

Administrative Action, the Principle of Legality and Deference – The Case of *Minister of Defence and Military Veterans v Motau*

Andrew Konstant*

I INTRODUCTION

*Minister of Defence and Military Veterans v Motau and Others*¹ marks a significant stride in administrative law, the likes of which we have not seen from the Constitutional Court in some time. The judgment tackles in impressive depth two of the fundamental issues in the judicial scrutiny of exercises of public power. The first issue is the complex definition of ‘administrative action’ in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Secondly, the judgment tackles the difficult question whether procedural fairness exists as a self-standing requirement of the principle of legality. Both of these concerns have surfaced in several previous judgments and have slowly and incrementally evolved into a daunting field of seemingly contradictory judgments. The judgment in *Motau* fleshes out these two questions and puts forward a framework to better guide future judicial decision-making.² However, in doing this, it raises some challenges of its own.

This is not entirely surprising as the judgment covers a great deal of ground. Briefly, the interesting features of the judgment include the use of the principle of legality to achieve a measure of deference with respect to administrative decisions, the content of the principle of legality, and the appointment and dismissal powers of a Minister in charge of an administrative agency. Instead of an assessment of the Court’s entire reasoning, this case note will tackle only one of its more novel features. More specifically, I wish to explore the Court’s use of the principle of legality for the purpose of showing deference towards a decision that it feels would be inappropriate to subject to more searching judicial scrutiny. In doing so,

* Researcher, South African Institute of Advanced Constitutional, Public, Human Rights, and International Law, a Centre of the University of Johannesburg. I am grateful to Cora Hoexter for helpful feedback on a draft of this article. I also benefited from discussions with David Bilchitz, Michael Bishop, Khomotso Moshikaro, Melanie Murcott and other participants at the Constitutional Court Review VII conference, as well as with Nurina Ally. Of course, all remaining errors are my own.

¹ [2014] ZACC 18, 2014 (5) SA 69 (CC), 2014 (8) BCLR 930 (CC) (*‘Motau’*).

² See A Konstant ‘Administrative Action and Procedural Fairness – *Minister of Defence and Military Veterans v Motau*’ (2016) 133 *South African Law Journal* 491 (broader discussion of the impact of the judgment).

however, I am unavoidably drawn into a discussion of the relationship between the principle of legality and PAJA more broadly.

The Court's approach reveals a subtle shift in the way it applies the principle of legality as a pathway of review. Prior to *Motau*, the Court relied on the principle of legality to achieve some measure of accountability in respect of decisions of the legislature and executive that did not constitute 'administrative action' in terms of PAJA. In order to do so, however, the Court began an aggressive campaign to expand the scope of the principle by filling it with the grounds of review ordinarily found in PAJA review. This often gave the impression that the Court viewed the principle of legality as simply a surrogate for PAJA review that was far easier to use. *Motau* is the Court's attempt to correct this impression and make explicit the difference between review under the principle of legality and review under PAJA. The Court adds to a list of distinguishing features of legality and PAJA review by pointing out that the former is the more 'appropriate' method to use in instances where greater deference is required.³

Before delving into the facts of the judgment, it is important to note the shifting nature of the jurisprudential terrain on which the judgment rests. The principle of legality has become a pragmatic tool in the hands of the courts and has, over time, been filled systematically with various grounds of review that are ordinarily found in PAJA. At this point, it is difficult to determine just which grounds of review fall outside the ambit of the principle of legality and remain exclusive components of PAJA review. However, the point to be made here is that the assessment below, and indeed any discussion of the relationship between review under the principle of legality and PAJA review, is subject to the courts' continued manipulation of the principle of legality. As such, any assessment of its content, use or worth will require revision should the Court continue to expand the ambit of the principle of legality.

II FACTS

The case relates to a decision of the Minister of Defence and Military Veterans to remove two directors, the Chairperson and Deputy Chairperson, from the board of the Armaments Corporation of South Africa (SOC) Ltd (Arm Scor). Arm Scor is a state-owned entity, and its governing statute is the Armaments Corporation of South Africa Ltd Act 51 of 2003 (the Arm Scor Act). In terms of the Arm Scor Act, Arm Scor falls under the governing jurisdiction of the Minister of Defence. These two directors, General Moreti Motau and Refiloe Mokoena, had their board membership terminated by the Minister after their failure to attend meetings arranged by the Minister for the purpose of dealing with certain procedural issues. This was done in terms of s 8(c) of the Act, which permits such termination on the showing of good cause. The Minister's reasons for terminating the directors' appointments included the lack of expeditious progress with several procurement projects as a result of the board's ineptitude, the failure of the board to conclude a service level agreement with the Department of Defence and Military Veterans as required by s 5 of the Arm Scor Act and, finally, that the Minister had received

³ *Motau* (note 1 above) at para 43.

several complaints about Armscor from members of the defence industry which she took as evidence of a breakdown in the relationship between the organisation and the industry. In summary, the Minister reasoned that the two directors had not acted in the best interests of the government.⁴

Following the decision of the Minister, both directors took the decision on review on the basis that it was ‘unlawful, unconstitutional and invalid’.⁵ The matter was first heard in the High Court, where Legodi J held that the decision was indeed administrative in nature and therefore fell within the purview of PAJA.⁶ The High Court found that the Minister’s decision was based on an error of law, was procedurally unfair, and that the Minister had acted on the basis of an ulterior motive. The matter was then taken on appeal by the Minister to the Constitutional Court.

This case note will examine the Court’s approach to the definition of ‘administrative action’ as well as the procedural fairness requirements that may flow from the principle of legality.

III ADMINISTRATIVE ACTION

Khampepe J, writing for the majority, admirably sets out several bases on which to decide whether the exercise of public power constitutes ‘administrative action’. Each basis is accompanied by a caution that indicates that no hard-and-fast rule can be extrapolated in order to dispense easily with this assessment. Therefore, as before, the assessment is context-dependent.⁷ The Court begins with the definitional hurdle that must be overcome for the application of PAJA to the decision under scrutiny. Section 1 of PAJA requires that the decision be ‘administrative in nature’. This is, the Court states, a valuable, albeit circular, step in that it forces the reviewing court to closely examine the decision in question.⁸ It also confirms that the primary issue at hand is the nature of the decision and not the identity of the decision-maker.⁹

The Court sets out several indicators that may prove helpful in determining the nature of the power. The first is the source of the power. Where a power flows directly from the Constitution, one could deem the power to be executive in nature. When a power is sourced in legislation, it is likely to be administrative in nature.¹⁰ Secondly, substantial constraints on the power would be an indication that the power is administrative in nature.¹¹ Finally, the court states that the nature of the power can be determined with reference to the appropriateness of subjecting the power to the stricter form of judicial scrutiny represented by the edifice of administrative law contained in PAJA.¹²

⁴ *Motau* (note 1 above) at para 14.

⁵ *Ibid* at para 17.

⁶ *Motau and Another v Minister of Defence and Military Veterans and Another* Case No: 51258/13 (TPD).

⁷ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11, 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) (‘SARFU’) at para 143.

⁸ *Motau* (note 1 above) at para 34.

⁹ *Ibid* at para 36.

¹⁰ *Ibid* at para 39.

¹¹ *Ibid* at para 41.

¹² *Ibid* at para 43.

