THE FUNDAMENTAL RIGHT TO JUST ADMINISTRATIVE ACTION: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE DEMOCRATIC SOUTH AFRICA

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ABSTRACT

For most of its existence South African administrative law has been shaped by the doctrine of parliamentary sovereignty – the heart of the constitutional order from 1910 to 1994 – and a racist political system that favoured the white minority at the expense of the black majority. In these circumstances, the rules of administrative law were of limited use in protecting the individual from exercises of administrative power that infringed fundamental human rights, often on a grand scale. On 27 April 1994, however, a new political and constitutional order came into existence that swept away the very foundations of the old order: parliamentary sovereignty was replaced by constitutional supremacy and the racial exclusivity of the old order was replaced by a commitment to equality, freedom and dignity in a democratic state. A justiciable Bill of Rights was at centre stage in this new order. That Bill of Rights includes a fundamental right to just administrative action. It is both the new constitutional order and this rather unusual fundamental right that have changed the nature of South African administrative law. This thesis examines the effect of the fundamental right to just administrative action on the law and practice of the judicial review of administrative action. It does so principally by examining the legal position before and after 27 April 1994 with particular reference to: what is meant by administrative action; the exercise of administrative power by private bodies regulated by the rules of administrative law, on the one hand, and exercises of private power regulated by rules of private law, on the other; the rules of standing, the notion of justiciability and the constitutionality of rules that seek to limit the right of the individual to approach a court to review administrative action; the meaning and scope of the right to lawful, reasonable and procedurally fair administrative action, in terms of the common law, the Constitution and the Promotion of Administrative Justice Act 3 of 2000; the meaning, scope and efficacy of the rights to reasons for administrative actions and of access to information; the procedure of judicial review and remedies that may be granted for the infringement of a person’s right to just administrative action; and conclusions and recommendations with regard to progress made in the construction of South Africa’s new, democratically based, administrative law.
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From an academic perspective, my interest in administrative law owes much to the enthusiastic and inspirational teaching of Lawrence Baxter at the University of Natal (Pietermaritzburg) in the early 1980s. My first practical exposure to the discipline came about when Chris Nicholson, then the director of the Legal Resources Centre’s Durban office, recruited student volunteers to monitor pension pay-points in the townships around Pietermaritzburg and to take statements from people who, having queued for hours for their meagre pensions, were told that there was no money for them that month. By successfully bringing substantial numbers of applications to compel the officials who administered the welfare system in the government of KwaZulu to comply with their obligations under the law, the LRC was able to make a marked difference to the lives of thousands of poor and marginalized South Africans.

A number of years later, when I was the director of the Grahamstown office of the LRC, I initiated a similar litigation campaign against the Eastern Cape Provincial Government to compel officials to take decisions on applications for pensions timeously, for the review of refusals to grant people pensions and to compel the reinstatement of pensions that had been cancelled unlawfully, unfairly and unreasonably. The corrective power of administrative law was illustrated by the first major case in the campaign, Bacela v Member of the Executive Council for Welfare, Eastern Cape Provincial Government [1998] 1 All SA 525 (E), in which the respondent had unlawfully decided to stop paying successful applicants for pensions the arrears (to the date of their application) to which the law entitled them: the effect of the judgment was that the respondent was forced to pay in the region of R150 million to thousands of old and disabled people and to maintenance grant beneficiaries who had been short-changed by the government. Although the Durban LRC’s campaign and the campaign in the Eastern Cape were over ten years apart, it was a precedent set in a matter argued by Chris Nicholson that was relied upon by Mpati J when he came to the assistance of Ms Bacela. Since then, the campaign has produced even bigger successes. For instance, Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (12) BCLR 1322 (E), confirmed on appeal in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2001 (10) BCLR 1039 (SCA),
broke new ground in relation to representative standing. It will also have the effect of reinstating (with arrears) the disability grants of many thousands of people whose only source of livelihood was taken away from them by procedurally unfair administrative action.

A great deal of water flowed under the bridge between Chris Nicholson’s campaign in the early 1980s and the campaign in the Eastern Cape in the mid to late 1990s. A state of emergency in the 1980s – and the ‘emergency jurisprudence’ that it spawned – had the effect of destroying a great deal of the capacity that an already flawed system of administrative law had for protecting human rights. More fundamentally, however, it damaged the legitimacy of the judiciary as the highest court, in particular, gave judgment after judgment in which it found for the executive, and abandoned the citizenry. One did not have to be gifted with more than an ordinary degree of insight to foresee the types of lawlessness that this – the discourse of power, rather than that of rights – would generate among both the governors and the governed. Many of the tales of that lawlessness emerged during the hearings of the Truth and Reconciliation Commission.

Practicing in the field of human rights law in this environment was both challenging and depressing as the law often appeared to be more part of the problem than part of the solution to the country’s travails. All of that began to change on 2 February 1990 as lawyers interested in the reconstruction of the South African legal system began to consider the options for reform and the possibilities that a Bill of Rights would generate for the meaningful protection of human rights. And, of course, all of this acquired concrete form on 27 April 1994, that marvellous day on which our democratic state was born.

Practicing law now in this environment of freedom and democracy is something few of us who practiced during the dark days of the 1980s could even have dreamt of then. Now, instead of ouster clauses, we have a fundamental right of access to court; instead of having to establish standing under the restrictive and inappropriate rules of the common law, we have the bounty of s38 of the Constitution; instead of official secrecy, we have a fundamental right of access to information; instead of forced removals, separate amenities, group areas, detention without trial, bannings of meetings, of people, of organisations, of publications, we have a democratic state founded on values of human dignity, freedom, equality, non-
racialism, non-sexism, constitutional supremacy, the rule of law, universal adult suffrage, multi-party democracy, accountability, responsiveness and openness; and instead of a system of administrative law labouring under the twin disabilities of parliamentary sovereignty and racial domination, we now have a fundamental right to just administrative action that protects every person from unlawful, unreasonable and procedurally unfair administrative action and gives to everyone a right to reasons for adverse administrative action.

I consider it to be a great privilege to be able to practice, teach and research in a system such as this and, I hope, to contribute something to the development of a new administrative law that can play a significant role in the achievement of a society which, in the words of the Constitution’s preamble, is based on ‘democratic values, social justice and fundamental human rights’.

I was privileged to work as an attorney for two remarkable organisations, both of which have contributed and continue to contribute significantly to South African administrative law and other areas of human rights and labour law as well. The first is the firm Cheadle, Thompson and Haysom, an amazing collection of energetic, committed and innovative lawyers, and the second is the Legal Resources Centre, the premier public interest legal organisation in the country. I am indebted to many colleagues at both, to many others at the side bar, the bar, the bench and in universities, and to the many remarkable people with whom one rubs shoulders in the field of human rights law in South Africa for the roles they have played in my development as a lawyer. I wish to single out but one person of the many that I refer to: I thank Rob Midgley, my colleague at Rhodes University both at present and when I taught at its East London campus from 1984 to 1986, and who is the supervisor for this thesis, for his assistance, support and encouragement.

Finally, I wish to pay tribute to my family – my wife Adrienne, my son Timothy and my daughter Ruth – for their love, support and companionship while I have been writing this thesis. This work is dedicated to them.

Clive Plasket
Grahamstown
Note: I have, in this thesis, considered cases reported in law reports published up to and including the end of 2001. In some isolated instances, however, more recent cases have been included. I have relied to a large extent on the Butterworth’s Constitutional Law Reports simply because I own a set of these reports and it was consequently convenient for me to work from them as my first choice.
INTRODUCTION

Much like the rule of law, the precise meaning of administrative law tends to mean different things to different people, even if there is a core of certainty about the fact that it involves the relationship between a part of the state – the administration – and the individual: some people lay emphasis on administrative law being concerned with attaining administrative efficiency, at one end of the spectrum of views; at the other end of the spectrum, others take the view that administrative law is primarily concerned with ensuring that the power wielded by the administration is tightly controlled so that human rights are not abused. Both are aims of administrative law and concerns for administrative efficiency and for the protection of human rights are both important, As a result, Craig says that neither perspective is ‘right or wrong in some absolute sense’. Indeed, public law in general is concerned with the interplay of empowerment, on one hand, and the control of power, on the other – with the dilemma that Madison alluded to that ‘you must first enable the government to control the governed; and in the next place oblige it to control itself’. This is especially true of administrative law, that branch of public law that forms the basis of this thesis.

In order to determine where the balance between empowerment and accountability lies, it is necessary to have an understanding of the context within which the rules of administrative law operate. In other words, ascertaining the relative importance that a particular system of administrative law accords to administrative efficiency, and how much to the protection of rights, involves an analysis of that system’s values, not only in the abstract, but also in practice. In assessing the views of commentators on administrative law, and in trying to establish for oneself how ‘right’ or ‘wrong’ those views are, a reader will be assisted by knowing the value-system that animates the commentator’s

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1 Craig, 3.
understanding of the world.

This thesis is based unashamedly on the primary importance of the protection of human rights, on the need for vigilance when powers are delegated to administrators and on the need for effective controls, especially judicial controls, of administrative power. This perspective is informed by my involvement in human rights litigation since the mid-1980s. In this period administrative law has featured prominently, both before 1994 and thereafter, in controlling excesses, abuses or neglect on the part of the administration. At times, however, administrative law has flattered to deceive: offering hope of redress but failing to deliver. The answers to both the successes of administrative law as a system of rules that can shield the individual from oppressive exercises of public power, and the failures to do so, are to be found in the interplay between empowerment and accountability, as that interplay is understood by judges, lawyers, legislators, administrators, commentators and the populace in general. It will be clear to the reader that, in my approach to issues of administrative justice, my ‘default settings’ are set closer to the idea that administrative law should concern itself primarily with the protection of rights, than with other issues such as administrative efficiency.

The reader will find that another central theme of this thesis is that the values of the South African democratic order – as expressed principally by the terms, spirit, tenor and ethos of the Constitution of the Republic of South Africa Act 108 of 1996, and its immediate predecessor, the Constitution of the Republic of South Africa Act 200 of 1993 – are also intimately concerned with the protection of rights: even if effective governance is of great importance, which few would dispute, it is not a commodity that ought to be bought cheaply. The effective (and sometimes brutally efficient) exercise of governmental power at the expense of human rights is a bitter experience that most South Africans would not

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3 In the pages that follow, this Constitution will be referred to, when the context requires this, as the final Constitution. In other instances, it will be referred to simply as the Constitution.

4 In the pages that follow, this Constitution will be referred to, when the context requires this, as the interim Constitution. In other instances, and where it cannot be confused with the final Constitution, it may be referred to as the Constitution.
want to see repeated. The postscript to the interim Constitution made this clear when it said that this Constitution provided a ‘historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex’. The preamble of the final Constitution speaks of it healing the ‘divisions of the past’, establishing a society ‘based on democratic values, social justice and fundamental rights’ and laying ‘the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law’.

The passing of the interim Constitution, by the racially designated tricameral Parliament, and its coming into force on 27 April 1994, have correctly been heralded by many as a legal revolution. For administrative law, perhaps more overtly than for some other branches of law, this event signalled the beginning of its reconstruction: prior to 27 April 1994, administrative law functioned in the shadow of the doctrine of parliamentary sovereignty in an undemocratic system of government that cynically ranked empowerment above accountability. The changes brought about by this fundamental break with the past were described as follows by Chaskalson P in Pharmaceutical Manufacturers Association of South Africa; In Re; Ex Parte Application of the President of the Republic of South Africa:5

‘Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was “the main crucible” for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and

5 2000 (3) BCLR 241 (CC), 260G-261E (paragraph 45).
other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control.

Because of the definitive break with the past that occurred on 27 April 1994, it is possible to consider South African administrative law on a ‘before and after’ basis, as long as it is borne in mind that the ‘after’ aspect is far from completed and will remain under construction for some time. In this process, which must be undertaken against the backdrop of the Constitution’s values, it is necessary to ascertain what parts of the old system remain, what aspects of it must be modified and what must either be developed or invented.

The interim and final Constitutions generated the most important reform of South African administrative law since the creation of a superior court of general jurisdiction at the Cape of Good Hope in 1827: they entrenched fundamental rights to lawful, reasonable and procedurally fair administrative action, and to reasons for adverse administrative action. The reforms went further, however, than merely giving administrative law this express constitutional base: these rights were entrenched in a Constitution that was founded on values of constitutional supremacy and the rule of law and of democratic governance.

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6 Baxter, 29.
7 Section 24(d) of the interim Constitution, in seeking to entrench the right to reasonable administrative action, or something akin to it, provided for a right to administrative action that was ‘justifiable in relation to the reasons given for it’. See further, chapter 9 below.
8 Interim Constitution, s24; final Constitution, s33.
9 Final Constitution, s1(c). See too s2. In the interim Constitution, s4 provided for its supremacy. The rule of law was held to be an implicit value of the interim Constitution. See Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC), 1482C-
aimed at ensuring ‘accountability, responsiveness and openness’. These values are important in distinguishing the pre-1994 administrative law from the post-1994 administrative law.

This thesis consists of 13 chapters. Chapter 1 first discusses introductory and definitional matters, such as what administrative law is and the sources of South African administrative law; secondly, this chapter examines the principal features of the South African system of administrative law prior to 27 April 1994, concentrating on a number of its defects and a process of reform that began to emerge in the mid- to late-1980s. Chapter 2 introduces the interim and final Constitutions and discusses their inclusion of administrative justice rights as fundamental rights. It also introduces the Promotion of Administrative Justice Act 3 of 2000, the means chosen by the Constitutional Assembly to give effect to these fundamental rights. A further theme that runs through this thesis is that the Act has not succeeded in properly and fully achieving this purpose.

The content of chapters 3 to 7 may be described as the framework for the control of administrative action. Chapter 3 details various ways in which administrative power is subjected to control, and discusses the effectiveness of these modes of control. It then focuses on judicial control of administrative power, both before and after 27 April 1994. It examines common law review, the inherent jurisdiction of the superior courts as the jurisdictional basis for common law review, the principle of legality and the constitutional justification for common law review – the ultra vires doctrine. It then examines the judicial authority in the constitutional state created on 27 April 1994, and the power of judicial

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10 Final Constitution, s1(d). In the interim Constitution, these values are not expressly stated but, as with the rule of law, are implicit. See for instance Mureinik ‘ A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 32 who spoke of the interim Constitution being based on a culture of justification. See too the judgment of Mahomed J in S v Makwanyane 1995 (6) BCLR 665 (CC), 757J-759B (paragraphs 262 and 263). See further Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T).

11 See too President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC), 1114I-1115D (paragraphs 132 and 133).

12 Section 33(3).
review under the Constitution. It also compares common law and constitutional review.

Chapter 4 concerns itself, in the main, with two inter-related issues of prime importance. The first seeks an answer to the question: ‘What is an organ of state?’ This is important because it is usually organs of state that are wielders of administrative power and a great deal of confusion has been generated by courts using inappropriate tests to determine what an organ of state is. The second issue seeks an answer to the question: ‘What is administrative action?’ Once again a great deal of confusion has been generated by courts grappling, often inadequately, with what is sometimes – but not always – a slippery concept. Many of the difficulties in this regard are highlighted. Finally the chapter turns to the definition of administrative action in the Promotion of Administrative Justice Act, which through a combination of poor drafting, inadequate understanding of the basics of administrative law and arbitrary choices in a hurried legislative process, is bound to bedevil a far from ideal legal position still further.

Chapter 5 concerns itself with the divide between public law and private law. Its focus is on the ways in which the law should decide when an ostensibly private body is exercising public power or performing public functions and should consequently be bound to act within the discipline imposed by the rules of administrative law. This issue is of particular significance in South Africa because s8(2) of the Constitution makes provision for the so-called horizontal application of fundamental rights in certain circumstances, and s1(i)(b) of the Promotion of Administrative Justice Act specifically includes in the definition of administrative action the administrative-type exercises of public power or performance of public functions by natural and juristic persons other than organs of state.

Chapter 6 examines the rules of standing that were first introduced into the legal system by s7(4)(b) of the interim Constitution and which are now encapsulated in s38 of the final Constitution. The extension of the restrictive common law rules of standing is discussed in relation to each leg of standing envisaged by s38 and an assessment is made of the progress made by the courts, between 1994 and the present, in giving effect to access to
justice through extended standing in litigation concerned alleged threats to or violations of fundamental rights. Chapter 7 is also concerned with access to court. It commences with a discussion on the concept of justiciability and the change that the new constitutional order has wrought to the concept as understood under the Westminster-inspired common law. The point is made that now a court is empowered to deal with any dispute as long as it can be ‘packaged’ as an issue involving rights. The high policy content of exercises of power is no longer an acceptable basis for holding that a matter is not justiciable. This chapter also discusses a number of issues directly concerned with the fundamental right of access to court\textsuperscript{13} such as: the constitutionality of ouster clauses; the constitutionality of time limits for the initiation of proceedings; the delay rule of the common law, its replacement with a six month time limit for the initiation of judicial review proceedings in terms of s7(1) of the Promotion of Administrative Justice Act and the constitutionality of this section; and the constitutionality of s7(2) of the Act which places an obligation on an application for judicial review, far more onerous than the common law, to exhaust internal remedies before approaching a court for relief.

Chapters 8, 9 and 10 deal in turn with the rights to lawful administrative action, the right to reasonable administrative action and the right to procedurally fair administrative action. In each chapter the reader will find a discussion of the common law, the interpretation of the particular right as contemplated by the Constitution (and if it is necessary because of differences in wording or interpretation, a discussion of both the interim and final Constitutions’ versions of the particular right) and a discussion of the codification of each ground of review in the Promotion of Administrative Justice Act. In each of these chapters, conclusions are made in respect of whether the Act has adequately given effect to the rights to lawful, reasonable and procedurally fair administrative action and, if not, what can be done to remedy the defect.

Chapter 11 concerns itself with two rights, one that is part of the broader right to just

\textsuperscript{13} Section 34.
administrative action and one that might as well be. The first is the right to reasons for adverse administrative action, contained in s33(2) of the Constitution, and the second is the right of access to information, contained in s32(1) of the Constitution and given effect to by the Promotion of Access to Information Act 2 of 2000. The point is made in this chapter that both rights are important adjuncts to the substantive rights to lawful, reasonable and procedurally fair administrative action because they allow for the opening up of the processes of the administration and thus serve as the ‘bulwark of the right to just administrative action’.14

Chapter 12 is dedicated to a discussion of two of the outstanding issues not dealt with elsewhere, namely procedure and remedies. Finally, chapter 13 synthesizes the major conclusions arrived at throughout the thesis. It concludes that the foundations of a new South African administrative law compatible with the values of the democratic order have been set but a great deal more needs to be done to ensure that South African administrative law, in practice and in theory, is able, properly and adequately, to hold administrative officials to account for the exercise of their powers and the performance of their functions. It points to the deficiencies in the Promotion of Administrative Justice Act as a major impediment to the attainment of such a system, to an immediate need for law reform in this respect and to the need for credible and permanent structures for law reform that can assess the state of administrative law, and of public administration, and respond to shortcomings appropriately and effectively, as well as of judicial training in the field of public law.

14 Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA), 189H (paragraph 42). See to Phato v Attorney-General, Eastern Cape 1994 (5) BCLR 99 (E), 113C-G.
CHAPTER ONE: SOUTH AFRICAN ADMINISTRATIVE LAW: AN INTRODUCTION

1.1. Introduction

Public law, particularly constitutional law and administrative law, is concerned with the institutions of government and with politics in a much more obvious way than private law.¹ A proper understanding of the nature of South African constitutional and administrative law therefore requires an understanding of the development of the institutions of government, of South African political history, particularly from the period of colonial rule to the advent of the democratic era, and of the way in which South African society is now ordered.² This need to trace the path that South Africa has taken from colonial outpost to multi-party democracy with a supreme Constitution is particularly important because South African society is in the process of transforming itself to reflect and give expression to the values that underpin the new constitutional order. The process of transformation can only be achieved if it is based on a proper understanding of where South African society has come from and where it wishes to go because constitutions in general, and the South African Constitution, in particular, are moulded by history, a point made by Sachs writing shortly before the commencement of the democratic era:³

'It is no accident that constitutions usually come into being as a result of bad rather than good experiences. Their text, or sub-text, is almost invariably: “never again”. In the case of South Africa, the new constitution arises out of the need to escape from the profound humiliations and...

¹ Corder and Davis ‘Law and Social Practice: An Introduction’ in Corder (ed) Essays on Law and Social Practice in South Africa Cape Town, Juta and Co: 1988, 1, 15. See too, Baxter, 3 who observes: ‘The institutions of public administration implement and develop public policy and the policy of government. Administrative action is a manifestation of these policies. Since administrative law is concerned with the efficacy, fairness and control of the administrative process and administrative action, it functions within an environment of controversy.’

² Craig, 3. See too Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC), 1336I-1337B (paragraph 34) in which Froneman DJP said: ‘The particular conception of the State and the democratic system of government as expressed in the Constitution determines the powers to review administrative action and the extent thereof (cf Craig, Administrative Law, 3rd ed at 3-40). Of importance in this regard, for present purposes, is the constitutional separation of the executive, legislative and judicial authority of the State administration as well as the foundational values of accountability, responsiveness and openness in a democratic system of government, (section 1(d) of the Constitution). The former provides legitimacy for the judicial review of administrative action (but not for judicial exercise of executive or administrative authority), whilst the latter provides the broad conceptual framework within which the executive and public administration must do its work and be assessed on review.’

oppression created by apartheid. Through the constitution, we affirm that we learn something from our dolorous history. It is worth repeating: all constitutions are based on mistrust. If we could trust our rulers, our parties, ourselves, we would not need constitutions. Power not only corrupts, it intoxicates, it confuses. Like Nature, it abhors a vacuum. Like Water, it follows the path of least resistance. Oppression is oppression, but in some ways, oppression in the name of the good is worse than oppression in defence of the bad, since it tarnishes the very ideas it seeks to protect and deprives people even of the image or hope of a better society.’

Much the same point was made by Mahomed J in *S v Makwanyane* after the interim Constitution had come into operation (on 27 April 1994, the date of South Africa’s first democratic election):

‘All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: It retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.’

The final Constitution makes it clear in a number of ways that it is concerned with the past, on the basis of the ‘never again’ thesis, as part of the process of building a better future. The preamble, for instance, reads as follows:

‘We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our country.
Nkosi Sikelel’iAfrika. Morena boloka setjhaba sa heso.
God seen Suid Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.’

As importantly, an understanding of South Africa’s past serves to explain the presence of the Constitution’s founding values – its essential features – contained in s1. They underpin the Constitution⁹ and all state action ought, ultimately, to conform to these values. Section 1 reads as follows:¹⁰

‘The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

⁹ Devenish, op cit, 33 says: ‘According to section 1, the Republic of South Africa is a single “sovereign, democratic State” founded on four fundamental but kindred sets of political values inherent in the democratic body politic, established by the Constitution.’ See too Henderson ‘Putting Section 1 to Work: Some Preliminary Thoughts on the First of the Founding Provisions of the New Constitution’ (1998) 115 SALJ 215.

¹⁰ Note that s1 has been given special protection against amendment. In terms of s74(1) a bill to amend s1 must have the support of a majority of at least 75 percent in the National Assembly and the support of at least six provinces in the National Council of Provinces.
South Africa’s history from 1652 to 1994 has been a history of the systematic denial of the values of s1: the undemocratic forms of state which have been the hallmark of government during this period; the denial of human dignity, equality and freedom in the form of slavery, practiced from 1658 to 1834 in the Dutch and British colonial periods, the pass laws and vagrancy laws in force from 1809 to 1828 during the British colonial period, the systematic deprivation of the land rights of black people, their rights to freedom of movement, freedom of association and so on through segregationist legislation before and after Union and during the rule of the apartheid regime; the vicious security laws and the evil of the hit squads; the entrenchment of racialism as the doctrine upon which rights and privileges were granted and withheld and the pervasiveness of gender discrimination; the crude gerrymandering of the white Natal settlers to keep the franchise for themselves exclusively, the equally crude exclusion of black people from church and state in the Boer Republics, the betrayal of black political rights in the South Africa Act of 1909, the disgraceful removal of coloured voters in the Cape from the common voters roll in the 1950’s, the balkanization of the country through the vicious charade of the homelands system, the bizarre make-believe of the tricameral parliamentary system and the unaccountable, unresponsive and secretive forms of government which accompanied these characteristics of government.  

The need to understand South Africa’s history as a starting point in the transformative endeavour is alluded to by Mureinik in his influential analysis of the interim Bill of Rights, but the point he makes holds good in respect of the final Constitution too:  

“What is the point of our Bill of Rights? The Bill is Chapter 3 of the interim Constitution, which declares itself to be aspiring to be “a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the — 12 —
At 8. This statement will be qualified during the course of this work. It is not only the executive arm of government that performs administrative acts but it is undoubtedly true that it performs most administrative acts. In addition, it is not only governmental actors that perform administrative acts as certain private bodies may also do so. These and other qualifications to the general statement will be discussed more fully in chapters 4 and 5 below.

1.2. Definition and Sources of South African Administrative Law

1.2.1. Definition and Context of South African Administrative Law

Boulle, Harris and Hoexter define constitutional law to include three aspects. It is, they say, ‘the law which regulates the principal organs of State, in the sense of describing their composition, powers and duties and procedures’, it ‘regulates the relationship among those branches when they come to exercise their powers’ and it ‘regulates some of the relationships between the various institutions of the State and its citizens’. There is, as will be shown, some overlap between constitutional law and administrative law because both deal with state institutions, their interaction with one another and their relationships with individuals; but administrative law tends to be more limited in scope because its focus is on one branch of government – the executive.

One of South Africa’s leading administrative lawyers, Marinus Wiechers, defined administrative law as ‘that section of public law which governs the organisation, powers and actions of the state administration’. A second, Lawrence Baxter, defined it more expansively. After giving a broad definition of administrative law as ‘that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organisations, or with other public authorities’, he proceeded to define what he calls general administrative law as ‘the general principles of law which regulate the organisation of administrative institutions and the fairness or efficacy of the administrative process, govern the validity of and liability for administrative action and

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13 At 8.
14 This statement will be qualified during the course of this work. It is not only the executive arm of government that performs administrative acts but it is undoubtedly true that it performs most administrative acts. In addition, it is not only governmental actors that perform administrative acts as certain private bodies may also do so. These and other qualifications to the general statement will be discussed more fully in chapters 4 and 5 below.
15 Wiechers, 1-2.
inaction and govern the administrative and judicial remedies relating to such action or inaction.16

These definitions are not necessarily unharmonious and do not need to be reworked in any significant way. Both are under-inclusive to a degree but the essence of the discipline is captured by both writers: it deals with the legal rules relating to the control of certain types of public power, whether governmental or private, and is based on the idea that all public power is subject to legal control.17 The type of public power that is the subject matter of administrative law is the power of administration – usually the exercise of power arising from the administering of legislation18 but also including the administering of certain ostensibly private schemes that have been created consensually.19 Bearing this in mind, and with due respect to the authors cited above, administrative law may be defined as the general principles of law that regulate the legal relationships of administrative institutions or other institutions, whether they are governmental or private, exercising public power of an administrative nature, with private persons or with other public institutions and that: (1) regulate the organization of those institutions and their composition, powers, duties and procedures; (2) govern the legal validity of their administrative actions and, in some instances, their omissions; (3) govern the liability of the state, particular organs of state or private bodies exercising public administrative powers, for their actions or omissions which are unlawful, unreasonable, procedurally unfair or otherwise unconstitutional; and (4) govern the judicial and non-judicial remedies available to those aggrieved by the invalid acts or omissions of such administrative institutions.20

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16 Baxter, 2.
17 Wade and Forsyth, 4-5.
18 See chapter 4 below.
19 See chapter 5 below.
20 It will be noted that this definition is similar to Baxter’s definition. That is so because his definition is, subject to the additions in the definition offered above, the most complete definition to be found in the South African literature. It is also an entirely adequate definition in most respects. The above definition makes reference to administrative action (or administrative power) and public power. These concepts will be dealt with in detail in chapters 4 and 5 below. It is neither practical nor necessary to deal with them at this point. Suffice it to say that administrative action and the performance of administrative action – the exercise of administrative power – involves the implementation of what may be termed an empowering provision, usually in the form of a statute but sometimes in the form of an agreement, and public power is power exercised in circumstances in which the law requires the public interest, as opposed to private whim, to dictate how the power is exercised.
Within this broad but rather static definition, differences of emphasis may be evident from one legal system to another: different systems may place relatively more emphasis on the protection of the rights of the individual, or on fostering openness and accountability in the administrative process, or on administrative efficiency.21 Craig says of the differing weightings of these values in different systems that none are ‘right or wrong in some absolute sense’ but that a proper balance between them can only be ascertained in the context of a particular democratic society and the political theory upon which the functioning of its public institutions are based.22 In the South African context, O’Regan says that ‘the Interim Constitution exacts us as lawyers to re-examine the principles and rules which were part of that old order to determine which are appropriate to the new. This task requires a vision of the constitutional democracy that informs the Interim Constitution, as well as an understanding of the constraints and context within which that constitution must take root’.23

Since Baxter and Wiechers wrote their text books on South African administrative law in 1984 and 1985 respectively, the underpinnings of the South African state have been changed fundamentally by the interim Constitution and the final Constitution. In particular, the constitutional system has changed from one based on parliamentary sovereignty to one in which the Constitution is supreme.24 Section 7(2) provides that the ‘state must respect, protect, promote and fulfill the rights in the Bill of Rights’ contained in Chapter 2 of the Constitution, and s8(1) provides that the Bill of Rights ‘applies to all law and binds the legislature, the executive, the judiciary, and all organs of state’. Section 8(2) allows for the Bill of Rights to bind natural or juristic persons who are not organs of state in certain circumstances.

Within the substantive provisions of the Bill of Rights, a number of related rights are of importance for administrative law: s33(1) creates a right to ‘administrative action that is lawful, reasonable and procedurally fair’, s33(2) provides a right to written reasons

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21 Craig, 3.
22 Craig, 3.
24 Constitution, s2, which also provides, as the logical consequence of constitutional supremacy that law or conduct inconsistent with the Constitution is invalid and that ‘the obligations imposed by it must be fulfilled’.
for administrative decisions and s33(3) provides that legislation ‘must be enacted to
give effect to these rights’; s32 creates a right of access to information and s34
creates a fundamental right of access to court. All of these rights flow from and are the
concrete manifestations of two sets of founding values – the values of constitutional
supremacy and the rule of law and of democratic governance to ensure accountability,
responsiveness and openness. The Constitutional Court has, on a number of
occasions, described the type of society envisaged by the Constitution. For instance,
in S v Makwanyane, in which the death penalty for murder was found to be
unconstitutional, Mahomed J said that the interim Constitution retained ‘from the past
only what is defensible and represents a decisive break from, and a ringing rejection of,
that part of the past which is disgracefully racist, authoritarian, insular and repressive
and a vigorous identification of and commitment to a democratic, universalistic, caring
and aspirationally egalitarian ethos, expressly articulated in the Constitution’.

It is into this conception of democracy that the new South African administrative law
must fit. Indeed, one of its principal functions must be to foster and advance the search
for the type of society which has been described in the preamble and in s1. While
there is a general trend in democracies towards greater participation by citizens in
administrative decision-making, and hence enhanced accountability, this does not mean
that judicial review, as a means of controlling administrative power will lose its
importance in South Africa. It may be tempting to argue that the advent of democratic
rule reduces the need for judicial controls over the administrative process. Such a view
would, it is submitted, be simplistic, unrealistic, at odds with the Constitution’s vision of
democratic rule and aimed at the wrong target.

That view would be simplistic because it is based on the idea that democratic rule is the
cure for all ills, that if mistakes are made the political process will rectify those mistakes
and that the political process, like the free market, will find its own equilibrium. It is
unrealistic because it ignores the fact that, at present and for the foreseeable future,

25 This legislation has now been passed. It is the Promotion of Administrative Justice Act 3 of 2000.
26 Constitution, s1(c).
27 Constitution, s1(d).
28 1995 (6) BCLR 665 (CC), 758B-C (paragraph 262). See too the preamble and the postscript of the interim Constitution.
large parts of the South African administration are dysfunctional to a greater or lesser degree. It is at odds with the Constitution’s vision of democracy for a number of reasons: it tends to ignore or underplay the important role of judicial review of administrative action in South Africa, historically, (and despite the odds) in seeking to safeguard and advance human rights; it ignores the central role of the courts in the current constitutional enterprise – as part of democratic governance, it must be stressed – and the role entrusted to the judiciary to act as protectors of fundamental rights and upholders of the Constitution; and it fails to take account of the fact that the simultaneous existence of non-judicial means of redress and responsive government, on the one hand, and extensive powers of judicial review, on the other, are not incongruous in any sense. These means of redress should rather be seen to represent an attempt to provide the citizenry with as complete a protective shield as possible against oppressive exercises of public power. Finally, the view antagonistic to judicial review aims at the wrong target because the issue involved is not whether judicial review and democracy are compatible. They are, if only because our Constitution makes them compatible. Rather, the issue is about the appropriate levels of scrutiny, about the intensity of review, of deference and of margins of appreciation in a democratic system of administrative law based squarely and explicitly on the rule of law.

Writing on the fact that the Constitution envisages what he termed a rights-based conception of public law (in which judicial review is of considerable importance) Corder has observed that the ‘core values of this approach to democracy and the functioning of the state are openness of action, participation in decision-making, justification for decisions made, and accountability for administrative action. The importance of the constitutional requirements of lawfulness, procedural fairness, reason-giving and justification for administrative action to such a conception of democracy is self evident. So the particular form of democratic framework within which we now operate is explicit and mandatory, and the principles of administrative law must be revised and developed or created to give expression to such a concept’.

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29 See Plasket ‘The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000’ (2002) 118 SAJL 50.
1.2.2. Sources of South African Administrative Law

Prior to the adoption of the interim Constitution, the predominant influence on South African administrative law was English Law. This is not surprising because of the English pedigree of South African constitutional institutions until 1994.31 With the passing of the South Africa Act in 1909, the entire country, irrespective of the constitutional histories of the constituent provinces, embraced the Westminster system and what went with it. For administrative law, it meant, most importantly, the acceptance of the ultra vires doctrine as the rationale for the jurisdiction of the ordinary courts to review administrative action.32

In comparison to English law, administrative law was under-developed in Roman Dutch law. It is, consequently, not a particularly significant source of South African administrative law,33 despite the fact that it has been influential in certain respects: the presumptions of statutory interpretation are obvious examples. In addition, says Baxter, the ‘old authorities have been cited in cases involving failure to observe prescribed procedures, the finality of administrative acts, delegation of powers, the principles of fair procedure, compensation for interference with rights, and in relation to judicial remedies’.34

Because of the influence of English law on South African administrative law, reliance has always been placed on English (and, to a lesser extent, Commonwealth) case law35 in much the same way as English cases are often cited in judgments on company law or the law of negotiable instruments. It would be incorrect to assume, however, that

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32 Baxter, 30-31.

33 Baxter, 34-35.

34 Baxter, 34. See too Wiechers, 33-36.

35 Baxter, 32. See too Pharmaceutical Manufacturers Association of South Africa: In re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 258D-E (paragraph 38).
English precedent has been applied slavishly by South African courts. The case law reveals important areas of divergence. For example, the review of administrative action for unreasonableness is a ground recognised in English law but not fully recognised in South African common law. 36 Secondly, in Staatspresident v United Democratic Front, 37 the Appellate Division went to lengths to avoid following English law, distinguishing it (erroneously at times) in its efforts to give effect to an ouster clause contained in s5B of the Public Safety Act 3 of 1953. 38 On the other hand, reliance was placed on English law when, in Administrator, Transvaal v Traub, 39 the Appellate Division accepted into South African law the concept of legitimate expectation.

Bearing in mind that borrowing from foreign legal systems must be effected with caution 40 there is no reason why the general administrative law of England and English speaking Commonwealth countries, in particular, cannot be used to modernise South African administrative law. 41 Indeed, international and comparative law are now more important than they were. Section 39(1) and s39(2) of the Constitution read:

‘(1) When interpreting the Bill of Rights, a court, tribunal or forum –
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.’

Similar provisions in the interim Constitution 42 were dealt with in S v Makwanyane. 43 Chaskalson P held that the public international law contemplated by the interim Constitution included both binding and non-binding law and that international

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36 Compare Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220 and Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
37 1988 (4) SA 830 (A).
39 1989 (4) SA 731 (A).
41 Baxter, 32-34.
42 Section 35(1).
43 1995 (6) BCLR 665 (CC).
agreements and customary international law provided a framework within which the Bill of Rights could be interpreted.\textsuperscript{44} He held too that what he termed ‘comparative “Bill of Rights” jurisprudence’ was important, especially in the ‘early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw’. He warned, however, of the dangers of assuming unthinkingly that foreign case law will always be a guide to the interpretation of the Bill of Rights.\textsuperscript{45} Given that the Constitution provides a fundamental right to just administrative action, which is broader, in some respects at least, than the common law, it is likely that s39 will play a role in infusing into South African administrative law international administrative law and comparative jurisprudence on a much more significant level than was previously the case.\textsuperscript{46}

1.3. Sources of Authority for Administrative Action

The first principle of administrative law is that public authorities derive their authority (also referred to as power or jurisdiction) from a legal instrument or legal rule and they may only do what that law authorises them to do.\textsuperscript{47} This, the principle of legality, is said to require ‘not only that the administrative authorities should not break the law, but also that all of their decisions have a basis in law and that their content complies with the law’.\textsuperscript{48} The law empowers and limits the powers of the administration in this way.\textsuperscript{49} The most significant source of authority for administrative action is statute,\textsuperscript{50} although common law, especially in the form of the prerogative, has also been regarded as a limited source of authority.\textsuperscript{51}

\textsuperscript{44} At 686D-E (paragraph 35).
\textsuperscript{45} At 687C (paragraph 37).
\textsuperscript{46} See in this regard, Baxter 35-36.
\textsuperscript{47} Baxter, 75-6.
\textsuperscript{49} Baxter, 386-387.
\textsuperscript{50} Baxter, 387; Wiechers, 28.
\textsuperscript{51} Baxter, 386. See too Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL), 949i-950b, where Diplock LJ said: ‘For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers... . The ultimate source of the decision-making power is nearly always nowadays a statute
1.3.1. The Constitution

The Constitution – the founding document of the democratic South Africa – is the ultimate source of all state power, whether legislative, executive or judicial. To be valid, every exercise of state power must have a legal pedigree that can be traced back to the Constitution.\textsuperscript{52} The Constitution is the specific source of authority for a variety of institutions of an administrative nature. Chapter 9, for instance, creates the office of the Public Protector,\textsuperscript{53} the Human Rights Commission,\textsuperscript{54} the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,\textsuperscript{55} the Commission for Gender Equality,\textsuperscript{56} the Auditor General,\textsuperscript{57} the Electoral Commission,\textsuperscript{58} and an independent body to regulate broadcasting.\textsuperscript{59} It describes these institutions as bodies designed to ‘strengthen constitutional democracy in the Republic’.\textsuperscript{60}

More generally, the Constitution establishes a variety of agencies and administrative structures, which include: municipalities, the vehicles for local government;\textsuperscript{61} the Judicial

\textsuperscript{52} This point is encapsulated by Froneman DJP in Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC), 1332A-C (paragraph 9): ‘The Constitution establishes a democratic state based, amongst other values, on the rule of law (section 1(c)) and a multi-party system of democratic government to ensure accountability, responsiveness and openness (section 1(d)). The authority of the State is found in three arms of government: the legislative, the executive and the judicial (sections 43, 85 and 165). Any public institution created by the Constitution or by legislation under its auspices (and there can be no other way), thus finds its ultimate authority and competence in the Constitution and is subject to its provisions.’

\textsuperscript{53} See s181(1) and s182.
\textsuperscript{54} See s181(1) and s184.
\textsuperscript{55} See s181(1) and s185.
\textsuperscript{56} See s181(1) and s187.
\textsuperscript{57} See s181(1) and s188.
\textsuperscript{58} See s181(1) and s190.
\textsuperscript{59} See s181(1) and s192.
\textsuperscript{60} See s181(1) and s192.
\textsuperscript{61} See s181(1).

\textsuperscript{61} Chapter 7 of the Constitution deals with local government. Note that the legislative acts of municipal councils are no longer considered to be administrative acts. They are still subject to the Constitution and the Bill of Rights in general but are not subject to review on the basis of the administrative justice provisions. See in this regard Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC).
Chapter 5 of the Constitution creates the branch of government that wields most administrative power – the executive in the national sphere of government. In terms of s85(1), executive authority on the national level is vested in the President. This authority is exercised by the President and the members of the cabinet which he or she appoints in five principal ways, namely by:

'(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
(b) developing and implementing national policy;
(c) co-ordinating the functions of state departments and administrations
(d) preparing and initiating legislation; and
(e) performing any other executive function provided for in the Constitution or in national legislation.'

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62 Section 178. Note that in terms of s1(i)(gg) of the Promotion of Administrative Justice Act, decisions of the Judicial Service Commission relating to the appointment of judicial officers are deemed not to be administrative acts.
63 Section179. Note that in terms of s1(i)(ff) of the Promotion of Administrative Justice Act, decisions to institute or continue prosecutions are deemed not to be administrative acts.
64 Section 196.
65 Section 196(4)(b).
66 Section 199(1). See in addition s198 and s199, s200-s204 (defence), s205-s208 (police) and s209-s210 (intelligence).
67 Section 220(1). See too the remainder of s220 as well as s221 and s222.
68 Section 224(1). See too the remainder of s224 as well as s223 and s225.
69 See s125 for the corresponding empowerment of provincial executives.
These powers are vested in the President as head of the national executive. It has been held, in *Minister of Public Works v Kyalami Ridge Environmental Association*, that the executive had the administrative power to establish a transit camp for victims of floods and that this power derived from the executive’s constitutional obligations to respect, protect, promote and fulfill the right of everyone of access to housing, its common law rights as owner of the land concerned and its power to implement policy. In addition the President is given powers by s84(2) in his or her capacity as Head of State. These powers were formerly common law prerogative powers. They are not regarded as administrative powers but fall within a separate category of executive powers. As a result, their exercise is subject to constitutional review generally but is not subject to review on the basis of s33(1) of the Constitution or reason-giving in terms of s33(2).

Finally, although Chapter 4 of the Constitution is mainly concerned with the legislative authority of the state on the national sphere, it also creates administrative powers: s57 and s70 set out provisions relating to internal arrangements, proceedings and procedures of the National Assembly and the National Council of Provinces respectively. In *De Lille v Speaker of the National Assembly* the proceedings of an ad hoc committee of the National Assembly was subjected to scrutiny on administrative law grounds.

The Constitution also places limits on the power of administrative agencies, principally through s2 which provides that the Constitution is the supreme law and that ‘law or conduct inconsistent with it is invalid and the duties imposed by it must be performed’, and Chapter 2, the Bill of Rights, which ‘applies to all law and binds the legislature, the executive, the judiciary, and all organs of state’. Apart from s33, which deals directly with just administrative action, Chapter 2 limits the power of administrative officials

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70 2001 (7) BCLR 652 (CC), 667B-C (paragraph 51).
71 President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC), 1114I-1123F (paragraphs 132-149). See too s1(i)(aa), (bb) and (cc) of the Promotion of Administrative Justice Act which excludes from the definition of administrative action exercises of power by the President in terms of s84 and certain other sections, the equivalent powers vested in provincial executives and the ‘executive powers or functions of a municipal council’.
72 See s116 in respect of the equivalent provision relating to provincial legislatures.
73 1998 (7) BCLR 916 (C), confirmed on appeal, although on somewhat narrower grounds in *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (SCA).
74 Section 8(1).
because they may not, for instance, discriminate,\footnote{Section 9.} infringe a person’s right to human dignity,\footnote{Section 10.} or infringe a person’s rights to freedom and security,\footnote{Section 12.} to name three examples, unless they have been authorised to do so by a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.\footnote{Section 36 (1).} More particular curbs on the powers of specific administrative agencies are to be found in the Constitution. For instance, local governments are under a duty ‘to promote social and economic development’\footnote{Section 152(1)(c).} and ‘to promote a safe and healthy environment’.\footnote{Section 152(1)(d).} Municipal Councils must conduct their business ‘in an open manner’ and may only hold closed sessions ‘when it is reasonable to do so having regard to the nature of the business being transacted’.\footnote{Section 160(7).} None of the security services or any of their members may, in the performance of their functions ‘prejudice a political party interest that is legitimate in terms of the Constitution’ or ‘further, in a partisan manner, any interest of a political party’.\footnote{Section 199(7).} Section 217(1) places limits on the way organs of state contract for goods or services: they are required to do so ‘in accordance with a system which is fair, equitable, transparent, competitive and cost effective’. More generally, the public administration is bound by a set of values and principles in the performance of its functions. These values and principles are justiciable: in \textit{Reuters Group PLC v Viljoen NO}\footnote{2001 (2) SACR 519 (C), paragraphs 46 and 47.} it was held that administrative action that was unethical was a nullity as it was in conflict with s195(1)(a) which requires that in the public administration a ‘high standard of professional ethics must be promoted and maintained’.

\subsection*{1.3.2. Other Statutory Sources}

As the activities of the modern state have proliferated, Parliament has created an ever increasing number of administrative agencies to undertake these activities or to regulate
or supervise particular forms of conduct. The form of the empowerment is often general, the detail being left to a minister or other functionary to flesh out by way of subordinate legislation. This method is probably universal and is based on a pragmatic approach to what Parliament can and cannot do with the limited time available to it. It also has the benefit of flexibility, as regulations can be amended easier and quicker than parliamentary legislation. There is, however, a difference, with profound constitutional implications, between this form of delegation and abdication, where, for instance, Parliament grants the power to an official to amend parliamentary legislation by regulation. While under a system of parliamentary sovereignty, such so-called Henry VIII provisions had to be accepted as valid, this is no longer the case.

In Executive Council of the Western Cape Legislature v President of the Republic of South Africa Chaskalson P held that while Parliament could validly delegate subordinate legislative power to administrative functionaries for regulatory purposes, it had no power to assign plenary legislative power, including the power to amend the Act under which the assignment was made, to an administrative functionary. He held that s16A of the Local Government Transition Act 209 of 1993, which purported to grant the President the power to amend the Act by proclamation, was invalid because it conflicted with s37 of the interim Constitution which vested legislative authority in Parliament, and was subversive of s59, s60 and s61, which prescribed the manner and form for the promulgation of legislation.

Most administrative powers created by statute are not legislative in nature. They vest

84 Corder Empowerment and Accountability: Towards Administrative Justice in a Future South Africa London and Cape Town, SA Constitution Studies Centre: 1991, 2. See too Davis ‘Administrative Justice in a Democratic South Africa’ 1993 Acta Juridica 21, 21-22 who says: ‘The future South African state will be required to seek effective mechanisms for dealing with the vast social and economic disparities bequeathed by apartheid. Consequently a rapid expansion in administrative agencies with post-apartheid social reconstruction seems likely. Even a cursory examination of the debate about including social and economic rights in a justiciable document suggests the need for certain administrative agencies.’
85 Wiechers, 29.
87 Wade and Forsyth, 863-864.
88 1995 (10) BCLR 1289 (CC).
89 At 1312A-C (paragraph 51). See too 1317A -1318B (paragraph 62).
90 At 1317A -1318E (paragraphs 62-63).
in officials or tribunals the power to make decisions, often of a discretionary nature.\footnote{Craig, 384 says that discretion exists \textquoteleft when there is power to make choices between courses of action or where, even though the end is specified, a choice exists as to how that end should be reached$.\footnote{For instance, administrators may be empowered to decide whether to grant or refuse a road transportation permit, or to grant it subject to conditions, whether to grant or refuse an application for a liquor licence, or to grant it subject to conditions, whether to accept one tender or another for a government contract or whether to arrest a person or use a less invasive means to ensure his or her attendance in court. In each instance, a particular statutory scheme is created with statutory purposes and constitutional, statutory and common law conditions for validity and rules of good administration surrounding, informing and limiting the discretionary power.}

\subsection*{1.3.3. Common Law}

Common law as a source of authority was mainly limited to the prerogative.\footnote{On the prerogative in South African law, see Sachs v Donges NO 1950 (2) SA 265 (A), 306-307. See too Carpenter Introduction to South African Constitutional Law Durban, Butterworths: 1987, 21-25 and 171-193.} It has now been settled by the Constitutional Court, in President of the Republic of South Africa v Hugo,\footnote{1997 (6) BCLR 708 (CC). See too Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), para 41.} that the common law prerogative no longer exists in South African law as an independent source of power. Section 84(1) of the Constitution provides that the President \textquoteleft has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive\textquoteright. Section 84(2) lists the responsibilities of the President as Head of State. These responsibilities include \textquoteleft making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive\textquoteright,\footnote{Section 84(2)(e).} \textquoteleft appointing commissions of enquiry\textquoteright,\footnote{Section 84(2)(f).} \textquoteleft receiving and recognising foreign diplomatic and consular representatives\textquoteright,\footnote{Section 84(2)(h).} \textquoteleft pardoning or reprieve offenders and
remitting any fines, penalties or forfeitures\textsuperscript{97} and ‘conferring honours’.\textsuperscript{98} Section 203(1) empowers the President to declare ‘a state of national defence’, a formulation for a declaration of war in keeping with articles 2(4) and 51 of the United Nations Charter, which seeks to prevent member states from acts of war except in self defence.\textsuperscript{99} The exhaustive codification of these former prerogative powers is consonant with the new constitutional order because, as Erasmus has argued, the ‘executive branch cannot retain “inherent” or common law powers going beyond the ambit of the supreme constitution’.\textsuperscript{100}

Apart from the prerogative, there may still be occasional residues of common law freedoms that are recognised by the law and that the executive may rely on to justify certain of its administrative actions. An example is provided by the Kyalami Ridge Environmental Association case\textsuperscript{101} in which the executive’s decision to create a transit camp for flood victims on its own land was held to be clothed in legality on this account, when viewed with its constitutional obligations and the general constitutional powers of the executive. In addition, as Bennett has pointed out, some rules of customary law, such as those rules that relate to the allocation of land, empower chiefs to exercise administrative powers.\textsuperscript{102} In addition, as will be discussed in detail below, administrative power may be created consensually in certain instances.\textsuperscript{103} The definition of an empowering provision in s1(vi) of the Promotion of Administrative Justice Act recognises all of the above sources of administrative power: an empowering provision is a ‘law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’.

1.4. Features of South African Administrative Law

1.4.1. General Observations

\textsuperscript{97} Section 84(2)(j).
\textsuperscript{98} Section 84(2)(k).
\textsuperscript{100} Erasmus, op cit, 632.
\textsuperscript{101} Supra.
\textsuperscript{103} See chapter 5 below.
In 1986, it was suggested by a leading academic lawyer that South African administrative law was a ‘dismal science’. The main reason for this unflattering description was a central characteristic of this system, the debilitating effect of Parliament surrendering more and more power to the executive. This trend is probably best illustrated by the broad powers vested in the executive to implement the system of apartheid. This was responsible (along with other factors) for skewing South African administrative law and stultifying its development: Dean wrote that administrative law ‘has developed within a system of government which concentrates enormous powers in the hands of the executive and the state administration and in which law has been used not to check or structure these powers, but rather to facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best’. These characteristics are inevitable consequences of a constitutional order built on the doctrine of the sovereignty of parliament, the repudiation of universal franchise, race classification and a race-based system of granting and withholding rights and privileges and a ‘legally emasculated judiciary’ vested with limited powers of judicial review.

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106 The Black Administration Act 38 of 1927 provides a good example. Section 1 of the Act provided that the State President was the Supreme Chief of all blacks in the country. The State President also had the power, in terms of s25, to legislate by proclamation in scheduled black areas. This power, a so-called Henry VIII clause, gave him powers equal to those of Parliament. See R v Maharaj 1950 (3) SA 187 (A). See too Devenish ‘The Development of Administrative and Political Control of Rural Blacks’ in Rycroft (ed) Race and the Law in South Africa Cape Town, Juta and Co: 1987, 26, 27.
107 See, for instance, Dean, op cit, at 165 - 6, who suggests that the inadequacy of Rule 53 of the Uniform Rules of the Supreme Court is a basic weakness in our administrative law. The failure of the courts to develop review on the basis of unreasonableness is another.
108 Dean, op cit, 164.
109 Mahomed ‘The Impact of a Bill of Rights on Law and Practice in South Africa’ June 1993 De Rebus 460, 460. See too Bouille ‘Constitutional Law in South Africa 1976-1986’ 1987 Acta Juridica 55, 92. In much the same vein, O’Regan has observed that the Diceyan model of parliamentary sovereignty was particularly inappropriate in South Africa because Parliament was not representative of the populace but was, instead, ‘racist in origin and composition’. She concludes that this ‘lack of a democratic base rendered both the doctrine of parliamentary sovereignty, and its companion doctrine, ultra vires, particularly devious in our legal system’ and that this fact was commented on ‘in judicial decisions or academic debate in the apartheid years’ only rarely. (‘A Fresh Start for Administrative Law’ Paper delivered at a conference on controlling public power, University of Cape Town March 1996, 8. See too Corder ‘Administrative Law: A Cornerstone of South Africa’s Democracy’ (1998) 14 SAJHR 38, 40-41.)
The South African political system was, generally, one that functioned according to law, albeit law made in the context outlined above. From colonial times onwards, immense powers were granted to officials at all levels of government with which to perform the social engineering required by successive racially exclusive and segregationist administrations. Along with these powers, increasingly draconian powers were granted to the security forces to control the inevitable resistance to government policy and to ‘manage’ the constant crises of control faced by the government. At the most basic level, Parliament’s tools of trade were relatively simple mechanisms: they included the conferring of discretionary powers couched in the broadest of terms, the specific exclusion of natural justice and the enactment of ouster clauses to limit judicial review. Faced with these mechanisms, and a common law that did not recognise unreasonableness as a ground of review on its own or a right to reasons for administrative decisions, it was hardly surprising that the courts did not effectively protect the victims of oppressive administrative action. It is, however, undoubtedly true that the courts could have done more to perform their constitutional function as

110 Dugard Human Rights and the South African Legal Order Princeton, Princeton University Press: 1978, 391 says: ‘The apartheid order is a legal order. Fashioned by politicians, it has been applied by lawyers. No South African lawyer has escaped the contamination of this order, which has infected judges, magistrates, prosecutors, advocates, attorneys and academics.’ See also Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 32. See too Boulle, op cit, 85 and Abel Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994 New York, Routledge: 1995, 13: ‘Perhaps most important, the infrastructure of apartheid - an administrative nightmare more complex and bureaucratic than the combined tax code, criminal law, regulatory apparatus, and welfare system of most countries - was constructed out of law and thus susceptible to legal challenge.’


112 See generally Matthews Freedom, State Security and the Rule of Law Cape Town, Juta and Co: 1986; see too Matthews ‘The South African Judiciary and the Security System’ (1985) 1 SAJHR 199. For the earliest security cases involving detention without trial, one of the more vicious aspects of the South African security system, see In re Willem Kok and Nathaniel Balie (1879) 9 Buch 45, Sigcau v The Queen (1895) 12 SC 256 and In re Marechane (1882) 1 SAR 27.

113 Such a discretion may either take the form of an ‘open ended’ grant of power which does not stipulate any so-called jurisdictional facts, as in Van der Westhuizen NO v United Democratic Front 1989 (2) SA 242 (A), or a so-called subjective discretion, in which the authorized official is required to form an opinion about, or be satisfied of the existence of, facts or circumstances, as in State President v Tsenoli 1986 (4) SA 1150 (A).

114 See for example reg 3(3) of the annual emergency regulations promulgated in terms of the Public Safety Act 3 of 1953 between 1986 and 1990.

115 See for example s5B of the Public Safety Act 3 of 1953 and Staatspresident v United Democratic Front 1988 (4) SA 830 (A).

116 Baxter, 741-742.
protectors of the populace against the excesses of the executive: indeed, Dean makes the point that the courts ‘have at times appeared to be all too willing partners displaying what virtually amounts to a phobia of any judicial intervention in the exercise of powers by administrative agencies’.\textsuperscript{117}

Corder says that our administrative law ‘has until very recently languished in a rudimentary form not unlike that of the English administrative law of the late 19th century’.\textsuperscript{118} This he explains as follows:\textsuperscript{119}

‘Thus the conceptual apparatus used by the judiciary has been characterised by a formalistic reluctance to recognise the growth of executive power (to the detriment of legislative legitimacy and civil liberties) and to develop legal rights and remedies within the scope of judicial review accordingly. In this vital respect, beyond a few judgments before 1950, judicial policy in South Africa has differed radically from that of its parent body in England. It has failed signally to enforce executive accountability to the law at the same time as government policy, largely discharged through the medium of administrative discretion, has wrought whole-sale changes to the socio-political economy. So repeated challenges in the courts to the implementation of apartheid or measures taken to keep it in place have fallen on deaf judicial ears.’

The observations of Dean and Corder identify accurately the weaknesses of South African administrative law prior to 1994. Indeed, given the oppressive political, economic and social foundations upon which the South African system of government was then built prior, and its fundamental constitutional premise, the sovereignty of parliament, it is hardly surprising that South African administrative law displayed the signs of being a dismal science. It would have been most surprising had it been otherwise. The challenge of the future will be to address and redress this legacy. The first steps along that path, which pre-dated the interim Constitution, will now be discussed.

1.4.2. Reform Initiatives


\textsuperscript{118} Corder, op cit, 16.

\textsuperscript{119} At 16. See too Baxter, 33-34.
The rather gloomy picture of South African administrative law which has been sketched above was off-set to an extent by an often understated process of judge-made reform, emanating, ironically, from a part of the Appellate Division in the late 1980s. The reform initiative appeared to be led by Mr Justice Michael Corbett, both before and after his accession to the position of Chief Justice. It was understated, for the most part, because it often did little more than restate and re-affirm the fundamental principles of administrative law which other judges in the Appellate Division had undermined or destroyed. It was not, however, confined to this: a line of natural justice cases, in particular, broke important new ground.

At the same time, this initiative had its limitations. They were principally of an institutional nature, although in one case at least, the reformers may have suffered from a lack of nerve. Judicial law reform is always limited by the incremental nature of the judicial process: judges have no say or control over the cases that come before them so it is difficult to embark on programatic reform; it is fundamental to the judicial decision-making process that judges decide only the issues that need to be decided on the facts of particular cases; and the system of precedent is conservative in nature, with the result that it is usually difficult to convince a court that a previous decision was clearly wrong.

It has been suggested that how courts deal with natural justice usually serves as a good barometer of judicial activism of restraint. If that is so, the notorious case of Omar v Minister of Law and Order was the strongest indication of a reversion to the ‘judicial dark ages’ of the repressive 1960s. The majority held that, in enacting emergency regulations in terms of the Public Safety Act 3 of 1953, the State President could validly

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120 Corder and Maluwa ‘Administrative Justice in Southern Africa: Background and Some Issues’ in Corder and Maluwa, 3, 7 observe that paradoxically the reform initiative coincided with ‘the most relentless executive lawlessness yet experienced’ in South Africa.


122 Baxter, 337 and 542.

123 1987 (3) SA 859 (A).

124 Dugard ‘Omar: Support for Wacks’s Ideas on the Judicial Process’ (1987) 3 SAJHR 295, 295. This article was part of a ‘Focus on Omar’ in which, apart from Dugard’s contribution, uniformly critical articles were written by (Prof) Rabie (at 300), Mathews (at 312), Baxter (at 317), McQuoid-Mason (at 323), Davis (at 326), Van Der Leeuw (at 331) and Van Der Vyfer (at 335).
exclude the right to a hearing, both before or after the extension of a person's detention by the Minister of Law and Order, as well as the right of detainees to access to legal representatives, despite the fact that no clear authorization of such interferences with common law fundamental rights was to be found in the Act. Indeed, Rabie ACJ, in a judgment which Baxter described as a judicial declaration of martial law,\textsuperscript{125} held that the Act's silence on questions of procedural fairness, in the context of the wide powers vested in the State President, meant that he had been granted implied power to exclude natural justice completely.\textsuperscript{126}

Shortly after this judgment was given, the first significant steps in the process of reform were taken in Attorney-General, Eastern Cape v Blom.\textsuperscript{127} Corbett JA held that the right to be heard is assumed to be impliedly incorporated into statutes unless expressly or impliedly excluded, as opposed to having to be expressly or impliedly included.\textsuperscript{128} The next natural justice case did not, like Blom, involve clarifying underlying assumptions of administrative law but broke important new ground: Administrator, Transvaal v Traub\textsuperscript{129} introduced into South African law the concept of legitimate expectation and, in so doing, extended the applicability of the right to be heard beyond cases in which liberty, property or existing rights were affected. The basis for the extension was, in the words of Corbett CJ, founded on the idea that there were circumstances which fell outside the traditional approach but in which fairness called out for judicial intervention:\textsuperscript{130}

\begin{quote}
‘There are many cases where one can visualise in this sphere - and for reasons which I shall later elaborate I think that the present is one of them - where an adherence to the formula of “liberty, property and existing rights” would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure
\end{quote}

\begin{footnotes}
\footnotetext{125}{See Baxter ‘A Judicial Declaration of Martial Law’ (1987) 3 SAJHR 311.}
\footnotetext{126}{At 893E-G.}
\footnotetext{127}{1988 (4) SA 645 (A).}
\footnotetext{128}{Interestingly, Blom’s case was a security matter, involving the validity of a ‘no bail certificate’ issued by the Attorney-General in terms of s30 of the Internal Security Act 74 of 1982. Cases involving this statute had, by then, tended to draw the most conservative of judicial interpretations. The point in Blom seems self-evident but, in South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A), 270F-G, Botha JA had held that a duty to hear only existed if it could be implied into a statute. This undermined the previously accepted position, as stated by the Appellate Division in R v Ngwevela 1954 (1) SA 123 (A).}
\footnotetext{129}{1989 (4) SA 731 (A).}
\footnotetext{130}{At 761E-F.}
\end{footnotes}
which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected.'

The importance of *Administrator, Transvaal v Zenzile*\(^{131}\) and *Administrator, Natal v Sibiya*\(^{132}\) lies in the fact that Hoexter JA held in both cases that public sector employees (not covered by the Labour Relations Act at that stage) were entitled to be heard before their contracts of employment were cancelled. In *Zenzile* the employees were long-term temporary staff who could be dismissed on 24 hours notice, while in *Sibiya* the employees were temporary employees who had been retrenched. These cases resolved the question of the application of administrative law in the context of contract. They thus overruled *Sibanyoni v University of Fort Hare*,\(^{133}\) *Mkhize v Rector, University of Zululand*\(^{134}\) and *Scholtz v Cape Divisional Council*.\(^{135}\) They affirmed instead the correctness of *Lunt v University of Cape Town*.\(^{136}\) In essence, it was held that if a public power is exercised, even if it is exercised through the medium of contract, the rules of administrative law apply. Hoexter JA articulated the principles involved in the following terms in *Zenzile*:\(^{137}\)

> ‘In my view it is logically unsound and wrong in principle to postulate that the *audi* principle has no application to “purely contractual relations”; from that premise to embark upon an enquiry as to whether or not there is something in the legislation which imports the *audi* principles into the contractual relationship; and to require that the statute concerned should incorporate the *audi* principle, either expressly or implicitly. It seems to me that so to approach the problem is to put the cart before the horse. The existence of a contractual relationship cannot alter the essential nature of the enquiry. With reference to any particular provision of a statute (in this case the Code), the questions to be answered are, as always: (i) is a public official empowered to give a decision affecting the existing rights of an individual? and, if so, (ii) is the right of the individual to be heard before the decision is taken excluded either expressly or impliedly?’

In *South African Roads Board v Johannesburg City Council*,\(^{138}\) Milne JA rejected the rigid classification of functions as either administrative or legislative as a means of

\(^{131}\) 1991 (1) SA 21 (A).

\(^{132}\) 1992 (4) SA 532 (A).

\(^{133}\) 1985 (1) SA 19 (Ck).

\(^{134}\) 1986 (1) SA 901 (D).

\(^{135}\) 1987 (1) SA 68 (C).

\(^{136}\) 1989 (2) SA 438 (C).

\(^{137}\) At 35I-36A.

\(^{138}\) 1991 (4) SA 1 (A).
determining whether natural justice applied to a particular type of administrative act. He held instead that a distinction should be drawn ‘between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals’.139

In respect of the first category, he held that ‘where a public authority is empowered to take a decision prejudicially affecting the members of a whole community, the public authority is normally guided solely by what it believes to be best for the community as a whole and is not obliged to consider the particular interests of individual members of that community. Consequently it may be argued that a failure to give individuals affected a hearing does not violate any rule of natural justice’.140 In respect of the second category of power which, he said, ‘depending on the circumstances, might be categorized as either administrative or as legislative or which might fall into the grey area in between’, the repository of the power ‘should normally and in the absence of a contrary indication in the statute be obliged to afford the particular party prejudicially affected a hearing before exercising the power’.141 The Roads Board case therefore finally put paid to the ‘administrative-law-by-numbers’ jurisprudence of the classification of functions approach, in favour of a more nuanced and flexible approach based more squarely on fairness.142

The reformers adopted much the same approach to substantive controls of the administrative process as they had to procedural safeguards. Johannesburg Stock Exchange v Witwatersrand Nigel Limited143 illustrates this point (and the dual nature of administrative law at the time). It reaffirmed the classic statement of the grounds of review articulated by Colman J in North West Townships Limited v Administrator, 139 At 12F-G.
140 At 12H-I.
141 At 12J-13A. See too Minister of Education and Training v Ndlovu 1993 (1) SA 89 (A), 105A-106E.
142 The Roads Board case must be read subject to the Constitutional Court decision in Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC). For purposes of the Constitution, it is necessary to ascertain whether a particular exercise of public power constitutes administrative action in order to determine whether the right to just administrative action applies. Apart from that, however, the Roads Board case has, indeed, put paid to the classification of functions.
143 1988 (3) SA 132 (A).
Transvaal. One of these grounds was the taking into account of irrelevant considerations or the ignoring of relevant considerations by an administrative decision-maker. A few days before this judgment, in Minister of Law and Order v Dempsey, Hefer JA had held, contrary to every authority on the issue and after citing a decision that did not establish his proposition, that it was for the repository of a power, rather than a court on review, to determine what was and what was not a consideration relevant to the exercise of that power. In Jacobs v Waks, the damage done in Dempsey was undone: Botha JA suggested that Hefer JA had not meant exactly what he had said, and reaffirmed the correctness of the Johannesburg Stock Exchange case on review for relevancy. It was, he held, indeed the function of the court to determine what was and what was not relevant to the exercise of a discretionary administrative power.

Dempsey’s case was the cause of another problem which the reformers overcame: Hefer JA had changed the common law rule that, in cases involving the deprivation of freedom, the onus lay on the arrester to justify his or her actions. In line with an approach based on formalism over substance (and certainly over the values which underpin the common law and the rule of law), Hefer JA accepted that the onus was on the arrester to place himself or herself formally within the terms of the empowering legislation. Having done that, however, (and it would be a particularly stupid person who could not) the onus, according to Hefer JA, then shifted to the arrestee to establish one or other of the grounds of review. When the smoke and mirrors of formalism are removed, it is clear that what Hefer JA did was to place the onus on the arrestee to

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144 1975 (4) SA 1 (T), 8G.
145 At 152A-D.
146 1988 (3) SA 19 (A).
147 The case relied upon for this proposition was Johannesburg City Council v Administrator, Transvaal and Mayofis 1971 (1) SA 87 (A), 99A. See further Plasket ‘Developments in the Discretion to Arrest and Detain in terms of Regulations 3(1) and 3(3) of the Emergency Regulations’ in Haysom and Plasket (eds) Developments in Emergency Law Johannesburg, Centre for Applied Legal Studies: 1989, 39, 42-43 and Cachalia and Plasket ‘Procedural Protection for Detainees and Representations for Release’ (1989) 5 SAJHR 73.
149 At 550F-H.
150 In South Africa, this approach to the onus appears to have been accepted from the earliest cases on detention without trial. See in this regard In re Willem Kok and Nathaniel Balle (1879) 9 Buch 45; Sigcau v The Queen (1895) 12 SC 256; and In re Marechane (1882) 1 SAR 27.
establish that his or her arrest was unlawful.\textsuperscript{151}

In \textit{During NO v Boesak},\textsuperscript{152} EM Grosskopf JA held that, on the question of onus, \textit{Dempsey}’s case was clearly wrong.\textsuperscript{153} He held (and in this conclusion Milne JA concurred) that the onus to justify lies on the infringer of every fundamental right, not just one who infringes a person’s right to freedom.\textsuperscript{154} For the majority, Nestadt JA expressed himself in agreement with Grosskopf JA only in respect of cases involving arrest. He held that whether ‘the same applies to a case such as the present where a public gathering has been prohibited, is a matter which I find unnecessary to decide. I prefer instead simply to assume, in favour of the respondents, that the onus was on appellant to establish that he properly exercised his discretion in terms of Reg 10(1)(c)’ of the Emergency Regulations.\textsuperscript{155} Gauntlett observes that the overruling of \textit{Dempsey} in relation to the onus is ‘perhaps the speediest known repudiation by the Appellate Division of one of its own decisions as “clearly wrong”’.\textsuperscript{156}

In one respect at least, the reformers appear to have lost their way. The Appellate Division was invited, in \textit{Catholic Bishops Publishing Company v State President},\textsuperscript{157} to reconsider and overrule \textit{Staatspresident v United Democratic Front}\textsuperscript{158} in respect of the nebulous, unprincipled and rather weak review jurisdiction which that court had

\textsuperscript{151} See, on the doctrinal difficulty created by this approach, Grant and Mureinik ‘Administrative Law’ 1990 Annual Survey 587, 606 who say: ‘In countless cases it has been said that an improper exercise of a discretion is no exercise of the discretion at all, and that that is what warrants the court’s interference. For if the only fact essential to the jurisdiction of the official is the bare existence of his or her opinion, understood as an empty husk independent of how it has been reached, then the official is acting within his or her jurisdiction – within his or her powers – even when he or she is abusing his or her discretion. What, then, entitles the court to interfere with the decision? Hefer JA’s judgment strikes, therefore, at the ultimate justification for review for abuse of discretion: that the repository of the discretion has gone outside its jurisdiction; that it has exceeded its authority and is acting beyond its powers.’

