Journal of African Law (2025), 1–19
doi:10.1017/S0021855325100788

RESEARCH ARTICLE

South African Lessons for the Development of the Doctrine of Legality in Lesotho

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(Accepted 28 March 2025)

Abstract

The touchstone of judicial review in Lesotho for a long time has preeminently been the *ultra vires* principle. The modern conception of the doctrine of legality as a constitutional device to control the exercise of public power has not been a prominent feature of Lesotho's public law. It has only gained traction recently. The superior courts in Lesotho – the High Court and the Court of Appeal – have ruled that the expansive doctrine of legality is now the cornerstone of constitutionalism in the country. In this new trajectory, they rely mainly on the well-developed South African legality jurisprudence. This development of constitutional law in Lesotho is laudable. However, the extent to which South African jurisprudence can inform Lesotho on this subject remains a matter of controversy. This article examines the "importation" of South African jurisprudence on legality into Lesotho, the lessons that Lesotho can derive and the future development pathways for legality in the country.

Keywords: constitutionalism; judicial review; legality; Lesotho; rule of law; South Africa

Introduction

This article analyses how Lesotho's nascent legality jurisprudence can be enhanced with lessons from a much more developed South African legality jurisprudence. This is set against the backdrop of an emerging trajectory in Lesotho to utilise the modern conception of legality to enhance the judicial review of the exercise of public power. The principle of legality is emerging as the most critical device of modern-day constitutionalism.[1] As an offshoot of the hallowed and time-honoured doctrine of the rule of law,[2] legality still obliges public functionaries to source their actions in

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1 TR Allan "Questions of legality and legitimacy: Form and substance in British constitutionalism" (2011) *International Journal of Constitutional Law* 155; D Dyzenhaus, M Hunt and M Taggart "The principle of legality in administrative law: Internationalisation as constitutionalisation" (2001) 11 *Oxford University Commonwealth Law Journal* 5; D Meagher "The principle of legality as clear statement rule: Significance and problems" (2014) 36/3 *Sydney Law Review* 413; B Chen "The principle of legality: Issues of rationale and application" (2015) 41/2 *Monash University Law Review* 329.

2 In *Affordable Medicines Trust and Others v Minister of Health* 2006 3 SA 247 (CC) (*Affordable Medicines Trust*) at para 49, the Constitutional Court of South Africa said: "The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution". See also RH Fallon "The rule of law as a concept in constitutional discourse" 1997 *Columbia Law Review* 1; R Henrico "Re-visiting the rule of law and principle of legality: Judicial nuisance or licence?" (2014) *Journal of South African Law* 742.

law.[3] It has evolved to demand much more than formal compliance with the law or the black letter of the law.[4] It is no longer sufficient that legislative, administrative and executive actions are grounded in law; such actions must also be justifiable in light of the broader constitutional values.[5] Like accountability, legality demands that the actions of public functionaries be justifiable in the broad sense.[6] This is an innovation of contemporary constitutionalism. Orthodox constitutionalism has primarily focused on restraining government activity, hence its label in some literature as "negative constitutionalism".[7]

Conversely, the new constitutionalism – styled "positive constitutionalism" – still limits government activity, but its newly developed devices, such as legality and accountability, impose positive obligations on public officials to justify their actions within the broader constitutional framework. South African constitutionalism is emerging as the prototype of this new model.[8] Hence, the South African Constitution is styled "post-liberal".[9] This is because, while it upholds the liberal principles of constitutionalism, such as the rule of law, separation of powers, equality, constitutionality and respect for fundamental rights, it also transcends these traditional liberal tenets. It places positive obligations on the state through innovative devices such as legality, rationality, justification, accountability and justiciability of social and economic rights.[10] Therefore, the principle of legality is inherent in a constitutional model based on justification, such as the South African model.[11]

In Lesotho, legality has, until recently, not been developed beyond its classical conception as a narrow ground of judicial review of administrative decisions. Legality has been conceived as one of the traditional three heads under which an administrative decision can be reviewed. Courts in Lesotho have tenaciously followed the three grounds of judicial review set out in the time-honoured decision of the House of Lords in *Council of Civil Service Unions (CCSU) and Others v Minister for the Civil Service*.[12] Therein, the House of Lords authoritatively stated the three heads under which administrative action can be reviewed: illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety. By illegality, the court meant that "the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it".[13] Courts in Lesotho

3 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*Fedsure*). In para 56, the Constitutional Court of South Africa said: "[T]he exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law".

4 A Young "Prorogation, politics and the principle of legality" (13 September 2019) *UK Constitutional Law Blog*, available at: <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> (last accessed 12 July 2024).

5 IJ Kroeze "Doing things with values: The role of constitutional values in constitutional interpretation" 2001 *Stellenbosch Law Review* 265.

6 M Cohen-Eliya and I Porat "Proportionality and the culture of justification" (2011) 59/2 *The American Journal of Comparative Law* 463; O Gerstenberg "Negative/positive constitutionalism, 'fair balance,' and the problem of justiciability" (2012) 10/4 *International Journal of Constitutional Law* 904.

7 SA Barber "Fallacies of negative constitutionalism" (2006) 75 *Fordham Law Review* 651.

8 J Van Der Walt and H Botha "Democracy and rights in South Africa: Beyond a constitutional culture of justification" 2000 *Constellations* 341; C Steinberg "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 123/2 *South African Law Journal* 264.

9 T Roux "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009) 20/2 *Stellenbosch Law Review* 258; K van Marle "Transformative constitutionalism as/and critique" 2009 *Stellenbosch Law Review* 286.

10 For a persuasive analysis of post-liberal constitutionalism, see JM Farinacci-Fernós "Post-liberal constitutionalism" (2018) 54 *Tulsa Law Review* 1. For a discussion of the nuances of the enforceability of socio-economic rights in South Africa see E Mureinik "Beyond a charter of luxuries: Economic rights in the constitution" (1992) *South African Journal on Human Rights* 464; F Michelman "The constitution, social rights, and liberal political justification" (2003) *International Journal of Constitutional Law* 13.

11 C Hoexter "The principle of legality in South African administrative law" (2004) 4 *Macquarie Law Journal* 165.

12 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 All ER 935.

13 Ibid.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

have followed *CCSU* as the blueprint for the country's judicial review jurisprudence. This comes as no surprise, considering that, as a former British colony, Lesotho's public law has consistently been based on British constitutional principles since its independence in 1966.

Even though the country has always had a written constitution since the return to constitutional democracy in 1993, with a supremacy clause,[14] the organization of state institutions and the fundamental constitutional ethos have always been British-based – a view unanimously shared in academic literature and judicial pronouncements in Lesotho.[15] One of the most critical features of this constitutional tradition, based on the British doctrine of parliamentary sovereignty,[16] is that the "intention of the parliament" is sacrosanct.[17] The courts' role when scrutinizing legislation is narrower: it is limited to the mechanical and formal exercise of understanding and seeking to effectuate the intention of the parliament. Courts seldom inquire into the substantive aspects of the legislation, such as its morality and rationality.[18] The cornerstone of this approach is the doctrine of *ultra vires*, which permits courts to set aside the actions of public officials if they exceed the scope of the empowering legislation.[19] The courts in Lesotho subscribe to this approach. The *ultra vires* doctrine has been the fulcrum of judicial review in Lesotho.[20] This model of judicial review, which is limited to investigating parliament's intentions, is weak.

However, a tectonic shift is underway: recent decisions of the superior courts in Lesotho appear to have ended this longstanding approach, and the principle of legality is now the guiding principle of that approach. There is a discernible series of leading decisions by the superior courts that have expanded the approach to judicial review, thrusting the doctrine of legality to the centre of judicial review in the country. This approach is apparent in decisions such as *Principal Secretary, Ministry of Foreign Affairs and International Relations v Maope*,[21] *All Basotho Convention v Speaker of the National Assembly*[22] and the recent decision of the High Court (sitting as the Constitutional Court) in *All Basotho Convention v The Prime Minister*.[23] These cases rely to a great extent on South African constitutional jurisprudence on the principle of legality. This approach should be commended for its contribution to the development of Lesotho's constitutional jurisprudence. It keeps the Constitution

14 Constitution of Lesotho 1993, s 2.

15 *Law Society of Lesotho v Ramodibedi* (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003); *Mapesela v Speaker of the National Assembly* (Cons No 07/2021) [2022] LSHC 102 (4 February 2022); *Attorney General v His Majesty the King and Others* (CONS/CASE 2 of 2015) [2015] LSCA 1 (12 June 2015); K Matlosa "Political instability and elections: a case study of Lesotho" (1997) 3/2 *Lesotho Social Sciences Review* 93.