This is the major point of departure for Jafta J, who wrote the dissenting judgment. For Jafta J the matter is not nearly as complex and rests largely on the notion that administrative action is involved wherever the implementation of legislation takes place.¹³ As such, unless the governing legislation explicitly or implicitly indicates otherwise, the primary determinative factor is whether the decision constitutes the implementation of legislation.¹⁴ In the present case, the Minister was clearly acting in terms of governing legislation, and therefore her decision constituted administrative action. From here, the prescription is fairly simple: procedural fairness is a requirement in the exercise of administrative powers and thus the Minister was in breach of this requirement when she did not afford the directors an opportunity to be heard before dismissing them.¹⁵

The definition of administrative action and the complexity of the inquiry involved in establishing the nature of public power have created a great deal of difficulty for the courts.¹⁶ Jafta J's approach simplifies the enquiry by arguing that the relevant issue is whether the action constitutes the implementation of a statute. It is arguable, however, whether such a simplistic approach can adequately incorporate all the exercises of public power that ought to be scrutinised in terms of the grounds of review provided for in PAJA, or be enough to justify any distinction between the legality review and PAJA review.

Khampepe J, on the other hand, found that the decision to remove the directors constituted executive action. In reaching this conclusion, Khampepe J turned to the Armscor Act and made three findings. First, the Minister's power in terms of s 8(c) is an adjunct to her power to formulate defence policy. The nature of the policy-making power that the Minister wields is wide and rather abstract, and does not involve the details of the day-to-day operations of the corporation. These details are instead left to the board. As a result, her involvement is limited to guiding the strategic direction of the organisation by appointing and dismissing leaders of the corporation.¹⁷ In conclusion, the majority judgment states that even though the appointment or dismissal of management is not itself policy creation, it is the means through which the Minister 'gives direction in the vital area of military procurement, and is therefore an adjunct to her executive policy formulation function'.¹⁸

The second point raised by Khampepe J is that the power is not a low-level bureaucratic power. In other words, it is not a power that simply involves the application of policy in the daily functioning of the state. The power operates exclusively between the Minister and high-level managers and allows for the supervision of these managers. This therefore suggests the exercise of executive power rather than administrative power.¹⁹ The third and final point that Khampepe J relies on is that the power is fairly unconstrained. The Minister need only rely on good cause to dismiss a board member. Thus, the Minister

¹³ Ibid at para 106.

¹⁴ This is a fundamental factor laid down in *SARFU* (note 7 above) at para 142.

¹⁵ *Motau* (note 1 above) at para 127.

¹⁶ C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) at 195.

¹⁷ *Motau* (note 1 above) at para 48.

¹⁸ Ibid at para 48.

¹⁹ Ibid at para 49.

exercises broad discretion with respect to appointment and dismissal, which again is indicative of executive rather than administrative power.²⁰

A The Relationship Between the Principle of Legality and PAJA

The *Motau* judgment is the Court's re-entry after a long hiatus into the complicated jurisprudence dealing with the lawful exercise of public power. Since the courts' adoption of the principle of legality, there has been the need to organise the two main pathways of judicial review on a more principled foundation. As in the case of s 33 of the Constitution and PAJA, the principle of subsidiarity could be used to achieve this.²¹ The Court in *Motau* certainly makes an effort towards organisation; however, instead of exclusively using the principle of subsidiarity, the Court suggests that one organising principle may be the need to show deference to a decision of the executive.²² Specifically, Khampepe J suggests that defining the decision as executive in nature can be justified by the need to 'show the Executive a greater level of deference'.²³ Khampepe J goes on to state that

the Court has found that administrative law review is not appropriate where the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate; is based on considerations of comity or reciprocity between South Africa and foreign states, involving policy considerations regarding foreign affairs; is closely related to the special relationship

²⁰ Ibid at para 50.

²¹ See C Hoexter 'A Rainbow of One Colour? Judicial Review on Substantive Grounds in South African Law' in H Wilberg & M Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 183 (author makes such a call). See also *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC) at para 82 ('*Albutt*') (provides an interesting counterpoint to this when the Court states that 'judicial policy' may prevent a court from even asking whether PAJA should be applied where the principle of legality is capable of resolving the matter). The Court in *Motau* does not deal with this assertion and has perhaps retreated from this position. One could, however, offer an argument against the designation of the principle of legality operating at a higher level of generality than s 33 of the Constitution. For instance, Fowkes argues that the principle of legality operates as a rule distinct from the principle found in s 1(c) of the Constitution. See J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) ch 13. If true, establishing that the principle of legality operates at a higher level of generality in relation to s 33 would be contestable. Likewise, it could be argued that the principle of legality acts as a *de facto* right to lawful public action. Such an argument would obviously stand in tension with the Court's explicit statement that the Constitution's founding provisions are not rights. *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders and Others* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*') at para 23. However, as Fowkes attempts to show, it is not easy to argue that the Court has been consistent in abiding by its statement in *NICRO*. Should such an argument prove persuasive, it would be difficult to determine whether such a right was more or less general than s 33. Ultimately, making an argument that subsidiarity can adequately organise the various pathways of review will require a convincing explanation of the provenance of the principle of legality and a general taxonomy of review.

²² I treat the two issues as largely distinct from one another. In my view, the intensity of a standard of review has little to do with the generality with which it is articulated. The principle of subsidiarity, as far as we know, does nothing more than tell us which norm should be applied where more than one is applicable. It does not necessarily designate one as more intensive than the other. Thus this note discusses the distinction in intensity of review without dealing with the Court's use of the principle of subsidiarity.

²³ *Motau* (note 1 above) at para 43.

between the president and the Director-General of a security agency; or involves the balancing of complex factors and sensitive subject matter relating judicial independence.²⁴

This is not the first time a court has made the argument that the use of the principle of legality is justified on the basis that it is more deferential than PAJA review. In 2014, in *NDPP v FULL*, the Supreme Court of Appeal (SCA) attempted to end the debate whether a decision not to prosecute is reviewable under PAJA.²⁵ The debate emerges from uncertainty whether PAJA, when excluding ‘decisions to prosecute’, also excludes decisions *not* to prosecute from the concept of administrative action. The central question is whether there is any reason to treat the two forms of decision differently. Brand JA held that the two policy justifications that exist for denying or limiting the courts’ review powers with respect to a decision to prosecute apply equally to decisions not to prosecute. The first is safeguarding the ‘independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought’.²⁶ The second justification is the width of the discretion exercised by the prosecuting authority and the ‘polycentric character that generally accompanies its decision-making’.²⁷ The implicit argument here can only be that the principle of legality is a form of review that poses less risk to the independence of the prosecuting authority than PAJA review does.

With *Motau* following suit, the Court has introduced the notion that the nature of a power can be determined, albeit in part, with reference to the appropriateness of subjecting that power to the stricter form of judicial scrutiny in terms of PAJA. The implicit argument here is that there is a category of decisions to which the courts should apply a light touch or deferential form of review. In other words, we have the Court hinting that PAJA review does not possess within it the necessary capacity for deference with respect to decisions of the executive branch of government. The Court, in adopting this line of reasoning, suggests an instrumentalist use of the principle of legality in order to achieve its preferred degree of deference. There are roots of this sentiment in previous cases. For instance, in *New Clicks*, Sachs J states that ‘judicial review of subordinate legislation can be more effectively and robustly done if not forced to tip-toe on the narrow pedestal appropriate for reviewing administrative acts’.²⁸ On the other hand, examples of judgments exist in which the only distinction pointed out is that the principle of legality applies to a wider set of public powers, as opposed to PAJA review, which is restricted to decisions defined as ‘administrative action’.²⁹

Scholars have also argued that the principle of legality is better suited to more deferential review and thus more appropriate for the review of executive decisions.³⁰ It is, however, important to note that these suggestions do not include

²⁴ Ibid.

