed by innovative judgments of the highest court. Implied constitutional rules and principles are an inevitable site of contestation and disagreement, and thus call more urgently for transparent justification. American debates over the doctrine of 'substantive due process' and the right to privacy – an entitlement not explicitly mentioned in the US Constitution – provide a vivid example.

The second issue is the meaning of the 'rule of law' – another theoretical and practical topic of enduring controversy. Professor Paul Craig, for instance, has argued that 'the distinction between *formal* and *substantive* meanings of the rule of law' is 'of crucial importance in determining the nature of the specific legal precepts which can be derived from the rule of law' ('Formal and substantive conceptions of the rule of law: an analytical framework' *Public Law* [1997] 467). Sir Tom Bingham – perhaps the most respected English judge of his generation – published an outstanding book in 2010 entitled *The Rule of Law*, which argues, rather expansively, that the rule of law is a political ideal so far-reaching that it requires compliance with human rights to respect for private and family life, freedom of assembly, to marry, protection of property, and to education, for example. On the other hand, the current Oxford Professor of Jurisprudence, John Gardner, has argued that there is no such thing as a 'formal' conception of the rule of law (John Gardner, *Law as a Leap of Faith* (2012) chap 8), and has criticised Sir Tom's arguments concerning the boundaries of

the rule of law in a book review ('How to Be a Good Judge' *London Review of Books* Vol 32(13) (2010)), remarking: 'As philosophy this would be high comedy. As the work of a judge it is, to repeat, impeccable.' Disagreements of this nature suggest that South African lawyers today cannot contentedly abstain from the debate about the rule of law in our own particular context; instead it ought to be tackled in the best tradition of past jurists like Professor Tony Mathews (recently celebrated in Carnelley & Hoctor (supra)).

The third and final issue raised by our courts' reasoning is that of constitutional interpretation. The 'rule of law' doctrine appears in the 1996 Constitution as an explicit founding constitutional 'value' and, as such, is a text that stands to be interpreted. How is this to be done? With reference to the views and intentions of the democratic Constitutional Assembly that enacted the text? By appealing to general public understandings of the idea of a rule of law? By way of explicit moral argument by judges about the meaning of the rule of law as a political ideal? As time goes by, and the extended principles of rationality continue to be elaborated by our courts in an ever-growing body of constitutional case law, these questions – which jurisdictions with an older tradition of interpreting a supreme constitutional master-text continue to debate – will become more pressing in South Africa. Given that judicial review on the basis of constitutional rationality has potential to generate conflict between the courts and the executive and legislature, as the *Democratic Alliance* judgment plainly demonstrates, these are questions that we cannot afford to ignore.