16 C Hoexter *Administrative Law in South Africa* (2nd ed, 2012, Juta) at 111. The author notes: "The doctrine … is tied to constitutional fundamentals associated with the Westminster system: separation of powers, parliamentary sovereignty and the rule of law …The legislature is the supreme lawmaker, while the function of the courts is to apply the law made by it".

17 A Allen and M Thomson *Cases and Materials on Constitutional and Administrative Law* (9th ed, 2008, Oxford University Press) at 541. The authors observe that "[i]n some countries … the judges are permitted to review legislation in order to establish whether it complies with the … constitution. In the United Kingdom, the absence of a written constitution with the status of a high law and the doctrine of parliamentary supremacy prevent the judge from exercising this role". See also J Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (2010, Cambridge University Press).

18 In *Collins v Minister of the Interior* [1957] 1 All SA 227 (A) at 233, Centlivres CJ specifically stated that "[i]f the provisions of a law are clear, we, as a court, are not concerned with the propriety of the legislation or policy of the legislature, our duty is to administer and interpret it as we find it". See also the *dictum* of Curlewis JA in *Builders Limited v Union Government (Minister of Finance)* 1928 AD 46 at 56.

19 *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

20 H 'Nyane "Judicial review of the legislative process in Lesotho: Lessons from South Africa" (2019) *Potchefstroom Electronic Law Journal* 1.

21 *Principal Secretary, Ministry of Foreign Affairs and International Relations v Maope* (C of A (CIV) 52/18) [2019] LSCA 12 (31 May 2019).

22 *All Basotho Convention and Others v Speaker of National Assembly and Another* (CIV/APN/406/2016) [2017] LSHC 1 (23 February 2017), available at: <https://lesotholii.org/akn/ls/judgment/lshc/2017/1/eng@2017-02-23> (last accessed 24 August 2025).

23 *All Basotho Convention and Others v The Prime Minister and Others* (Constitutional Case No 0006/2020) [2020] LSHCONST 1 (17 April 2020) (*All Basotho Convention v The Prime Minister*).

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

of Lesotho (the Constitution) abreast with modern trends in constitutional law. The judiciary in Lesotho is often known for its reticence and conservatism, and the superior courts cite the outdated nature of the Constitution as their reason for not being more progressive.[24] These recent decisions on the principle of legality are among the few cases where the superior courts in Lesotho have been positively influenced by general public law developments and, in particular, constitutional law. While this is a laudable development for constitutional law in Lesotho, the extent to which South African jurisprudence can inform Lesotho's approach to this subject remains a matter of controversy.[25]

The article is divided into three substantive parts. The first part reconceptualizes the notion of legality and the state of art in its development. The second part focuses on South Africa as the country from which Lesotho imports the modern concept of legality. The third part analyses how the doctrine has "migrated" to Lesotho, its possible prospects, challenges and development.

Methodological considerations

This article studies constitutional designs in two neighbouring southern African countries: Lesotho and South Africa. Hence, it is a comparative study that requires comparative constitutional law methodological tools. Comparative constitutional law is emerging as the most critical area of constitutional studies.[26] In an increasingly globalized world, the cross-pollination of constitutional values between and among constitutional designs is inevitable. As an offshoot of general comparative law, comparative constitutional law proceeds from the candid acceptance that constitutional law develops through the "migration" of certain universal values and doctrines. Although it is widely accepted as both a method and a substantive subject of constitutional studies, comparative constitutional law is not without controversy. Legal families, in general, and constitutional designs, in particular, have been in the crosshairs of colonization everywhere. As Joireman notes, "[e[ffective colonisation in Africa demanded a legal system to both maintain control of a country and resolve disputes within it. Everywhere the colonial metropoles established their own systems of law".[27] Hence, as a result of this "legal imperialism",[28] the study of comparative constitutional law has by and large been criticized for studying how prominent legal families have performed across the world with utter disregard for indigenous legal systems. In former colonies like Lesotho, which operate under both the received Roman-Dutch common law and customary law, disproportionate attention has been given to developing the received common law, often at the expense of indigenous law.[29] Notwithstanding these downsides, the comparative legal method remains one of the best ways of studying law. It is widely accepted that one of the prime purposes of comparative legal methods is to improve one's own legal

24 For instance, see *Khathang Baitsokoli and Another v Maseru City Council and Others* (C of A (CIV) No 4/05).

25 In most cases, the courts refuse to follow the South African example because the South African Constitution embodies most of these progressive notions. In *Development for Peace Education v Speaker of the National Assembly* (Constitutional Court Case No 5/2016) the Constitutional Court of Lesotho clearly refused to follow the jurisprudence in South Africa and said in para 55: "The South African Constitution is one of the most progressive constitutions of the world today, but this court should be circumspect when applying the valuable constitutional jurisprudence of the South African courts". In the recent case of *Mochochoko v Prime Minister* (CIV/APN/141/2020) (unreported), the High Court refused to accept the argument to liberalize the rules of standing in public law cases in line with the South African Constitutional Court's decision in *Ferreira v Levin* 1996 1 SA 984 (CC). The court said that "[i]t will readily be observed that *Ferreira* is distinguishable from this case as it was dealing with the issue of standing in constitutional challenges within the context of the South African Constitution".

26 VC Jackson and MV Tushnet *Comparative Constitutional Law* (2006, Foundation Press).

27 SF Joireman "Inherited legal systems and effective rule of law: Africa and the colonial legacy" (2001) 39/4 *The Journal of Modern African Studies* 571 at 571.

28 JQ Whitman "Western legal imperialism: Thinking about the deep historical roots" (2009) 10/2 *Theoretical Inquiries in Law* 305.

29 S Poulter "The common law in Lesotho" (1969) 13/3 *Journal of African Law* 127; JE Beardsley "The common law in Lesotho" (1970) *Journal of African Law* 198; WCM Maqutu and A Sanders "The internal conflict of laws in Lesotho" (1987) 20/3 *Comparative and International Law Journal of Southern Africa* 377.

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system. The comparative legal method helps to understand better the history, traditions, values and future development pathways of a constitutional design.[30] In contemporary times, there are multiple drivers of comparative constitutional law, including the global spread of democratic values, the universalism of human rights and the increased propensity to harmonize rules in areas such as trade, among others.[31] This has rendered the comparative legal method very popular among constitutional researchers, judges and practitioners.[32] Some constitutions, like South Africa's, have even made it a constitutional imperative. Section 39 of the Constitution of the Republic of South Africa empowers courts to "consider foreign law" when interpreting the Bill of Rights.[33]

The comparative constitutional law method is a composite idea: it entails multiple methodical approaches to the study of law in general and constitutional law in particular. Jackson intelligibly divides them into five categories.[34] However, three approaches are relevant to this study: classificatory, historical and universalistic. The first, the classificatory approach, organizes legal systems into "legal families", such as common law and civil law.[35] For instance, Lesotho and South Africa are common law countries that use Roman-Dutch common law. Ironically, their constitutional designs are markedly different: Lesotho is based on the Westminster system, while the new South African design intentionally abandons Westminster's precepts.[36] The second category, the historical approach, is "concerned with understanding the development of constitutional law or constitutional systems over time".[37] Under this approach, the idea is to study how the two systems being studied have evolved. They may have similar or dissimilar histories, but the scholar must know their historical realities.

The third category, the universalistic approach, acknowledges that specific transcendental and universal values are applicable universally.[38] Therefore, these values can be easily "migrated" from one constitutional typology to another.[39] Kommers's description best captures its thrust: "principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community".[40] These principles evolve across jurisdictions. In constitutional studies, this transcendentalism is more pronounced.

These three approaches are relevant to the study of the migration of constitutional precepts between these two countries. The two countries share many similarities: they belong to the same common law family (Roman-Dutch law), are geographically proximate (Lesotho is an enclave within South Africa) and have significant cultural and economic ties, among other commonalities.[41] However, historically, the constitutions of these two countries have developed in diametrically divergent routes. Lesotho's constitutional design has been heavily influenced by British design since its independence from Britain in 1966, and the present South African Constitution serves as the lodestar for the country's transformation from apartheid to the new democratic dispensation. Among its

30 VC Jackson "Comparative constitutional law: Methodologies" in M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012, Oxford University Press) 54.