²⁵ *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58, 2014 (4) SA 298 (SCA).

²⁶ Ibid at para 25.

²⁷ Ibid.

²⁸ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign as Amici Curiae)* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 609.

²⁹ *Albutt* (note 21 above) at para 49.

³⁰ Hoexter *Administrative Law* (note 16 above) 124.

the assertion that the distinction in depth of review should be used by the courts as reasons for classifying a decision as administrative in nature or not. And most importantly, as in Hoexter's case especially, the suggestion is caveated by the requirement that the principle of legality contains only the grounds of review that reflect the bare minimum of what is required of administrative decisions.³¹ Therefore, the more grounds of review that the principle of legality adopts, the less able it is to play the role of a more deferential pathway of review.

The result of the Court's adoption of the distinction between the intensity of review of the principle of legality and PAJA review is that such a distinction can be and has been used as a partial justification for the organisation of the two forms of review. The other potential justification is the principle of subsidiarity. *Motau's* organisational principle can thus be briefly described as the following: first the court considers whether the decision is administrative in nature. In doing so it may consider, among other factors, whether it wants to show the decision a degree of deference. If, after considering these factors, the court finds that the decision is not administrative in nature, it may well have to decide whether the decision is executive or legislative and will apply the principle of legality. This sequence of reasoning reveals several important changes in the role that the principle of legality plays in judicial review.

IV THE PRINCIPLE OF LEGALITY

The *Motau* judgment reflects the Court sharpening its understanding of the relationship between the principle of legality and PAJA. In order to make this clear, it may be helpful to lay out the short history of the principle and its early use by the Court.³² Any such exposition must begin with s 1(c) of the Constitution in which the principle is anchored. This founding provision ensures that, as a constitutional democracy, the state holds the Constitution as the supreme law and upholds the rule of law. It is the concept of the 'rule of law' specifically from which the Court initially drew in constructing the principle of legality in its doctrinal form.³³

This history of the principle has been well documented and there is a reasonably consistent narrative. The origin of the principle was explained in *Fedsure*.³⁴ The

³¹ C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *South African Law Journal* 484, 507.

³² For a fuller depiction, see C Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165, 174.

³³ See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) ch 11 at 15 (Description of the novelty of instrumentalising the rule of law or the principle of legality in this manner).

³⁴ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*') at para 59. Cf Fowkes (note 21 above) (Argues that the principle of legality has a more complex past than is ordinarily thought. Fowkes' reading of *Fedsure* is that the Court's reasoning was based on the Interim Constitution which did not have a provision like s 1(c). Thus, in Fowkes' view, the Court in that case relied on the general notion of 'constitutionalism' to anchor the principle of legality in the Interim Constitution. Later cases though have had the benefit of a 'rule of law' provision and have therefore moved away from the construction in *Fedsure*.)

Court found that the principle was ‘implicit in the Constitution’ and reflected the notion that ‘the exercise of public power is only legitimate where lawful’.³⁵ The principle gained further content in *Pharmaceutical Manufacturers* where the Court held that rationality was a ‘minimum threshold requirement applicable to the exercise of all public power’.³⁶ More recently the Court and the SCA have added aspects of procedural fairness and the obligation to give reasons.³⁷

The mooring of the principle of legality in the Constitution does not explain why the Court turned to the principle of legality as an alternative avenue of review to PAJA. The simple answer largely lies in the Courts’ aversion to the definition of ‘administrative action’ in PAJA on one hand, and the inability to allow a class of decision to be unreviewable on the other. The rationale of placing the definition in PAJA was to narrow the applicability of the legislation. It was evident that the Final Constitution provided many other means to deal adequately with ‘non-administrative’ decisions and that PAJA need only concern itself with administrative decisions of a certain type.³⁸ The definition, however, proved to be too complex for the courts to navigate. As a result, it became necessary for the Court to develop another avenue of review equipped with the grounds necessary to hold non-administrative exercises of public power to account. A sub-textual reason was certainly to permit courts to avoid the burdensome reasoning that lurks behind the definition of administrative action in PAJA.

The reason the Court resorted to the principle of legality has been described as allowing for a pattern of avoidance by the courts with respect to the definition of ‘administrative action’ in PAJA.³⁹ Some judges have effectively presented review in terms of the principle of legality and PAJA review as substitutable. They have argued that there is no inflexible rule dictating that courts confront the definition of ‘administration action’.⁴⁰ Instead, courts may simply assume the application of the principle of legality without worrying much about determining the nature of the decision.⁴¹ Other forms of avoidance include the direct application of s 33 in place of PAJA. This strategy has come under criticism from scholars whose concern is respect for the principle of subsidiarity.⁴²

³⁵ *Fedsure* ibid at paras 56 and 59.

³⁶ *Pharmaceutical Manufacturers Association of South Africa and Another; In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 90.

³⁷ *Albutt* (note 21 above); *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC); and *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115, 2013 (1) SA 170 (SCA).

³⁸ See C Hoexter ‘The Constitutionalism and Codification of Judicial Review in South Africa’ in C Forsyth et al (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010). See also J Klaaren & G Penfold ‘Just Administrative Action’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 63 at 63–65.

³⁹ Hoexter (note 16 above) at 131.

⁴⁰ See, eg, *Minister of Education for the Western Cape and Another v Beauvallon Secondary School and Others* [2014] ZASCA 218, 2015 (2) SA 154 (SCA), [2015] 1 All SA 542 (SCA) at para 16; *Democratic Alliance* (note 37 above) at para 12.

⁴¹ The same form of reasoning was employed in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134, 2013 (6) SA 421 (SCA), [2013] 4 All SA 571 (SCA) (‘*Scalabrini*’).

⁴² See, eg, C Hoexter ‘“Administrative Action” in the Courts’ (2006) *Acta Juridica* 303.

It has become clear that the Court has an instrumental aim in the use of the principle of legality. In *SARFU*, the Court states that just because a decision is classified as executive in nature, this does not mean that there are no constraints placed upon it.⁴³ Added to this is the Court's expressed position that the principle of legality is not a static doctrine and will evolve with changing circumstances. This statement was made in the course of expanding the scope of the doctrine, and it would not be unreasonable then to assume that the form of evolution that the Court had in mind was the principle's expansion. This seems to suggest that the Court's desire to fill the principle of legality with the tools of PAJA review is being driven by a need to constrain executive decisions.⁴⁴ In other words, the stronger a court's desire to restrain executive decision-making, the more expansive the principle of legality will become.⁴⁵

The purpose of this section is to show that the courts have changed the way in which the principle of legality is being viewed and used. It has been considered a catch-all that had, as its purpose, holding the executive or legislature to account.⁴⁶ Coupled with the expansion undertaken by the Court, one might be tempted to think that the principle of legality was as sharp a tool for holding other arms of government to account as PAJA review. In *Motau*, the Court has sought to alter this perception. It has made the most explicit movement towards viewing the principle of legality as an instrument to show deference to executive or legislative decisions.⁴⁷ When once it appeared that the Court would rely on almost any justification sourced from the principle of legality or 'rule of law' to hold the executive accountable, it is now positioning the principle of legality as a weaker and less invasive form of review.⁴⁸

The Court indicates quite clearly in *Motau* that one can expect a less intrusive review under the principle of legality than under PAJA review. We could ask whether the jurisprudential 'supporting structures' exist within our law for such an assumption, whether good or bad. In order to attempt an answer, we must identify the features of the two pathways of review that lead to a difference in the intensity of the review when either is applied. The first possible candidate is that there exists a difference in the width of deference available in each. Perhaps, when using the principle of legality, a judge feels more constrained in assessing the decision than if she applied PAJA. The other candidate is the set of grounds of review available in each pathway of review. If we can determine that they differ

⁴³ *SARFU* (note 7 above) at para 148.