\textsuperscript{152} 1990 (3) SA 661 (A).

\textsuperscript{153} At 679G-680A.

\textsuperscript{154} See particularly at 680B where Grosskopf JA said: ‘\textit{Dempsey} se saak het spesefiek te doen gehad met a vrheidsberowing. Dieselfde beginsels behoort myns insiens toegepas te word op alle gevalle waar daar inbreek gemaak word op fundamentele regte.’ See too his remarks at 673G-H.

\textsuperscript{155} At 663G-H.


\textsuperscript{157} 1990 (1) SA 849 (A).

\textsuperscript{158} 1988 (3) SA 830 (A).
recognized through its balkanization of the ultra vires doctrine. Without engaging the arguments, Corbett CJ simply held that he was not convinced that the United Democratic Front case was clearly wrong.\textsuperscript{159}

Outside of the courts and prior to 1994, administrative law reform of any real significance never occurred: the system of government was too dependent on broad, ineffectively controlled discretionary powers. There was thus no significant incentive for those in power to reform administrative law in any meaningful way. Reforms, such as the creation of the office of the Advocate General, a type of ombud, tended to be ad hoc responses to particular crises and to be limited in their scope.\textsuperscript{160} Apart from that, the South African Law Commission investigated the review of administrative action and, in 1986 and 1992, published reports which included draft legislation to codify judicial review.\textsuperscript{161} In 1995, the Law Commission published a report, also including draft legislation, on representative standing.\textsuperscript{162} More recently, and to give effect to the Constitution’s direction that the right to just administrative action should be regulated by statute, the Law Commission published a number of drafts of the Administrative Justice Bill for comment.\textsuperscript{163} The legislation was passed, in rather different form, at the beginning of 2000 as the Promotion of Administrative Justice Act.

A private initiative, spearheaded by Professor Hugh Corder of the University of Cape Town has, in many senses, been at the forefront of administrative law reform. This initiative has taken the form of two international conferences – the so-called

\textsuperscript{159} Grant and Mureinik say: ‘It is a matter for regret that his lordship declined to adduce any reasons for his conclusion, because it is submitted that the published critiques of the reasoning in UDF merit a reply’ (‘Administrative Law’ 1990 Annual Survey 587, 605).

\textsuperscript{160} See in this regard Baxter, 288 who says: ‘Like the American “special prosecutor”, the Advocate General was created in the wake of a scandal – in the latter case the information scandal. Although the Advocate General Bill was introduced by the government as designed to create an ombudsman after the classic style, it originally contained a clause which would effectively have prevented the future publication of information concerning public corruption. In the face of considerable public and parliamentary opposition the offending clause was withdrawn. Nevertheless, the Advocate General is by no means an ombudsman in the classic sense. Rather, the office constitutes a kind of special purpose ombudsman possessing many of the forms of an ordinary ombudsman but only a very limited jurisdiction.’


\textsuperscript{162} ‘Die Erkenning van ‘n Groepsgeding in die Suid-Afrikaansereg’ project 88.

\textsuperscript{163} Project 115, Discussion Paper 81; January 1999.
Breakwater conferences of 1993, 1996 and 2001 – which culminated in the issuing of declarations on administrative law reform and the publication of the papers presented by such well known public lawyers as Professor Jeffrey Jowell, Professor John Evans, Professor (now Judge) Kate O'Regan, Professor Lawrence Baxter, Professor Welshman Ncube, Professor Karthy Govender, Professor Paul Craig, Professor Cass Sunstein, Professor (now Judge) Dennis Davis and numerous others. The influence of this initiative (and more particularly the first Breakwater conference) was explained in the following terms by Corder and Maluwa:164

‘At the conclusion of the event, the participants adopted a statement which was to set the agenda for the development of administrative law reform in South Africa over the next three years. The reasons for the extraordinary influence of this workshop were twofold: first, negotiations about the future shape of the South African constitution were about to begin at that time, and many of the workshops participants played critical roles in that process, as advisors, drafters or negotiators; and, second, many of the subscribers to the ideas in the Breakwater declaration were to find themselves, within eighteen months, in very influential positions in government. Furthermore, the thinking on the formulation of the constitutional protection to be accorded to administrative justice of the two most influential parties in the subsequent negotiations was directly fashioned by the proceedings at the workshop.’

Despite the institutional fetters on the judge-driven process of administrative law reform, its importance was immense. Its influence is apparent in the post-1994 legislative reforms. For example, its influence may be seen in: the acceptance of, and codification of, the doctrine of legitimate expectation in s24(b) of the interim Constitution and s3 of the Promotion of Administrative Justice Act;165 the acceptance of the reasonable suspicion standard for disqualifying bias, contained in s6(2)(a)(iii) of the Act;166 and the codification of Corbett CJ's formulation of the test for reviewable errors of law, contained in s6(2)(d) of the Act,167 to name but three issues.

The importance of the contribution of the reformers also lies in the fact that the reform initiative cleared the way in important respects for the next phase of administrative law reform.
reform, inspired by the advent of democratic rule and constitutional supremacy and driven by a democratic government. It is at this juncture that the judicial and non-judicial reform initiatives intersect. Many of the starting points of the Breakwater conferences and, indeed, of the post 1994 legislative reforms, were located in and built upon a system of administrative law that, although it may have displayed characteristics that Dean had lamented in 1986, was in the process of re-assessment.

1.4.3. Concluding Remarks

It is in the context of the characteristics of South African administrative law that have been outlined above that the right to just administrative action acquires its significance and will be interpreted by the courts. It is probably no exaggeration to say that administrative law, and consequently judicial control over administrative decision-making, will acquire an importance and a significance that it previously did not enjoy as the democratic government embarks on a massive program to address the imbalances of wealth, power and opportunity that apartheid created and implemented through inadequately controlled administrative power. There is a measure of irony in the fact that, in all probability, the only practical way in which to undo the effects of apartheid’s social engineering is by using the same legal mechanism – administrative agencies exercising discretionary powers, duly empowered by statute.

This fact serves to emphasise the particular importance of the reform initiatives that have been discussed above. Sachs has made the point that ‘oppression in the name of the good is worse than oppression in defence of the bad since it tarnishes the very

168 Corder ‘Introduction: Administrative Law Reform’ 1993 Acta Juridica 1,2 who says: ‘Secondly, it is abundantly clear that any future South African government will have to embark on radical restructuring of social relations in the country in order to undo apartheid structures and to attempt to compensate for some of the suffering experienced by the majority in the past. This program will necessarily involve massive interference by the state in society and the economy, much of which will inevitably rely on the exercise of administrative discretion. While legislative control might prove more effective than it is today and while the effect of past executive excesses might encourage greater levels of fairness and probity among state officials, mechanisms will have to be developed for holding the administration accountable to the public for its actions if the future system is to be more just and democratic than those of the past and present.’

ideas it seeks to protect and deprives people even of the image of hope of a better society.\(^{170}\) The aspirations and values of the Constitution would be hollow indeed if administrative law was not in step with the constitutional ethos of rationality and of justification in the exercise of public power even, and some might say, especially, when such power is exercised for the noblest of motives.

CHAPTER TWO: SOUTH AFRICAN ADMINISTRATIVE LAW IN THE DEMOCRATIC ERA

2.1. Rationality and Reasonableness as Constitutional Values

Under the system of parliamentary sovereignty, Parliament had the power to enact whatever laws it wished, ‘however unreasonable, however unacceptable; indeed, however unjust or even unenforceable such laws might be in the perception of those they sought to bind’.¹ Now the Constitution prescribes limits on the exercise of power of public institutions, bodies and functionaries, including the democratically elected legislatures in the various spheres of government. In the broadest of terms those limits are to be found in the idea that the exercise of public power must be rationally justified and reasonable. Mureinik makes this point when he says that if the interim Constitution were to be ‘a bridge away from a culture of authority’ it would be required to lead to ‘a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command’.²

The centrality of rationality and reasonableness was alluded to specifically by Ackermann J, in the context of the arbitrariness of the imposition of the death penalty, in S v Makwanyane.³ He held:⁴

‘In reaction to our past, the concept and values of the constitutional state, of the “regstaat”, and the constitutional right to equality before the law are deeply foundational to the creation of the “new order” referred to in the preamble. The detailed enumeration and description in section 33(1) of the criteria which must be met before the legislature can limit a right entrenched in Chapter 3 of the Constitution emphasises the importance, in our new constitutional state, of reason and justification when rights are

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³ 1995 (6) BCLR 665 (CC).
⁴ At 725I-726B (paragraph 156). See too Prinsloo v Van Der Linde 1997 (6) BCLR 759 (CC).
sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.'

This statement also applies to administrative decision-making and, indeed, to all exercises of public power.5

Galligan6 argues that in democratic societies, administrative functionaries exercising delegated powers are required to account for their actions because they hold their powers on trust, as it were. Because it is impossible in large and complex societies for administrators to account directly, various principles and practices have been developed to control the exercise of public powers. In this way, an indirect form of accountability has been developed. Rules of legal accountability are thus part of the political morality that requires this indirect form of accountability. Indeed, Galligan suggests that the ‘most rudimentary requirements of political morality are that in exercising discretionary powers,

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5 See Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 272H-273B (paragraphs 85 and 86). See too Qozoleni v Minister of Law and Order 1994 (1) BCLR 75 (E), 90E-F. Taggart ‘The Province of Administrative Law Determined?’ in Taggart (ed) The Province of Administrative Law Oxford, Hart Publishers: 1997, 1, 3 says that the ‘list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and rationality, and while they were distilled primarily from administrative law there is much common ground here with constitutional law’. See too, in the same book, at 217, Oliver ‘The Underlying Values of Public and Private Law’. Useful comparative examples of the requirements of reasonableness and rationality in administrative decision-making in a constitutional state are to be found in decisions of the Indian courts because it `is in administrative law that the Indian judiciary has most innovatively extended the ambit of the concept of equality’ through the development of the doctrine of non-arbitrariness, a constitutionalized version of Wednesbury unreasonableness. (See Sorabjee ‘Obliging Government to Control Itself: Recent Developments in Indian Administrative Law’ [1994] PL 39, 44-45.) The rationale for the development of the doctrine is to be found in State of Andhra Pradesh v Raja Reddy AIR 1967 SC 1458, 1468, in which Subba Rao J observed that `official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination, one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately’.

officials should comply with standards of rationality, purposiveness, and morality’ – that ‘powers are conferred in order to serve and achieve certain ends and goals, and no matter how difficult they may be to discern, or no matter how vaguely they may be stated, officials must seek them out and direct their actions towards them in ways which are rational and reasonable’. In South Africa, this general linkage between these basics of political morality in democratic systems of government and their application through the rules of administrative law are strengthened and protected from legislative erosion by the constitutionalization of the right to just administrative action and the founding values contained in s1 of the Constitution, particularly s1(c) and s1(d) which speak of constitutional supremacy and the rule of law and of multi-party democratic government, to ensure ‘accountability, responsiveness and openness’.

These linkages have received judicial recognition. In Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government Froneman J held:

‘Mention has already been made that the Constitution provides that the courts have a policing role to ensure that public power is exercised in accordance with the principle of legality. It also declares ours to be a democratic state (section 1). One of the foundations of democracy is that those who are chosen to rule must be accountable to those they govern. The Constitution recognises that as a founding value of our democracy (section 1(d)). It also recognises that modern societies need to be run by persons other than those directly elected by the people. Those in the public administration must accordingly also be subject to the foundational values of democracy, otherwise the promise of democracy may become an illusion. So the Constitution states explicitly that public administration must be governed by the democratic values and principles of the Constitution, and states specifically that public administration must be accountable (section 195, particularly section 195(1)(f)). The fundamental importance of accountable public power is emphasised in the Bill of Rights chapter of the Constitution by providing that everyone has the right to administrative action that is lawful, reasonable and fair (section 33). And the courts are the final instruments to ensure the accountability of the exercise of public power (sections 34 and 165). In this way the courts become an indispensable instrument of democracy as far as the public administration of the country is concerned ...’

The development of constitutional mechanisms to protect people from the abuse of power

7 2000 (12) BCLR 1322 (E), 1328H-1329B.
– abuse of trust, in Galligan’s terms – by administrative officials is described and discussed in the remainder of this chapter.

2.2. The Interim Constitution

2.2.1. The Bill of Rights

Chapter 3 of the interim Constitution contained its bill of rights, a set of justiciable fundamental rights. For the most part, those rights were well recognized first generation rights. Others, such as children’s rights, the right to education and the right to a healthy environment are not as common. Even more uncommon were s23, the right of access to information, and s24, the four-pronged right to administrative justice. Section 23 provided that every person ‘shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights’. Section 24 provided:

‘Every person shall have the right to –
(a) lawful administrative action where any of his or her rights or interests is affected or threatened;
(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

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8 For example, s8 contained the right to equality and to be free from unfair discrimination, s9 contained the right to life, s10 contained the right to human dignity and s11 contained the right to freedom and security of the person, to mention the first four rights contained in Chapter 3.
9 Section 30.
10 Section 32
11 Section 29.
12 Du Plessis and Corder Understanding South Africa’s Transitional Bill of Rights Cape Town, Juta and Co:1994, 164-165; Corder ‘Administrative Justice’ in Van Wyk et al (eds) Rights and Constitutionalism: The New South African Legal Order Cape Town, Juta and Co: 1994, 387, 388-389. Evans ‘Administrative Appeal or Judicial Review: A Canadian Perspective’ 1993 Acta Juridica 47, 72 said, prior to the promulgation of the interim Constitution, and of the idea of entrenching a right to administrative justice that ‘I know of no jurisdiction in which such an extravagant grant of power over the entire administrative process has been made to the judiciary. Of course, the uniqueness of such a provision does not necessarily prove its undesirability in the context of the new South Africa’.
(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

It would appear that the fundamental right of access to information is unique to the South African Constitution and the Malawian Constitution,\textsuperscript{13} although, in many countries this right is provided for in freedom of information legislation. A right to administrative justice is to be found in only two other constitution. They are the constitutions of Namibia\textsuperscript{14} and of Malawi.\textsuperscript{15}

2.2.2. Administrative Justice

While the entrenchment of a right to just administrative action may be unusual in itself, bills of rights, being instruments designed to control governmental power, will inevitably impact, whether directly or indirectly, on administrative decision-making. First, and in the most general terms, the paramountcy of a supreme constitution will always subject exercises of discretionary powers to constitutional review. Secondly, in other instances, certain specific constitutional provisions may affect administrative decision-making more directly. Section 7 of the Canadian Charter or Rights and Freedoms is an example of such a provision. It provides that everyone has a right not to be denied their rights to life, liberty and security

\textsuperscript{13} Section 37 of the Constitution of the Republic of Malawi (Republic of Malawi (Constitution) Act, 1994) provides: 'Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.'

\textsuperscript{14} Section 18 of the Namibian Constitution provides that ‘administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal’. See Parker 'The “Administrative Justice” Provision of the Constitution of the Republic of Namibia: a Constitutional Protection of Judicial Review and Tribunal Adjudication Under Administrative Law’ (1991) 24 CILSA 88.

\textsuperscript{15} Section 43(a) of the Malawian Constitution provides that everyone has the right to ‘lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened’ as well as a right to reasons for administrative decisions, contained in s43(b).
of the person except in accordance with the principles of fundamental justice.\textsuperscript{16} The effect of s7 is that every exercise of administrative power which impinges on life, liberty or security of the person is subject to constitutional review. For all practical purposes, this is a limited entrenchment of a right to just administrative action as, it has been held, the principles of fundamental justice include both procedural and substantive due process.\textsuperscript{17} Thirdly, it has been held in Canada and in South Africa that the rule of law is a fundamental underpinning of the constitutional order. This means that the principle of legality is at the heart of the constitutional state, with obvious implications for administrative decision-making and, indeed, the exercise of any public power.\textsuperscript{18}

All of the major actors in the debate on the content of South Africa’s interim bill of rights favoured the inclusion of a right to administrative justice in one way or another.\textsuperscript{19} Not surprisingly, the final formulation of s24 was rather different from most of the formulations proposed by the various parties either before or at the time of the negotiations, but certain core aspects are common to all. The earliest formulation was that of the Constitutional Committee of the African National Congress (ANC) which published a draft bill of rights in the form of a working document in 1990.\textsuperscript{20} Article 2(24) provided that any person ‘adversely affected by an administrative or executive act shall have the right to have the matter

\begin{footnotesize}
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\item[\textsuperscript{16}] For an example of s7 of the Charter in the administrative law context, see Singh v Minister of Employment and Immigration (1985) 14 CRR 13 (SCC), in which it was held that the principles of fundamental justice required the rules of procedural fairness to be observed in determining the applicant’s claim for refugee status. For an American equivalent, see Goldberg v Kelly 397 US 254 (1970), in which the entitlement of a welfare recipient to a pre-termination hearing was based on the due process provision of the Fourteenth Amendment of the Constitution of the United States of America.
\item[\textsuperscript{18}] See Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC).
\item[\textsuperscript{20}] ANC Constitutional Committee A Bill of Rights for a New South Africa Bellville, Centre for Development Studies: 1990.
\end{itemize}
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reviewed by an independent court or tribunal on the grounds of abuse of authority, going beyond the powers granted by law, bad faith, or such gross unreasonableness in relation to procedure or the decision as to amount to manifest injustice’. That formulation was criticized for potentially casting the grounds of review in stone, for its formulation of gross unreasonableness as a ground of review which was ‘arguably narrower than the formalistic approach adopted by the Appellate Division’, for omitting some grounds of review, such as vagueness, and for possibly reducing ‘the potential of our common law to respond to new challenges’.21 Despite a spirited, but generally unconvincing, defence of the provision by one of its drafters,22 the criticism appears to have had some effect as the next draft inserted brackets around the word ‘gross’ (where it qualified unreasonableness).23

The attempt by the ANC to design an administrative justice right is important for two reasons against which the fact that it may have ‘got it wrong’ at the first attempt is relatively unimportant. First, it provided the initiative for the constitutionalization of the right, a position which all other parties subsequently adopted. Secondly, the ANC, in going out on a limb in formulating the right, succeeded in highlighting the need to use another method of entrenching the right to avoid some of the negative consequences mentioned by Marcus and Davis. Every party, including the ANC, learnt from that process. The formulation agreed upon in the negotiations concentrated, as a result, on the broad strokes of judicial review – illegality, irrationality and procedural impropriety24 – and the right to reasons, rather than on attempting to codify the grounds of review.

Writing of the importance of s24, as part of the bridge from an authoritarian past to a democratic future, Mureinik argued that the rights contained in s24(b) and s24(d) were ‘more than a set of merely technical entitlements arbitrarily dreamt up by administrative

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24 These are the three heads under which Lord Diplock classified the grounds for review in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL), 950h.
lawyers’. Instead, these rights rested ‘upon the principles of participation and accountability which embody the aspiration to responsive democracy’.25 This aspiration, and these principles, evident from the terms of the interim Constitution generally, were bound to find their way into the final Constitution: from a reading of Schedule 4, the Constitutional Principles upon which the final Constitution was required to be based, it is evident that a premium was placed on accountability, responsiveness and openness, principally in relation to the separation of powers.26

2.3. The Final Constitution

2.3.1. The Bill of Rights

The final Constitution was signed into law by President Nelson Mandela at Sharpeville and came into force on 4 February 1997.27 It had been certified by the Constitutional Court, as required by s71 of the interim Constitution, to be in compliance with the Constitutional Principles contained in Schedule 4 of the interim Constitution.28 In terms of Constitutional Principle II, a justiciable bill of rights containing ‘all universally accepted fundamental rights, freedoms and civil liberties’, drafted with due consideration to the terms of Chapter 3 of the interim Constitution, was required to form part of the final Constitution.

That Bill of Rights is contained in Chapter 2 of the final Constitution. Section 7(2), part of its first section, places obligations on the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. This formulation places both negative and positive obligations on the state.29 Section 8(1) provides that the ‘Bill of Rights applies to all law, and binds the

25 Mureinik, op cit, 43.
26 See Constitutional Principle VI, in particular.
legislature, the executive, the judiciary and all organs of state’. Section 8(2) creates the possibility of horizontal application of the Bill of Rights in certain circumstances, allowing for a provision of the Bill of Rights to bind ‘a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.30

The Bill of Rights in the final Constitution is far more extensive than that contained in the interim Constitution. It contains the usual (and, in terms of Constitutional Principle II, obligatory) civil and political rights such as the rights to equality,31 life,32 human dignity,33 freedom and security of the person,34 freedom from slavery, servitude and forced labour,35 privacy,36 freedom of religion, belief and opinion,37 freedom of expression,38 freedom of assembly and related rights,39 freedom of association,40 political rights,41 a right not to be deprived of citizenship,42 freedom of movement and residence,43 the right of access to court44 and to due process on arrest, dignified and humane treatment in detention and to a fair trial.45

In addition to these rights, the Bill of Rights also contains a set of social and economic

31 Section 9.
32 Section 10.
33 Section 11.
34 Section 12.
35 Section 13.
36 Section 14.
37 Section 15.
38 Section 16.
39 Section 17.
40 Section 18.
41 Section 19.
42 Section 20.
43 Section 21.
44 Section 34.
45 Section 35.
rights which vary in their formulation and in their enforceability. This category of rights is made up of rights freely to choose a trade, occupation or profession,\textsuperscript{46} to fair labour practices and other employment rights,\textsuperscript{47} to property,\textsuperscript{48} to access to adequate housing,\textsuperscript{49} to access to health care, food, water and social security,\textsuperscript{50} children’s rights,\textsuperscript{51} rights to education\textsuperscript{52} and rights to language and culture.\textsuperscript{53} Section 24 contains a so-called third generation right, an environmental right. There are two remaining rights which are rather unusual. They are the right of access to information and the right to just administrative action, contained in s32 and s33.

In keeping with most modern constitutions containing a bill of rights, the South African Constitution contains, in s36, a provision defining the circumstances in which fundamental rights may validly be limited. It allows for the limitation of fundamental rights by way of law of general application and to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors’ including a set of five specific factors. Section 37 of the Constitution specifies when and how a state of emergency may be declared and what effect such a declaration may have on fundamental rights. It does so on the basis that ‘a lucid and adequate emergency provision in the constitution is the most beneficial way of anticipating and addressing genuine threats to the security of the state’.\textsuperscript{54} Section 38 guarantees that courts will grant appropriate remedies for infringements of the Bill of Rights and extends standing to a wide range of potential litigants in litigation on fundamental rights\textsuperscript{55} and s39 directs courts, tribunals and other fora, when interpreting the Bill of Rights

\begin{footnotes}
\item[46] Section 22.
\item[47] Section 23.
\item[48] Section 25.
\item[49] Section 26.
\item[50] Section 27.
\item[51] Section 28.
\item[52] Section 29.
\item[53] Sections 30 and 31.
\item[54] Devenish \textit{A Commentary on the South African Bill of Rights} Durban, Butterworths: 1999, 555.
\item[55] See Chapter 6 below.
\end{footnotes}
to promote the ‘values that underlie an open and democratic society based on human dignity, equality and freedom’\(^{56}\) and, when interpreting legislation or developing the common law or customary law, to ‘promote the spirit, purport and objects of the Bill of Rights’.

2.3.2. The Right to Just Administrative Action

It was assumed, until fairly late in the constitution-making process, that the rights of access to information and to administrative justice would remain directly entrenched in the final Constitution’s bill of rights. The main issue at that stage was the wording of the final equivalent of s24(d), the sub-section providing for rational administrative action. In due course it was decided to follow the route of ‘non self-executing’\(^{57}\) rights of access to information and to just administrative action plus transitional provisions which kept s23 and s24 of the interim Constitution in operation until the legislation envisaged by s32 and s33 of the final Constitution – to ‘execute’ the right – had been passed.

Section 32 provides:

‘(1) Everyone has the right of access to –
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.’

Section 33 provides:

‘(1) Everyone has the right to administrative action which is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

\(^{56}\) Section 39 also says that courts, tribunals and other fora ‘must consider international law’ and ‘may consider foreign law’ when interpreting the Bill of Rights.

\(^{57}\) This terminology to describe the formulation of the rights is used by Asimow ‘Administrative Law Under South Africa’s Final Constitution: The Need for an Administrative Justice Act’ (1996) 113 SALJ 613. It is not particularly accurate terminology in the sense that, without legislation having been passed, the courts have ‘executed’ both rights since 1994 in many cases.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court or, where appropriate, an
independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.’

Item 23(1) of Schedule 6 dealt with legislation that Parliament was required to pass in
terms of s9(4) (the proscription of private unfair discrimination), s32(2) and s33(3). It
provided that this legislation had to be passed within three years of the date on which the
final Constitution came into effect.58 Item 23(2) of Schedule 6 provided, in effect, that, until
this legislation was passed, the fundamental rights contained in s23 and s24 of the interim
Constitution continued to apply (with only minor stylistic changes). Item 23(3) of Schedule
6 provided that s32(2) and s33(3) would lapse if the legislation envisaged was not enacted
within three years of ‘the date the new Constitution took effect’.

The interim Constitution’s Constitutional Principle IX required the final Constitution to make
provision for ‘freedom of information so that there can be open and accountable
administration at all levels of government’. Objection was taken in the certification of the
final Constitution that s32, read with item 23 of Schedule 6, did not comply with
Constitutional Principle IX.59 The Constitutional Court held that Constitutional Principle IX
had been complied with. It described the transitional arrangement as a means of ‘affording
Parliament time to provide the necessary legislative framework for the implementation of
the right to information’ because freedom of information legislation ‘usually involves
detailed and complex provisions defining the nature and limits of the right and the requisite
conditions for its enforcement’.60 The court observed that the ‘legislature is far better placed
than the courts to lay down the practical requirements for the enforcement of the right and

58 In terms of s243(1) the Constitution was to come into effect ‘as soon as possible on a date set by the
President by proclamation, which may not be a date later than 1 July 1997’. As stated above, the
President brought the Constitution into effect on 4 February 1997.
(CC), 1291H-1292G (paragraphs 82-87).
60 At 1291G-H (paragraph 83).
the definition of its limits’ and that although s32(1) is ‘capable of being enforced by a court – and if the necessary legislation is not put in place within the required time it will have to be – legislative regulation is obviously preferable’.61

Whether the same reasoning applies to legislation to give effect to s33 is an open question. Asimow has suggested that legislation is, indeed, necessary for this purpose. If it is, it is submitted that such necessity is limited: courts in South Africa after 1994 have shown themselves to be capable of developing the constitutionally based grounds of review contemplated by s33, even if, at times, that development has been a bit slow or patchy. They development of the common law grounds of review from the mid-1980s to the mid-1990s by the Appellate Division in particular also attests to the fact that the courts are capable of giving life to s33 without legislative prompting. As a result, it is submitted that there was no need for legislation to attempt to codify the grounds of review. Indeed, the legislation may have succeeded only in muddying the water in some important respects.

Legislation would be necessary if it had been decided to provide for review of administrative action by a tribunal or tribunals other than the High Courts. This policy option has not been adopted, although the Promotion of Administrative Justice Act contemplates some Magistrates’ Courts having the jurisdiction to review administrative action. It is, furthermore, highly unlikely that in the foreseeable future administrative courts or administrative appeal tribunals will be established. If, at some stage, such reforms are deemed necessary, appropriate legislation could then be passed: the Constitution does not act as a barrier to such legislation. It has, instead, made provision for precisely this possibility in s34.

Finally, legislation would be necessary for the second and third purposes mentioned in s33(3), namely to impose a duty on the state to give effect to the rights to lawful, reasonable and procedurally fair administrative action and to reasons for adverse

61 At 1292E-F (paragraph 86).
administrative action, and to promote an efficient administration. But neither of these purposes have been met in any substantial way in the Act, apart perhaps from the codification of the grounds of review. Indeed, the detailed provisions of the various South African Law Commission drafts of the bill that aimed at achieving the purpose of promoting administrative efficiency were deleted at an early stage of the legislative process. In conclusion, then, it does not necessarily follow that the factors that led the Constitutional Court to conclude that legislation was the best way to give effect to the right of access to information apply with equal force to the right to just administrative action.

2.4. The Promotion of Administrative Justice Act 3 of 2000

The legislation that s33(3) of the Constitution required Parliament to pass by 3 February 2000, in order to give effect to the rights to just administrative action, was drafted initially by a committee of the South African Law Commission comprised of Adv Jeremy Gauntlett SC, Adv Andrew Breitenbach, Professor Hugh Corder, Professor Phillip Iya and Professor Cora Hoexter. This committee consulted widely, both internally and outside the country, on the content of the draft legislation. A second version was drafted by Professor Jeremy Sarkin of the University of the Western Cape, apparently because the cabinet was unhappy about aspects of the first version. A third version was drafted by an official within the Department of Justice. The final version passed by Parliament differed in important respects from all three versions. The Act was passed by Parliament shortly before the constitutional deadline and assented to by the President on 3 February 2000. It was not, however, brought into force on that day. On 30 November 2000 the Act was brought into effect with the exception of s4 and s10.

2.4.1. The Terms of the Act

(a) General Provisions and Application

The long title of the Act provides that its purpose is to ‘give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto’. It also contains a preamble that states that the Act was passed in order to ‘promote an efficient administration and good governance’ and to ‘create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action’.

Section 2 of the Act, headed ‘Application of Act’ sets out circumstances when the Act, potentially, does not apply. It provides:

‘(1) The Minister may, by notice in the Gazette -
(a) if it is reasonable and justifiable in the circumstances, exempt an administrative action or a group or class of administrative actions from the application of any of the provisions of section 3, 4 or 5; or
(b) in order to promote an efficient administration and if it is reasonable and justifiable in the circumstances, permit an administrator to vary any of the requirements referred to in section 3(2), 4(1)(a) to (e), (2) and (3) or 5(2), in a manner specified in the notice.

(2) Any exemption or permission granted in terms of subsection (1) must, before publication in the Gazette, be approved by Parliament.’

This is a rather strange provision. Its effect is to make the Minister the arbiter of when the rights to a hearing and to reasons do not apply. It may well be an unconstitutional infringement of the doctrine of the separation of powers because decisions as to the boundaries of rights such as these are at the heart of the judicial function. Whether blanket exemptions of groups or classes of administrative actions is practical is open to doubt. Administrative functions in a modern state are often complex and varied and so do not lend themselves to being grouped, as the weaknesses in the classification of functions approach to administrative law has shown. Section 2 therefore, even if it is otherwise constitutional, may not be an effective or accurate way of achieving the purpose of delineating the boundaries of these rights. Thirdly, what is the effect of a decision of the Minister in terms of this section? If the Minister permits an administrator to vary a
The term ‘organ of state’ is defined in s239 of the Constitution and, in terms of s1(ix) of the Act, bears the meaning assigned to it by that section of the Constitution. See further, chapter 4 below.

Section 1(i)(a).

Section 1(i)(b).

Section 1(i).

Section 1(vi).

Sections 1(i)(aa), (bb) and (cc).

(b) Definitions

The first definition of importance is the definition of ‘administrative action’. This term is defined to mean a decision taken or a failure to take a decision by, first, an organ of state, when it is ‘exercising a power in terms of the Constitution or a provincial constitution’ or when it is ‘exercising a public power or performing a public function in terms of any legislation’ or, secondly, by ‘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’ and which decision or failure ‘adversely affects the rights’ of any person and has ‘a direct, external legal effect’. Because of the inclusion of private actors in the definition of administrative action, the term ‘empowering provision’ was defined too. This term means ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’.

The definition of administrative action expressly excludes nine categories of exercises of power or performance of functions. The first three sets of exclusions relate to the exercise of executive powers or the performance of executive functions in the national, provincial and local spheres of government. The second set exclude the legislative functions of the

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63 The term ‘organ of state’ is defined in s239 of the Constitution and, in terms of s1(ix) of the Act, bears the meaning assigned to it by that section of the Constitution. See further, chapter 4 below.

64 Section 1(i)(a).

65 Section 1(i)(b).

66 Section 1(i).

67 Section 1(vi).

68 Sections 1(i)(aa), (bb) and (cc).
legislative organs in the three spheres of government. The third set of exclusions are ‘the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), or the judicial functions of a traditional leader under customary law or any other law’. Fourthly, decisions to institute or continue prosecutions do not fall within the definition of administrative action. Fifthly, decisions of the Judicial Service Commission ‘regarding the appointment of a judicial officer’ are excluded from the operation of the Act as are, in the sixth and seventh places, ‘any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000’ and ‘any decision taken, or failure to take a decision, in terms of section 4(1)’ of the Act itself.

The term ‘decision’ is related conceptually to the term ‘administrative action’. A decision, in terms of s1(v) means:

‘... any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –
(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instruments;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.’

Section 1(iv) defines the terms ‘court’ to mean:

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69 Section 1(i)(dd).
70 Section 1(i)(ee).
71 Section 1(i)(ff).
72 Section 1(i)(gg).
73 Section 1(i)(hh).
74 Section 1(i)(ii). See further Chapter 10 below.
(a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution; or
(b)(i) a High Court or another court of similar status; or
(ii) a Magistrate’s Court, either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate designated in writing by the Minister after consultation with the Magistrates Commission, within whose area of jurisdiction the administrative action occurred, or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.'

(c) Procedural Fairness

Two sections of the Act deal with the requirements of procedural fairness in the form of the right to a hearing. Section 3 sets out the general requirements of the right to a hearing when administrative action ‘materially and adversely affects the rights or legitimate expectations of any person’. Section 4 deals with the requirements of procedural fairness when the rights of the public are ‘materially and adversely’ affected. It thus serves to extend the right to a hearing to circumstances not recognised by the common law. It does so by empowering administrators who contemplate taking action that will affect the public generally to either hold a public enquiry, to follow a notice and comment procedure, to do both or to utilise another fair but different procedure provided for by any other applicable legislation.

(d) Reasons

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75 See Chapter 10 below for a detailed discussion of the right to procedurally fair administrative action.
76 Section 6(2)(a)(i) deals with the second aspect of procedural fairness, the right to an unbiased decision. It provides that administrative action may be set aside if the administrator concerned was either biased or reasonably suspected of being biased. Section 6(2)(c) provides for the review of administrative action that is procedurally unfair.
78 Section 4(1).
Section 5(1) gives effect to s33(2) of the Constitution, the right to reasons.\textsuperscript{79} This right is vested in ‘any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action’. Such a person may request reasons ‘within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action’. An administrator must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action’.\textsuperscript{80} If the administrator fails to furnish adequate reasons, it must be presumed, on review, (and subject to the administrator being able, validly, to refuse to furnish adequate reasons) that ‘the administrative action was taken without good reason’.\textsuperscript{81}

An administrator is relieved of the obligation to furnish adequate reasons for his or her decisions when he or she decides that a refusal to furnish reasons is reasonable and justifiable in the circumstances.\textsuperscript{82} An administrator will not be required to comply with the provisions of s5 in one further instance, namely, when an empowering provision provides for a reason-giving procedure which is ‘fair but different’. The administrator will be required, in such cases, to act in compliance with the empowering provision in question.

Finally, s5(6) makes provision for the giving of reasons automatically. Section 5(6)(a) provides that, in ‘order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the Gazette publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section’. Section 5(6)(b) provides that the ‘Minister, must, within fourteen days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant

\textsuperscript{79} See Chapter 11 below for a detailed discussion of the right to reasons.
\textsuperscript{80} Section 5(2).
\textsuperscript{81} Section 5(3).
\textsuperscript{82} Section 5(4).
The specific grounds of review are discussed more fully in Chapters 8, 9 and 10 below.

(e) Judicial Review and Remedies

The Act sets out grounds of review, the procedure to be followed in applications for review, time limits applicable to such applications and the remedies that a court may grant in review proceedings. Section 6(1) provides that ‘any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action’. Section 6(2) sets out the grounds of review.83

The first set of grounds, in giving effect to the right to lawful administrative action, deals with the authority of administrators to act and also gives effect to the right to procedural fairness in both of its manifestations. Section 6(2)(a), (b) and (c) provide that administrative action may be reviewed if:

‘(a) the administrator who took it –
   (i) was not authorised to do so by the empowering provision;
   (ii) acted under a delegation of power which was not authorised by the empowering provision;
   or
   (iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair.’

The next set of grounds relates, again, to the right to lawful administrative action, but these grounds deal with abuses of discretion, as well as with some aspects of the right to reasonable administrative action. In terms of s6(2)(d), (e) and (f), administrative action may be reviewed if:

‘(d) the action was materially influenced by an error of law;
(e) the action was taken –
   (i) for a reason not authorised by the empowering provision;

83 The specific grounds of review are discussed more fully in Chapters 8, 9 and 10 below.
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;
(f) the action itself –
(i) contravenes a law or is not authorised by the empowering provisions; or
(ii) is not rationally connected to –
   (aa) the purpose for which it was taken;
   (bb) the purpose of the empowering provision;
   (cc) the information before the administrator; or
   (dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision.’

Section 6(2)(h) provides further for the right to reasonable administration, seeking as it does, to define this concept generally. It provides that administrative action may be reviewed if ‘the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function’. The last ground of review, contained in s6(2)(i), is a catch all which will allow, potentially, for the development of the constitutional review of administrative action beyond the grounds of review that have been listed. It provides that administrative action may be reviewed, if ‘the action is otherwise unconstitutional or unlawful’.

Section 6(3) deals specifically with the review of failures by administrators to take decisions. It provides:

‘If any person relies on the ground of review referred to in subsection 2(g), he or she may in respect of a failure to take a decision, where –
(a)(i) an administrator has a duty to take a decision;
(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
(iii) the administrator has failed to take that decision,
institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the
ground that there has been unreasonable delay in taking the decision; or
(b)(i) an administrator has a duty to take a decision;
(ii) a law prescribes a period within which the administrator is required to take that decision; and
(iii) the administrator has failed to take that decision before the expiration of that period,
institute proceedings in a court or tribunal for judicial review of the failure to take the decision within
that period on the ground that the administrator has a duty to take the decision notwithstanding the
expiration of that period.’

Section 7 concerns itself with procedural aspects of applications for judicial review. It
provides, in the first place, that the constitutional rights to lawful, reasonable and
procedurally fair administrative action must be exercised within a specified time. Section
7(1) reads:84

‘Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable
delay and not later than 180 days after the date -
(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies
as contemplated in subsection (2)(a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the
administrative action, became aware of the action and the reasons for it or might reasonably
have been expected to have become aware of the action and the reasons.’

Section 7(2) deals with the exhaustion of internal remedies.85 It provides, first, that ‘no
court or tribunal shall review an administrative action in terms of this Act unless any internal
remedy provided for in any other law has first been exhausted’;86 secondly, that if the court
or tribunal is not satisfied that an internal remedy has been exhausted, it must ‘direct that
the person concerned must first exhaust such remedy before instituting proceedings in a
court or tribunal for judicial review in terms of this Act’;87 and, thirdly, that a court or tribunal
may, ‘in exceptional circumstances and on application by the person concerned, exempt

84 See Chapter 7 below for a more detailed discussion of this section.
85 See Chapter 7 below for a more detailed discussion of this section.
86 Section 7(2)(a).
87 Section 7(2)(b).
such person from the obligation to exhaust any internal remedy if the court or tribunal
deems it in the interest of justice'.

The rules of procedure to govern applications for judicial review must be made by the
Rules Board for Courts of Law within one year of the date of commencement of the Act.
These rules must be approved by Parliament before publication in the Government
Gazette. Before these rules come into operation, proceedings for judicial review must be
instituted in a High Court or the Constitutional Court.

Section 8(1) provides that ‘in proceedings for judicial review in terms of section 6(1)’, the
reviewing court or tribunal ‘may grant any order that is just and equitable’. Such orders may
include orders:

(a) directing the administrator –
   (i) to give reasons; or
   (ii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the administrative action and –
   (i) remitting the matter for reconsideration by the administrator, with or without directions; or
   (ii) in exceptional cases –
      (aa) substituting or varying the administrative action or correcting a defect
           resulting from the administrative action; or
      (bb) directing the administrator or any other party to the proceedings to pay
           compensation;
(d) declaring the rights of the parties in respect of any matter to which the administrative action
    relates;
(e) granting a temporary interdict or any other temporary relief; or
(f) as to costs.’

In cases where the cause of action is the failure of an administrator to act, the reviewing

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88 Section 7(2)(c).
89 Section 7(3).
90 Section 7(5).
91 Section 7(4).
court or tribunal may also grant an order that is just and equitable.\textsuperscript{92} In these types of cases, this relief may include orders:

\begin{itemize}
  \item[(a)] directing the taking of the decision;
  \item[(b)] declaring the rights of the parties in relation to the taking of the decision;
  \item[(c)] directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
  \item[(d)] as to costs.'
\end{itemize}

Finally, s9 deals with time periods. Section 9(1)(a) allows for the possibility of the 90 day period for the requesting and furnishing of reasons to be reduced, while s9(1)(b) contemplates the possibility of the 90 day period and the 180 day period, for the requesting and furnishing of reasons and the launching of review proceedings respectively, being extended. These periods may be reduced or extended ‘by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned’. Section 9(2) provides that an application for the reduction or extension of the time limit may be granted ‘where the interests of justice so require’.\textsuperscript{93}

(f) Regulations

The Minister is given extensive regulation-making competence by s10 of the Act. These powers go to both the administration of the Act and ongoing administrative law reform. Section 10(1) provides that the Minister must make regulations relating to the following:

\begin{itemize}
  \item[(a)] the procedure to be followed by designated administrators or in relation to classes of administrative action in order to promote the right to procedural fairness;
  \item[(b)] the procedures to be followed in connection with public enquiries;
  \item[(c)] the procedures to be followed in connection with notice and comment procedures;
  \item[(d)] the procedures to be followed in connection with requests for reasons; and
  \item[(e)] a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the
\end{itemize}

\textsuperscript{92} Section 8(2).
\textsuperscript{93} See Chapter 7 below for a more detailed discussion of s9.
In addition, s10(2) gives the Minister the discretion to make regulations relating to five other matters. They are: first, ‘the establishment, duties and powers of an advisory council to monitor the application of this Act’ and to give him or her advice on a range of issues such as ‘the appropriateness of publishing uniform rules and standards which must be complied with in the taking of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state’, secondly, ‘the compilation and publication of protocols for the drafting of rules and standards’; thirdly, ‘the initiation, conducting and co-ordination of programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action’; fourthly, ‘matters required or permitted by this Act to be prescribed’ and, fifthly, ‘matters necessary or convenient to be prescribed’ to achieve the objects of the Act or to give effect to the recommendations of the advisory council.

Sections 10(3), 10(4), 10(5) and 10(6) prescribe procedural fetters on the Minister’s regulation-making powers: in terms of s10(3), he or she must, prior to making regulations, consult with the Public Service Commission ‘regarding any matter which may be regulated by the Public Service Commission under the Constitution or any other law’; in terms of s10(4), prior to promulgating regulations, the Minister must, depending on the regulation in question, either submit the regulation to Parliament for tabling or submit it to Parliament for approval; in terms of s10(5), if a regulation may ‘result in financial

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94 Section 10(2)(a).
95 Section 10(2)(a)(i).
96 Section 10(2)(b).
97 Section 10(2)(c).
98 Section 10(2)(d).
99 Section 10(2)(e).
100 This procedure must be followed for regulations made under s10(1)(a), (b), (c) and (d) and s10(2)(c), (d) and (e).
101 This procedure must be followed for regulations made under s10(1)(e) and s10(2)(a) and (b).
expenditure for the State’, the Minister is required to make it in consultation with the Minister of Finance; in terms of s10(6), the regulations contemplated by s10(1)(e) – the code of good administrative conduct – ‘must be approved by Cabinet and must be made within two years after the commencement of this Act’.

3.4.2. Comments on the Act

These comments on the Act will be relatively brief and general. A more detailed analysis of its various provisions will be undertaken in the chapters that follow. It must be stated at the outset that the Act contains a mixture of the good and the bad: it contains some provisions that aid the process of creating and developing the constitutional review of administrative action while others of its provisions place unnecessary restrictions on the utilisation of the review mechanisms that the Act creates.

On the positive side, the Act has extended the right to procedural fairness through s4 in that the public enquiries and notice and comment procedures which that section envisages are not available through the common law, and it is unlikely that they would have been developed by the courts, certainly in the short to medium term. These provisions of the Act most certainly go beyond the boundary of natural justice set by the Appellate Division in *South African Roads Board v Johannesburg City Council*, namely that a member of the public has no right to a hearing when administrative action affects members of the public equally.

Similarly, the right to reasons that is regulated by s5 is important in that the courts have turned their backs, consistently, on the development of a general common law duty to give reasons. It must be added, however, that the bases for this refusal are thin, to say the

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102 See further, Chapter 10 below.
103 1991 (4) SA 1 (A).
104 At 12F-I.
105 See further, Chapter 11 below.
least, and if the approach of the courts elsewhere may be taken as a guide, it might have been possible to persuade a South African court that a common law duty to furnish reasons should be developed.\textsuperscript{106}

Thirdly, the Act will contribute meaningfully to enhanced access to justice by defining a court to mean, inter alia, a court ‘within whose area of jurisdiction ... the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced’.\textsuperscript{107} All of the versions of the bill had vested review jurisdiction in courts ‘within whose area of jurisdiction the administrative action occurred or the administrator has his or her principal place of administration’.\textsuperscript{108} Through the formulation adopted in the Act, the approach to jurisdiction applied by the Appellate Division in \textit{Estate Agents Board v Lek}\textsuperscript{109} has been preferred over a jurisdictional arrangement that would often have made it all but impossible for everyone but the richest members of society to approach the courts for administrative justice based on the Constitution.

As against these positive contributions, the Act contains provisions that are problematic. The first such problem relates to the definition of administrative action.\textsuperscript{110} The definition excludes some exercises of power that are clearly administrative in nature and would be subject to review as administrative action in terms of the common law. An example is the exclusion from constitutional review under the Act of the exercise of ‘the executive powers or functions of a municipal council’.\textsuperscript{111} This appears to be the result of an erroneous belief

\textsuperscript{106} The development of such a duty by the Indian courts is a good illustration of what could be achieved in the development of the common law to make it compatible with a Constitution that places a premium on accountability, responsiveness and openness — on justification for exercises of public powers. See Sorabjee ‘Obliging Government to Control Itself: Recent Developments in Indian Administrative Law’ [1994] PL 39, 44.

\textsuperscript{107} Section 1(iv)(b).

\textsuperscript{108} Section 1(d) of the bill which was the subject of hearings before the Justice Committee of Parliament during December 1999.

\textsuperscript{109} 1979 (3) SA 1048 (A).

\textsuperscript{110} See further, Chapter 4 below.

\textsuperscript{111} Section 1(i)(cc).
that, because the executive powers and functions in the national and provincial spheres of government are excluded, consistency requires the same exclusion in the local sphere. This overlooks the fact that the exclusion of the first two spheres derives from the fact that the executive powers and functions concerned have their origin in the prerogative, which has now been exhaustively codified in the Constitution and the exercise of which has been held not to constitute administrative action. The local sphere of government has never had prerogative power, neither in South Africa nor in England. A second example is the exclusion from constitutional review in terms of the Act of decisions made by judges sitting in the Special Tribunal established by the Special Investigating Units and Special Tribunals Act 74 of 1996, an exclusion which is arbitrary.

A similar problem – the breadth of the protection that the Act offers – is evident in two respects in relation to procedural matters. With regard to time limits for the launching of proceedings and the exhaustion of internal remedies, the Act is more restrictive of the right of access to court than the common law. Section 7(1) provides that review proceedings must be initiated ‘without unreasonable delay and not later than 180 days after’ internal remedies have been exhausted or the date on which the applicant became aware of or is deemed to have become aware of the administrative action concerned and the reasons for it. Section 7(2) provides, essentially, that an aggrieved person must first exhaust internal remedies before approaching a court by way of judicial review. A late application for review and an application brought before internal remedies have been exhausted may only be condoned by the court on an application being brought for this purpose ‘where the interests of justice so require’, in the case of the 180 day provision, and ‘in exceptional circumstances’ and if ‘the court or tribunal deems it in the interest of justice’, in the case

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112 President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC).
113 President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC), 11141-1123F (paragraphs 132-149).
114 Section 1(i)(ee).
115 See Chapter 4 below for a detailed discussion on the definition of administrative action.
116 Section 9(2). Note that, in terms of s9(1), it is possible that the late launching of an application can be condoned by agreement between the parties.
of a failure to exhaust internal remedies.¹¹⁷

By contrast, the common law favours an approach that recognises that delay and the failure to exhaust internal remedies should not unduly hamper the court’s functions and hence the right of the individual to approach a court for relief. So, in the case of delay, it is accepted that, in most cases, a delay of six months would not even warrant an explanation, and that delay ‘in initiating review proceedings is pre-eminently a point which the respondent or the Court should raise because the respondent and the Court are best able to judge whether, having regard to the respective spheres of interest of each, the lapse of time which has occurred merits the raising of an objection’.¹¹⁸ In respect of the exhaustion of internal remedies, the common law approach is that the right of access to court will only be deferred if the legislature expressly or impliedly made provision for this result.¹¹⁹ The weak nature of the duty to exhaust internal remedies at common law is further emphasised by Southwood J in Maluleke v Member of the Executive Council, Health and Welfare, Northern Province¹²⁰ in which he observed that the point that a person has not exhausted internal remedies ‘will seldom be upheld particularly where the aggrieved person’s very complaint is the illegality of the decision which he seeks to challenge’ and that ‘generally an aggrieved person such as the applicant should have unrestricted access to court to seek redress’.

What the above issues highlight is the fact that, in important respects, the common law provides rules that are more compatible with the spirit, purport and objects of the Constitution than the legislative instrument that was required by the Constitution to give effect to the fundamental right to just administrative action. The Act, in important respects, represents a limitation on the fundamental right as it had been interpreted by the courts between 27 April 1994 and the coming into force of the Act. This raises the question of

¹¹⁷ Section 7(2)(c).
¹¹⁸ Scott v Hanekom 1980 (3) SA 1182 (C), 1192G-1193G.
¹¹⁹ Baxter, 720.
¹²⁰ 1999 (4) SA 367 (T), 372G-H.
whether the legislature has succeeded in fulfilling its constitutional mandate, in terms of s33(3), to give effect through legislation to the rights to lawful, reasonable and procedurally fair administrative action, to reasons for administrative decisions and to promote an efficient administration. This question will be answered in detail in the chapters that follow.
CHAPTER THREE: CONTROLLING ADMINISTRATIVE POWER THROUGH JUDICIAL REVIEW

3.1. Methods of Controlling Administrative Power

Administrative action may be controlled, and administrative decision-makers hence held to account, in a number of ways, both formal and informal, internal to the administration and external to it. In what follows, the focus will be on institutional, and relatively formal, methods of control. These include control of the administrative process by the administration itself, legislative control of the administration, control of the administrative process by the institutions established by the Constitution to support constitutional democracy, control through the political process broadly and judicial control of administrative action.

3.1.1. Internal Controls

(a) Constitutional and Statutory Framework

Public administration in South Africa is required by s195(1) of the Constitution to be 'governed by the democratic values and principles enshrined in the Constitution' and to comply with nine specific principles. These principles are:

'(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development oriented.
(d) Services must be provided in partially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy makings.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human resource management and career development practices, to maximise human potential, must be cultivated.
(I) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

The principles and values of s195(1) apply, in terms of s195(2), to administration in the three spheres of government, to organs of state and to public enterprises. There importance has been highlighted in a number of cases. In President of the Republic of South Africa v South African Rugby Football Union the Constitutional Court stated that the importance of the Constitution’s commitment ‘to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public’ should not be underestimated in the light of the fact that prior to the advent of democracy ‘the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability’.

In South African Association of Personal Injury Lawyers v Heath Chaskalson P (although probably not speaking only of official misconduct) made the important point that ‘[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution’ that these types of misconduct ‘undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms’ and that if such practices are ‘allowed to go unchecked and unpunished they will pose a serious threat to our democratic State’.

In order to promote the values and principles contained in s195(1) and generally to

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1 1999 (10) BCLR 1059 (CC), 1115B-D (paragraph 133).
2 2001 (1) SA 883 (CC), 891E-F (paragraph 4).
3 See too Reuters Group PLC v Viljoen NO 2001 (2) SACR 519 (C) in which unethical conduct of an administrative nature, on the part of two senior members of the staff of the National Director of Public Prosecutions, was set aside on this basis. See further Mahambahlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government 2001 (9) BCLR 899 (SE) in which the values and principles of s195(1) were taken into account for the purposes of developing an appropriate constitutional remedy when administrative officials had delayed unreasonably in taking a decision in respect of the applicant’s eligibility for a social grant.
contribute to effective and efficient public administration, s196 creates a Public Service Commission. This Commission has powers to investigate, monitor and evaluate,\(^4\) to make recommendations,\(^5\) to give directions\(^6\) and to report\(^7\) on matters connected with the functioning of the public administration. The Public Service Act, Proclamation 103 of 1994 and its regulations regulate the public service, providing, inter alia, for a hierarchy within the public service, the appointment of employees, terms and conditions of employment, grounds and procedure for the termination of employment and an enforceable code of conduct for public servants.\(^8\) Section 197 of the Constitution creates the framework within which the public service functions. It provides, for instance, that the public service ‘must loyally execute the lawful policies of the Government of the day’.\(^9\)

(b) Employment Discipline

The hierarchical structure of the public service and, indeed, of most, if not all, institutions that may exercise public power, ensures (on a formal level at least) a measure of control through the usual rules that regulate employment. The effectiveness of these controls depends, in large measure, on the will and determination of the employer to implement them and to instill workplace discipline, and on the efficacy of the structures put in place for this purpose. Through these methods, maladministration which takes the form of employee misconduct, may be controlled, but bad, unwise or misguided discretionary decision-making which falls short of misconduct, may not be.\(^10\) In some instances, such

\(^4\) Section 196(4)(b).
\(^5\) Section 196(4)(c).
\(^6\) Section 196(4)(d).
\(^7\) Section 196(4)(e).
\(^8\) The Code of Conduct is contained in Chapter M of the Public Service Regulations. It was promulgated in Government Gazette 18065 of 10 June 1997. Its purpose is to ‘give practical effect to the relevant constitutional provisions relating to the Public Service’ and to serve as a ‘guideline to employees as to what is expected of them from an ethical point of view’ (Reg M2).
\(^9\) Section 197(1).
\(^10\) Note that the ongoing assessment of the performance of the public service by the Public Service Commission, and training in proper decision-making processes and reason-giving may have longer term benefits but the fruits of such programs are not evident across the board at this stage. Indeed, it is probably true to say that the standard of work of the public service in South Africa remains pitifully low in substantial sectors of administration. See for examples of this wide-spread maladministration in
decision-making may be controlled on an ad hoc basis, activated by complaints from members of the public. If, however, the administrative decision is discretionary in nature, it may not be possible to reverse it for two reasons: first, because interference by a person not empowered to take the decision would, if heeded by the decision-maker, amount to an unlawful abdication of authority;\(^{11}\) and secondly, the decision-maker would probably be functus officio and unable, in law, to undo his or her decision.\(^{12}\) That said, however, complaints from members of the public (as long as the administration does not close ranks) may serve to improve decision-making in future cases.

(c) Information and Reasons

The administration may be forced to take seriously the standard of its decision-making by virtue of the Constitution’s open government provisions. It is under a general duty to provide information held by it to any person who makes a request for information in accordance with the provisions of the Promotion of Access to Information Act 2 of 2000.\(^{13}\) The administration is also under a duty to provide reasons for its administrative decisions.\(^{14}\) These provisions ought to have the effect of alerting the administration to the need to take decisions on the assumption that the factual and policy bases of those decisions, as well as reasons for conclusions, may well have to be supplied to members of the public and may be the subject, in due course, of judicial review. One imagines that this realization

\(^{11}\) See Baxter, 442.

\(^{12}\) See Baxter, 372-373.

\(^{13}\) This Act gives effect to s32 of the Constitution. Prior to the promulgation of the Act, item 23(2)(a) of Schedule 6 of the Constitution provided that a transitional right of access to state held information, essentially similar to s23 of the interim Constitution, would apply. This right was qualified by the proviso that the information requested had to be necessary for the exercise or protection of a right. For examples of the application of this right, see \textit{Uni Windows CC v East London Municipality} 1995 (8) BCLR 1091 (E) and \textit{Van Niekerk v Pretoria City Council} 1997 (3) SA 839 (T). See too chapter 11 below.

\(^{14}\) Section 33(2) of the Constitution says: ‘Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.’ This right is regulated by s5 of the Promotion of Administrative Justice Act. Until that legislation was passed, item 23(2)(b) of Schedule 6 provided for a right to reasons which was essentially similar to that contained in s24(c) of the interim Constitution. See too chapter 11 below.
should have a powerful effect on the administration and should bring about changes in decision-making processes. The potentially positive impact of such measures has received judicial endorsement on a number of occasions: in Transnet Ltd v Goodman Brothers (Pty) Ltd,15 for instance, Schutz JA commented that the appellant, once it got used to giving reasons for its decisions would probably find the exercise a ‘healthful’ one16 and in Van Niekerk v Pretoria City Council17 Cameron J observed that the right of access to information had subordinated organs of state to ‘a new regimen of openness and fair dealing with the public’.18

(d) Internal Appeals

Appeals are creatures of statute. In certain statutes, an aggrieved party may be given a right to appeal against an administrative decision, not to a court, but to an appellate tribunal or functionary within the administration.19 From time to time, a right of appeal is granted from the decision of an administrative agency to a court.20 The principal advantage of a system of internal appeals is that the second decision is likely to be on the merits, rather than on the way the decision was reached, as in cases of review, and, being internal, the second decision will (in theory at least) be taken by administrators with specific expertise in the area of administration concerned. They will, as a result, be able to make factual findings (and draw inferences from the facts) and take their own discretionary decisions, thus substituting their decisions for those of the decision-makers at first instance.21

15 2001 (2) BCLR 176 (CC).
16 At 194D (paragraph 16).
17 Supra.
18 At 850B-C.
19 See for instance s8 of the Road Transportation Act 74 of 1977, which creates an appeal from the decisions of local road transportation boards to the National Transport Commission.
20 See for instance s21 of the Films and Publications Act 65 of 1996, which creates an appeal from a Review Board to the High Court in respect of certain decisions. In terms of s21(3), the High Court ‘may confirm the decision appealed against or may set the decision aside, and give such decision, make such classification and impose such conditions as should in its view have been given, made or imposed’.
21 Baxter, 255.
Because internal appeals are created by statute, their scope varies from statute to statute. They vary from proceedings that are more properly called reviews, to appeals on the records, to complete re-hearings. The scope of the appeal must, in each instance, be determined from the terms of the statute in question. One major consequence of an internal appeal is that it may activate a rule to the effect that an aggrieved party may only approach a court for relief against an administrative decision if that party has exhausted internal remedies. At common law, the rule only applies if 'such intention is clearly evident from the governing legislation or, in the case of a private organisation, from the terms of agreement between the complainant and the association concerned'. In terms of s7(2) of the Promotion of Administrative Justice Act, however, a duty is cast in much stronger terms on every applicant to exhaust internal remedies before applying for judicial review. As with employment discipline as a means of controlling administrative action, internal appeals are also only as effective as the efficiency of the people who administer the internal appeal mechanism in question and the quality of their decision-making. For this reason, it is submitted that the creation of the onerous duty that is placed upon an applicant for judicial review to exhaust internal remedies is premature (to say the least), counter-productive and will simply cast the burden of maladministration on its victim.

3.1.2. The Legislature

Democratic theory would have it that, in a constitutional system such as South Africa’s, the legislature, as representative of the people, controls the executive. After all, the executive, with the exception of the President and, at most, two other Cabinet Ministers, is drawn from the National Assembly. Section 92 of the Constitution entrenches the accountability of the executive to the legislature. It provides:

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22 Baxter, 256. Tikly v Johannes NO 1963 (2) SA 588 (T). See further 3.2.3 below.
23 Baxter, 720.
24 See Chapter 7 below.
26 Section 91(3).
27 For the equivalent provision in the provincial sphere of government, see s133 of the Constitution.
'(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must –
(a) act in accordance with the Constitution; and
(b) provide Parliament with full and regular reports concerning matters under their control.’

What is more a positive duty is placed on the main legislative organs of state to hold the executive to account: in the national sphere of government, for instance, s42(3) of the Constitution provides that one of the central functions of the National Assembly is to scrutinize and oversee executive action, s55(2)(a) provides that it must provide mechanisms ‘to ensure that all executive organs of state in the national sphere of government are accountable to it’ and s55(2)(b) also requires it to provide mechanisms to ‘maintain oversight’ of the ‘exercise of national executive authority, including the implementation of legislation’ and of ‘any organ of state’.28

In practice, the picture is somewhat different. Responsible government has been affected by the relative power, in the modern state, of the executive in relation to the legislature. This is, in large measure, due to the strength of the party system, its central position in the legislative systems of many modern states, including South Africa, and the fact that party discipline and solidarity may make majority party members reluctant to criticize the executive. In this way loyalty to the governing party may trump loyalty to Parliament.29 It must be borne in mind that in a system such as South Africa’s, the executive consists of most of the leadership of the majority party. This also serves to explain why the tail wags the dog in this case. Legislative control of executive power through the convention of ministerial responsibility is largely ineffectual for the above reasons. That does not mean

28 See s114(2) for the equivalent provisions in relation to provincial legislatures.
29 Meer ‘Legislative Controls of the Executive’ in Corder and McLennan (eds) Controlling Public Power Cape Town, Department of Public Law, University of Cape Town: 1995, 83, 84. See too Corder and Maluwa ‘Administrative Justice in Southern Africa: Background and Some Issues’ in Corder and Maluwa 3, 6 who say that by the late 1980s ‘it could fairly be said that, with the exception of Botswana, the autocracy of the executive with the connivance of the legislature was the real locus of government power through Southern Africa, constitutional niceties notwithstanding’. 
that it should be ignored entirely as a potential source of control: through Parliamentary debates and questions, and perhaps more importantly, the proceedings of Parliament’s portfolio committees, issues may be placed on the public agenda and, on the appropriate issue, it may be found that a ruling party is less monolithic than was assumed.\textsuperscript{30} The preconditions for effective legislative control have been identified as follows by Ncube:\textsuperscript{31}

\begin{quote}
‘The lesson here is that the effectiveness of any representative body in limiting and controlling public power or the use of executive authority, does not depend on the existence of an elected legislature per se. Rather, it is predicated on all the conditions of democracy and representation, that is to say, on the capacity of the legislature to act independently, on all the constitutional and other legal provisions which determine and affect how legislative bodies become seized of issues, how they debate and act and on how faithfully they serve the represented and the general public good.’
\end{quote}

3.1.3. State Institutions Supporting Constitutional Democracy

Chapter 9 of the Constitution creates six institutions to ‘strengthen constitutional democracy in the Republic’.\textsuperscript{32} They are the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.\textsuperscript{33} These institutions are described as being ‘independent and subject only to the Constitution and the law.’ They are required to be impartial and must exercise their powers and perform their functions ‘without fear, favour

\textsuperscript{30} It is probably true to say that questions in Parliament have been less effective as a means of holding the executive to account as had been hoped. The portfolio committees have had mixed fortunes in holding the executive to account. Some appear to have performed this function particularly well and, to an extent at least, in a non-partisan manner. Others have been far from effective. The controversy within the Select Committee on Public Accounts is a good example of a committee that once worked on a non-partisan basis falling prey to the dictates of party discipline in relation to the government’s arms acquisition process.


\textsuperscript{32} Section 181(1).

\textsuperscript{33} Section 181(3).
or prejudice’. They are accountable to the National Assembly, and are required to report to it on their activities and the performance of their functions at least once a year.

Some of these institutions are more important than others as controllers of public power. The Electoral Commission, for instance, is established to manage national, provincial and local elections, to ensure they are free and fair and to declare the results. It tends, therefore, to be an exerciser of public power rather than a controller of public power. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, is principally concerned with promoting ‘respect for the rights of cultural, religious and linguistic communities’ and promoting and developing ‘peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association’. Although it has the powers to ‘monitor, investigate, research, educate, lobby, advise and report’ on issues within its mandate, it is unlikely that it will play a significant role as a controller of public power. Indeed, s185(3) appears to envisage that this Commission will, when it receives complaints about matters that fall within its jurisdiction, act as a conduit, channelling those complaints to the Human Rights Commission for further action.

The remaining institutions are more centrally concerned with controlling public power, and, in some cases, private power too. So, for instance, the Public Protector is given the power to ‘investigate any conduct in State affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice’, to report thereon and to take remedial action; and the Auditor General is empowered to ‘audit and report on the accounts, financial statements and financial

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34 Section 181(2).
35 Section 181(5). See generally Esack NO v Commission on Gender Equality (2000) 21 ILJ 467 (W) and Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC).
36 Section 190(1).
37 Section 185(1)(a).
38 Section 185(1)(b).
39 Section 185(2).
40 Section 182(1).
management' of departments and administrations in the three spheres of government and any other ‘institution or accounting entity’ required by legislation to be audited by the Auditor General.41

The effectiveness of the Public Protector, the Human Rights Commission and the Commission for Gender Equality, in particular, will depend on their accessibility to as large a number of people as possible and their ability to provide speedy and effective remedies.42 All of these institutions appear to suffer from the same problem: they have all been underfunded to the point that they appear to have been inhibited in their ability to perform their constitutional mandate adequately.43 Professor Karthy Govender, a Commissioner of the Human Rights Commission, identified this problem and the dilemmas it created, at the second Breakwater Conference in 1996. He said:44

‘Given the present fiscal constraints, we may not be able to take all individual cases, notwithstanding the merits. We may have to restrict ourselves to cases indicating systemic violations of rights or cases having the potential to impact on society as a whole. The contrary view is that the Human Rights Commission, given its mandate, cannot turn people away when there is clearly a violation of fundamental rights, even if it impacts only on the individual and his immediate family. It would be a difficult task to explain to a person whose fundamental rights have been violated, that his case cannot be pursued with vigour because of logistic constraints. A revamped and revitalised legal aid system and structured referrals to other bodies and effective non-governmental organizations may assist in this process. It is imperative that the Human Rights Commission and these bodies clarify their respective jurisdictions and roles and establish working relationships that would be of mutual assistance.’

More recently, the same problem was raised in Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government45 in which it had been argued by the respondents that, rather than approach a court for relief on behalf of themselves and a large number of similarly situated others, the applicants should have referred the

41 Section 188(1).
42 Plasket ‘Accessibility Through Public Interest Litigation’ in Corder and Maluwa, op cit, 119, 122.
45 2000 (12) BCLR 1322 (E).
problem of procedurally unfair cancellations of disability grants to either the Public Protector or the Human Rights Commission. Froneman J dealt with this argument (in the context of justiciability for purposes of standing in terms of s38(d)) as follows:

‘In an oblique way the respondents did raise this as an issue in the papers by suggesting that the matter should not be decided in a Court of law but that the affected beneficiaries should pursue the matter through the offices of the Public Protector and the Human Rights Commission. On a purely factual level the applicants have answered that by detailing the history of the efforts made to pursue the matter through the office of the Public Protector and the own efforts of the Human Rights Commission to rectify the appalling situation. These are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the Courts are precluded from coming to the assistance of the applicants.’

3.1.4. The Political Process

During the years of oppression under the apartheid system, South Africans developed forms of political mobilization that proved effective in publicising abuses of power by those in positions of authority and pressurising those in power to change their decisions or revoke their actions. The negotiated settlement that led to the first democratic elections in April 1994 was, in part at least, the product of political mass action against apartheid. Political mass action entered South African political culture despite all the odds and in the face of the most severe forms of repression.

The political process is still a viable means of controlling public power. It can take various forms, such as boycotts, mass meetings and rallies, demonstrations, picketing, marches and petitioning. These forms of political mobilization are now protected by the Bill of Rights through: s15 which provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion; s16(1) which protects freedom of expression; s17 which provides that everyone has ‘the right peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions’; s18 which entrenches freedom of association; s19 which provides that every ‘citizen is free to make political choices’; and

46 At 1333G-I.
s21 which protects freedom of movement.

3.1.5. The Courts

The role of the courts changed with the demise of the doctrine of parliamentary sovereignty and the creation of a constitutional state in which all public power is subject to a supreme Constitution. The power of the judiciary increased dramatically as it was given the role of testing all exercises of public power, legislative and executive, for constitutional compatibility. Burns, in making this point, says:

‘In a constitutional state each and every act of the government must be authorised, either by the Constitution itself, or by the law, which obtains its validity from the Constitution. It is the task of the judiciary to protect the Constitution; to act as guardian over the potentially oppressive power of the other two branches of government and to ensure that the exercise of power complies with established law. This is a radical departure from the courts’ role under the former system of government.’