31 G Samuel *Research Methods in Law* (2017, Routledge).

32 G Jacobsohn and M Schor (eds) *Comparative Constitutional Theory* (2018, Edward Elgar Publishing).

33 South African Constitution 1996, s 39(1)(c).

34 Jackson "Comparative constitutional law", above at note 30 at 56: "The world of comparative constitutional scholars includes several broad classes of methodological approach, which this chapter describes as (1) classificatory, (2) historical, (3) normative, (4) functional, and (5) contextual".

35 Ibid.

36 H Kotzé "The new parliament: Transforming the Westminster heritage" in M Faure and J Lane *South Africa: Designing New Political Institutions* (1996, SAGE Publications) 252.

37 Jackson "Comparative constitutional law", above at note 30 at 58.

38 M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012, Oxford University Press) at 54.

39 DP Kommers "The value of comparative constitutional law" (1976) 9 *John Marshall Journal of Practice and Procedure* 685.

40 Id at 692.

41 RF Weisfelder "Lesotho and South Africa: Diverse linkages" (1971) 18/2 *Africa Today* 48.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

transformative features is the intention to depart from the classical Westminster conceptions, such as parliamentary sovereignty. In developing this constitution to realize its transformation purpose, courts in South Africa have impressively developed universalistic principles, such as legality, the rule of law, accountability and human rights, among others. Their approach to these doctrines has been the allure of courts in other countries like Lesotho.

Conceptual framework: re-visiting the notion of legality

The orthodox approach

The requirement that the exercise of public power must comply with legal prescription has always been at the centre of public law.[42] It is justified by two constitutional doctrines – the rule of law[43] and parliamentary sovereignty.[44] In its classical formulation, the rule of law emerged as the antithesis of discretion and arbitrariness.[45] While the doctrine has advanced greatly in recent times – to the extent of including meta-legal matters[46] – its basic formulation is usually credited to the English constitutional authority, Dicey.[47] He formulated the rule of law as a doctrine that exalts (a) the supremacy of the ordinary law against arbitrariness, (b) equality before the law and subjection of all to the jurisdiction of the ordinary courts and (c) respect for fundamental rights.[48] The first aspect – which obliges public functionaries to base their decisions on a law of general application – is the one that inspires the modern-day notion of legality. Today, the judiciary continues to observe this symbiotic relationship between the rule of law and legality. As noted by the Constitutional Court of South Africa in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*,[49] "a fundamental principle of the rule of law, recognised widely, [dictates] that the exercise of public power is only legitimate where lawful … this principle of legality is generally understood to be a fundamental principle of constitutional law".[50]

42 H Wade and CF Forsyth *Administrative Law* (7th ed. 1994, Clarendon Press) at 41 and 44. The authors state that "[t]he simple proposition that a public authority may not act outside its powers (*ultra vires*) might fitly be called the central principle of administrative law … the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power". See also D Oliver "Is the ultra vires rule the basis of judicial review?" 1987 *Public Law* 543.

43 In *Fedsure*, above at note 3, para 56, the Constitutional Court of South Africa said that "[t]he rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law". See also the Canadian Supreme Court decision in *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* [1998] 2 SCR 217. In para 72, the court said: "The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical … Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution".

44 TR Allan "Legislative supremacy and the rule of law: Democracy and constitutionalism" (1985) *Cambridge Law Journal* 111.

45 J Jowell "Beyond the rule of law: Towards constitutional judicial review" (2000) *Public Law* 671.

46 F Hayek *The Constitution of Liberty* (1960, University of Chicago Press) at 205 defines the rule of law not only in narrow "legalistic" terms but also as "a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal". See also C Murphy "Lon Fuller and the moral value of the rule of law" 2005 *Law and Philosophy* 239; J Raz "The rule of law and its virtue" (1977) *Law Quarterly Review* 195; KA Adams "What is just: The rule of law and natural law in the trials of former East German border guards" (1992) *Stanford Journal of International Law* 271.

47 AV Dicey *Introduction to the Study of the Law of the Constitution* (1915, Macmillan).

48 L Bingham "The rule of law" (1994) *Cambridge Law Journal* 67; BJ Hibbitts "The politics of principle: Albert Venn Dicey and the rule of law" (1994) *Anglo-American Law Review* 1.

49 1999 1 SA 374 (CC).

50 *Fedsure*, above at note 3, para 56. See also *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC).

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

In like manner, in the famed case of *R (on the application of Miller) v Secretary of State for Exiting the European Union*,[51] the UK Supreme Court adverted to the natural relationship between the rule of law and the modern-day notion of legality. The court observed that initially, sovereignty was reposed in the crown, which exercised virtually all the powers of the state based on prerogative. However, the powers of the "crown were progressively reduced as parliamentary democracy and the rule of law developed".[52]

Another basis for the doctrine of legality, which is not entirely different from the former, is the enduring principle of parliamentary sovereignty.[53] Although the principle is rooted in British constitutional theory, its waves have rippled worldwide.[54] Its relics persist in the former British colonies, even those with written constitutions.[55] In most cases, the constitutions of former British colonies are little more than codifications of British constitutional conventions. The doctrine provides, amongst others, that parliament is the sole lawgiver, and the judiciary's role is to implement the intention of parliament.[56] The role of the court is narrow: it cannot scrutinize the content of the law made by parliament but can only review those actions that go beyond the law as promulgated by parliament. This approach is anchored in the notion of *ultra vires*. Allan captures this instructively, thus: "[t]he defenders of the ultra vires doctrine, locating the basis of judicial review in legislative intent, have emphasised the importance of parliamentary sovereignty".[57] In modern constitutional democracies, the newfound justification for this doctrine is that parliament is the elected branch of government; therefore, the courts must yield to its intentions.[58]

The *ultra vires* principle became the single most important device through which the courts enforced the legality of public decisions.[59] Deferring to the notion of parliamentary sovereignty, the courts were always loath to tamper with the "intention of parliament". In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,[60] the court held that the overriding justification for judicial intervention is the doctrine of *ultra vires* – the doctrine that power (*vires*) must be exercised within the confines of the law established by parliament.[61] The height of this judicial deference was expressed in *Ndlwana v Hofmeyr*, where the court confirmed that "[i]nasmuch as Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union, the Supreme Court has no power to pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority".[62] This judicial attitude was fairly prevalent across jurisdictions. The UK House of Lords held a similar view as recently as 1993 in *R v*

51 *R (on the application of Miller) v Secretary of State for Exiting the European Union* 2017 UKSC 5 (*Miller*). For an analysis see S Payne "The Supreme Court and the Miller case: More reasons why the UK needs a written constitution" (2018) *The Round Table* 441.

52 *Miller*, ibid, para 41.

53 P Craig "Ultra vires and the foundations of judicial review" (1998) *Cambridge Law Journal* 63; Goldsworthy *Parliamentary Sovereignty: Contemporary Debates*, above at note 17.

54 J Owen "Exporting the Westminster model: MPs and colonial governance in the Victorian era" (2014) *Britain and the World* 28.

55 HO Yusuf and T Chowdhury "The persistence of colonial constitutionalism in British Overseas Territories" (2019) 8/1 *Global Constitutionalism* 157.

56 C Forsyth "Of fig leaves and fairy tales: The ultra vires doctrine, the sovereignty of parliament and judicial review" (1996) *Cambridge Law* Journal 122.

57 TR Allan "Constitutional dialogue and the justification of judicial review" (2003) *Oxford Journal of Legal Studies* 563.

58 Ibid; see also M Elliott "The ultra vires doctrine in a constitutional setting: still the central principle of administrative law" 1999 *Cambridge Law Journal* 129.

59 In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) (*Pharmaceutical Manufacturers Association*) at para 50, the Constitutional Court of South Africa said that "[w]hat would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality".

60 1903 TS 111.