⁴⁴ A Price 'The Evolution of the Rule of Law' (2013) 130 *South African Law Journal* 657.

⁴⁵ See Price (ibid) for a useful account of the expansion of the grounds of review under the principle of legality and their counterparts in administrative law review.

⁴⁶ See Michelman (note 33 above) at 16–23 (argues that a significant purpose of the principle of legality in the early stages of the Court's jurisprudence was as a method to secure its jurisdiction over the Supreme Court of Appeal).

⁴⁷ This is also not surprising given the Court's movements towards affording the public institutions a wider berth when reviewing their actions. This is typified in the majority's position in the recent decision in *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31, 2016 (1) SA 132 (CC) ('*My Vote Counts*') and, in particular, the judgment's stance on deference.

⁴⁸ More recently the SCA has also opted to recast the principle of legality as a milder form of review by describing it as a 'measure of last resort'. See *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143, [2016] 4 All SA 842, 2017 (2) SA 63 (SCA) at para 38.

in either identity or use, then perhaps there is justification for believing that one form of review is more deferential than the other.

A Value of *Motau's* Organisational Method

Now that we have dealt with the implications of the judgment with respect to the principle of legality, the question is whether the distinction between the two paths of review on the basis of their respective standards is sensible. The judgment, understandably given that the matter did not turn on this point, did not elaborate on the specific aspects of the two forms of review that yield different levels of intensity. This section will proceed to suggest the possible mechanisms within each form of review that may support the Court's conclusion and the weaknesses that each possesses. Before this is done, however, there are some initial problems with the Court's attempt to deal with the relationship between the principle of legality and administrative law review in this manner.

The judgment implies that the courts should define a decision as executive on the basis that there may be a desire to apply some degree of deference to the decision. Should this motivation exist as a self-standing reason for characterising a decision as executive in nature, it would be a rather unprincipled way of defining executive action. Further, it conflates the nature of the power with the respect that a court should show it. These are two separate steps with different reasons that guide the determination of each. The nature of the power refers to whether the power falls into one of the four defined categories: judicial, executive, legislative or administrative. It involves a determination with reference to the features of each to determine whether the decision under review meets a particular definitional threshold. The level of deference is a separate concern. Deference with respect to each of these categories exists on a sliding scale. Reasons for deference may operate differently within each category, and it would be difficult to ascertain a standard level of deference in every case of executive, judicial, legislative or administrative decisions. Degrading the distinction between these two steps would make an already challenging process of determining the nature of a decision and the requisite judicial approach all the more difficult.

Beyond this initial issue, there is the question of whether such a distinction between legality and PAJA review can be sustained. In order to determine whether this is possible, we must be able to draw a line between the level of intrusion by a court when using the principle of legality as opposed to PAJA review. This distinction should have some positive basis. We should be able to justify it by pointing to inherent features of the pathways that make one always more appropriate in certain instances than the other. Before trying to locate these features, it will be instructive to look at the features that we already know exist. The Court, in making this distinction, gestures towards deference. This is not a new concept, even if it remains somewhat undeveloped in our administrative law jurisprudence, and it may pose problems for the Court's perspective on the levels of intensity in both forms of review.

B Deference in General

The two pathways being distinguishable on the basis of the appropriateness of their application to decisions of the executive implies that there exists a distinction in the level of deference available in each pathway. The notion or doctrine of deference is not very well developed in South African jurisprudence despite the urging of some.⁴⁹ The consequence of *Motau* is to make apparent the deficiencies of an un-nuanced notion of deference and the concomitant lack of attention paid to the standards of review attached to each form of review. For the Court to have assumed that legality and PAJA review differ in terms of their respective levels of intrusion, there must presumably have been some sophisticated and unexplained understanding of deference that justifies the Court's reasoning. The reason for this assumption is that, as far as we know, the deference mechanism that we currently have in administrative law is sufficient to calibrate a court's approach to a decision on the same basis that justifies a court's review of a decision of the executive. If deference under PAJA review is capable of achieving the same aim the Court has with respect to the principle of legality, it would be difficult to argue that a distinction between the two forms of review exists. To better understand this argument, it would be useful to capture our best understanding of the Court's approach to deference.

Substantial scholarship has been devoted to the need for a self-standing doctrine of deference,⁵⁰ the content of such a doctrine or theory, and its uses in different forms of judicial review.⁵¹ It is not possible in the space available here to sift through this literature or to adequately formulate a doctrine or theory of deference. In place of such an analysis, it may only be necessary to lay out in general what is meant by deference in the judicial setting and the fundamental principles that guide or justify it. These principles will facilitate some understanding of what the Court was trying to achieve in *Motau* and whether these efforts could be successful.

⁴⁹ Hoexter (note 31 above). Cf DM Davis 'To Defer and When? Administrative Law and Constitutional Democracy' (2006) *Acta Juridica* 23. See also PJH Maree & G Quinot 'A Decade and Half of Deference' (2016) *Tydskrif vir die Suid-Afrikaanse Reg* 268 (a recent description of the Court's construction of deference and its discussion in South African academic circles).

⁵⁰ Allan is perhaps the most vocal opponent of a doctrine of deference. Despite this, he is committed to many of the underlying principles of deference and essentially argues that these principles can find better expression by judges reacting to particular circumstances of each case. In other words, there is no need for the establishment of a doctrine that seeks to guide the decision-making of judges in every relevant case. See TRS Allan 'Common Law Reason and the Limits of Judicial Deference' in D Dyzenhaus (ed) *The Unity of Public Law* (2004) 289. See also H Corder 'Without Deference, With Respect: A Response to Justice O'Regan' (2004) 121 *South African Law Journal* 438, 441. Cf A Kavanagh 'Defending Deference in Public Law and Constitutional Theory: A Reply to TRS Allan' (2010) 126 *Law Quarterly Review* 236. It is not necessary for the purposes of the arguments in this note to adopt a position with respect to whether a doctrine of deference is needed or whether we can make do with identifying and relying on the reasons for deference in each particular case.

⁵¹ P Daly *A Theory of Deference in Administrative Law* (2012); M Lewans *Administrative Law and Judicial Deference* (2016); D Dyzenhaus 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed) *The Province of Administrative Law* (1997) 279; M Hunt 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth & P Keyland (eds) *Public Law in a Multi-Layered Constitution* (2003) 337; J King 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409.

As far as consensus is concerned, most scholars agree that there are several drivers of deference in judicial decision-making. On the one hand we have the constitutional mandate with which each arm of government has been endowed. This may be viewed as some form of plenary power in decision-making of a particular kind or over particular substantive areas. The belief is that, at the very least, each arm of government when acting as a check over the other should respect the plenary power. Included in this principle is the injunction against any arm of government assuming the plenary power of another. This prohibition is usually presented under the heading of the separation of powers. Other, more pragmatic, principles that one can use as justifications for deference focus on the institutional capacity of the courts to decide matters ordinarily governed by other branches of government.⁵² Acting as distinct reasons for deference, they could lead to a scenario in which a court may possess the constitutional mandate to check the power of another arm of government. This mandate, however, does not preclude the court from deferring to that arm of government on the basis of a disparity in the institutional competencies of the two institutions.⁵³ As a result, the justification for deference may rest neatly on an interpretation of the separation of powers, as well as the institutional features of the court and its capacity to decide certain matters.