Judicial review of administrative action (like most litigation) is historical, in the sense that it usually examines the lawfulness, procedural fairness and rationality of a decision that has already been taken. Despite this, it would be incorrect to suggest that it is unable to control how power is exercised prospectively. While administrative officials may seek to disobey, obstruct or attempt to circumvent court orders from time to time, it is no doubt true that most officials habitually obey court orders. Decisions of the courts, being definitive and
binding, ought therefore to serve as guides to lawful, if not, good administration. It is as a result of factors such as these and despite the crisis of legitimacy which the judiciary faced under the apartheid system, that Burns can observe: 'History has shown that judicial review has been the most effective way of controlling administrative action.'

3.2. Judicial Review

3.2.1. Inherent Jurisdiction: The Basis of Common Law Review.

In 1827, a Supreme Court of general jurisdiction was established at the Cape of Good Hope. The Charter of Justice of 1832 vested in it the jurisdiction to review the proceedings of inferior courts. Similar jurisdiction was vested in the superior courts of the colony of Natal, the Boer republics and later the colonies which they became after the Anglo-Boer South African War. No specific jurisdiction was granted to any of these courts to review the decisions of administrative tribunals or officials. Despite this, they all assumed this jurisdiction at an early stage. They did so on one of two bases: Taitz has argued that the Cape Supreme Court assumed jurisdiction with no reference to a source of authority and on an erroneous reliance on 'the unreported decision of Kannemeyer v Rivers allegedly decided in 1866', which, he says, had nothing to do with judicial review. This court justified its interference in administrative decision-making 'on the necessity of its functioning with justice and reasonableness'. In the Transvaal, in Johannesburg

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52 Baxter, 9. See too Taitz The Inherent Jurisdiction of the Supreme Court Cape Town, Juta and Co: 1985, 5-7.
53 Quoted from Rose-Innes Judicial Review of Administrative Tribunals in South Africa Cape Town, Juta and Co: 1963, 3. For the modern equivalent of this provision, see s19 of the Supreme Court Act 59 of 1959.
54 Taitz, op cit, 28-36 and 72-79.
55 Taitz, op cit, 74.
56 Taitz, op cit, 33.
Consolidated Investment Co v Johannesburg Town Council.\textsuperscript{57} Innes CJ located the court’s power to intervene in the administrative process explicitly within its inherent jurisdiction to ‘entertain all civil causes and proceedings arising within the Transvaal’.\textsuperscript{58} Taitz says that this basis rather than the basis relied upon by the Cape Court was the correct basis and was subsequently approved by the Appellate Division.\textsuperscript{59}

The Constitutional Court, in \textit{Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council},\textsuperscript{60} has observed that [p]rior to the enactment of the interim Constitution, our superior courts asserted a power to review subordinate legislation as well as administrative and executive action. The jurisdiction to do so was said to lie in the inherent jurisdiction of the courts. The legal principles and the body of law developed by the courts in the application of this power were often referred to as “administrative law”.\textsuperscript{61} The position is now somewhat different because the supreme Constitution is the source of the review jurisdiction of the courts. In addition, the Promotion of Administrative Justice Act has given the grounds of review a statutory base. It has been held by the Constitutional Court in \textit{Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa}\textsuperscript{62} that the common law has largely been subsumed by the Constitution but it remains of importance for purposes of giving meaning to the Constitutional right to just administrative action – and consequently also to the provisions of the Promotion of Administrative Justice Act.

(a) The Principle of Legality

The principle of legality lies at the core of administrative law.\textsuperscript{63} It goes to the very heart of

\begin{flushleft}
\textsuperscript{57} 1903 TS 111.
\textsuperscript{58} At 115.
\textsuperscript{59} Taitz, op cit, 36.
\textsuperscript{60} 1998 (12) BCLR 1458 (CC).
\textsuperscript{61} At 1472H-I (paragraph 23).
\textsuperscript{62} 2000 (3) BCLR 241 (CC), 260G-261D (paragraph 45).
\end{flushleft}
the discipline by requiring that administrative action, in order to be valid, and hence lawful, comply with a set of substantive and procedural prescriptions. Its essence is that a public authority may only act if empowered by law to do so and may only do what the law authorizes.64 But the principle of legality, especially in a constitutional state,65 involves more than mere ‘law following’.66

‘Legality may be either a minimalist or a normative concept. The former is not concerned with what the rules of law actually say but only with whether they are valid in terms of their legal pedigree. Value judgment is almost totally excluded, and the requirement of legality is satisfied if administrative action is legally authorized in the manner described above. The normative concept, on the other hand, requires that these legal rules express certain minimum principles of justice. Legality in this sense connotes much more than a mere technique of government: it is a principle of just government. As a basic principle of the legal system, it requires fairness, equality before the law and freedom from arbitrary administrative action.’

Prior to April 1994 the components of the principle of legality were said to be drawn from two sources: first, they derived from the terms of particular statutes that granted powers to administrators and defined, with differing degrees of detail, the limits of those powers; and, secondly, they derived from the common law requirements for the proper exercise of powers that the courts had evolved67 and that were ‘implied into the law in much the same way as terms are implied into some contracts’.68 Baxter says that the common law principle

64 Baxter, 76. This principle was recognized for the first time in South Africa in Municipality of Green Point v Powell’s Trustees (1848) 2 Menz 380.
65 Baxter, 77-78 says: ‘When we use the term “legality”, or the concepts of the “rule of law” or “rechtsstaat”, however, something more is almost always implied, and in Western constitutionalism something more is a necessary prerequisite. In the English, French and German traditions, respectively, the concepts of the Rule of Law, Legality and the Rechtsstaat have each been used to express certain minimum qualities which the laws governing public authorities and private individuals must possess. Although each of these concepts has connotations and modes of expression that are peculiar to their countries of origin, each has embraced substantially the same values.’
66 Baxter, 78.
67 Baxter, 301, who says that the ‘substantive implications of the basic principle that administrative action must be authorized by law are continually developing’. See too Boulle, Harris and Hoexter, op cit, 258, who say that the ‘requirements of legality are subject to constant change and development by judicial interpretation’.
68 Boulle, Harris and Hoexter, op cit, 256. Wiechers, 176, says: ‘This general principle of legality provides that an administrative act must not only be performed within the scope of the conferred powers and the requirements embodied in the empowering statute, but must also be in accord with those rules and prescripts of common law which postulate the intention of the ideal legislature
of legality consists of the following aspects: (1) ‘the perpetrator of the act in question must be legally empowered to perform the act’; (2) ‘administrative action may only be taken by the lawfully constituted authority’; (3) ‘the act must have been performed in accordance with the circumstantial and procedural prerequisites prescribed by the empowering legislation’; (4) ‘the power to act must not be exercised unreasonably’; (5) ‘the decision to act must be taken in a fair manner’; and (6) ‘action taken without lawful authority generally attracts the same liability as would the acts of private persons’.

If, therefore, administrative action has been taken contrary to any of the first five requirements, the result is that the action will be unlawful and the sixth requirement will apply. The result is the same whether the defect in the administrative action was non-compliance with a statutory provision or a common law prerequisite for the lawful exercise of public power.

The principle of legality now has a constitutional base. It was held, in *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* that the rule of law was an implicit foundation of the interim Constitution and that the principle of legality flowed logically from it. Section 1(c) of the final Constitution provides expressly that the rule of law is one of its founding values. In *Fedsure* Chaskalson P, Goldstone J and O'Regan J held that the principle of legality implied at least that all exercises of public power had to be authorised by law. It means, in addition, that functionaries must act in good faith and must not misconstrue their powers, that, in order to protect fundamental rights, laws should be ‘pre-announced, general, durable and reasonably precise rules administered by regular courts or similar independent tribunals according to fair procedures’, that rules must be stated in a ‘clear and accessible manner’ and that those who exercise public power must

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69 Baxter, 301. Boulle, Harris and Hoexter, op cit, 259, group the requirements of legality into four, namely, the principles of ‘authority and regularity’ and ‘fairness and reasonableness’.

70 1998 (12) BCLR 1458 (CC).

71 At 1483D-E (paragraph 58).

72 President of the Republic of South Africa v South African Rugby Football Union 1999 (7) BCLR 725 (CC), 1123C-D (paragraph 148).

73 De Lange v Smuts NO 1998 (7) BCLR 779 (CC), 799H (paragraph 46).

74 Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC), 865D (paragraph 47).
exercise their powers rationally.\textsuperscript{75} There is, thus, little difference between the common law and constitutional manifestations of the principle of legality. Both are rooted in the rule of law but the statutory, constitutional, manifestation of this common law doctrine is now entrenched and is an essential feature of the South African constitutional state.

(b) The Ultra Vires Doctrine

In 1855, according to Baxter,\textsuperscript{76} the Cape Supreme Court first articulated its jurisdiction to review administrative action in terms of the ultra vires doctrine, the inverse of the principle of legality.\textsuperscript{77} This doctrine has been described in the following terms:\textsuperscript{78}

\begin{quote}
‘This doctrine is tied to the theory of the separation of powers and the sovereignty of Parliament. Its essence is that Parliament, in conferring powers or “vires” on public authorities, sets statutory boundaries for the exercise of those powers. Parliament is the sovereign lawmaker, while the function of the courts is to apply the law made by Parliament; therefore the courts are required to see that the intention of Parliament is carried out, and that public bodies act intra vires – that they remain within the boundaries of their powers. Conversely, the courts are entitled to set aside administrative action which is ultra vires the powers of public authorities.’
\end{quote}

The case referred to above was \textit{Central Road Board v Meintjies}.\textsuperscript{79} It involved the levying

\textsuperscript{75} Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 273G-274C (paragraphs 89 and 90).

\textsuperscript{76} At 303.

\textsuperscript{77} Baxter, 300. At 301 Baxter says: ‘When administrative action is challenged before them, the courts have had to determine whether that action was beyond the powers of, or “ultra vires” its perpetrator. The details have been worked out on a casuistic basis, and the requirements of the principle of legality have had to be inferred from what it has been held administrators must not do, rather than from what they are required to do. The principle of legality therefore constitutes the obverse facet of the ultra vires doctrine.’


\textsuperscript{79} (1855) 2 Searle 165. Baxter, at 303 (footnote 10), says that, in earlier cases, the court had reviewed administrative action without “necessarily employing the ultra vires terminology”. In one of the cases cited by him, \textit{In re Insolvent Estate of Brink} (1828) 1 Menz 340, regulations were held to be inoperative for want of promulgation. In a second case, \textit{Municipality of Graham's Town v Ford and Jeffries} (1844) 3 Menz 506, municipal by-laws which imposed market duties were held to be valid on the basis that the municipal legislatures were empowered to make such by-laws by the General Municipal Ordinance 9 of 1836. Interestingly, the court expressed the view that political control, rather than judicial review, would ensure that by-laws would not “work injustice or injury to those inhabitants of the Municipality who have no voice in its legislation, or to persons not belonging to the Municipality.”
of rates (of one penny in the pound) for one purpose and using the revenue raised for another. The Board's argument was that the court had no jurisdiction to deal with how it exercised its powers. This argument was rejected by the court in no uncertain terms. In his short concurring judgment, Wylde CJ said, in essence, that it ill behoved the Board to admit on the one hand that it had contravened the law as a matter of course and then, on the other, to seek the protection of the court. He held that Meintjies was entitled to `come to the Court for protection against this action, and the Court is bound to interfere in his behalf, in like manner as they would be bound to interfere in any other case of injustice duly brought before them'.

It had also been argued that the defendant's remedy lay in approaching the legislature, rather than the court, an argument which Bell J held `upon ordinary constitutional principles' to be `entirely fallacious upon every foot upon which it is rested'. It was, he said, `the province of this Court to administer that law, as it is the province of this Court to administer the general law of the Colony; to enforce against the lieges the legal demands of this Board, and, on the other hand, to protect the lieges against the illegal demands of the Board, by refusing its assistance for their enforcement'. More importantly, he held:

`If the Road Board ... can levy its rates and enforce the levy without coming here, let it do so. But if it or the Government must come here to recover either road-rates or general taxes, this Court does not sit to force the exactions of the Government, without enquiring whether they are legal or illegal, referring the subject, in the language of the plaintiffs, to the Government or the Legislature for redress. The Government cannot recover even the general taxes except through the intervention of the Courts of Law; and it is as old as Magna Charta that the Crown shall take or imprison any man, "nor pass upon, nor condemn him, unless by the law of the land". If the law even as to the general taxes prescribe that they shall be levied only in a particular way, to that particular amount, and for a particular purpose, this Court will not enforce their levy in any other way, to any other amount or for any other purpose. In all this, the Court is far from interfering with the province of the Government or of the Legislature, as was suggested from the bar in the course of the argument; it is strictly confining...

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80 At 171.
81 At 175.
82 At 175.
83 At 176.
Since Meintjies, South African courts have relied on the ultra vires doctrine, the ‘administrative law corollary of parliamentary sovereignty’,84 to explain why and in what circumstances they may set aside exercises of administrative power. It was not surprising, says Baxter, that the courts adopted the view that they did ‘because the logic behind the doctrine provides an inherent rationale for judicial review: no statutory authority is needed’. He says that the ‘self-justification of the ultra vires doctrine is that its application consists of nothing other than an application of the law itself, and the law of Parliament to boot’.85 Baxter’s views on the ultra vires doctrine as ‘the reason why the grounds of review constitute causes of action at all and why they justify the award of a remedy’ are not shared by everyone: apart from academic views on the breadth of the ultra vires doctrine,86 the doctrine has come across hard times in much more fundamental ways, both in South Africa and in England.87

First, a question mark hangs over the ultra vires doctrine as a justification for judicial review because it is unable to justify review of non-statutory powers, such as prerogative powers,88 or public powers created consensually89 and it ‘provides neither a complete explanation of

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84 O’ Regan ‘A Fresh Start for Administrative Law’ Paper delivered at a conference on controlling public power, University of Cape Town, March 1996, 6. See too Davis ‘Administrative Justice in a Democratic South Africa’ 1993 Acta Juridica 21, 26 who says: ‘Under a Westminster system the supremacy of parliament is the cardinal principle of the constitutional process. The consequence is that the judiciary has an inferior rank to the democratically elected parliament and thus also to the executive.’
85 Baxter, 303.
86 On the terms of this debate see Breytenbach ‘The Justification of Judicial Review’ (1992) 8 SAJHR 512, 517-519.
88 Breytenbach, op cit, 520-521. See too Boule, Harris and Hoexter, op cit, 262 who say that the ‘truth is that the ultra vires doctrine is a legal fiction which we have – at least to some extent – outgrown’.
89 Jowell ‘Of Vires and Vacuums: the Constitutional Context of Judicial Review’ [1999] PL 448, 449; Woolf ‘Droit Public – English Style’ [1995] PL 57, 65 who says: ‘These statements lead me to the so-called doctrine of ultra vires and the presumed intention of Parliament and its impact on public law. It is suggested by those whose views command great respect that this doctrine is the source of the court’s jurisdiction on applications for judicial review. I have reservations as to whether this is correct. I am not happy about transferring into public law a latin tag which has a clearly defined role in private, and in particular company law. There are cases where ultra vires can readily be applied; for example
the courts' functions, nor a convincing justification of their powers'.

Secondly, in its desire to give effect to an ouster clause to save vague regulations, the Appellate Division all but emasculated the doctrine in *Staatspresident v United Democratic Front* and developed what has been termed 'a “demure” construction of judicial authority' which would ‘routinely defer to an ouster’ by drawing a distinction ‘between a narrow conception of ultra vires and a nebulous species of review which results in “imperfect or ineffective” official action – whatever that entails’.

It is clear that this decision is an aberration. It should probably be regarded in much the same light as the notorious English war-time decision of *Liversidge v Anderson* as the Appellate Division's contribution to the total strategy.

While it is important from a principled point of view to ascertain the constitutional basis for the power to judicially review administrative action, it is suggested that one must take care to ensure that the debate remains rooted in reality. It cannot be gainsaid that courts have, for many years, been prepared to intervene when public powers were exercised outside of the boundaries of the law. Few would doubt that this is as it should be. Even though this was usually justified in terms of the ultra vires doctrine, this doctrine is not an independent constitutional principle. It is, rather, a particular manifestation of the rule of law and when

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90 Breytenbach, op cit, 523.
91 See in this regard, Breytenbach, op cit, 529 who says that the reasoning in the majority judgment is probably 'an aberration which was designed to avoid emasculating the ouster clauses in the emergency regulations'.
92 1988 (4) SA 830 (A).
78 Breytenbach, op cit, 529.
79 [1942] AC 206. See Baxter, 464, footnote 511, on how this case was dealt with by the courts before finally being expressly overruled in *Inland Revenue Commissioner v Rossminster Ltd* [1980] AC 952, 1011. The UDF case has been 'overruled' by the constitutional right to just administrative action. See Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31, 38.
80 De Smith, Woolf and Jowell, 14-15 (paragraph 1-025). They say of the rule of law that it 'acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify – albeit not always explicitly – a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should
statutory powers are under scrutiny in a Westminster-type system, this constitutional principle always has to be balanced against a second constitutional principle of importance, the sovereignty of parliament. 81

The debate on the ultra vires doctrine has lost most of its relevance in South African administrative law because first the interim Constitution and now the final Constitution have clarified and simplified the issue of the mandate of the courts to judicially review all exercises of public power. As a result, it has been observed that history has overtaken the common law doctrine because ‘whatever the value or role of the doctrine of ultra vires in the past, its significance has been drastically reduced in the post-constitutional era. Its foundation, the doctrine of parliamentary sovereignty, has been abolished’. 82 It is now clear beyond question that the power to judicially review administrative action (and, indeed, every exercise of public power) is sourced in s1(c) of the Constitution, the founding value of constitutional supremacy and the rule of law, which is given specific form in s33, the fundamental right to just administrative action.

Finally, it must be borne in mind that the ultra vires terminology serves two purposes. In the first place, the term is used to describe the justificatory doctrine that is to the effect that courts may review and set aside exercises of public power that do not conform with the law because Parliament intended powers delegated by it only to be used lawfully, reasonably and fairly. It is this doctrine that is the subject of controversy for the reasons set out above. In the second place, however, the term is used descriptively. It is used in this sense to describe exercises of public power that have strayed beyond the powers granted to the functionary concerned by the applicable empowering instrument and, thus used, is descriptive of infringements of the principle of legality. In South Africa, under the present

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81 Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 258F-259C (paragraph 39).
82 O’Regan, op cit, 10-11.
constitutional system in which the sovereignty of Parliament holds no sway, it is no longer appropriate or necessary to use the ultra vires terminology in the justificatory sense but it continues to be used in the second, descriptive, sense to describe invalid acts of public functionaries.

(c) Common Law Review

In most of the earlier judicial review cases, the courts tended to concentrate on the formal aspects of legality rather than grounds of review that had to do with the substance of how discretionary powers were exercised. This is probably not surprising because the rules to control discretion were developed by the courts on a casuistic basis, and became more sophisticated as the administrative state advanced. The courts were, in the earlier years of the 20th century in particular, feeling their way into a relatively new and expanding jurisdiction. Even the leading case of Johannesburg Consolidated Investment Co v Johannesburg Town Council,83 spoke in relatively vague terms about the circumstances in which a court would interfere with the exercise of an administrative power: when the functionary ‘disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty’, according to Innes CJ,84 and ‘on the ground of corruption, fraud and irregularity’, according to Wessels J.85

In African Realty Trust v Johannesburg Municipality,86 Bristowe J developed and gave context to these rather broad grounds. He held:87

‘If a public body or an individual exceeds its power the Court will exercise a restraining influence. And if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or

83 1903 TS 111.
84 At 115.
85 At 123.
86 1906 TH 179.
87 At 182. This statement of the law formed the core of the doctrine of gross unreasonableness which was authoritatively articulated in Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220. The fact that the courts did not extend the test for unreasonableness to meet new needs has been identified as one of the key weaknesses of South African administrative law, and will be dealt with below. See chapter 9 below.
dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an
unreasonableness so gross as to be inexplicable, except on the assumption of mala fides or ulterior
motive, then again the Court will interfere. But once a decision has been honestly and fairly arrived
at upon a point which lies within the discretion of the body or person who has decided it, then the
Court has no functions whatever. It has no more power than a private individual would have to
interfere with the decision merely because it is not one at which it would have itself arrived.'

In Shidiack v Union Government (Minister of the Interior), Innes ACJ held that ‘where a
matter is left to the discretion or determination of a public officer, and where his discretion
has been bona fide exercised or his judgment bona fide expressed, the Court will not
interfere with the result’. It would interfere, however, if ‘such an officer had acted mala
fide or from ulterior and improper motives, if he had not applied his mind to the matter or
exercised his discretion at all, or if he had disregarded the express provisions of a
statute’.

In more recent time, a more nuanced and detailed approach to the grounds of review is
evident. In Northwest Townships Ltd v Administrator, Transvaal, for instance, Colman J
held that ‘a failure by the person vested with the discretion to apply his mind to the matter’
included ‘capriciousness, a failure, on the part of the person enjoined to make the decision,
to appreciate the nature and limits of the discretion to be exercised, a failure to direct his
thoughts to the relevant data or the relevant principles, reliance on irrelevant
considerations, an arbitrary approach, and an application of wrong principles’. The
statement of the grounds of review in the Northwest Townships case has been restated
in the following terms by the Appellate Division in Johannesburg Stock Exchange v

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88 1912 AD 642.
89 At 651.
90 At 651-652. Mahomed ‘Disciplining Administrative Power – Some South African Prospects,
Impediments and Needs’ (1989) 5 SAJHR 345, 348, says that the ground categorized as ‘failure to
apply the mind’ was initially interpreted as a complete failure to apply the mind, ‘an abdication of
discretion or a refusal to exercise a discretion’, and was therefore extremely difficult to establish.
Later, however, in the case of Commissioner for Inland Revenue v City Deep Ltd 1924 AD 398, 304,
it was interpreted as a failure to apply the mind properly. He says that this development was ‘pregnant
with real possibilities of disciplining the exercise of administrative discretions’.
91 1975 (4) SA 1 (T), 8G.
Witwatersrand Nigel Limited: 92

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice". ... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid. ... Some of these grounds tend to overlap.'

These are the grounds recognized by the common law as grounds upon which a court would interfere with an administrative exercise of power. In Hira v Booysen 93 Corbett CJ set out the context within which these grounds of review operate. After referring to the well known and well-worn exposition of the power of judicial review articulated in the Johannesburg Consolidated Investment case, 94 the Chief Justice observed that this formulation 'is not to be regarded as precise or exhaustive'. He proceeded to point out that it has been established over the years that 'for instance, common law review applies also to cases where the statute creates a power rather than a duty; where the duty or power is vested in an individual official, as distinct from a public body; where the decision under review is taken without proceedings, in the sense of a hearing, having occurred; and where the duty or power is created not by statute but consensually, as in the case of a domestic tribunal. Over the years, too, the grounds of review have been elaborated and defined.' 95

Johannesburg Stock Exchange v Witwatersrand Nigel Limited, 96 together with its various glosses, thus articulated the grounds of review at common law when the interim Constitution came into force. The importance of the case lies in the fact that, even if the

92 1988 (3) SA 132 (A), 152A-D.
93 1992 (4) SA 69 (A).
94 Supra, 115.
95 At 84D-F.
96 Supra.
basis for the judicial review of administrative action has changed, the common law still serves as the foundation for the new constitutionalised administrative law of the democratic era.97 One is not able to give meaning to either the constitutional rights entrenched in s33 or the provisions of the Promotion of Administrative Justice Act without an understanding of the common law and its development by the courts over the years.

3.2.2. Judicial Authority in the Constitutional State

The interim Constitution maintained all courts which existed immediately before its commencement, deeming them to have been ‘duly constituted in terms of this Constitution or the laws in force after such commencement’ and providing that they would continue to function in terms of the applicable laws.98 The provisions which regulated jurisdiction, procedures, powers and authority of judicial officers and other matters concerning the establishment and functioning of courts also continued in force.99 Section 96(1) provided that the judicial authority of the Republic vested ‘in the courts established by this Constitution and any other law’. One new court, the Constitutional Court, was established by s98(1). It was vested with jurisdiction as ‘the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution’,100 including, inter alia, jurisdiction in respect of alleged violations or threatened violations of fundamental rights entrenched in the Bill of Rights, disputes as to the constitutionality of executive or administrative acts or conduct or threatened executive or administrative acts or conduct102 and concerning the constitutionality of any

97 See Pharmaceutical Manufacturers Association of South Africa, supra, especially at 261A-C (paragraph 45) in which Chaskalson P said that the interim Constitution had ‘shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law’. He continued: ‘That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power.’
98 Interim Constitution, s241(1).
99 Interim Constitution, s241(10).
100 Interim Constitution, 298(2).
101 Interim Constitution, s98(2)(a).
102 Interim Constitution, s98(2)(b).
law, including Acts of Parliament, whether passed or made prior to or after the commencement of the Constitution. The Appellate Division was stripped of its previous constitutional jurisdiction, such as it was, but otherwise retained its pre-Constitution jurisdiction. The provincial and local divisions of the Supreme Court retained their previous jurisdiction, including their inherent jurisdiction, and were vested with additional constitutional jurisdiction. That included jurisdiction in respect of alleged violations or threatened violations of fundamental rights and disputes over the constitutionality of executive or administrative acts or conduct or threatened executive or administrative acts or conduct, but did not, except where the parties otherwise agreed, include the jurisdiction to set aside Acts of Parliament or sections thereof.

Section 165(1) of the final Constitution vests judicial authority in the courts. Section 165(2) provides that the courts are independent and subject only to the Constitution and the law,
which they must apply impartially and without fear, favour or prejudice’, while s166 names those courts. Apart from name changes, these courts are the same courts that were preserved or created by the interim Constitution. The Constitutional Court remains the highest court in constitutional matters.\textsuperscript{110} It has exclusive jurisdiction in respect of four areas, namely constitutional inter-governmental disputes, the constitutionality of parliamentary and provincial bills, whether Parliament or the President have failed to comply with a constitutional duty and the certification of provincial constitutions.\textsuperscript{111}

The High Courts – the former provincial and local divisions of the Supreme Court and the superior courts of the former homelands – now have jurisdiction in any constitutional matter except those that fall within the exclusive jurisdiction of the Constitutional Court or have been assigned to another court of similar status.\textsuperscript{112} The Supreme Court of Appeal (the former Appellate Division) and the High Courts have jurisdiction, in terms of s172(2), to make orders concerning the constitutionality of Acts of Parliament, provincial Acts or the conduct of the President but such orders will have no force unless they are confirmed by the Constitutional Court.\textsuperscript{113} In terms of s172(1) a court deciding a constitutional issue within its jurisdiction ‘must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’ and may then make an order ‘that is just and equitable’. These courts may, in terms of s172(1)(b), make orders that limit the retrospective effect of orders of invalidity or suspend orders of invalidity to allow constitutional defects to be remedied by the passing of legislation, for instance.

It is clear from these provisions that the courts are the guardians of the Constitution and

\textsuperscript{110} Final Constitution, s167(3)(a).
\textsuperscript{111} Final Constitution, s167(4).
\textsuperscript{112} Final Constitution, s169(a). Section 166(e) recognises as courts ‘any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts’. Two new courts recognised in terms of s166(e) are the Labour Court established by s151 of the Labour Relations Act 66 of 1995 and the Land Claims Court established by s22 of the Restitution of Land Rights Act 22 of 1994.
\textsuperscript{113} On the purpose of s172(2), see President of the Republic of South Africa v South African Rugby Football Union 1999 (2) BCLR 175 (CC), 184E-H (paragraph 29) and Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 264A-F (paragraphs 55-56).
particularly the Bill of Rights. The justiciability of the Bill of Rights was provided for in Constitutional Principle II of Schedule 4 of the interim Constitution and accepted by the Constitutional Court in the first certification case as having been successfully achieved.\footnote{114} The result is that the courts have the jurisdiction to ensure compliance with the terms of the Constitution in respect of legislation as well as executive and administrative action. The superior courts have, in other words, the power of judicial review over legislation and administrative or other executive action. Indeed, the courts have the power, arising directly from the Constitution, to set aside any exercise of public power inconsistent with the Constitution. In the words of Kentridge ‘[i]t requires no Chief Justice Marshall to invent such a power.’\footnote{115}

(a) Constitutional Review

While the source of common law review is the inherent jurisdiction of the superior courts, the Constitution creates a similar but broader constitutional review jurisdiction that allows for the review of legislative as well as executive and administrative acts.\footnote{116} It does so principally through Chapter 8, which creates and defines the judicial authority of the South African state,\footnote{117} read with s1 which entrenches founding values such as constitutional supremacy and the rule of law, s2 which proclaims the Constitution to be the supreme law

\footnote{116} See Davis ‘Constitutionalism, Interpretation and Judicial Review’ in Davis, Cheadle and Haysom (eds) \textit{Fundamental Rights in the Constitution} Cape Town, Juta and Co: 1997, 3: ‘The Constitution of the Republic of South Africa (Act 200 of 1993), with its move towards a federal structure and its Chapter on Fundamental Rights made a decisive break with the Westminster tradition and gave the Constitutional Court and the Supreme Court a heavy responsibility to ensure that the fledgling democratic order keeps to the lofty ideals and the messy compromises of the interim constitutional arrangement. Decisive as this break was, the concept of judicial review was not foreign to South African lawyers. Whenever a judge is asked to review an administrative act or subordinate legislation, he or she is in effect invited by one of the parties to intervene in a matter which has been entrusted to another arm of government. In this decision the judge is guided by the principles which flow from the kind of justice promoted by a legal system predicated on the rule of law. But within the context of a constitutional system based upon the sovereignty of parliament, the scope for a judiciary to supervise the decisions of the legislature, and to a lesser extent the executive, is limited.’
\footnote{117} See s165 in particular.
of the land and states that law or conduct inconsistent with it is invalid, s7(2) which places an obligation on the State to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ and s8(1) which states that the ‘Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’. The Constitutional Court summarised the position in President of the Republic of South Africa v South African Rugby Football Union\textsuperscript{118} in stating that the ‘exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the legislature, the executive and the judiciary which determines who may exercise power in particular spheres. An overarching bill of rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers’.

Unlike common law review, constitutional review is not, in its original form at least, a judge-made jurisdiction. It is created by and given a great deal of its content by the Constitution and draws its values from the Constitution. It has, nonetheless, much in common with common law review, as the similarities between, for instance, the idea of lawful administrative action in its common law and constitutional contexts will attest, but extends beyond the common law in respect of other aspects of just administrative action such as procedural fairness, the duty to give reasons and review for unreasonableness or irrationality. The main difference, from a foundational perspective, has been identified by Froneman J in Matiso v Commanding Officer, Port Elizabeth Prison\textsuperscript{119}. He held that under the previous constitutional dispensation, the process of judicial review had as its starting point a search for the intention of the legislature, whereas after 27 April 1994, judicial review is now aimed at testing exercises of public power against ‘the values and principles imposed by the Constitution’ and is thus concerned with the ‘recognition and application of constitutional values and not with a search to find the literal meaning of statutes’. In Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan

\textsuperscript{118} 1999 (10) BCLR 1059 (CC), 1114I-1115A (paragraph 132).
\textsuperscript{119} 1994 (3) BCLR 80 (SE), 87F-H.
Council. Chaskalson P, Goldstone J and O'Regan J observed that the interim Constitution had ‘radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of State, is now subject to constitutional control’.

(b) The Promotion of Administrative Justice Act

The Promotion of Administrative Justice Act provides that the courts defined in s1(iv) have the power to review administrative action. It also sets out a number of grounds upon which administrative action may be reviewed. In so doing it seeks to give effect to s33(3)(a) of the Constitution, in particular. The grounds of review are intended to ensure that everyone has the right to challenge administrative action (as it, rather inadequately, defines this term) that is not lawful, reasonable or procedurally fair. In this endeavour the Act has left some gaps. It does not, for instance, provide expressly for reviewing administrative action on the ground of vagueness or disproportionality. It does, however, contain a catch-all. This provision empowers reviewing courts, in the absence of one of the specified grounds of review, to review administrative action if it is ‘otherwise unconstitutional or unlawful’.

(c) Constitutional and Common Law Review Compared

In Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight, Hefer JA held that the constitutional review jurisdiction of the courts existed alongside the equivalent common law.

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120 1998 (12) BCLR 1458 (CC).
122 Section 6(1).
123 Section 6(2).
124 See further, chapter 9 below.
125 Section 6(2)(i). See chapter 8 below.
126 1999 (8) BCLR 833 (SCA).
review jurisdiction, the latter not having been abolished by the interim Constitution.\textsuperscript{127} He held further in this respect:\textsuperscript{128}

‘What is lawful and procedurally fair within the purview of section 24 is for the courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact. There is no indication in the interim Constitution of an intention to bring about a situation in which, once a court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds. On the contrary, section 35(3) is a strong indication that it was the intention, not to abolish any branch of the common law, but to leave it to the courts to bring it into conformity with the spirit, purport and objects of the Bill of Rights. Section 33(3) which proclaims that the entrenchment of rights shall not be construed as denying the existence of any other rights conferred by common law which are not inconsistent with the Bill of Rights, point the same way.’

Hefer JA explained the similarities and differences between the two species of review in the following terms:\textsuperscript{129}

‘Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action but the question is in each case whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion. The grounds for review which the courts have developed over the years can never be regarded as a numerus clausus for the simple reason that administrative law is not static. As new notions develop and take root, so must new measures be devised to control the exercise of administrative functions. In South Africa this is particularly true in view of the requirement of section 35(3) of the interim Constitution that any law be interpreted, and that the common law be applied and developed, with due regard to the spirit, purport and objects of the Bill of Rights.’

A similar theme was explored by the Constitutional Court in President of the Republic of

\textsuperscript{127} At 843G.
\textsuperscript{128} At 843H-844B.
\textsuperscript{129} At 843C-G.
South Africa v South African Rugby Football Union\textsuperscript{130} in its analysis of the purpose of s33 of the final Constitution. The court held that the right to just administrative action ‘was entrenched in our Constitution in recognition of the importance of the common law governing administrative review’ but that it was not correct to view s33 ‘as a mere codification of common-law principles’.\textsuperscript{131} It held further that the ‘principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common-law principles developed over decades’.\textsuperscript{132}

The distinction drawn by Hefer JA in Container Logistics has been held to be no distinction at all in Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa.\textsuperscript{133} Chaskalson P held that the ‘control of public power by the courts through judicial review is and always has been a constitutional matter’ and that the common law principles that had been applied to control powers prior to 1994 ‘had been subsumed under the Constitution, and insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts’.\textsuperscript{134} He held that there is ‘only one system of law. It is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control’.\textsuperscript{135}

The main difference between the pre- and post-1994 constitutional arrangements was in the relationship between the Constitution and the common law in respect of the control of

\textsuperscript{130} 1999 (10) BCLR 1059 (CC).
\textsuperscript{131} At 1117D (paragraph 135).
\textsuperscript{132} At 1117E-F (paragraph 136).
\textsuperscript{133} 2000 (3) BCLR 241 (CC).
\textsuperscript{134} At 257B-D (paragraph 33).
\textsuperscript{135} At 260G (paragraph 44).
powers. Prior to 1994, the Constitution was largely silent on the control of public power. Common law principles such as the rule of law, the sovereignty of Parliament and the rules relating to the exercise of prerogative powers filled the gap. After 1994, the opposite was true. The Constitution now devotes much more attention to controlling power by abolishing reliance on parliamentary sovereignty but incorporating other common law principles such as the rule of law. Chaskalson P stressed that although when the interim Constitution came into operation it ‘shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written Constitution which is the supreme law’, the common law retains relevance for the development of the new public law. So, for instance, he held that the constitutional doctrine of legality and the common law doctrine of ultra vires are identical when a functionary exceeds a statutory power, and the rights to just administrative action ‘cannot mean one thing under the Constitution, and another thing under the common law’.

The question to be decided in Pharmaceutical Manufacturers was whether the power to review an exercise of public power by the President was, by definition, a constitutional matter. The court held that it was. It did not decide whether common law review had been abrogated by the Constitution. It also did not comment on the substantial number of cases in which common law review of administrative action had been undertaken. Despite these points, however, it is difficult to find a place for common law review between the decision in Pharmaceutical Manufacturers and the terms of the Promotion of Administrative Justice Act which, incidentally, also does not claim to replace the common law.

The factors in Pharmaceutical Manufacturers that militate against the continued existence of common law review are the following. First, Chaskalson P held that the Constitution,

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136 At 257D-260B (paragraphs 34-41).
137 At 261A-B (paragraph 45).
138 At 262G-263A (paragraph 50).
139 The long title of the Act proclaims its purpose to be to ‘give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996’.
through express provisions, now does the work of controlling public power which the common law once did.\textsuperscript{140} Secondly, he appears to have relegated the common law to the function of stop-gap.\textsuperscript{141} Thirdly, the common law principles have, he held, been subsumed by the Constitution and retain relevance only for the purpose of determining the meaning of the specific constitutional provisions.\textsuperscript{142} Fourthly, whereas Hefer JA in \textit{Container Logistics} relied on s33(3) and s35(3) of the interim Constitution to hold that the Constitution could not be understood to abrogate common law review, Chaskalson P held that these sections did not have this effect. Instead, they meant only that ‘the Constitution was not intended to be an exhaustive code of all rights that exist under our law’ and they applied to rights other than those entrenched in the Constitution.\textsuperscript{143} The common law, he held, ‘supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims’.\textsuperscript{144}

There are indications in the Act too that it will not be possible for a litigant to apply for the review of administrative action on the basis of the common law, even though the Act does not purport expressly to abrogate the common law. In giving expression to s33 of the Constitution, the Act defines administrative action in a more restrictive manner than the common law.\textsuperscript{145} For example, the executive powers or functions of a municipal council do not constitute administrative action for the purposes of the Act but they do for purposes of the common law. Secondly, the grounds upon which administrative action may be reviewed in terms of the Act are listed.\textsuperscript{146} Thirdly, a time limit is stipulated within which applications

\begin{footnotes}
\item At 257B-C (paragraph 33).
\item At 261D-E (paragraph 45).
\item At 259G-260B (paragraph 41); 260F-G (paragraph 44); 260G-261E (paragraph 45); 262C-D (paragraph 49).
\item At 262C-D (paragraph 49).
\item At 262E-F (paragraph 49).
\item Section 1(i). See further chapter 4 below.
\item Section 6. Note however that s6(2)(i) provides for something of a catch-all ground of review which may have the effect of making it co-extensive with the common law. It provides that administrative action may be reviewed if, apart from any of the other grounds listed in the section, ‘the action is otherwise unconstitutional or unlawful’.
\end{footnotes}
for judicial review must be commenced.\textsuperscript{147} Fourthly, a radically different, and more restrictive, approach to that of the common law is taken by the Act to the issue of the exhaustion of internal remedies.\textsuperscript{148} Fifthly, specific procedures will regulate applications for judicial review.\textsuperscript{149}

Between Pharmaceutical Manufacturers and the Act, therefore, it is hard to conceive of independent space for common law review. If, as Chaskalson P has said, the common law has been subsumed and now only fills any gaps left in the Constitution, it largely has been overtaken by events. Judicial review is now closely regulated by the Act in respect of the subject matter of review, the grounds of review, the time for bringing applications, the exhaustion of internal remedies and the procedure. It is unlikely, in the face of this regulation, that a litigant could claim to review, on common law grounds, an exercise of power that is defined as administrative action in terms of the Act; or to launch proceedings after the Act’s time limit has expired; or to bring proceedings despite not having exhausted internal remedies and without applying for condonation for this failure. The very rationale for common law review is the inherent jurisdiction of the superior courts. That rationale only holds good for as long as Parliament does not regulate judicial review. Even those exercises of power that are administrative in nature but have been defined not to be by s1(i) of the Act will not be subject to common law review because the common law has been subsumed under s1(c) of the Constitution. The demise of the common law may be described as a mixed blessing because: on the one hand, the Constitution articulates a set of values that form the foundation of judicial review and it has replaced the more fluid values of the common law, susceptible as they were to the legislative will, with explicitly stated democratic values of a universalistic nature; on the other hand, the common law properly developed is generally more protective of rights than the Act. Its definition of administrative action is broader, its approach to delay in instituting review proceedings is more in step with the spirit, purport and objects of the Bill of Rights as is its approach to the

\textsuperscript{147} Section 7(1) read with s9.
\textsuperscript{148} Section 7(2).
\textsuperscript{149} Section 7(3).
exhaustion of internal remedies and its lack of formalities in respect of procedure.¹⁵⁰

3.2.3. Review and Appeal Distinguished

In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*¹⁵¹ Innes CJ distinguished between three types of review,¹⁵² namely review of decisions of lower courts,¹⁵³ regulated now by s24(1) of the Supreme Court Act 59 of 1959,¹⁵⁴ review of what he termed public bodies in terms of the inherent jurisdiction of superior courts¹⁵⁵ and special statutory reviews in which ‘a wider exercise of supervision and a greater scope of authority’ is granted to the courts than under the other two types of review jurisdiction.¹⁵⁶

In *Tikly v Johannes NO*¹⁵⁷ Trollip J set out three meanings of the word ‘appeal’. He held that the word could connote ‘(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information ... (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the evidence under appeal was given, and in which the only determination is whether that decision was right or wrong ... (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly’.¹⁵⁸

¹⁵⁰ The only aspects of the Act which appear to go beyond the common law are the provisions that create rules of procedural fairness when administrative action will effect the public (s4) and the right to reasons (s5).
¹⁵¹ 1903 TS 111.
¹⁵³ At 114.
¹⁵⁴ The grounds of review are codified in s24(1) in the following terms: (a) ‘absence of jurisdiction on the part of the court’; (b) ‘interest in the cause, bias, malice or corruption on the part of the presiding judicial officer’; (c) ‘gross irregularity in the proceedings’; and (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
¹⁵⁵ At 115.
¹⁵⁶ At 116.
¹⁵⁷ 1963 (2) SA 588 (T).
¹⁵⁸ At 590G-591A.
Judges sometimes use the words review and appeal interchangeably. This is especially true of many of the older cases, but it is clear from Tikly (which also uses the terms in this loose way) that there is a fundamental difference between the two processes. These differences are particularly important in respect of the second type of review referred to by Innes CJ in the Johannesburg Consolidated Investment Co case, the review of administrative action, because at common law it had no statutory basis and hence no statutorily defined ambit. Baxter says that without ‘statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the court were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation. More than this, the court would be moving beyond its special area of expertise’.

From this it is apparent that the separation of powers is one of the reasons for the distinction between review and appeal. There is also a pragmatic reason – the institutional competence of the courts, on the one hand, and administrators, especially experts in their fields, on the other. These reasons remain valid in the new constitutional dispensation despite the increased power of the judiciary: even if the courts are now empowered to assert themselves more than they have done in the past, their basis for intervention remains review. This point was made in Derby-Lewis v Chairman, of the Committee on Amnesty of the Truth and Reconciliation Commission in which it was held that ‘our law is to the effect that the valid distinction between an appeal and review remains intact. A review court is not called upon to pronounce on the correctness or otherwise of the

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160 See, in this respect, Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC), 1336B-1337G (paragraphs 30-37), in which Froneman DJP set out with care the distinction between review and appeal in the context of the enhanced constitutional review jurisdiction created by the right to administrative action which is justifiable in relation to the reasons given for it. He said, however, (at 1337D (paragraph 36)): ‘In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the “merits” of the matter in some way or another. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justified, the process will be in order.’
161 2001 (3) BCLR 215 (C).
decision arrived at by the administrative decision-maker'.

3.3 Conclusions

The advent of democracy has enhanced, strengthened and entrenched the ways in which the citizenry can hold accountable those who wield public power. It has done so in various ways: by bolstering the internal controls over the activities, or lack thereof, of public servants with constitutional principles to guide them in the exercise of their powers and the performance of their functions, and by creating mechanisms to enhance openness, accountability and responsiveness; by requiring, in express constitutional terms, that legislatures in all spheres of government hold the executive accountable for exercises of power; by creating new institutions like the Public Protector, the Human Rights Commission and the Commission for Gender Equality to strengthen democratic governance; by guaranteeing through constitutionally entrenched fundamental rights the availability of the political process or social action as a means of redress for grievances; and by enhancing the power of the courts to act as guardians of the Constitution. Even if some of these institutions of democratic governance are not functioning optimally at present, the fact that they are in place is a healthy sign for the development of a culture of rights and of justification, and of the process of maturing necessary for a proper democracy in South Africa.

The courts now have potentially potent review powers. Fears have been expressed by some that these powers could be used in undemocratic ways by the courts to paralyse social and economic programs deemed necessary to remedy inequalities and other inequities of the past. It is only responsiveness, accountability and openness in the administration of justice that will ensure that the courts do not overstep the mark, but there

162 At 243I. See too Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 273H-274A (paragraph 90).
is, in a constitutional democracy such as South Africa, something of a bottom line: faith has to be put in the courts. The jurisdiction of the courts now involves at least two distinct constitutional elements: first, in general terms, the duty of the courts to monitor compliance with the Constitution by the legislature, the executive and all functionaries who exercise public power. This is a duty to hold these institutions and functionaries to the terms of the Constitution and the Bill of Rights;\(^{164}\) and secondly, the more precise duty imposed on the courts to ensure that administrative action complies with the requirements of s33(1) and (2), and in this way to develop a constitutionally based conception of judicial review of administrative action. O’Regan says of the challenge of developing this jurisdiction:\(^{165}\)

‘The new jurisdiction conferred upon the judiciary is to many of us heartening, but also perturbing. The comforting, if misleading, coherence of parliamentary sovereignty lies behind. The judicial approach to legislative and executive action needs a new philosophical basis. The considerations urging judicial restraint mentioned by Justice Stone in his famous dissent remain cogent, but in themselves do not answer the difficult question of when it is that judges should be restrained. This too requires a conception of democracy grounded in our constitution and sensitive to the context and urgencies of our time.’


\(^{165}\) O’Regan, op cit, 17-18.
CHAPTER FOUR: THE BOUNDARIES OF ADMINISTRATIVE ACTION

4.1. The Administrative State

The scope of bureaucratic activity in the modern state is vast: as Beinart wrote, in 1948, the public service has been given powers of intervention, powers of compulsion, powers of inspection, powers of decision, usually of a wide discretionary nature, which have constant impact on the person, property, labour and trade of the individual. What is more, they are supplemented by powers to make rules and regulations in relation to those powers, and often to conduct investigations and decide disputes...'. More recently, Wiechers wrote that ‘via the state administration the state provides services, regulates the subject’s life in many respects, determines the circumstances in which the citizen lives and works, and ensures economic, social and labour peace and progress. The modern state, and in particular the administration as its executive arm, is not merely a guard or “night-watchman” combattting evils, but an active entrepreneur, welfare officer, teacher, builder, planner, guardian of morals and much more’.2

Craig says that in England in 1833 the central government only employed 21 305 officials, most of whom worked in the revenue departments. A bureaucracy of this size could, obviously, do little beyond attending to the most rudimentary of governmental functions.3 Since then the administrative state has grown immensely, in England and in South Africa.4 By 1900, the number of civil servants employed by the central government in England had grown to 50 000 and, by 1980 this figure had grown to 548 600 ‘non-industrial civil

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1 Beinart ‘Administrative Law’ (1948) 11 THRHR 204, 212-213. See too Boulle, Harris and Hoexter, at 85, who say: ‘A feature of the modern state is that the administration is the most active branch of the state system, and in terms of the extensive authority delegated to it performs all of the functions which characterise contemporary government: formulating policy, regulating, policing, providing services, settling disputes, acting entrepreneurially, consuming, and controlling the economy.’

2 Wiechers, 18. See too, Beinart, op cit, 204-205 and 208-209.

3 Craig, 42.

4 For an account of this phenomenon in South Africa, see Baxter, 7-17.
servants'.\(^5\) In South Africa, the growth of bureaucracy followed much the same pattern.\(^6\) Baxter, writing in 1984, says that ‘public authorities, excluding those employed by the homeland governments but including employees of parastatals or quangos, now employ 1 511 000 persons. This figure represents just under 17 percent of the economically active population’.\(^7\) More recently – in 1995 – during the course of legal proceedings, the chairperson of the Public Service Commission stated that there were then about one million civil servants in the employ of the government.\(^8\) This figure would appear to exclude those employed by parastatals or quangos.

One of the defining characteristics of administration in the modern state is the delegation of discretionary powers to administrators. Such powers are no longer regarded as the threat to the foundations of the constitutional order that prompted Lord Hewart to write The New Despotism\(^9\) and a member of the Pretoria Bar to foresee ‘with alarm not unmixed with despondency, the subtle but powerful attack which is being made upon those ancient and honourable institutions by the crafty and iconoclastic public servant’, resulting in ‘a country in which Parliament retains but a mere vestige of its legislative authority and the Courts of

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\(^5\) Harlow and Rawlings Law and Administration London, Weidenfeld and Nicolson: 1984, 6-7. The source of these statistics was the Justice All Souls Review 1981.

\(^6\) Beinart, op cit, (footnote 1), 204-206. See too Baxter who, at 7, says: ‘As in Britain, Europe and elsewhere, the series of disasters of the twentieth century, both natural and man-made, was to influence the scope of governmental activity in South Africa. But in many other respects the South African administrative state evolved under conditions which were determined by indigenous circumstances.’

\(^7\) Baxter, 15.

\(^8\) Transkei Public Servants Association v Government of the Republic of South Africa 1995 (9) BCLR 1235 (Tk), 1241G-H. See too the Public Service Commission Report on the Rationalisation of Public Administration in the Republic of South Africa, 1994-1996: RP70/1997, which gave the size of the public service in the Republic of South Africa, the TBVC states and the self-governing homelands, as at the end of September 1993, as 1 187 600 employees. Once again this would appear to exclude those employed by parastatals or quangos.

\(^9\) Lord Hewart The New Despotism London, Ernest Benn Ltd: 1929. In a ‘Prefatory Note’ Lord Hewart said: ‘This little essay is obviously not intended to be more than a brief introduction to a topic of large, and unhappily growing, dimensions. An exhaustive examination of the pretensions and encroachments of bureaucracy – the new despotism – must await greater leisure and another occasion. Yet it seemed to be high time that, at any rate, a note of warning should be offered. Est quadam prodire tenus, si non datur ultra.’
Justice are abandoned to the rat and the spider'.

The influence of Dicey can be blamed, at least in part, for these alarmist views of administration in the modern state, for it was his ‘unsound critique of the exclusive administrative jurisdiction vested in the French Conseil d’Etat, which he stigmatised as being opposed to the fundamental principles of the rule of law that pervaded the British Constitution’ which fuelled Lord Hewart’s intemperate attack on administrative law and blunted the development of administrative law for years.

Since Dicey’s time, the nature of the state has changed (from ‘nightwatchman’ to ‘benefactor’) and, with it, conceptions of public power and the role of law in its control have changed as well.

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10 Page ‘Courts and the Community’ (1931) 48 SALJ 439, 439 quoting a Mr Norman Price of the Pretoria Bar. Mr Page, the Chief Magistrate of Durban, did not agree with the views of either Lord Hewart and Mr Price. He said for instance, at 440-1: ‘At the very outset of the enquiry we discover that the encroachment upon judicial territory is the work of Parliament itself – a Parliament in which the profession of the law is represented in exceptional strength. It is hardly possible to contemplate that these members of a profession which demands as essential qualifications perspicacity and mental alertness could be hoodwinked and deceived – however subtle the machinations of the would-be usurper – into acquiescence in their own ultimate annihilation; or that the executive which contains an even larger proportion of lawyers than Parliament itself, could be deluded into hatching in ignorance and complacency the eggs of this intrusive cuckoo.’

11 See for a critique of Dicey and his influence in giving administrative law a ‘bad name’, Craig, 4-7. See too De Smith, Woolf and Jowell, 156-159 (paragraphs 3-006 to 3-009).


13 For instance, at 12-13 of The New Despotism, Lord Hewart says: ‘The apologists of the growing system, or lack of system, which is here proposed to explore sometimes permit themselves to speak of it as if it were “Administrative Law”. But the description, it will be seen, is quite curiously the reverse of the truth. The Continental system of “Administrative Law”, profoundly repugnant as it is to English ideas, is at least a system. It has its Courts, its law, its hearings and adjudications, its regular and accepted procedure. It would be a strange misuse of terms if the name of “Administrative Law” were to be applied to that which, upon analysis, proved to be nothing more than administrative lawlessness.’

14 In Ridge v Baldwin [1964] AC 40, 72, Lord Reid said of English law: ‘We do not have a developed system of administrative law’. That would not be true today. South African was similarly underdeveloped for a long time, although there are now signs of development. See Baxter, 43-4. See too Corder ‘Introduction: Administrative Law Reform’ 1993 Acta Juridica 1. Corder says, at 1: ‘South African administrative law has been called a “dismal science” and deservedly so. While fellow jurisdictions in the British Commonwealth and our “parent” system in the UK have adapted (more or less successfully) to the realities of the administrative state of the late twentieth century through legislative intervention and judicial creativity, South African administrative law has stagnated in a time warp from which it appeared likely never to escape.’

The development of the state in this way has also had the result of markedly shifting the locus of power within the state. Baxter says of this phenomenon:\textsuperscript{16}

‘The “administrative state” has become a cliche. The true value of the term is that it emphasizes the growing importance of the executive and administrative branch of government relative to the legislative and judicial branches. It highlights the fact that many of the legislative functions of government are performed, not by Parliament, but by administrative officials and institutions, while many judicial functions which would otherwise be performed by the Supreme Court or other courts of law are performed instead by administrative officials and tribunals.’

As part of this process, the administration expanded its activities to include many areas of endeavour that had previously been regarded as the preserve of the individual, regulated significant aspects of the economy and even engaged in entrepreneurial undertakings of its own. This invasion of the private sphere by governments, the privatisation of government and the emergence of corporatism,\textsuperscript{17} together contribute to a broader conception of public power. De Smith, Woolf and Jowell say of these developments that such ‘changes make it all the more desirable to have clear criteria for identifying the kinds of official decisions that are subject to public law and a clear division in a modern state as to what constitutes the “public” and the “private” realm’.\textsuperscript{18}

\section*{4.2. What is an Organ of State?}

\textsuperscript{16} At 4. The influence of the executive branch of government may also be illustrated by the amount of legislating which it does. Baxter, 74-5 gives a statistical comparison between parliamentary and administrative legislation. He says, for instance that in 1982 ‘Parliament passed 106 Acts whilst delegated legislation at central government level alone comprised 232 proclamations (enacted by the State President) and 2 815 sets of regulations (enacted by senior officials)’.

\textsuperscript{17} Baxter, at 15, says in this regard: ‘The trend is manifested in at least three ways. First, there has been increased collaboration between government and private organizations for the purpose of conducting public ventures, such as economic development. Part and parcel of this alliance has been the limited removal of restrictions which hamper free enterprise. Secondly, there has been a noticeable “publicization” of trades and professions as a result of the creation of statutory boards governing a wide variety of vocations, from teaching to land surveying. Thirdly, Parliament has created numerous policy councils and advisory committees covering almost every facet of public administration.’ Harlow and Rawlings, op cit, at 49, say that ‘the essence of corporatism is centralization and a state in which public and private are inextricably tangled’. See too De Smith, Woolf and Jowell, 163-167 (paragraphs 3-015 to 3-022).

Organs of state, along with the legislature, the executive and the judiciary, are bound by the Constitution. In terms of s7(2), they are obliged to `respect, protect, promote and fulfil the rights in the Bill of Rights’. In terms of s237 they must perform all constitutional obligations `diligently and without delay’. It is, therefore, important to ascertain who or what is an organ of state. Section 239 defines an organ of state as:

`(a) any department of state or administration in the national, provincial or local sphere of government;
(b) any other functionary or institution
   (i) exercising a power or performing a function 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,
       but does not include a court or judicial officer.’

The first part of the definition should not provide difficulties. The identification of a `department of state or administration’ is relatively easy (although identifying the correct one to sue may be difficult in certain cases). It will be noticed that, in the second part of the definition, the terms `public power’ and `public function’ are linked to `legislation’. In other words, it is only a person or body exercising or performing a statutory power or function that falls within the definition of an organ of state.

This means that disciplinary bodies of voluntary associations or other domestic tribunals, whose decisions attract public law-style judicial review at common law, fall outside of the definition. These powers will be subject to review either through an implied term of a contract or through s8(2) and s33 of the Constitution, read with s1(i)(b) of the Promotion of Administrative Justice Act. Administrative acts of governmental functionaries that are performed outside will be subject to control through s33 of the Constitution, read with s1(i)(b) of the Promotion of Administrative Justice Act in that they would involve the exercise of public power or the performance of public functions, in terms of an empowering provision, by functionaries who, although not private individuals, are nonetheless natural

19 Section 8(1). In terms of s8(2), a `provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. This provision makes it possible to subject the exercise of public powers by private bodies subject to constitutional review. See chapter 5 below.

20 See chapter 5 below.
or juristic persons other than organs of state.\textsuperscript{21} If all else fails, and the power or function concerned is a public one, its exercise or performance will be subject to control through s1(c) of the Constitution, the principle of legality that flows from the founding value of constitutional supremacy and the rule of law.\textsuperscript{22}

Section 7(1) of the interim Constitution provided that the Bill of Rights bound ‘all legislative and executive organs of state at all levels of government’. An organ of state was defined in s233(1)(ix) as including ‘any statutory body or functionary’. The meaning of this term, as it was used in the interim Constitution, was considered and defined in different ways in Baloro v University of Bophuthatswana\textsuperscript{23} and in Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting.\textsuperscript{24} Although the definition of an organ of state is now broader, the debate in these cases is worthy of consideration because it highlights important differences in the perceptions of the judges involved of the nature of the state and the breadth of constitutional control of power. In addition, it has been held that the new definition makes no difference to the test that must be applied to determine whether a body is an organ of state.

In Baloro, the applicants had been discriminated against by their employer, the respondent: it had placed a moratorium on the promotion of all non-South African staff. Because the applicants had claimed that their rights to equality in terms of s8 of the interim Constitution had been infringed, the court was required to decide whether the university was bound by

\begin{itemize}
\item \textsuperscript{21} One thinks here of the ‘purely beneficial disposition’ granted by the respondent in Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid 1992 (4) SA 1 (A), if that decision is correct, or a non-statutory customary law power exercised by a chief. For examples of such powers see Bennett ‘Administrative Law Controls over Chiefs’ Customary Powers of Removal’ (1993) 110 SALJ 276. He cites as examples of chiefly administrative powers, at customary law, the control and disposition of land: ‘It is the chief who divides the tribal domain into commonage, residential and agricultural areas; and it is the chief who regulates use of common resources. Anyone who has been accepted as a member of the tribe has a general entitlement to land within the chiefdom. The chief will then allot the petitioner a plot for building a house, church, store or school, or of course for farming.’
\item \textsuperscript{22} Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC).
\item \textsuperscript{23} 1995 (8) BCLR 1018 (B).
\item \textsuperscript{24} 1996 (3) SA 800 (T).
\end{itemize}
the Bill of Rights. Friedman JP held that the term ‘organ of state' should be given what he termed an ‘extended meaning' to include:\textsuperscript{25}

\begin{itemize}
  \item [(i)] statutory bodies
  \item [(ii)] parastatals
  \item [(iii)] bodies or institutions established by statute but managed and maintained privately such as universities, law societies, the South African Medical and Dental Council, etc
  \item [(iv)] all bodies supported by the State and operating in close co-operation with structures of State authority
  \item [(v)] certain private bodies or institutions fulfilling certain key functions under the supervision of organs of the State.’
\end{itemize}

His reasoning was that, in the modern era, constitutions serve to control public power broadly and not only governmental power in strict terms: that, in the words of Du Plessis, ‘bills of rights have been invoked in recent years, with varying degrees of intensity, to curb the exertion of superior social power outside the traditional domain of "state authority"’.\textsuperscript{26} This approach appears to be in step with the final Constitution which recognises the need to control at least some forms of purely private power for the reasons offered by Du Plessis.\textsuperscript{27}

In the Directory Advertising Cost Cutters case, the applicant provided a consultancy service to advertisers and prospective advertisers in which it gave advice on the cost implications of particular advertisements and the cost effectiveness of alternatives. It sought to compel Telkom, the telephone company, to provide it with information concerning prices for advertising in telephone directories. These prices were contained in some 25 price lists per annum and were determined by Telkom and a contracting partner, Maister Directories (1981) (Pty) Ltd, which had the exclusive right in terms of its contract with Telkom to canvass and sell advertising in telephone directories. The applicant alleged that it was entitled to the information that it sought in terms of s23 of the interim Constitution, the right

\begin{itemize}
  \item At 1056B-D.
  \item Du Plessis ‘The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa’s Transitional Constitution’ 1994 \textit{TSAR} 706, 712 quoted at 1051H-I.
  \item See s8(2) in particular.
\end{itemize}
of access to information. Central to its case therefore was the argument that Telkom was an organ of state because the right was only enforceable against ‘the state or any of its organs’. Van Dijkhorst J held that Friedman JP’s definition of an organ of state in Baloro was too wide. He held instead:

‘The concept as used in s7(1) of the Constitution must be limited to institutions which are an intrinsic part of government – ie part of the public service or consisting of government appointees at all levels of government – national, provincial, regional and local – and those institutions outside the public service which are controlled by the State – ie where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such extent that it is effectively in control. In short, the test is whether the State is in control.’

Directory Advertising Cost Cutters was applied in Mistry v Interim National Medical and Dental Council of South Africa. MacLaren J held that the first respondent, a body created by statute and vested with powers of investigation, including the power of entry, search and seizure, in respect of the conduct of medical and dental practitioners, was not an organ of state. The reason was that the Minister only appointed some, but not the majority, of the councillors of the first respondent, its activities were financed by fees charged to medical and dental practitioners and it employed staff who were not state employees. The result was that the first respondent was held not to be bound by the interim Constitution and could thus not infringe the applicant’s fundamental right to privacy. In Korf v Health Professions Council of South Africa Van Dijkhorst J held that despite the fact that the final Constitution had extended the definition of an organ of state, the control test was still to be applied, that the respondent (the successor to the first respondent in Mistry) was not an organ of state.

28 At 810F.
29 At 810F-H. See too Goodman Brothers (Pty) Limited v Transnet Limited 1998 (8) BCLR 1024 (W) which dealt with the definition of an organ of state in the final Constitution. The nature of the respondent and its relationship to the government were essentially similar to that of the respondent in the Directory Advertising Cost Cutters case. Blieden J applied the test developed by Van Dijkhorst J. He held that ‘those factors which distinguish the respondent from Telkom do not address the real basis for the finding by Van Dijkhorst J that Telkom is an organ of state, namely that it is ultimately controlled by the state through the relevant minister and in this way it exercised a public function’ (at 1031B). This case therefore does not enter the debate about the outer limits of the definition.
30 1997 (7) BCLR 933 (D).
31 At 947E-948C.
32 2000 (3) BCLR 309 (T).
for the reasons articulated in Mistry and that consequently it was not obliged to furnish the applicant with information (in terms of s32(1) read with item 23(2)(a) of Schedule 6 of the Constitution) which she required for the exercise or protection of her rights.33

A third approach to defining an organ of state has emerged. It may be termed a benevolent control test. It accepts that the test is, indeed, whether the state is in control of the body in question but applies a more generous and nuanced interpretation of what that control entails. Two cases illustrate this approach. The first is Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds.34 The applicant, a local government body, had approached the court with a view to obtaining an order that would end its relationship with the first respondent. One of the grounds upon which it relied was that an obligation to remain in a relationship with the first respondent constituted an infringement of its fundamental right to freedom of association. It therefore became necessary to determine whether the first respondent was an organ of state and was hence bound by the Bill of Rights (and, if so, whether the right to freedom of association could be enforced by the applicant). Cameron J accepted that the control test applied. Indeed, he held that he had no choice as he was bound by Directory Advertising Cost Cutters.35 He described the institutional profile of the first respondent as follows. First, it came into existence through a statutory instrument and operated in accordance with a statutory regime; secondly, a management committee was created by the statute and empowered to control the fund; thirdly, the members of this committee were elected by members of the fund; fourthly, the committee had the power to dissolve the first respondent; fifthly, its existence was accessory to the existence of other organs of state because it was created for the benefit of state employees, its rules could only be amended with the approval of the Premier of the province and its express purpose for existence was to provide certain employment benefits

33 At 314E-315F.
34 1997 (8) BCLR 1066 (T).
35 With all due respect to Cameron J, his choice was slightly wider than his words suggest. He could have departed from Van Dijkhorst J’s judgment if he was of the view that it was clearly wrong. This is, in fact, what he did, on a different aspect of Directory Cost Cutters in Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T).
for state officials. After conceding that the control test as articulated in *Directory Advertising Cost Cutters* was a narrow test, Cameron J held that it was nonetheless to be applied with a measure of flexibility and adaptability. On this basis, he held that the first respondent was indeed an organ of state. It met the requirements of the control test ‘nie slegs in die sin dat die bestaansvoorwaardes in sy statute alleen gewysig kan word deur staatsgoedkeuring nie, maar ook in die sin dat sy bestaan ’n newebestaan is. Sonder die staat het die Eerste Respondent geen bestaan nie.’

The second case is *Esack v Commission on Gender Equality* in which the issue at stake was whether the respondent, a Chapter 9 institution, was an organ of state. Jordaan AJ held that it was:

‘In my view, the commission is an intrinsic part of government. It does consist of government appointees. A so-called “control” test applied by Van Dijkhorst J does not mean that the decisions made by the body concerned can be altered or varied by the state. As I understand the concept “control”, it means the right to prescribe what the function of the body is and how it is to be performed. As Van Dijkhorst J puts it, it must be part of the governmental apparatus. ... Section 10(1)(a) of Act 39 of 1996 which reads “the commission shall be independent” does not detract from the fact that it is part of the governmental apparatus. It performs a government function in casu to eradicate discrimination on the ground of gender, ensuring the ethos of the Constitution of non-discrimination to become a reality. In my view, therefore, the commission is “the state” and the Second Applicant was therefore an employee of the state. The fact that she was not entitled to all the benefits of a public servant, for example, a medical fund and pension privileges, does not detract from this.’

Van Dijkhorst J and MacLaren J took a particularly narrow (some might say, Victorian) view of the state. This is a view of the state that certainly predates the rise of the modern administrative state. Their understanding of public power and the limits of constitutions in controlling it is at odds with the realities of the modern world, the ways in which power is exercised in it and with the values and ethos of the Constitution itself. Theirs is a definition

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36 At 1073I-1074C.
37 At 1074E-F.
39 At 473F-H.
which is even narrower than the common law test to determine whether or not a body or official is an administrative organ. What is more, this interpretation, in respect of the definitions in both Constitutions, appears to have ignored or misinterpreted crucially important words: s233(1)(ix) of the interim Constitution did not merely include statutory bodies and functionaries as organs of state but said that an organ of state included ‘any statutory body or functionary’. Their interpretation reads ‘any’ as ‘some’. This interpretation is not apparent from the text and a purposive approach to statutory interpretation would militate against it too.

Section 239(b)(ii) of the final Constitution speaks of the third category of organ of state as being ‘any functionary or institution’ which exercises a ‘public power’ or performs a ‘public function’ in terms of ‘any legislation’. In Korf Van Dijkhorst J defined a public function as engaging ‘in the affairs or service of the public’ and held that the respondent, which had investigated the conduct of a doctor on receiving a complaint from a member of the public, was not performing a public function. He agreed with the reasoning in Mistry that the same respondent was not an organ of state when it had entered the applicant’s premises during the course of an investigation into his conduct after receiving a complaint from a member of the public, had searched his premises pursuant to statutory authority to do so and had seized documents to be used as evidence against him for disciplinary purposes. In these circumstances, the eventual conclusion in both cases that the bodies concerned were not organs of state jars when viewed against the powers and functions which they exercised and which they otherwise had access to in terms of the legislation which created and empowered them. Surely the powers exercised and the functions performed by the respondents in Mistry and Korf were public powers and public functions? They were, in the first place, disciplinary and policing or regulatory powers and functions and, secondly, they were being exercised in the public interest. When these respondents were exercising their

41 Supra.
42 At 315A.
43 Supra.
powers of investigation, entry, search and seizure, they were acting ‘authoritatively in the exercise of a governmental function’, a characteristic which Van Dijkhorst J himself identified as the actions of organs of state in Directory Advertising Cost Cutters.  

The definition of an organ of state must, indeed, be broader than Van Dijkhorst J has held it to be. Burns has argued that s239 achieves a broader definition through a shift in emphasis (which, one presumes, was deliberately intended to give recognition to the explicitly broader approach of s8 generally to the control of power). She says:

‘State departments and their officials are organs of state and are generally easy to recognise. To determine whether a public institution qualifies as an organ of state, is rather more difficult, but section 239, which places the emphasis on the power or function exercised by the body in question, has resolved many of the problems of identification. The approach is no longer based on the extent to which the public body, functionary, institution or parastatal is subject to government control; but rather whether the body exercises a “power or function in terms of the constitution” or exercises “a public power or performs a public function in terms of legislation”. To determine whether parastatals and fringe organisations (semi-state bodies) and quangos (quasi-autonomous non-governmental organisations) are organs of state, one simply asks: does the parastatal, fringe organisation or quango exercise a power or function under the constitution (or any provincial constitution) or does it exercise a public power or perform a public function in terms of legislation?’