61 J Dugard "The judiciary and national security" (1982) South *African Law Journal* 655.

62 *Ndlwana v Hofmeyr* 1937 AD 229.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

Lord President of Privy Council, Ex parte Page.[63] The court said: "The fundamental principle is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases … this intervention … is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred".[64]

This orthodox view of legality places the courts in a significantly weaker position than the other two branches of government – parliament and the executive.[65] The courts of law ultimately became too pedantic and formalistic in their approach to legality. They developed what Hoexter calls a "tendency to rely on technical or mechanistic reasoning instead of substantive principle and to prefer formal reasons to moral, political, economic or other social considerations".[66] The *ultra vires* approach was primarily negative – it focused solely on restraining public officials from exceeding their formal powers. Hence, as a ground for judicial review, legality was couched negatively as "illegality", mainly concerned with what public functionaries "must not do". Thus, legality is cast as an "obverse facet of the *ultra vires* doctrine".[67]

The contemporary approach: legality as a principle of justification

Consequently, the orthodox approach to *ultra vires* has come under immense criticism in contemporary public law discourses.[68] The orthodox approach is losing currency in many jurisdictions because its foster mother, the doctrine of parliamentary sovereignty, is equally losing its influence in many countries.[69] The intention of parliament is no longer the only consideration when assessing the validity of public functionaries' decisions. In South Africa, for instance, the court in *Baloro v University of Bophuthatswana* most aptly explained this new approach.[70] The court noted that today's courts are different from those under the old dispensation, as they are "now confronted by a rapid oscillation from the positivist jurisprudence founded on the sovereignty of Parliament to a jurisprudence based on the sovereignty of the law contained in the Constitution with a justiciable bill of rights".[71] This newfound role of the courts has effectively meant that the old frontiers of the judiciary's role have been pushed significantly outwards.[72] The courts are now empowered to protect the constitution's higher values. Hence, modern-day legality is a potent instrument that the courts use to ensure that all public powers are not only sourced in law but also justifiable in the broader constitutional scheme.[73]

Mureinik characterizes this change as a shift from a culture of authority to a culture of justification.[74] A culture of authority is primarily a pedantic legal culture, where the enquiry ends upon determining whether the public functionary has been authorized to perform the act in question. If

63 *R v Lord President of Privy Council, Ex parte Page* [1993] AC 682.

64 Id at 701.

65 As Craig "Ultra vires and the foundations of judicial review", above at note 53 at 64 contends, "[t]he ultra vires principle is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, administrative agencies, local authorities and the like".

66 Hoexter "The principle of legality in South African administrative law", above at note 11.

67 L Baxter *Administrative Law* (1984, Juta).

68 PA Joseph "The demise of ultra vires: Judicial review in the New Zealand courts" 2001 *Public Law* 354; see also Craig "Ultra vires and the foundations of judicial review", above at note 53 at 63 which summarizes the criticisms of the *ultra vires* notion thus: (a) the indeterminacy of the *ultra vires* principle, (b) the lack of reality of the *ultra vires* principle, (c) tensions within the *ultra vires* principle and (d) the *ultra vires* principle and the scope of public law.

69 Jowell "Beyond the rule of law: towards constitutional judicial review", above at note 45 at 669; Joseph, id at 463.

70 *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B).

71 Id at 243.

72 Hoexter "The principle of legality in South African administrative law", above at note 11 at 484.

73 Henrico "Re-visiting the rule of law and principle of legality: Judicial nuisance or licence?", above at note 2 at 742.

74 E Mureinik "A bridge to where? Introducing the Interim Bill of Rights" (1994) *South African Journal on Human Rights* 31; P de Vos "A bridge too far? History as context in the interpretation of the South African constitution" (2001) *South African Journal on Human Rights* 1.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

the answer is in the affirmative, the enquiry ends. Conversely, in a culture of justification, the enquiry does not end with the question of "authority to act"; it goes further. Public functionaries must also provide sufficient substantive reasons for any of their decisions.[75] This approach is best exemplified by the House of Lords decision in *R v Secretary of State for the Home Department, ex parte Simms*.[76] The facts of this case are intriguing and warrant a summary. In this case, prisoners who were serving life sentences for murder claimed that they had been the victims of miscarriages of justice. To reopen their cases, they sought to conduct oral interviews with journalists who had shown interest in their plight. The prison authorities were not prepared to allow such interviews to take place unless the journalists signed written undertakings not to publish any part of the interviews. In doing so, the prison authorities relied on the secretary of state's policy in exercising his powers under section 47(1)(c) of the Prison Act of 1952 (the Act). The Act and the prison rules gave the secretary of state broad discretionary powers to ensure prison discipline and order. The main question was whether the prison policy was *ultra vires* the Act and the rules. The House of Lords confirmed that the principle of legality is "operating as a constitutional principle".[77] Lord Hoffmann defined the principle thus:

> "[T]he principle of legality means that parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."[78]

This approach frames the modern-day notion of legality as the embodiment of justification. Therefore, rationality is the heartbeat of the new approach to legality. The decisions of public functionaries are not only evaluated in terms of their formal and mechanical legality; they must also be rationally connected to the objective that the action seeks to achieve. Rationality is, therefore, the minimum threshold for exercising public powers. In the search for the content of rationality, courts have distinguished reasonableness from rationality because rationality, and not reasonableness, is an incident of legality.[79] In *Democratic Alliance*, the court underscored the much-needed conceptual distinction thus: "[i]t is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself".[80] On the other hand, the rationality test, in general, demands a rational connection between the exercise of power and the purpose for which the power was granted; the reasonableness test requires weighing the options available to the decision-maker and determining whether the decision-maker chose the best option.[81] Accordingly, the Constitutional Court of South Africa stated the following in *Pharmaceutical Manufacturers Association*: "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be

75 Cohen-Eliya and Porat "Proportionality and the culture of justification", above at note 6 at 475.

76 *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400.

77 Id at 411: "In these circumstances even in the absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle … This is called 'the principle of legality'".

78 Id at 412.

79 This distinction is more important in Lesotho in view of the influence that the *dictum* of Lord Diplock in *CCSU* exerts in Lesotho. See, for instance, the decisions of the Court of Appeal in *Brigadier Mareka and Others v Commander Lesotho Defence Force* (C of A (CIV) 52 of 2016) [2016] LSCA 9 (29 April 2016); *Seeiso v Hon Minister of Home Affairs and Others* (C OF A (CIV) No 21 of 1994) LSCA 139 (10 August 1994).

80 *Democratic Alliance v President of South Africa and Others* 2013 1 SA 248 (CC), para 29.

81 A Pillay "Reviewing reasonableness: An appropriate standard for evaluating state action and inaction" (2005) *South African Law Journal* 419, above note 102 at 419.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement".[82]

Therefore, it seems that the legality principle has evolved from its orthodox conception as a formal and mechanical principle of public law based on the common-law doctrine of *ultra vires* to a more expansive and formidable constitutional doctrine that is instrumental in holding functionaries accountable for the exercise of public power.[83] Indeed, this new approach does not come without its own risks. The primary concern is that, by empowering the courts to demand justification from the other branches of government, the modern conception of legality may inadvertently grant the courts unintended supremacy over the other branches of government.[84] While the justification of public decisions is a welcome development in contemporary constitutional thought, care should always be taken to guard against the undue expansion of judicial power, as that will distort the much-desired balance among the main branches of government.[85]

An overview of the development of legality in South Africa

The story of the development of legality cannot be separated from the broader story of public law in South Africa. During the apartheid era, most public law principles were overshadowed by the prevailing doctrine of parliamentary sovereignty, which prioritized the legislative intent – the intention of parliament – as the most essential aspect of public law.[86] Most, if not all, precepts of public law were rendered subservient to it; legality was no different. It received homage in the *ultra vires* doctrine and the rule of law. It "formed the basis of the judicial control of administrative action".[87] As Milne AJ stated in *Estate Geekie v Union Government*,[88] "[i]n considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted *ultra vires* or not".[89] So, the question of legality invariably involved an enquiry into whether a public functionary had transgressed the legal boundaries created by parliament.

Although the courts were restricted to operating within the narrow scope of interpreting the intention of parliament, they always created avenues to expand the operationalization of that intention. The courts regularly imputed legislative intent through presumptions and other canons of legislative

82 *Pharmaceutical Manufacturers Association*, above at note 59, para 85.

83 In *Affordable Medicines Trust*, above at note 2, para 50, the Constitutional Court of South Africa said: "The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers, is now invalid under the Constitution as an infringement of the principle of legality".