These institutional reasons for deference have more recently been packaged by Aileen Kavanagh as a 'doctrine' of deference that is guided by the institutional capacity of the courts in adjudicating matters better suited to the deliberation of administrative or executive bodies.⁵⁴ These institutional reasons for deference are broken down into the greater institutional competence, expertise, or constitutional/democratic legitimacy of an administrative body to decide a matter. Kavanagh suggests that, instead of creating a distinction between policy and non-policy laden decisions (the former requiring deference and the latter not), the courts should instead make a distinction between 'the type of policy decision appropriate to the institutional features, competence, and legitimacy of the courts and the type of policy decision that is beyond that competence'.⁵⁵ This interpretation, and the focus on the competency of the court in relation to the subject matter in question, would mean that, for instance, the question of the fishing quotas dealt with in *Foodcorp*⁵⁶ and *Bato Star*⁵⁷ warranted deference of the court not by virtue of the fact that the decision involved an assessment of public

⁵² See J Jowell 'Due Deference under the Human Rights Act' in J Jowell & J Cooper (eds) *Justice/UCL Seminars* (2003). (Jowell argues that these two sets of justifications are distinct and should not be grouped together. Jowell separates the notion of constitutional competence or permissibility from institutional competence.)

⁵³ J Jowell 'Judicial Deference and Human Rights: A Question of Competence' in P Craig & R Rawlings (eds) *Law and Administration in Europe Essays in Honour of Carol Harlow* (2003) 67.

⁵⁴ See also C Sunstein and A Vermuele 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.

⁵⁵ A Kavanagh 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (2008) 194, 197.

⁵⁶ *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2004 (5) SA 91 (C).

⁵⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC).

policy (a separation of powers issue), but rather because the decision involved public policy *and* was beyond the ability of the court to make.

Trying to determine whether at least some of the above theory has manifested in case-law is not difficult. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,⁵⁸ O'Regan J, writing for the majority, held that deference in the review of administrative power springs from 'the fundamental principle of separation of powers'.⁵⁹ What emerges from this principle is a two-pronged test for determining the degree of deference appropriate in any given circumstance. The first factor is the appropriate role of the executive and the legislature in terms of the Constitution. This factor requires the Court's recognition of the democratic legitimacy of each branch of government and is therefore a reference point for the Court's boundary of intrusion. The second factor that the Court will consider is the institutional competence of the executive or legislature in comparison to its own.⁶⁰ In other words, the Court will remain alert and respond to its own institutional limitation and will not seek to venture too far into terrain for which it does not possess the necessary expertise or knowledge. Within this second element would exist concerns of polycentricity or other reasons typically used to justify the Court's lack of ability to scrutinise the merits of a decision taken by the executive or legislature. In reality, the standard adopted in judicial review is variable depending on the circumstances of each case.⁶¹

If one were to juxtapose PAJA review with its attendant mechanism of deference, alongside a principle of legality which the courts have not explicitly imbued with a notion of deference, one could argue that the principle of legality appears to be the more invasive form of review. The appearance becomes even more stark in the face of the continued expansion of the principle of legality's scope of review.⁶²

The implication of the judgment in *Motau* is that we can now discern two points in the public law review process where the choice for deference may be made. The first is situated in the act of deciding whether the exercise of a specific public power constitutes administrative action and manifests itself by characterising the power as executive in nature. Thus, acting as both reason for and consequence of the choice is the application of the less invasive legality review to the power in question.⁶³ The second location of deference occurs, in theory, within a PAJA review. For the time being, all we know for certain is that a court, after having decided that the decision should be tested against the grounds of review contained in PAJA, may calibrate the intensity of its scrutiny through the device of deference.⁶⁴

⁵⁸ Ibid.

⁵⁹ Ibid at para 46.

⁶⁰ Ibid at para 48.

⁶¹ Hoexter (note 31 above) at 502.

⁶² See L Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *South African Law Journal* 810.

⁶³ L Kohn 'Our Curious Administrative Law Love Triangle: The Complex Interplay Between PAJA, the Constitution and the Common Law' (2013) 28 *South African Public Law* 22, 33.

⁶⁴ Hoexter (note 32 above) at 184.

The difficulty that arises as a result of *Motau* is this: If deference is going to act as a reason for opting for a principle of legality review over a PAJA review, and PAJA review itself contains a mechanism for deference, then the deference offered by the principle of legality must be greater than that offered by PAJA review. If this is not the case, and we can achieve just as much deference under PAJA review as we can under the principle of legality, then there is little reason to opt for the principle of legality review. Our problem is that it is not entirely clear how the standards of review in the two forms of review differ. As demonstrated above, the current notion of deference is broad enough that a court can be just as deferential under one form of review as it can be under the other.⁶⁵ As such, one option may be to build in different principles of deference into each form of review where one is a greater constraint on judicial discretion than the other. The alternative option is to make a distinction between the intrusiveness of review on the basis of the grounds of review contained in each pathway. The feasibility of this latter option may take greater explication.

C Grounds of review

Putting aside deference as an option for distinguishing between PAJA review and the principle of legality, perhaps the next methodological option available is to assess how well the Court's distinction can rest on the argument that the two pathways of review each contain a distinct, albeit increasingly similar, set of grounds of review. It is possible that the Court views these distinctions as resulting in the difference in the intensity of review offered by each pathway. The validity of this perception hinges on grounds of review playing the determinative role in calibrating the standard of review attaching to each pathway of review.

At the outset we encounter the first problem. There are substantial overlaps between the grounds of review available under the principle of legality and PAJA review. Coupled with this, the Court has arguably closed the door to the option of distinguishing between the two pathways of review on the basis of differing levels of scrutiny where there are overlapping grounds of review. In *Democratic Alliance v President of the Republic of South Africa and Others*, the Court held that there was no need to believe that the test for rationality in terms of the principle of legality and PAJA review should be any different.⁶⁶ The Court went so far as to say that '[i]t 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'.⁶⁷ In other words, the Court stated that the overlapping grounds of review in the principle of legality and PAJA review work in the same way and should lead to the same outcome. This would make it difficult to argue that under a bifurcated model of deference, as suggested above, a court can arrive at two distinct outcomes when the same ground of review is used. This is despite reasons for deference nudging the court in two different directions.

⁶⁵ See C Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 *South African Law Journal* 222.

⁶⁶ *Democratic Alliance* (note 37 above) at para 44.

⁶⁷ *Ibid.*

This would then require us to read *Motau* as arguing that the non-overlapping grounds of review did the work in distinguishing the intensity of review in the principle of legality and PAJA review. There is some authority for this reading of the judgment. In *New National Party* Yacoob J argued that rationality was the more appropriate ground of review to use than reasonableness when testing legislative schemes.⁶⁸ Of course, the distinction between the forms of rationality review used for assessing legislation and public power may dilute the usefulness of Yacoob J's holding.⁶⁹ Nevertheless, in his note Price defends the Court's distinction of the two grounds of review on the basis that rationality acts as the 'baseline' standard which all public power (and legislative acts) must meet. Reasonableness on the other hand requires far more of the state as justification for its actions.⁷⁰ Therefore, if aspects of the ground of reasonableness only were available under PAJA review, then that would make this pathway of review more intrusive than the principle of legality.