De Waal, Currie and Erasmus agree with this approach. They argue that for a functionary or institution to qualify in terms of s239(b)(ii), it must be empowered by statute, as opposed to being created through statutory mechanisms such as those of the Companies Act 61 of

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44 Supra, 810C-D. See by way of contrast Association of Chartered Certified Accountants v Chairman, Public Accountants’ and Auditors’ Board 2001 (2) SA 980 (W) in which Boruchovitz J found that the respondent, a professional association created by statute to regulate the accountants’ and auditors’ profession exercised public powers and fulfilled public functions in terms of its statute, being a ‘regulatory body entrusted with the task of ensuring that proper standards are maintained in the accounting and auditing profession’ (at 996D). Similarly, in Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA), although it was not held to be necessary to decide whether the appellant was an organ of state, the courts focus, in deciding that it had acted administratively in calling for and deciding upon tenders, was on the public nature of its functions. In contrast to these decisions, Niles-Duner J held in Ngubane v Meisch NO 2001 (1) SA 425 (N) that an examiner for the notarial practice examination was not an organ of state because when marking examination scripts, he was not performing a public function (at 429H-I) and did not mark scripts under the control of the state as he was appointed by the Judge President and was required to act independently (at 429I-J).

45 At 16-17.
1973. Secondly, they argue that the power or function that the functionary or institution exercises or performs must be exercised or performed in the public interest, as opposed to for private gain.\textsuperscript{46} If one wants to label the test that is to be applied in order to identify organs of state, it would be more faithful to the constitutional text to call the test a ‘public power or function’ test rather than a ‘control test’. The former mirrors the reality of how public power, the type of power that the Constitution is meant to control, is indeed exercised in the modern world and in the South Africa of the early 21\textsuperscript{st} century.

The Constitutional Court has now dealt with this issue in \textit{Independent Electoral Commission v Langeberg Municipality}.\textsuperscript{47} In this matter, the issue was whether the appellant, a chapter 9 institution, was an organ of state within a sphere of government, either national, provincial or local, and whether consequently the respondent was under an obligation, in terms of s41(3) of the Constitution, to attempt to resolve its intergovernmental dispute with the appellant and was under a duty to ‘exhaust all other remedies before it approaches a court to resolve the dispute’. Yacoob J and Madlanga AJ held, in the first place that the IEC ‘exercises public power and performs public functions in terms of the Constitution and it is therefore an organ of State as defined in s239 of the Constitution’.\textsuperscript{48} They held further that ‘under s181(2) the Commission is independent, subject only to the Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter intends to make a distinction between the State and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national’.\textsuperscript{49}

\subsection*{4.3. What is Administrative Action?}

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\begin{itemize}
\item \textsuperscript{46} At 39.
\item \textsuperscript{47} 2001 (3) SA 925 (CC).
\item \textsuperscript{48} At XXX (paragraph 22).
\item \textsuperscript{49} At XXX (paragraph 27).
\end{itemize}
4.3.1. Introductory Remarks

Because of the diversity of activity in the modern administration, the courts tended to classify administrative acts along the lines of the functions of government, namely ‘legislative’, ‘administrative’ and ‘judicial’, as well as hybrids or variants of those categories such as ‘quasi-judicial’, ‘purely administrative’ and ‘ministerial’. Apart from the terminological confusion generated by the proliferation of these labels, the classification of functions led to immense difficulties in administrative law as the labels were often treated as ‘complete descriptions of all the characteristics of the act in question’. The dangers of classification have now been exposed and it has been accepted that the range of administrative activity in a modern state is so great that the rather simplistic categorization of functions is of little use. As the importance of classification, as a determinant of the breadth of review, has waned over time, it was recognised that the same principles of law apply to the review of all administrative acts, irrespective of their nature. This point was made authoritatively by Schreiner JA in Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd.

‘The classification of directions and functions under the headings of “administrative”, “quasi-judicial” and “judicial” has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification, and even some disagreement as to the usefulness of the classification when achieved. I do not propose to enter into these interesting questions to a greater extent than is necessary for the decision of this case; one must be careful not to elevate what may be no more than a convenient classification into a source of legal rules. What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context.’

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50 Baxter, 344.
51 Baxter, 344. See too Wade and Forsyth, at 47, who warn the reader ‘that the courts themselves are addicted to distinctions which are more superficial and more confusing than those discussed here, and which by no means always help to clarify’. See too the views of Froneman DJP on the rationale for classifying functions in English law, and the fact that no such corresponding need existed in South Africa, in Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC), 1333E-G (paragraph 17).
52 Baxter, 348.
53 Baxter, 348.
It is no longer acceptable for courts to classify administrative functions but it is now particularly important to be able to identify those exercises of public power that constitute administrative action.\(^{55}\) This is so for at least two inter-related reasons: first, at the most general level, it is necessary to know, when the performance of a function or the exercise of a power is being scrutinized, what rules apply to control that act; secondly, on a more specific level, it is necessary to be able to identify what is and what is not administrative action for the purpose of determining whether the fundamental right to just administrative action applies in any specific case.

The definition of administrative action should be wide enough to cover all aspects of administrative activity, whether adjudicative, legislative or bureaucratic, and should reflect the reality of state activity on a bureaucratic level. Klaaren has suggested that the term ‘includes all action taken by bodies exercising public power’.\(^{56}\) His statement requires clarification. First, he overshoots the mark somewhat when he suggests that bodies exercising all types of public power undertake administrative action for the purposes of the Constitution. It is only those bodies or persons who are bound by s8(1) or s8(2) of the Constitution whose exercises of certain public powers or performance of certain public functions – powers and functions of an administrative nature – may be held to constitute administrative action.\(^{57}\) The enquiry as to whether a particular exercise of power or performance of a function falls within the definition of administrative action is, for the most

\(^{55}\) See Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA), 186I-187A (paragraph 33) in which Olivier JA held: ‘Before the introduction of the interim Constitution it was not necessary to define the concept of “administrative action” with precision. By and large, the criteria have usually been that an administrative action requires a decision (and resultant action) taken in the exercise of a public power or the performance of a public function, affecting the rights, interests or legitimate expectations of others.’

\(^{56}\) ‘Administrative Justice’ in Chaskalson et al, 25-2. Note that in Metro Inspection Services (Western Cape) CC v Cape Metropolitan Council [1999] 1 All SA 115 (C), 124g, Cleaver J said of this statement that the ‘authorities cited do not appear to justify so wide a submission’. See further Craig,41, who says: ‘The type of institutions subject to administrative law include the Executive itself, fringe bodies or quangos, local authorities, tribunals, inquiries and inferior courts.’

\(^{57}\) On the definition of an organ of state for the purposes of the Bill of Rights see 4.2 above and, on s8(2) of the Constitution, see 5.5.2 below.
part, a functional one: in the context of government,\textsuperscript{58} if a public power is not an executive power, an original legislative power or a judicial power, it is likely to be an administrative power. Van Wyk says that ‘in its most rudimentary form, administrative action can be described as any act of the “administration”’ and that there is no reason why the term should be given a narrow meaning.\textsuperscript{59}

4.3.2 The Test

The test to determine whether a particular public function or exercise of public power constitutes administrative action, for the purpose of determining whether s33 of the Constitution applies to it, was set out by the Constitutional Court in President of the Republic of South Africa v South African Rugby Football Union.\textsuperscript{60} The court began its analysis of this issue from the premise that the Constitution regulates public powers in different ways, depending, essentially, on whether the power in question is legislative, executive or judicial. It pointed out that an ‘overarching Bill of Rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers’.\textsuperscript{61} Of the public administration, in particular, and the control of its powers, the court held:\textsuperscript{62}

‘The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.’

\textsuperscript{58} Private exercises of administrative power will be discussed in detail in chapter 5 below.
\textsuperscript{60} 1999 (10) BCLR 1059 (CC).
\textsuperscript{61} At 1114 I-1115A (paragraph 132).
\textsuperscript{62} At 1115B-D (paragraph 133).
Control over this form of governmental activity takes a range of forms. In addition to the fact that the Bill of Rights binds the executive and all organs of state, and that s32 creates a right of access to information, s33 creates a right to just administrative action and chapter 10 of the Constitution prescribes values and principles that govern public administration in every sphere of government, in organs of state and in public enterprises.63 Institutions such as the Public Protector and the Auditor-General were created to minimise and control the incidence of maladministration.64 Within this context, it becomes particularly important to be able to define administrative action, as opposed to any other form of action. This point is made by the Constitutional Court as follows65:

‘In section 33 the adjective “administrative” not “executive” is used to qualify “action”. This suggests that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute “administrative action”. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’

In delineating between administrative actions and other exercises of public power, a number of considerations are relevant. These include the source of the power which, the Constitutional Court has said, is relevant but not necessarily decisive, the ‘nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and, on the other, to the implementation of legislation, which is’.66 The court conceded that drawing lines in this way was bound to be a difficult exercise but stated that these lines ‘will need to be drawn carefully in the light of the provisions of the Constitution and the overall

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63 At 1115D-1116B (paragraph 134).
64 At 1116B-C (paragraph 134).
65 At 1119D-F (paragraph 141).
66 At 1120A-C (paragraph 143).
constitutional purpose of an efficient, equitable and ethical public administration'.

4.3.3. Separation of Powers Distinctions

The Constitutional Court has identified a number of functions that once attracted administrative law controls but no longer do. The distinction drawn in these cases is between administrative action, on the one hand, and legislative, executive and judicial action on the other. In addition, a rather curious type of power, exercised by an executive organ, the President, but which is neither administrative nor legislative, but something in between, has also been identified.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* the appellants argued that the respondent had acted administratively in increasing municipal rates and that the resolution to this effect was therefore subject to review in terms of s24 of the interim Constitution. Chaskalson P, Goldstone J and O'Regan J held that when a municipal council acts legislatively, as the respondent had done, the product of its exercise of power is not administrative action: it was, prior to 27 April 1994, but then municipal councils exercised delegated legislative powers; that changed when the interim Constitution came into force because municipal councils became original legislators exercising powers vested in them directly by the Constitution.

In *President of the Republic of South Africa v South African Rugby Football Union* a decision by the President to appoint a commission to enquire into the affairs of the South African Rugby Football Union was taken on review. In the court of first instance, it had been held that the decision, which the court assumed to have been an administrative decision, was invalid because the President had fettered his discretion by acting under the dictation

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67 At 1120C-D (paragraph 143).
68 1998 (12) BCLR 1458 (CC).
69 See in particular from 1472E-1478E (paragraphs 21-42).
70 1999 (10) BCLR 1059 (CC).
of the Minister of Sport. On appeal, the Constitutional Court held that the exercise of power by the President was not administrative action. In the first place, the source of the power to appoint a commission was s84(2)(f) of the Constitution. It vested executive, rather than administrative, power in the President, as head of state, rather than as head of the executive. Secondly, the function did not involve the implementation of legislation – the hallmark of administrative action – but the exercise of independent constitutional powers, laden with policy. The court held further:

‘A commission of enquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of enquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. It should, however, be emphasised again that this conclusion relates to the appointment of the commission of enquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter.’

In Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa, the President had purported to bring the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 into operation, thereby repealing the Medicines and Related Substances Control Act 101 of 1965, which it was intended to replace. He had, however, acted prematurely because he had exercised the power to bring the Act into operation – contained in s55 of the Act – before schedules had been prepared that would list the substances to be regulated by Act. In this way, the President’s purported exercise of power in reliance on s55 of the Act had rendered the 1998 Act meaningless and ineffectual. The matter had been referred to the Constitutional Court in terms of s172(2)(a) of the Constitution for confirmation of the finding

71 See South African Rugby Football Union v President of the Republic of South Africa 1999 (7) BCLR 725 (T).
72 At 1121A-C (paragraph 144).
73 At 1122E-G (paragraph 146).
74 At 1122H-1123A (paragraph 147).
75 2000 (3) BCLR 241 (CC).
of a full bench of the Transvaal High Court\textsuperscript{76} that the conduct of the President had been unconstitutional. A central issue was whether the President’s exercise of power in purporting to bring the Act into operation in terms of a section of the Act itself – as opposed to assenting to bills in terms of s84(2)(a) of the Constitution – constituted administrative action. Chaskalson P held that it did not:\textsuperscript{77}

‘This is one of those difficult cases. The power is derived from legislation and is close to the administrative process. In my view, however, the decision to bring the law into operation did not constitute administrative action. When he purported to exercise the power the President was neither making the law, nor administering it. Parliament had made the law, and the executive would administer it once it had been brought into force. The power vested in the President thus lies between the law-making process and the administrative process. The exercise of that power requires a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. In substance the exercise of the power is closer to the legislative process than the administrative process. If regard is had to the nature and subject matter of the power, and the considerations referred to above, it would be wrong to characterise the President’s decision to bring the law into operation as administrative action within the meaning of item 23(2)(b) of the sixth schedule to the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power.’

In\textsuperscript{78} De Lange v Smuts NO the issue was whether s66(3) of the Insolvency Act 24 of 1936 was constitutionally valid. This section authorised the committal to prison of recalcitrant examinees by officers presiding at meetings of creditors of insolvent estates. The presiding officer at such a meeting was either the Master of the High Court, or an officer in the public service designated by him or her, or a magistrate, or an officer in the public service designated by him or her. It had been held by the Cape High Court that s66(3) was inconsistent with the right, contained in s12(1)(b) of the Constitution, not to be detained

\textsuperscript{76} See Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa 1999 (4) SA 788 (T). This was an appeal against a decision of a single judge.

\textsuperscript{77} At 270H-271C (paragraph 79).

\textsuperscript{78} 1999 (7) BCLR 779 (CC).
without trial, and that the limitation of this right did not meet the standard for the valid limitation of a fundamental right set out in s36(1) of the Constitution.\textsuperscript{79} On referral to the Constitutional Court in terms of s172(2)(a) of the Constitution, Ackermann J, for the majority, held that the section was, indeed, invalid, but only to the extent that it authorised a presiding officer who was not a magistrate to commit recalcitrant examinees to prison.\textsuperscript{80} He held that ‘the “fair trial” prescribed by section 12(2)(b) requires, apart from anything else, a hearing presided over or conducted by a judicial officer in the Court structure established by the 1996 Constitution and in which section 165(1) has vested the judicial authority of the Republic’.\textsuperscript{81} He held further that ‘whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here – that is the power to commit an uncooperative witness to prison – is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers’.\textsuperscript{82}

Finally, he held that the presiding officer, when exercising powers in terms of s66(3) was acting judicially and not administratively. In this respect he held that Conradie J, in the court below, had erred:\textsuperscript{83}

\begin{quote}
'I am unable to agree with the learned judge’s conclusion that where it is the magistrate who presides over a meeting of creditors “it is clear that, in doing so, he fulfills one of the many administrative functions with which he is by law charged” to the extent that this is applied to the committal procedure under section 66(3). It is unnecessary for purposes of this case to consider whether the officer presiding at a meeting of creditors is, in respect of other aspects of the meeting and the examination of persons thereat, performing an administrative or a judicial function. The crucial enquiry relates to proceedings for issuing a committal warrant. In such proceedings the presiding officer determines whether the witness has complied with the statutory obligation to produce documents and answer questions and the sanction to be imposed if this has not been done. The witness is entitled to legal
\end{quote}

\textsuperscript{79} At 786B-D (paragraph 7). See, for the judgment in the court below, \textit{De Lange v Smuts NO} 1997 (11) BCLR 1553 (C).
\textsuperscript{80} At 822C-D (paragraph 109). Nine judges sat in this matter. Chaskalson P, Langa J and Madala J concurred in the judgment of Ackerman J. Sachs J delivered a separate concurring judgment. Didcott J and Kriegler J dissented, holding that the section was not constitutionally invalid and Mokgoro J and O’Regan J, in separate judgments, held that the section was invalid in its entirety.
\textsuperscript{81} At 803F (paragraph 57).
\textsuperscript{82} At 804G (paragraph 61).
\textsuperscript{83} At 811G-812C (paragraph 80).
representation and may apply to the High Court for his discharge from custody. This is in substance a judicial proceeding even if it is not conducted in a court of law. I have no doubt in my mind that the process of factual and legal evaluation involved in deciding whether or not to commit an examinee to prison and the act of issuing the committal warrant, are clearly judicial and nothing else."

The fact that legislative action, executive action of a non-administrative nature and judicial action all fall outside of what was meant by the term administrative action does not mean that these exercises of power are free from judicial control. They must comply, in order to be valid, with whatever specific constitutional requirements may be prescribed,84 may not infringe fundamental rights except if they meet the requirements of section 36(1)85 and must comply with the principle of legality which is part of the rule of law and which is, in terms of s1(c), at the heart of the Constitution. The rule of law means, at least, that exercises of public power must be authorised by law,86 that the functionary involved must act in good faith and must not misconstrue his or her powers,87 that exercises of public power must be rational,88 that to protect fundamental rights laws should be ‘pre-announced, general, durable and reasonably precise rules administered by regular courts or similar independent tribunals according to fair procedures89 and that rules must be stated in a ‘clear and accessible manner’.90

84 See for instance Mpehle v Government of the Republic of South Africa 1996 (7) BCLR 921 (Ck), 944C-I.
85 See for example President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC), 716D-E (paragraph 13). Note, however, that non-legislative acts which infringe rights can never meet the first requirement of s36(1) because, not being legislative, they cannot be said to constitute laws of general application. See in this regard Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal 1999 (2) BCLR 151 (CC), 167H (paragraph 42).
87 President of the Republic of South Africa v South African Rugby Football Union, supra, 1123C-D (paragraph 148).
88 Pharmaceutical Manufacturers of South Africa; in re: ex parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 273G-274C (paragraphs 89 and 90).
90 Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC), 865D (paragraph 47).
The distinctions to be drawn in terms of the separation of powers are well illustrated by *Ed-U-College (Section 21) PE Inc v Permanent Secretary, Department of Education and Welfare, Eastern Cape*\(^91\) in which Leach J was required to determine whether the allocation of subsidies to private schools was administrative action. He held that while the allocation of a budget to the department concerned through the passing of an Appropriation Act was legislative action, the use of these funds in the discretion of the Member of the Executive Council (the MEC) concerned was an administrative act: the legislature, as he put it, supplied the department with the cake which ‘the second defendant, in the exercise of his discretion … was left to slice up’.\(^92\) The Constitutional Court arrived at the same conclusion when it dismissed an application for leave to appeal against this judgment in *Permanent Secretary, Department of Education and Welfare v Ed-U-College (Section 21) PE Inc*.\(^93\) On the central issue of the nature of the MEC’s function of allocating the funds to particular schools, O’Regan J held that ‘it cannot be argued that the determination of the precise subsidy formula by the MEC constituted legislative action. It was not action taken by the legislature, nor was it debated or considered by the legislature, nor did it in any way form part of the legislative process, nor did it follow as a matter of course from the legislation itself. Indeed, the determination took place in the light of a statutory power conferred upon the MEC by the Schools Act which suggests that the MEC has, as long as funds have been appropriated for the purpose, the power to determine when a subsidy should be granted’.\(^94\)

4.3.4. Functional Distinctions

It is easy enough to recognise particular administrative actions, such as the granting of a road transportation permit or a liquor licence, the deportation of an alien or the promulgation of subordinate legislation by a functionary to whom a legislative power has

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91 2001 (1) SA 257 (SE).
92 At 263F.
93 2001 (2) SA 1 (CC).
94 At 11H-12B (paragraph 16).
been delegated. Those examples say little about what distinguishes administrative action from any other exercise of public power. All they illustrate collectively is what is already well known – that administrative action covers a particularly wide spectrum of activities. In order to fall within the definition of administrative action, functionally, an activity must relate to the implementation of legislation – to its administration. In this sense, it is the function that is important, rather than the functionary. Within this functional arena, it is not always easy to identify administrative action as some of the judgments show.

Most administration is carried out by members of the executive branch of government in the three spheres of government, or by members of the public service in one or other of the departments of the national or provincial governments or in local governments. This is so because it is, after all, the province of the executive and its bureaucracy to administer the country. A range of administrative powers and functions are also exercised or performed by organs of state that may not fit snugly into the executive branch of government, or any other, for that matter. An example would be an arbitration award made by a commissioner of the Commission for Conciliation, Mediation and Arbitration (the CCMA), acting in terms of the Labour Relations Act 66 of 1995 or the regulation of elections by the Independent Electoral Commission. Apart from these, however, the remaining branches of government – the various legislatures and executives, and the judiciary – exercise certain powers and perform certain functions that are administrative in nature. Private bodies may also exercise administrative power or perform administrative functions and may be empowered to do

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95 See, for example, Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC). But see Shoprite Checkers (Pty) Ltd v Ramdaw NO (2000) 21 ILJ 1232 (LC), 1258B-1259D (paragraphs 85-88) in which Wallis AJ held that an arbitration conducted by a commissioner of the CCMA was not an instance of administrative action, but the performance of a function similar to that of a private arbitrator. This conclusion appears to be based on incorrect readings of Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC) and Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC) and has now been overruled on appeal in Shoprite Checkers (Pty) Ltd v Ramdaw NO 2001 94) SA 1038 (LAC). See too Glaxo Welcome SA (Pty) Ltd v Mashaba (2000) 21 ILJ 1114 (LC), 1118A-1119A (paragraphs 14-16) in which Marcus AJ observed that the test for review set out by the Constitutional Court in Pharmaceutical Manufacturers ‘bears a striking similarity to the Carephone test’.

96 See Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC).

97 See chapter 5 below.
so either consensually\(^98\) or in terms of statute.\(^99\)

Parliament, and other legislative bodies like it, have been vested with certain administrative powers and functions, in addition to their legislative powers and functions. In the case of Parliament, s57 and s70 provide for the internal arrangements, proceedings and procedures of the National Assembly and the National Council of Provinces respectively. Whether the internal affairs of Parliament are justiciable was the central issue in De Lille \textit{v} Speaker of the National Assembly.\(^100\) The facts were that the applicant, a Pan Africanist Congress (PAC) Member of Parliament, had been disciplined by the National Assembly which had, by resolution, excluded her from the House for fifteen days after an ad hoc committee had made a recommendation to this effect. Her misconduct was that she had claimed in the House that certain members of the African National Congress (ANC) had been spies for the apartheid regime and, when challenged to name people, she had named eight senior ANC members. She was ordered by the Speaker to withdraw her statements, which she did. Ms De Lille launched an application for an order setting aside the resolution and interdicting the respondent from giving effect to the resolution.\(^101\)

Hlophe J granted the application. He held that the internal functioning of the National Assembly was indeed justiciable, despite a common law rule to the contrary and an ouster clause to this effect in s5 of the Powers and Privileges of Parliament Act 91 of 1963.\(^102\) Hlophe J held that Ms De Lille had not been afforded the benefits of procedural fairness. He found that the ad hoc committee had prejudged the issue and was therefore biased.\(^103\) He formulated the law as follows:\(^104\)

\footnotesize
\begin{itemize}
  \item\(^98\) An example of this is the Press Ombudsman.
  \item\(^99\) An example of this is the Johannesburg Stock Exchange.
  \item\(^100\) 1998 (7) BCLR 916 (C).
  \item\(^101\) For the facts of the case, broadly, see the judgment at 919D-921E (paragraphs 1-5).
  \item\(^102\) At 928D-935G (paragraphs 20-34) and 938F-939E (paragraphs 39-41). See further chapter 7 below.
  \item\(^103\) At 927C-H (paragraphs 16-18).
  \item\(^104\) At 926G-927 B (paragraph 15). While the factual basis for the finding that the issue was prejudged is clear and overwhelming, the finding of Hlophe J that the ANC was complainant, prosecutor and judge in its own cause, is not as convincing as a ground upon which to conclude that the ad hoc committee was biased. At 927F-H (paragraph 18).
\end{itemize}
‘Mrs De Lille was not given a hearing at all in the National Assembly whereas the purported hearing before the ad hoc committee violated the common law rules of natural justice. She was entitled to be heard fairly by an unbiased committee and she was entitled to make representations regarding the proposed sanction against her. South African courts have repeatedly laid down that the common law rules of natural justice apply unless the relevant statute has expressly or by necessary implication excluded them. These rules require that when a statute empowers a public official or a body to give a decision prejudicially affecting an individual’s rights, interests or legitimate expectations, such an individual must be heard before the decision is taken or, I would add, before any serious recommendations prejudicially affecting such rights or interests or legitimate expectations are made by the body concerned. Surely the exercise by a body of a disciplinary power over one of its members is an obvious case in which fairness requires that the rules of natural justice should be complied with. It follows therefore, that whatever the source of power that was exercised by the Assembly to suspend the first applicant that had to be done in accordance with the dictates of fairness and natural justice.’

Later in his judgment, Hlophe J held specifically that the passing of the resolution constituted an infringement, inter alia, of Ms De Lille’s fundamental right to just administrative action in terms of s33 of the Constitution. The second ground upon which Ms De Lille succeeded was that no lawful authority existed for the National Assembly to suspend her. Section 58(1) of the Constitution provides that Members of Parliament enjoy freedom of speech in the House, subject only to its rules and orders. Rule 85(a) provides for suspension by the Speaker but no rule allows for suspension by the National Assembly. In these circumstances, it was held by Hlophe J that Ms De Lille’s suspension was ‘unconstitutional and in violation of her freedom of speech’.

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105 At 936D-938E (paragraphs 36-38).
106 See too Burns-Ncamashe v House of Traditional Leaders (Eastern Cape) [1999] 4 All SA 478 (Ck), where a similar point was upheld. See in contrast Killian v Gauteng Provincial Legislature 1999 (2) BCLR 225 (T) in which Van Dijkhorst J held that the Speaker of the Gauteng Legislature had lawful authority to undertake that the Legislature would pay the reasonable costs of minority parties which had referred the constitutionality of a bill to the Constitutional Court, when they argued their case in that court. The constitutionality of a bill had been referred by the Speaker to the Constitutional Court in terms of s98(9) of the interim Constitution after the Speaker had been petitioned by a third of the members of the Legislature. See, however, Bushbuck Ridge Border Committee v Government of the Northern Province 1999 (2) BCLR 193 (T) in which undertakings to change provincial boundaries were held not to constitute administrative action.
107 At 934H-936C (paragraph 35). This finding was confirmed on appeal in Speaker of the National Assembly v De Lille [1999] 4 All SA 241 (A).
In the same way that legislatures can act administratively, judicial officers may also. For instance, the Judge President of a division of the High Court is empowered by s43 of the Supreme Court Act 59 of 1959 to ‘make rules for regulating the proceedings of that Division or any Local Division within the area of jurisdiction’. When exercising this power, a Judge President will be acting administratively. Similarly, when a judge or magistrate presides in an inquest in terms of the Inquest Act 58 of 1959\(^{108}\) or as a commissioner in a commission of enquiry in terms of the Commissions Act 8 of 1947 or similar provincial legislation,\(^{109}\) he or she will be acting as an administrative functionary, rather than as a judicial functionary.\(^{110}\) Kolbatschenko v King NO\(^{110}\) affords a further example. The respondent, the Judge President of the Cape High Court at the time, was approached in chambers, in terms of the International Co-operation in Criminal Matters Act 75 of 1996, and pursuant thereto issued a request for international assistance in a criminal investigation. The court held, when review proceedings were instituted, that the issuing of the request and an informal request made by the state were administrative actions ‘by or on behalf of the South African Government, notwithstanding the fact that neither of the respondents is a member of the Executive’\(^{111}\).

The categorisation of the power to incarcerate recalcitrant examinees as a judicial power in De Lange v Smuts NO\(^{112}\) may be binding but its correctness is certainly open to doubt.

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\(^{108}\) See De’ath (Substituted by Tiley) v Additional Magistrate, Cape Town 1988 (4) SA 769 (C). See too Attorney General of the Gambia v N’jie [1961] All ER 504 (PC), 508 in which Denning LJ drew a distinction between the judicial and administrative functions of the Chief Justice of the Gambia. He held: ‘Some of the powers of the Chief Justice are clearly judicial powers, as when he sits in court to decide civil or criminal cases. Others are equally clearly administrative powers, as when he directs the times at which the offices of the court shall be open, or appoints notaries public, or makes rules of court.’

\(^{109}\) See Van der Merwe v Slabbert NO 1998 (6) BCLR 697 (N). In President of the Republic of South Africa v South African Rugby Football Union, supra, 1122I-1123A (paragraph 147), the Constitutional Court drew a distinction between the decision to appoint a commission, on the one hand, and the conduct of a commission, on the other. While the decision to appoint did not constitute administrative action, the ‘conduct of the commission, particularly one endowed with powers of compulsion, is a different matter’.

\(^{110}\) 2001 (4) SA 336 (C).

\(^{111}\) At 356J-357A.

\(^{112}\) 1998 (7) BCLR 779 (CC).
The reasoning of Ackermann J, for the majority, appears to be that because a magistrate is a judicial officer, it is competent for a magistrate to imprison a recalcitrant examinee but it is not competent for any other presiding officer to do so: whatever their qualities ‘they are officers in the public service – in the executive branch of the State – and therefore do not enjoy the judicial independence which is foundational to and indispensable for the discharge of a judicial function in a constitutional democracy based on the rule of law’. Ackermann J appears to have overlooked the fact that it is the function and not the functionary that is determinant of whether action is administrative or not. He also appears to have overlooked the fact that the Constitution requires of courts that they be independent and impartial, not people holding judicial office who carry with them these qualities to whatever function they engage in. The attempt by Sachs J to find an extended meaning for the term ‘court’ to include a person who carries out judicial functions is not convincing. On the other hand, O’Regan J’s judgment identifies the primary purposes of a creditors’ meeting as administrative in nature: it cannot be said, she held, that a creditors’ meeting ‘itself carries the hallmark of judicial independence and impartiality required of our courts of law’. And when the presiding officer has to deal with a recalcitrant examinee, O’Regan J held, the function of the presiding officer remains administrative in nature:

‘The fact that a person who is a judicial officer presides over the creditors’ meeting does not transform the proceedings of a creditors’ meeting into a judicial proceeding. Nor can the fact that the legislature confers a power generally reserved only to courts of law upon the presiding officer at such proceedings change the overall character of the proceedings. They remain administrative or quasi-judicial proceedings, albeit ones which have been clothed with an extraordinary and, in my view, procedurally unfair and inappropriate power.’

A somewhat similar problem of functional definition was raised in Bernstein v Bester NO.

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113 At 803I-804A (paragraph 59).
114 See by way of contrast South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).
115 At 852D-E (paragraph 177).
116 At 845G-846A (paragraph 160).
117 At 846F-G (paragraph 161).
118 1996 (4) BCLR 449 (CC).
a case that dealt with the constitutionality of s417 and s418 of the Companies Act 61 of 1973, sections that provided for the summoning and examination of persons on the affairs of an insolvent company. The applicants argued, inter alia, that the sections infringed s24(b) and s24(c) of the interim Constitution. Ackermann J stated, obiter, that he was unconvinced that the actions authorised by those sections were administrative actions as envisaged by s24. In reaching this conclusion, he indicated what he described as two major difficulties. First, he said:  

‘The enquiry in question is an integral part of the liquidation process pursuant to a court order and in particular that part of the process aimed at ascertaining and realizing assets of the company. Creditors have an interest in their claims being paid and the enquiry can thus at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have difficulty in seeing how s24(c) of the Constitution can be applied to the enquiry, because it is hard to envisage an “administrative action” taken by the Commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather evidence to facilitate the liquidation process. It is not aimed at making decisions binding on others.’

Secondly, in respect of the term ‘all legislative and executive organs of state’ contained in s7(1) of the interim Constitution and describing those bound by Chapter 3, Ackermann J said that he also had difficulty in ‘seeing how a commissioner, appointed to conduct a section 417 enquiry, can be described as an executive organ of state’. 

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119 Ackermann J expressed the view that, even if the actions involved were administrative actions, ss417 and 418 of the Companies Act were not in conflict with s 24 of the interim Constitution. (At 497F-498B (paragraphs 100 and 101)) Kriegler J agreed with this view. (At 506E-F (paragraph 131).)

120 In his criticism of this decision, Van Wyk ‘Administrative Justice in Bernstein v Bester and Nel v Le Roux’ (1997) 13 SAJHR 249, 252 and 252, footnote 13, says that Ackermann J’s starting point was that administrative action ‘for the purposes of s24 amounts to a classification, or, put differently, the expression is a constitutional term of art’. Secondly, Van Wyk says that the more one reads the relevant portions of the judgment in the light of the authority cited in it, ‘the harder it becomes to understand the conclusion that at common law an investigative enquiry may require procedural fairness, while under s24 of the Constitution a similar kind of investigation need not comply with procedural fairness because it is not administrative action as envisaged by the Constitution’.

121 At 496I-497B (paragraph 97).

122 At 497C (paragraph 98). Section 233(1)(ix) of the interim Constitution defined an organ of state to include ‘any statutory body or functionary’. Section 418(1)(a) of the Companies Act provides: ‘Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a Commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding up of any company.’
In *Jeeva v Receiver of Revenue, Port Elizabeth*¹²³ Jones J came to the opposite conclusion to Ackermann J. The applicants had been subpoenaed to appear at a s417 enquiry. They were all former directors or employees of two defunct companies and were suspected by the Receiver of having fraudulently divested the companies of assets and having stopped trading through them to defeat substantial claims for income tax and sales tax. The applicants had called on the Receiver to provide them with all information in his possession relevant to the enquiry. The Receiver refused to do so and the applicants launched an urgent application to compel the provision of the information. The applicants argued that they required the information in question for the exercise or protection of their fundamental rights in terms, inter alia, of s24 of the interim Constitution. Jones J held:¹²⁴

‘A commission of enquiry authorised by the Master of the Supreme Court and held under the machinery of the Companies Act is administrative action against the applicants which in this case has a material bearing upon their rights and interests. It is quasi-judicial in nature. The applicants are accordingly entitled to administrative action which is lawful, justifiable and both substantially and procedurally fair. Because they must submit to interrogation, they are entitled to prepare themselves to deal with the subject matter of the enquiry. They are entitled to equality before the law, which, in my view, includes equal access to the information held by the interrogator, especially if the interrogator is directly or indirectly an organ of State.’

This view of what constitutes administrative action must be preferred to Ackermann J’s narrower conception of public power.¹²⁵ If a commissioner appointed in terms of the Companies Act exercises a power in bad faith or for an improper purpose, a court would, if approached for relief, correct and set aside the commissioner’s unlawful exercise of power. In doing so it would apply administrative law principles. It would do so because a functionary, empowered by a statute and exercising a public power or performing a public

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¹²³ 1995 (2) SA 433 (SE).
¹²⁴ At 443I-444A.
¹²⁵ Van Wyk, op cit, 254 says that the limited reading of s24 of the interim Constitution ‘can easily result in little of the just remaining in the “administrative action”’. But see *Strauss v The Master* 2001 (1) SA 649 (T) in which Mynhardt J accepted as correct the views of Ackermann J in *Bernstein* and held that Jones J was wrong in *Jeeva*. In the light of developments since *Bernstein*, particularly the test set out by the Constitutional Court itself in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC), 1120A-D (paragraph 143), *Strauss* cannot be regarded as correct.
function in the administration of that statute, had exceeded the powers granted by the statute.

Steele v South Peninsular Municipal Council\textsuperscript{126} is an example of the type of issue that would not have been of any consequence prior to the enactment of a fundamental right to just administrative action: it would have been accepted without question that the decision of the respondent local authority to remove speed humps from a road was administrative action. Conradie J held, however, that this decision was not an administrative act. The decision, he held, ‘constituted the exercise of its constitutional authority and “right to govern … the local government affairs of its community” (s10C(3) of the Local Government Transition Act 209 of 1993, read with items 6 and 7 of Schedule 2A to the Act, which confers powers on the council in matters pertaining to road safety)\textsuperscript{127} and that all the council did was to pass a resolution ‘pursuant to its statutory obligation to see to traffic control and road safety within its area of jurisdiction’\textsuperscript{128}. In this passage, Conradie J has explained precisely what administrative action is – the taking of a decision by a duly empowered public authority in the administration of the functions entrusted to it by law – and why the decision was administrative action. It may have been so that no law that the respondent administered said specifically that it could construct and remove speed humps but that does not mean, as Conradie J held,\textsuperscript{129} that it did not ‘implement any particular law’. This simply means that the power concerned was an implied rather than an express one. An implied power, no less than an express power, must be capable of being traced back to a particular law. Indeed, Conradie J specifically identified the law that empowered the council to act as it did.

The point has been made above that the administration performs a wide range of functions and exercises a wide range of powers. Many of these are unique to the exercise of governmental powers but some are not. In the same way as an individual has the power

\textsuperscript{126} 2001 (3) SA 640 (C).
\textsuperscript{127} At 643B.
\textsuperscript{128} At 643J-644A.
\textsuperscript{129} At 644A.
to evict trespassers from his or her land, so too do public authorities that own or control land. In the same way as individuals may institute legal proceedings, many public authorities may also do so. Are the exercises of these powers or the performance of these functions instances of administrative action or is the public authority treated in the same way as a private individual in these instances?

A majority of the Appellate Division held in Mustapha v Receiver of Revenue, Lichtenburg,¹³⁰ that when the Minister of Native Affairs, as trustee of the South African Native Trust created by the Native Trust and Land Act 18 of 1936,¹³¹ cancelled a trader’s statutory permission to occupy a piece of trust land because the trader was Indian, he exercised a contractual power and could exercise that power in a racially discriminatory manner. He had, said Ogilvie Thompson AJA, a ‘complete discretion’ to cancel and, as with a private individual exercising a contractual power, ‘his reasons or motives for exercising an admitted right of cancellation of that contract or normally irrelevant’.¹³²

The relationship between contract and administrative law has generated some controversy in the past¹³³ but has been settled for some time: Administrator, Transvaal v Zenzile¹³⁴ laid to rest the suggestion that contract and administrative law could not co-exist. For this reason it is submitted that, even before the interim Constitution came into force, the majority judgment in Mustapha could no longer be accepted as correct. It can now be

¹³⁰ 1958 (3) SA 343 (A).
¹³¹ This Act was later known as the Development Trust and Land Act. Its original title has been used here for the sake of consistency with the usages of terms in the judgment.
¹³² At 358 D-E.
¹³³ See especially, in relation to the right to a hearing, Sibanyoni v University of Fort Hare 1985 (1) SA 19 (Ck), Mkhize v Rector, University of Zululand 1986 (1) SA 901 (D) and Scholtz v Cape Divisional Council 1987(1) SA 68 (C). For comments of these cases see Mureinik ‘Natural Justice for Students: The Case of the Undisciplined Contract’ (1985) 1 SAJHR 48, Hlophe ‘Natural Justice: Do Students Have Rights?’ (1987) 104 SALJ 255 and Harris and Hoexter ‘Administrative Law in Contractual Disguise’ (1987) 104 SALJ 557. See too Plasket ‘Rattling the Chains of Sibanyoni’s Ghost: Contract and Natural Justice Revisited in the Ciskei High Court’ (1999) 20 IILJ 2228.
accepted that Schreiner JA’s dissenting judgment articulates the correct approach to the control of statutory powers exercised through the instrument of a contract. He held:\textsuperscript{135} ‘Although a permit granted under sec. 18(4) of Act 18 of 1936 has a contractual aspect, the powers under the sub-section must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised.’

Despite this, the predilection with seeking to treat public authorities in the same way as private individuals rears its head from time to time. This is illustrated by the cases that follow.

In \textit{Uitenhage Local Transitional Council v Zenza}\textsuperscript{136} the applicant local authority had launched proceedings to evict a group of people from vacant land owned by it. The applicant had plans for a housing project on this land but would not have been able to obtain funding while the respondents were occupying the land. It was suggested by one of the respondents in his answering affidavit that the decision to evict was reviewable for want of a prior hearing having been given to the respondents. Jennett J held that the taking of this decision did not constitute administrative action because the applicant had not taken a discretionary decision as a public body. It was in the same position as any private land owner.\textsuperscript{137}

\textsuperscript{135} At 347D-G.
\textsuperscript{136} 1997 (8) BCLR 1115 (SE).
\textsuperscript{137} At 1118H–1119B. But see \textit{Bristol District Council v Clark} [1975] 1 WLR 1443 (CA) in which it was held that a decision taken by the council to evict a tenant was subject to review on administrative law grounds. At 1448, Denning MR held: ‘The powers of the local authority are contained in section 111 of the Housing Act 1957. They have the general management, regulation and control of houses provided by them. This means that they can pick and choose their tenants at their will; they can grant
In Smith v Kwanonqubela Town Council\textsuperscript{138} one Watson had been appointed to perform the functions of the respondent council, as all of its councillors had resigned shortly after passing a resolution entitling the appellant, the former chief executive officer of the council, to take early retirement on most beneficial terms. Watson’s authority expired on 2 February 1994 but, on 16 August 1994, he launched proceedings in the name of the council for the setting aside of the resolution and for the repayment of the benefits that had been paid to the appellant in terms of the resolution. On 2 December 1994, the Alexandria Transitional Council, which had subsumed the respondent, resolved to proceed with the application. It was argued by the appellant that the decision to launch the proceedings was not capable of ratification. The argument and the court’s conclusion is contained in the following lines of the judgment of Harms JA:\textsuperscript{139}

‘Watson’s contentious act was an administrative one; it was not authorised by law; an unauthorised act is invalid; an invalid act cannot be ratified. The argument, I fear, already breaks down at the first proposition and it becomes unnecessary to consider the others. The launching of legal proceedings is not an administrative act but a procedural one open to any member of the public.’

\[\textsuperscript{138}\textsuperscript{139}\]

\[\textsuperscript{138}\textsuperscript{139}\]
With respect to both Jennett J and Harms JA, it is unlikely that they are correct. In the first place, the fact that private individuals and public authorities are able to own land and to sue does not mean that their respective obligations in respect of how they exercise their rights of ownership or to litigate are identical. The private individual has the freedom to act arbitrarily, unfairly and irrationally, while a public authority does not. The public interest is central to all exercises of power by public authorities as they perform all functions and exercises all powers for and on behalf of the public and in their interests.

If Jennett J was correct, it would mean that a decision by a local authority to evict only those squatters who had not pledged to vote for the majority party in the next election would be lawful – or at least not be subject to control on administrative law grounds. Would Jennett J have washed his hands of the respondent's problems if, instead of alleging a breach of their right to procedural fairness, they had alleged that the applicant had infringed their right to lawful administrative action because the decision to litigate was passed in a meeting that was not quorate? Given these considerations, it is hard to see the basis upon which the decision to evict in Zenza was not administrative action. At the very least, the difference between the private owner and the organ of state that owns property is that the one owns the property for his or her own advantage and gain, while the other holds the property in trust, as it were, and is obliged to use the property to further the public interest. This very distinction is the very rationale for the application of public law controls over public institutions but not over individuals and private bodies.

The statement of Harms JA in Smith that a decision by an official to launch proceedings ‘is not an administrative act but a procedural one open to any member of the public’ is puzzling. In the first place the distinction that he drew tells one very little. There are many administrative acts that are procedural in nature. The giving of notice of a hearing is an example. The holding of a hearing is another. The notification of a decision is yet another.

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140 See, for an example of a local authority’s decision to sue being set aside on administrative law grounds, Woods v East London Municipality 1974 (4) SA 541 (E). See too, on decisions of local authorities to evict people from land Kayamandi Town Committee v Mkhwaso 1991 (2) SA 630 (C) and Greater Johannesburg Transitional Metropolitan Council v Main Reef Road Squatters WLD 20 December 1995 (case no 24502/95) unreported.
If an empowering provision provides either expressly or implicitly that a particular procedure is a prerequisite for the validity of an administrative act, non-compliance with the procedure will be fatal. That much is trite law. It is also trite that a public authority can only do what the law authorises it to do. This principle, in respect of local authorities such as the respondent in Smith, was established in South Africa in the 1840s at least: in Municipality of Green Point v Powell’s Trustees the court held that a municipality, being a creature of statute, ‘possessed no power or privileges except such as were expressly given to it’ by the ordinance that created it. As with the Zenza matter, Harms JA in Smith appears to have assumed that because the ability to litigate is a competence that a local authority shares with private individuals, the rules relating to the litigious acts of private individuals, rather than those relating to public authorities, apply. That is, to say the least, a questionable assumption. In both instances statute would have either expressly or impliedly granted the local authority the power to act and, in taking a decision to act, the local authority would be performing a function in the administration of that empowering statute. This means that the decisions in both cases were administrative actions.

That the private law-type functions of public authorities may also be controlled by the rules of administrative law emerges clearly from cases dealing with the contractual relationships of public bodies and the tendering process. The cases tend to indicate that even the heartland of the law of contract – the rules of offer and acceptance – bow to the regulation of administrative law. In other words, decisions by public authorities to contract or not to contract with particular parties are often administrative decisions. In Claude Neon Limited v City Council of Germiston an officer of the first respondent undertook to notify the applicant when the first respondent was about to invite tenders for the erection of illuminated street signs in Germiston. He failed to do so, the applicant did not tender and the contract to erect the signs was awarded to the second respondent. On these facts Zulman J set aside the contract between the first and second respondent. He held that the undertaking created a legitimate expectation on the part of the applicant that it would be

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141 (1848) 2 Menz 380.
142 1995 (5) BCLR 554 (W).
informed when the tender process was about to begin and that the failure to comply with the undertaking constituted an administrative act that was procedurally unfair.\textsuperscript{143}

The Supreme Court of Appeal was called upon, in Transnet Limited v Goodman Brothers (Pty) Ltd,\textsuperscript{144} to determine whether the appellant calling for and adjudicating upon tenders constituted administrative action. The court answered this question in the affirmative. Olivier JA identified what he termed the threshold requirement for determining whether Transnet was acting administratively as simply being whether it exercised a public power or performed a public function.\textsuperscript{145} He held that its activities in respect of tendering where administrative because the powers in question arose from the Legal Succession to the South African Transport Services Act 9 of 1989 and were ‘directly related to affairs not confined to the internal affairs of Transnet. Public funds and eventually state responsibility are involved’.\textsuperscript{146} Schutz JA, in a concurring judgment, held that administrative actions and decisions would have preceded the conclusion of a contract by the appellant and in giving effect to such a contract it, as a public body, would be spending public money in the public interest.\textsuperscript{147}

\textsuperscript{143} At 561I-562C. See too Gencor SA Limited v Transitional Council for Rustenburg and Environs 1998 (2) SA 1052 (T). In this matter the applicant and the second respondent had submitted tenders to purchase mineral rights from the first respondent but the first respondent had decided not to sell. It informed both parties of its decision and that the issue would be revisited at a later stage. Despite the fact that the applicant responded by indicating that it remained interested in acquiring the mineral rights, the first respondent, without further reference to the applicant, sold the mineral rights to the second respondent. On these facts, Kirk-Cohen J held that the first respondent had created a legitimate expectation that it would, before disposing of the mineral rights, inform the applicant of its intention and afford it an opportunity to bid for them (at 1061C). Reliance in this case was not placed on the Constitution because the contract between the first and second respondents came into existence prior to 27 April 1994. Kirk-Cohen J held that this fact did not distinguish Claude Neon in a material way because the common law doctrine of legitimate expectation predated the interim Constitution and both it and the final Constitution merely entrenched this doctrine (at 1063F-G).

\textsuperscript{144} 2001 (2) BCLR 176 (SCA).
\textsuperscript{145} At 188F-G (paragraph 36).
\textsuperscript{146} At 189D (paragraph 39).
\textsuperscript{147} At 192G-H (paragraph 7). See too Umfolozi Transport (Edms) Bpk v Minister van Vervoer [1997] 2 All SA 548 (SCA), 552j-553a.
It was held in Metro Inspection Services (Western Cape) CC v Cape Metropolitan Council\textsuperscript{148} that a decision by the respondent to cancel a contract with the first applicant constituted administrative action and consequently attracted the obligation to act fairly and to furnish reasons. The contract in question was authorised by s4(3)(a) of the Regional Services Councils Act 109 of 1985 and, in terms of it, the first applicant undertook to perform one of the respondent’s administrative functions, the collection of levies from levy payers. Cleaver J, in reaching the conclusion that the decision to cancel the contract was an administrative decision was influenced by three major factors: that the first applicant was appointed to perform statutory functions of the respondent, that the terms of the contract were inextricably bound up with the statute and that the decision to cancel the contract was ‘of the same nature of that which conferred on the respondent the right to contract with the first applicant’.\textsuperscript{149} He held:\textsuperscript{150}

\begin{quote}
'I accordingly conclude that when the respondent made the decision to terminate its agreement with the first applicant, the principles of administrative law applied to that decision. Applying the rationale expounded in Zenzile’s (supra) case, the respondent and decision-maker in regard to the decision to terminate the agreement is a public authority and since its authority to appoint the first applicant derives from a public power, it must, in my view, follow that its authority to terminate the agreement with the first applicant similarly derives from a public power. This, together with the peculiar content of the agreement, renders the agreement an administrative agreement in my view.'
\end{quote}

On appeal, in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC\textsuperscript{151} the court came to the conclusion that the appellant had not been acting administratively when it had cancelled the contract with the respondent. Streicher JA stressed that not every act of administration performed by an organ of state is subject to s33 of the Constitution: the section is ‘designed to control the conduct of the public administration when it performs an act of public administration: ie when it exercises public

\textsuperscript{148} [1999] 1 All SA 115 (C).
\textsuperscript{149} At 125f-j.
\textsuperscript{150} At 126b-c.
\textsuperscript{151} 2001 (3) SA 1013 (SCA).
power'. He held that although the power to contract was statutory in nature, the power to cancel the contract in question derived from the contract and the common law:

‘Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.’

Streicher JA appears to have given a great deal of prominence to the fact that the power to cancel was not statutory in origin and to the relative parity in bargaining power of the parties to the contract. These points raise issues of some importance and place question marks over the court’s conclusion. First, it was pointed out that certain regulations gave the appellant the power to cancel contracts on grounds specified therein. Streicher JA’s answer to this was that the appellant had not purported to cancel in terms of those regulations but had acted outside them, relying on a common law power to cancel. This begs the question of whether, when a statutory power is given to enter into contracts and another statutory provision specifies the grounds upon which contracts may be cancelled by local authorities, the common law power to cancel still exists. Far from resolving the problem, this appears to raise another one related to the principle of legality. Secondly, Streicher JA appears to have placed far too much stress on the source of the power to cancel. It has been accepted, since R v Panel on Take-Overs and Mergers: Ex Parte Datafin PLC that it is the nature of the power, not its source, that is decisive of whether the exercise of a power

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152 Para 16.
153 Para 18.
154 1987 QB 815 (CA).
or the performance of a function is subject to control on the basis of lawfulness, reasonableness and procedural fairness. Thirdly, Streicher JA appears to have answered the question whether the appellant was acting administratively by asking whether the respondent needed the protection of s33. As the respondent was powerful enough to look after itself, there was no need to give it any of the protections that administrative law has to offer. This is no way to determine whether the appellant was acting administratively because it would have meant that a different answer would have been called for if the respondent was not as able to look after itself.

What emerges from the cases it that there is a disturbing amount of confusion among judges on the question of what administrative action is. As the confusion arises from the interpretation of the term as it is used in s33 of the Constitution, and centres on what public power is, or what public functions are, it is a state of confusion that will be carried forward into the interpretation of s1(i) of the Promotion of Administrative Justice Act. Short of intensive judicial training in public law, and meticulous advocacy to highlight the errors in many of the judgments cited above, it is difficult to recommend a solution to the problem. Perhaps the tendency, evident in some of the judgments, to retreat to the comfort of private law rather than engage with what the rules of public law require of public bodies exercising public powers under the Constitution, points to a need for more extensive courses in public law disciplines in South African law faculties.

This said, the importance of the Transnet matter should not be underestimated. What emerges from it is that in the South African system of administrative law the scope for public bodies created by statute being able to avoid the discipline of administrative justice through contract is small. As soon as the body purports to exercise statutory power and it is required to do so in the public interest, the rules of administrative law become operative. The scope for the reasoning of the majority in Mustapha’s case has been severely limited by a more realistic view of how public power is exercised in the modern state. In this context, the judgments in Zenza, Smith, Steele and Cape Metropolitan Council, criticized above, can be seen as decisions that have not engaged with the issues
meaningfully and have not come to terms with the reality that administrative action, in the modern state, is exercised in numerous ways, including through the use of techniques usually associated with the ordering of private affairs.

4.3.5. The Promotion of Administrative Justice Act

(a) Introduction

The Promotion of Administrative Justice Act contains a definition of administrative action that differs in some important respects from the definition developed by the courts. Section 1(i) of the Act defines administrative action in two ways. First, it says what administrative action is and then it says what administrative action is not. It provides in the first instance that administrative action means ‘any decision taken, or any failure to take a decision’ by either an organ of state when it is ‘exercising a power in terms of the Constitution or a provincial constitution’ or ‘exercising a public power or performing a public function in terms of any legislation’ or by ‘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’ if such decision or failure to decide ‘adversely affects the rights of any person and which has a direct, external legal effect...’.

In terms of the remainder of s1(i), the following exercises of power do not fall within the definition of administrative action:

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139, and 145(1) of the Constitution;

(cc) the executive powers and functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special
Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
(ff) a decision to institute or continue a prosecution;
(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
(ii) any decision taken, or failure to take a decision, in terms of section 4(1).’

Section 1(i) suffers from deficiencies which raise the question of whether it is in accordance with the Constitution’s instruction to the legislature to give effect to the rights contained in s33. The problems stem directly from the restrictive approach taken by the legislature to administrative justice. In this sense, s1(i) appears to be part of a larger design aimed at limiting the scope of the rights and making them more difficult to exercise than their common law equivalents. It is part of a package of measures that includes the time limits in s7 and s9, the requirement that internal remedies be exhausted, in s7(2), and the downgrading of the law reform proposals contained in the South African Law Commission draft bill to rather vague discretions vested in the Minister, to name three obvious examples.

(b) Section 1(i): Adverse, Direct, External Legal Effect

The two major deficiencies of s1(i) are the curious mish-mash of random limits to the definition of administrative action itself and the equally random nature of the specific exclusions from the definition. The problem is highlighted in general terms by Hoexter as follows:

‘Section 1 of the Act is not content with noting a series of exclusions from the definition of administrative action. It also stipulates the features that must be present before action can qualify as “administrative action”. There must be a “decision” by an organ of state or a natural or juristic person which “adversely affects the rights of any person and which has a direct, external legal effect”. This is a startling departure both from the definition proposed by the South African Law Commission and from the common law, and in my view its effect is to narrow the ambit of administrative action beyond

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what is acceptable. Most notably, it means that in the absence of a right – and moreover, one that is adversely affected – there is simply no entitlement to administrative justice. It means that there is no such entitlement even in relation to “lawful” administrative action, the most fundamental requirement of all; a requirement so fundamental, in fact, that the Constitutional Court has insisted on it in relation to action that is not administrative.'

The practical problems that will be generated include the following. First, the right to just administrative action through the Act may not apply to advisory or investigative action because they will not adversely affect rights, in themselves.\(^\text{156}\) The discredited case of Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad\(^\text{157}\) and its progeny may return in a slightly different manifestation and in so doing contribute to the undermining of administrative justice.\(^\text{158}\) Secondly, the lifting of the phrase ‘direct, external legal effect’ from German law, without reference to its role, purpose or context in that system may generate confusion or worse in South African law. One recalls that the borrowing of the German concept of negating the essential content of a right, grafted onto the limitation provision in the interim Constitution, was not a success. Hoexter says that the ‘drafters of the statute may yet have cause to regret the uncritical borrowing of this German formulation, which seems to have captured the imagination of the Portfolio Committee on Justice in December 1999, at a fairly late stage in the gestation of the Act. The concept of “direct, external legal effect” is entirely foreign to South African jurisprudence, and its hasty incorporation in the Act may well have unimagined consequences’.\(^\text{159}\)

\(^{156}\) Hoexter, op cit, 515.

\(^{157}\) 1959 (3) SA 651 (A). See Baxter, 585-587. He describes the approach in this case as representing ‘an almost primitive reaction to the growing complexity of the administrative process’ (at 587).

\(^{158}\) In Cassem’s case, it was held that an affected person had no rights to natural justice apart from those expressly stated in the Act in question when the respondent board investigated whether to recommend that a particular area be proclaimed a group area for a particular race. In this investigation phase, the board did not affect the rights of any person because it only had powers of recommendation. A group area was proclaimed by the Governor-General who considered the recommendation of the appropriate Minister, who in turn had considered the recommendation of the board. No person was entitled to be heard by the Governor-General because he did not act quasi-judicially but administratively when he decided to issue a proclamation, despite the fact that this act did affect rights. (See in particular, 659B-660F.)

\(^{159}\) Hoexter, op cit, 515, footnote 150. See for an explanation of this term in German administrative law, Pfaff and Schneider ‘The Promotion of Administrative Justice Act from a German Perspective’ (2001) 17 SAJHR 59.
Thirdly, apart from seeking to serve as a pointer that the term ‘administrative action’ is to be narrowly construed, it is far from clear what other useful purpose the German formulation serves. It makes little sense to define administrative action by the severity of its effects on rights. Even if this is the way it is done in Germany, this is add odds with the way in which the South African legal system works. In South Africa, the requirement of prejudice to an applicant for judicial review is what makes an issue justiciable and distinguishes it from academic matters that courts are not willing to hear: if there is no prejudice to the applicant, he or she cannot be said to have had a right infringed and hence will have no entitlement to a remedy. An administrative act that has a minor effect, no effect on a right or a beneficial effect remains an administrative act. To argue the contrary is to argue against common sense and rationality. Parliament’s conceptual confusion and its unwise borrowing from Germany is bound to cause confusion. Its irrationality is apparent from an example given by Currie and Klaaren who say that the import of this aspect of the definition of administrative action means that a decision to refuse a licence is administrative action but a decision to grant a licence is not. The constitutionality of this part of the definition of administrative action must be open to grave doubt. The wisest course that could be followed would be for Parliament to amend the definition before too much damage has been done.

(c) Section 1(i): The Exclusions

(i) Executive Powers and Functions

In the remainder of s1(i) – the specific exclusions – one finds more of the same type of difficulties. While, in general terms, the exclusion of the executive powers or functions of the national executive and even the provincial executives are justified, the exclusion of the

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160 The Promotion of Administrative Justice Act Benchbook Cape Town, Siber Ink: 2001, 76. The authors appear to suggest (at 75-76) that in determining adverse effect, a court will have to look at all of the effects of the action alleged to be administrative action and to weigh up whether they are adverse or beneficial. This is not correct but it illustrates the confusion that bad legislation can create and, perhaps, foretells of difficulties to come.
‘executive powers or functions of a municipal council’ are less easy to justify. The first two exclusions are, in general and subject to the criticisms levelled below, no more than a statement that powers in the nature of prerogative powers on both national and provincial levels are not the subject matter of administrative law. The case law supports this approach. No similar argument can be made in favour of excluding executive powers and functions in the local sphere. Municipal councils have never had prerogative powers and it would be taking a quest for uniformity a bit far to treat a municipal executive in the same way as the national or provincial executive. Furthermore, while the Constitution contains an exhaustive list of the executive powers and functions of the national and provincial executives, no similar powers and functions are vested in municipal executives. All that this inclusion does is create the potential for disputes about the divide between executive and administrative powers and functions where no need exists for such disputes. Once again, the potential for confusion is created by thoughtless legislative action.

The structure and specific content of s1(i)(aa) and s(1)(i)(bb) requires comment. Both subsections start with the general proposition that the executive powers and functions of the executive in the national and provincial spheres do not constitute administrative action. Then, both sub-sections specifically exclude what appears to be a random list of executive power or functions. So, for instance, the power of the President or a Premier to assent to bills, to sign them, to refer them back to the legislature and to refer them to the Constitutional Court are all listed. But the power vested in the President to declare a state of national defence in terms of s203 – the ultimate executive power – is not mentioned. One presumes that this omission will be remedied by the general part of s1(i)(aa).

The specific and deliberate omission of two former prerogative powers contained in s84(2)

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161 While provincial executives prior to 1994 never enjoyed prerogative powers, provincial executives after 1994 derived their powers directly from the Constitution and were modelled on the national executive. Their functions are similar, if less extensive, and it is therefore appropriate that the executive powers and functions of provincial executives are excluded from the definition of administrative action.

162 See Constitution, s79(1), s79(4), s121(1) and s121(2).
is even more curious. Every sub-section of s84(2) is mentioned in s1(i)(aa), and is thus excluded specifically from the definition of administrative action, except for s84(2)(e) and s84(2)(j). These are the powers to make appointments that the President is required to make by the Constitution or legislation and in which he acts ‘other than as head of the national executive’, and the power to pardon and reprieve offenders and to remit fines, penalties and forfeitures. Does their deliberate exclusion from s1(i)(aa) mean that the legislature intended them to be regarded as administrative acts or was the intention that, like the power to declare a state of national defence, the fact that they are not mentioned specifically will be remedied by the general terms of the section?

It is submitted that these exclusions in the circumstances outlined above must be taken to mean that the legislature considered the powers and functions concerned to be instances of administrative action. If the legislature had intended their inclusion, it would have achieved this easily. It would simply have referred to s84(2) rather than mentioning each sub-section of s84(2) apart from the two mentioned above. What makes the exclusion of s84(2)(j) even more puzzling is that the Constitutional Court accepted in President of the Republic of South Africa v Hugo that the power to pardon offenders was a former prerogative power and, consequently, it held in President of the Republic of South Africa v South African Rugby Football Union that the exercise of such a power could not be said to constitute administrative action.

Section 91 provides a further example of the interpretive difficulties that s1(i)(aa) has generated. The powers and functions contemplated by s91(2), s91(3), s91(4) and s91(5) are excluded from the definition of administrative action. Section 91(2) vests in the President the power to appoint the Deputy President and Ministers, to assign to them their portfolios and to dismiss them. That is clearly an executive, rather than an administrative, power. Section 91(3) stipulates how the President selects the Deputy President and Ministers. It provides that all must be drawn from the National Assembly except for two

163 1997 (6) BCLR 708 (CC).
164 1999 (10) BCLR 1059 (CC).
Ministers who may be drawn from elsewhere. Section 91(4) provides that the President, not being a member of Parliament, must appoint a Minister as leader of government business in the National Assembly. Section 91(5) provides that the ‘Deputy President must assist the President in the execution of the functions of Government’.

The section raises one major difficulty. The s91(5) exclusion appears to mean that when the Deputy President assists the President in the execution of the functions of government, the Deputy President acts in an executive capacity irrespective of whether the President in any specific aspect of the execution of the functions of government is acting in an executive or administrative capacity. That is obviously absurd but it is the literal meaning of s91(5) read with s1(i)(aa). Rather than include all but s91(1), the drafters of s1(i)(aa) ought only to have included s91(2) and s91(4). Section 91(3) simply prescribes one form of qualification that the Deputy President and the Ministers must possess. It does not empower the President in any way or vest the performance of a function in him.

Section 92(3)(a) provides that Cabinet members must act in accordance with the Constitution and s92(3)(b) provides that they must give full and regular reports to Parliament. These functions are excluded from the ambit of administrative action by s1(i)(aa). Section 133(3) is the equivalent provision in respect of provincial executives. Section 133(3)(a) requires compliance with the Constitution on the part of members of provincial executives and s133(3)(b) requires them to report to their respective legislatures. Section 1(i)(bb) excludes from the ambit of administrative action in the provincial sphere only the reporting requirement and not the constitutional conduct requirement. Two points need to be made about this. The first is the obvious point that the legislature has acted irrationally by including both aspects of s92(3) but only one of the equivalent aspects in the provincial sphere, s133(3). The second point is that it makes no sense to define as, or exclude from, the definition of administrative action an obligation placed on the national executive to act constitutionally. Such an obligation is not a power or a function.

(ii) Legislative Powers and Functions
The simplicity of the formulation that the legislative powers and functions of legislative bodies created by the Constitution are excluded from the definition of administrative action has much to commend it. The Act would probably be the better for similar brevity in other subsections of s1(i). This provision should create few problems of interpretation.\textsuperscript{165}

(iii) Judicial Powers and Functions

Along with the judicial functions of the courts referred to in s166 of the Constitution, the exercises of power of, and the performance of functions by, a Special Tribunal established by the Special Investigating Units and Special Tribunals Act 74 of 1996 are excluded from the ambit of administrative action. It is not clear why this exclusion was deemed necessary whereas other similar tribunals, like the Competition Tribunal and the Competition Appeal Board, in particular, are not excluded. Perhaps it is because the Act creates an appeal from a Special Tribunal to the High Court, but there are numerous examples of similar appeals in other statutes. One thinks, for instance, of the appeal from a decision of the Review Board to the High Court, created by s21 of the Films and Publications Act 65 of 1996. Perhaps it is because the Special Tribunal is presided over by a judge. But other tribunals presided over by judges or magistrates, such as inquest courts, are not mentioned. The nub of the problem is not that Special Tribunals are excluded but rather that only Special Tribunals are excluded. This smacks of arbitrariness and a rather careless approach on the part of the legislature.

(iv) Decisions to Prosecute

There also appears to be no sound basis in principle for excluding from the ambit of administrative action, decisions to institute or continue prosecution. Such decisions are

\textsuperscript{165} See for instance Ed-U-College (Section 21) PE Inc v Permanent Secretary, Department of Education and Welfare, Eastern Cape 2001 (1) SA 257 (SE) and Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (Section 21) PE Inc 2001 92) SA 1 (CC).
subject to internal review by the National Director of Public Prosecutions but no more. They are administrative decisions even if they tend to be difficult to review in practice.

(v) Decisions of the Judicial Service Commission

It is only one type of decision of the Judicial Service Commission that is excluded from the definition of administrative action, namely those decisions that have to do with the appointment of judicial officers. It is not apparent why this is so. Once again, the exclusion appears to be arbitrary. Perhaps Parliament was motivated by a desire to insulate the Commission from giving reasons for its decisions.

(vi) Decisions in Terms of the Promotion of Access to Information Act 2 of 2000

Section 1(i)(hh) excludes from the ambit of administrative action ‘any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000’. In other words, and in broad terms, the exclusion is of decisions taken by officials, governmental or private, to grant or refuse access to information that has been requested by a person in terms of the Act. This falls squarely within what is generally understood to be administrative action but for some reason Parliament has chosen to proclaim, irrationally, that it is not administrative action. The Act makes provision for an internal appeal against decisions taken by information officers in some cases and for a review thereafter which must be launched within 30 days. The court is empowered to determine whether decisions under challenge complied with the provisions of the Act and

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166 See s179(5)(d) of the Constitution which states that the National Director of Public Prosecutions may review such a decision taken by a Provincial Director of Public Prosecutions after consulting him or her and after considering representations by the accused, the complainant and any other relevant person.

167 See Baxter, 333 who wrote in 1984: ‘If there are signs that the standards of review relating to prerogative powers are beginning to be harmonized with those relating to other powers, the same may be said of the discretionary powers of the Attorneys-General and public prosecutors. For long these were regarded as virtually non-justiciable. Courts fell over backwards to assert the impeccable qualities of Attorneys-General. This unrealistic attitude has begun to change with the normal standards of review at last being applied to both prosecutors and Attorneys-General.’

168 Section 81(3).
may grant orders that are just and equitable.\textsuperscript{169}

There is no readily apparent reason why this particular type of administrative action should be deemed not to be administrative action. The Liquor Act 27 of 1989, to take a random example, has something of a similar structure. It creates a right to reasons,\textsuperscript{170} a statutory review\textsuperscript{171} and an appeal to the High Court on questions of law.\textsuperscript{172} Despite this elaborate system, exercises of power or the performance of functions in terms of this Act are, correctly, not excluded from the definition of administrative action. There are many other similar examples. The conclusion is inescapable that this exclusion is arbitrary.

(vii) Decisions in terms of Section 4 of the Promotion of Administrative Justice Act

Much the same criticism can be levelled against the exclusion of decisions taken or failures to take decisions in terms of s4(1) of the Act itself. Indeed, this exclusion reaches a high point of make-believe because a decision which is by the legislature’s own definition an administrative decision is specifically said not to be one. This tends to disclose once again the conceptual confusion that characterises the Act as a whole. The heart of the confusion is the tendency, commented on above, to define administrative action in terms of its effects. In all probability a decision to hold a public enquiry rather than to follow a notice and comment procedure will not be set aside on review, not because it is not administrative action, but because the applicant would be hard pressed to prove prejudice and hence an entitlement to a remedy. If the applicant was able to show prejudice, he or she would still be able to review the decision whether it is characterised as administrative action or not. If the legislature wished to insulate these types of decisions from the duty to give reasons, it should have said so. Even that, as a motivation for the exclusion has its problems. In most instances a person who asks for reasons for a decision to hold a public enquiry rather

\textsuperscript{169} Section 82.
\textsuperscript{170} Section 130.
\textsuperscript{171} Sections 131 and 132.
\textsuperscript{172} Section 134.
than a notice and comment procedure would not be able to show that his or her rights had been adversely affected and hence would not be entitled to reasons in terms of s5 of the Act. If he or she was able to cross this threshold, it is hard to imagine why the legislature would want to deny him or her a right to reasons.

4.4. Conclusion

Two major problems that go to the heart of the development of a system of administrative law that properly articulates the values of the Constitution have emerged in this chapter. The first is that a number of judges have not come to terms with what is meant by the term administrative action. This confusion has had the effect of allowing some exercises of public power to escape the discipline of s33 of the Constitution. More disturbingly, at least some of the judges who have erroneously excluded particular exercises of power from the operation of s33 appear to have assumed that this means that the power is not subject to control, or to particular controls that are entrenched in s33. This problem is even to be found in the Constitutional Court’s judgment in *President of the Republic of South Africa v South African Rugby Football Union*. In this matter, for instance, the erroneous assumption was made that because the President’s decision to appoint a commission of enquiry was not an administrative act he was under no obligation, for this reason, to hear the respondents or to give reasons for his decision. In all probability, the President did not have to give a hearing because it is not unfair to appoint, without hearing people, an investigative body that will not have the power to affect the rights of anyone.