84 In *Democratic Alliance,* above at note 80, para 42, the court said: "It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this court as the 'minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries'. And the rationale for this test is 'to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'." See also A Price "Rationality review of legislation and executive decisions: Poverty Alleviation Network and Albutt" (2010) *South African Law Journal* 580; L Kohn "The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?" (2013) *South African Law Journal* 810; IM Rautenbach "Rationality standards of constitutional judicial review and the risk of judicial overreach" (2018) *Journal of South African Law* 1.

85 TC Neal and T Vallinder "The global expansion of judicial power: The judicialization of politics" in TC Neal and T Vallinder (eds) *The Global Expansion of Judicial Power* (1995, New York University Press) 1; H 'Nyane "The judicialisation of politics in South Africa: A critique of the emerging trend" (2020) 36/4 *South African Journal on Human Rights* 319.

86 J Sarkin "The political role of the South African Constitutional Court" (1997) *South African Law Journal* 134.

87 AJ Henderson "The curative powers of the constitution: Constitutionality and the new ultra vires doctrine in the justification and explanation of the judicial review of administrative action" (1998) *South African Law Journal* 346.

88 *Estate Geekie v Union Government* 1948 1 All SA 136 (N).

89 Id at 143.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

interpretation, even where it was not stated categorically.[90] For instance, the courts readily presumed that parliament could not grant powers to be used for ulterior motives or vaguely and uncertainly.[91] As far back as 1935, the court in *R* v *Shapiro and Another*[92] said that "statutes do not empower the authorities to make regulations so uncertain that people will not know how to comply with them or whether they are subject to them or not. So if a regulation is found to be void for uncertainty, that is one way of arriving at the conclusion 'that it is *ultra vires*"'.[93] Be that as it may, the reality of the matter is that, during the pre-democratic era, "the courts simply became more deferential and more formalistic"[94] in their application of the notion of legality.

It is now common cause that when the country transitioned to a new constitutional dispensation, starting with the interim Constitution of the Republic of South Africa, public law experienced a paradigm shift.[95] The South African Constitution, rather than Parliament, became supreme. The notion of legality was similarly rejuvenated, receiving a boost from being a mere common-law principle to becoming a formidable constitutional construct. This development happened very early in the constitutional development of the republic, under the interim Constitution, and was affirmed by the Constitutional Court in *Fedsure*. When the court reaffirmed the longstanding common-law principle of lawfulness – that "the exercise of public power is only legitimate where lawful"[96] – the court further stated that it "seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[97] This injunction seems to have provided the basis for the conception of legality in South Africa's post-democratic constitutional dispensation.

In its subsequent decision in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[98] the Constitutional Court developed legality further. The court was confronted with the vexed question of whether the president's decision constituted an administrative decision. The court found that the president's decision did not constitute an administrative action; therefore, the exacting requirements of procedural fairness for just administrative action, as outlined in section 33 of the South African Constitution, did not apply to the president's decision. However, the court warned that the enquiry does not end there. The principle of legality applies "as it does to all power exercised in terms of the constitution. The President must also act in good faith and must not misconstrue the nature of his or her powers".[99] Thus, legality emerged as a safety net[100] – a kind of catch-all principle for the exercise of public power that may not qualify as "administrative action" in terms of the South African Constitution and the Promotion of Administrative Justice Act.[101]

The principle of legality was further developed in *Pharmaceutical Manufacturers Association* when the Constitutional Court confirmed that rationality is a minimum threshold for legality. The court said: "Decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to

90 GE Devenish *The Interpretation of Statutes* (1992, Juta).

91 J Hlophe "Judicial control of administrative action in a post-apartheid South Africa -some realities" 1993 *Acta Juridica* 105.

92 *R v Shapiro and Another* 1935 NPD 155.

93 Id at 159. See also *R v Jopp and Another* 1949 4 SA 11 (N).

94 Hoexter "The principle of legality in South African administrative law", above at note 11.

95 Mureinik "A bridge to where? Introducing the Interim Bill of Rights" above at note 74.

96 *Fedsure*, above at note 3, para 66.

97 Id, para 58.

98 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC) (*SARFU*).

99 *Pharmaceutical Manufacturers Association*, above at note 59, para 34.

100 *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 2 SA 311 (CC), para 97.

101 See Promotion of Administrative Justice Act 3 of 2000 (PAJA), s 1.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement".[102]

Thus, rationality has been thrust to the centre of the legality enquiry. Therefore, the enquiry about legality is three-fold. The first enquiry is whether the exercise of power is sourced in law. The second one is whether there is a legitimate objective that the decision seeks to attain. Thirdly, the decision must be rationally connected to the purpose for which the power has been given. This enquiry is both substantive and procedural. The enquiry about the legitimacy of the purpose is substantive.[103] It draws the courts into assessing the merits and demerits of public functionaries' decisions, which they have always been loath to do. The courts in South Africa are still battling this balance between deference and interference.[104] However, care is always taken to distinguish rationality from unreasonableness.[105] With reasonableness, the enquiry is "whether there are less restrictive means of achieving the same result. Proportionality is not applicable to rationality review".[106] The enquiry about the relationship between the decision and the purpose for which the power was given is clearly procedural as it is not concerned with the substance of the decision.

While it is now fairly settled that "non-administrative"[107] decisions are reviewable in terms of the principle of legality,[108] there is a discernible uncertainty about whether the same principles of procedural fairness applicable to administrative action are applicable to decisions susceptible to judicial review based on legality. In *SARFU*,[109] the court intimated that the president's decision to appoint a commission of inquiry was not an administrative action and, therefore, "the procedural fairness requirement for just administrative action demanded by section 33 of the Constitution is not necessary".[110] The same view seems to have influenced the court in *Masetlha v President of the Republic of South Africa*.[111] The court stated that while the president's decision to dismiss the head of intelligence was subject to the requirements of legality, it would be improper "to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action".[112]

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102 *Pharmaceutical Manufacturers Association*, above at note 59, para 85.

103 According to M Du Plessis "The variable standard of rationality review: Suggestions for improved legality jurisprudence" (2013) 130/3 *South African Law Journal* 597 at 600 observes that "[u]nder this leg of the enquiry the applicant could attack the purpose stated by the government functionary as being illegitimate, which is necessarily a substantive enquiry".

104 KS McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2011, PULP); D Brand: "Judicial deference and democracy in socio-economic rights cases in South Africa" 2011 *Stellenbosch Law Review* 614.

105 Pillay "Reviewing reasonableness", above at note 81 at 419.

106 Y Nehushtan "The unreasonable perception of rationality and reasonableness in UK public law" (1 July 2019) *UK Constitutional Law Blog*, available at: <https://ukconstitutionallaw.org/2019/07/01/yossi-nehushtan-the-unreasonable-perception-of-rationality-and-reasonableness-in-uk-public-law/> (last accessed 12 July 2020).

107 Section 1 of PAJA defines an administrative action as any decision taken, or any failure to take a decision, by –
(a) an organ of state, when –
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect …
The definition specifically excludes certain decisions from the definition, such as executive, judicial and legislative decisions. These decisions are characterised herein as "non-administrative".

108 *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA); *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* 2018 3 SA 380 (SCA); *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC); *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC).

109 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, ibid, para 77.

110 Id, para 34.

111 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) (*Masetlha*).

112 Id, para 77. Moseneke DCJ held emphatically in *Masetlha* at para 78 that "[t]he authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement".

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However, the court adopted a somewhat contradictory view in *Albutt v Centre for the Study of Violence and Reconciliation.*[113] This case concerned the power of the president to grant a pardon under section 84(2)(j) of the South African Constitution. The question for determination was whether the president is required to afford the victims a hearing before exercising the power to grant a pardon. The court answered the question in the affirmative: "the decision to exclude victims of the crimes in respect of which pardons were sought under the special dispensation process was irrational".[114] The court further stated that "[t]he victims of these crimes are entitled to be given the opportunity to be heard before the President makes a decision to grant pardon".[115]

Despite disagreements regarding the doctrine's procedural aspects, the doctrine of legality in South Africa is *comparatively* advanced. Legality is emerging as the most critical device of constitutionalism in the new dispensation. It has aspects that are yet to solidify, such as the rationality test, its implications for the separation of powers and its procedural aspects.[116] Hopefully, these aspects will be developed on a case-by-case basis.