This, in my view, is a difficult argument to make persuasively. Being most generous, one could argue that the grounds of review play an important role in modulating the intensity of the court's review. This has certainly been argued before. A compelling example of this argument is that the ground of rationality steers a court away from the merits of a decision and thus ensures a more deferential form of review.⁷¹ The same could be said of the ground of procedural fairness which has the explicit aim of reviewing only how a decision was made and not why it was made.⁷² However, even the most ardent believers in the usefulness of the grounds of review as a way to calibrate the intensity of review accept that each ground of review can be applied with a variable standard of review which sharply diminishes their independent ability to dictate the intensity of review.⁷³ The Court has certainly made clear that it does not regard grounds of review as possessing a single standard of intensity and that they can be applied in a manner that affords the decision-maker a variable degree of deference.⁷⁴ This has created an uneven standard of scrutiny applied by the Court in cases which have relied on the principle of legality's ground of rationality.⁷⁵

Aside from the reality that rationality does not offer a fixed standard of review, relying on a merits/procedure distinction as a way of tagging a ground of review as deferential or not, is problematic. On the spectrum of which grounds point

⁶⁸ *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC). The same point is made in *Pharmaceutical Manufacturers* (note 36 above) at para 78.

⁶⁹ See A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 37, 45.

⁷⁰ As suggested above, this is a common assumption. It seems intuitive that because rationality is an easier standard for the state to meet, it is less intrusive than a ground such as reasonableness.

⁷¹ M Fordham 'Surveying the Grounds: Key Themes in Judicial Intervention' in P Leyland & T Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 184, 189.

⁷² *Ibid.*

⁷³ P Craig 'The Common Law, Shared Power and Judicial Review' (2004) 24 *Oxford Journal of Legal Studies* 237.

⁷⁴ Price (note 69 above) at 54.

⁷⁵ A Price 'Rationality Review of Legislative and Executive Decisions: *Poverty Alleviation Network and Albutt*' (2010) 127 *South African Law Journal* 580.

towards the merits of the decision and which point towards process (the implication being that merit based review is inherently more intrusive than process-based review), lawfulness sits squarely on the merit side.⁷⁶ Given that the core of the principle of legality must be the ground of lawfulness, this should indicate that it is *more* invasive than grounds that, at least prior to the expansion of the principle of legality, are typically only found in PAJA review. This is clearly displayed in English law where courts arrogate to themselves almost unfettered power to decide questions of law.⁷⁷ On the merit/substance formulation, the question of deference seems to swing away from the core conception of 'legality'.⁷⁸ Yet, as has been made clear, lawfulness sits alongside, or even below, rationality as the lowest and easiest bar that public power must meet. It becomes less clear, when we delve into the minutiae, whether courts are more or less deferential when it comes to the ground of lawfulness.

Perhaps an even more fine-grained view of the problem may help to illustrate the difficulty in identifying which ground of review in its application is more or less deferential than another. As an example, take the grounds of lawfulness and reasonableness. With respect to a ground of lawfulness, there is less scope for a court to accept the state's argument that an action is lawful. The court will determine that on its own. In other words, there are fewer reasons to accept or add weight to justifications offered by the state. Yet asking whether an action is lawful is a far narrower question to ask than if the action was reasonable. On the other hand, when asking whether an action was reasonable, the court has the latitude to accept the state's assertion that the action is, indeed, reasonable. In fact, there may be good reasons for the court to do so. The court is thought not to be in a position to gauge for itself whether the action is reasonable. On the other hand, the question of whether an action is reasonable is far broader and more challenging for the state to provide justifications.

So, how then do we clearly, reliably and – most importantly – objectively, decide which threshold of review is actually higher? Take it as probabilities. The state is less probable to meet the higher threshold in reasonableness review, but more probable to fall under the reasons for deference. In lawfulness review, the state is more probable to meet the threshold, but less probable to be saved under reasons for deference. Given an equal number of similar cases going through each avenue of review, is it possible, *ex ante*, to tell which threshold will yield the most wins for the state?

What becomes clear from this view of the grounds of review is that the role of deference is far greater in calibrating the intensity of review than is typically acknowledged. The consequence is that grounds of review on their own have

⁷⁶ See Fordham (note 71 above) at 188. See also D Feldman 'Convention Rights and Substantive Ultra Vires' in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 245, 257.

⁷⁷ M Fordham *Judicial Review* (6th Edition, 2012) 196.

⁷⁸ C Saunders 'Constitution as a Catalyst' (2012) 10 *New Zealand Journal of Public and International Law* 143, 148. For further elucidation that courts are typically allowed to state their own opinion on questions of law, see T Endicott 'Questions of Law' (1998) 114 *Law Quarterly Review* 292; P Craig 'Judicial Review, Appeal and Factual Error' (2004) *Public Law* 788; R Williams 'When is an Error not an Error?' (2007) *Public Law* 793; HWR Wade 'Anglo-American Administrative Law' (1966) 82 *Law Quarterly Review* 226.

limited relevance in the calibration of the intensity of review.⁷⁹ In truth, it is more appropriate to focus our measure of the intensity of review on the order that the court deems necessary to award. It is the court's ruling as to what to do with the decision of the administrator or executive which alerts us as to the intrusiveness of the review. More specifically, we care more about whether a court has made a particular decision in circumstances which should instead have urged the court to show restraint, whether it be under the grounds of lawfulness, reasonableness, irrationality or procedural fairness. The mere fact that the court has asked the executive to proffer argument as to the reasonableness of its decision is not in and of itself dispositive of the intrusiveness of the judiciary. In other words, the intensity of the review is truly manifested in the reaction, and the acceptable range of reasons for that reaction, of the court to those arguments. Does the court accept them as sufficient on the basis of its lack of expertise or democratic legitimacy? Or does the court regard itself fully capable and under a constitutional obligation to stand in the way of a decision made by another branch of government? These are the questions which most directly signify the intrusiveness of the court and the manner in which it is calibrated.

For this picture to become clearer, it may be helpful to have a more detailed breakdown of the role of grounds of review in the review process. Mark Elliott has provided a useful deconstruction of the stages of deference in judicial review which provides a basis on which to picture the role of the various grounds of review.⁸⁰ Elliott begins by pointing out that deference can be broken down into two stages.⁸¹ The first stage he has termed the 'starting-point deference' which denotes the framework within which the adjudication takes place. The second is 'adjudicative deference', which is the deference available to the courts during the adjudicative process.

Starting-point deference is placed within the rubric of a justification thesis.⁸² Elliott argues that the first step a court takes in setting the intensity of review applicable in relation to an impugned decision is to set the bar that the state has to reach in order to justify that decision. This the court does by framing the review in terms of the grounds under which the review will take place. Each ground is accompanied by a standard of justification that is either more or less burdensome on the state in terms of the justification that it must offer. Therefore, asking whether a decision is reasonable is less deferential than asking if the decision is

⁷⁹ I would not go as far as Allan's depiction of grounds of review as lacking in meaning, being empty vessels, which only take tangible form when applied to particular circumstances. See TRS Allan 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' (2003) *Public Law* 429. See also R Posner 'What is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part I' (2016) 19 *Green Bag* 187 (A similar critique of standards of review in the United States).

⁸⁰ M Elliott 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in M Elliott & H Wilburg (eds) *The Scope and Intensity of Substantive Review* (2015) 61.

⁸¹ See also Price (note 69 above) at 53. (Price makes a similar argument. His argument is, however, less nuanced than that of Elliott. Price seems to make a hard distinction between the variability of review offered by choosing the ground of review, and the variability achievable within the ground of review. Elliott on the other hand takes into account the inseparability of the two forms of variability. He accepts that the variability offered by one can be mediated, enhanced or modified by the variability offered by the other.)

⁸² Elliott (note 80 above) at 66.

rational or lawful. The variation in the standard of review or intensity of review is thus established by choosing to subject the decision to higher or lower standards of justification.