It would be surprising if s1(c) of the Constitution did not embrace a conception of the rule of law that included the requirements of procedural fairness. More than that, this would run counter to the Constitutional Court’s own view, perhaps not expressed in the clearest of terms, that procedural fairness does indeed form part of the rule of law envisaged by the Constitution as one of its founding values. Similarly, it may well be that there was no

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173 1999 (10) BCLR 1059 (CC).
174  *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC), 799E-H (paragraph 46).
basis for ordering the giving of reasons, but it does not necessarily follow that because a person is not entitled to reasons in terms of s33, he or she is not entitled to them at all. The development of an extensive duty to give reasons in other jurisdictions, either as a means of ensuring the effectiveness of the courts as the institutions empowered to control the exercise of public power, or as a third leg of procedural fairness, point to the danger of assuming that no right to reasons can be developed through s1(c) and s1(d) of the Constitution.175

The answer to this problem lies, in the first instance, in judges themselves equipping themselves for their enhanced role as watchdogs over the exercise of all public power. This means that judges have to come to terms with what is expected of a judiciary in a constitutional state that is democratic and has a justiciable Bill of Rights and functions according to the values contained in s1 of the Constitution. The type of approach that is necessary has been articulated by Froneman J in two of his earlier constitutional judgments (and echoed in many of his later judgments), namely Qozoleni v Minister of Law and Order176 and Matiso v Officer Commanding, Port Elizabeth Prison.177

In the former case, he stated that it is important for judges to be cognisant of the criticisms of the performance of the judiciary in the protection of human rights under the old order.178 Implicit in this statement is the idea, it is submitted, that judges must consciously ensure that their judgments articulate the new constitutional ethos and avoid the comfort of a ‘business as usual’ approach to the judicial review of public powers. Secondly, Froneman J stated that if the Constitution was to serve its purpose of serving as a bridge from authoritarian rule to a system based on ‘openness, democratic principles, human rights, reconciliation, reconstruction and peaceful co-existence’ it was required to be interpreted to give clear expression ‘to the values it seeks to nurture for a future South Africa’ and that

175 See chapter 11 below.
176 1994 (1) BCLR 75 (E).
177 1994 (3) BCLR 80 (SE).
178 At 79F-H.
this should be done in such a way that it is ‘a living document for all the citizens of the country and not only for the chosen few who deal with it in courts of law’.\textsuperscript{179} All of this entails a recognition on the part of judges that ‘the previous constitutional system of this country was the fundamental “mischief” to be remedied by the application of the new Constitution. That Rubicon needs to be crossed not only intellectually, but also emotionally, before the interpretation and application of the present Constitution is to fully come into its own right’.\textsuperscript{180} In much the same vein, in \textit{Matiso}, Froneman J stated that much of the criticism of the performance of the judiciary in the apartheid era was in truth directed at the failure of the judges to recognise the ‘fatal flaws’ in the system that they were part of, that they were performing their functions within a warped system in which Parliament was not representative and discriminated against those who were not represented in it and that they failed to ‘make adjustments accordingly, insofar as it was possible to do so in the fields of, say, statutory interpretation and administrative law’.\textsuperscript{181}

Apart from pointing to the need for judges to approach their functions from a proper perspective when they are called upon to serve as protectors of the citizenry against the excesses of government, it is difficult to point to more specific ways of remedying the state of confusion that presently detracts from progress towards a democratically compatible and properly developed system of administrative law. Judicial training is of immense importance and is being taken more than before by the judiciary itself. The point has been made elsewhere of the need to re-assess law faculty curricula so that law students go into practice or into other spheres of legal activity with a proper understanding of public law and its place in the legal system of early 21\textsuperscript{st} century South Africa. That too is of great importance. And of course, decisions in the courts are often only as good as the counsel who appeared! This raises questions about the way in which administrative law is developed in South Africa’s young democracy. There is a need for the type of focused litigation that made for the development of labour law in the 1980s. The need for strong

\begin{footnotes}
\item At 80G-I.
\item At 81H.
\item At 87C-E.
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bodies involved in public interest litigation, like the Legal Resources Centre, the Centre for
Applied Legal Studies and the law clinics of university law faculties are obvious examples
of organs of civil society that should play an important role in the development of
administrative law.

The second problem is of the legislature’s making. It would appear that the legislature had
no rational plan when it set about defining administrative action and, more particularly, in
determining the exclusions from the definition: the German concepts were borrowed on a
whim; a misconception of the nature of the powers in question brought about the exclusion
of executive functions in the local sphere of government; a confusion over powers,
functions and obligations and a less than ordered approach created logical havoc in the
other executive action exclusions; and arbitrariness pervaded much of the rest of the
exclusions, as has been shown above. The constitutionality of some of the exclusions may
be challenged. If this happens, the arbitrariness of their inclusion in the Act will make
justification for limiting the right to just administrative action well nigh impossible. They will
probably breed more confusion, rather than less, as courts grapple with their meaning, their
scope and their consequences. There is little to be said for trying to make do with what is
obviously a bad job. Parliament should obtain expert advice, follow that advice and amend
the Act before too much harm is caused. That is the obvious route to follow.

If left as they are, the most important result of the arbitrariness of the exclusions is that they
will probably be the breeding ground for an alternative administrative law sourced directly
in s1(c) of the Constitution. The false assumptions that have been made about the
consequence of exclusion from the definition of administrative action have been pointed
out above. It can be accepted that if a power is not administrative but is nonetheless a
public power, it will be subject to review by virtue of s1(c), if no other provision of the
Constitution applies to control that power. The principle of legality as articulated by the
Constitutional Court consists of rules of administrative law applied under another name. In
this sense s1(c) appears to be something of the poor relation of s33: it mirrors s33 at the
moment, except for the right to reasons and, to an extent, the right to be treated in a
procedurally fair manner. The rule of law, however, is not only concerned with legality in the strict sense – what Baxter calls ‘law following’ – but also with procedural justice. It would be most surprising, given this fact, if the courts were to free those exercising public powers to act unfairly simply because those public powers could not be said to be administrative, as defined in s1(i) of the Act. Review in terms of s1(c) therefore can be taken to have all of the ingredients of review envisaged by s33(1). All that is required is for the right to procedural fairness to be fully recognised by the courts.

The right to reasons, the only remaining difference between the principle of legality and the right to just administrative action, may also be developed by the courts. Just as the rule of law is central to the Constitution, so too are the values of accountability, responsiveness and openness, contained in s1(d), and which are at the heart of the development of what Mureinik called a culture of justification. The basis upon which the courts have, in the past, refused to recognise the general duty to give reasons is, with respect, so inadequate and so out of kilter with the Constitution that it can hardly stand in the way of the development of such a duty by the courts. The utility of the right to reasons would be to act as a safeguard against arbitrariness and to ensure ‘reason and justification when rights are sought to be curtailed’.

It is often said that the law in common law jurisdictions like South Africa does not recognise a general right to reasons. That statement may well have been accurate a decade ago, but is not necessarily accurate today. In India, as will be shown in chapter 11 below, the courts developed a general duty to give reasons so that they could properly fulfill their role as protectors of the Constitution: how, they asked, could they ensure that public powers were not exercised arbitrarily if the decision-maker did not disclose his or her reasons? In

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182 At 77.
185 S v Makwanyane 1995 (6) BCLR 665 (CC), 725I-J (paragraph 156).
England the duty to give reasons has been developed as a third leg of procedural fairness where, it would appear, a right to review or to appeal against a decision will unlock a right to reasons. Would a South African court really refuse to order a Director of Public Prosecutions to give reasons if he or she had decided to withdraw a charge against a person, when asked for reasons by the victim of the crime concerned, so that the victim could have the decision reviewed by the National Director of Public Prosecutions in terms of s179(5)(d) of the Constitution, read with s22(2)(c) of the National Prosecuting Authority Act 32 of 1998? If a court did refuse to order the giving of reasons, it is hard to imagine that its judgment would be one that articulated, and was based upon, the values of the Constitution.

Similarly, when the decision of an information officer who refuses to provide access to information requested in terms of the Promotion of Access to Information Act is taken on review, a court will apply the principles of administrative law in determining whether the information officer has acted properly: his or her decision will be set aside if one or more of the grounds contained in s6(2) of the Promotion of Administrative Justice Act are found to be present, even though the court will not be applying that Act but will be interpreting the Promotion of Access to Information Act and supplementing it with the review jurisdiction created by s1(c) of the Constitution.

These examples of review of administrative action outside of the scope of the Act highlight the problem that bad legislative work has caused. It is probably not in the best interests of the orderly development of South African administrative law that these two streams of statute-inspired and constitutionally inspired administrative law exist side by side but, given the problems that are inherent in the Act, this is inevitable unless Parliament takes the necessary steps to achieve harmony by improving the Act. As matters stand, however, the legislature has done no favours for the cause of administrative justice: it must be said that this cause would have been better served by the direct application of s33 of the Constitution, unhindered by legislation, as had happened from 1994 until the bulk of the Act came into force on 30 November 2000.
CHAPTER FIVE: ADMINISTRATIVE LAW IN THE PRIVATE SPHERE

5.1. The Public Law/ Private Law Divide

5.1.1. Public Power

The meaning of public power is a topic of particular importance for public lawyers because changes in the way governments administer keeps the issue alive as the boundary line between public and private shifts over time. The first Breakwater Declaration of 1993, in setting out what it termed ‘points of departure’ defined public power to include ‘not only the power exercised by government institutions at all levels and of different kinds’ but ‘also the exercise of power in some circumstances by nominally private bodies’. The declaration concluded that in a democracy ‘the exercise of public power should be accountable and be required to conform to the principles of fairness, equality and responsiveness’. The second Breakwater Declaration of 1996 dealt with the nature of public power more extensively. It said of public power:


2. The first Breakwater Declaration was the product of a conference of eminent public law experts from South Africa and abroad, hosted by the Department of Public Law at the University of Cape Town. The purpose of the workshop was to address administrative law reform ‘at a time when political events have made constitutional negotiations the centre of attention, further emphasising the urgency of the need for a viable system of both empowerment and accountability of a future South African executive’. (Corder ‘Introduction: Administrative Law Reform’ 1993 Acta Juridica 1, 1.) See chapter 1 above.

3. The first Breakwater Declaration is reproduced in 1993 Acta Juridica 18-20. The aspects of it which are quoted above are at 18 (para I(iii)). The document is prefaced by the following disclaimer: ‘This document is not intended to be the final word on administrative law reform. Rather, the aim is to contribute positively to the debate about administrative justice in a future South Africa. With the exception of the constitutional entrenchment of a right to administrative justice in Part IV below, the general thrust and framework of this declaration are supported overwhelmingly by the workshop participants.’ Despite these qualifications, the first Breakwater Declaration has been influential. Corder, writing at the time of the second Breakwater conference in 1996, says, quite correctly, that the 1993 Declaration ‘set the agenda for the development of administrative law reform in South Africa over the next three years’. (Corder and Maluwa ‘Administrative Justice in Southern Africa: Background and Some Issues’ in Corder and Maluwa, op cit, 3, 4.)

4. Corder and Maluwa, op cit, 14 (paragraph 6.).
The definition of public power, it is conceded, represents contested ground. Its complexity requires continual investigation because its scope and nature are ever changing. Public power is a creature of evolution: it includes not only the power exercised by governmental institutions at all levels and of different kinds, but also the exercise of power in some circumstances by nominally private bodies. Public functions exercised by such nominally private bodies should also be controlled by public law. A sophisticated and flexible measure of public power must, therefore, be developed, dependent on concepts such as: the availability of alternative means of control; the nature and extent of the power wielded; the vulnerability of the citizen; whether the public body operates in a competitive or monopolistic environment; and the applicable rules of private law.

The Promotion of Administrative Justice Act has included in its definition of administrative action the exercise of public power or the performance of public functions, in terms of an empowering provision, by natural or juristic persons other than organs of state. This definition does not, however, demarcate between the public and the private spheres any more clearly than the Breakwater Declarations or, for that matter, the rules of the common law. The line between the public and the private acts of natural and juristic persons will still have to be drawn, on a case by case basis, by the courts. In this endeavour, the courts must be guided by the particular values of the Constitution that relate to accountability, openness and responsiveness and the Constitution’s commitment to control excesses of power on the horizontal as well as the vertical plains.

5.1.2. Private Actors.

Davis says that the ‘blurring of the boundaries (between the private and public spheres) is now accepted wisdom but its translation into the body of law has proved more complex’.  

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5 One presumes that this reference to a ‘public body’ should have been a reference to a ‘private body’, given the context of the passage as a whole.
6 The term ‘empowering provision’ is defined in s1(vi) of the Act as ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’.
7 Section 1(i).
8 Davis “‘Public Power”: Do Administrative Lawyers Really Care?’ in Corder and Maluwa, op cit, 43, 45. De Smith, Woolf and Jowell, at 155 (paragraph 3-001), say of the distinction between public and private law that ‘today, the existence of a divide separating public and private law probably causes
Despite this difficulty, it is of some importance that the boundary be identified because different consequences may flow from whether an exercise of power is held to be public or private. In South Africa, unlike in England, the distinction does not (at the moment) have significant procedural implications but it does affect the substantive principles of law that apply – either administrative law principles, on the one hand, or principles of private law, such as rules of the law of contract or delict, on the other – and thus demarcates between ‘individual right and public interest’. To determine whether public law applies in any particular case, it is necessary to determine whether the body or person concerned exercises a power or performs a function that is public in nature. If so, the exercises of power or performance of functions of that body or person will be controlled by the application of standards of lawfulness, procedural fairness and rationality, even if it, he or she is not an organ of state. To determine what is and what is not a public power or public function is, as the cases discussed below tend to indicate, often easier said than done.

5.1.3. The Divide in the Case Law: Drawing the Line.

The South African case of *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* and the English case of *R v Panel on Take-overs and Mergers, ex parte*

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9 In England, principally through the special procedure for judicial review provided for in R.S.C. Order 53, the distinction is particularly important. If an applicant uses this procedure when he or she should not have, or fails to use it when he or she should have, the mistake will be fatal to his or her case. See in this regard, De Smith, Woolf and Jowell, 160-162 (paragraphs 3-012 to 3-014) and 660-672 (paragraphs 15-011-15-035). See too O'Reilly v Mackman [1983] 2 AC 237 which held that the R.S.C. Order 53 procedure was mandatory in cases of judicial review. The same problem does not exist in South Africa. See Baxter, 61. See too Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A). The Promotion of Administrative Justice Act has not altered the position in any significant way at present but may do so when rules for judicial review are promulgated.

10 Baxter, 56. See too Davis “‘Public Power’: Do Administrative Lawyers Really Care?” in Corder and Maluwa, op cit, 44 who says: ‘Traditional theory sees public power as the appropriate source of power to be regulated so that bodies exercising public power become the exclusive group to which the rules of administrative law should be applied.’

11 Transnet Ltd v Goodman Brothers (Pty) Ltd 2002 (2) BCLR 176 (SCA), 188F-G (paragraph 36).

12 1983 (3) SA 344 (W).
Datafin PLC\textsuperscript{13} are examples of the extension of administrative law controls to ostensibly private bodies. They represent the first major steps along an institutional spectrum that stretches from the governmental and, hence undoubtedly public, at one end, to the uncontroversially private, at the other end.\textsuperscript{14} In both cases the respondent was a body which regulated the conduct of those involved in trading in stocks and shares. In the case of the Johannesburg Stock Exchange (the JSE), a statute made provision for the licensing of stock exchanges, a registrar oversaw its functioning and its rules were required to be published in the \textit{Government Gazette}.\textsuperscript{15} In the case of the Panel on Take-overs and Mergers (the panel), no direct legislative framework was in place: the panel had been formed by the major financial institutions of the City of London, on the initiative of the Governor of the Bank of England, after criticism of the conduct of the financial institutions in a period of frenetic take-over activity in the 1960s.\textsuperscript{16} This institution, which regulated a part of the financial market, lacked any de jure power but exercised a great deal of de facto power ‘by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions’.\textsuperscript{17} Some statutory schemes for the regulation of economic activity recognised the panel and the place it occupied in the regulatory landscape. In both cases, there was no contractual privity between the parties. The courts held, in both, that these bodies were amenable to judicial review on public law grounds.

The essential issue in the \textit{Dawnlaan} case was whether the applicant could review a

\textsuperscript{13} 1987 QB 815 (CA).
\textsuperscript{14} Craig ‘What is Public Power?’ in Corder and Maluwa, op cit, 25, 28-34.
\textsuperscript{15} See the Stock Exchanges Control Act 7 of 1947.
\textsuperscript{17} At 826.
decision of a committee of the JSE that was contrary to its rules and, in particular, its rules for the listing of shares.\textsuperscript{18} The respondent argued that the court did not have review jurisdiction because the JSE’s rules and listing requirements had no statutory foundation.\textsuperscript{19} Goldstone J found that the Act imposed ‘a public duty upon the JSE to adhere to its own rules and requirements’;\textsuperscript{20} that ‘the Legislature cannot have intended that ... the committee of a stock exchange should be a law unto itself’ because it could not have been intended that ‘members of the public for whose benefit such a committee exists and operates, may not complain where such a committee has acted in disregard of, or contrary to, such rules to the prejudice of such person’;\textsuperscript{21} and that the review jurisdiction of the superior courts ‘is a necessary implication and consequence of the provisions of the Act in terms of which a stock exchange is licensed and its committee is established’.\textsuperscript{22} On the ostensibly private nature of the JSE, Goldstone J said:\textsuperscript{23}

‘Strictly speaking, a stock exchange is not a statutory body. However, unlike companies or commercial banks or building societies formed under their respective statutes, the decisions of the committee of a stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy. It is for that reason that the Act makes the public interest paramount. To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.’

The statutory structure, from which Goldstone J inferred that decision-making by the committee of the JSE had to be directed to furthering the public interest, was notably

\textsuperscript{18} By way of contrast, see Herbert Porter and Co Ltd v Johannesburg Stock Exchange 1974 (4) SA 781 (W), in which private law principles applied by virtue of the fact that there was contractual privity between the parties. In that case Coetsee J also dealt with the nature of the Johannesburg Stock Exchange. He said, at 791C-D that to describe the Stock Exchange Control Act as empowering legislation was inaccurate: ‘Neither directly, nor indirectly, does the Stock Exchange Control Act create statutory stock exchanges. This Act falls nicely in the general pattern of South African legislation enacted to control a large variety of financial institutions such as banks, building societies, pension funds, benefit funds, insurance companies etc. It is fundamentally licensing legislation.’

\textsuperscript{19} At 362G.

\textsuperscript{20} At 364B.

\textsuperscript{21} At 364F.

\textsuperscript{22} At 365B.

\textsuperscript{23} At 364H-365A.
absent in the Datafin case: the panel had no ‘visible means of legal support’. 24 Much appears to have been made of the fact that the panel was a self-regulating body. According to Donaldson MR, this meant that, although it lacked de jure powers, it exercised immense de facto power nonetheless. 25 Of the argument that it was not amenable to the court’s review jurisdiction for this reason, Lloyd LJ said: 26

‘Of course there will be many self-regulating bodies which are wholly inappropriate for judicial review. The committee of an ordinary club affords an obvious example. But the reason why a club is not subject to judicial review is not because it is self-regulating. The panel wields enormous power. It has a giant’s strength. The fact that it is self-regulating, which means, presumably, that it is not subject to regulation by others, and in particular, the Department of Trade and Industry, makes it not less but more appropriate that it should be subject to judicial review by the courts.’

The prime importance of Datafin is that it found that the source of power was not definitive of the question of whether a body is subject to judicial review. The court held that the nature of the power, rather than its source, was what either attracted judicial review or repelled it. 27 Donaldson MR held that possibly ‘the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction’. 28 Lloyd LJ held that between bodies empowered by statute and contract respectively ‘there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or

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24 At 834G-H, Donaldson MR qualified this statement to an extent. He said that ‘perhaps I should have used the word “direct”. Invisible or indirect support there is in abundance’.
25 At 826C-D.
26 At 845E-F.
27 See Craig ‘What is Public Power?’ in Corder and Maluwa, op cit, 28 who says: ‘The uncertainty which this third test generates is to be expected. It is the price to be paid for moving away from formalistic tests based upon the source of power or upon the narrow definition of the prerogative given above. Statements that a body must have a sufficiently “public element” or must be exercising a public duty cannot function as anything other than conclusory labels for whatever we choose to pour into them. They cannot guide our reasoning in advance. In Datafin itself the court was, as will be seen, influenced by a number of such factors including: the undoubted power wielded by the Panel, the statutory cognisance given to its existence, the penalties, direct and indirect, which could follow from non-compliance with its rules, and the absence of any other redress available to the applicants.’
28 At 838E.
Donaldson MR expressed the need for judicial control of bodies exercising powers similar to the panel by saying that he would be ‘very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted’ and that it was unthinkable that ‘the panel should go on its way cocooned from the attention of the courts in the defence of the citizenry’. It is important to note that the panel fitted into a regulatory framework, and was recognised by the government to be part of that framework. If the panel had not been formed in the way in which it had been, it is likely that the government would have created a body like it by statute. Donaldson MR, in dealing with the public duty performed by the panel, referred to the willingness of the government to leave the regulation of take-overs and mergers in the hands of the panel rather than enact legislation for this purpose.

The panel’s powers could not be controlled through the application of private law principles and its jurisdiction was not contractual or consensual for most people subject to its power: Lloyd LJ said that the ‘City is not a club which one can join or not at will. In that sense the word “self-regulation” may be misleading. The panel regulates not only itself, but all others who have no alternative but to come to the market in a case to which the code applies’. More controversially, Lloyd LJ held, obiter, that the panel’s powers stemmed, in fact, from governmental action in the form of ‘an implied devolution of

29 At 847C.
30 At 838H-839B.
31 At 835H-836B.
32 At 835G. Donaldson MR said: ‘No one would have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain.’
33 At 838F.
34 At 839B.
35 At 846A.
power’. Donaldson MR appears to have adopted a similar view for the purpose of identifying its public character. He said of the birth of the panel that, as ‘an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions’.

The nature of the powers exercised by the JSE in *Dawnlaan* and by the panel in *Datafin* make them fairly clear cases that call out for some form of intervention by the courts to protect individuals, who would otherwise be without a remedy, from oppressive exercises of power. The only appropriate remedies available are those fashioned from public law duties. In other words, it is only public law that is able to supply a means of controlling these types of power, and hence providing access to an appropriate remedy. The next step along the institutional spectrum from governmental power to purely private power will illustrate why this is so. This step enters the realms of contracts of a special kind. These are contracts that have implied in them duties similar to those that arise in public law – duties to act lawfully, procedurally fairly and rationally.

In *Theron v Ring van Wellington van die N.G. Sendingkerk in Suid Afrika*, a case involving disciplinary proceedings in a church, Jansen JA held that, as a general rule, the same principles applied whether decisions of statutory or contractual bodies were under review. The only real difference is that in the first instance, the starting point is the intention

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36 At 849B-D. Lloyd LJ had found (at 848H-849A) that ‘it is not just the source of the power that matters, but also the nature of the duty’ and that nothing in the earlier case of *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 ‘compels us to decide that, in non-statutory cases, judicial review is confined to bodies created under the prerogative, whether in the strict sense, or in the wider sense in which that word has now come to be used’. In the later case of *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 (CA), 921C, Bingham MR said that the effect of *Datafin* was ‘to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of take-overs and mergers’.

37 At 835F.

38 1976 (2) SA 1 (A), 21D. See too Baxter, 340-341.
of the legislature, while in the second, it is the intention of the parties. The similarity between the powers of statutory and contractual tribunals is therefore mirrored in the similarity of the method of their control. Cockrell explains this as follows:

‘At the level of legal platitude it could simply be said that such a duty arises from the express or implied terms of the contract itself. But at a deeper level the legal basis of this duty is considerably more enigmatic, and the implicit presumption in favour of its inclusion seems to be better explained in terms of the good faith basis of our law of contract. The law’s willingness to import the duty to comply with the administrative-law standards of bounded rationality may also be explained on the basis that the domestic tribunal possesses the sort of hierarchical power which mimics the exercise of state power. In sum, the role of the contract in the importation of these administrative-law duties seems to be a relatively passive one, since the contract is simply the empty vessel into which the duty is poured. The default presumption in favour of the inclusion of the duty is triggered by the nature of the power which the tribunal exercises.’

In South Africa, as in England, the regulation of horseracing has led the way in providing precedent on the control of powers exercised by voluntary associations. The leading South African case of Turner v Jockey Club of South Africa\textsuperscript{40} and the English case of R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan\textsuperscript{41} will be discussed to illustrate the intersection of contract and administrative law. Both matters involved the disciplinary functions of the Jockey Clubs and, in both instances, the appellants were parties to contracts with the Jockey Clubs in terms of which the respondents’ rules constituted the terms. The Turner case was argued on the basis of contract while, in the Aga Khan case, it was argued that the Jockey Club was subject to judicial review outside of the law of contract.

In Turner, the appellant, a jockey, had been disciplined for allegedly bribing an apprentice jockey to ‘pull’ a horse. He challenged the validity of his conviction and the sentence


\textsuperscript{40} 1974 (3) SA 633 (A).

\textsuperscript{41} (1993) 1 WLR 909 (CA).
imposed on him in disciplinary proceedings conducted by organs of the respondent.\textsuperscript{42} The principles applicable to the control of the power exercised by the Jockey Club were set out in the following terms by Botha JA.\textsuperscript{43}

‘In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. ... The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (AD) at pp214-5, and the authorities there cited. The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified.’

The fundamental principles of justice referred to by Botha JA are essentially similar to the grounds of review in administrative law. In Turner, the focus was on the rules of natural justice – that a domestic tribunal, while free to regulate its own procedure, had to ensure a proper hearing in which the ‘accused’ had an opportunity to adduce evidence and correct or gainsay prejudicial statements or allegations made against him or her, that it was required to hear both sides of the dispute fairly and that it had to observe the ‘principles of fair play’.\textsuperscript{44} On the substantive level, a domestic tribunal is required to ‘discharge its duties honestly and impartially’ and its findings must be ‘fair and bona fide’: in short, such a body is ‘under an obligation to act honestly and in good faith’.\textsuperscript{45}

Despite the fact that pouring public law principles into the empty vessel of the contract achieves the same result as direct judicial review, the courts appear to have guarded the line jealously between public and private law. The Aga Khan case\textsuperscript{46} illustrates the point. In that case, three judges dealt with the consequences of the apparent broadening of judicial review in Datafin. They held, for differing reasons, that the Jockey Club was not subject to

\textsuperscript{42} At 644E-G.
\textsuperscript{43} At 645H-646B.
\textsuperscript{44} At 646F-G.
\textsuperscript{45} At 646H.
\textsuperscript{46} Supra.
review because of the contractual origin of its powers and despite Datafin having rejected the source of a body’s power as the determinant of the court’s review jurisdiction.

Bingham MR found that the Jockey Club regulated a ‘significant national activity’, that its exercises of power affected the public, that its powers were to be exercised in the ‘interest of the public’ and that, had it not existed, the government would have created a public body to regulate horseracing. He nonetheless concluded that it was not ‘in its origin, its history, its constitution or (least of all) its membership a public body’; that it had not been ‘woven into any system of governmental control of horseracing, perhaps because it has itself controlled horseracing so successfully...’; and that, in the result, while its powers ‘may be described as, in many ways, public they are in no sense governmental’.47

Farquharson LJ defined the issue as ‘whether on the one hand the Jockey Club is a domestic body which exercises its powers consensually or whether on the other there are public elements in the discharge of its functions which render it amenable to judicial review’.48 On the argument that the consent to the jurisdiction of the Jockey Club was not proper consent, as the applicant had no choice but to consent to its terms, Farquharson LJ held that while this may have been true, it did not mean that there was no consent as ‘nobody is obliged to race his horses in this country’.49 Having thus kept the contractual line

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47 At 923G-H. But see R v Jockey Club, ex parte RAM Racecourses Ltd [1993] 2 All ER 225 (QB), 228b-i for some of the terms of the royal charter under which the Jockey Club was incorporated and empowered. On its monopoly power, especially the power of coercion that it enjoys, see 229a-c. In the light of these factors it is, with respect, stretching reality to hold that the Jockey Club exercises private power. Indeed, but for precedent binding upon them, the judges in this case would not have come to this conclusion. See in this regard, 244d. (See too R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy [1993] 2 All ER 207 (QB).) In the modern world it is really a matter of chance whether a body such as the Jockey Club exercises power consensually or through statute. See Heatley v Tasmanian Racing and Gaming Commission [1976/1977] 137 CLR 487 (HC) in which powers similar to those of the English Jockey Club were exercised by the respondent empowered by statute. It was held that it was bound by the rules of natural justice when it took a decision to exclude a person from race meetings.

48 At 928A-B.

49 At 928H. Later in the judgment, at 930C-D, Farquharson LJ said of this argument: ‘I understand the criticism made by Mr Kentridge of the reality of the consent to the authority of the Jockey Club. The invitation to consent is very much on a take it or leave it basis. But I do not consider that this undermines the reality of this consent. Nearly all sports are subject to a body of rules to which an entrant must subscribe. These are necessary, as already observed, for the control and integrity of the sport concerned. In such a large industry as racing has become, I would suspect that all those
actively and honestly engaged in it welcome the control of licensing and discipline exerted by the Jockey Club."

In his judgment Hoffmann LJ held that administrative law control over power would be appropriate only if the power in question was governmental in nature, whether de facto or de jure:51 one must be dealing with ‘a privatisation of the business of government itself’ in which the body exercising power must have been ‘integrated into a system of statutory regulation’.52 If the power is indeed governmental, then it does not matter that the source of the power is contractual:53 in terms of Datafin, the source of power does not matter in these circumstances. He concluded that the Jockey Club did not exercise governmental power despite the fact that he had held earlier that its control of the sport of horseracing gave it ‘considerable power over a section of the economy which is not only important in itself but supports another important economic activity, namely horserace betting’.54 He took the view that, even where such immense power is exercised, affecting the ‘public interest and the livelihoods of many individuals’, it was nonetheless not reviewable in terms of the rules of public law. If, he said, control over private power of this nature was needed, it had to be found in private law or specific legislation intended to curb excesses of private power.55

Cases like Turner and Aga Khan fall into a neat pigeon hole: they are not problematic for the courts as long as the contract can be used as the empty vessel into which all of the

50 At 929H-930B.
51 At 931D.
52 At 931H-932A.
53 At 932E.
54 At 932F and 930H.
public law controls can be poured.\textsuperscript{56} (They work from the assumption, however, that it is appropriate to imply public law-style duties, without questioning the source and implications of that assumption.)\textsuperscript{57} Effective control of power (however one wishes to describe that power) and the mystical line between the public and the private (or is it between the governmental and the private?) are maintained. But this may all be far too convenient and serve only to avoid the real issues: one only has to alter one or two of the circumstances of the contract-type cases to illustrate the point. First, should the answer be the same if there is no contract between an aggrieved person and a powerful, albeit private body, exercising monopoly power in an undertaking of importance to the public generally? Secondly, how is the power of such a body controlled if it has had the foresight or cynicism to exclude the more ‘troublesome’ of the rules of public law from its contracts with its members? In both instances the choices open to the courts are stark: either the exercises of power of such bodies are recognised as public powers, and are thus susceptible to control, or they are not, and are placed beyond the control of the courts, and may be exercised as arbitrarily or oppressively as the organisation wishes. It is suggested that the second option flies in the face of the Constitution, its ethos and its values. The result is that

\textsuperscript{56} In this regard see the judgment of Hoffmann LJ. At 933F-G he dealt with the adequacy of the contractual remedy available to the Aga Khan. This seems to have been an important consideration for him and the other two judges. He held: ‘In the present case, however, the remedies in private law available to the Aga Khan seem to me entirely adequate. He has a contract with the Jockey Club, both as a registered owner and by virtue of having entered his horse in the Oaks. The club has an implied obligation under the contract to conduct its disciplinary proceedings fairly. If it has not done so, the Aga Khan can obtain a declaration that the decision was ineffective (I avoid the slippery word void) and, if necessary, an injunction to restrain the club from doing anything to implement it. No injustice is therefore likely to be caused in the present case by the denial of a public law remedy.’

\textsuperscript{57} The answer lies in the fact that the powers in question are so like governmental powers of coersion and regulation that it would be unfair to allow the body in whom the power vests to exercise it oppressively or unfairly. This was, however, made plain in R v Jockey Club, ex parte RAM Racecourses Ltd supra, a case in which there was no contract into which the public law duties could be poured and in which precedent precluded the court from deciding that the decision of the Jockey Club was indeed amenable to judicial review. Despite all of this Simon Brown J held, at 247b-d: ‘I find myself, I confess, much attracted by Mr Beloff’s submissions that the nature of the power being exercised by the Jockey Club in discharging its functions of regulating racecourses and allocating fixtures is strikingly akin to the exercise of a statutory licensing power. I have no difficulty in regarding this function as one of a public law body, giving rise to public law consequences. On any view it seems to have strikingly close affinities with those sorts of decision-making that commonly are accepted as reviewable by the courts. And at the same time I certainly cannot identify this particular exercise of power with that of an arbitrator or other domestic body such as would clearly be outside the supervisory jurisdiction.’
the retreat from Datafin, embodied in Aga Khan in particular, is not of much weight in South Africa, even assuming that retreat to be defensible in England, an assumption open to some doubt.

There are indications of discomfort in Aga Khan with the consequences of the contractual safe-haven being closed: two of the three judgments hint at the extension of public law controls in the absence of a contract.\(^\text{58}\) Bingham MR, while not wanting to be drawn on the issue, observed that where no contract existed the non-existence of contractual remedies could then be material.\(^\text{59}\) Farquharson LJ rejected the submission of counsel for the Jockey Club that its ‘susceptibility to judicial review must be answered on an all or nothing basis’. He did not ‘discount the possibility that in some special circumstances’ judicial review might be available to a party: ‘If for example the Jockey Club failed to fulfil its obligations under the charter by making discriminatory rules, it may be that those affected would have a remedy in public law’.\(^\text{60}\) These misgivings amount to trying to have it both ways. They beg the very question and miss the point made in the judgment of Bingham MR about the nature of the power exercised by the Jockey Club that ought to have led to a conclusion that it was possible to judicially review it in terms of the rules of public law.

As Turner was argued and decided on the basis of implied contractual terms, it did not deal with whether public law controls could have been imposed on the Jockey Club in the absence of a contract between it and an aggrieved party, or if the principles of lawfulness, reasonableness and procedural fairness had been excluded by express provisions. Aga Khan’s response to the direct application of public law appears to have been influenced by the ‘last resort’ type of approach: because contractual remedies were available, they should have been sought and the fact that they were not sought excluded the direct

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\(^\text{58}\) The third judgment, that of Hoffmann LJ, takes a more robust view. He held that if the remedies available through the application of private law were not adequate, that was a matter for the legislature, not the courts: the answer to the problem was not to ‘try to patch up the remedies available against domestic bodies by pretending that they are organs of government’ (at 933B-F).

\(^\text{59}\) At 924D-E.

\(^\text{60}\) At 930F.
application of public law. In order to reach this point, and to avoid the consequences of the central proposition in Datafin, the court had to define the public realm restrictively: it equated public power with governmental power. That, as Dawnlaan Beleggings shows, is not the approach taken by the South African courts. This means that, in South Africa, the boundary line between public and private will probably be drawn closer to the private end of the spectrum than it would in England. The test will equate public interest with public benefit, rather than with privatised governmental functions. It will be argued below that the South African law as articulated by the courts prior to 1994 will inform the Constitution in drawing the line between the public and the private in the post-1994 period.

5.2. The Impact of the Constitution

5.2.1. The Interim Constitution.

A majority of the Constitutional Court held in Du Plessis v De Klerk\(^61\) that, in general, the Bill of Rights in the interim Constitution bound the state but not private persons: the Bill of Rights applied directly to all legislation and to common law of a public law nature but not to common law of a private law nature.\(^62\) In respect of private common law, s35(3) of the interim Constitution provided for indirect application. This section stated that in interpreting any law and in applying and developing the common law and customary law, ‘a court shall have due regard to the spirit, purport and objects of this Chapter’. Kentridge AJ concluded that ‘Chapter 3 does not have a direct horizontal application but that it may and should have an influence on the development of the common law as it governs relations between individuals’.\(^63\) He had earlier spoken of s35(3) ensuring that ‘the values embodied in Chapter 3 will permeate the common law in all its aspects including private litigation’.\(^64\)

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\(^{61}\) 1996 (5) BCLR 658 (CC).
\(^{62}\) At 684G-685A (paragraph 49).
\(^{63}\) At 692H (paragraph 62).
\(^{64}\) At 691E-F (paragraph 60).
Du Plessis v De Klerk has been overtaken by events. Section 8(2) of the final Constitution now provides for the horizontal application of the Bill of Rights in appropriate circumstances. Nonetheless, Du Plessis v De Klerk contains valuable observations on the control of power in a constitutional state. All of the judges accepted the need for some form of constitutional control of private power. They held different views on whether that control was to be exerted through the direct application of the Bill of Rights to private relationships or indirectly through the development of a constitutionally compatible common law. Mahomed DP’s judgment is particularly important in this respect. Because of his concern that the Constitution should control private exercises of power effectively, so as to avoid the privatisation of apartheid, his judgment serves to illuminate the purpose that s8(2) of the final Constitution was intended to promote and so assists in its interpretation.

Nowhere in his judgment is this concern for the proper control of private power clearer than in the following passage:

‘What is patent from the preamble, the postscript and the substance of the Constitution is a very clear and eloquent commitment to the creation of a defensible society based on freedom and equality setting its face firmly and vigorously against the racism which has dominated South African society for so long and the repression which became necessary to perpetuate its untenable ethos and premises. To leave individuals free to perpetuate advantages, privileges and relations, quite immune from the discipline of Chapter 3, would substantially be to allow the ethos and pathology of racism effectively to sustain a new life, subverting the gains which the Constitution seeks carefully to consolidate.’

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65 Cheadle and Davis ‘The Application of the 1996 Constitution in the Private Sphere’ (1997) 13 SAJHR 44, 54 say that the court must have been aware of the fact that the Constitutional Assembly had agreed to the horizontal application of fundamental rights in certain circumstances and that, as this was well known, ‘the majority of the court had placed itself at intellectual odds with the new Constitution’. They also observe, at 55, that the majority decision has been cured specifically by the final Constitution.

66 See further below.

67 See the judgment of Mahomed DP, in particular, at 697C (paragraph 72). See too the judgment of Kriegler J at 715E (paragraph 122) who said: ‘I still cannot see the dire consequences feared by some jurists, including my esteemed colleague Ackermann J. Indeed, as I see it, it makes no fundamental difference with regard to such consequences whether the horizontal application of Chapter 3 is direct or indirect. It has little, if any, effect jurisprudentially or socially whether the Chapter 3 rights are enforced directly or whether they “irradiate” private legal relationships.’

68 At 698D-F (paragraph 75).
In throwing in his lot with the indirect application of Chapter 3 to private law relationships founded in the common law, Mahomed DP again dealt with private power and his concern of unchecked private power undermining the Constitution.69

‘Notwithstanding all these observations I would have remained profoundly uncomfortable if the construction favoured by Kentridge AJ meant, in practice, that the Constitution was impotent to protect those who have so manifestly and brutally been victimised by the private and institutionalised desecration of the values now so eloquently articulated in the Constitution. Black persons were previously denied the right to own land in 87% of the country. An interpretation of the Constitution which continued to protect the right of private persons substantially to perpetuate such unfairness by entering into contracts or making dispositions subject to the condition that such land is not sold to or occupied by Blacks would have been for me a very distressing conclusion. These and scores of other such examples leave me in no doubt that those responsible for the enactment of the Constitution never intended to permit the privatisation of Apartheid or the privileges it bestowed on the few, or the offensive attitudes it generated amongst many to be fossilized and protected by courts rendered impotent by the language of the Constitution.’

The effect of the indirect application of Chapter 3 of the Constitution to such exercises of private power would be that ‘most of the common law rules, upon which reliance would have to be placed by private persons seeking to perpetuate unfair privilege or discrimination, would themselves be vulnerable to invasion and re-examination in appropriate circumstances’.70 The effect of Du Plessis v De Klerk is, therefore, that the boundary between public and private exercises of power must be re-assessed in the light of the Constitution’s values.

5.2.2. The Final Constitution

The final Constitution has adopted an express but general formulation to regulate private exercises of power through the application of the Bill of Rights. Sections 8(2) and 8(3) provide:

‘(2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

69 At 702E-G (paragraph 85).
70 At 703A-B (paragraph 86).
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1).

The effect of s8(2) is that the freedom of the individual to exercise private power as he, she or it sees fit has been reduced. It has been reduced when, and to the extent that, the power is such that it is appropriate to subject it to constitutional control by using the means provided by s8(3)). For administrative law, that raises the possibility of the so-called horizontal application of the rights to just administrative action, possibly even to instances along the institutional spectrum which have not attracted public law controls in the past.

In order to begin to address these issues, the second Breakwater Declaration, to borrow its own terms, provides a point of departure. If an exercise of power or performance of a function of an administrative nature, irrespective of where it manifests itself on the institutional spectrum, has certain characteristics, it begins to approximate the type of power or function that administrative law usually controls. The principal requirement is that the power or function in question must be public in nature. If it is, the power or function will be subject to public law control if private law (or any other source) does not provide an alternative (effective) method of control. Such powers or functions should be effectively controlled if, for instance, those against whom the power is exercised or the function is performed are vulnerable or if the power is exercised or the function is performed in a monopolistic, rather than a competitive, environment. It would then be the type of power or function for which the repository should be held to account and in respect of which the public interest in controlling the power or functions (through the same techniques as are used to control governmental powers and functions) outweighs any claim that the private functionary would have to privacy, freedom or the right to associate freely.

71 See Corder and Maluwa, op cit,13-16.
If a power or function of this nature can be exercised or performed in such a way that the values of the Constitution are undermined and offended by it, it is likely that it is the type of power or function that should be subjected to review for lawfulness, reasonableness and procedural fairness.\textsuperscript{73} It is the sort of power or function that s8(2) is there to control: it is likely that in these circumstances it would be appropriate to place an obligation on the repository of the power or function to act in accordance with the right to just administrative action, in the sense that this right would be capable of application to such circumstances and suitable for the control of an otherwise largely unfettered exercise of power or performance of a function.\textsuperscript{74}

Cases like Dawnlaan, Turner and Theron confirm that it is possible (and it was appropriate in those cases) to subject private actors to the discipline of the requirements of lawfulness, procedural fairness and rationality, albeit that these duties are sometimes imposed through the medium of contract. It is, therefore, no major conceptual leap, on a theoretical level at least, to apply the similar rights to just administrative action to them or to other similar bodies, either through the medium of a contract or independently and directly. In other words, these rights are capable of horizontal application. The remaining issue is whether, in particular cases, it is appropriate to apply the rights horizontally – whether the rights are suited to horizontal application in specific instances.

5.2.3. The Promotion of Administrative Justice Act.

Section 1(i) of the Promotion of Administrative Justice Act defines the term administrative

\textsuperscript{73} The common law approached the question of privately exercised public power in much the same way. Baxter, at 101 says: ‘Although the basis upon which the powers of these bodies rest is contractual and not statutory, such bodies are often in a position to act just as coercively as public authorities and their decisions often have far-reaching effects. Many of the principles of administrative law are designed to protect individuals from abuse of power. For this reason they are applied in almost identical form to these private bodies, and administrative law has itself drawn much from decisions involving “domestic tribunals”.’

\textsuperscript{74} See, on s8(2) and s8(3) generally, Cheadle and Davis ‘The Application of the 1996 Constitution in the Private Sphere’ (1997) 13 SAJHR 44. See too De Waal, Currie and Erasmus The Bill of Rights Handbook (4ed) Cape Town, Juta and Co: 2001, 55-57.
action in both its governmental and private contexts. The legislation has, in this way, recognised that s33 of the Constitution can be applied horizontally and can thus bind natural or juristic persons who are not organs of state when they exercise powers or perform functions of an administrative nature. Section 1(i) of the Act defines administrative action in this context as ‘any decision taken, or any failure to take a decision’ by ‘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’ if such decision or failure to decide adversely affects rights and has a ‘direct, external legal effect’. An empowering provision is defined by s1(vi) as ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’.

5.2.4. The Post-1994 Cases

In Cronje v United Cricket Board of South Africa the applicant, a former captain of the national cricket team, was not able to rely on an implied contractual term as the basis for a right to be heard before a decision was taken by the respondent to ‘ban’ him for life as a result of his part in the match fixing scandal that rocked South African and international cricket: having ‘cast aside the honour of leading his national cricket team for the shadowy pleasures of bookmakers’ money’ his fixed-term contract of employment with the respondent was not renewed when it expired some time before the respondent decided to disassociate itself from him. Kirk-Cohen J held that, in the absence of an implied contractual term, the applicant was not entitled to be heard because the respondent was not a public body. He described it as a ‘voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded.’ In addition, he held that the ‘conduct of private bodies, such as the respondent, is ordinarily

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75 2001 (4) SA 1361 (T).
76 At 1370H.
77 At 1375E..
governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice\(^78\) and that in ‘exceptional cases private bodies are vested with public powers by statute. They are then subject to the rules of public law in the exercise of those powers. Those rules may expressly or by necessary implication prescribe the manner in which their powers must be exercised. If the repository of the power does not exercise them in the prescribed way, its conduct is subject to judicial review under public law. But these consequences flow, not from the nature of the body or the impact of its conduct, but from the underlying statute’.\(^79\)

These statements of the law are open to doubt. In the first place, Kirk-Cohen J was not correct when he said that it is only statute that can create public power and that a duty to be heard can only arise through statute: as has been seen from the cases cited above, it is the nature of the power, rather than its source that is of prime importance in determining whether public law-style judicial review is an appropriate means of controlling the power of a private body. To categorise the power of the respondent as being contractual, rather than statutory, and from this to draw the conclusion that the rules of public law do not apply to it, ignores the reality of the power at the disposal of the respondent: it is able to exercise immense de facto power outside of contract, and to affect a great many people who, like the applicant, are not in contractual privity with it; in the words of Lloyd LJ in Datafin\(^80\) the respondent ‘regulates not only itself, but all others who have no alternative but to come to’ it if they wish to have anything to do with cricket.

Its substantial power to regulate cricket stems from the fact that it exercises monopoly power in its field. In doing so, it performs the equivalent of governmental functions in its sphere. It should not be forgotten that the respondent is different to a private club: it is an institution that functions on a national and international level and is reliant on the public for support and, ultimately, for its success. It is also, in South Africa, evident that the

\(^{78}\) At 1375F.
\(^{79}\) At 1375G.
\(^{80}\) At 839B.
administration of the major sporting codes is a matter of public interest and public concern.\textsuperscript{81} It is for this reason that commissions of enquiry have been appointed to investigate the affairs of cricket, rugby and soccer over the last number of years. It is also the reason why a Ministry of Sport exists and why the Minister of Sport takes a keen and public interest in the affairs of these bodies and even expresses his views – as Minister of Sport – on, for instance, the decision taken by the president of the respondent to overrule the selectors and change the team shortly before the start of a test match against Australia. Goldstone J held in \textit{Dawnlaan Beleggings},\textsuperscript{82} that to treat the JSE as a private body ‘would be to ignore commercial reality’. In the same way, to treat the respondent as nothing more than a private club is unrealistic and ignores the reality of how power is exercised in the modern world. It is precisely for this reason that the drafters of the Constitution made provision, in s8(2), for the Bill of Rights to bind ‘natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’ and why s1(i) of the Promotion of Administrative Justice Act makes provision for the review of the exercises of power of natural and juristic persons other than organs of state acting administratively.

In \textit{Coetzee v Comitis},\textsuperscript{83} Traverso DJP came to a conclusion contrary to that of Kirk-Cohen J when she was called upon to consider the constitutionality of the transfer rules of the National Soccer League (the NSL). She held, in the course of dealing with the extended standing of the applicant in terms of s38 of the Constitution, that the NSL ‘is a body which performs a public function. Soccer is a sport which enjoys large support. The fate of soccer players is of public interest. If, as contended by the applicant, the regulations of the NSL violate the fundamental rights of the professional players, such as fair administrative action, fair labour practices, freedom of association, human dignity etc, this is patently a

\textsuperscript{81} The administration of individual sporting codes is integrated into a broader statutory framework in which the public interest plays and important part. See the South African Sports Commission Act 109 of 1998, especially the preamble thereof, and the National Sport and Recreation Act 110 of 1998.

\textsuperscript{82} Supra, 364H-365A.

\textsuperscript{83} 2001 (1) SA 1254 (C).
matter of such vast public interest, that a narrow approach would be inappropriate\(^\text{84}\). This is a far preferable approach to the control of the powers exercised in the public sphere by ostensibly private bodies than the approach in *Cronje*. It recognises that public power is not only governmental power but also power that is meant to be exercised in the public interest and in the public sphere, as opposed to power exercised for private benefit and in the private sphere. It recognises too that the NSL is not in the same category as a private club and that it is unrealistic to pretend that it is. These are the central fallacies of *Cronje* highlighted by the reliance of Kirk-Cohen J on *Aga Khan* which, as stated above, represents the retreat from *Datafin* in England through equating public power with governmental power.

It probably would have been wiser for Kirk-Cohen J to look to New Zealand and Australia for guidance, especially when dealing with the regulation of sport. In *Finnegan v New Zealand Rugby Football Union Inc*\(^\text{85}\) two members of clubs affiliated to the defendant brought proceedings against it to set aside its decision to accept an invitation to send an All Blacks team on a tour of South Africa. In dealing with the question of standing, Cooke J held:\(^\text{86}\)

‘While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from public law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power – although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.’

The South African context, outlined above, would also tend to militate against the narrow approach to public power that Kirk-Cohen J adopted.

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\(^{84}\) Para 17.8.

\(^{85}\) [1985] 2 NZLR 159 (CA).

\(^{86}\) At 179, lines 13-23.
The Australian case of *Forbes v New South Wales Trotting Club Ltd*\(^\text{87}\) tends to undermine Kirk-Cohen J's assumption that the right to be heard only arises in the context of statutory powers and, more generally, his rather narrow view of what public power may be. The appellant had been banned from entering courses of or under the control of the respondent, a non-statutory body that regulated trotting races in New South Wales. He had earned an income as a punter at these races and, prior to being warned off, had not been given a hearing. In holding that he was entitled to be heard, Gibbs J held:\(^\text{88}\)

‘The respondent, although not granted statutory powers, was in fact the body whose function was to control trotting in New South Wales, and trotting is a public activity in which quite large numbers of people take part, whether as spectators or otherwise. Members of the public have the legitimate expectation that they will be given permission to go onto courses when trotting meetings are being held provided that they pay the stipulated charge and provided of course that they are not drunk, disorderly or otherwise unfitted by their condition or behaviour to be admitted. The respondent had power to defeat this expectation by acting under rule 28, and was accordingly required to observe the rules of natural justice.’

The third South African post-1994 case on the issue of the exercise of public power by a private actor is *Marais v Democratic Alliance*.\(^\text{89}\) It concerned the sport of politics. The applicant had first been required in terms of a decision by the respondent political party, of which he was a member, to relinquish his position as the mayor of Cape Town. When he refused to do so the respondent expelled him from membership of the party, thereby causing him to lose his position as mayor. He challenged both decisions. It was argued by the respondent that a decision taken by a political party to remove a public representative from public office was administrative action for purposes of the Promotion of Administrative Justice Act. Van Zyl J held that this submission was incorrect. His starting point appears to have been that it was only on rare occasions that private bodies could perform

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\(^{88}\) At 264. See too the judgment of Murphy J at 275 in which he held that ‘a body, such as the respondent, which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on payment of a fee, is exercising public power. It may not arbitrarily exclude or remove such a person from the lands during a race meeting.’

\(^{89}\) 2002 (2) BCLR 171 (C).
administrative acts: when they exercise public power or perform public functions and when they do so in terms of an empowering provision.\textsuperscript{90} He held that the respondent’s decisions did not amount to administrative action because they did not meet either requirement:\textsuperscript{91}

‘A decision compelling the mayor of a large city to relinquish his mayoral office will certainly arouse wide-ranging public interest, particularly if it is initiated by a “political judgment” of the leader of the political party that the mayor represents. The perception cannot be faulted that a mayor occupies a public office that requires of him or her to protect the interests of the public, as represented by the electorate and the community at large. He or she would inevitably feature prominently in the public eye. It does not follow, however, that a decision to remove him or her from office constitutes the exercise of public power or the performance of a public function in terms of an empowering provision. Every case must be considered in accordance with the relevant facts and circumstances pertaining thereto.’

Because the respondent appeared to have ‘devised a scheme designed to yield a pre-determined outcome’ that amounted to a ‘political stratagem to remove the applicant as mayor without first having to resort to disciplinary proceedings’ its decisions could not – indeed, could ‘never’ -- be regarded as administrative actions: they were not taken ‘in the exercise of a public power or in the performance of a public function, however widespread the public interest therein and the public reaction thereto might have been’ and because they were not of an administrative nature being ‘patently political decisions instigated and initiated by the “political judgment” of the respondent’s leader’.\textsuperscript{92} Secondly, Van Zyl J held that the decisions were not administrative acts as they were not taken in terms of an empowering provision: because the empowering provision in terms of which the respondent purported to act, namely its constitution, did not authorise it to remove the applicant from his office as mayor of Cape Town, and because the second decision – to expel him – was a decision that followed this decision, it had no power to do what it did, and hence could not be said to have acted in terms of an empowering provision.\textsuperscript{93}

\textsuperscript{90} At 184F-G (paragraph 48).
\textsuperscript{91} At 185E-G (paragraph 51).
\textsuperscript{92} At 187B-D (paragraph 58).
\textsuperscript{93} At 186D-E (paragraph 55).
There is a great deal of confusion in this judgment. All of this could have been avoided by holding that, whatever the limits of administrative action under the Act, the duty to act fairly was impliedly incorporated into the terms of the respondent’s constitution that formed the contract between the applicant and the respondent.\(^{94}\) (This is, in effect, what Van Zyl J decided because, having found that the Act did not apply, he proceeded to review and set aside the decisions. Although he never said so, the only basis upon which he could have done this, having found that the decisions were not exercises of public power, was that a duty to act fairly was an implied term of the contract.) Van Zyl J’s view of the private nature of the decisions is, with respect, simplistic. The fact that an election promise made by a political party on a provincial border dispute was held not to be administrative action\(^{95}\) does not mean that a different type of decision altogether is also not administrative action. Van Zyl J also appears to have lost sight of the role of political parties in South African politics. They are not simply clubs for like-minded people: they occupy a central place in the electoral system in all three spheres of government. They are entitled to public funds to help them to contest elections.\(^ {96}\) Without political parties, the electoral system, based as it is on the principle of proportional representation,\(^ {97}\) cannot function. They have been integrated into the system of governance. The electorate votes for parties, not people, in elections and the Constitution forbids floor-crossing, on pain of loss of one’s seat.\(^ {98}\) In this sense, political parties are at the heart of the system of government that s1(d) of the

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\(^{94}\) Turner v Jockey Club of South Africa 1974 (3) SA 633 (A). This was the approach taken by Hodes AJ in Pennington v Friedgood 2002 (1) SA 251 (C) in which the applicant sought to review a number of decisions taken by the chairperson of the annual general meeting of a medical aid scheme. In essence, he held that the applicant was in contractual privity with the scheme, that the terms of the contract were contained in the rules of the scheme and ‘nothing contained in the Act, the regulations or the scheme rules imports a requirement by the trustees to observe the common law principles of administrative law’. (At 262E-263F (paragraphs 36-42). Whether he was correct on the final aspect is open to doubt.

\(^{95}\) Bushbuck Ridge Border Committee v Government of the Northern Province 1999 (2) BCLR 193 (T).

\(^{96}\) Section 236 of the Constitution provides: ‘To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.’

\(^{97}\) Constitution, s46(1)(d), s105(1)(d) and s157(2) and (3).

\(^{98}\) Constitution, s47(3), read with item 13(3) of Annexure ‘A’ to Schedule 6. Legislation is being drafted to regulate floor-crossing. It is likely that the legislation will allow for limited opportunities to cross the floor, rather than remove all obstacles to floor-crossing.
Constitution contemplates as a founding value of the South African democratic state. The section states expressly that South Africa is required to have a ‘multi-party system of democratic government’ that serves the purpose of ensuring ‘accountability, responsiveness and openness’.

In this context, the decision to remove the mayor of one of the largest municipalities in the country from office is not just a decision that may excite public curiosity or generate fierce debate: it is a decision that goes to the heart of governance under the Constitution. The fact that the decision was ‘political’ in nature makes no difference. So is, for instance, a decision by the Minister of Education to merge certain institutions of higher education and to leave others as they are. Surely Van Zyl J was not suggesting that the decision of the leader of a political party that a political office-bearer of that party should relinquish the office that he or she holds as a representative of the party in a sphere of government is akin to the president’s executive powers, such as the power to appoint and dismiss cabinet ministers. That the decision involved the weighing up of political considerations does not make it any less of an administrative decision (or any less justiciable) than the Minister of Education’s decisions on the rationalisation of tertiary education institutions. Van Zyl J appears to lose sight of the fact that virtually every decision of a political party will involve political issues. Politics, after all, is their core business. As Van Zyl J himself showed, this fact did not render the decision any less reviewable for procedural fairness outside of the Act.

The final basis upon which Van Zyl J held the decisions not to be administrative actions can be dealt with concisely. The consequence of his finding that it is only decisions that are taken in terms of an empowering provision that can be said to be administrative actions is that the moment a decision-maker acts unlawfully by straying beyond his or her powers, he or she has not acted administratively. In the result, the Act only defines as administrative action, valid administrative action and all of the grounds of review that deal with unlawful administrative action can be ignored. This is obviously an incorrect understanding of the Act. The comparative and illustrative non-sequitur is that, as the
unfair labour practice jurisdiction only applies to employers and employees, it cannot be invoked by a person who was dismissed, because he or she is no longer an employee.

5.2.5. Conclusion

The Act does not define a public power or a public function. In order to interpret these terms guidance may be derived from pre-1994 common law and from comparative sources but it must be remembered that, in the final analysis, the definition must be consonant with the values of the Constitution and the constitutionally compatible legal traditions and usages of this country. This interpretation, it is submitted, involves the consideration of three inter-related aspects, namely, the nature of the person or institution exercising power or performing a function, the nature of the public power or public function and the underlying purpose of its exercise or performance, and the availability of means of controlling the power or function apart from those that could be imposed through administrative law.99

So, for example, the large insurance company or bank, exercising immense powers over thousands of clients in contractual privity with it, may have far greater power than many public authorities and certainly operates in the public domain but the power it exercises is private in nature, being exercised for private gain, and its clients have remedies in the law of contract. On the other hand, the Press Ombudsman, empowered by an agreement between interest groups in the print media, may exercise a far more modest degree of

99 It will be recalled that in Datafin Donaldson MR held that to determine whether a body was subject to the rules of public law, ‘the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction’ (at 838E). See further R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy supra, 221c-g for the factors that may be relevant to determining the public nature of the powers or functions exercised or performed by a private body. They are the source of the existence of the body, the nature and source of the power or function concerned, the role of the body in the broader context (including whether it exercises monopolistic powers), the existence or otherwise of means of redress other than judicial review and the way in which an aggrieved person’s rights are affected by the body. See too Pannick ‘What is a Public Authority for the Purposes of Judicial Review’ in Jowell and Oliver (eds) New Directions in Judicial Review London, Stevens and Sons: 1988, 23.
power but it does so in the public domain, its powers are regulatory in nature and are exercised in the public interest and no contractual or other private law remedies are available to many of those adversely affected by his exercises of power. It is particularly important to bear in mind that this is a dynamic part of the law that can be developed to meet new demands and to ‘embrace new situations as justice requires’.\(^{100}\) It is also a starting point in this process that public powers and public functions are wider than governmental powers and governmental functions: the private exercise of administrative power, in South Africa, if not elsewhere, goes beyond the ‘privatisation of the business of government itself’.\(^{101}\) If this was not so, there would be no need for s1(i)(b) of the Act because all of those bodies exercising such powers or performing such functions would fall within the definition of an organ of state and would be covered by s1(i)(a) of the Act. For the reasons given above, the cases that have dealt with the issue since the final Constitution came into force cannot be said to be the last word on the subject.

The judgment of Olivier JA in Transnet Ltd v Goodman Brothers (Pty) Ltd\(^ {102}\) is of some importance in the process of finding the way to draw the line between public and private exercises of power. In the first place, Olivier JA pointed out that one must be aware of an ever-changing environment in which it has become increasingly difficult to identify administrative action as a result of the use by the state of private law institutions, like

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\(^{100}\) Rv Jockey Club, ex parte RAM Racecourses Ltd supra, 248d. See too at 246j-247b where Simon Brown J observed of the post-Datafin situation: ‘The proper application of this fresh approach will obviously have to be determined on a case by case basis. There are many different types of institution – often of an increasingly monopolistic nature – ruling various aspects of our national life. Some flexibility of response by the courts is surely required. And for this there is ample scope – above all in the well-settled principle which establishes that merely because some public body is amenable to judicial review it by no means follows that it is reviewable in all its functions. ... Why should not the courts be prepared similarly to approach the question the other way and extend the review jurisdiction to certain (even if relatively few) functions of what may ordinarily be regarded as non-governmental institutions when those particular functions can be seen to have an essentially public character.’

\(^{101}\) Aga Khan, 931H (judgment of Hoffman LJ).

\(^{102}\) 2001 (2) BCLR 176 (SCA).
contracts, when it engages in privatisation, or delegates its functions or outsources them.\footnote{103}{At 186F (paragraph 31).} While the organisation of the state, therefore, becomes ever more complex, and administrative action is masked by new mechanisms of administration, the need to be able to identify administrative action with precision has become more important than it was before a fundamental right to just administrative action was created.\footnote{104}{At 186G-187B (paragraphs 32-33).} While, ultimately, what is and what is not administrative action must be determined on a case by case basis, a number of characteristics have been identified by the courts. The most important for present purposes are: that, being the product of the doctrine of the separation of powers, administrative law is intended to regulate and control the exercise of public power by organs of government other than the courts;\footnote{105}{At 187D (paragraph 34.1).} that the central issue in determining whether an exercise of public power is an administrative power is not who exercised it but the nature of the power;\footnote{106}{At 187G (paragraph 34.3).} that the implementation of legislation will usually constitute administrative action;\footnote{107}{At 187H (paragraph 34.4).} and that, in determining what is administrative action, relevant considerations apart from the nature of the power are such factors as whether a public duty has been placed on the decision-maker and where the particular exercise of power fits into a spectrum reaching from the formulation of policy, at one end, to the implementation of legislation, at the other end.\footnote{108}{At 187I (paragraph 34.5).} Obviously, when dealing with administrative action on the part of a private actor, the necessary modifications have to be made to some of the factors mentioned above. So, for instance, if one takes the example of the Marais case, no legislation permitted the Democratic Alliance to take action against Marais, but it relied upon a different empowering provision, its constitution to do so; when it took action against him, it was purporting to implement provisions of its constitution and not to develop policy. It must also be borne in mind that the enquiry is one that requires a judgment to be made on a basket of factors that may differ from case to case and that, with one exception, the weighing of factors must be flexible. The one essential precondition is the public element,
and probably in South Africa, as in England, the absence of consensual submission to the jurisdiction of the body involved.109 This second element must, however, be treated with caution: it is not the mere presence of a contract, for instance, that will exclude the direct application of administrative law, as cases such as Administrator, Transvaal v Zenzile110 and Administrator, Natal v Sibiya111 Administrative law may also be grafted onto the contract, as it were, rather than be poured into it. The issue, surely, is whether the contract, or other mechanism, can control the exercise of power in question and whether it can do so adequately in the context of a Constitution that requires private actors, in appropriate cases, to be bound by the requirements of lawfulness, reasonableness and procedural fairness.

The organising principles of privacy and freedom of association have been recognised by the United States Supreme Court as the touchstone against which to measure the public nature of private organizations. In Roberts v United States Jaycees112 two chapters of the Jaycees had complained that the rules of the organization excluded women from full membership contrary, it was alleged, to the provisions of the Minnesota Human Rights Act. The respondent, in turn, attacked the constitutional validity of the Act, alleging that it was an over-broad encroachment of the rights of male members to freedom of association and to free speech.113 Brennan J’s starting point was that, as part of the protection of liberty, the ‘formation and preservation of certain kinds of highly personal relationships’ must be accorded a ‘substantial measure of sanctuary from unjustified interference by the State’.114 He drew a distinction between the most intimate of relationships such as familial relationships, on one hand, and relationships within large corporations, such as relationships between employees, on the other. The main characteristics of the former are the ‘relative smallness’ of the association, ‘a high degree of selectivity in decisions to begin

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109 Datafin, 838E. See in this respect, Pennington v Friedgood, supra, 262E-263F (paragraphs 36-42).
110 1991 (1) SA 21 (A).
111 1992 (4) SA 532 (A).
113 For the background to and the facts of the case see 612-618.
114 At 618.
and maintain the association’ and ‘seclusion from others in critical aspects of the relationship’. The latter type of relationship lacked these characteristics. He concluded:  

‘Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual’s freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. ... We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.’

In upholding the appeal, Brennan J found that the Jaycees was a large organization, unselective in respect of membership apart from gender and age requirements and that ‘much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship’. The organization was, in other words, sufficiently public to justify constitutional scrutiny of its rules.

The Roberts case is, at least on its face, about discrimination. On a broader level, however, it is about power that, although wielded by a private body, is sufficiently public to warrant the application of public law control of it by the courts. In the South African context, the approach adopted by the American courts has an echo in Baloro v University of Bophuthatswana. In seeking to articulate when Chapter 3 of the interim Constitution may have applied horizontally, Friedman JP focused on the type of power exercised by the natural or juristic person in question. He stated as a general principle that ‘any activity, operation, undertaking or enterprise operating in the community, and open to the public is subject to the horizontal dimension of the said rights contained in Chapter 3 [of the interim Constitution], read with sections 33(4) and 35’.

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115 At 620.
116 At 620.
117 At 621. See too Board of Directors of Rotary International v Rotary Club of Duarte 481 US 537 (1987) in which the same conclusion was reached in respect of an organization which, ‘rather than carrying on their activities in an atmosphere of privacy’ sought to ‘keep their “windows and doors open to the whole world”’ (at 547).
118 1995 (8) BCLR 1018 (B), 1059D.
This appears to be a useful starting point in the search for the line between private power which is immune from public law regulation and that species of it that ought to be regulated by public law. Friedman JP used the word ‘public’ to mean, it would appear, a ‘presence in the public domain’ or something similar.\(^\text{119}\) For purposes of imposing the standards of lawfulness, reasonableness and procedural fairness on private bodies, this definition of public power requires qualification. The nature of the power or function, in other words, while it must be exercised in the public domain, must also display an extra element: it must be the type of power or function that is suited to administrative law control. A test as strict as that postulated by Hoffmann LJ in *Aga Khan* — that the power or function is governmental or arises from the privatisation of government\(^\text{120}\) — is not appropriate in South Africa or compatible with the values and ethos of the Constitution. Instead, the test should be that when a natural or juristic person other than an organ of state exercises a power or performs a function in the public domain that seeks to regulate conduct, to control behaviour, to compel, to prohibit, to grant or withhold rights and privileges, to investigate, to try, to impose discipline, and so on, it will be subjected to administrative law control if the power is to be exercised or the function is to be performed in the public interest, rather than for private gain: when the public interest overshadows the private interest in how and why the power is exercised or the function is performed, it is appropriate to control the power or function through the application of the rules of administrative law.

Thirdly, judicial review is intended to act as something of a measure of last resort. This is why courts are reluctant to review exercises of power directly when some other means of control — such as contractual remedies or statutory remedies created for specific power relations — are available. If such an alternative means of control exists and is effective, an

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\(^\text{119}\) See particularly at 1059E-G where he suggested that three questions determine whether a private exercise of power is subject to the Bill of Rights. They are : (i) ‘Whether the activity is a “public function”, that is operating in the public domain.’ (ii) ‘Whether the activity is so linked or “intertwined” with public action that the private actor becomes equated with the public domain.’ (iii) ‘Whether the conduct of the private actor (persons) complained of, has been approved, authorised or encouraged by the State or public institutions in an adequate manner so as to be responsible for it.’ If, he concluded, ‘any of these questions are answered in the affirmative, the horizontal dimension is applicable’.

\(^\text{120}\) At 931D-932E.
aggrieved litigant should use it rather than seek to extend the review function of the courts: in the language of s8(2) of the Constitution, it would not be appropriate to extent the operation of the rights to lawful, reasonable and procedurally fair administrative action in circumstances where there is no need to do so. This idea recognises the limits of judicial review and recognises that the law may regulate power in many different ways.