The importation and development of legality in Lesotho

Public law in Lesotho, particularly constitutional law, is fundamentally based on English constitutional theory due to the country's colonial legacy.[117] The country attained independence in 1966 with a constitution that was based on British constitutional theory. The Independence Constitution was suspended in 1970. When the country returned to constitutional democracy in 1993, the 1966 independence constitutional model was adopted almost verbatim in the new Constitution. Therefore, the constitutional design – including the executive, parliamentary structure and practice, judicial practice and civil service, to mention just a few – is moulded on the British model.[118] This is despite the country having a written Constitution with a supremacy clause. Like many former British colonies,[119] the Constitution has mostly codified British constitutional conventions. This paradigm was captured aptly by Maqutu J in *Law Society of Lesotho v Ramodibedi*, thus: "[i]t seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again when constitutional problems arise Britain is our first reference point".[120] At one point, courts in Lesotho insisted that the doctrine of parliamentary sovereignty was part of Lesotho's constitutional theory. In cases such as *Khaketla v The Honourable Prime Minister*[121] and *Tsang v Minister of Foreign Affairs*,[122] the superior courts in Lesoho used the doctrine of parliamentary sovereignty to justify deference to the executive and the legislature.[123]

Although the two cases were decided before the 1993 Constitution – the period in which the 1966 Constitution was suspended – it was palpably incorrect for the courts to reckon that parliamentary sovereignty was part of Lesotho's Constitution when the country opted for constitutional

113 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).
114 Id, para 74.
115 Ibid.
116 MN De Beer "A new role for the principle of legality in administrative law: State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd" (2018) *South African Law Journal* 613.
117 JH Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" (1978) *Comparative and International Law Journal of Southern Africa* 137; R Gocking "Colonial rule and the 'legal factor' in Ghana and Lesotho" (1997) *Africa: Journal of the International African Institute* 61.
118 WJA Macartney "African Westminster? The Parliament of Lesotho" (1970)23 *Parliamentary Affairs* 121; LBBJ Machobane *Government and Change in Lesotho, 1800–1966* (1990, Palgrave Macmillan).
119 HO Yusuf and T Chowdhury T "The persistence of colonial constitutionalism in British Overseas Territories" (2019) 8/1 *Global Constitutionalism* 157.
120 *Law Society of Lesotho v Ramodibedi* (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003) at para 7.
121 *Khaketla v The Honourable Prime Minister* (CIV/APN/145/85) [1985] LSCA 118 (24 July 1985) (*Khaketla*).
122 *Tsang v Minister of Foreign Affairs* (CIV/APN/35/92) [1992] LSHC 23 (25 February 1992) (*Tsang*).
123 These cases were decided during the dictatorships of former Prime Minister Leabua Jonathan and the military junta, respectively. This was a period when courts' deference to the two regimes based on force and coercion was at its height.

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supremacy upon independence in 1966. This anomaly was soon corrected by the Court of Appeal in *Attorney General v Swissbourgh Diamond Mine* and subsequent decisions, stating that parliamentary sovereignty is not part of the constitutional tapestry of Lesotho, but constitutional supremacy is.[124] In *Swissbourgh*, the Court of Appeal laid to rest the protracted debate about the applicability of parliamentary sovereignty thus: "the doctrine of parliamentary sovereignty, which had its origin in English law … never properly became part of the common law of South Africa or Lesotho and that it had merely been imposed and maintained as a matter of political expediency".[125] Nevertheless, despite the correctly stated position that constitutional supremacy, and not parliamentary sovereignty, is the touchstone of Lesotho's Constitution design, public law development has been inspired by developments in England.[126] The principle of legality is no exception. For the most part, the operative doctrine in Lesotho has been the *ultra vires* principle, in terms of which the courts are narrowly concerned with whether the public functionary has overstepped the legal boundaries set by the lawmaker.[127] As Hoexter contends, "[t]he doctrine … is tied to constitutional fundamentals associated with the Westminster system … The legislature is the supreme lawmaker, while the function of the courts is to apply the law made by it".[128] The doctrine of *ultra* vires – whose essence is that the courts must search the intention of Parliament, and no more – has been the basis of judicial review in Lesotho. In *Khaketla v The Honourable Prime Minister*,[129] the court confirmed that "however unjust, arbitrary or inconvenient any legislation may be, it must be given its full effect. It is not the province of the Court to scan its wisdom or policy, and the Court must take the statute as it finds it". This has been the prevailing judicial policy in Lesotho.[130] The position was restated in *Sekhonyana v Prime Minister of Lesotho and Others* where Maqutu J said:

> "Despite the existence of the Constitution, nothing is firmly settled. Parliament can adjust the powers of the Government's exercise of both prerogative and existing statutory powers. It is for this reason that in this area of politics no penalties have been provided in the Public Inquiries Act of 1994. *If Parliament wanted the Courts to interfere it would have made its intention clear in that respect. What the Applicant is asking the Court to do is to interfere with the relations between an elected government and Parliament.*"[131]

This approach was based on the orthodox thought in which the courts were restrained and deferred to the two political branches.

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124 *Attorney General v Swissbourgh Diamond Mine (No 2)* LAC (1995-1999) 214. For instance, in a relatively recent decision, *Phaila v Director of Public Prosecution* (Constitutional Case 24 of 2018) [2021] LSHC 7 (18 March 2021), para 50, the High Court (exercising its constitutional jurisdiction) correctly stated that: "Section 2 of the Constitution enshrines the constitution's supremacy in the unadorned, norm-trumping sense. This doctrine has been interpreted to mean that constitutional powers falling within the exclusive sphere of a particular person or institution cannot be whittled down or taken away by an Act of Parliament and exclusively conferred on another body".

125 *Attorney General v Swissbourgh Diamond Mine (No 2)*, id at 225.

126 In *Law Society of Lesotho v Ramodibedi* (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003), at para 7, the court noted that "[i]t seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again, when constitutional problems arise, Britain is our first reference point".

127 *Minister of Small Business, Cooperatives and Marketing v Lesotho National Wool and Mohair Growers Association* (C of A (CIV) 20/2019) [2019] LSCA 19 (31 May 2019); *Chalatse and Another v The Acting Chief Justice and Others* (C of A CIV NO/63/2014) [2015] LSCA 19 (7 August 2015), available at: <https://lesotholii.org/akn/ls/judgment/lsca/2015/19/eng@2015-08-07> (last accessed 24 August 2025).

128 Hoexter "The principle of legality in South African administrative law", above at note 11 at 111.

129 *Khaketla v The Honourable Prime Minister*, above at note 121.

130 *Tsang*, above at note 122; *Sekhonyana v Prime Minister of Lesotho and Others* (CIV/APN/207/95) [1995] LSCA 143 (25 September 1995), available at: <https://lesotholii.org/akn/ls/judgment/lsca/1995/143/eng@1995-09-25> (last accessed 24 August 2025).

131 *Sekhonyana v Prime Minister of Lesotho and Others*, id at 10 (emphasis added).

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It is imperative to note that courts in Lesotho have always been weary of the distinction Hoexter draws between "judicial review in the administrative law sense" and "judicial review in the constitutional law sense".[132] Judicial review in the administrative law sense refers to the power of courts to review and set aside administrative decisions using the broad common law grounds of judicial review, including illegality, irrationality and procedural impropriety. For this review, the courts in Lesotho have broadly followed the House of Lords decision in *CCSU*.[133] In cases such as *Sopeng v Minister of Interior and Another*,[134] the Court of Appeal implied *audi alteram partem* rule into the discretionary power granted by the Urban Government Act of 1983 to act against councillors. The court quashed the termination of councillors' membership of the council. The court held that procedural fairness (*audi* rule) is implied whenever power is granted to the public functionary.

On the other hand, constitutional law review refers to the setting aside of legislation or state actions by applying higher constitutional norms, such as provisions of the constitution or constitutional doctrines like the rule of law, separation of powers and human rights, among others. Before 1993, courts were pre-eminently using administrative law review to set aside administrative decisions. There is one prominent case, *Swissbourgh*,[135] which was decided during the transition but under the pre-constitution dispensation, where the Court of Appeal used the Human Rights Act of 1983 as a statute *sui generis*, to set aside retrospective legislation, the Revocation of Specified Mining Leases Act of 1992,[136] by the then military junta. Following *Swissbourgh*, courts in Lesotho have quashed legislation and other state actions using the constitutional provisions and other constitutional doctrines with relative ease. In like manner, in *Seeiso v Minister of Home Affairs*,[137] the court used constitutional norms – freedom of peaceful assembly as enshrined in section 15 of the Constitution – to invalidate a minister of home affairs directive prohibiting a meeting of chiefs and their subjects.