The second stage of the process of calibrating the intensity of the review takes place during the course of adjudication. This stage Elliott titles ‘adjudicative deference’. Here the court must decide whether the state has met the justificatory burden set by the applicable grounds of review. This gives the court the opportunity to take into account all the peculiar circumstances of the case before it. In particular, the court may consider the importance of the fundamental value impacted by the impugned decision or the normative considerations regarding its ability to make a decision with respect to the impugned decision. In other words, the court may place greater weight on the reasons offered by the state if the court believes, for instance, that the state is better placed to understand the factors involved in the decision.

The problem here is that if the level of intrusiveness is calculated only after both the ground of review and the level of applicable deference are taken into account, how then does one compare the level of intrusiveness of grounds of review as an objective fact? Adjudicative deference is a variable contingent on the facts of a particular case. Unless deference is objectively understood to respond differently to each ground of review in a way that ensures that each ground of review is more or less intrusive, then there is no basis to place them in a hierarchy of least to most intrusive forms of review.

Perhaps another way to view the issue is to consider what we typically understand ‘intrusion’ to entail. When the judiciary is accused of an overly-intrusive judgment, the harm is characterised as a separation of powers breach, or, less commonly, an instance of a court grappling with issues beyond its understanding. Given this, we would ordinarily say that a ground of review is unduly intrusive when it has produced either of these harms. More particularly for our purposes we need to determine at what point during the review can we expect to see either of these harms materialise. Plainly, one could not argue that the harm of a separation of powers breach, or a competence concern arises when the court identifies the applicable ground of review. By asking whether a decision was reasonable or rational and having the decision-maker put up justifications for its decision that meet the acceptable standard cannot mean that the court has substituted its decision for that of the decision-maker. It is only when the court attempts to pass judgment on whether the justifications are sufficient in meeting the applicable standard that we are concerned about the court’s expertise, competence or democratic legitimacy. It is when attempting to decide whether the justifications are satisfactory that a court will employ some form of adjudicative deference. Without an *ex ante* understanding of that deference, there is no way to determine whether the court will be intrusive before the case is decided.

What we have shown is that grounds of review do little by themselves to calibrate the intensity of review. As such, they constitute a poor basis for distinguishing between the levels of intensity offered by either legality or PAJA review. A necessary component of such a distinction is the form of deference that a court is compelled to use in a legality or PAJA review. Yet with the un-nuanced understanding of deference that the courts have developed, it may be too early

to label either pathway of review as necessarily being more deferential than the other.

Perhaps, then, the argument should be that the primary function of the grounds of review by themselves is not to play the definitive part in the calibration of the intensity of review, but instead to perform an organisational role in the review process. The grounds of review primarily indicate the questions the court is asking the decision-maker and indicates to the decision-maker what type of justifications it must put forward in order to meet the applicable standard. They perhaps have the incidental effect that greater substance of the decision may fall under the scope of the review when certain grounds are applied as opposed to others. However, the identity of the ground by itself has little effect on the intrusiveness of the review, other than the manner in which the court assesses the justification of the decision-maker.

This issue may, however, be little more than an academic debate. The overlapping grounds of review under the principle of legality and PAJA may make relying on the content of the two pathways for a distinction all but impossible. In reality, the potential for the expansion of the principle of legality is endless. The principle's generality means that it could, in theory, include all the elements that reside in PAJA and perhaps much more.⁸³ The risk of all review collapsing into legality review becomes more than a notional concern with the Court's proclamation of the open-textured nature of the principle of legality.⁸⁴ This is not at all surprising and is maybe not a bad idea.⁸⁵ As the nature of the decisions that are taken on review evolve, there may be a corresponding need for the tools with which a court conducts review to evolve. Despite this, the more obvious concern is this: What are thought to be the more deferential of the grounds of review that exist under the principle of legality, also exist under PAJA review. In other words, the reason that the Court may like to turn to the principle of legality also applies with respect to PAJA review.

If the Court hopes to maintain that a desire to show greater deference is a reason to choose to apply the principle of legality over PAJA review, then greater work needs to be done on the manner in which the principle of legality operates. The Court should aim to ensure that the nominally deferential grounds of review in the principle of legality and those in PAJA review produce two distinct degrees of deference. This can perhaps best be achieved by defining *and* distinguishing the various forms of adjudicative deference that apply with respect to the grounds of review within the principle of legality and PAJA review respectively. A more extreme solution that maintains the distinction between the principle of legality and PAJA review on the basis of a difference in the grounds of review that each

⁸³ C Hoexter 'The Rule of Law and the Principle of Legality in South African Administrative Law Today' in M Carnelley & S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 55. See also Price (note 44 above) at 656.

⁸⁴ See Sachs J's judgment in *New Clicks* (note 28 above) at para 614 (states that legality 'is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner').

⁸⁵ UK courts have similarly acknowledged that grounds of review are a multiplying breed of tools. See Fordham (note 71 above).

contains is for the Court to end, and possibly reverse, its campaign to make the principle of legality into the more flexible and robust analog of PAJA review.

V THE FUTURE OF THE PRINCIPLE OF LEGALITY

The principle of legality is obviously an important development in the Court's jurisprudence. PAJA both explicitly excludes executive and legislative decisions, as well as other important exercises of public power, from its ambit. Added to this, the legislation presents courts with the difficult task of deciding what constitutes 'administrative action'. The possibility that significant decisions of public authorities are unreviewable is unthinkable, and so the principle of legality fills a potential gap of accountability. Despite its functional use, however, remarkably few attempts have been made to critique the doctrine on its own terms. Much has been written about the doctrine's relationship with PAJA, but few have attempted to explain the borders, mechanics or justifications of this legal instrument developed by the Court.⁸⁶ Here, I only intend to raise a few issues that relate specifically to the question of the principle's standard of review.

The manner in which the Court has approached the review of exercises of public power has meant that when the impugned decision is shown or assumed not to be administrative in nature, the appearance of the principle of legality has been somewhat unpredictable. In fact, it appears that the Court typically raises the principle explicitly only in instances where it is debatable whether the power being exercised is administrative in nature or not. In other words, it only seems to get mention when a central issue before the court is whether PAJA should apply. The lack of predictability is compounded by the Court's relative silence with respect to the reasons for choosing one form of review over another. This pattern of judicial modesty is most apparent in rights-based adjudication where the Court, on the one hand, fails to develop or explain a relationship between PAJA review and review of decisions argued to effect rights.⁸⁷ On the other hand, the Court, after holding that the decision under review is not administrative in nature and therefore does not require the application of PAJA, does not seek to find if the principle of legality should apply.

A recent example is *Shuttleworth*, where the Court dealt with the ministerial decision to impose a 10 per cent levy on wealth transferred abroad. In *Shuttleworth*, Moseneke DCJ laboured through the process of showing that the decision was not administrative in nature and yet made no mention of the principle of legality.⁸⁸

⁸⁶ See Price (note 44 above) at 658 (Raises a fundamental question regarding the justification of the principle of legality). See also Fowkes (note 21 above) at 23.

⁸⁷ S Rose-Ackerman, J Fowkes & S Egidy *Due Process of Lawmaking: The United States, South Africa, Germany and the European Union* (2016) 150. See also *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3, 2008 (4) SA 458 (CC), 2008 (6) BCLR 601 (CC), 2008 (2) SACR 1 (CC) (the Court was especially intrusive in the case of a fundamental rights violation).