Finally, it must be borne in mind that the exercise of demarcating the public from the private is difficult, particularly when done in the abstract. The dividing line is also not necessarily static: the line will move as modes of governance change. In seeking that elusive divide, in the application of s8(2) of the Constitution through s1(i) of the Promotion of Administrative Justice Act, courts will need to be guided by the values of the Constitution, particularly the values of accountability, responsiveness and openness. They cannot approach the task at hand without the guidance of the Constitution for that is the basis of their power to develop the law and to exercise a review jurisdiction. And they cannot approach their task either with a phobia for or a mistrust of public law, or a mind-set that retreats to the comforts of precedent developed in an era very different to the present. That is simply a recipe for allowing exercises of power and performances of functions that ought to be controlled to slip the net.
CHAPTER SIX: STANDING

6.1. Standing in Public Law

The rules of standing that require a litigant to have capacity to sue and a sufficient interest in the matter operate to allow certain cases through the doors of the court and to keep others outside. This topic tends to be controversial because how standing is dealt with by the courts has obvious implications for access to justice and is, therefore, of constitutional significance. It is also important to bear in mind that the answers to where the line is drawn between those who have standing and those who do not are often of limited assistance because these answers are ‘most often used as conclusions of arguments about values and policies the premises of which are unexpressed’. It would, therefore, be incorrect to view the rules of standing (in their public law application, at least) as neutral procedural provisions: in administrative law the approach of the courts to standing ‘reflects more clearly than anywhere else the prevailing system of values upon which the law is based’. Cameron is particularly forthright in this respect. After stating that the various rules of standing are ‘highly manipulable’, he says that ‘[w]hether an applicant’s interest is only “academic” or whether the litigation is “premature” involves a value judgment that will differ from judge to judge and from case to case. The standing requirement can be manipulated by judges who feel disinclined to hear certain cases or to decide certain issues for reasons which are not openly expressed’.

The fact that the rules of standing have been developed within an essentially private law

1 Baxter, 644. This chapter is principally concerned with the second aspect, the interest of a litigant in the subject matter of particular litigation.
3 De Smith, Woolf and Jowell, 99 (paragraph 2-001).
5 Baxter, 644. On whether locus standi is a procedural or substantive issue see Cane, op cit, 304.
paradigm has added to the problem. The same rules are not necessarily suited to adjudication in which public law rights and interests are in issue. The reason for this, in this instance expressed within the specific context of the extended standing provisions of the interim Constitution, is explained by O'Regan J in Ferreira v Levin NO:

‘Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than of a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law.’

The constitutional significance of standing lies principally in two related issues: whether unlawful conduct may be permitted to persist because no individual litigant has a sufficient

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8 1996 (1) BCLR 1 (CC), 119B-E (paragraph 229). See too Ngxuza v Permanent-Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (12) BCLR 1322 (E), 1327D-E in which Froneman J, with reference to the above passage, held: ‘Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality. ... All this speaks against a narrow interpretation of the rules of standing.’
personal interest to be ‘allowed’ by the courts to stop it,\(^9\) and its inverse, whether persons who do not necessarily have a direct, substantial and personal interest can approach the courts for relief because those with a direct, substantial and personal interest are not able to do so for one or other reason.\(^{10}\) The context within which these questions have to be answered is this: if the rules of standing are too restrictive, they will act as inhibitors to the achievement of justice and may undermine the rule of law; if, on the other hand, the rules are too loose, they may undermine the proper functioning of the courts by opening their doors to frivolous cases, utilizing judicial resources at the expense of more deserving cases.\(^{11}\) It has been suggested that if a legal system’s rules of standing are properly constructed ‘they should only prevent a litigant who has no legitimate reason for bringing proceedings from doing so’.\(^{12}\) In this way, a premium would be placed on access to the courts and public spirited individuals or organisations would be able to ensure constitutional and lawful conduct by the state.

It is worth noting that the trend, internationally, has been to extend standing. This development has been described by Bhagwati, writing about the Indian experience, as a

\(^9\) De Smith, Woolf and Jowell, 99 (paragraph 2-001) say of this issue: ‘At its heart is the question whether it can ever be right, as a matter of principle, for a person with an otherwise meritorious challenge to the validity of governmental action to be turned away by the court on the ground that his rights or interests are not sufficiently affected by the impugned decision? To put this another way, are there some governmental decisions, the legality of which is otherwise justiciable, but in respect of which no one person has been sufficiently affected to enable a legal challenge to be made? To answer yes to these questions presupposes that the primary function of the court’s supervisory jurisdiction is to redress individual grievances, rather than that judicial review is concerned, more broadly, with the maintenance of the rule of law.’

\(^{10}\) Budlender ‘The Accessibility of Administrative Justice’ 1993 Acta Juridica 128, 131, in the context of public interest litigation, outlines the problem thus: ‘Often, people whose rights are infringed cannot themselves go to court to protect them. There are many possible reasons for this: for example, they may not be aware of their rights, or they may fear victimization. This is particularly likely in the field of administrative justice, where the subject will often have a continuing relationship with the public authority, and may fear challenging powerful administrators. In such cases, the rules of locus standi stultify justice, because the only person who is permitted to challenge the unlawful action in question is unable to do so.’

\(^{11}\) It is by no means clear that the courts would, indeed, be flooded with frivolous cases if the rules of standing were relaxed. See in this respect Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa 1996 (3) SA 1095 (Tk), 1106D-H; Ngxuza v Permanent-Secretary, Department of Welfare, Eastern Cape Provincial Government, supra, 1332B-E.

\(^{12}\) De Smith, Woolf and Jowell, 100 (paragraph 2-003).
process of breaking the ‘chains forged by the traditional doctrine of standing’ to make available access to justice ‘for the purpose of making basic human rights meaningful for the large mass of people’. It will be seen below that s38 of the Constitution, and s7(4)(b) of the interim Constitution before it, were designed to have precisely this effect. In cases in which it is alleged that a fundamental right has been infringed or threatened, the rules of standing have been dramatically reformed. In other areas of law not involving fundamental rights, it would be safe to assume that the indirect application of the Constitution will have the effect of allowing for judge-made reforms in step with the spirit, purport and objects of the Bill of Rights.

6.2. The Rules of Standing: the Common Law

The matter of Dalrymple v Colonial Treasurer highlights the constitutional problem created by the traditional approach to standing when issues affecting the public at large are at stake. The applicants were members of the Transvaal Legislature who sought an interdict to prevent the respondent from unlawfully making certain payments to members of the legislature. The illegality of the payments was accepted as established by Innes CJ and Bristowe J. That did not mean, however, that the applicants were entitled to the relief which they claimed. Their application was, in fact, dismissed because it was found that they lacked standing. In reaching this conclusion, Innes CJ set out the position as

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13 Cited by Budlender, op cit, 132. Sorabjee ‘Obliging Government to Control Itself: Recent Developments in Indian Administrative Law’ [1994] PL 39, 49 says of judge-made reforms of the rules of standing: ‘One of the most significant contributions made by the Indian judiciary is its liberalization of the doctrine of locus standi.’

14 1910 TS 372.

15 For a summary of the facts see 373-374.

16 At 378 (Innes CJ) and at 398 (Bristowe J). Wessels J was equivocal about the illegality of the payments and avoided having to make a specific finding on this issue. It is worth noting that Innes CJ, with Bristowe J concurring, ordered that each party pay their own costs. Innes CJ said in this respect, at 403: ‘The ordinary rule would lead us to discharge the rule with costs. But the view I take is that there was a clear illegality, and a very important constitutional point raised in connection with that illegality; and I think that this is a case where the Court should exercise the wide discretion which it always reserves in the matter of costs, and in discharging the rule should make no order as to costs.’
follows:  

‘The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side: it is of equal force in regard to criminal procedure. Just as no man can claim damages in a civil action unless he has himself been injured, so no man may institute a private prosecution unless he has been specially affected by the crime. And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals. The acts complained of in this instance fall within the former category.’

Limited concessions are made to the ‘class’ nature of certain rights and interests in a few narrowly defined circumstances. The first entered our law by way of the rule that is drawn from the case of Patz v Greene and Co but it falls far short of according standing to litigate in the public interest. The rule was articulated in the following terms by Solomon J, quoting from the English case of Chamberlaine v Chester and Birkenhead Railway Co:

‘Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage – some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen’s subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage.’

In endorsing this view, which Solomon J described as ‘not only good law, but also common sense’, he explained that where ‘the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained

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17 At 379. In Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87, 100 Wessels CJ held that in order to be accorded standing a litigant was required to have ‘a direct interest in the matter and not merely the interest which all citizens have’. See too Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) in which the same rules were applied despite the fact that the validity of legislation was being challenged against the bill of rights operative at that stage in the territory now known as Namibia.

18 1907 TS 427, 433.

19 18 LJ Ex 494. Special damage in this context means ‘damage to an individual over and above the damage suffered by the public at large, or as is often the case, by a relevant section of the public of which the applicant is a member’ (Cane, op cit, 313).
damage is entitled to his remedy'.

The second concession is the standing afforded to ratepayers to challenge the actions of their local authorities. The rationale for affording this class of litigant standing varies. In Dalrymple, for instance, Innes CJ offered two possible explanations. First, he suggested that in the case of certain municipalities, the statute which formed them created a universitas of which every ratepayer was a member, and was thus vested with a right to object to the use of municipal property outside of the terms of the statute. Secondly, in respect of other municipalities, he suggested that a ratepayer had standing because of a fiduciary relationship between municipality and ratepayer. Wessels J, in the same case, appeared to accept these reasons and added others of his own. For example, he also founded a ratepayer’s standing on his or her statutory ‘right of supervision and interference in municipal affairs’. Bristowe J, in the third judgment in Dalrymple, offered a rather alarming basis in the course of grappling with the argument that, if a ratepayer had standing in respect of acts of a municipality, so too should a taxpayer in respect of the acts of the central government. For him standing in the former case and not in the latter was based on the fact that municipal councillors were ‘drawn from all classes of the population, and are not necessarily persons who can be trusted to keep strictly within their powers and to subordinate their private interests to their public duties’ whereas the ‘great officers of State are tried men who have earned the trust reposed upon them, and the very immensity of the trust is in itself a guarantee that it will not be betrayed’. Baxter, in dealing with these and similar attempts to justify ratepayer, but not taxpayer, standing says that they are neither valid nor persuasive and that a more realistic (albeit unprincipled) basis for the

\[\text{At 433. On the rule in general see Baxter, 659-670. For a good example of the rule in operation see Director of Education, Transvaal v McCagie 1918 AD 616. But see Cane, op cit, 314, who says of the rule (in English law): ‘In this sense special damage is essentially a private law concept for although it is not such as would give rise to an action for damages in private law, and although special damage need not relate to an interest in the nature of property, it does make the individual and his interests central to the question of standing.’}\]

\[\text{Supra, 383-385.}\]

\[\text{At 395.}\]

\[\text{At 401-402.}\]
difference is simply that the courts fear that the floodgates will be opened ‘to a rush of challenges to official action from an extremely wide group of potential litigants’.24

The most expansive exception to the individualized view of standing is to be found in the well known case of Wood v Ondongwa Tribal Authority.25 It applies when life or individual liberty is in issue. The appellants – the applicants in the court below – were the Anglican bishop of Damaraland in Namibia and the Lutheran bishop of Ovango Kavango, also in Namibia. They had launched an application to interdict unlawful random assaults (which went together with unlawful deprivations of liberty) on members or suspected members of two political parties, the Democratic Co-operative Development Party (Demkop) and the South West Africa Peoples’ Organization (SWAPO) perpetrated by members of the tribal police of two tribal authorities. The applicants did not know those whom they sought to protect and, indeed, the protectees were not identifiable, given the random nature of the illegal conduct. Despite these hurdles, the standing of the appellants was upheld by the Appellate Division.

Rumpff CJ held that in cases of this nature an applicant’s interest should be ‘widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order’ and that such an applicant would be acting in a way ‘not dissimilar to the way in which a negotiorum gestor would act in our law, or a person would be permitted to act as a curator ad litem to an unknown, absent or inaccessible person ... except that he would attempt to protect something far more precious than property’.26 This form of standing is, however, subject to conditions. They are: first, the applicant must satisfy the court that the protectee is not able to make the application himself or herself; secondly, the applicant would have to satisfy the court that he or she had good reason for making the application; and thirdly, the applicant would be required to establish that the

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24 Baxter, 659.
25 1975 (2) SA 294 (A).
26 At 311H.
Finally, it is important to bear in mind that the standing accorded the appellants in Wood was personal rather than class based: it was held that in the circumstances they had a sufficiently direct interest.  

6.3. Standing and the Constitution

6.3.1. General Remarks

Section 7(4) of the interim Constitution provided for standing for a broad range of litigants in fundamental rights litigation. This provision did to South African law, on a formal level at least, what a number of years of judicial activism had done for Indian law. The purpose of s7(4) was to bring about bold reform to the law of standing, to overcome the inhibition of human rights litigation by the conventional rules of standing, ripeness and mootness.

Section 7(4) of the interim Constitution read:

‘(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by –

   (i) a person acting in his or her own interest;

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28 For an application of Wood see Deary NO v Acting President, Rhodesia 1979 (4) SA 43 (R) in which the standing of the Roman Catholic Church was recognised for the purposes of proceedings to interdict allegedly unlawful executions of people sentenced to death by courts martial. Beck J, in arriving at this conclusion, held: ‘It must be said at the outset that the Court will be slow indeed to deny locus standi to an applicant who seriously alleges that a state of affairs exists, within the Court’s area of jurisdiction, whereunder people have been, are about to be, and will continue to be unlawfully killed. ... The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the Court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts.’ (At 45F-G.) On the limitation of the scope of Wood in South Africa see Loots ‘Keeping Locus Standi in Chains’ (1987) 3 SAJHR 66.

29 Loots, 51.

(ii) an associate acting in the interest of its members;
(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
(iv) a person acting as a member of or in the interest of a group or class of persons; or
(v) a person acting in the public interest.'

Section 38 of the final Constitution is the successor to s7(4) of the interim Constitution. It reads:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name:
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interests; and
(e) an association acting in the interest of its members.'

The Constitutional Court has held that a broad and generous approach to standing is required in constitutional litigation. In Ferreira v Levin NO,31 Chaskalson P (for the majority) said of s7(4) of the interim Constitution:

'Whilst it is important that this court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and which serves to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of section 7(4) of the Constitution on which counsel for the respondents based his argument.'

He also observed that the category of persons empowered to approach a court of competent jurisdiction for appropriate relief is 'broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened, and to that extent the section demonstrates a broad and not a

31 1996 (1) BCLR 1 (CC), 98B-D (paragraph 165).
narrow approach to standing'.\(^{32}\) O'Regan J located the new standing provisions within the context of the enhanced role of the judiciary in a constitutional state. She said:\(^{33}\)

‘Section 7(4) is a recognition too of the particular role played by the Courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. The role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.’

In Beukes v Krugersdorp Transitional Local Council\(^{34}\) Cameron J held that the broad approach to standing 'seems to me to be appropriate, not only to the Constitutional Court, but to all courts that are called upon to adjudicate constitutional claims' and it 'should be taken not only to who qualifies as having standing under s7(4)(b) but to how that standing may be evidenced'.\(^{35}\) The same judge, now sitting in the Supreme Court of Appeal has, in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza\(^{36}\) applied the same broad and generous approach in developing the common law

\(^{32}\) At 99C-D (paragraph 167). See too Van Huysteen NO v Minister of Environmental Affairs and Tourism 1995 (9) BCLR 1191 (C), 1209H-1211G.

\(^{33}\) At 119F-G (paragraph 230). See too Ngxuza v Permanent-Secretary, Department of Welfare, Eastern Cape Provincial Government, supra, 1327D-F.

\(^{34}\) 1996 (3) SA 467 (W), 474E-F.

\(^{35}\) Southwood J interpreted s38 in much the same way in Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening 1998 (2) SA 559 (T). He held that the aim of the section was clear and unambiguous: it was intended to make provision for virtually unlimited standing so that as little interference as possible would occur in respect of the means of approaching courts, the nature of the enquiry and the remedy to be granted. He held that the purpose of the section was to ensure that fundamental rights were upheld. To achieve this purpose courts had to be placed in the position to be able to determine whether an applicant’s fundamental rights had been infringed or threatened and to grant appropriate relief where such violations had occurred. (At 569D-F.)

\(^{36}\) 2001 (10) BCLR 1039 (SCA), 1050G-1053B (paragraphs 21-27). See too the judgment of Froneman J in the court below, in Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (12) BCLR 1322 (E), 1327D-F: ‘Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often
of jurisdiction in respect of a class action in which a substantial number of members of the class resided outside the jurisdiction of the court in which the proceedings were instituted. He held that, even if, in strict terms the court may not have had jurisdiction over these beneficiaries of the class action, ‘it is plain that the Constitution requires adjustment of the relevant rules, along sensible and practical lines, to ensure the efficacy of the class action mechanism’.37

6.3.2. People Acting in Their Own Interest

At first blush, s38(a) of the Constitution might appear to do no more than constitutionalise the general rule of common law.38 This is not so: first, as Trengove has pointed out, it ‘protects the right of every person to gain access to court for the protection for his or her fundamental rights against undue restriction or erosion by the state’.39 In this sense, s38(a) (and the rest of the section too) functions as an adjunct to s34, the fundamental right of access to court;40 secondly, because s38 displays a deliberate bias towards enhanced access to court and because it applies to anyone acting in their own interest, rather than anyone who has a direct and substantial interest in the subject matter of the litigation, individual standing in constitutional cases is broader than the common law equivalent.

This broader approach is evident in the majority judgment in Ferreira v Levin NO.41 The applicants had challenged the validity of s417 of the Companies Act 61 of 1973 after they

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37 At 1051G-H (paragraph 23).
38 Loots, op cit, 56.
39 Trengove, op cit, 7.
40 See in this respect De Lille v Speaker of the National Assembly 1998 (7) BCLR 916 (C), 939C-E (paragraph 41) in which Hlophe J held that an ouster clause contained in s5 of the Powers and Privileges of Parliament Act 91 of 1963 was invalid because it conflicted, inter alia, with s34 and s38 of the Constitution.
41 Supra.
had been summoned to be examined on the affairs of companies which were in the process of being wound up. The section provided that an examinee ‘may be required to answer any question put to him ... notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him’. The applicants argued that this provision infringed (inter alia) their fair trial right against self incrimination. They had not been examined yet and had, consequently, not incriminated themselves or been faced with such self-incriminatory evidence in a trial. It was contended on behalf of the respondents that the applicants had no standing in terms of s7(4)(b)(i) of the interim Constitution because their fair trial rights had not, as yet, been impaired.

Chaskalson P rejected this argument because, he held, it was ‘highly technical to say that a witness called to a section 417(2)(b) enquiry lacks standing to challenge the constitutionality of the section. A witness who genuinely fears prosecution if he or she is called upon to give incriminatory answers cannot be said to lack an interest in the decision on the constitutionality of this section’. At 97D (paragraph 163). He concluded that where ‘the impugned section of the Companies Act has a direct bearing on the applicants’ common law rights, and non-compliance with this section has possible criminal consequences, they had sufficient standing in my view to secure a declaration from this court as to the constitutionality of the section’. At 98G (paragraph 166). See too Kolbatschenko v King NO 2001 (4) SA 336 (C).

Both Chaskalson P and O’Regan J (who found that, on the facts, the applicants had not established personal standing but had public interest standing) observed that a person could have a sufficient interest in a matter despite the fact that his or her rights were not affected or threatened. They cited, as an example, the well known Canadian case of R v Big M Drug Mart Limited in which a juristic person, which did not enjoy a right to freedom of religion itself, was nonetheless able to challenge the constitutionality of Sundays observance legislation because it infringed such a right.

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42 At 97D (paragraph 163).
43 At 98G (paragraph 166). See too Kolbatschenko v King NO 2001 (4) SA 336 (C).
In line with this approach, Heher J, in National Coalition for Gay and Lesbian Equality v Minister of Justice, accepted that the applicant organisation had a sufficient interest itself to challenge the constitutionality of rules of common law and statutory provisions that criminalised various forms of consensual sexual conduct between adult men. Two of the organisation’s objectives were to ‘promote equality before the law for all persons, irrespective of their sexual orientation...’ and to ‘challenge by means of litigation ... all forms of discrimination on the basis of sexual orientation’. In City of Cape Town v Ad Outpost (Pty) Ltd, the respondents relied on the right to freedom of expression, entrenched in s16 of the Constitution, to challenge a by-law that prohibited the erection of advertising billboards without permission. They erected the billboards but were not responsible for the information or ideas that the advertisements imparted. It was argued that s16 had no application because the freedom of expression of the respondents was not affected or threatened. Davis J rejected this argument. He held that the generous approach to standing required by the Constitution justified the conclusion that the ‘respondents have a clear interest in ensuring that the right of freedom of expression is not breached in an unjustifiable manner’.

45 1998 (6) BCLR 726 (W).
46 At 732 C-D.
47 2000 (2) SA 733 (C).
48 At 748F-G. See too Van Huysteen NO v Minister of Environmental Affairs and Tourism 1995 (9) BCLR 1191 (C), 1210G in which Farlam J held that s7(4)(b)(i) of the interim Constitution was wide enough to cover the interest of a trustee when he or she sues on behalf of a trust. In Bafokeng Tribe v Impala Platinum Ltd 1998 (11) BCLR 1373 (B), 1399D-1404G Friedman JP held that a tribe, as the beneficiary of a trust, could sue in its own name when the trustee, the Minister of Land Affairs, had not sued on its behalf and was faced with a serious conflict of interest. See further Richardson v South Peninsular Municipality 2001 (3) BCLR 265 (C). By way of contrast, Pickering J, in Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape 1996 (2) SA 898 (Tk) held that the applicant did not have a sufficient interest in the subject matter of the litigation, namely, the validity of certain pieces of local government legislation, because it was not alleged that the rights of traditional leaders were being infringed by the legislation because of their membership of the applicant or that it was prevented by the legislation from pursuing its objects, which were, essentially, the protection and promotion of the institution of traditional leadership. (At 905E-F.) Note that the court also held that the deponent to the founding affidavit did not have authority to institute proceedings on behalf of the applicant (at 908I) and that it did not have standing to sue in the interests of its members because it had not claimed such standing, relief appropriate to such standing and because it was doubtful that the fundamental right relied upon to activate this form of standing had been infringed (at 905H-J). The applicant had argued that the fundamental right to make political choices had been infringed because the legislation under challenge made provision for a proportional
These interpretations of s38(a), consonant with the broad approach to standing favoured in Ferreira, were not echoed in Naidenov v Minister of Home Affairs. It is an example of a much narrower approach that does not further the culture of accountability and justification which are at the heart of the constitutional state. The applicant was an illegal immigrant whose temporary residence permit had expired. Although he had applied for another permit, he had only done so after his original permit had expired. This application had not been determined when he was arrested with a view to his deportation. In an urgent application, he applied for orders declaring his arrest to be unconstitutional, directing that he be released and interdicting his deportation. Spoelstra J, in dismissing the application, held that Naidenov did not have an interest which was recognised by, and protected by, the law. Although he was principally concerned with the administrative justice section of the interim Constitution, and specifically with s24(c) which provided that any person whose rights or interests were adversely affected by administrative action had a right to reasons, he equated this section with s7(4)(b), holding that the word ‘interest’ in both sections was co-extensive:

‘The word “interest” (section 7(4)(b)) or “interests” (section 24(c)) as employed in Chapter 3 of the Constitution presupposes an interest which entitles the holder to judicial protection in regard to that interest. The applicant’s “interest” is not such an interest. His interest can probably be described as a wish to remain in this country or a wish not to be returned to his own country. As indicated above, this kind of “interest” cannot be enforced in a court of law. It is therefore not an interest as contemplated by section 24(c) of the Constitution.’

In the light of the Constitutional Court’s approach to s38(a) and the judgments that have applied this approach, Naidenov must be regarded as wrongly decided. It is clear that the courts have accepted that the section does more than constitutionalise the general rule of common law because it bolsters the right of access to court for the protection of a person’s representation system rather than one based on ward representation in the local government elections.

49 1995 (7) BCLR 891 (T).
50 See in particular s1(c) and s1(d) of the Constitution.
51 At 9011-902 A. See too Xu v Minister van Binnelandse Sake 1995 (1) SA 185 (T).
fundamental rights and, because of this, individual standing in constitutional cases is broader than the common law if only as a result of the need to interpret s38(a) purposively, less technically than other statutory provisions and more expansively.

6.3.3. People Acting on Behalf of Others Who Cannot Act in Their Own Name

Section 38(b) extends the principle developed in Wood v Ondongwa Tribal Authority to litigation to vindicate all fundamental rights and not just the right to freedom. It has been suggested that the requirement that the person directly affected is unable to litigate himself or herself should be broadly construed along the lines of the Indian judge-made rule upon which it was modelled (along with Wood).

Section 38(b) has been dealt with in two cases of importance. In Maluleke v Member of the Executive Council, Health and Welfare, Northern Province the applicant’s old age pension, along with the pensions of 92,046 others, was stopped as part of a process to root out people who were receiving pensions to which they were not entitled. A decision

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52 Trengove, op cit, 7. See too De Lille v Speaker of the National Assembly 1998 (7) BCLR 916 (C), 939C-E (paragraph 41).
53 1975 (2) SA 294 (A).
54 Trengove, op cit, 8-9. Third party litigation is allowed in India by any person or organization suing on the basis of an infringement of ‘any constitutional or legal right’ where the person or class of persons whose rights have been violated is ‘unable to approach the court personally because of poverty, helplessness, disability, or a socially or economically disadvantaged position’ (Loots, op cit, 50).
55 The section was also discussed in general terms in Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensionfonds 1997 (8) BCLR 1066 (T) in which the applicant, a local authority, had sought to free itself from a relationship with the respondent pension fund, relying, inter alia, on the fundamental right to freedom of association. Cameron J held that both parties were organs of state. He left undecided the question whether an organ of state could be the bearer of fundamental rights but observed that it was conceivable that an organ of state could litigate on behalf of a person who could not institute the proceedings himself or herself, in terms of s7(4)(b)(ii) of the interim Constitution. (At 1075B-C.) He held that it was not necessary to decide whether organs of state could initiate class litigation or sue in defence of the public interest. (At 1075C.) Cameron J concluded, however, that broad as the approach of the courts should be to locus standi in constitutional litigation, it was still necessary for an applicant to set out in the pleadings the basis and nature of any claim to act on behalf of others, which the applicant in this instance had failed to do. (At 1076A-F.)
57 At 370J-371A.
was taken to suspend payments to the 92,046 beneficiaries so that they could then present themselves for re-registration, at which stage their entitlements could be determined properly.\textsuperscript{58} The idea was that those who proved to be genuine beneficiaries would be reinstated and paid arrears for the period of suspension.\textsuperscript{59} The applicant had applied for a declarator that the stopping of her pension was unlawful and a mandamus to compel the respondent to pay her interest from the time of cancellation to the time of reinstatement. She applied for similar relief for everyone who had been prejudiced in the same way during this process. She succeeded on her own behalf as Southwood J found that the respondent did not have lawful authority to suspend the applicant’s pension in the circumstances.\textsuperscript{60}

She did not succeed in her capacity as a representative litigant. Southwood J held, in the first place, that it had not been clearly alleged in the papers which fundamental rights had been infringed or threatened, and that therefore the extended standing provisions of s38 had not been activated.\textsuperscript{61} Secondly, he stated that it was ‘difficult to imagine’ how the suspension of pension payments could be an infringement of the Bill of Rights, despite having found the suspension of the applicant’s pension to have been effected without lawful authority – in other words, in the face of the fundamental right to lawful administrative action.\textsuperscript{62} Thirdly, he held that even if the infringement of a fundamental right had been established, he was not persuaded that the applicant had standing in terms of either s38(b), s38(c) or s38(d) to represent the interests of all of those affected by the respondent’s decision. In respect of s38(b) he held simply that there was no evidence to

\begin{thebibliography}{99}
\bibitem{footnote58} At 371E-F.
\bibitem{footnote59} At 371F-G.
\bibitem{footnote60} At 373D.
\bibitem{footnote61} It is not clear how Southwood J came to this conclusion because the papers set out in some detail the rights infringed. They were the right to lawful administrative action, procedurally fair administrative action (s33(1) of the Constitution), the right of access to social security, including social assistance (s27(1)(c)) and the right to be free from arbitrary deprivations of property (s25(1)).
\bibitem{footnote62} At 373J-374A. See Ngxuza v Permanent-Secretary, Department of Welfare, Eastern Cape Provincial Government supra, 1330G-H, in which Froneman J questioned Southwood J’s conclusion. He held: ‘It is not clear to me why Southwood J found it difficult to imagine how the suspension of payment of social benefits could be an infringement of a right in the Bill of Rights. He had himself found that the suspension of benefits in that case was unlawful. That in itself appears to me to be an infringement of the right to just administrative action contained in section 33 of the Bill of Rights.’
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show that the 92 046 affected pensioners could not act in their own interests.

One hardly needs screeds of sociological evidence to know that most people affected by the decision were, from a practical point of view, unable to litigate on their own behalf. The reasons given by Didcott J in Mohlomi v Minister of Defence for the unfairness of a sixth-month limitation of action provision are equally apposite in this regard. He held, with regard to the disparity between the sixth-month provision and the normal three-year provision in terms of the Prescription Act 68 of 1969:

‘That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the main stream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.’

It must also be viewed in the light of the statement of Ackermann J in Fose v Minister of Safety and Security that in a country such as South Africa ‘where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated’, a passage cited with approval by Southwood J in Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening.

It is suggested that Southwood J approached the interpretation of s38(b) on too narrow a basis. His approach smacked of the ‘austerity of tabulated legalism’ that Lord Wilberforce warned against when interpreting fundamental rights provisions, in Minister of Home Affairs (Bermuda) v Fisher. Social grants are given on the basis of need and are far from princely in amount. It is therefore fair to assume that, with the legal aid system in a state of

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63 1996 (12) BCLR 1559 (CC), 1566F-H (paragraph 14).
64 1997 (3) SA 786 (CC), 826I (paragraph 69).
65 1998 (2) SA 559 (T), 570E-F.
collapse, none of the 92 046 affected pensioners would be able to approach a court for relief individually because of their poverty.

A far more realistic approach was taken by Froneman J in *Ngxuza v Permanent-Secretary, Department of Welfare, Eastern Cape Provincial Government*. 67 In this case, four applicants whose disability grants had been cancelled by the first respondent applied, on their own behalf and on behalf of all similarly situated people in the province, for the reinstatement of the grants. They claimed standing to do so on the basis of s38(a) – in their own interest – and s38(b), s38(c) and s38(d), as representative litigants. They claimed that the grants of approximately 100 000 people had been cancelled by the first respondent in violation of the right of everyone to fair administrative action. 68 In holding that the applicants had standing in terms of s38(b) to litigate on behalf of those whose grants had been cancelled, Froneman J observed that the evidence before him tended to confirm the ‘correctness of the situation sketched by Didcott J’ in *Mohlomi* and quoted above. 69 He proceeded to say that in the Eastern Cape Province, a substantial proportion of the population is poor, many people live in rural areas far from lawyers, roads are poor, public transport is erratic and the legal aid system is in a state of crisis. 70 He concluded:

‘The evidence presented in this case is also sufficient to distinguish it from the *Maluleke* matter. There is evidence that many people in similar circumstances as the applicants are unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in

67 Supra.
68 For the facts, see 1323J-1326G.
69 At 1329G-H.
70 At 1329H-I.
71 At 1331A-B. The Supreme Court of Appeal, in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (SCA) did not find it necessary to deal with Froneman J’s findings that the respondents on appeal had standing in terms of s38(b) and s38(d). It dismissed the appeal on the basis that Froneman J was correct in holding that the respondents had standing to litigate on behalf of a class of similarly placed people whose disability grants had all been cancelled in violation of their fundamental right to procedurally fair administrative action. The first paragraph of the judgment may be understood as support for Froneman J’s findings on the inability of the members of the class to litigate on their own behalf. Cameron JA held (at 1041E-F (paragraph1)): ‘The law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both.’ See too 1045I-1046D (paragraphs 11 and 12).
obtaining legal aid. Effectively they are unable to act in their own name. Their individual names have not been disclosed, but that information is known to the respondents (who have admitted as much in the papers). I would have been surprised if the respondents did not know the identities of those people whose benefits they have discontinued since 1996.'

6.3.4. People Acting as Members of, or in the Interest of a Group or Class

Section 38(c) introduces class actions into South African law. The essence of a class action is that 'one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it'.\(^\text{72}\) The Constitution, in creating this form of standing, does not flesh out how the class should be defined and identified, who may enforce a successful class action and who is bound if it fails. It has been regarded as necessary that legislation be passed to regulate class actions and to provide answers to these issues.\(^\text{73}\) In the meantime, the courts will have to develop appropriate rules of procedure to give effect to class actions using their inherent jurisdiction, now entrenched in s173 of the Constitution, to regulate their own processes and to develop the common law. These procedural rules will have to accord with the spirit, purport and objects of the Bill of Rights.\(^\text{74}\)

Beukes v Krugersdorp Transitional Local Council\(^\text{75}\) was one of the earlier cases to recognise the standing of a party to sue on behalf of members of a class of similarly placed ratepayers. The respondent challenged the applicant’s standing because, it was argued,


\(^\text{73}\) Trengove, op cit, 10. See too Estelle Hunter ‘The Draft Legislation Concerning Public Interest Actions and Class Actions: the Answer to all Class IIs?’ (1997) 30 CILSA 304, 305 in particular. The legislation to regulate class actions and public interest suits has not been passed yet.

\(^\text{74}\) Constitution, s39(2). See Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza supra, para 12.

\(^\text{75}\) 1996 (3) SA 467 (W).
he had not defined the class accurately enough so that the interests of its individual members could be determined.\textsuperscript{76} The people whom the applicant represented had all appended their names, addresses and telephone numbers to a form entitled 'list of group to class action' and in which they authorized the applicant to bring an application on their behalf 'to declare invalid the conduct of the Transitional Local Council of Krugersdorp, concerning the distinction which is made in respect of the levying of municipal rates and for an order declaring that we also are entitled to pay municipal rates at a flat rate'.\textsuperscript{77} Cameron J rejected the respondent's argument. He held:\textsuperscript{78}

'In the present case, the founding papers proceed explicitly from the averment that the Applicant as well as the listed persons live in "white areas", and that they are for this reason affected unfairly by the TLC's discriminatory rates policy. From this it seems to be plain that the group or class of persons as a member of whom and in whose interests the applicant is acting are those ratepayers of Krugersdorp within the TLC's authority who do not enjoy the benefit of "flat rate" municipal charges. It would run counter to the spirit and purport of the interim Constitution to require that persons who identity themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should reiterate with formalistic precision the complaint with which they associate themselves. Even more contrary to the spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation. Mr De la Rey's contention that no

\textsuperscript{76} At 473H-474A.
\textsuperscript{77} At 472H-I.
\textsuperscript{78} At 474F-H. Three other cases bear mention here. In Bafokeng Tribe v Impala Platinum Ltd 1998 (11) BCLR 1373 (B) Friedman JP held that the plaintiff tribe had standing in terms of the Constitution to litigate on behalf of its members as a representative litigant (at 1399D-1404G) and in Minister of Health and Welfare v Woodcard (Pty) Ltd 1996 (3) SA 155 (N) Hurt J held that the applicant had standing to interdict the unlawful burning of the by-products of a sawmill because he was the Minister responsible for the administration and enforcement of the Atmospheric Pollution Prevention Act 45 of 1965 which proscribed the respondent's conduct in the absence of a permit (at 161H-162A) and as a representative litigant suing on behalf of a class of people, namely the respondent's neighbours, because the burning operations constituted an infringement of their fundamental right to an environment which was not detrimental to their health or well being (at 164E-G). In Coetzee v Comitis 2001 (1) SA 1254 (C), Traverso DJP held in a challenge to the constitutionality of the transfer rules of the National Soccer League (the NSL) that as it performed public functions it was subject to the Constitution. As the challenge was based on the alleged infringement of fundamental rights, Traverso DJP held that the applicant had standing to litigate on behalf of or in the interests of other professional soccer players and potential professional soccer players (paras 17.8, 17.9 and 17.10). Not much in the way of evidence appears to have been adduced by the applicant apart from an allegation that he enjoyed broad support from other players. In the light of the approach to standing in Ngxuza in both the High Court and the Supreme Court of Appeal it is open to doubt whether the applicant could be said to have had standing to institute a class action. He probably ought to have been held to have had standing in the public interest.
unnecessary restrictions should be placed on the application of s7(4)(b)(iv), and that it should be read so as to avoid obstructions on its invocation, seems to me to be correct."

What emerges from Beukes and other cases that have recognised the right of a litigant to sue on behalf of a class is that access to court should not be restricted by the application of over-technical rules of procedure. This does not mean, however, that class actions will always be appropriate. When representative standing is appropriate and when it is not are at the heart of the decisions in Maluleke v Member of the Executive Council, Health and Welfare, Northern Province, on the one hand, and Nqzuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government, on the other.

In Maluleke Southwood J rejected the applicant’s argument that she had standing to litigate on behalf of 92 046 similarly placed pensioners because they formed a class which she represented. It will be recalled that he had also rejected her standing to litigate for them because they were not able to litigate in their own names, or in the public interest. His reasons for holding that the applicant did not have standing as a class litigant were that the group of people concerned ‘constitute a group or class in only the vaguest and broadest sense – payment of their benefits was suspended’, that the circumstances of each person

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79 In Lifestyle Amusement Centre (Pty) Ltd v Minister of Justice 1995 (1) BCLR 104 (C) only one of a class of nearly 2000 small-scale, unlicenced casino operators resided within the jurisdiction of the court and four of this number claimed to act on behalf of the class in claiming interim relief pending a constitutional challenge to the gambling legislation. Van Den Burgh AJ dismissed their application because it amounted to impermissible forum shopping and an abuse of process (at 111B). The applicants had stated forthrightly that they had brought their application in the Cape because judges in other divisions had dismissed similar applications. In Matiso v Commanding Officer, Port Elizabeth Prison 1994 (3) BCLR 80 (SE) the applicant, an imprisoned judgment debtor, sought orders for her release from civil imprisonment, the release of all other civilly imprisoned judgment debtors in the prison and an interdict to prevent the respondent from taking into custody any other judgment debtors, pending an application to the Constitutional Court to set aside sections of the Magistrates’ Courts Act 32 of 1944 that purported to authorise civil imprisonment for debt. Melunsky J granted an order for the release of the applicant, referred the constitutional issue to the Constitutional Court and directed that the applicant was to initiate proceedings in that court within one month. He granted leave to the remaining judgment debtors in the Port Elizabeth Prison to apply to join in the proceedings as co-applicants (at 85B). He did not allow the applicant to litigate on behalf of other imprisoned judgment debtors because this would have had the effect of granting relief without the judgment creditors of each judgment debtor having the opportunity of being heard (at 84H).

80 1999 (4) SA 367 (T).

81 2000 (12) BCLR 1322 (E).
could differ and thirdly that it was not apparent that the members of the class were aware of the litigation and were willing to be bound by it and any costs order that could be made.\footnote{At 374C-D.}

As with the application of s38(b), Southwood J’s approach to s38(c) was too narrow. The first problem has a simple answer. The Constitution does not say that the group or class must be close-knit or have more than one defining characteristic. Indeed, all that is necessary is one characteristic – in this instance, the common thread of all suffering a similar infringement of their fundamental rights at the hands of the same respondent and as a result of one decision.\footnote{Southwood J, it would appear, approached the issue of standing from a narrow private-law model of adjudication rather than from a broader perspective consonant with the extended standing provisions of the Constitution, which he himself had recognised in Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening 1998 (2) SA 559 (T), 569D-F.} The second problem – that each person’s circumstances could differ – is more apparent than real. It stems from the fact that the race- and ethnically-based social assistance legislation in force before April 1994 has not been rationalised and so, in the Northern Province, one of seven different statutes applied, depending on where a particular pensioner lived. Despite the plethora of legislation, however, the 92 046 affected pensioners were prejudiced by one decision to suspend their grants until they could convince officials of their entitlement.

The third problem which Southwood J raised is one not of the applicant’s making. No legislation has been passed to regulate class actions and class actions are unknown to the common law. As a result, no statutory or common law rules were in place to regulate such matters as notice to members of the class or costs orders. As a judgment would have affected the rights of the 92 046 pensioners, members of the class would have to have been given some form of notice of the proceedings and be given an opportunity to associate with, or disassociate from, them. But the fact that the applicant did not manufacture a notice procedure which may or may not have met with Southwood J’s approval ought not to have meant that the application was dismissed on this basis. Courts
For instance he held specifically, at 1331C, that ‘the many practical difficulties associated with representative and class actions, highlighted in the Maluleke case, cannot justify the denial of such an action where the Constitution makes specific provision for it’. At 1333A-B, he observed that if ‘there is a clearly defined class of people who have been wronged in the manner required by section 38 it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress’.

At 1332F-G, Note that it was established on the papers that the procedure that the respondents adopted to cancel grants did not comply with the requirements of the fundamental right to procedurally fair administrative action, as envisaged by s33(1) of the Constitution. See in this respect, Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E). Note too that s27(1)(c) of the Constitution gives to everyone a fundamental right of access to social security including ‘if they are unable to support themselves and their dependants, appropriate social assistance’. See too Ngxuza, 1330H-J.

Froneman J’s judgment in Ngxuza stands in stark contrast to Southwood J’s judgment. He confronted the problems of extended standing, such as the difficulty of ensuring that class litigants represent the interests of the class properly, by holding that the solution lies not in deviating from the broad approach to standing required by the Constitution and endorsed by the courts but rather in developing new and innovative judicial responses to give effect to s38. This is the essential conceptual difference between this judgment and Southwood J’s judgment in Maluleke: it can be said that Southwood J saw only the problems, but Froneman J also saw the solutions. Froneman J held that the applicants had established that they had standing to act for the class (and in the public interest) because: first, they established a common interest that related to the infringement of a fundamental right as they and those they claimed to represent had all had their grants discontinued ‘in the same unlawful manner by the respondents’; secondly, the class that the applicants wished to represent was ‘sufficiently clear and identifiable’; and thirdly, the applicants were members of that class.

The approach taken by Froneman J is perhaps best summed up by what he drew from the
comparative law to which he was referred. He held that the importance of the foreign case law lay in the assistance it rendered to South Africans in ‘our quest for democracy’.  

Froneman J said that, from the Indian law, he learnt that ‘flexibility and a generous approach to standing in a poor country is “absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective” (in the words of Bhagwati J in SP Gupta and Others v President of India and Others (1982) 2 SCR 385; (1982) ASC 149 at 189-190’. From the Anglo-American common law he drew the lesson that representative standing ‘should be treated as being not a rigid matter of principle, but a flexible tool of convenience in the administration of justice, and should be applied, not in a strict and rigorous sense, but according to its wide and permissive scope’.  

Froneman J’s judgment was upheld by the Supreme Court of Appeal in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza.  

Cameron JA was particularly harsh in his criticism of the way the appellants had exercised their powers in implementing the wholesale cancellation of disability grants in the province of the Eastern Cape and in relation to their conduct in the litigation that flowed from this. On the central question of whether a case had been made out for standing in terms of s38(c), the court saw none of the difficulties that had plagued Southwood J in Maluleke.

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87 At 1331D.
88 At 1331D-F.
89 2001 (10) BCLR 1039 (SCA). It was held that, as the respondents had opted to sue as class litigants, rather than in the public interest – a choice Froneman J had given them – there was no need, on appeal, to deal with whether they had standing in terms of s38(b) or s38(d).
90 At para15 Cameron JA said the following, which is indicative of the light in which the court viewed the conduct of the appellants: ‘All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticize government’s decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that “people’s needs must be responded to”. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province’s approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as if it was at war with its own citizens, the more shamefully because those it was combating were in terms of secular hierarchies and affluence and power the least in its sphere.’
Cameron JA held:91

‘The complaint that the class was not adequately defined in the order of the court below is difficult to appreciate. There can be no conceptual complaint about the clarity of the group’s definition. From the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants, through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requirements for a class action are therefore present.’

6.3.5. People Acting in the Public Interest

The class action provision relates to a limited (although not necessarily small) number of similarly situated claimants being represented by one of their number or another person. A litigant claiming standing in terms of s38(d) would litigate on an issue, which he or she would claim is of public interest.92 In Ferreira v Levin NO,93 in a minority judgment on this issue, O'Regan J held that the applicants, in challenging the constitutionality of s417 of the Companies Act, had standing to do so in the public interest. She held:94

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91 At para 16. Note that, at para 19, Cameron JA held that, to the extent that Maluleke and Lifestyle Amusement Centre (Pty) Ltd v Minister of Justice 1995 (1) BCLR 104 (C) (see footnote 96 above) questioned ‘the availability of the class action in our law’, or suggested ‘different criteria for constituting and defining a class for the purposes of a class action’ he was unable to agree with them and ‘to the extent that they are inconsistent with this judgment they must be regarded as overruled’.


94 At 120F-H (paragraph 234).
‘This court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and a range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case.’

She held further that while ordinarily it is necessary for a litigant to allege an infringement of or a threat to a fundamental right, this is not necessary for public interest litigants. They only have to allege that ‘objectively speaking, the challenge, rule or conduct is in breach of a right enshrined in Chapter 3 [of the interim Constitution]. This flows from the notion of action in the public interest. The public will ordinarily have an interest in the infringement of rights generally, not particularly.’

In *Port Elizabeth Municipality v Prut NO* the appellant had appealed against the dismissal of an application in which it had applied for a declarator that its differential treatment of ratepayers who owed rates in terms of the Municipal Ordinance 20 of 1974 (C) and residents who owed service charges in terms of the Black Local Authorities Act 102 of

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95 At 120l (paragraph 235). In *Louw v Matjila* 1995 (11) BCLR 1476 (W), 1484B, Van Schalkwyk J observed that the ‘right of a citizen to enforce obedience of the law by its political representatives is ensured by the provisions of section 7(4)(b)(v) of the [interim] Constitution’. The case of *Mhlekwa v Head of the Western Tembuland Regional Authority: Feni v Head of the Western Tembuland Regional Authority 2000 (9) BCLR 979 (Tk)* provides a good example of the public interest standing provision being applied. In this matter, the applicants, who had been convicted and sentenced by the Western Tembuland Regional Authority Court, challenged the constitutionality of various sections of the Regional Authority Courts Act 13 of 1982 (Tk). They did so in their own interest and also in the public interest, claiming that the issues involved affected the ‘large majority of the population of the former Republic of Transkei’ (at 988B-C). The respondents at first contended that the applicants did not have public interest standing but later conceded that they did. The court appears to have accepted that the applicants did, indeed, have public interest standing: it first set aside the convictions and sentences on the basis of various irregularities in the trials of the applicants (at 9841-987H) and then proceeded to deal with the constitutionality of the sections of the Act that the applicants had challenged, setting them aside (at 1033H-1034C).

96 1996 (4) SA 318 (E).
1982 did not constitute unfair discrimination in terms of the Constitution.\(^{97}\) The appellant wanted to write off approximately R62.6 million that was owed to it by people living in the black residential areas formerly governed by the Act but it wanted to collect what was owed to it by people living in the former white areas that had previously been governed by the Ordinance. Melunsky J addressed the issue of whether the appellant had standing on the basis that a court ‘should be slow to refuse to exercise its jurisdiction’ in terms of the Constitution ‘where a decision will be in the public interest and where it may put an end to similar disputes’.\(^{98}\) He concluded:\(^{99}\)

‘The result is that there seems to be no reason for denying the appellant standing, not only because it is acting in its own interest but also because it is acting in the public interest. In this regard it should be noted that it is clearly in the public interest to have clarity on whether the municipality’s decision to write off more than R62 million discriminates unfairly against other service-charge debtors or ratepayers. Furthermore a decision once given in this application will not be academic: it will have an effect on all persons in the position of the two respondents. Moreover, and in the words of Chaskalson P at 1082F (para [164]) in Ferreira, there is “a pressing public interest that the decision be given as soon as possible”.’

Prut’s case, when reduced to its basics, is authority for the proposition that if an issue of constitutionality is one of public interest, a representative litigant may vindicate the public interest as long as the issue is a real, and not merely an academic, one. On this basis, Froneman J recognised the standing of the applicants in Ngxuza to sue in the public interest.\(^{100}\) So too did Pillay AJ in Nomala v Permanent Secretary, Department of Welfare.

\(^{97}\) At 320H-J. For all of the relief which the appellant claimed, see 320H-321H.

\(^{98}\) At 325E-F.

\(^{99}\) At 325J-326B.

\(^{100}\) At 1333D-1334G. In applying Prut’s case to the facts he held: ‘In an oblique way the respondents did raise this as an issue in the papers by suggesting that the matter should not be decided in a court of law, but that the affected beneficiaries should pursue the matter through the offices of the Public Protector and the Human Rights Commission. On a purely factual level the applicants have answered that by detailing the history of the efforts made to pursue the matter through the office of the Public Protector and the efforts of the Human Rights Commission to rectify the appalling situation. These are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the courts are precluded from coming to the assistance of the applicants.’ (At 1333G-I.)
Eastern Cape Provincial Government, yet another matter in which the conduct of the provincial Department of Welfare, in the administration of the system of social assistance, was found wanting. The issue in this matter was whether a standard-form letter informing people that their disability grant had been cancelled or that an application for such a grant had been refused contained a statement of the reasons for the decision, as required by the relevant regulations. The standard-form letter contained five grounds, such as ‘not disabled’ or ‘able to work’ which, Pillay AJ held were not reasons. He held that the applicant had standing, on the basis of Prut, to seek relief on this issue in the public interest because the issue was not an academic one, having earlier in his judgment made the point that ‘it is undisputed that the standard-form reasons have been used and will continue to be used to justify all decisions taken by the department...’.

In Prior v Battle the applicant challenged the constitutional validity of two sets of provisions in the Transkei Marriage Act 21 of 1978 which vested in a husband marital power over his wife as an inevitable and unalterable consequence of both civil and customary marriages. Ms Prior was married civilly. The respondents argued that she lacked standing to challenge the provisions as they affected civil marriages because, being subject to the marital power of her husband, she required his assistance to litigate. This

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101 2001 (8) BCLR 844 (E).
102 At XXX. In the somewhat similar, earlier decision of Bacela v Member of the Executive Council for Welfare, Eastern Cape Provincial Government [1998] 1 All SA 525 (E) s38(d) was not applied despite the issue being of considerable public interest. The applicant had been granted an old-age pension but, because of administrative bungling, she had not been paid. The relevant regulations made in terms of the Social Assistance Act 59 of 1992 provided that when an application for a pension is approved, payment of the pensioner’s grant is back-dated to the date of the application. After Ms Bacela had been informed that her application for the pension had been successful, the respondent had issued instructions to her officials to stop paying arrears. Ms Bacela claimed standing to challenge this decision in her own interest in terms of s38(a) and in the public interest because the issue was not an academic one, having earlier in his judgment made the point that ‘it is undisputed that the standard-form reasons have been used and will continue to be used to justify all decisions taken by the department...’.

103 At 853D.
104 1998 (8) BCLR 1013 (Tk).
argument was rejected by Miller J on two grounds: first, he held that Ms Prior had standing to litigate in her own interest, and secondly, he held that she also had standing to litigate in the public interest. Ms Prior also challenged the validity of the customary marriage provisions, claiming public interest standing to do so. On this score she was unsuccessful. Miller J held that because her marriage was not a customary marriage she did not have a sufficient legal interest to challenge the constitutionality of the customary marriages provisions of the Act. He made no reference to public interest standing in this context as he had done to bolster Ms Prior’s standing to challenge the civil marriages provisions of the Act. Miller J appears to have misconceived the nature of the enquiry in a most fundamental way: he ignored the fact that public interest standing presupposes that the applicant need not, himself or herself, have a direct and substantial interest in the subject matter of the dispute.

Maluleke v Member of the Executive Council, Health and Welfare, Northern Province also found that the applicant lacked standing to litigate in the public interest. Southwood J took the view that ‘the facts show that it would not be in the public interest to deal with the relevant issues en masse’ as there could be ‘different facts and different legal considerations which simply make it impossible to deal with the rights of 92 000 people as if they were the same as those of the applicant’. It has been argued above that it was, indeed, possible to deal with the cases of all of the affected pensioners together. Prut’s case would tend to confirm that this is possible: some of the circumstances of individual debtors may have varied but the main issue, that of the constitutionality of the decision to write off some debts but not others, was common to all of those whose debts were not going to be written off. That is precisely what made the issue one of public interest. By the

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105 At 1017D-1018D. The first respondent was the applicant’s husband. He took no part in the proceedings and abided the court’s decision. The real opposition came from two regional authorities and five tribal authorities which had been given leave to intervene.  
106 At 1020F-G.  
107 See in this regard, Ferreira v Levin NO 1996 (1) BCLR 1 (CC), 119F-G (paragraph 230) and 120 I (paragraph 235).  
108 1999 (4) SA 367 (T).  
109 At 374D-E.
same token, the fact that 92 046 pensions were suspended for the same reason by the
same official – and 92 046 people were denied their fundamental right of access to social
security and social assistance – in circumstances that infringed their fundamental rights to
lawful and procedurally fair administrative action surely raised an issue of public interest
which was certainly justiciable. Southwood J’s refusal to deal with the matter on this basis
appears to fly in the face of his own views in Gerber’s case,110 expressed through quoting
with approval the words of Ackermann J in Fose v Minister of Safety and Security111 that
particularly in a country like South Africa ‘where so few have the means to enforce their
rights through the courts, it is essential that on those occasions when the legal process
does establish that an infringement of an entrenched right has occurred, it be effectively
vindicated’.

The realities of South African life are such that the 92 046 pensioners would not, from a
practical point of view, be able to litigate for themselves. By denying the applicant standing,
Southwood J effectively denied to them the relief that he had held the applicant was
entitled to. In other words, he deprived them of the only opportunity that they had of
redress. Even if they had been able to litigate individually, it is unlikely that 92 046
individual applications all dealing with the same issues of law could be regarded as a more
cost-effective utilisation of judicial resources than one application that disposed of the issue
once and for all. How would the roll of the Transvaal Provincial Division deal with an
additional 92 046 applications? Southwood J should have been guided, once again, by
the judgment of Melunsky J Prut’s case, in which he held that ‘a Court should be slow to
refuse to exercise its jurisdiction in terms of the said section [of the interim Constitution]
where a decision will be in the public interest and where it may put an end to similar
disputes’.112

110 Supra, 570C-F.
111 1997 (3) SA 786 (CC), 826I (paragraph 69).
112 At 325E-F.
This is precisely what he did in the more recent case of *Van Rooyen v The State*\(^{113}\) in which a number of accused as well as a magistrate and an association of magistrates challenged the constitutionality of various provisions of the Magistrates’ Courts Act 32 of 1944. In holding that the magistrate and the association had standing to litigate in the public interest, Southwood J held that the purpose of s38 of the Constitution was to allow virtually unfettered access to courts so that fundamental rights could be protected effectively,\(^{114}\) that the issue was one of prime importance, affecting the right of every person to have his or her dispute resolved and be tried by an independent court\(^{115}\) and that it was ‘a matter of great public concern that (what appears to be a majority of) regional magistrates in the Republic of South Africa consider that regional courts and magistrates' courts generally are not institutionally independent and are therefore unconstitutional because of the legislation which they attack. It is clearly in the public interest that this issue be addressed and resolved.\(^{116}\)

### 6.3.6. Associations Acting in the Interest of Their Members

Section 38(e) is intended to clarify the rather untidy common law position: the general rule is that an association does not have standing to litigate on behalf of its members\(^{117}\) but in some instances courts have allowed associations to do so.\(^{118}\) Loots has suggested that the courts have tended towards recognition of the idea that an organisation should be able to represent the interests of its members\(^{119}\) and has concluded that the conflicting case law was, in fact, the spur for the drafters of the interim Constitution to include s7(4)(b)(ii) and

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\(^{113}\) 2001 (4) SA 396 (T).
\(^{114}\) At 423G-H.
\(^{115}\) At 424C.
\(^{116}\) At 424H.
\(^{117}\) See for instance, *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O).
\(^{118}\) See for instance *African National Congress (Border Branch) v Chairman, Council of State of the Republic of Ciskei* 1992 (4) SA 434 (Ck).
\(^{119}\) Loots, 57.
close the debate, certainly in respect of constitutional litigation.\textsuperscript{120} In line with a generous approach to the interpretation of the Constitution Trengove has submitted that the term ‘association’ should include ‘unincorporated associations, associations incorporated at common law, statutory associations and partnerships’ and that it ought to include as well associations created specifically ‘to serve as vehicles for the institution of particular legal proceedings in the interest of their founding members’.\textsuperscript{121}

Section 38(e) appears to have been the subject of little controversy. So, for instance, in Transvaal Agricultural Union v Minister of Land Affairs\textsuperscript{122} it was accepted without argument that the applicant could, on behalf of its members, challenge (unsuccessfully, as it happened) certain provisions of the Restitution of Land Rights Act 22 of 1994. And in Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal\textsuperscript{123} it was likewise accepted without argument that the respondent (on appeal) had standing to challenge (which it did successfully) a decision taken by the appellant to stop paying subsidies to various state-aided schools.

In Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk,\textsuperscript{124} however, the applicant was held not to have standing to review a decision by the National Transport Commission to amend a road transportation permit of the first respondent. Gihwala AJ held that the applicant did not have standing to litigate in the interests of its members because it did not meet the requirements set out in the regulations made in terms of the Road Transportation Act 74 of 1977, namely that an objector had to be the holder, itself, of a road transportation permit. No mention was made of the Constitution in this judgment. If the applicant had relied on s38(e) of the Constitution, the outcome of this matter may well have been different.

\textsuperscript{120} Ibid.
\textsuperscript{121} Trengove, op cit, 8.
\textsuperscript{122} 1996 (12) BCLR 1573 (CC), 1576A-B (paragraph 1).
\textsuperscript{123} 1999 (2) BCLR 151 (CC), 153C-D (paragraph 3).
\textsuperscript{124} 1997 (4) SA 635 (O).
6.4. The Development of the Common Law

During the late 1980s and early 1990s, a reform initiative within the Appellate Division, then the highest court in the country, was evident despite this court’s otherwise poor record in defence of human rights during the years of emergency rule. While the reformers did not alter the rules of standing on anything like the grand scale of the Indian judiciary, it is true to say that the rules of standing were, at least to an extent, relaxed in their application. Both the interim and final Constitutions empower the judiciary to develop the common law so that it will reflect the spirit, purport and objects of the Bill of Rights. The common law of standing has been developed in two noteworthy cases that are discussed below. A third case, in which a procedural development is dealt with will also be discussed.

In *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa*, Pickering J questioned the fundamentals of the traditional approach to standing, and suggested its reform in respect of environmental matters. The facts of the case were compelling as a test case for this very issue. It was common cause that, over a fairly lengthy period of time and along the entire Transkei Wild Coast, environmentally harmful and unlawful practices were occurring on a regular basis: persons were acquiring from local chiefs the ‘right’ to occupy and to build holiday houses on prime coastal land, for as little as R200.00 and a bottle of brandy. This wide-spread practice was

125 See in this regard, Corder and Maluwa ‘Administrative Justice in Southern Africa: Background and Some Issues’ in Corder and Maluwa (eds) Administrative Justice in Southern Africa Cape Town, Department of Public Law, University of Cape Town: 1997 who wrote: ‘In South Africa, perhaps spurred by forthright academic and popular disquiet, the judiciary itself embarked on a process of incremental reform in the late 1980’s, paradoxically at the time of the most relentless executive lawlessness yet experienced.’


128 Final Constitution, s39(2). The equivalent section of the interim Constitution was s35(3).

129 1996 (3) SA 1095 (Tk).
in contravention of s39 of Decree 9 (Environmental Conservation) of 1992 (passed by the Military Council of the former Republic of Transkei).\textsuperscript{130} It created a ‘coastal conservation area’ of 1 000 metres from the high water mark inland along the entire coast and within which a number of activities such as clearing land or erecting buildings were prohibited except on the authority of a permit issued by the relevant department ‘in accordance with the plan for the control of coastal development approved by resolution of the Military Council’.\textsuperscript{131} The government had done little to enforce the law and appeared to be unwilling to do so unless it was politically expedient to do so.\textsuperscript{132}

Section 29 of the interim Constitution provided that every person had a fundamental right to ‘an environment which is not detrimental to his or her health or well-being’. Despite the fact that the applicant sought to rely on this right, it is clear that it did not apply to the facts and hence could not activate the extended standing provided for in s7(4) when a fundamental right is affected or threatened. Despite that, the first respondent conceded that the applicant had standing (after initially alleging that it did not). This concession appears to have been erroneously made\textsuperscript{133} and probably explains why Pickering J dealt with standing at common law at some length. He started by saying:\textsuperscript{134}

‘I may mention that in my opinion there is also much to be said for the view that, in circumstances

\textsuperscript{130} \textit{At 1100E-F, Pickering J said that it was clear from photographic evidence ‘and this is not denied by the respondents, that considerable and irreversible environmental degradation of the Transkei Wild Coast within the coastal conservation zone has been and was occurring at the time of the institution of these proceedings...in blatant contravention of the provisions of s39 of the Decree’}.\textsuperscript{131} At 1099C-1100C.

\textsuperscript{131} \textit{At 1107B Pickering J referred to a Task Group that had been established to deal with the problem but this body resolved, inter alia, to ‘determine political support for proposed action against owners of cottages erected illegally’(at 1108A) before taking other rather half-hearted action such as requesting that ‘all illegal activities perpetuated in the erection of illegal cottages and alienation of land be ceased’ (at 1108G). He concluded: ‘In these circumstances, where “political support” for legal action had to be first determined and where persons illegally allocating sites, sometimes in return for little more than a bottle of brandy, were to be “requested” to stop doing so applicants’ averted sense of frustration at the lack of any concrete action in terms of s39 of the Decree becomes almost palpable. The overwhelming sense to be gained from a reading of the minutes of the Task Group is that of the slow and inexorable grinding of wheels across a bureaucratic landscape, regardless of the urgency of the situation.’}
where the locus standi afforded persons by s 7 of the Constitution is not applicable and where a statute imposes an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have locus standi at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.'

On that well-worn objection to the extension of standing, that the floodgates would be opened and the courts would be inundated with cases brought by cranks, busybodies and mischief-makers, he observed that ‘it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them’.135 On the dangers of a rash of frivolous or vexatious litigation, he said that the ‘meddlesome crank and busybody with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession, is, in my view ... more often a spectral figure than a reality’ and that if such people are tempted to flood the courts with frivolous or vexatious litigation, ‘an appropriate order of costs would soon inhibit their litigious ardour’.136 He thus held that the applicant had standing and, on the merits, found in its favour, issuing a mandamus to compel the government to enforce the Decree.

In McCarthy v Constantia Property Owners’ Association137 Davis J was called upon to decide whether members of a voluntary association had standing to seek orders to set aside agreements made by its office bearers with a property developer contrary to the terms of its constitution. A number of years prior to the litigation, the first respondent had entered into agreements with the second respondent to limit the size of a shopping centre which the latter planned to develop in Constantia, Cape Town.138 Pursuant to these agreements, servitudes in favour of the first respondent were registered over the property, embodying the agreements, and limiting the rights of the first respondent to expand the

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135 At 1106E.
136 At 1106G-H.
137 [1999] 4 All SA 1 (C).
138 Davis J started his judgment, at 3f-g, thus: ‘There can be few more beautiful residential areas in the world than Constantia in Cape Town. Nestling in the embrace of a unique mountain range it enjoys leafy tranquility of which its residents are justly proud.’
shopping centre. Some time later, the office bearers of the first respondent agreed to allow the second respondent to expand the shopping centre in contravention of the earlier agreements and the servitudes. It was alleged by the applicants that this decision was a nullity as it had been taken in conflict with the terms of the first respondent’s constitution.

The point was taken that the applicants lacked standing. It was argued that they did not have a direct interest in the issue because the servitudes, being in favour of the first respondent (which was a juristic person), could only be enforced, waived or relaxed by it. Davis J held that ‘the issue of locus standi can no longer be examined in isolation for section 38 of the final Constitution Act 108 of 1996 mandates a broad approach to standing for the purpose of enforcement of the rights entrenched in Chapter 2 of the Constitution’. This section, he held, had ‘radically extended’ the common law of standing. He observed that if s38 applied, the applicants would have had standing, but they had not relied upon the fundamental right to a protected environmental and it was not, in any event, directly of application. He then proceeded to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In concluding that the applicants – who had approached the court to ‘protect the environmental fabric of their suburb’ – had standing, Davis J stated:

‘In the context of the present case the Constitution clearly envisages a generous regime of access to courts. In addition it purports to protect the environment. Section 8(2) provides that the provision in the Bill of Rights binds all natural and juristic persons, if and to the extent, that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Whatever the interpretation of this opaque phrase, it is clear that its intention was to extend the scope of application of the Bill of Rights. In short, the Bill of Rights was not only designed to introduce the culture of justification in respect of public law but intended to ensure that the exercise of private power should similarly be justified. Accordingly the carefully constructed but artificial divide between public and private law which might have dominated our law prior to the constitutional enterprise can no longer

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139 At 8d.
140 At 8g.
141 At 8h.
142 At 9d.
143 At 9a-d.
be sustained in an uncritical fashion and hence unquestioned application.’

In Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza the appellants argued that the respondents ought to have litigated in the Ciskei Division of the High Court in Bisho, rather than in the Eastern Cape Division of the High Court in Grahamstown: that the former court had jurisdiction over the appellant because Bisho is the seat of the provincial government, while the members of the class in whose interest the respondents had litigated resided in the jurisdiction of the Grahamstown court, the Bisho court (which has jurisdiction over the territory of the former homeland of Ciskei) and the Transkei High Court in Umtata (which has jurisdiction over the territory of the former homeland of Transkei). This argument was made possible by the fact that the interim Constitution and, later, the final Constitution, both provided for the continued existence of all courts functioning at the time that they came into operation, and the saving of their jurisdiction, pending the rationalisation of the structures and jurisdictions of the courts. All three of the above courts function in the province of the Eastern Cape.

This argument, Cameron JA said, had more superficial attraction than the others raised by the appellants but stood to be rejected nonetheless. He held, in the first place that the fact that ‘the necessary rationalisation has not yet occurred within the Eastern Cape Province can hardly be laid at the door of the applicants or the class they seek to represent.  That the province should seek to exploit the situation is a further miserable reflection on the way it has conducted itself in this litigation’. On the merits of the jurisdictional point itself, Cameron JA held:

‘The objection in any event has no substance.  First, this is no ordinary litigation.  It is a class action.  It is an innovation expressly mandated by the Constitution.  We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.  As pointed out earlier

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144 2001 (10) BCLR 1039 (SCA).
145 At para 20.
146 At para 21.
147 At para 22.
we are also enjoined to develop the common law — which includes the common law of jurisdiction — so as to “promote the spirit, purport and objects of the Bill of Rights”. This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* [1962 (4) SA 326 (A)] this Court held, applying the common law doctrine of cohesion of a cause of action (*continentia causae*), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants, and over members of the class entitled to payment of their pensions within its domain. That in my view is sufficient to give it jurisdiction over the whole class, who subject to satisfactory “opt-out” procedures will accordingly be bound by its judgment.’

### 6.5. Conclusion

A striking feature of the academic writing on standing in South Africa (and elsewhere, for that matter) is that there appears to be a great deal of unanimity that the common law rules of standing are inadequate, certainly in public law matters. At the same time, there has been scant recognition of this inadequacy on the part of the judiciary which, prior to 1994, maintained the narrow rules against challenge, even in the face of trenchant debunking of the foundations upon which that narrow conception rested, principally the so-called floodgates argument.\(^{148}\) Despite this unpromising foundation, the standing provisions of the interim and final Constitutions have had a profound effect on South African law already. This has been made possible by a series of important cases that have approached the issue from a broad and purposive perspective, rather than from a narrow and legalistic one.

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\(^{148}\) See Baxter, 672. See too Budlender, op cit, 132-133, who says: ‘The call for the relaxation of the rules of locus standi is usually met by the argument that this will “open the floodgates”. This is misconceived, for two reasons. First, if the cases are well-founded, there can be no objection to a flood of people trying to achieve justice. And secondly, the concern that people will flood the courts with unfounded litigation is simply not borne out by the international experience.’
The influence of Buekes v Krugersdorp Transitional Local Council,149 Port Elizabeth Municipality v Prut NO150 and Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa151 bear special mention. The judges in those matters articulated the new approach to standing under the Constitution with the type of rigour necessary to carry the day. In a sense, the landmark decision of Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government152 was made possible by the ground-breaking work of the judges in these cases, supplemented by the insights of Froneman J. These cases also owe much to the judicial leadership given by the Constitutional Court in Ferreira v Levin NO.153 This is a factor of considerable importance as the courts are called upon to create a new jurisprudence based on the values of the Constitution, as a result of the legal revolution that occurred on 27 April 1994. The Supreme Court of Appeal has now made its indelible mark in the judgment of Cameron JA in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza.154 Many of the questions raised in cases like Maluleke v Member of the Executive Council, Health and Welfare, Northern Province155 have now been definitively answered.156

These cases tend to indicate that the South African courts are beginning to take the steps necessary to break the ‘chains forged by the traditional doctrine of standing’ in order to enhance access to justice and the protection of human rights,157 as had been done to great

149 1996 (3) SA 467 (W).
150 1996 (4) SA 318 (E).
151 1996 (3) SA 1095 (Tk).
152 2000 (12) BCLR 1322 (E).
153 1996 (1) BCLR 1 (CC).
154 2001 (10) BCLR 1039 (SCA).
155 1999 (4) SA 367 (T).
156 See especially Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza, supra, para 19 in which Maluleke and Lifestyle Amusement Centre (Pty) Ltd v Minister of Justice 1995 (1) BCLR 104 (C) were expressly overruled insofar as they questioned the availability of class actions or suggested ‘different criteria for constituting and defining a class for the purposes of a class action’.
157 Budlender, op cit, 132, citing Justice PN Bhagwati, former Chief Justice of the Indian Supreme Court, one of the major actors in the judicial reform of standing in that country.
effect by the Indian Supreme Court. As a result of these judicial reforms, it has been said of the Indian judiciary that the ‘activist judge, bold and adventurous enough to break with Anglo-Saxon perceptions of the judicial role, has transformed the court room from “an arena of legal quibbling for men with long purses” to an arena for hope for the oppressed’. Within the context of the South African Constitution and its prominent positioning of courts as the principal protectors and enforcers of rights, similar steps away from the narrow and restrictive private law model of adjudication are called for and are mandated by s38.