In both strands of judicial review – administrative review and constitutional review – one doctrine that has not, until the recent discernible wave of decisions by the superior court, been applied is the doctrine of legality in its modern incarnation. Three recent decisions of the superior courts in Lesotho have anchored this paradigmatic shift. These cases will be analysed seriatim. The first case to import the South African conception of the principle of legality was *All Basotho Convention v Speaker of National Assembly*. The case resulted from peculiar political circumstances. The leaders of three political parties – the All Basotho Convention, the Basotho National Party and the Reformed Congress – had fled Lesotho and were exiled in South Africa. They claimed that their lives were endangered in Lesotho because of the hostile relations they had with the government of the day and the army. Therefore, they could not regularly attend the parliamentary sittings as contemplated by the Constitution. About 12 other members of the opposition started not attending the sittings of the House in solidarity with their leaders.

All of them eventually missed one-third of the House's sittings, thus contravening section 60(1)(g) of the Constitution. Section 60(1)(g) provides that a member of the National Assembly shall vacate office if, "in any one year and without the written permission of the Speaker of the National Assembly, he is absent from one-third of the total number of sittings of the House of which he is a member". The speaker wrote to these members of the opposition, calling upon them to individually show cause why she should not, by operation of section 60(1)(g) of the Constitution, pronounce that they had vacated

132 Hoexter *Administrative Law in South Africa*, above at note 16 at 113.

133 *Seeiso v Minister of Home Affairs* LAC (1990-94) 665; *Muyanja and Others v Labour Commissioner* (C of A (CIV) 40 of 11) [2012] LSCA 32 (3 September 2012), available at: <https://lesotholii.org/akn/ls/judgment/lsca/2012/32/eng@2012-09-03> (last accessed 24 August 2025); *Brigadier Mareka and Others v Commander Lesotho Defence Force* (C of A (CIV) 52 of 2016) [2016] LSCA 9 (29 April 2016), available at: <https://lesotholii.org/akn/ls/judgment/lsca/2016/9/eng@2016-04-29> (last accessed 24 August 2025).

134 *Sopeng and Others v Minister of Interior and Another* LAC (1990-94) 507.

135 *Attorney General v Swissbourgh Diamond Mine,* above at note 124.

136 Act 7 of 1992.

137 *Seeiso v Minister of Home Affairs* LAC (1990-94) 665.

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their seats in the House and why she should not proceed with informing the Independent Electoral Commission that vacancies existed in the National Assembly for purposes of starting the process of filling them. The opposition approached the court seeking to interdict the speaker on the grounds that the speaker lacked such powers under the law. They argued that section 69(1) of the Constitution confers upon the High Court jurisdiction to hear and determine any question concerning the vacancy of any seat in the Senate or the National Assembly. They placed much reliance on the doctrine of legality.[138] The speaker contended that, by virtue of her position under the Constitution and common law, she was best suited to declare a vacancy in the House.[139]

The court was persuaded by the legality argument, namely, that the relevant sections of the Constitution do not empower the speaker to declare a vacancy in the National Assembly. In its reasoning, the court relied heavily on the emerging jurisprudence of the Constitutional Court of South Africa.[140] The court said: "The requirement for the speaker to demonstrate that she acted pursuant to a particular enabling law is inescapably also imposed by the principle of legality test. This is a traditionally common law concept that has gained recognition in democratic constitutions and, therefore, is enforceable".[141] Interestingly, the court did not discuss in detail the nature of the Lesotho Constitution and how, like the Constitution of South Africa, it facilitated the smooth operation of the contemporary concept of legality.[142]

The court also invoked the doctrine of legality in the *Maope* case. The Court of Appeal was presented with a situation in which the respondent was Lesotho's ambassador and permanent representative to the UN. When the government changed in 2017, the ambassador and others whom the previous government had deployed were recalled. They challenged their recall, citing the infringement of their contracts. The government argued that the constitutional and statutory powers and functions vested in the executive to appoint and recall diplomats are not administrative in nature and, therefore, are not subject to judicial review. The court dismissed the government's argument and held that:

> "The exercise of all public power is subject to constitutional and statutory control. Thus, even constitutional and statutory decisions by the Executive to recall diplomats otherwise than in terms of their contracts of engagements, can be and have been challenged in our courts. In my opinion, [the] Executive's exercise of powers and functions can be reviewed on the basis of the principle of legality or rationality that stem from the rule of law."[143]

In *Maope*, the court stated that the basis for invoking legality was the rule of law. The doctrine of the rule of law is not explicitly provided for in the Constitution of Lesotho. However, the courts in Lesotho have readily invoked it as a fundamental feature of the country's constitutional edifice.

The most recent case where the High Court of Lesotho, sitting as the Constitutional Court, applied the legality principle was *All Basotho Convention v The Prime Minister*. The case concerned the purported prorogation of Parliament by the prime minister in terms of section 91(3) of the Constitution. The section provides that where the Constitution requires the king to perform any act in accordance with the advice of the prime minister and the king fails to perform that act, the prime minister may perform such an act. Consequently, such an act will be deemed to have been performed by the king. On 20 March 2020 at 18:00, the prime minister wrote to the king, advising him to prorogue

138 *All Basotho Convention v Speaker of National Assembly*, above at note 22, para 29.

139 Id, para 42.

140 The court relied on *Fedsure*, above at note 3; *Affordable Medicines Trust*, above at note 2; *Pharmaceutical Manufacturers Association*, above at note 59; *Masetlha*, above at note 111; *SARFU*, above at note 98.

141 *All Basotho Convention v Speaker of National Assembly*, above at note 22, para 88.

142 In South Africa, the doctrine of legality is first derived from the rule of law, which is expressly provided as a constitutional value in s 1 of the Constitution of South Africa. This is not the position in the Constitution of Lesotho.

143 *Principal Secretary, Ministry of Foreign Affairs and International Relations v Maope*, above at note 21, para 88.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

Parliament, citing the COVID-19 pandemic as the reason for such prorogation.[144] In the letter advising prorogation, the prime minister indicated that if the king did not comply with the advice by 21:00 the same day – which was effectively a three-hour ultimatum – the prime minister would invoke section 91(3) of the Constitution and prorogue Parliament himself. Indeed, the king did not comply, and the prime minister consequently went ahead and prorogued the Parliament the same day.[145]

The application of legality in this case is intriguing because section 91(3) of the Constitution empowers the prime minister to act if the king does not take the advice. However, the court invoked the principle of rationality to assess the legality of the prime minister's decision. The court found that the decision failed the rationality test, a key aspect of legality, and declared the prime minister's decision to prorogue Parliament unconstitutional. In arriving at this decision, the court placed much reliance, once again, on developing the principles of legality and rationality in South Africa. The court thereafter concluded that: "[W]hen the Prime Minister exercises his executive powers in terms of the Constitution, his exercise of those powers is constrained by the principles highlighted above and most significantly, for the purpose of this case, by the principle of rationality".[146]

The case has thrust rationality, which is an incident of legality, to the centre of constitutional theory in the country. Henceforth, it is no longer sufficient to base a decision solely on an empowering law; such power must also pass the rationality test, as the court has noted. The South African Constitutional Court, in *Albutt*, instructively laid out the rationality test. In this regard, the court held that public functionaries have broad discretion in choosing the means to achieve constitutionally or legislatively permissible objectives. Courts would be slow to interfere with the choice of such means: "courts may not interfere with the means selected simply because they do not like them or because other more appropriate means could have been selected".[147] However, if the decision's rationality is called into question, "courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved".[148] The court made the caveat that the enquiry is not whether there are others but the rational connection between the selected means and the purpose the action sought to achieve. Hence, the fulcrum of the rationality test is the connections between the means and the purpose for which the power was granted. A similar approach was followed in *Law Society of South Africa and Others v President of the Republic of South Africa and Others.*[149] This is the case in which the president's participation in the regional decision-making process and his own decision to suspend the Southern African Development Community Tribunal operations were declared unconstitutional on the ground of irrationality, among other grounds.