⁸⁸ See *South African Reserve Bank and Another v Shuttleworth and Another* [2015] ZACC 17, 2015 (5) SA 146 (CC), 2015 (8) BCLR 959 (CC) at para 35. (Moseneke DCJ relies on *Permanent Secretary of the Department of Education and Welfare, Eastern Cape Province and Another v Ed-U-College* [2000] ZACC 23, 2001 (2) SA 1 (CC), 2001 (2) BCLR 118 (CC) to show that the decision was one of high policy and therefore did not constitute an administrative decision.)

The result is the seemingly haphazard use of a broad and general principle and the unpredictable application of a standard of review to any given case.⁸⁹

It is clear that the principle of legality as an abstract value is expected of all exercises of public power. What *Motau* has pointed out is that the principle is used directly by courts with respect to some categories of powers, while with others the courts adopt some form of proxy that achieves the same aim.⁹⁰ The problem remains that there are cases on the fringes of these categories that receive uneven application of the principle of legality. This uneven distribution of the principle of legality has been pointed out before. However, *Motau* reveals the tension that underlies the broad application of the principle of legality. Quite simply, in instances where the principle is used, ignored, or simply not mentioned, there is no clear distinction between the standards of review that apply to these categories of decisions.

However, developing a coherent doctrine of use for the principle of legality with its attendant standard(s) of review is not an easy task. In order to accomplish this, the Court must take into account that the principle applies to the exercise of all public power and principally applies to decisions of the executive and legislative branches of government. The trick will be to develop standards of review and therefore methods of deference that are responsive to the nature of power under review as well as peculiar circumstances that arise in any review, without expanding the width of variability to the point of arbitrariness.⁹¹

What complicates this task is that these are very broad categories and contain institutions of various types that exercise powers of various natures. As discussed above, standards of review, and our desire to show deference, to a large extent, is dependent on principles of separation of powers and institutional competence. Under the umbrella of these principles, one could pack a great number of norms that would form the justification for a court's demeanour towards a particular decision. For instance, the separation of powers guards liberty against a tyrannical state, and enhances democratic accountability.⁹² Matching tasks according to institutional competence may enhance democratic accountability by publically and transparently ensuring that a decision is taken by the institution most capable of producing the superior decision.⁹³ The complication arises as any governmental institution which possesses powers or functions that are either executive or legislative in nature could inhabit a place within the constitutional scheme which would have different implications with respect to any of these

⁸⁹ Further examples include *MEC for Social Development, Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZASCA 88 (the SCA bases its decision squarely on the separation of powers and does not refer to the principle of legality) and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2012 (4) SA 618 (CC), 2010 (5) BCLR 457 (CC).

⁹⁰ See also H Corder 'Reviewing Executive Action' in J Klaaren (ed) *A Delicate Balance, The Place of the Judiciary in a Constitutional Democracy* (2006) 73, 76.

⁹¹ See M du Plessis & S Scott 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 *South African Law Journal* 597.

⁹² See A Huq 'Libertarian Separation of Powers' (2014) 8 *New York University Journal of Law and Liberty* 1006. See also J Waldron *Political Political Theory* (2016) 63. (Waldron has argued that separation of powers furthers the rule of law. By slowing down the process of decision-making, separation of powers promotes regularity and stability.)

⁹³ A Huq 'The Institution Matching Canon' (2015) 106 *Northwestern University Law Review* 417.

norms. For instance, an executive agency could be under direct control of a ministerial department and thus more democratically accountable. On the other hand, the same agency could be independent of any executive control and thus be less accountable. Review in each instance would be calibrated differently in order to account for this distinction.

The complications are not limited to identifying the plurality of norms that drive the formulation of the standard of review. These norms can also conflict with one another. For instance, in the example above, the independent executive agency could be applying its executive powers to highly complex issues. On the one hand, the court is faced with an unaccountable institution which may encourage it to apply a stricter standard of review. Yet on the other hand, its lack of competence may necessitate a more lenient approach. Standards of review that comprise the principle of legality will have to take this into account.

With the principle of legality, the problem is compounded with the application of the principle to a far broader array of institutions than those within the traditional conception of ‘public bodies’. In *AAA Investments*, the Court accepted that any institution, whether private or public in origin, that performs a public function is considered to be an ‘organ of state’ under s 239 of the Constitution.⁹⁴ The decisions of these institutions, if also considered executive in nature, are then subject to review under the principle of legality. This opens the door to a substantial variety of institutions that exhibit an inexhaustible number of characteristics relevant for the application of a standard of review.

It may be that the Court would prefer that the principle of legality remain broad and obscure, and its application remain unpredictable. Such latitude allows the Court to achieve other aims, such as the preservation of its own legitimacy or the flexibility to respond to peculiar facts of individual cases. Courts may, within the space created by the principle of legality, whether explicitly used or not, operate based on motives removed from the strict doctrinal considerations of law. This doctrinal vacuum would allow for the more pragmatic style of decision-making that some scholars have noted.⁹⁵ Despite being faced with the task of determining constitutional meaning, courts focus on their appropriate or strategic role in the adjudicatory process.⁹⁶ If *Motau* is read to further the objective of increasing judicial latitude, then the pleasant aspect of its reasoning could be that, in clearly pointing out the pragmatic use of the principle of legality and the notion of deference, the Court was being more transparent than it usually is.⁹⁷

⁹⁴ See *AAA Investments v Micro Finance Regulatory Council and Another* [2006] ZACC 9, 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) at para 30. This was confirmed in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC) at para 53. See also M Finn ‘Allpay Remedy: Dissecting the Constitutional Court’s Approach to Organs of State’ (2015) 6 *Constitutional Court Review* 258.

⁹⁵ See, eg, T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

⁹⁶ See also most recently D Strauss ‘The Supreme Court, Foreword: Does the Constitution Mean What It Says’ (2015) 129 *Harvard Law Review* 1 (Argues that courts ought to, and do, take into account extraneous factors in order to determine what its appropriate role is as opposed to a process which focuses entirely on the constitutional text).

⁹⁷ Something that would be welcomed by some. See S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *South African Law Journal* 762.

On the other hand, the Court in *Motau* could have made a valuable initial step in making what is a complicated bifurcation of administrative law more workable. Simply, if we know what each pathway of review is for and when to use them, we will have a simpler review process.

VI CONCLUSION

What has become quite clear is that there needs to a better dividing line between the principle of legality and PAJA review. If ever it was suitable to point to the distinct grounds of review each contains in order to tell them apart, it is difficult to see how that can be justified with current case law. The same can be said of the use of any notion of deference that the Court may currently have. Yet the Court in *Motau* has quite clearly claimed that the two pathways of review can be distinguished based on their distinct standards of review. On the basis of this claim, the belief is that the principle of legality is the more appropriate pathway of review in cases dealing with executive decisions. This is so important a distinction that the Court argues that it should play a role in the determination of what is or is not executive action. The overall conclusion is that the principle of legality, in the Court's mind, should be thought of as a less invasive form of review than administrative law review and used when the court feels that deference is owed to the decision-maker.

These findings create a puzzle that I think should be, at least partially, the focus of the Court's efforts in the development of the judicial review of exercises of public power. This note, I hope, points towards a few issues that should be of concern. The primary point is that standards of review are made up of two components which have a complicated relationship with one another: the questions being asked of the impugned decision, and the degree of receptivity of the court to any answers that the state puts forward. Both should be clearly articulated in a set of review mechanisms if we are to assume that one is more or less deferential than the other. As a corollary step, courts may have to reconsider the expansion of the principle of the legality which increasingly looks like PAJA review and, instead, focus on finding the distinguishing features of the two forms of review.