The need for extended standing, especially when fundamental rights are in issue, should not blind one to the fact that this type of litigation brings with it its own set of problems. Froneman J identified the main problem in Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government as being that of ensuring proper representation when a person litigates for a class or in the public interest. This problem can be addressed by ensuring that only those who wish to be are affected by the outcome of a case, that those who associate themselves with a case are given the opportunity to make representations and that the representative litigant represents future interests adequately. He stressed that these problems should not be regarded as ‘factors that militate against a broad view of standing. At most they require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation’.

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158 See for example the leading case of SP Gupta v Union of India 1982 AIR 149 (SC). In Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (12) BCLR 1322 (E), Froneman J described the foreign law on representative standing to which he had been referred by the applicants as ‘instructive not because we should slavishly do what others have done or are doing, but because we might learn something from them to assist us in our quest for democracy’.

159 Meer ‘Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa’ (1993) 9 SAJHR 358, 362. Loots, op cit, 50 says of the process of judicial reform in India that the Supreme Court created access to justice ‘by scrapping the traditional rule of standing’.

160 2000 (12) BCLR 1322 (E).
161 At 1327G-H.
162 At 1327H.
Froneman J then turned to what he termed the practical objections to extended standing. He identified the following five:  

‘(1) the “floodgates” argument – that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons;  
(2) the “classification” difficulty – that often the common interest of the applicants and those they seek to represent will be broad and vague;  
(3) the “differing circumstances” argument – that seen from the respondent’s side the persons seeking relief must be treated differently;  
(4) the “res judicata” difficulty – that some members of the group may not wish to associate themselves with the representative litigation; and  
(5) the “practical impossibility” argument – that it is impossible for the courts to deal with cases involving thousands of people and that it would adversely affect the public administration if scarce resources have to be used to defend such cases in court.’

In dealing with these issues he held: that the floodgates argument was not a real issue as it was improbable that courts would indeed be flooded by litigants wishing to litigate on behalf of others and that the problem, such as it was, could be adequately dealt with by fashioning a procedural requirement that a prospective representative litigant be required to obtain leave to sue as such;  
that the classification issue could also be dealt with at a preliminary stage;  
that the different circumstances issue was, in reality, a red herring, as it relates to the merits but, in any event, it is not ‘a requirement relating to the standing of persons initiating such a claim that the defence to a representative action must be uniform’;  
that the res judicata problem can also be minimized by appropriate procedures such as requiring the representative litigant to give notice to the class, thus providing an opportunity to its members to associate or disassociate from the litigation; and that the practical impossibility issue ‘is one that really begs the question of standing. If there is a clearly defined class of people who have been wronged in the manner required by section

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163 At 1331H-1332A.  
164 At 1332B-E.  
165 At 1332F-G.  
166 At 1332G-H.  
167 At 1332 I-J.
38 it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress. If it means that courts will have to act in new and innovative ways to accommodate them, then so be it’.\textsuperscript{168} 

The necessity to develop the rules of standing are important from a practical point of view. One of the leading figures in the Indian legal revolution, Krishna Iyer J, in Fertilizer Corporation Kamgar Union (Regd) v Union of India,\textsuperscript{169} made this point with great eloquence when he said that ‘it is essential that the Rule of Law must wean the people away from the lawless street and win them for the court of law’. In this sense, the extension of standing enhances access to justice in a meaningful way, thereby contributing to stability in society – an important contribution in a country like South Africa (or India) in which there are huge disparities of wealth and power. This has been recognised by the Constitutional Court: in Fose v Minister of Safety and Security\textsuperscript{170} Ackermann J held that it was important in a country like South Africa – with those marked disparities of wealth, opportunity and, consequently, access to court – that when it is established that fundamental rights have been infringed or threatened, courts must ensure that those rights are vindicated. Section 38 is a particularly important mechanism for this purpose, especially where, as in Ngxuza’s case, the issue involved the fundamental right of access to a socio-economic entitlement of social assistance and consequently the promise, in the preamble, of social justice for the people of South Africa.

Without the means of ensuring that the protection of the law can reach those who have been wronged by exercises of administrative or other governmental power, the fundamental rights contained in the Bill of Rights would be in danger of being regarded by the majority of South Africans as empty promises or, perhaps worse, a charter of luxuries available to the rich and powerful to entrench still further their positions of privilege. In this sense, s38 may be seen as a particularly important gateway to the achievement of social

\textsuperscript{168} At 1333A-B.
\textsuperscript{169} 1981 (1) SCC 568, 584.
\textsuperscript{170} 1997 (3) SA 786 (CC), 826I (paragraph 69).
justice and fundamental human rights that the preamble to the Constitution promises.
CHAPTER SEVEN: JUSTICIABILITY AND ACCESS TO COURT

7.1 Justiciability

7.1.1. Justiciability in General

Justiciability, in broad terms, is about whether a particular dispute is amenable to judicial resolution. The most obvious factor to impact on the appropriateness of judicial resolution of a dispute is the doctrine of the separation of powers which allocates spheres of influence to the legislature, the executive and the judiciary. In this sense the supervisory review jurisdiction vested in courts is a governmental power of substantial political importance. As a result, judges faced with decisions on or about the boundary between the powers and functions of the judiciary and another branch of government may ‘often exercise self-restraint in order to preserve the balance of government, as judges perceive this balance to be’.

7.1.2. Restraints on Judicial Decision-Making

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1 Craig, 479. He distinguishes between standing and justiciability as follows: ‘Locus standi is concerned with whether this particular plaintiff is entitled to invoke the jurisdiction of the court. This question must be distinguished from that of justiciability which asks whether the judicial process is suitable for the resolution of this type of dispute at all, whoever may bring it to the courts.’ See too Loots ‘Access to Court and Justiciability’ in Chaskalson et al, 8-2. See further Cane ‘The Function of Standing Rules in Administrative Law’ [1980] PL 303, 309-310. In this chapter issues of ripeness and mootness, often included in discussions on justiciability, will not be dealt with.

2 Baxter, 320.

3 Baxter, 328. Not surprisingly, given South Africa’s history of oppression, it is possible to find expressions of this balance between judiciary and executive that do no credit to the judiciary as buttress between the executive and the individual (see R v Pretoria Timber Co (Pty) Ltd 1950 (3) SA 163 (A),181-2 and others that do. In the former category, Galgut J held in Brink v Commissioner of Police 1960 (3) SA 65 (T), 69 that if a court was ‘faced with the situation that the safety of the State was in danger, that Court would not necessarily merely act in terms only of the regulations but would support any action taken by the authorities where such acts are bona fide’. In contrast, in the first detention without trial case, In re Willem Kok and Nathaniel Balie (1879) 9 Buch 45, 66, De Villiers CJ rejected an argument that the court ought not to order the release of the detainees because of the ‘unsettled state’ of the country. He said: ‘The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country.’
Traditionally, matters, or issues within matters, involving a high degree of policy (referred to as discretion in some cases) have been said to be non-justiciable. They are sometimes regarded as unsuitable for judicial resolution because, for example, they may involve issues of ‘statecraft or national policy’, or a court may believe that the issue may be dealt with more effectively in ways other than through the judicial process. Galligan makes the point that these two reasons for non-justiciability often tend to coalesce: that ‘issues of national security may be non-justiciable, partly because such matters just are better left to the ministers of the Crown, and partly because the kinds of decisions in issue are analytically unsuited to adjudication’. Factors such as these represent institutional restraints on judicial decision-making, crimping the scope of judicial review.

A second set of factors, attitudinal in nature, play the same role but in a less obvious or measurable way: these factors are the views and attitudes of judges themselves to the nature and boundaries of their roles. Baxter says that the ‘breadth of the matters that are considered to be justiciable is heavily dependent on judicial activism or restraint’, the former expanding jurisdiction and the latter contracting it. South African history, particularly the history of the 1980s under emergency rule, is rich with examples. The introductory paragraphs of Bloem v State President of the Republic of South Africa stand out in this regard because of the remarks of MT Steyn J on the causes of the state of emergency and its justification. These remarks were described by Cameron as a ‘politically partisan, emotive and one-sided exposition of the government’s views of the causes of and necessity for the state of emergency’. MT Steyn J’s defence of the state of emergency was aimed at sketching a context within which ‘this application must now be considered’. Cameron says of its one sided interpretation of the socio-political environment of the time

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4 This term is borrowed from the notorious case of Liversidge v Anderson [1942] AC 206, 261-262, once said to be the contribution of the House of Lords to the war effort.
6 Baxter, 325.
7 1986 (4) SA 1064 (O), 1067D-1068E.
9 At 1068E.
that it ‘shows all the detachment of a defensive broadsheet put out to justify the apartheid regime and all the political sophistication of the sort of propaganda which is daily produced by the SABC’.

This case and the contemporary case of Metal and Allied Workers Union v State President, provide good examples of the different results that may flow from the views and attitudes of judges in relation to the judicial review of exercises of power. In both cases reg 3(10) of the Emergency Regulations was challenged. This regulation prohibited access by legal representatives to their clients who were held as detainees in terms of the Emergency Regulations. In Bloem, M T Steyn J upheld the validity of the regulation on the basis that it was not unreasonable, being sufficiently linked to security considerations for the State President to restrict the common law fundamental right of a detainee to access to legal advice. In the Metal and Allied Workers Union case, Didcott J, perhaps the most outstanding liberal judge of the era, held that reg 3(10) was invalid. He approached the issue as follows:

‘Is the State President really empowered, under this enabling section, to say that you may not see your lawyer over something that has nothing to do with the purpose of your detention or with anything else within the State President’s power, and at a time which has nothing to do with either? The answer, of course, might no doubt be that permission in such a case could be obtained. Perhaps it would often be obtained. But that is not an answer. The question is whether such a visit should be subject to anybody’s permission at all. And the answer, in my view, is that it is not, because the State President has no power whatsoever to go beyond the scope, wide as it is, of the enabling section.’

After citing the judgment of Jansen JA in Mandela v Minister of Prisons as authority for the proposition that the right of access to a legal advisor is a common law fundamental right, Didcott J held further that there was ‘nothing whatsoever in the enabling section which attenuates, either expressly or by necessary implication, a whole host of visits by lawyers for purposes and at times of which one can easily conceive. There may well be

10 Cameron, op cit, 341.
11 1986 (4) SA 358 (D).
12 At 1093D-J.
13 At 375B-C.
14 1983 (1) SA  938 (A), 957.
some circumstances amounting to the necessary consequences of incarceration which perforce control, regulate and limit those visits. But they do not, in my judgment, justify a total prohibition, unless someone or other chooses to give permission'.

It is likely that a substantial number of judges at the time shared views such as those expressed by MT Steyn J, although it is unusual for those views to be articulated in a judgment. Those views were, after all, the dominant views of the white community, from which all of the judges were drawn. It is not surprising then to find that virtually the entire body of emergency jurisprudence, certainly in the Appellate Division, represents an ever diminishing core of justiciability: every discretion exercised by every functionary from the State President to the rawest recruit in the security forces was justiciable only on extremely narrow grounds and even when the State President made vague or unreasonable regulations, his exercises of power were held to be non-justiciable because of an ouster clause kept alive by perverse legal reasoning and probably motivated by the considerations expressed by MT Steyn J in Bloem.

7.1.3. Justiciability in a Constitutional State

In the Westminster tradition, prerogative powers were once regarded as non-justiciable. More recently, the courts in England, in South Africa and in many other jurisdictions have

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15 At 375F.
16 The validity of reg 3(10) was upheld by the Appellate Division in Omar v Minister of Law and Order 1987 (3) SA 859 (A), one of the more notoriously pro-executive decisions of the Appellate Division during the years of emergency rule. On the composition of the judiciary at the time, Mr Justice Johan Kriegler, speaking of the legitimacy crisis facing the judiciary, said: 'I would also point out that it is a fact in my country that the majority of judicial officers are white, middle class, tending towards middle age, probably conservative, male and of one language group.' (‘Sentencing in Times of Unrest’ (1988) 3 SACJ 447, 451.)
18 Staatspresident v United Democratic Front 1988 (4) SA 830 (A); Staatspresident v Release Mandela Campaign 1988 (4) SA 903 (A); Natal Indian Congress v State President 1989 (3) SA 588 (D). (In defence of Friedman J in the last case, he arrived at the conclusion reluctantly on the basis of the UDF and RMC cases that challenges based on unreasonableness, as well as vagueness, were defeated by the ouster clause.)
accepted that prerogative powers are, indeed, justiciable, albeit on narrow grounds.\textsuperscript{19} Despite this the English courts have shied away from conceding that every exercise of prerogative power is justiciable: it is generally held that executive decisions on matters of foreign affairs and defence in particular are not justiciable at all. For example, in Chandler v Director of Public Prosecutions\textsuperscript{20} Lord Reid said that it was, in his opinion, ‘clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such a discretion has been wrongly exercised’.

This was an appeal by six members of an anti-nuclear organization who had been charged and convicted under the Official Secrets Act for conspiring to incite others to enter a military airfield for a purpose prejudicial to the safety or interests of the State. Their intention was to occupy, and thus prevent aircraft from being able to use, the airfield. In this way they sought to publicize their cause which was to prevent nuclear war and to make the facts of nuclear war known to the general public.\textsuperscript{21} During the course of their trial the appellants had not been allowed to adduce evidence (and cross examining state witnesses on the evidence they wished to lead) to establish that their conduct was not prejudicial to the interests of the State because the aircraft based at the airfield ‘used nuclear bombs and that it was not in the interests of the State to have aircraft so armed at that time there’. They wished to prove that it would have been of benefit to the State if the aircraft had been immobilised.\textsuperscript{22} Viscount Radcliffe, in concurring with Lord Reid, held that ‘the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments and part expectations and hopes. I do not think there is anything amiss with

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  \item See in particular Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL), 955b-956c.
  \item 1964 AC 763 (HL), 791. See too the Council of Civil Service Unions case, supra, 951f-h and 956d-e.
  \item At 787-788.
  \item At 788.
\end{itemize}
a legal ruling that does not make this issue a matter for judge or jury’.23

In American constitutional jurisprudence, courts may avoid decisions because of the ‘political questions doctrine’ which is to the effect that ‘there are some questions that are inherently nonjusticiable because they are too “political” for judicial resolution’.24 Hogg points out that there is a lack of unanimity among commentators as to whether the doctrine exists as a distinct doctrine of constitutional law or whether it is merely a manifestation of the doctrine of the separation of powers in operation.25

The case of Operation Dismantle Inc v The Queen,26 which disavowed the political questions doctrine in Canadian law, provides a good guide to questions of justiciability in a constitutional system fairly similar to South Africa’s. It also appears to be in kilter with the limited number of cases on this issue that have been heard by our courts since April 1994. It arose, like Chandler, in the context of opposition to nuclear weapons. The appellant, a peace organization claiming to represent some 1.5 million Canadians, had sought, inter alia, a declaratory order to the effect that the decision of the Canadian Government to allow the United States of America to test cruise missiles in Canada was an infringement of the right to life, liberty and security of the person contained in s7 of the Charter of Rights and Freedoms. It alleged that the testing of the missiles posed a threat to the lives and the security of Canadians because it increased the risk of nuclear conflict. It appealed against the decision of the Federal Court of Appeal to strike out its statement of claim on the basis that it failed to disclose a cause of action.27 On appeal the decision of the court below was upheld because the nexus between the decision to allow testing and the threat to fundamental rights was too nebulous – that the increased threat of nuclear war could not be linked factually to the government’s obligation to respect s7 of the Charter.28

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23 At 798-799. See too the Council of Civil Service Unions case, supra, 952e-f.
24 Hogg, 804 (paragraph 33.5).
25 Ibid.
27 See generally for the facts, the judgment of Wilson J at 494-497.
28 Per Dickson J at 494.
Wilson J’s judgment dealt at some length with justiciability. Her approach to it was refreshingly simple: courts should not be scared off by the fact that they are called upon to adjudicate on ‘weighty matters of State’ and they must bear in mind that they are exercising a review jurisdiction and are not being called upon to substitute their opinions for those in whom discretionary powers have been vested. From this starting point, two central issues arise: first, the court must determine 'who as a constitutional matter has the decision-making power' and secondly, (once it is determined that the court has jurisdiction) 'the scope (if any) of judicial review of the exercise of that power' must be determined. She then concluded:

'It might be timely at this point to remind ourselves of the question the court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s91(7) of the Constitution Act, 1867 and that the federal executive has the powers conferred upon it in ss9-15 of that Act. Accordingly, if the court were simply being asked to express its opinion on the wisdom of the executive’s exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s7 of the Canadian Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s24 of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of “a court of competent jurisdiction”. While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so called "political question".'

The issue of justiciability, as defined by Wilson J (with the constitutional purpose of judicial review as its anchor), is a relatively simple one: it is not, as she says, a matter of second guessing the policy choices of the executive but rather of deciding 'whether any particular

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29 At 503.
30 At 503-504.
act of the executive violates the rights of the citizens'.

In a series of cases dealing with former prerogative powers now codified in the Constitution and one case dealing with the privileges of Parliament, the South African courts have followed the lead of the Canadian courts. The first case is Hugo v State President of the Republic of South Africa in which a presidential pardon of certain categories of offenders (through an instrument called Presidential Act no. 17) was challenged on the basis of a breach of the rights in the interim Constitution to equality and to be free from discrimination. Magid J ordered the respondent to rectify the instrument promulgating the pardon which, he found, discriminated unfairly against male prisoners who were parents of children under the age of twelve years. In doing so, he found that, as 'the powers and functions of the State President, including the common law prerogatives which existed before the commencement of the Constitution, are specifically enumerated in the Constitution, which is the supreme law of the land, the Constitution is the sole source of such powers and functions' and that 'those powers must be exercised and those functions must be performed within the four corners of the Constitution and strictly in accordance with its provisions'. He held accordingly that the 'Constitution not only grants this court the jurisdiction to review the exercise of those powers, but enjoins it to ensure that those powers are exercised within the bounds set out in section 75 and 81 and with due regard to the fundamental rights of individuals'.

On appeal to the Constitutional Court, in President of the Republic of South Africa v Hugo, Goldstone J for the majority allowed the appeal on the basis that, although the Presidential Act did indeed discriminate, it did not do so unfairly. The entire court, apart from Didcott J who decided the appeal on the basis of mootness, and hence did not

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31 At 504.
32 1996 (6) BCLR 876 (D).
33 At 886A-G.
34 At 883E-G.
35 At 883H.
36 1997 (6) BCLR 708 (CC).
canvass the merits, accepted that the president's powers, which were derived from the Constitution and not from the prerogative were justiciable and subject to compatibility with the Constitution. In a review of comparative sources, Goldstone J found that in English law the subject matter of a prerogative power, rather than the fact that it was a prerogative power, determined its justiciability. By contrast, in South Africa, constitutional supremacy precluded such an approach as the Constitution obliged the judiciary to 'test impugned action by any organ of state against the discipline of the interim Constitution and, in particular, the bill of rights'. He concluded:

'In my view, it would be contrary to that promise if the exercise of presidential power is above the interim Constitution and is not subject to the discipline of the Bill of Rights. However, it may well be that, because of the nature of a section 82(1) power or the manner in which it is exercised, the provisions of the interim Constitution and, in particular, the Bill of Rights, provide no ground for an effective review of a presidential exercise of such a power. The result, in a particular case, may be the same as that in England, but the manner in which that result is reached in terms of the interim Constitution is a different one. On the English approach, the courts, in certain cases, depending on the subject matter of the prerogative power exercised, would be deprived of jurisdiction. Under the interim Constitution the jurisdiction would be there in all cases in which the presidential powers under section 82(1) are exercised.'

Kriegler J, in endorsing Goldstone J's finding that the president's powers were reviewable, saw no need to define with any precision the nature of those powers because 'the President as the supreme upholder and protector of the constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands'.

In Mpehle v Government of the Republic of South Africa the applicant challenged the validity of the decision of the Premier of the Eastern Cape Province to suspend him from

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37 At 714D-E (paragraph 8).
38 At 716D-E (paragraph 13).
39 At 723B-C (paragraph 28).
40 At 723D-F (paragraph 28).
41 At 738B (paragraph 65).
42 1996 (7) BCLR 921 (Ck).
his position as Member of the Executive Council for Safety and Security. This decision was taken after the Deputy President (of the national government) had informed the Premier that the national government had information that the applicant and a special police unit formed by him were involved in violence in the Tsolo area of the former Transkei. The first issue was whether the Premier had the power to suspend, as opposed to terminate, the appointments of Members of the Executive Council. The relevant section of the interim Constitution, s149, made no mention of a power to suspend. Heath J found that the power to suspend was incidental to the power to terminate an appointment on the 'logic of the greater including the lesser'. He held too that the exercise of this power was subject to constitutional review in the sense that the court "has jurisdiction to consider the question whether the Premier has the power relied upon and also whether he has complied with the enabling requirements or to put it differently, whether the jurisdictional facts were present". In applying this formulation, Heath J held that the applicant was entitled to a hearing (which he had received) and that the Premier was obliged to consult relevant parties. He also held, despite his restrictive definition of the grounds of review, that he was free to consider the merits of the exercise of the Premier's discretion but that he was not in the same position as the Premier to evaluate the evidence of the applicant's involvement in violence and would 'require much more than the mere denial of the applicant to arrive at a conclusion that the second respondent could never have arrived at the decision to suspend the applicant which would be in the best interests of the government and of security and stability'.

This judgment is open to criticism. First, the vagueness of parts of the judgment and a degree of confusion as to the standards of review mar it. Secondly, the finding that the

43 At 931I-932G.
44 At 930D-E.
45 At 944C.
46 At 930H-931F.
47 At 944I.
48 At 944F-G.
49 At 944J-945A.
power to terminate an appointment includes the power to suspend is, with respect, doubtful. These criticisms apart, Heath J was correct, it is submitted, when he found that he had the jurisdiction to review the exercise of the power to terminate. His basis for this is perhaps more illusive. It appears to be derived from two disparate (but not necessarily unharmonious) sources – the supremacy of the Constitution and its 'general spirit of fairness' and the common law rule that a court is entitled to ascertain whether a prerogative power exists ('whether the Premier has the power relied upon') and whether that power was exercised in accordance with its procedural requirements ('whether he has complied with the enabling requirements'). In effect, it could be said, Heath J did no more than apply the principle of legality to the Premier's exercise of power.

The final matter to be discussed here is De Lille v Speaker of the National Assembly in which the applicant, a Member of Parliament, sought an order setting aside a resolution passed by the National Assembly suspending her from it for 15 days. She had, in Parliament, alleged that certain members of the majority party had been spies for the apartheid regime. The speaker ruled that her reference to spies was unparliamentary as were certain other statements made by her. She duly withdrew the offending statements unconditionally but, despite this, an ad hoc committee was established to report on her conduct and make recommendations to the House. The proceedings of the ad hoc committee were fraught with difficulties, to say the least. It was, the court found, conducted in a procedurally unfair manner in that the applicant was denied a hearing and the

50 See in this respect GNH Office Automation CC v Provincial Tender Board, Eastern Cape SCA 26 March 1998 (case no.427/96) unreported, in which the power to suspend a contract was held not to be incidental to the power to cancel it. Smalberger JA held, at 12: ‘The one (suspension) is not a logical component of the other (cancellation). The power to suspend is not reasonably necessary for the purposes of cancellation. Nor is it necessary to give effect to the power to cancel; the effective exercise of the power to cancel is not thwarted by the denial of a power to suspend. It may be useful or convenient to have a power to suspend, but that is not the test. ... As cancellation and suspension are unrelated concepts this is not a case, as found by the court a quo ... of the greater including the lesser.’

51 At 944B.
52 At 931D-G.
53 At 944B-C.
54 1998 (7) BCLR 916 (C).
committee displayed bias. The respondent sought to meet the applicant's challenge by claiming parliamentary privilege on two grounds: first, she claimed that, at common law, the internal workings of Parliament were privileged and hence non-justiciable; secondly, she had issued a certificate in terms of s5 of the Powers and Privileges of Parliament Act 91 of 1963 which provides that on the production of the speaker's certificate 'stating that the matter in question is one which concerns the privilege of Parliament' a court 'shall immediately stay such proceedings, which shall thereupon be deemed to be finally determined'. Hlophe J asserted the justiciability of the internal workings of Parliament in strong and strident terms:55

'The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any other of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.'

It can be seen from a survey of the cases mentioned above, that the boundary of justiciability has been extended considerably by the supremacy of the Constitution and the new positioning of the judiciary within the three branches of government. Apart from the supremacy of the Constitution, however, certain fundamental rights bolster the all embracing nature of justiciability. The right to just administrative action, contained in s33, and of access to court, contained in s34, are two prime examples. The Constitution, based as it is on the values of constitutional supremacy and the rule of law, provides the mechanisms for the control of all public powers. This has shifted the boundary of justiciability by providing the courts with the tools with which to control all exercises of public power no matter what their subject matter. There is now a clear bottom line: if a dispute can be packaged as a rights issue – that a right has been infringed – then it is

55 At 931G-932A (paragraph 25). On appeal, in Speaker of the National Assembly v De Lille [1999] 4 All SA 241 (A) the decision of the court below was upheld.
justiciable, irrespective of the degree of discretion vested in the functionary against whom proceedings have been brought or irrespective of the policy content of the decision: the exercise of all public powers, the Constitutional Court has said, are subject to review for legality and objective rationality at least.\(^{56}\)

7.2. Access to Court

7.2.1. Judicial Supervision and the Constitution

Writing of the English constitutional system in which parliamentary sovereignty is central, De Smith, Woolf and Jowell say that in ‘matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of the Executive, tribunals and other officials exercising public functions, and to afford protection to the rights of the citizens. Legislation which deprives them of these powers is inimical to the principle of the rule or supremacy of law’.\(^{57}\) In South African law prior to 27 April 1994 (as in English law), the efficacy of statutory provisions that sought to exclude judicial review – ouster clauses or privative clauses – was to be determined on the basis of the presumed intention of the legislature, interpreted against the backdrop of a presumption against the ousting of the jurisdiction of courts.

Ouster clauses in South African law will now be extremely difficult for the legislature to justify against the Constitution. Various provisions of the Constitution have, for all practical purposes, spelt the end of such devices: first, the founding provisions of the Constitution

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\(^{56}\) Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 272C-273B ( paragraphs 83-86).

\(^{57}\) De Smith, Woolf and Jowell, 231 (paragraph 5-016). See too Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL), 950i-951a, in which Diplock LJ said: ‘By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.’
speak of the democratic South African state being founded, inter alia, on the values of constitutional supremacy and the rule of law; secondly, s2 gives concrete expression to this value by providing that the Constitution is the supreme law and that law or conduct inconsistent with it is invalid; thirdly, s7(2) places obligations, both positive and negative, on the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’; fourthly, s8(1) provides that the Bill of Rights ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’. In addition, two fundamental rights have the effect of entrenching the power of the courts to review the acts or decisions of the administration and protecting the courts from the unreasonable and unjustified ousting of their jurisdiction. They are the right to just administrative action contained in s33(1), and s34 which provides that everyone ‘has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum’.

7.2.2. Ouster Clauses

(a) Ouster Clauses in General

Prior to 27 April 1997, Parliament was free to limit or exclude the jurisdiction of the courts to review the acts or decisions of the administration. Indeed, Parliament enacted ouster clauses extensively, particularly in security legislation and in statutes which entrenched

58 Section 1(c). It is through this provision that the doctrine of legality has been developed by the Constitutional Court. See, in particular, Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa supra, 259G-260B (paragraph 41); 272H-274C (paragraphs 82-90).

59 On s34 generally, see Bernstein v Bester NO 1996 (4) BCLR 449 (CC); Concorde Plastics (Pty) Ltd v National Union of Metalworkers of South Africa 1997 (11) BCLR 1624 (LC); Lesapo v North West Agricultural Bank 1999 (12) BCLR 1420 (CC); Beinash v Young 1999 (2) BCLR 125 (CC). See too De Waal, Currie and Erasmus The Bill of Rights Handbook (4ed) Cape Town, Juta and Co: 2001, 554-580.

60 See for example s28(7) and s29(6) of the Internal Security Act 74 of 1982 and s5B of the Public Safety Act 3 of 1953.
or furthered segregation and apartheid. Generally speaking, such provisions had limited success in achieving their aim of keeping the courts out of the administrative process. This is testimony to the vitality of the values of the common law, particularly the presumption of statutory interpretation against the ousting of the jurisdiction of the courts. It is also an indication of what the courts were capable of doing, even in the face of the most hostile legislation, to protect individual rights and freedoms, if they were so minded.

Writing in 1984, Baxter said that ouster clauses ‘can be almost meaningless, though they do have the practical effect of encouraging strong judicial restraint’. Prior to 1988, the courts, on the basis of what Baxter refers to as ‘the logic of review’, were able to draw the sting of most ouster clauses. Their approach is well illustrated by the cases of Hurley v Minister of Law and Order and, on appeal, Minister of Law and Order v Hurley. In these matters, an application for the release of one Paddy Kearney had been brought by his employer and his wife after he had been detained without trial by an officer in the South African Police purporting to act in terms of s29(1) of the Internal Security Act 74 of 1982. This provision allowed for indefinite detention for purposes of interrogation, if the arrestor, who was required to be a policeman of or over the rank of Lieutenant-Colonel, had ‘reason to believe’ that the person to be detained either had committed or intended to commit certain specified offences or was withholding information relating to the commission or

61 See for example s5(4) of the Black Administration Act 38 of 1927 and s2 of the Blacks (Prohibition of Interdicts) Act 54 of 1956.
62 For a good example of this, see R v Padsha 1923 AD 281, 304 in which Innes CJ said: ‘It is competent for Parliament to oust the jurisdiction of the courts of law if it considers such a course advisable in the public interest. But where it takes away the right of an aggrieved person to apply to the only authority which can investigate and, where necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what prima facie is their duty, namely, from investigating cases of alleged injustice or illegality.’
63 At 726.
64 At 726. He says: ‘For administrative action to be valid, it must (a) be contemplated by some enabling legislation, (b) be performed by the competent authority, and (c) conform to all substantive and procedural conditions laid down by the enabling legislation. If any of these requirements are not met the action is ultra vires and may be set aside on review; it is simply “not action within the meaning of the legislation”.
65 1985 (4) SA 709 (D).
66 1986 (3) SA 568 (A).
intended commission of one of these offences. Section 29(6) of the Act provided that '[n]o court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section'.

The respondent in the court below argued that s29(6) precluded the court from considering the matter. Leon ADJP found that this provision did not succeed in ousting his jurisdiction. He held:

'The exclusion of jurisdiction is dependent upon the action being taken or the detention of the person being effected “in terms of this section”. If the action taken and the detention effected is not in terms of the section then, in my view, the ouster clause cannot apply. It accordingly becomes necessary to determine when the section applies. As a matter of ordinary interpretation the section applies if, and only if,

(i) any commissioned officer as defined in s1 of the Police Act 1958,
(ii) of, or above, the rank of lieutenant-colonel,
(iii) if he has reason to believe that any person,
(iv) has committed or intends or intended to commit one of the offences stated or
(v) is withholding the information referred to,

he may then arrest such person or cause him to be arrested and may detain him or cause him to be detained. If, for example, a sergeant had effected the arrest and detention, the section would not apply for there would then be a manifest absence of jurisdiction. So too, it seems to me, it must follow that, if the commissioned officer does not have reason to believe, the action taken will not be taken in terms of the section.'

This approach to ouster clauses has the twin virtues of starting from the premise that the jurisdiction of the courts to fulfil their constitutional mandate should not lightly be assumed to have been ousted and that ouster clauses are not absolute because, as Baxter says, ‘they must be construed in the context of the legislation in which they are enacted as must the acts to which they refer’.

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67 The relevant provisions of s29 are cited by Rabie CJ at 576F-I in the appeal. On s29 more generally, see Mathews Freedom, State Security and the Rule of Law Cape Town, Juta and Co: 1986, 79-95.
68 At 716D-G.
69 See Leon ADJP’s discussion of judicial policy in this regard at 715C-716B.
70 Baxter, 727, quoted by Leon ADJP at 722I-J.
On appeal, Rabie CJ adopted much the same approach. He held that s29(6) would succeed in ousting the court’s jurisdiction ‘only if the officer who arrested or caused the arrest of a person was an officer of the required rank, and if he had reason to believe – i.e. if he had reasonable grounds for believing – that the person concerned was a person as described in para (a) or para (b) of s29(1). Whether he was such an officer, and whether he entertained such belief, are questions of fact, and it is only when such facts exist that it can be said that s29(6) is of application’.71 Hurley, in both the court below and on appeal, therefore dealt with the ouster clause in the traditional way. The basis of this approach was that the ouster clause would only come into operation if the functionary had acted in terms of the empowering provision – in other words, lawfully – in which event the court could not intervene on review in any event. Circuitous as that may be, it was the only way of ensuring that Parliament did not rob courts of their constitutional role of protecting the individual from arbitrary exercises of public power through ouster clauses.

Having asserted the importance of protecting the court’s review jurisdiction in this way, a mere two years later, Rabie ACJ (as he had by then become72), Hefer JA, Grosskopf JA and Vivier JA ousted their own jurisdiction in the most alarming fashion in Staatspresident v United Democratic Front.73 Van Heerden JA dissented. The case involved a challenge to the validity of certain emergency regulations promulgated by the appellant purporting to act in terms of s3 of the Public Safety Act 3 of 1953. It had been held in the court below74 that certain of these regulations were invalid because of their vagueness and that an ouster clause contained in s5B of the Act did not succeed in insulating vague regulations from review.75 Indeed, of the argument to the contrary, the court observed that counsel had

71 At 584H-I.
72 See in this regard Cameron ‘Nude Monarchy: the Case of South Africa’s Judges’ (1987) 3 SAJHR 338.
73 1988 (4) SA 830 (A).
74 United Democratic Front v State President 1987 (3) SA 296 (N).
75 Section 5B read as follows: ‘No interdict or other process shall issue for the staying or setting aside of any proclamation issued by the State President under s2, any regulation made under s3, any notice issued by the Minister under s4 or s5A(1) or (2) or any regulation made under s5A(4), and no court shall be competent to enquire into or give judgment on the validity of any such proclamation, notice or regulation.’
argued the point undaunted by the weight of authority against them. Their argument was that the ouster applied to acts which were ultra vires ‘in the narrow sense’ – alleged to be ‘void ab initio’ – and acts which were ultra vires in a ‘wider sense’ – alleged to be merely ‘voidable’. Page J and Galgut J declined to accept the invitation to find the considerable weight of authority in favour of the traditional view wrong.

On appeal, the paucity of authority in favour of the view rejected by Page J and Galgut J did not stand in the way of the majority. They accepted the argument and, in doing so, did immeasurable damage to South African administrative law and to the reputation of the South African judiciary. Their reasoning was that the regulations dealt with matters on which the State President was authorized to legislate and he had claimed to act in terms of the empowering legislation, from which Rabie ACJ concluded:

‘Die Staatspresident het by die uitvaardiging van al die regulasies op die bevoegdheid wat art 3(1)(a) aan hom verleen, gesteun, en selfs indien dit so sou wees (soos deur die Hof a quo bevind) dat sommige van die regulasies so vaag is dat dit as ongeldig beskou moet word, dan is dit nog steeds regulasies wat die Staatspresident uit kragte van sy bevoegdheid ingevolge art 3(1)(a) gemaak het. ’n Mens sou kon sê dat hy in die uitoefening van sy bevoegdheid nagelaat het om sommige van die regulasies so duidelik te maak as wat die reg van hom vereis, of dat hy sommige regulasies gemaak het wat weens hulle vaagheid oneffektief is en dus nie toegpas kan word nie, maar hy het na my mening met die maak van sodanige regulasies nogtans nie anders as ingevolge, of kragtens, die bevoegdheid wat art 3(1)(a) aan hom gee, opgetree nie. ’n Onvolmaakte of oneffektiewe uitoefening van sy bevoegdheid deur regulasies te maak wat vaag is, beteken dus na my mening nie dat die Staatspresident buite sy bevoegdheid gegaan het en dus ultra vires opgetree het nie.’

76 At 304G.
77 At 304G-J.
78 At 305A-C.
79 The late Mr Justice Ismail Mahomed sarcastically described this judgment, when he, as counsel, was arguing the matter of Natal Indian Congress v State President 1989 (3) SA 588 (D) as ‘binding but not persuasive’. See in this regard, Haysom and Plasket ‘The War Against Law: Judicial Activism and the Appellate Division’ (1988) 4 SAJHR 303, 303-304. See too Mr Justice John Didcott ‘Salvaging the Law’ (Extracts from the Second Ernie Wentzel Memorial Lecture at the University of the Witwatersrand, 4 October 1988) (1988) 4 SAJHR 355, 358-359.
80 At 853B.
81 At 553C-F.
In order to reach this conclusion, the court had to reject the accepted orthodoxy that Parliament did not intend to permit subordinate legislators to enact vague subordinate legislation and that, when they did so, their purported exercises of power were ultra vires and, for this reason, invalid. Instead, according to Hefer JA, the power of a court to set aside a vague regulation was not based on the ultra vires doctrine but on ‘die vaagheid van die voorskrif opsigself’, whatever that means. It has been pointed out that this strange game of intellectual gymnastics resulted in constitutional nonsense because ‘implicit in it is a rejection of sovereignty and an assertion that the courts can interfere when and where they want to, which is hardly consistent with the substance of his [Hefer JA’s] judgment.’

Distressingly, when the Appellate Division, by then presided over by Corbett CJ, was provided with the opportunity to revisit the United Democratic Front case, in Catholic Bishops Publishing Co v State President, Corbett CJ held that he was unconvinced that the earlier decision was clearly wrong.

The United Democratic Front case was applied in Natal Indian Congress v State.

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82 The court impliedly reversed the decision of the Appellate Division in the leading case on vagueness, R v Pretoria Timber Co (Pty) Ltd 1950 (3) SA 163 (A), without even mentioning it: Hefer JA simply asserted that, in South African law, there was no need to seek to justify judicial interferences with the exercise of discretionary powers by reference to the ultra vires doctrine although ‘sommige beslissings van one Howe (waaronder hierdie Hof) ’n ander indruk skep’ (at 870I-J).

83 At 867A. See too Rabie ACJ’s judgment (at 855G-H) to the effect that ‘vaagheid gesien moet word as ‘n selfstandige grond waarop ondergeskikte wetgewing soos die onderhawige aangeveg kan word, en nie as ‘n geval van ultra vires nie. Dit volg dan dat na my mening die Hof a quo verkeerdelik bevind het dat art 5B van die Wet nie van toepassing is op die regulasies wat hy weens vaagheid ongeldig verklaar het nie’.

84 Haysom and Plasket, op cit, 321. See too Mureinik ‘Administrative Law’ 1988 Annual Survey 34, 63-64 who says: ‘The second observation is one invited by the court’s thesis, central to the majority judgments, that a regulation which is uncertain – and which, in the absence of an ouster would be struck down as void for vagueness – is none the less intra vires. A regulation which is intra vires is one which is within the powers of its makers – within their authority. If so, what, precisely, is the justification for striking it down? By what title does the court presume to annul something fully within powers granted by the supreme legislature to another organ of government? The great difficulty here is that the court’s reasoning seems to bring it into conflict not only with the jurisdictional principle upon which review has hitherto been thought to rest, but with the doctrine of Parliamentary sovereignty itself.’

85 1990 (1) SA 849 (A).

86 At 866H-I. It is a pity that Corbett CJ did not give reasons for this conclusion, merely stating that he had ‘carefully considered’ the ‘various arguments’ advanced by counsel for the appellant.
President in the context of an attack on emergency regulations based on unreasonableness. Friedman J held that the ratio of the judgment of Hefer JA was that all of the implied limitations or restrictions on the power of subordinate legislators, of which the prohibition against making vague regulations was one, being judge-made requirements for valid administrative action, rather than legislatively intended restrictions on delegated powers, fell outside of the ultra vires doctrine. That meant specifically that the implied restrictions on the promulgation of unfair, unjust or unreasonable subordinate legislation could not operate in the face of the ouster. Interestingly, Friedman J had, earlier in the judgment, stated that he found the ‘reasoning in the minority judgment of Van Heerden JA [in the United Democratic Front case] to accord, with respect, more with what I had always understood the law to be, but this is very much besides the point’. 

That then was the rather unsatisfactory state of the law at the time that the interim Constitution came into force on 27 April 1994. The power to oust the jurisdiction of the courts was made possible, in the first instance, by an unrepresentative Parliament abusing the doctrine of parliamentary sovereignty. For the rest, an executive-minded Appellate Division abdicated its function as protector of the individual against executive excesses, surrendering its jurisdiction in a way in which all of the ouster clauses which ever formed part of South African statute law had never succeeded in achieving before. This abdication of judicial authority had the effect of giving the executive a virtual free hand, to the detriment of the rights of the people, in the furtherance of emergency rule.

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87 1989 (3) SA 588 (D).
88 At 591E. Friedman J resigned from the bench soon after delivering this judgment but whether the two events are in any way connected is not clear. He did not seek to hide the discomfort he felt in reaching his conclusion that his jurisdiction had been ousted. In concluding his judgment he said (at 594I-J): ‘In the result, I regret that the application must fail. I use the word “regret” advisedly. In general, one of the traditional roles of the Courts is to act as a watch-dog against what I might term Executive excesses in the field of subordinate legislation. It fulfils its role by measuring that legislation against long and well established legal principles. It is therefore a matter of regret that, in the field of security legislation, the Legislature should have seen fit to remove from the Court the role which, as I have said, is traditionally one entrusted to it, of fairly without favour or prejudice, safeguarding the interests both of the State and its officers on the one hand and those of its citizens on the other.’
89 Didcott, op cit, 359.
(b) Ouster Clauses and the Constitution

In 1923, Kotze JA, in Union Government v Fakir, expressed disapproval of the practice of attempting to oust the jurisdiction of the courts. He pointed out ‘the general danger involved in departing from a well-known rule of constitutional law in all civilized countries – namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the court’. For the next 70 years, Kotze JA’s advice appears to have been ignored by the legislature. Even so, the courts, through the standard technique of requiring administrative action to have been taken ‘in terms of’ or ‘under’ the empowering legislation were able to minimize the damage of ouster clauses to the rule of law. Indeed, so successful were the courts in maintaining their jurisdiction until the United Democratic Front case that Baxter was able to suggest that the only real effect of ouster clauses was to encourage ‘strong judicial restraint’. The standard technique was considered necessary, as the only way of safeguarding the rule of law, even if it had the effect of gutting the ouster clause of meaning, leaving a largely senseless provision in the Act in question. This is hardly the worst of sins if one’s starting point is...

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90 1923 AD 466.
91 At 471. In much the same vein, De Smith, Woolf and Jowell, at 231 (paragraph 5-016), say: ‘In matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of the Executive, tribunals and other officials exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule or supremacy of law.’
92 At 726.
93 R v Medical Appeal Tribunal, ex parte Gilmore [1957] 1 QB 574, 586.
94 See in this regard the dissenting judgment of Van Heerden JA in the United Democratic Front case, at 859C-D, where he observed that a superfluous provision in an Act is not a rarity. See too R v Minister of Health, ex parte Yaffe [1930] 2 KB 98 (CA), 145 in which Scrutton LJ said in much the same context, and perhaps rather mischievously, that he could find ‘no reason to assume that the framers of this Act objected to tautology’. See further Mureinik ‘Administrative Law’ 1988 Annual Survey 34, 62 who says that the approach which construes an ouster as a nonsense is based on a cogent argument and a hard choice: ‘If you accept the orthodox technique, you are rendering the ouster nugatory, and that conflicts with a very important canon of construction. But if you reject the orthodox technique, you are bound to exclude review altogether. And that means that you are rendering nugatory every control on the exercise of power postulated in the remainder of the statute: you are rendering unenforceable every condition that it imposes upon the powers it confers. To minimize the damage – to make as little nugatory as possible – and because our legal system as a whole discloses a deep and proper antipathy to unbridled power, we adopt the orthodox technique, faute de mieux.’
that courts ought to protect the rights of individuals – to ‘serve as buttresses between the executive and the subjects’.95 Even in a system based on parliamentary sovereignty there is strong support for the idea that judicial review is so important a constitutional fundamental that not even a sovereign Parliament can abolish it constitutionally.96

Since the coming into operation of the interim Constitution, the position of the judiciary relative to the legislature and the executive has changed fundamentally. The new constitutional order has, in the words of Mr Justice Mahomed, ‘very substantially enhanced the potency of judicial authority, effectively making it the ultimate and unchallenged power to decide what laws even a democratically elected Parliament can or cannot make’.97 The South African state is founded on a set of values that include the ‘supremacy of the constitution and the rule of law’98 and ‘a multi-party system of democratic government, to ensure accountability, responsiveness and openness’.99 Ouster clauses are self-evidently at odds with these values. In addition, it has been suggested by some writers that the right to lawful administrative action, in particular, ‘outlaws’ ouster clauses on its own100 and the

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95 R v Pretoria Timber Co (Pty) Ltd 1950 (3) SA 163 (A), 181H-182A.
97 Mahomed ‘The Role of the Judiciary in a Constitutional State’ (1998) 115 SALJ 111, 112. He also wrote that there ‘can be no doubt that the depth of judicial power in the modern state is formidable, and in this country it is arguably even awesome’ (at 112).
98 Section 1(c). In the context of the interim Constitution, which did not contain a similar provision, the Constitutional Court, in Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) BCLR 1458 (CC), 1483D-E (paragraph 58) held that it was ‘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. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here.’
99 Section 1(d). On the effect of these values on our administrative law generally see Corder ‘Administrative Justice: A Cornerstone of South Africa’s Democracy’ (1998) 14 SAJHR 38, 41.
100 Klaaren ‘Administrative Law’ in Chaskalson et al, 25-13 ; Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 38-39. He says of s24(a) of the interim Constitution: ‘The object of s24(a) is to annul ouster clauses: since it creates a constitutional right to lawful administrative action, it vitiates legislative provisions which attempt to insulate administrative action from judicial review, because administrative action which in the absence of such a provision is reviewable - in the sense that it is liable to be set aside on review - is unlawful. The force of s24(a), it seems, is consequently to overrule decisions such as Staatspresident v United Democratic Front...’ See too Davis and Marcus ‘Administrative Justice’ in Davis, Cheadle and Haysom (eds) Fundamental Rights in the Constitution Cape Town, Juta and Co: 1997, 155, 159.
right of access to court ensures that the courts, or court-like tribunals in some instances, will always have jurisdiction to review legislative, executive and administrative acts.\footnote{The interim Constitution’s equivalent of s34, s22 was discussed by the Constitutional Court in Bernstein v Bester NO 1996 (4) BCLR 449 (CC) within the context of whether it created a right to a fair civil trial. Ackermann J’s remarks were obiter and could be criticized for being too restrictive. For present purposes, however, they are instructive on at least the broader purpose of the right. He said (at 499F-G (paragraph 105)): ‘It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the “regsstaatidee”, for it prevents legislatures, at whatever level, from turning themselves by acts of legerdomain into “courts”.’}

In Hintsho v Minister of Public Works and Administration\footnote{1996 (2) SA 828 (Tk).} s22 of the interim Constitution was relied upon to set aside ouster clauses in two pre-1994 decrees. Miller AJ simply held that s22 ‘clearly renders the ouster clauses unconstitutional and, as this Court has jurisdiction to enquire into the constitutionality of laws passed by the Legislature of the former Republic of Transkei ... they, the ouster clauses, can and must be declared to be unconstitutional and accordingly invalid’.\footnote{At 842B.} It will be noted that Miller AJ did not enquire expressly into whether the ouster clauses could be justified in terms of the limitation provision.\footnote{If the remarks of Madlanga J, in the related matter of Dlisani v Minister of Correctional Services 1999 (1) SA 1020 (Tk), 1032G, are an indication of judicial policy, it is clear that the legislation would have failed the limitation test. He said that the Transkei High Court had ‘woven its way through this forbidding morass of Draconian legislation’ slowly and on a case by case basis. He referred to the ouster clauses in the legislation in question as ‘odious procedural hurdles, if not barricades’.} It is notionally possible that an ouster clause could pass the limitation test, but it is unlikely in the extreme, given the central position of the judiciary in the constitutional state and the prime importance of judicial review in fostering a culture of justification.

The potency of the constitutional review jurisdiction of the courts and the slight prospect of ouster clauses surviving constitutional challenge are strong themes which run through the judgment of Hlophe J in De Lille v Speaker of the National Assembly.\footnote{1998 (7) BCLR 916 (C). This judgment is discussed more fully above at 7.1.3 in the context of justiciability.} Two ousters, one a common law rule and the other a statutory provision, were raised by the respondent.
First, it was argued that when the National Assembly took disciplinary measures against Ms De Lille, it was exercising its privilege to regulate its own internal matters and that while the court could ‘scrutinise the nature and extent of the privilege’, it could not enquire into or pronounce upon the exercise of the privilege. Hlophe J rejected this argument, holding that all exercises of power by the National Assembly were subject to the supremacy provision of the Constitution. He concluded that ‘the nature and exercise of parliamentary privilege must be consonant with the Constitution. The exercise of parliamentary privilege which is clearly a constitutional power is not immune from judicial review. If a parliamentary privilege is exercised in breach of a constitutional provision, redress may be sought by an aggrieved party from law courts whose primary function is to protect rights of individuals’.

Secondly, the respondent had issued a certificate in terms of s5 of the Powers and Privileges of Parliament Act 91 of 1963. In terms of this section, when the Speaker issues a certificate stating that a matter before a court or a judge ‘is one which concerns the privilege of Parliament, that court or judge shall immediately stay such proceedings, which shall thereupon be deemed to be finally determined’. Hlophe J dealt with the certificate as follows:

‘Section 5 is inconsistent with section 1(c) of the Constitution and the rule of law as founding values of the South African legal order. Surely the rule of law does not countenance the administrative issue of a certificate to shield illegal and unconstitutional acts from judicial review. The section is also at variance with section 2 which provides that law or conduct inconsistent with the Constitution is invalid. Section 2 cannot be circumvented by a certificate which purports to prevent unconstitutional conduct from being enquired into and declared invalid. There are many other provisions of the Constitution that the said section 5 violates: section 34 which guarantees access to court; section 38 dealing with the enforcement of the Bill of Rights through the courts; and section 167, particularly 167(3) which states that no person or organ of State may interfere with the functioning of the courts. Any certificate issued under section 5 undermines the independence of the courts and interferes with their functioning. Section 5 is accordingly unconstitutional and invalid. Accordingly no certificate issued under its

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106 At 928B (paragraph 20).
107 At 929D-G (paragraph 22).
108 At 934H (paragraph 33).
109 At 939C-E (paragraph 41). Note, it is apparent from the context that the references to s167 and s167(3) are erroneous and are intended to be references to s165 and s165(3) of the Constitution.
6.2.3. Limitation of Action Provisions

South African statute law prior to April 1994 was replete with provisions – sometimes referred to as expiry periods – that prescribed time limits that were shorter than usual for the institution of proceedings against state institutions. These provisions tended to differ from the usual prescription provisions, such as those contained in the Prescription Act 68 of 1969, in that they did not recognise exceptions (such as minority) but, instead, operated in an all or nothing way to bar proceedings after the time limit had expired. The only exception recognised by the courts was impossibility of compliance, as where a person alleged that he had been assaulted by the police had not been able to comply because he had been held incommunicado, in terms of s6 of the Terrorism Act 83 of 1967, for longer than the six month period prescribed by the relevant legislation. These provisions uniformly prescribed much shorter periods within which proceedings had to be instituted than the Prescription Act. Examples of such provisions were to be found in s32(1) of the Police Act 7 of 1958 and s113(1) of the Defence Act 44 of 1957, as well as in similar statutes in the various homelands. (It was, in fact, in the homeland of Ciskei where these provisions first came under constitutional attack.) They are relevant to administrative law for two reasons: in the first place they apply when claims for damages are brought in circumstances that amount to indirect reviews of administrative powers, such as claims

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111 Hartman v Minister van Polisie 1983 (2) SA 489 (A), 496F-G; 499C-500D; Pizani v Minister of Defence 1987 (4) SA 592 (A), 602C-H.

112 See Montsisi v Minister van Polisie 1984 (1) SA 619 (A), particularly at 635A-B.

113 Rather strangely, Ciskei, while ruled by a military Council of State following a coup d’etat, had a constitution, the Republic of Ciskei Constitution Decree 45 of 1990, enacted by the military regime, which contained a justiciable bill of rights. It was against the equality right contained in s1(2) of Schedule 6 of the Constitution Decree that expiry periods in s48(1) of the Police Act 32 of 1983 and s71 of the Defence Act 17 of 1986 were first challenged. See in this regard Qokose v Chairman, Ciskei Council of State 1994 (2) SA 198 (Ck), reversed on appeal in Chairman of the Council of State v Qokose 1994 (2) BCLR 1 (Ck AD) and Zantsi v Chairman of the Council of State, Ciskei 1994 (6) BCLR 136 (Ck).
arising from unlawful arrests; secondly, the case law on their constitutionality became relevant when the Promotion of Administrative Justice Act imposed a time limit for the institution of proceedings for judicial review.

The Constitutional Court has dealt with two such provisions. In the first case, *Mohlomi v Minister of Defence*,\(^{114}\) the constitutionality of s113(1) of the Defence Act was in issue. It provided that no 'civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof'. The plaintiff, who was a minor when his cause of action arose,\(^{115}\) alleged that he had been shot by a soldier and sought to claim damages as a result. He had instituted his action within the six month period prescribed by s113(1) but he only gave 28 days notice, instead of ‘the thirty-one comprising a month at the time of the year that counted’.\(^{116}\) The Minister had filed a special plea to the effect that s113(1) had not been complied with. It was met by a replication to the effect that the section was an unconstitutional infringement of the fundamental rights of the plaintiff to equality, to access to court and to property.

Didcott J viewed with some disfavour the defendant’s reliance on s113(1) in the circumstances of the case: he said that it was not suggested or likely that three days short notice could have caused any prejudice to the defendant and wondered why the defendant or one or other of his officials had chosen to rely on the section and had not waived reliance on it – an attitude which he described as 'unfortunate'.\(^{117}\) He held that s113(1) infringed the plaintiff’s right of access to court entrenched in s22 of the interim Constitution, when viewed in the context of the longer time periods and equitable exceptions

\(^{114}\) 1996 (12) BCLR 1559 (CC).
\(^{115}\) If the Prescription Act had applied, prescription would not have started to run until the plaintiff had attained majority.
\(^{116}\) At 1562E (paragraph 5).
\(^{117}\) At 1563A-C (paragraph 7).
contemplated by the Prescription Act and the shorter time periods and lack of exceptions in the section. He also took into account ‘the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons’.118 In the result, he held, the section denied people an ‘adequate and fair opportunity to seek judicial redress’ because the time periods were too short.119 Didcott J found, finally, that the section was not saved by the limitation provision contained in s33(1) of the interim Constitution, primarily because of its rigidity: the desired end – the protection of the state’s legitimate interests – could have been achieved through means less damaging to the right of access to court.120 In support of this last point, Didcott J referred to the provision which has replaced s32(1) of the Police Act, s57 of the South African Police Service Act 68 of 1995. It increases the time period within which actions must be instituted from six months to one year, calculated not from when the cause of action arose but from the ‘date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date’ and provides that a court may condone non-compliance ‘where the interests of justice so require’. Didcott J was not prepared to be drawn on the constitutionality of s57121 but it is clear form the second case to come before the Constitutional Court on the constitutionality of expiry periods that the possibility of condonation will not necessarily save an expiry period from constitutional invalidity.

In Moise v Transitional Local Council of Greater Germiston122 non-compliance with the
provision under scrutiny, s2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970,\(^{123}\) could be condoned if the party in default applied to court for such condonation. The court could grant condonation if there was no prejudice to the defendant and if special circumstances had existed that prevented compliance with the time period.\(^{124}\) Somyalo AJ held that s2(1)(a) violated the right of access to court despite the condonation provision: the fact that condonation could be granted did not alter the fact that a hurdle had been placed in the way of access to court and condonation was not simply there for the asking.\(^{125}\) The section had to be viewed holistically as consisting of ‘(i) specific notice (ii) within a short period and (iii) with limited scope for condonation for non-compliance’ and when so viewed, it amounted to ‘a material limitation of an individual’s right of access to a court of law under section 34 of the Constitution’.\(^{126}\) Somyalo AJ held further that the provision was not saved by s36(1) of the Constitution because ‘the active protection of the right of this particular category of prospective litigants to approach a court for adjudication of their claims without the limitation contained in section 2(1)(a) of the Act outweighs the government interest concerned’.\(^{127}\)

7.2.4. The Rule Against Delay

(a) The Common Law

All common law remedies apart from habeas corpus may be withheld by a court.\(^{128}\) Their award is said to be discretionary although it is unusual for a party who has established the requirements for a remedy to be denied that remedy. In proceedings to review

\(^{123}\) Section 2(1)(a) provides that no legal proceedings may be instituted against ‘an administration, local authority or officer’, – the debtor – ‘unless the creditor has within ninety days as from the day on which the debt became due, served a written notice of such proceedings, in which are set out the facts from which the debt arose and such particulars of such debt as are within the knowledge of the creditor, on the debtor by delivering it to him or by sending it to him by registered post’.

\(^{124}\) Section 4.

\(^{125}\) At 770D-771B (paragraphs 13-15).

\(^{126}\) At 771C (paragraph 16).

\(^{127}\) At 774A-B (paragraph 24).

\(^{128}\) Baxter, 712-713.
administrative action at common law, a remedy may be withheld if an applicant has
delayed unreasonably in launching proceedings. The purpose of this rule is to bar an
applicant from proceeding who wishes to ‘drag a cow long dead out of a ditch’; a
respondent may be prejudiced by a long delay because witnesses may no longer be
available or they may no longer have an adequate recollection of relevant events. The
basis for the delay rule was expressed as follows by Corbett J in Harnaker v Minister of the
Interior: ‘As I understand the position, the raison d’etre of this rule is the fact that review under the common
law, being an inherent jurisdiction exercised by the Court, is not governed by any statutory rules of
procedure and, consequently, unlike other procedures, it is not circumscribed by specific time limits.
It has been recognised by the Courts that an undue and unreasonable delay on the part of an
aggrieved party in initiating review proceedings may cause prejudice to other parties to the
proceedings and that, therefore, in such cases the Court should have the power to refuse to entertain
the review. The same approach has been adopted in regard to review proceedings governed by
statute but in respect of which no time limits have been laid down by the statute.’

The effect of the application of the delay rule is that an invalid administrative act may be
‘converted’ by default into a valid act. This is well illustrated by Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad, a matter in which the validity of a town
planning decision was an issue. It was held by four of the five judges of appeal that the
decision-maker had failed to take into account certain relevant considerations but the
appeal was dismissed nonetheless by three of the five judges of appeal because of the
appellant’s unreasonable delay of three and a half years in instituting proceedings to

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129 Louw v Mining Commissioner, Johannesburg (1896) 3 OR 190, 200; Baxter, 715.
130 Baxter, 715. See for example Sampson v South African Railways and Harbours 1933 CPD 152, 154-155.
131 1965 (1) SA 372 (C), 380C-E.
132 This was conceded by Corbett J in Harnaker v Minister of the Interior, supra, 381B-C.
133 1978 (1) SA 13 (A).
134 See the judgment of Miller JA (with whom Hofmeyr JA concurred) at 38D-H and the judgment of
Muller JA (with whom Jansen JA concurred) at 26H-27A. Rumpff CJ dissented on this point.
challenge the decision.\textsuperscript{135} In Harnaker’s case\textsuperscript{136} Corbett JA considered the application of the delay rule in the context of a challenge to subordinate legislation. He conceded that the delay rule could, in a sense, ‘validate’ a nullity.\textsuperscript{137} In holding that the delay rule applied to challenges to subordinate legislation as well as to other forms of administrative action, he appeared to be influenced by the fact that the narrow common law rules of standing limited the directly harmful scope of legislation of the type under his consideration. He held:\textsuperscript{138}

‘It is true that a legislative act will affect a wider section of the public: but if the affected members of the public, having locus standi to apply to court for an order declaring the legislative act null and void, delay unreasonably in taking such action and this causes prejudice, I do not see why they should not all be precluded from obtaining relief. After all why should they be in a better position than the individual who alone is aggrieved by the ultra vires act of a quasi judicial body? Moreover, in as much as a member of the public, generally bound by the law, would not have locus standi to approach the court for an order of nullity, unless or until he could show that a real interest of his own had been, or might be, affected by the law, I can see no inequity arising from the application of the delay rule in this way.’

In the Wolgroeiers case\textsuperscript{139} Muller JA, with whom Jansen JA concurred, identified the issue as whether a court could dismiss an application for review on the basis of unreasonable delay alone without proof of prejudice to the respondent.\textsuperscript{140} He held that prejudice to the respondent occasioned by the delay was not simply a factor in determining whether a remedy should be granted or withheld but was the crucial factor.\textsuperscript{141} He cited with approval\textsuperscript{142} Corbett J’s analysis of the interrelationship between delay and prejudice in

\begin{itemize}
  \item\textsuperscript{135} The appeal was dismissed on this basis by Miller JA, Hofmeyr JA and Rumpff CJ. Muller JA and Jansen JA dissented.
  \item\textsuperscript{136} Supra.
  \item\textsuperscript{137} At 381C.
  \item\textsuperscript{138} At 381D-F.
  \item\textsuperscript{139} Supra.
  \item\textsuperscript{140} At 27B-C.
  \item\textsuperscript{141} At 27H, he said: ‘Nou sê die advokaat vir die respondent dat daar etlike sake in ons regspraak is waar aansoeke om hersiening afgewys is op grond bloot van onredelik versuim. Dit is waar. Maar daar is ’n lang reeks sake wat duidelik toon nie alleen dat die bestaan al dan nie van benadeling ’n belangrike faktor is nie maar ook dat dit die deurslaggewende faktor behoort te wees.’
  \item\textsuperscript{142} At 30C.
\end{itemize}
Harnaker: that, in review proceedings ‘unreasonable delay by the plaintiff in instituting action, coupled with resultant prejudice, to the defendant, is a valid defence, or objection, to the action’. Muller JA concluded from this that delay on its own was not a good enough reason to dismiss the appeal and that the delay, to be fatal, had to have caused prejudice to the respondent. Finally, Muller JA held that, on the facts, neither the respondent nor anyone else had suffered prejudice as a result of the three and a half year delay from the taking of the challenged decision to the launching of proceedings. He would, consequently, have upheld the appeal.

The decision for the majority on the delay issue was written by Miller JA. He defined the issue to include two related points: first, a court must decide whether the proceedings in question were in fact brought within a reasonable time; and secondly, it must decide, if the delay was unreasonable, whether it ought to be condoned, in which event the court must exercise its discretion taking into account all relevant factors. Miller JA stated that the avoidance of prejudice to the respondent was not the only reason for the existence of the rule against delay and that Corbett J had not intended to create this impression in Harnaker. He concluded that it flowed from the nature of the delay rule that the court’s discretion was not restricted to the question of prejudice alone. He held:

‘Wat wel deur ons Howe voorgeskryf is, is dat verrigtinge binne redelike tyd ingestel moet word en, soos ek reeds genoem het, staan dit die Hof vry om, na gelang van omstandighede, en by die uitoefening van sy diskresie, onredelike vertraging oor die hoof te sien in geskikte gevalle. Ek kan onmoontlik aanvaar dat by die daarstelling van die vereiste dat verrigtinge binne redelike tyd ingestel moet word, daar bedoel is om die Hof se diskresie aan bande te lê in die mate dat selfs waar ‘n gedingvoerder die Hof se voorskrif verontagsaam deur onnodige en buitensporige versuim om verrigtinge in te stel, die Hof nie by magte is om die aansoek te weier nie slegs omdat nie bewys is

143 Harnaker v Minister of the Interior, supra, 381F-G.
144 At 30D.
145 At 30E-F.
146 At 32H.
147 At 39C-D.
148 At 41C-D.
149 At 42A-D.
of kan word dat respondent nie wesenlik benadeel is nie, al sou daar, op ‘n oorsig van al die omstandighede, ander grondige redes wees vir die uitoefening van sy diskresie teen die aansoekdoener. Ek aanvaar dat benadeling van die respondent en die graad daarvan ‘n relevante faktor is by oorweging of onredelike versuim oor die hoof gesien behoort te word, en dat dit soms die deurslaggewende faktor kan wees, veral in gevalle van betreklik geringe versuim. ... Terwyl, soos ek reeds aangedui het, die vraag of daar onredelike vertraging was ‘n feitebevinding verg, berus die antwoord op die vraag of onredelike vertraging oor die hoof gesien behoort te word by die regterlike diskresie van die Hof, uitgeoefen met inagneming van alle tersaaklike omstandighede en faktore.’

The majority decision has been criticised by Taitz\textsuperscript{150} mainly for moving prejudice from centre stage of the enquiry into the unreasonableness of a delay. He queried how a court could decide on the unreasonableness of a delay – the first stage of the majority’s enquiry – without reference to prejudice as the criterion.\textsuperscript{151} He suggested that ‘the court reintroduce prejudice as the sole criterion in enabling it to decide whether or not to entertain unreasonably delayed review proceedings’.\textsuperscript{152} Despite this criticism, the Wolgroeiers case remains the leading authority on the question of whether delays in launching review proceedings should be condoned.\textsuperscript{153} The purpose, effect and functioning of the delay rule has been summarised succinctly by Griessel J in the following terms in Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape.\textsuperscript{154}

\begin{enumerate}
\item Where no time limit has been specified for the institution of review proceedings, such proceedings have to be instituted within a reasonable time.
\item What amounts to a reasonable time depends on the facts of each case. The length of time is
\end{enumerate}

\textsuperscript{150} ‘The “Delay Rule” and Review Procedure’ (1980) 97 SALJ 393.
\textsuperscript{151} At 395.
\textsuperscript{152} At 400.
\textsuperscript{153} As illustrations of the flexibility of the rule see, Radebe v Government of the Republic of South Africa 1995 (3) SA 787 (N) in which a delay of 14 years was not condoned, and Sekeleni v Premier of the Eastern Cape Province [2001] 2 All SA 493 (Tk) in which a delay of 10 years was condoned. See too Mamabolo v Rustenburg Regional Local Council 2001 (1) SA 135 (SCA) for a recent application of the delay rule. See further Lion Match Co Ltd v Paper, Printing, Wood and Allied Workers Union 2001 (4) SA 149 (SCA) criticized for misapplying the delay rule by Driver and Plasket ‘Administrative Law’ 2002 Annual Survey forthcoming.
\textsuperscript{154} 2001 (4) SA 294 (C), 306H-307G. See too Yuen v Minister of Home Affairs 1998 (1) SA 958 (C), 968J-969H.
not necessarily decisive. Each case depends on its own facts.

3. When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation; to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.

4. The rationale for this judicially evolved common-law rule is twofold: first, an unreasonable delay may cause prejudice to other parties. Second, finality should be reached within a reasonable time in judicial and administrative proceedings.

5. Prejudice may take many forms. The official whose decision is sought to be reviewed may have forgotten the relevant facts. The recollection of the relevant facts by those concerned may have faded - memory being unfaithful at times. Others may no longer be available. Documentary proof may have been destroyed or may have disappeared. Other parties may have acted on the strength of the decision to their prejudice.

6. Once unreasonable delay is raised as a defence in review proceedings, the Court must embark upon a twofold enquiry: the first enquiry is whether a reasonable time has elapsed. This is a factual enquiry, the question being whether, in all the circumstances, a period that has elapsed was unreasonable. During this enquiry the Court does not, therefore, exercise a discretion although the Court does have to express a value judgment (waardeoordeel) on the reasonableness or otherwise of the delay. Such value judgment cannot be expressed in vacuo, however, but it must depend on the particular circumstances of each case, including the applicant's explanation for the delay. ...

7. If the Court finds that the delay was reasonable, the enquiry ends there. If the Court, however, concludes that the delay was unreasonable, the Court is then required to embark upon the second enquiry, this being whether the unreasonable delay should be condoned. Here the Court exercises a discretion.’

(b) Sections 7 and 9 of the Promotion of Administrative Justice Act

The common law delay rule operated in the absence of any statutory regulation of the time
within which applications for judicial review had to be brought. The Promotion of Administrative Justice Act has, for purposes of giving effect to the fundamental right to just administrative action, stipulated a time period within which applications for review must be initiated. This provision is contained in s7(1), which reads as follows:

‘Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.’

Section 7(2)(a) places an obligation on a person aggrieved by administrative action to exhaust internal remedies before applying to review the action concerned and s7(2)(c) allows for exemptions from this obligation, on application to court, in exceptional circumstances in the interests of justice.155

Section 9 of the Act allows for the variation of time limits in respect of the providing and requesting of reasons in terms of s5 and the initiating of review proceedings in terms of s7. It reads as follows:

‘(1) The period of –

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.’