It is apparent, therefore, that rationality, an aspect of legality, is now a constitutional construct and a firm precept of Lesotho's public law, in general, and constitutional law in particular. In *All Basotho Convention*, the court correctly laid out the rationality standard thus: "The decision [must] be rationally related to the purpose for which the power was given".[150] In this case, the court placed considerable emphasis on the justification provided by the prime minister, which was that Parliament was being prorogued due to Covid-19 and the three-hour ultimatum given by the prime minister to the king. Ultimately, the court determined that the prime minister had acted irrationally.[151]

144 However, the court found that the real reason for prorogation was political. Two important political processes seem to have precipitated the decision to prorogue Parliament: (a) the National Assembly had just passed the Ninth Amendment to the Constitution, which, amongst others, prevents a prime minister who has lost the confidence of the house from calling an early election; (b) there was a pending motion of no confidence against the prime minister. See para 2 of the judgment.

145 Legal Notice 21 of 2020.

146 *All Basotho Convention v The Prime Minister*, above at note 22, para 84.

147 *Albutt v Centre for the Study of Violence and Reconciliation*, above at note 113, para 51.

148 Ibid.

149 2019 (3) SA 30 (CC).

150 *All Basotho Convention v The Prime Minister*, above at note 22, para 85.

151 Id, para 54.

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

Conclusions and the possible development of legality in Lesotho

The contemporary wave of decisions of the superior courts in Lesotho has thrust the doctrine of legality to the centre of constitutionalism in Lesotho. This new pattern emphatically represents a shift from the orthodox position where legality was an incident of the doctrine of *ultra vires:* as a narrow common law ground for judicial review. Legality is now a firm ground for constitutional review. This shift has certainly been inspired by developments in legality review in South Africa. It is expected that, in the future, the South African legality jurisprudence will continue to be a trail-blazer for Lesotho. Currently, the legal framework in Lesotho remains at a rudimentary stage. The *All Basotho Convention v Speaker of the National Assembly* and *Maope* cases only reaffirmed that legality is an aspect of the Constitution of Lesotho. The principle was considerably advanced in *All Basotho Convention v The Prime Minister*, where the court was confronted with what may be styled "a real legality question": where the public functionary applied the law as it was but still failed the legality test. The court invoked the rationality test – an incident of legality – precisely as the South African Constitutional Court has applied it. In particular, the court relied on the Constitutional Court's *dictum* in the *Democratic Alliance* case, which states that rationality is the "minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries".[152] Hence, with this emerging pattern, public functionaries in Lesotho will, in future, not only rely on the black letter of the law to exercise their power. A second requirement is evolving as their duty to determine the extent to which power is justifiable. Public officials will have to ensure that power is used for the purpose for which it was conferred.

The court in *All Basotho Convention v The Prime Minister* further explained the basis for importing the contemporary conception of legality into Lesotho. The court stated that there are two avenues through which the principle of legality can be established in Lesotho. The first one is the hallowed notion of the rule of law. Stripped of its modern complications,[153] the rule of law classically refers to the use of laws of general application, as opposed to arbitrary decision-making. The Constitution of Lesotho does not expressly state that the rule of law is a foundational value of the Constitution. However, the superior courts in Lesotho have been readily willing to interpret it as part of the broader schematization of the Constitution.[154] For instance, in *Jobo v Commander, Lesotho Defence Force*,[155] the High Court said:

> "The concept of 'the rule of law' is universally accepted and recognised by all civilised nations it applies to all organs and it transcends to all organs of state – [the] Legislature, the Executive[,] the Judiciary and to all organs and institutions create by the Constitution. Rule of law is inviolable and applies to all citizens of Lesotho regardless or rank, status or power. Anyone who disrespect or disobeys the rule of law, and exercises public power and at his own discretion does so at his own risk *[sic]*."[156]

Another basis for the principle of legality in Lesotho is the concept of constitutional supremacy, as outlined in section 2 of the Constitution.[157] The principle of constitutional supremacy not only

152 *Democratic Alliance*, above at note 80, para 42.

153 Fallon "The rule of law as a concept in constitutional discourse", above at note 2; Henrico "Re-visiting the rule of law and principle of legality: judicial nuisance or licence?", above at note 2; Raz "The rule of law and its virtue" above at note 46 at 195.

154 *Attorney General v Swissbourgh Diamond Mine,* above at note 124; *Khathang Tema Baitsukuli v Maseru City Council* C of A (CIV) No 4 of 2005; *The Law Society of Lesotho v The Prime Minister* (C of A (CIV) No 5 of 1985) [1985] LSCA 144 (3 September 1985) at 129; *Judicial Officers' Association of Lesotho v Right Honourable the Prime Minister Pakalitha Mosisili* (Constitutional Case No 3/2005).

155 *Jobo v Commander, Lesotho Defence Force* (CIV/APNS/189) [2015] LSHC 25 (18 June 2015).

156 Id, para 65.

157 See *Ramoholi v Principal Secretary for the Ministry of Education and Another* (CIV/AFN/105/95) [1995] LSCA 11 (9 January 1995).

https://doi.org/10.1017/S0021855325100788 Published online by Cambridge University Press

entails a narrow validating rule for other norms in a constitutional democracy, but it also embodies a constitutional value that promotes restraint and justification for the exercise of public power.[158] The court in *All Basotho Convention v The Prime Minister* has comprehended this dual nature of constitutional supremacy. It correctly reasoned that the Constitution's supremacy clause "embodies the doctrine of the rule of law whose constituent element is the principle legality and accountability. This principle is also a basic feature of the Constitution".[159]

It remains to be seen, though, how the judiciary in Lesotho will address the procedural aspects of the principle of legality in the future. As demonstrated above, South Africa continues to grapple with the question of whether procedural fairness is part of the principle of legality.[160] In Lesotho, the Court of Appeal in *President of the Court of Appeal v The Prime Minister*[161] has already hinted that the prime minister's exercise of executive power to advise the king to appoint a tribunal to investigate the president of the Court of Appeal is subject to the principle of procedural fairness.[162] On the strength of this decision, it is not unimaginable that the courts in Lesotho will demand some measure of procedural fairness as an aspect of the principle of legality in the future. Indeed, as the court correctly observed, "procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and … the one-size-fits-all approach is inappropriate".[163] It is therefore expected that while legality review may not necessarily be based on exacting procedural requirements like normal administrative law review, courts in Lesotho, on the strength of South African legality jurisprudence and local cases, such as the president of the Court of Appeal, use procedural fairness as a tenet of the legality view.

Competing interests. None

158 The observation by F Michelman "The rule of law, legality and the supremacy of the Constitution" in S Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed, 2012, Juta) ch 11-1 at ch 11-36 in relation to South Africa arguably applies with equal force to Lesotho: "The challenge thus posed to bench and bar by the 'supremacy' clause in FC s 1*(c)* is clear and somewhat daunting. It is to comprehend the sense in which 'supremacy of the Constitution' now is established as a polestar for the general guidance of South African government, society, and jurisprudence, beyond the point of establishing the trumping rule that the Final Constitution's norms prevail, in cases of conflict, over other norms claiming recognition in the legal system".

159 *All Basotho Convention v The Prime Minister*, above at note 22, para 39.

160 M Murcott "Procedural fairness as a component of legality: Is a reconciliation between Albutt and Masetlha possible?" (2013) *South African Law Journal* 260.

161 *President of the Court of Appeal v The Prime Minister* (C of A (CIV) No 62/2013) [2014] LSCA 1 (4 April 2014).

162 Id, para 12: "Moshidi AJ [in the court a quo] held that the appointment of the Tribunal was merely a preliminary step which had no adverse effect on any of the appellant's rights. The contention that it affected the appellant's right to his reputation and dignity, he found 'plainly without merit'. I do not agree with this finding. On the contrary, common sense dictates, in my view, that a judge's reputation will inevitably be tainted by the appointment of a Tribunal of inquiry into allegations of serious misconduct or incompetence against him or her".

163 Id, para 20.

Cite this article: 'Nyane H "South African Lessons for the Development of the Doctrine of Legality in Lesotho" (2025) *Journal of African Law*. https://doi.org/10.1017/S0021855325100788