(c) The Fairness, Practicality and Constitutionality of Sections 7 and 9

A number of aspects of s7 and s9 raise concern. In the first place, the 180 day time period is the outer limit for launching proceedings. The section appears to contemplate the

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155 This issue will be dealt with in more detail below.
possibility of an applicant being non-suited even inside the 180 day limit. This, it is submitted, is what is meant by ‘without unreasonable delay and not later than 180 days after the date …’. Secondly, s9(1)(b) contemplates extensions of the 180 day limited ‘for a fixed period’ either by agreement or court order. This formulation tends to suggest that prior to launching an application, an applicant who is concerned that he or she may not meet the 180 day deadline must either try to reach agreement with the respondent or approach a court, on application, for the setting of a date by which he or she must launch the proceedings. If the drafters had intended the agreement or order to relate to condonation for late launching of an application, they would surely have used language that indicated this more clearly. If this is what was intended, the 180 day limitation of action provision will be unconstitutional on the same basis as s113(1) of the Defence Act was held to be unconstitutional in Mohlomi v Minister of Defence. In all probability, however, courts will interpret the provision as a condonation provision despite its rather obscure wording. That is probably what was, in truth, intended by the drafters.

The real problem with s7 and s9 (assuming that s9 is indeed a condonation provision) is that the 180 day time period will undoubtedly work to the detriment of the poor, the illiterate and the marginalised – that large mass of the population who are ‘most lacking in

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156 Curie and Klaaren The Promotion of Administrative Justice Act Benchbook Cape Town, Siber Ink: 2001, 180 (paragraph 7.5) suggest that this is unlikely. That may appear to be so but the section sets a new and much shorter benchmark. It invites respondents to take the point that proceedings should have been brought quicker, even inside the 180 day period. Lion Match Co Ltd v Paper, Printing, Wood and Allied Workers Union supra, in which the delay between the defective establishment of the Conciliation Board and the filing of the appellant’s special plea was five months, opens up this possibility. The nub of the problem is that the Act has created an issue where none existed before. (It is submitted that the Lion Match Co Ltd case is an aberration. It certainly is not in step with the long line of cases dealing with undue delay.)

157 See, for instance the condonation provision in the South African Police Service Act 68 of 1995. Section 57(1) of this Act provides that legal proceedings against the Service must be instituted ‘before the expiry of the period of 12 calendar months after the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date’. Section 57(2) provides that notice of intended proceedings must be given at least one calendar month before the proceedings are instituted. Section 57(5) provides: ‘Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those subsections where the interests of justice so require.’

158 1996 (12) BCLR 1559 (CC).
protective and assertive armour’ and whose needs ‘must animate our understanding of the Constitution’s provisions’.\(^{159}\) They do not have easy access to lawyers. Indeed, substantial numbers of the South African population live far from towns which have attorneys offices, let alone the money to pay lawyers. A relatively small number of the poorer sector of the community may find their way to advice offices which may succeed in obtaining for them the services of lawyers which either do not charge for their services – such as the Legal Resources Centre – or who are able to obtain legal aid or who do the work on contingency. Judicial notice was taken of such factors, for purposes of determining whether applicants had standing to litigate on behalf of others, in terms of s38(b), s38(c) and s38(d) of the Constitution, in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government*\(^{160}\). After referring to Didcott J’s comments in *Mohlomi v Minister of Defence*,\(^{161}\) Froneman J held:\(^{162}\)

> The evidence presented in this case confirms, to a large extent, the correctness of the situation sketched by Didcott J. A large proportion of the people living in this province is poor. Many of them live in rural areas, far from access to lawyers that well-off urban people take for granted. Roads are often in poor condition (I take judicial notice of that) and public transport is not always easily available. If and when they do get to a lawyer they will be told that the legal aid system provided by the state is in dire straits and that they might not find the necessary financial assistance to enable them to take an unhelpful and unresponsive public administration to

The factors to which Didcott J and Froneman J alluded apply as forcefully in respect of the 180 day provision in the *Promotion of Administrative Justice Act*. As against the position of the poor, the illiterate and the marginalised, it is safe to assume that the rich and the powerful will more often than not be able to meet the 180 day cut off. They have ready access to lawyers and are able to pay for the services of as many as they need. In this way an equality point may also raise its head.

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\(^{159}\) *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (SCA), 1046C (paragraph 12).

\(^{160}\) 2000 (120 BCLR 1322 (E).

\(^{161}\) Supra, 1566G-I (paragraph 14).

\(^{162}\) At 1329H. See too *Moise v Transitional Local Council of Greater Germiston* 2001 (8) BCLR 765 (CC), 770G-771A (paragraph 14).
The fact that the 180 day period may be extended in the circumstances set out in s9 is not a cure-all for a number of reasons. Anyone who has litigated against the state (both before and after April 1994) will know that agreement to extend the 180 day period is unlikely to be granted in the majority of cases. The state will, in most cases, either actively oppose an extension of time or, at least, leave the applicant to convince the court that strong enough grounds for condonation are present. The first danger here lies in the balance that the Act envisages between the right to just administrative action and administrative convenience. The right may be limited through the back door, as it were, in this way. When an applicant is non-suited because of his or her delay in initiating proceedings, the effect of this is to ‘convert’ an invalid administrative act, by default, into a valid one. This was conceded by Corbett J in Harnaker v Minister of the Interior, as was mentioned above. The second danger lies in the focus of the litigation. If, more often than not, an application for condonation is going to be opposed, the focus in litigation will tend to change from the conduct of the administration in relation to the cause of action to the conduct of the applicant in bringing the application: the applicant will be required to ‘beg’ to be allowed through the doors of the court. This will tend to have a chilling effect on the exercise of the right to just administrative action and the right of access to court will be diluted.

Administrative law cases often generate difficult issues of public policy. The issues are likely to increase in complexity and magnitude, especially as more people and

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163 See the remarks of Didcott J in Mohlomi supra, at 1562I-1563C (paragraph 7) about the defendant’s special plea to time-bar the plaintiff despite the absence of prejudice to the State. See too the recent case of Maluleke v Member of the Executive Council for Health and Welfare, Northern Province 1999 (4) SA 367 (T) in which counsel for the respondent argued various technical points in an effort to defeat the application of an applicant who had, together with over 92 000 others, had payment of her pension suspended unlawfully. The respondent succeeded (but should not have) in respect of one issue, the standing of the applicant to claim relief on behalf of the entire class of people who were similarly situated.

164 1965 (1) SA 372 (C ), 381A-C.

165 Many attorneys, particularly in smaller centres, often run cases for poor clients ‘on spec’. They tax a bill of costs if they succeed but charge the client nothing. This type of work appears to be encouraged by the legal profession which is trying to project an ethos of social responsibility, especially as the legal aid system is not functioning optimally. If an attorney is faced with the prospect of incurring expenses in running such a case which has good facts but which is out of time, he or she is unlikely, in most instances, to take the risk.
organisations begin to approach courts to vindicate or protect their socio-economic and environmental fundamental rights in particular. Technical procedural mechanisms like the 180 day time period may serve as a convenient ‘bolt hole’ for some judges or magistrates who find themselves overwhelmed by the magnitude of the issue or the difficulty of the decision on the merits, or who might simply have a pro-executive approach to matters of administrative discretion, socio-economic rights or environmental justice. It also allows the respondent a ‘free hit’: the opportunity to take a technical point in which the applicant has to discharge the onus, and which has nothing to do with the merits.

From a practical point of view, the 180 day time period will undoubtedly force lawyers, for their own protection if for no other reason, to institute proceedings as a first step, rather than trying to resolve matters through negotiation. From a policy point of view, therefore, this provision is undesirable because it will reduce the possibilities of negotiated solutions to administrative law issues. It will also lead to a substantial amount of unnecessary and costly litigation on what the ‘interests of justice’ means and related issues.\textsuperscript{166} It is, furthermore, doubtful that it is necessary for the Act to contain a time period at all. The common law delay rule, with all its flexibility, is entirely adequate and has served the cause of administrative justice well for more than a century in this country. Gauged against the common law delay rule, the 180 day provision is most oppressive. One would not expect the legislature in seeking to give effect to a fundamental right of the importance of the right to just administrative action to limit the right by introducing a statutory provision that is more restrictive of the individual’s right of access to court than the common law.

The functioning of the delay rule was discussed with great insight in \textit{Scott v Hanekom}.\textsuperscript{167}

\textsuperscript{166} See by way of example, the large volume of case law that provisions such as s32 of the Police Act and s113 of the Defence Act generated. They, with respect, add very little value to South African jurisprudence and most of the cases involve attempts by the state to use technical mechanism to try to defeat the claims of individuals, whether they are legitimate or not. That type of litigation is unconscionable and a democratic legislature in a constitutional state should not encourage the executive and administration to behave in such a fashion by providing them with a legal basis for so doing.

\textsuperscript{167} 1980 (3) SA 1182 (C).
The respondent had taken the point that the applicants had not, in their founding papers, explained the delay of some six months in bringing the application to challenge the lawfulness of community council elections. Marais AJ held that this was not necessary or desirable in the large majority of cases. His views are quoted at length below. They highlight the weaknesses inherent in the 180 day provision from the point of view of practice and procedure. He held:

‘I do not read the decision in that case [the Wolgroeier’s case] as laying down an inflexible rule that an applicant in review proceedings must, as a matter of course, devote portion of his launching affidavit to an explanation of such delay as may have occurred in initiating the proceedings. There are cogent reasons why such a rule should not be laid down. The scope of review proceedings is limitless. The antecedent investigations and preparation of process may be simple or complex. The time required for this purpose may be short or it may be long. The parties may have spent many fruitless months in attempting to negotiate an acceptable compromise or settlement before resorting to litigation. Is each prospective applicant in a review proceeding to apply his mind to the question of the notional reasonable time within which his application should be brought and, if he does not initiate his proceedings within that period, must he, when he launches his application, spell out what the circumstances were that led to the delay? And must he do so, for example, even although the respondent is well aware of the reasons for the delay because the parties have been negotiating for months to reach a compromise, simply because the Court may mero motu question the delay?

I can think of few things more calculated to result in a frequent and often wholly unnecessary increase in the costs of such proceedings than an affirmative answer to these questions. Because of the elasticity of the concept of a reasonable time, and the potentially widely differing individual assessments of what such period would be in any particular case, the likelihood is that, for safety’s sake, it would become standard practice for applicants in review proceedings to detail in their launching affidavits all that has happened since the decision which it is sought to review was given. In my judgment, such a development in the practice of the Courts has nothing to commend it.

In my view, the period of time within which review proceedings are brought, forms no part of an applicant’s cause of action. The denial of access to the Court because of an unreasonable delay arises from an objection de hors the merits of the case and it is fundamentally procedural in character. Delay in initiating review proceedings is pre-eminently a point which the respondent or the Court should raise because the respondent and the Court are best able to judge whether, having regard to the respective spheres of interest of each, the lapse of time which has occurred merits the

168 At 1192G-1193G.
raising of an objection.

I recognise that there may be cases (and they are likely to be rare) in which the delay is so manifestly inordinate that an applicant can be expected to explain the delay in his founding affidavits. But, unless the delay which has occurred does fall within this extreme category of cases, an applicant should not be expected, as a matter of course, to explain, in advance of any objection by the respondent or the Court, any apparent delay which may have occurred. If such an objection is raised by the respondent, the applicant can deal with it in his replying affidavits. To the extent that in doing so he makes allegations which the respondent has not had an opportunity of meeting in his opposing affidavit, the respondent obviously would be entitled to file a further affidavit dealing with such allegations. In the rare case where the respondent raises no objection to any delay which has occurred, but the Court does, I cannot think that any Court would refuse to allow the applicant to put before it a further affidavit explaining the delay.’

As Marais AJ explained, the common law delay rule functions very much in the shadows and in practice hardly ever usurps the limelight from the merits. That is so particularly because the respondent, in order to succeed, would be required to make out a case that he, she or it has been prejudiced by the delay or that some other similar circumstances exist.169 That is as it should be. The preferable position is illustrated by Marais AJ’s conclusion in Scott v Hanekom:170

‘Unless therefore the delay which occurred in the present case falls into the category of delay which is manifestly inordinate, I am not prepared to hold that the applicants should have explained the delay in their launching affidavits, and that, having failed to do so, they are precluded from explaining it in their replying affidavits in response to an objection pertinently raised by the first respondent. I am not satisfied that a delay of some six months in the launching of this application is a delay of so gross a nature that it called for explanation by the applicants ab initio. It follows that there can be no legitimate objection to the matter which the applicants inserted in the replying affidavits to explain and account for the delay which occurred.’

169 Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A). See to Gencor SA Ltd v Transitional Council for Rustenburg and Environ 1998 (2) SA 1052 (T), in which Kirk-Cohen J held that a delay of 14 months from when the applicant became aware of its cause of action to when it instituted proceedings was not unreasonable (at 1065F-1067G).

170 Supra, 1193H-1194A.
The 180 day provision amounts to an infringement of the right of access to court.\textsuperscript{171} The principal issue, in the event of its constitutionality being challenged, will be whether the condonation provision saves it. In other words, the issue will boil down to whether the procedural scheme created by s7(1) and s9 is a reasonable and justifiable limitation of the right of access to court. This right is self-evidently important in a democratic state founded on constitutional supremacy and the rule of law. The purpose of the 180 day period is, presumably, to achieve finality when administrative decisions are taken. Its importance lies in administrative convenience rather than principle. Its importance is accordingly rather low on the scale. The limitation has potentially far-reaching effects in the sense that 180 days is not a particularly long period of time and condonation is not there for the asking.\textsuperscript{172} It is likely to be particularly onerous for poor people who may spend a great deal of time going from pillar to post trying to resolve their problem, or who may simply do very little out of a sense of powerlessness, ignorance of their rights or not having anyone to turn to for help. The relation between the 180 day provision and its purpose is more illusory than real: while it is meant to achieve finality, it cannot because, in order to have any prospect of being constitutional, provision must be made for condonation, which then undermines the very purpose of the provision. One cannot have finality when it is possible that a person may challenge an administrative act outside of the 180 day period and have grounds for condonation. It becomes all the more unworkable when viewed in the context of the extended standing provisions of s38 of the Constitution. When a litigant had to show that he or she had a real and substantial interest, personal to him or her, in the subject matter of litigation, it could be argued that the area of operation of administrative action had a built-in confining mechanism. When representative standing became a reality, it became possible for administrative action to be challenged by a much wider category of people who

\textsuperscript{171} Mohlomi v Minister of Defence, supra; Beinash v Young 1999 (2) BCLR 125 (CC).

\textsuperscript{172} See Moise v Transitional Local Council of Greater Germiston supra, 771A-B (paragraph 15) in which Somyalo AJ said of a condonation provison in the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970: ‘It should also be noted that section 4 does not afford a defaulting creditor carte blanche. The power of a court under the section is confined to extending the period for notice and is by no means open-ended. The jurisdictional criteria for the grant of the indulgence are quite clearly circumscribed and are not mere formalities. As the plaintiff in Abrahamse found to his cost, condonation may well be refused despite a hard-luck tale.’
are not directly affected. Finally, the delay rule of the common law attests to the existence of a workable, reasonable, fairer less restrictive means of ensuring that people do not drag long dead cows out of ditches.

It is consequently submitted that the 180 day provision ought not to be part of the Act. There was no need to insert a time period because the common law regulated this aspect of review proceedings adequately and fairly. In contrast, the 180 day provision may well be unconstitutional for the reasons set out above and, even if it is not, it will operate unfairly in respect of most victims of unjust administrative action, is unworkable from a practical point of view and will work to the detriment of the proper administration of justice. In the absence of a successful challenge to the constitutionality of the provision, law reform is needed. Two possible amendments are proposed. First, the damage may be undone by Parliament simply repealing s7(1). The common law delay rule will then fill the gap. Secondly, s7(1) could be amended to read: ‘Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay.’

7.2.5. Exhaustion of Internal Remedies

(a) The Common Law

When a statute creates an internal avenue for redress, such as an internal appeal, the courts have sometimes insisted that an aggrieved party should utilise such remedies before applying for judicial review. To the extent that this may be called a rule – which is open to doubt – it is far from absolute. It is said to apply only when legislation requires, either expressly or impliedly, the exhaustion of remedies prior to judicial review or where an agreement exists between private parties (such as a club and its members) to this

\[\text{173 See generally Plasket 'The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000' (2002) 119 SALJ forthcoming.}\]
effect. Indeed, in *Bindura Town Management Board v Desai and Co.*, Van Heerden JA held that there is no general rule that ‘a person who considers that he has suffered a wrong is precluded from having recourse to a Court of law while there is hope of extra-judicial redress’. And in *Welkom Village Management Board v Leteno* Ogilvie-Thompson AJA cited with approval a passage in *Golube v Oosthuizen* that the ‘mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies’.

Whether a statute containing an internal remedy should be interpreted to mean that review of decisions subject to that remedy are impliedly precluded or deferred until that remedy has been exhausted is largely dependant on two considerations: whether the internal remedy is effective and whether the alleged unlawfulness has undermined or tainted the internal remedy. The courts are decidedly reluctant to imply an intention to oust or defer their jurisdiction until internal remedies have been exhausted. This approach led Southwood J, in *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province*, to observe that a failure to exhaust internal remedies ‘will seldom be

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174 Baxter, 720.
175 1953 (1) SA 358 (A), 362H.
176 1958 (1) SA 490 (A), 503B-C.
177 1955 (3) SA 1 (T), 4F.
178 See by way of contrast, Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* (note 22), 181 (para 7.6) who suggest (erroneously, it is submitted) that ‘it is a principle of South African constitutional law that administrative justice is fostered by the existence of internal remedies’. The case they cite in support of this proposition is no authority for it at all. They suggest, however, that a completely different approach is called for that would see the demise of the authorities cited above: ‘The non-existence of such internal remedies should not be lightly assumed. Where their existence or non-existence is a matter of statutory interpretation, an interpretation in favour of their existence will be in line with giving effect to the constitutional right to administrative justice.’ With the greatest of respect this does not follow and does not accord with reality. This approach to internal remedies may give effect to s7(2) of the Act but that does not mean that it gives effect to the right to just administrative action. It will be argued below that it does the opposite: it undermines the right and the right of access to court in an unreasonable and unjustifiable way.
179 Baxter, 721. See too *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C), 6B-7C.
180 1999 (4) SA 367 (T), 372G-H. See too *Mahlaela v De Beer NO* 1986 (4) SA 782 (T), 790F-H in which Stafford J held: ‘From these decisions it appears that the mere existence of a domestic
upheld – particularly where the aggrieved person’s very complaint is the illegality of the decision which he seeks to challenge’ and that ‘generally an aggrieved person such as the applicant should have unrestricted access to the court to seek redress’.

This common law rule is in harmony with the right of access to court, and with the founding value of the rule of law contained in s1(c): the duty to exhaust internal remedies, thereby deferring resort to judicial review, only applies when it is clearly intended and functional. The rule is not absolute and its application depends on considerations of effectiveness and fairness. This is borne out by the factors taken into account by courts in seeking to ascertain whether legislation impliedly precludes or defers judicial review until after internal remedies have been exhausted: in Lawson v Cape Town Municipality the factors as ‘the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases upon which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any “re-hearing” on appeal; the powers of the appellate tribunal, including its power to redress or “cure” wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains’.

(b) Section 7(2) of the Promotion of Administrative Justice Act

Section 7(2) of the Act requires applicants for judicial review of administrative action to

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remedy does not conclude the question. The necessary implication can seldom, if ever, arise when the aggrieved person’s very complaint is the illegality or fundamental irregularity of the decision which he seeks to challenge in the Courts. If the respondent’s contention that he was entitled as it were to throw the letter of application back in the applicant’s face is wrong in law, then the refusal to allocate a house has been made without applicant having been given an opportunity of being heard. This would be a fundamental irregularity. The fact that the applicant has an option to appeal does not mean he has an obligation to do so. That obligation he only has if the right to approach this Court has been taken away or deferred, until he has exhausted those remedies.’

Supra, 6H-7A
exhaust their internal remedies before approaching a court for relief. The section reads as follows:182

'(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

The section seeks to make far-reaching changes to the common law. It differs from the common law in the following ways: first, it places a positive and unequivocal obligation on a person aggrieved by administrative action to utilise internal remedies, irrespective of the circumstances; secondly, it bars courts from reviewing administrative action unless internal remedies have been exhausted (or unless an exemption has been granted); thirdly, in order to be exempted from the obligation to exhaust internal remedies, an applicant must make an application, in which, on general principles, the onus will be on him or her to establish the necessary requirements for exemption; fourthly, an exemption will only be granted if two requirements are present. They are ‘exceptional circumstances’ and the ‘interests of justice’ being deemed to favour such an exemption. The new approach to internal remedies embodied in s7(2) must be assessed within the context of the functioning of the South African public administration. It will be argued below that the public administration is, at present, so riddled with inefficiency that s7(2) will result in grave injustices rather than administrative justice.

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182 Note that in the first judgment to consider s7(2), Marais v Democratic Alliance 2002 (2) BCLR 171 (C), the court held that the section could not apply to a voluntary association where the internal remedy was created by the constitution of that body: the duty to exhaust internal remedies only applies when the internal remedy is ‘provided for in any other law’, as opposed to when it is created by ‘an empowering provision’. Self-evidently, the constitution of an empowering provision cannot be said to be a law.
(c) Section 7(2) and Public Administration in South Africa

In President of the Republic of South Africa v South African Rugby Football Union,\(^\text{183}\) the Constitutional Court spoke of the type of public administration envisaged by the democratic Constitution, and the reason for subjecting public administration to a range of constitutional values, principles and duties. It said:

‘Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.’

In terms of s195(1) of the Constitution, public administration must be governed by the ‘democratic values and principles enshrined in the Constitution’ including those specifically set out in the section. They include the promotion of a high standard of professional ethics,\(^\text{184}\) the promotion of efficient, economic and effective use of resources,\(^\text{185}\) the provision of services in an impartial, fair, equitable and unbiased manner,\(^\text{186}\) the accountable conduct of public administration\(^\text{187}\) and the fostering of transparency through the provision to the public of timely, accessible and accurate information.\(^\text{188}\)

A legislative framework has been put in place to promote the values and principles of

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183 1999 (10) BCLR 1059 (CC), 1115B-D (paragraph 133).
184 Section 195(1)(a).
185 Section 195(1)(b).
186 Section 195(1)(d).
187 Section 195(1)(f).
188 Section 195(1)(g).
s195(1). On its own, however, it will not have the effect of achieving the type of public administration that the Constitution speaks of. Indeed, while there are pockets of excellence in the South African public administration, it is also true that, by and large, the public administration functions on a level far below that required by s195(1) of the Constitution. The fact that public administration leaves much to be desired was recognised in the White Paper on Transforming Public Service Delivery, the so-called Batho Pele White Paper. At paragraph 1.2.8 the following was said of the public administration:

‘The Public Service is currently perceived as being characterized by, for example, inequitable distribution of public services, especially in rural areas, lack of access to services, lack of transparency and openness and consultation on the required service standards, lack of accurate and simple information on services and standards at which they are rendered, lack of responsiveness and insensitiveness towards citizens’ complaints, and discourteous staff. These perceptions, which are frequently reflected in media reporting of Public Service activities, are also shared by many public servants themselves, as was confirmed during the consultation process which preceded the preparation of this White Paper and the WPTPS.’

While it is generally true to say that public administration functions at a level far below the ideal, this is not to say that progress has not been made in confronting the legacy of the racially and ethnically organized public administration of the apartheid era or, indeed, that confronting and eradicating this legacy is not a mammoth task. Even the most optimistic reformer would concede, however, that it will be years before marked and significant changes will be evident throughout the public administration in all three spheres of government. At present, however, the South African public administration may best be described as being dysfunctional in significant respects and unable to deliver services as it should. This is the context within which s7(2) of the Act must be analyzed: it is predicated on, and can only serve a valid purpose in, a system that operates much more efficiently

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189 The legislation consists, inter alia, of the Public Service Act, Proclamation 103 of 1994, and particularly the Code of Conduct promulgated as part of the Public Service Regulations (Government Notice R825, Government Gazette 18065 of 10 June 1997), the Public Finance Management Act 1 of 1999, Treasury Regulations made thereunder (Government Notice R 556, Government Gazette 21249 of 31 May 2000) and related legislation such as the Provincial Exchequer Act 1 of 1994 (EC) and the Treasury Instructions made in terms of section 26 of the Act.

190 General Notice 1459, Government Gazette 18340 of 1 October 1997.
than does the South African public administration. When it is superimposed on a public administration that falls so far short of the standards set by s195 of the Constitution, it is bound to cause administrative injustice and protect, rather than help to eradicate, the type of administrative torpor and inefficiency that is so widespread and which has attracted increasingly critical judicial comment.\textsuperscript{191}

It may be suggested that the fact that a department functions badly in the execution of its core functions does not mean that its internal appeal mechanisms are dysfunctional too. The answer to that argument is simply that the probabilities are stacked heavily against it, as the case of \textit{Pongolo v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government}\textsuperscript{192} tends to show. The four applicants had applied for disability grants during 1995 and 1996. Their applications were ignored so, represented by the Legal Resources Centre (the LRC), they applied for and were granted orders (on 2 April 1998) against the Member of the Executive Council for Welfare to compel her or her delegate to decide on the applications within 14 days of the date of the order. Still no proper decisions were taken. After contempt of court proceedings were instituted and settled in respect of these and some 39 other similar cases, adverse decisions were taken. Internal appeals were lodged. Despite promises to decide the appeals promptly, no decisions were taken.

This necessitated another application to the High Court, made five months after the appeals were lodged, to compel decisions. Instead of deciding then, the respondent opposed the application and only settled the matter some three months later. The Member of the Executive Council for Welfare set aside the decisions to refuse the applications and referred them back to the original decision-maker for new decisions. The applicants were thus in the same position they had been in when their applications for disability grants were

\footnotesize\textsuperscript{191} On the widespread incidence of maladministration, particularly in the Eastern Cape province, and the judicial responses to this problem, see Plasket ‘The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000’ (2002) 119 \textit{SALJ} forthcoming.

\footnotesize\textsuperscript{192} ECD (case no 90/2000). The author has personal knowledge of this matter, having acted for the applicants in their initial applications and the contempt proceedings, and having settled the papers in the application to compel an appellate decision.
first made in 1995 and 1996. The applicants finally achieved a measure of finality in August 2001. Three of the four applicants were successful in obtaining their disability grants. The fourth has yet to be paid his arrears but has been placed on the system and hence is paid a monthly grant. Finality for the three applicants was only achieved five or six years after the applicants first applied for grants, three years and four months after they obtained court orders to compel decisions within 14 days and two years and three months after they lodged their internal appeals. The internal appeal slowed the process by eight months and required the applicants to apply for a mandamus. The applicants were in a far better position than most other people in a similar predicament: they were represented by the LRC, an organisation that has considerable expertise in matters involving social assistance and had a relationship, albeit a rather stormy one, with the department. Despite this, the internal appeal mechanism did not work for the applicants in Pongolo. What chance is there of it working for people who are not represented by legal representatives, especially if they have not been given adequate reasons or are illiterate? With all due respect, the answer is obvious. It is within this reality, rather than the imaginary construct of a perfect public administration, that the operation of s7(2) must be assessed.

The facts of the Pongolo matter highlight the problem faced by an applicant: it is only after a person has tried to exhaust his or her internal remedy that he or she may discover that exceptional circumstances were present which would have entitled him or her to be exempted from the obligation. By then of course, the damage has been done. If a person knew of the Pongolo matter or even, perhaps, of a few other similar matters, and applied to be exempted in terms of s7(2)(c), it is not difficult to envisage the response from the department concerned: it may argue that, while it is so that the applicants in Pongolo...
the other cases the applicant may cite were victims of an injustice, things are different now; or that the applicant has chosen a handful of atypical cases that do not reflect accurately on the department’s prowess in processing its internal appeals; or that the evidence adduced by the applicant is inadmissible similar fact evidence; or that the evidence (which by its very nature will tend to be individualised accounts of specific instances of maladministration or inefficiency) simply is not adequate to discharge the onus of crossing the high thresholds of exceptional circumstances and that the interests of justice favour exemption. One can think of even more points – whether good or bad – that could be taken and probably would be taken.194

If a dispute of fact arose in relation to the facts upon which an applicant seeks to establish the existence of exceptional circumstances, it would have to be resolved in accordance with the rule in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.195 This may well see the applicant’s application being dismissed and him or her being directed, in terms of s7(2)(b), to first exhaust his or her internal remedy before instituting proceedings. The only other option (apart from the seldom used robust approach of rejecting the respondent’s version on the papers, when that version is sufficiently outrageous) would be to refer the matter to oral evidence. Either way, the applicant would be the loser: in the first instance because he or she would have been denied a hearing on the merits in circumstances in which there would not even have been an issue of him or her not being heard in terms of the common law; and in the second instance, by being forced into an unnecessary trial on a preliminary issue that only serves to waste the time and resources of the court, the applicant and the respondent (who will usually be funded by tax payers’ money). The nett result will probably be that the applicant will be denied justice, a commodity, said Cameron JA in the Ngxuza appeal,196 that is particularly hard to come by in this country.

194 One hopes, however, that the hard hitting criticism leveled by Cameron JA in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza supra, particularly at 1047A-I (paragraphs 14-15) may have some effect in dampening the point-taking ardour of those who act for organs of state in litigation.

195 1984 (3) SA 623 (A).

196 Supra, 1041E (paragraph 1).
What stands out is that the need to bring an application for exemption, the evidential difficulties to establish exceptional circumstances, the point-taking on the part of respondents that will be encouraged, the abstentionist signal that is sent to the bench, the procedural quick-sand that is created for applicants is quite unnecessary and has little to do with the attainment of administrative justice. Immense potential for disputes is created where none need exist. When the administration begins to meet the standards set for it by s195(1) of the Constitution, people may start using its internal procedures for redress: they will do so if they work and if they deliver just and fair results cost-effectively and expeditiously. Legislative fiat does not make dysfunctional remedies effective remedies: indeed, all that s7(2) probably does is insulate underperforming administrators from judicial review. Until the time arrives when the South African administration is functioning as it should, s7(2) will have the effect of placing the burden of inefficient administration on the populace. This result also signifies that the section is unnecessary. More than that, however: it can hardly be said to ‘promote an efficient administration’ as envisaged by s33(3)(c) of the Constitution.

(d) Constitutionality

When compared to the common law rule, s7(2) of the Act bristles with antagonism for the right of access to court. Indeed, the section infringes this right because it places a bar on the ability of a person to approach a court for relief from unlawful, unreasonable or procedurally unfair administrative action. Even if the right of access is merely restricted, as opposed to extinguished, it would amount to an infringement: in Beinash v Young\textsuperscript{197} Mokgoro J held that s2(1)(b) of the Vexatious Proceedings Act 3 of 1956 infringed s34 of the Constitution because it imposed ‘a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts’.\textsuperscript{198} That barrier was that a person against whom the Act had been invoked was

\textsuperscript{197} 1999 (2) BCLR 125 (CC), 132D-E (paragraph 16).
\textsuperscript{198} See too Moise v Transitional Local Council of Greater Germiston 2001 (8) BCLR 765 (CC), 770D-771A (paragraphs 13-14).
required to obtain leave to sue from a court.

In order to survive constitutional challenge, a case would have to be made out by a respondent that s7(2) meets the criteria of s36(1) of the Constitution for acceptable limitations of fundamental rights. It is unlikely that the section would meet these criteria. In the first place, it has to be weighed against a fundamental right that is central to the rule of law – which, in the words of Mokgoro J in Beinash v Young, is ‘of cardinal importance for the adjudication of justiciable disputes’ and is ‘by nature a right that requires active protection’. As against this, the importance of the purpose of s7(2) must be considered. It is difficult to find a purpose of any rationality, importance, significance or legitimacy for s7(2) given that the common law functioned entirely adequately. Its ostensible purpose, one presumes, is a misguided attempt to promote efficiency in public administration and the administration of justice in relation thereto. The nature and extent of the limitation varies from statute to statute. In some instances, the section may create a more complete bar than in others. In cases, for instances, where a statute provides that an internal appeal must be lodged within a specified time, an aggrieved person may be barred from approaching a court before the expiry of that time but not thereafter. In such cases it serves to defer judicial review. In other instances, it may serve as a more complete bar where, for instance, the statute contains no time limit or a longer time limit which, when read with the 180 day time limit for the institution of review proceedings, entirely excludes access to court. The limitation of the right of access to court is, however, a blanket one, applying whenever an internal remedy exists and irrespective of the nature, effectiveness or efficacy of the remedy and irrespective of the nature of the complaint about the decision that the aggrieved person wants remedied. This contrasts markedly with the factors that are taken into account, in terms of the common law, in determining whether an Act impliedly ousted or defers judicial review before internal remedies have been exhausted.

The exemption provision is extremely limited, and exemption is not simply there for the

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199 Supra, 132H-133A (paragraph 17).
200 See Lawson v Cape Town Municipality 1982 (4) SA 1 (C), 6H-7A.
asking. Indeed, it would appear that the requirements for exemption are set very high.\textsuperscript{201} This ‘escape hatch’, as Mokgoro J called an exemption procedure in \textit{Beinash v Young},\textsuperscript{202} is very narrow. This means that a person who applies for exemption is at substantial risk of being refused. The final factor specified in s36(1) is whether less restrictive means are available to achieve the purpose of the provision under challenge. Self-evidently, there is a reasonable and workable less restrictive way of achieving the purpose of s7(2) – to the extent that its purpose may be said to be the rational allocation of judicial and administrative resources for the attainment of administrative justice. The common law has served that purpose in the past and, as has been stated above, does so in a way that is more in harmony than is s7(2) with the spirit, purport and objects of the Bill of Rights and with the founding values of the Constitution. It is submitted, in the result, that s7(2) is rigid and overbroad and is therefore incapable of justification.\textsuperscript{203} Its ‘one size fits all’ approach to internal remedies is arbitrary to say the least. Arbitrary exercises of power that infringe fundamental rights are incapable of rational justification, and hence incapable of justification in terms of s36(1) of the Constitution. Such exercises of power also fall foul of the rule of law embedded as a founding value of the Constitution by s1(c).\textsuperscript{204}

Even if s7(2) is not unconstitutional, it certainly is impractical, particularly in a country such as South Africa which has an administration, in the national, provincial and local spheres of government, that can hardly be described as a model of efficiency. It is ill conceived, to say the least, and it can hardly be argued that it is capable of promoting an efficient administration. The Promotion of Administrative Justice Act was meant to propel South Africa’s rather backward administrative law into a democratic framework and into the 21\textsuperscript{st}

\begin{footnotesize}
\textsuperscript{201} See for a somewhat similar set of circumstances in which a discretion vested in a court to condone non-compliance with a notice provision was held not to save the provision from invalidity, \textit{Moise v Transitional Local Council for Greater Germiston} supra, 771A-B (paragraph 15).

\textsuperscript{202} Supra, 133F-134A (paragraph 19).

\textsuperscript{203} See \textit{Case v Minister of Safety and Security} 1996 (5) BCLR 609 (CC), 632D-F (paragraph 49) and \textit{South African National Defence Force Union v Minister of Defence} 1999 (6) BCLR 615 (CC), 625F-626B (paragraph 18) and footnote 12.

\textsuperscript{204} \textit{S v Makwanyane} 1995 (6) BCLR 665 (CC), 725H-726C (paragraph 156); \textit{Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa} 2000 (3) BCLR 241 (CC), 272H-I (paragraph 85).
\end{footnotesize}
century. Because this provision will do more harm than good (as has been argued above), these important goals stand in danger of being undermined. Law reform in this particular case is easy: Parliament simply has to repeal s7(2) to solve the problem. The common law will then flow into the gap that has been created.

7.3. Conclusion

Of the many changes to the legal system that the Constitution has wrought, one of some significance is that it has altered and expanded the concept of justiciability. This change was the product of the larger constitutional shift from a system based on the foundations of the Westminster model to a system based on constitutional supremacy in which every exercise of public power is subordinated to the discipline and control of the constitution. By placing obligations on the legislature, the executive, the judiciary and all organs of state to respect, protect, promote and fulfil the rights contained in the Bill of Rights, as s7(2) and s8(1) do, and by entrenching a fundamental right of access to court, the Constitution has expanded the frontiers of justiciability. The English law approach to justiciability, fashioned principally from the reluctance of courts to interfere with policy-laden exercises of prerogative powers, is inappropriate in the South African constitutional state. Instead, the courts in South Africa have embraced the approach exemplified by the Canadian case of Operation Dismantle Inc v The Queen. The approach to justiciability articulated by Wilson J recognises explicitly and unequivocally that the currency of the courts is rights and duties and that however policy-laden or ‘political’ a challenged decision or exercise of public power may be, if it involves the infringement of or a threat to fundamental rights it is, on that account alone, a justiciable dispute and the proper province of the courts of law.

The right of access to court serves to ensure that the boundaries of justiciability cannot be constricted unreasonably and unjustifiably by the legislature. In other words, legislative action cannot, subject to s36 of the Constitution, validly take from the courts their

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constitutional function of deciding justiciable disputes. The Constitution has thus all but put an end to legislative restrictions on judicial review through the medium of the pernicious ouster clause. It cannot be said unequivocally that ouster clauses are a thing of the past: it is notionally possible, although unlikely, that an ouster clause may survive constitutional challenge and be held to constitute a reasonable and justifiable limitation of the right of access to court.

The position is less straightforward in respect of the validity of the measures contained in the Promotion of Administrative Justice Act that impose a time limit for the institution of proceedings for judicial review and that place a rigid duty on litigants to exhaust internal remedies prior to instituting proceedings for judicial review. It has been argued that, given the unfair impact of the time limit on poor people in particular, this measure is unconstitutional despite the fact that a discretion is granted to a court to condone a failure to commence proceedings timeously. It has also been argued that the ‘one size fits all’ approach to the exhaustion of internal remedies renders this provision overbroad and purposeless and hence incapable of justification in terms of s36 of the Constitution. But, more than this, the provisions are examples of unwise policy choices on the part of Parliament. They make for unfairness where none has to exist and they clutter the procedural rules of judicial review unnecessarily where the common law can hardly be faulted. They therefore ought to be repealed as soon as possible.

Both of the procedural hurdles that have been discussed in above stand out because they are more restrictive than their common law equivalents. While there is no reason in principle why the fundamental rights contained in the Constitution, and related mechanism to give effect to those rights, should, of necessity, be broader and more protective of the individual than the common law, such a result would, in the South African context, be strange and, indeed, aberrant. South African administrative law has been forged in a distorted and racist system in which naked power, exercised by a brutal and unrepresentative sovereign legislature trumped respect for human dignity, equality and
human rights and freedoms;\textsuperscript{206} in which a crass and arrogant public administration, often with scant regard for legality, and functioning in a closed, secretive and unaccountable manner, exercised vast and often draconian discretionary powers in doing the bidding of the legislature;\textsuperscript{207} in which the courts often appeared to be ‘all too willing partners displaying what virtually amounts to a phobia of any judicial intervention in the exercise of powers by administrative agencies’;\textsuperscript{208} and in which ‘law has been used not to check or structure’ administrative powers but to ‘facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best’.\textsuperscript{209} Post-1994 administrative law is different. It functions on the foundation of the founding values of s1 of the Constitution. Of particular importance are the founding values of the supremacy of the constitution and the rule of law and of ‘democratic governance to ensure accountability, responsiveness and openness’. When viewed in this light, it is apparent that s7(1) and s7(2) of the Promotion of Administrative Justice Act are alien to the new administrative law\textsuperscript{210} and undermine, rather than give effect to these values.

\begin{footnotes}
\item[208] Dean ‘Our Administrative Law – A Dismal Science?’ (1986) 2 \textit{SAJHR} 164, 164.
\item[209] Dean, op cit, 164.
\end{footnotes}
CHAPTER EIGHT: THE RIGHT TO LAWFUL ADMINISTRATIVE ACTION

8.1. The Scope of the Right

8.1.1. Introduction

All the parties involved in negotiating the terms of both the interim Constitution and the final Constitution appear to have accepted the need to entrench a right to lawful administrative action. Despite this, there was a measure of divergence on the meaning of the term. For instance, two of the drafters of s24 of the interim Constitution argued that the right was ‘likely to be interpreted as giving constitutional expression to the “narrow” view of ultra vires, ie that the administrative action must fall foursquare within the grant of statutory authority’.¹ Most writers took a different, broader, view. That view is exemplified by Davis and Marcus who wrote that s24(a) ‘would appear to introduce a wide approach to ultra vires, better described as the principle of legality. In other words, lawful administrative action must not only comply with the provisions of the empowering statute, but must accord with the rules and principles of the common law. Paragraph (a) thus introduces the concept of legality as a constitutionally entrenched right’.²

The broader view is correct: there can be no merit in an argument that the word ‘lawful’ means ‘semi-lawful’ or ‘partially lawful’ so that it includes some, but not all, of the

¹ Du Plessis and Corder Understanding South Africa’s Transitional Bill of Rights Cape Town, Juta and Co:1994, 168. One of them conceded elsewhere that the ‘concept of lawfulness in s24(a) is particularly susceptible of a wide or narrow interpretation, co-terminous with the notions of wide and narrow “ultra vires” – already familiar ideas in our courts’. See Corder ‘Administrative Law’ in Van Wyk et al Rights and Constitutionalism: The New South African Legal Order Cape Town, Juta and Co: 1994, 387, 399. Burns described the narrower view of Du Plessis and Corder as ‘a limited legalistic view of the doctrine of ultra vires’ and said that it did not ‘conform to the general principle of legality which forms the cornerstone of, and basis for, the exercise of all administrative action’. (‘Administrative Justice’ (1994) 9 SAPL 347, 352.)

components of the principle of legality. Such a distinction between statutory and common law requirements of legality is arbitrary. Secondly, it is not an interpretation that is compelled by the text or consonant with the wider values of the Constitution. Thirdly, such an interpretation is contrary to the purposive and generous interpretation of fundamental rights that has been endorsed by the Constitutional Court.

8.1.2. The Purpose of the Right

The entrenchment of the right to lawful administrative action is a response to the grant of wide powers to administrative officials for the purposes of the social engineering deemed necessary for the implementation of the system of apartheid and the security system designed to suppress resistance to that policy. These powers were not controlled effectively by the courts in the exercise of their common law review jurisdiction. The terms of empowerment and lack of statutory limitations of power were only part of the pathology of executive excess in the apartheid state. This point is made by Asmal: ‘Statutes conferring enormous discretion on civil servants, virtually limitless powers of delegated legislation granted to Ministers and a virtual absence of any appeal system – either

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3 See Baxter, 78, who says: ‘On this basis it is easy to see that, even where the legal rules governing the administrative process do not place express limitations on the exercise of administrative power, an extensive body of implicit limitations qualifies the lawful conduct of administrative operations. Even though South Africa’s legal system falls woefully short of this wider and broadly accepted version of the doctrine of legality, in so far as its racial and security legislation is concerned, the wider doctrine is nevertheless a core principle of our administrative law ...’: Wiechers ‘Administrative Law and the Benefactor State’ 1993 Acta Juridica 248, 248 says that the ‘subject of state administration is not generally received with much enthusiasm by lawyers’ for two reasons, the first of which is that, ‘in the past the state administration ... was called upon to carry out the legalized and institutionalized policies of a government set on maintaining power through racial discrimination and domination and on ensuring law and order by keeping the state in a semi-permanent state of emergency by the adoption of far-reaching legislative and administrative security measures’. See too President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC), 1115B-D (paragraph 133).

4 Abel Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994 New York and London, Routledge:1995, 17 who says: ‘Despite repeated boasts about the independence of judges and the respect they enjoyed, the judicial structure offered little more support for the rule of law than did the constitutional framework.’ See too Wiechers, op cit, 248-249: ‘In the above context, it was only natural for South African administrative lawyers to direct their attention mainly to the often harsh powers, crass style and bloated arrogance of the administration, as well as to the timid way in which our courts at times exercised their powers of judicial review of administrative action.’
administrative or judicial – ensured that legalized tyranny characterized the implementation of grand apartheid. It would not be an exaggeration to describe the position of the voteless majority as objects of the law.\textsuperscript{15}

This delegation of broad discretionary powers to officials was a defining feature of law in the apartheid state.\textsuperscript{6} Despite some notable successes in the courts, the possibilities of legal challenge were limited by the fact that administrative law in South Africa was located within a warped system – one in which vast powers were delegated to administrators without adequate checks on how those powers were exercised, and in which the courts failed to perform their function of protecting the populace from executive and administrative excesses.\textsuperscript{7} Chaskalson described the central features of the legal system during the apartheid era as follows:\textsuperscript{8}

\begin{quote}
‘In the recent history of this country the pillars upon which racial discrimination has stood has been the Population Registration Act, the pass laws, the land laws, the labour laws, the homeland policy and
\end{quote}

\textsuperscript{5} ‘Administrative Justice and Democracy Within the South African Context’ in Corder and McLennan (eds) Controlling Public Power: Administrative Justice Through the Law Cape Town, University of Cape Town: 1995, 12, 12. In much the same vein, Wiechers, op cit, 248 says that ‘by blatantly relying on and exploiting the British legacy of parliamentary sovereignty, the government contrived to protect large spheres of administrative activity from public scrutiny, judicial investigation and even parliamentary enquiry, and at the same time invested the administration with powers which sometimes equalled those of parliament. All this was done in a legal system that had no constitutional safeguards against governmental abuses and no protection of fundamental human rights and liberties. No wonder that the state administration, by and large, came to be seen as a submissive, but equally vicious handmaiden of a very hard task-master’.

\textsuperscript{6} Abel, op cit, 13 says that the ‘infrastructure of apartheid – an administrative nightmare more complex and bureaucratic than the combined tax code, criminal law, regulatory apparatus, and welfare system of most countries – was constructed out of law and thus susceptible to legal challenge’; Baxter, 13.

\textsuperscript{7} Mahomed ‘Disciplining Administrative Power – Some South African Prospects, Impediments and Needs’ (1989) 5 SAJHR 345, 346, writing of the same phenomenon, said that the majority of citizens ‘whose lives are regulated by a bewildering network of administrative regulations and discretions, do not have access to the ultimate sanction against abuse of power: an effective vote to throw out of office those who are accountable for the abuse of power and to put into their place others who would be required to discipline and control such abuse.’

\textsuperscript{8} Dean ‘Our Administrative Law: A Dismal Science?’ (1986) 2 SAJHR 164,164.

‘The Past Ten Years: A Balance Sheet and Some Indicators for the Future’ (1989) 5 SAJHR 293, 294. In discussing the imminent political changes in the country at the time, Chaskalson said that if the purpose of the change was to produce a just society, ‘the gap that presently exists in South Africa between law and justice needs to be narrowed’ and that courts and lawyers should concentrate their efforts in ‘helping to develop efficient and equitable principles of rights protection and good administration. That is to say, in the development of a fair system of administrative law and in the application and broadening of the principles of the rule of law’. (At 298.)
citizenship, the laws regulating and controlling education, and the key to them all, the franchise laws. They constituted a network of interlocking legislation through which it was sought to regulate and control the day to day lives of people. In turn they spawned a massive bureaucracy charged with the task of administering these laws. Intricate regulations were enacted to provide the levers for bureaucratic control and at the centre was the notion that society could best be regulated by a system geared to administrative discretion. The law was built on a structure of privilege dispensed by the state through its officials, rather than upon the recognition of fundamental rights. Permits became the order of the day; and if you were black, they were the key to your very existence.’

South African administrative law has lagged far behind the systems of other Anglo-American jurisdictions with which our law shares its roots. The gap is particularly noticeable in the sphere of judicial review where the common law has functioned alongside a legislative program hostile to values such as equality and the protection of freedom. The result was what Chaskalson described as ‘an almost schizophrenic approach by courts to problem solving’ as they were ‘at one and the same time being asked to articulate and give effect to equitable common law principles, and to uphold and enforce discriminatory laws: at one time to be an instrument of justice and at another to be an instrument of oppression’. Opinions on how the courts acquitted themselves in the protection of human rights and in controlling administrative discretion tend to be critical. Corder, for instance, says that the two main reasons for the poor state of our administrative law were the granting of ‘virtually untrammelled power to the executive (especially in the areas of race discrimination and oppression of opposition) and a judiciary which at crucial moments displayed an executive-mindedness which far exceeded that of the majority in Liversidge

9 Corder ‘Introduction: Administrative Law Reform’ 1993 Acta Juridica 1,1 says: ‘South African administrative law has been called a “dismal science” and deservedly so. While fellow jurisdictions in the British Commonwealth and our “parent” system in the UK have adapted (more or less successfully) to the realities of the administrative state of the late twentieth century through legislative intervention and judicial creativity, South African administrative law has stagnated in a time-warp from which it appeared likely never to escape.’

10 Dugard Human Rights and the South African Legal Order Princeton, Princeton University Press: 1978, 38, says that the legal values enshrined in Dicey’s formulation of the rule of law are common to democratic legal orders and are ‘part of the fabric of most Western European legal systems’. He says that Roman-Dutch law recognized the principles of freedom of person and equality before the law and accepted that the sovereign was not above the law, but bound by it.

11 Chaskalson, op cit, 294. This dilemma, the disjuncture between law and justice, is articulated in classic terms by Didcott J in In re Dube 1979 (3) SA 820 (N), 821E-G.
v Anderson. Few would dispute these assessments today.¹²

Given this poor history of administrative accountability, either through political institutions or the courts, the place of the right to lawful administrative action in the Bill of Rights is obvious. It is no accident that a similar constitutionalization of administrative justice occurred when Namibia’s bill of rights came to be drafted.¹³ The two countries shared the same unhappy experience of South African officialdom and rule by rampant discretionary power.¹⁴ It is this phenomenon that the four rights to just administrative action is intended to remedy and to prevent in the future: in this endeavour, the right to lawful administrative action is the first building block, limiting administrative decision-makers from straying beyond the legal limits of their powers, irrespective of the source of those limits. This interpretation is consonant with South Africa’s history, which forms a backdrop to the terms of and the values protected by the Constitution, and is in keeping with the understanding of the rule of law upon which South African administrative law is based – recognition that mere rule by law inevitably leads to unjust and arbitrary exercises of power.¹⁵

The Constitution operates from much the same premise: every exercise of public power

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¹² Corder, op cit, 1; Forsyth In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950-1980 Cape Town, Juta and Co:1985, 225-226. See too Froneman J’s remarks on the judiciary more generally in Qozeleni v Minister of Law and Order 1994 (3) BCLR 625 (E), 632H-633B.

¹³ See in this regard, Parker ‘The “Administrative Justice” Provision of the Constitution of the Republic of Namibia: A Constitutional Protection of Judicial Review and Tribunal Adjudication Under Administrative Law’ (1991) 24 CILSA 88. That part of s18 of the Namibian Constitution which imposes a duty on administrative decision-makers to ‘comply with the requirements imposed ... by common law and any relevant legislation’ is the equivalent of s24(a). For the rest, s18 entrenches rights to fair and reasonable administrative action. The equivalents of ss24(b) and (d).


¹⁵ See Baxter, 77 who says that, ‘in the English, French and German traditions, respectively, the concepts of the Rule of Law, Legality and the Rechtsstaat have each been used to express certain minimum qualities which the laws governing public authorities and private individuals must possess’. See too Wade and Forsyth, 24, who say that the rule of law requires more than exercises of power being authorized by law ‘since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law. Quod principi placuit legis habet vigorem (the sovereign’s will has the force of law) is a perfectly legal principle, but it expresses rule by arbitrary power rather than rule according to ascertainable law’.
must be justified, not only on procedural grounds but also substantively. In other words, the Constitution articulates ‘a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion’.16 This idea formed part of South African administrative law before 27 April 1994, despite all of its faults and shortfalls: Baxter wrote in 1984 that as the principles of administrative law were based on a normative concept of the rule of law, mere compliance with the letter of the law by the administration was never considered by the courts to be sufficient for the validity of administrative action.17 In the light of this statement and the history of administrative power in this country, it would be surprising if the right to lawful administrative action was interpreted to refer to legality in its most value-free sense. This, after all, is a conception of the rule of law which, Baxter reminds us, was ‘compatible with the regime in Nazi Germany’.18 Such an interpretation would undermine, rather than promote, the values articulated in s1 of the Constitution, particularly s1(c) which states that the democratic South African state is founded on constitutional supremacy and the rule of law.

8.1.3. The Judiciary and the Right to Lawful Administrative Action

The judiciary has had relatively little to say about the scope and ambit of the right to lawful administrative action. The academic debate has not found its way into the law reports. If anything, the courts appear to have accepted that the right contemplates a broad approach. For instance, in Pennington v Minister of Justice,19 Steyn AJ appeared to accept (from his reference to Johannesburg Stock Exchange v Witwatersrand Nigel Ltd20) that the grounds

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16 Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 32. See, for an authoritative acceptance of this idea, Pharmaceutical Manufactuers Association of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 272C-274C (paragraphs 83-90).
17 Baxter, 79.
18 Baxter, 79.
19 1995 (3) BCLR 270 (C), 277C-J.
20 1988 (3) SA 132 (A), 152A-D.
of review created by the interim Constitution were the same as those contemplated by the common law. In respect of s24(a), he certainly did not suggest the contrary. (It must be added that, certainly in respect of s24(b), s24(c) and s24(d), Steyn AJ was not correct in his assumption.\textsuperscript{21}) More explicitly, in Jenkins v Government of the Republic of South Africa\textsuperscript{22} Dukada AJ held that ‘subsection (a) of section 24 is general and reaffirms the common law principle of legality in administrative actions’. In Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council\textsuperscript{23} Chaskalson P, Goldstone J and O'Regan J arrived at much the same conclusion as Dukada AJ had in the Jenkins matter. They held that while the common law principles of judicial review remained of some relevance, they were now ‘underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to “administrative action” the principle of legality is enshrined in s24(a)’. The right to lawful administrative action has not received much close judicial attention because the ambit of the right has not proved to be controversial despite the narrow interpretation that was proposed by some. Those views, especially in the light of the stable common law meaning of lawful administrative action, have not prevailed in any of the cases.

8.2. The Promotion of Administrative Justice Act

8.2.1. The Grounds of Review

Section 6(1) of the Promotion of Administrative Justice Act provides that ‘[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action’. Section 6(2) sets out a number of grounds on which administrative action may be reviewed. In this way, s6(2) seeks to give effect to the fundamental rights to lawful,

\begin{itemize}
\item \textsuperscript{21} See White ‘Administrative Law’ 1995 \textit{Annual Survey} 43, 46.
\item \textsuperscript{22} 1996 (8) BCLR 1059 (Tk), 1066G-H.
\item \textsuperscript{23} 1998 (12) BCLR 1458 (CC), 1483F-G (paragraph 59).
\end{itemize}
reasonable and procedurally fair administrative action.\textsuperscript{24}

In defining the grounds of review that are covered by illegality – in other words, in defining when the right to lawful administrative action has been infringed – the legislature has not opted for the narrow approach criticised above. Instead, it has included most of the grounds of review for illegality recognised by the common law. It has interpreted the right to lawful administrative action to embrace what Corder would term the wide notion of ultra vires. These grounds are dealt with below.

(a) Section 6(2)(a): Authority to Act

Section 6(2)(a) codifies two grounds of review that deal with the question of legality. Section 6(2)(a)(i) provides that administrative action is liable to be set aside if the decision-maker was not authorised by the empowering provision in question to take the decision. This ground covers two related aspects: first, it requires that a valid law must have empowered the official concerned to take action; secondly, it requires that, in addition, the official who took action must have been properly appointed or, if a body took the action concerned, that it was properly constituted. Baxter explains the position by saying that ‘[p]ublic authorities possess only so much power as is lawfully authorised, and every administrative act must be justified by reference to some lawful authority for that act. Moreover, on account of the institutional nature of law the public authority itself exists as an office or body created by law. A valid exercise of administrative power requires both a lawful authorisation for the act concerned and the exercise of that power by the proper or lawful authority.’ \textsuperscript{25} Section

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} The grounds of review in the Act define, in effect, the inverse of the rights to lawful, reasonable and procedurally fair administrative action and therefore fall into the three broad heads of review identified by Diplock LJ in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL), 950h-i, namely, illegality, irrationality and procedural impropriety.
\item \textsuperscript{25} At 384. See too, on the first aspect, De Villiers v Pretoria Municipality 1912 TPD 626, 645-646 in which Bristowe J set out the principle as follows: ‘This conclusion seems indeed to be a necessary corollary from the principle that a statutory corporation established for a particular purpose has no power qua corporation outside the sphere of activity especially or impliedly prescribed for it by the Legislature. Its acts outside those limits are therefore void, not so much because the Legislature has prohibited them, as because the powers which it has conferred upon the being which it has created, do not extend to them. For the purpose of such acts the corporate persona is in fact nonexistent’. On the second aspect, see Onshelf Trading Nine (Pty) Ltd v De Klerk NO [1997] 1 All SA 682 (W). A decision of the Independent Broadcasting Authority (the IBA) was set aside because the meeting of
\end{itemize}
\end{footnotesize}
6(2)(a)(ii) provides that it is a ground of review if an administrator ‘acted under a delegation of power which was not authorised by the empowering provision’. This ground of review must be understood in the context of the common law position which is that, in the absence of an express provision authorising the delegation of power, it is presumed that there is no implied power to delegate.  

(b) Section 6(2)(b): Compliance With Mandatory and Material Procedures and Conditions

Section 6(2)(b) provides that administrative action will be invalid if a ‘mandatory and material procedure or condition prescribed by an empowering provision was not complied with’. This ground of review covers more than one aspect recognised by the common law. It recognises as grounds of review: first, non-compliance with mandatory formalities such as the promulgation of subordinate legislation, which is a necessary precondition for its validity; secondly, failures to apply mandatory procedural rules such as time limits for lodging claims for export incentives, for instance; and thirdly, non-compliance with prescribed preconditions – or jurisdictional facts – which serve as the trigger for the exercise of a discretionary power.

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the IBA at which a decision adverse to the applicant was taken was not quorate. The quorum was, according to Streicher J, particularly important because members of the IBA were, in terms of s4(2)(c) of the Independent Broadcasting Authority Act 153 of 1993, required, when ‘viewed collectively’ to ‘represent a broad cross-section of the population of the Republic’ (at 689).

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26 See in particular, Arenstein v Durban Corporation 1952 (1) SA 279 (A), 297. Baxter, at 433-434 says that ‘a public authority which purports to delegate its powers without express authority to do so must show that the delegation is impliedly permitted by its empowering legislation. Prima facie, therefore, delegation of powers without express authority is a form of abdication of authority’. See, for a good illustration of the approach of the courts to delegation of power, Nkalweni v Chairman, White Commission [1998] 2 All SA 225 (E).

27 See for example R v Tatton 1915 CPD 390.

28 See, for example, South African Citrus Exchange Ltd v Director-General: Trade and Industry 1997 (3) SA 236 (SCA) (but see by way of contrast, Vokwana v National Transport Commission 1984 (2) SA 245 (Tk)).

29 See Minister of Law and Order v Hurley 1986 (3) SA 568 (A) in which it was held that, in order for a discretionary power to arrest to be activated, the arresting policeman had to have had reason to believe that a particular state of affairs, prescribed in the statute, existed. On jurisdictional facts and their reviewability, see 8.5.2 below.
(c) Section 6(2)(d): Errors of Law

Section 6(2)(d) provides that it is a reviewable irregularity if administrative action is ‘materially influenced by an error of law’. The section has given effect to the Appellate Division’s decision in *Hira v Booyzen*[^30] which is the leading case on errors of law and which clarified the position on their reviewability.

(d) Section 6(2)(e)(i) and (ii): Improper Purpose and Ulterior Motive

Administrative action may be set aside if it is taken ‘for a reason not authorised by the empowering provision’,[^31] or for ‘an ulterior purpose or motive’.[^32] The common law equivalent of the first of these grounds is generally known as improper purpose. Baxter says that purpose is an important defining characteristic of administrative power and that powers are conferred for particular purposes whether these are spelt out specifically or merely stated generally. He concludes that on ‘the general level, they must always be exercised for the purpose of advancing the public interest; at the specific level they must be used to advance the particular purposes of the enabling legislation. Attempts to use a power for an unauthorised purpose will constitute a ground of review.’[^33] The common law equivalent of the second ground of review is probably best (but not entirely accurately) described as ‘ulterior motive’. Its inclusion in the Act puts to rest a debate about whether ulterior motive was a ground of review at all. One line of cases held that it was not[^34] while a second line

[^31]: Section 6(2)(e)(i). See for examples of this ground of review *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) and *Rikhoto v East Rand Administration Board* 1983 (4) SA 278 (W), confirmed on appeal in *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (A). For a useful English case on the issue, see *Wheeler v Leicester City Council* [1985] AC 1054, especially at 1081C.
[^32]: Section 6(2)(e)(ii).
[^33]: At 507.
[^34]: See for example, *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) and *Tsose v Minister of Justice* 1951 (3) SA 10 (A).
of cases recognised it as a ground of review. The Act resolves the debate in a way that is in step with the founding constitutional values of openness, accountability and responsiveness and in keeping with the requirements, on the part of those involved in public administration, to act in accordance with a ‘high standard of professional ethics’ and to provide services in an ‘impartial, fair, equitable and unbiased’ manner.

(e) Section 6(2)(e)(iv): Acting Under Dictation

Section 6(2)(e)(iv) provides that an administrative act will be unlawful if the administrator decided or acted as he or she did because of the ‘unauthorised or unwarranted dictates of another person or body’. The general principle that underpins this ground of review is set out in Computer Investors Group Inc v Minister of Finance as follows:

‘Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits. The public body will not have applied the provisions of the statutory enactment.’

It has been suggested that s6(2)(e)(iv) is underinclusive in that it only contemplates the form of fettering of discretion known as acting under dictation but does not include others.

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35 See for example, Ochberg v Cape Town Municipality 1924 CPD 485; University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives) 1988 (3) SA 203 (C); and Highstead Entertainment (Pty) Ltd t/a ‘The Club’ v Minister of Law and Order 1993 (2) SACR 625 (C). See too Hoexter ‘Administrative Justice and Dishonesty’ (1994) 111 SALJ 700.

36 Section195(1)(a).

37 Section195(1)(d).

38 Note that s6(2)(e) also contains a further three grounds of review that are better classified as grounds which go to the reasonableness of administrative action. They are that the administrative action was taken because irrelevant considerations were taken into account or relevant considerations were ignored, (s6(2)(e)(iii)) that it was motivated by bad faith (s6(2)(e)(v)) and that the decision was arbitrary or capricious (s6(2)(e)(vi)). These grounds will be dealt with further in the following chapter.

39 1979 (1) SA 879 (T), 890C-E.

40 At 890C-E. See too Britten v Pope 1916 AD 150. See further Hofmeyr v Minister of Justice 1992 (3) SA 108 (C), confirmed on appeal in Minister of Justice v Hofmeyr 1993 (3) SA 131 (A).
such as rigid adherence to a fixed policy or ‘passing the buck’.\textsuperscript{41} The section can, and should, be read to include these instances of fettering of discretion but, if it cannot be so read, the catch-all ground of review, s692)(i) can cater for them.

(f) Section 6(2)(f)(i): Contravening a Law

Section 6(2)(f)(i) provides that administrative action will be invalid if it ‘contravenes a law or is not authorised by the empowering provision’. The ground of review codified in this provision is, perhaps, best illustrated by a Zimbabwean case, \textit{Foroma v Minister of Public Construction and National Housing}.\textsuperscript{42} It involved the legality of a so-called VIP Housing Scheme, which was run in purported reliance on the Housing and Building Act as the source of power\textsuperscript{43} and funded with public funds intended for the homeless. The beneficiaries of this scheme, who included a High Court judge, used it not only to build houses but also to effect repairs and extensions, to redecorate houses, to instal swimming pools, to have plumbing work done in a hair salon and to build staff quarters. In some instances, beneficiaries used the scheme to build more than one house for themselves.\textsuperscript{44} Smith J held that it should have been clear ‘to anyone of even the meanest intelligence that Chapter 22:07 [of the Act] does not authorise the VIP Housing Scheme’,\textsuperscript{45} concluding that the Minister and his Permanent Secretary ‘abused their positions in Government in order

\textsuperscript{42} 1997 (1) ZLR 447 (H).
\textsuperscript{43} It was found that those who ran this scheme did not, in fact, believe that the statute gave them the authority to do so. The Permanent Secretary of the Department tried vainly to pull the scheme within the terms of any provision of the Act but on each attempt, was forced to concede that the particular section could not apply. (At 452D-453C.) For example, Smith J observed that one of the sections relied upon was s5(1)(b): ‘That paragraph provided that the Minister could make advances to any persons for buying land and erecting dwellings thereon. Admittedly the paragraph referred to the making of such advances for the aged, the handicapped, etc, but the Ministry decided to ignore those qualifications.’ (At 452H-453A.) Later, Smith J said: ‘As Mrs Zindi said, it took her less than three minutes to get him [the Permanent Secretary] to concede that he was wrong in his interpretation of the relevant, and sometimes irrelevant, provisions of Chapter 22:07, and that Chapter 22:07 did not authorise the VIP Housing Scheme.’
\textsuperscript{44} At 457G-458C.
\textsuperscript{45} At 460E.
to grant improper favours to assist cronies. The very name given to the scheme, the VIP Housing Scheme, shows that it was formulated to help those who held high office or had the right contacts. The scheme was corrupt'.

(g) Section 6(2)(g): Administrative Inaction

Section 6(2)(g) when read with s6(3) provides that a failure to take a decision in circumstances where a decision-maker is under a duty to take a decision and has not done so, either timeously, or within a time period specified by a law, is a ground of review. If a time period is prescribed for the taking of the decision, the failure is reviewable when the period has expired. If no time period is prescribed, the failure is subject to review after a reasonable time has passed. The common law recognised a failure to act as a reviewable irregularity: because powers are conferred on administrative functionaries for a reason, it is expected that they exercise their powers when properly called upon to do so. In Cape Furniture Workers' Union v McGregor NO Greenberg J held:

‘Naturally, where there is no direct refusal, or there are no circumstances amounting to a refusal the court in considering whether a reasonable time has elapsed, will take into account all the steps which the official found it necessary to take in order to arrive at a decision, all the difficulties with which he found it necessary to deal. And the mere fact that he has not dealt with the matter in the most expeditious way will not be ground for interference. The court will not place itself in the position of a supervising official and will not arrogate to itself the latter’s rights of dictating to the official concerned not only what he has to do but how he has to do it, but will allow a good deal of latitude in its scrutiny

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46 At 459F.
47 This proposition was set out in the well known case of Julius v Lord Bishop of Oxford (1880) 5 AC 214 (HL), 225 in which Earl Cairns LC held that where ‘a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised’. See too Baxter, 414.
48 1930 TPD 682.
49 At 686. See too Chotabhai v Union Government (Minister of Justice) 1911 AD 13; Norman Anstey and Co v Johannesburg Municipality 1928 WLD 235; Singh v Umzinto Rural Licensing Board 1963 (1) SA 872 (D); Dlisani v Minister of Correctional Services; Mathwetha v Minister of Safety and Security 1999 (1) SA 1020 (Tk); Mahambahalala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government 2001 (9) BCLR 899 (SE); Mbanga v Member of the Executive Council for Welfare 2001 (8) BCLR 821 (SE).
of its conduct, and a delay caused by failure on his part to envisage the problem in its true perspective in itself will not entitle the court to interfere. But if, after making all these allowances and taking all the circumstances into consideration the court comes to the conclusion that the official has failed to do his duty, has failed to come to a decision within a reasonable time when the statute requires him to do so, I see no reason why the court should not order him to perform his duty.’

(h) Section 6(2)(i): Otherwise Unconstitutional or Unlawful Administrative Action

The final ground of review contemplated by the Act is that contained in s6(2)(i). It is in the nature of a catch-all that allows for omissions in s692) to be cured and also allows for the development of new grounds of review in the future. It provides simply that administrative action may be set aside if it is ‘otherwise unconstitutional or unlawful’.

8.2.2. Comments on Specific Grounds of Review

(a) General Remarks

It will be apparent from what has been stated above that the statutory grounds upon which administrative action may be reviewed for want of lawfulness are, by and large, identical to the corresponding common law grounds applied by the courts prior to April 1994. As a result, the familiar and established principles of the common law articulated in the cases remain as important now when used to interpret s6(2) of the Act as they have previously been in their common law settings. It must be borne in mind, however, that they will be applied in a very different context. They will be applied in the context of a democratic constitutional order that has as founding values the rule of law and constitutional supremacy and openness, accountability and responsiveness. Two of the grounds of

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50 This provision is discussed in detail below.
51 See on the relationship between the Constitution and the common law in public law, Pharmaceutical Manufacturers Association of South Africa: In re; Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 260G-261D (paragraph 45).
52 See President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC), 1115B-D (paragraph 133).
review mentioned above require specific comment for different reasons. The first, the reviewability of jurisdictional facts in terms of s6(2)(b) of the Act, particularly those that are cast in subjective language, is in need of re-assessment because of the unsatisfactory common law position and in the light of the values of the Constitution. The second calls for analysis because it is somewhat different to the common law grounds of review: it is the application of the catch-all ground contained in s6(2)(i), namely that the administrative action complained of is ‘otherwise unconstitutional or unlawful’.

(b) Jurisdictional Facts

(i) Introductory Remarks

The power vested in administrative decision-makers to choose between competing solutions – to exercise discretionary power\(^53\) – includes the freedom to make some mistakes\(^54\) within the boundaries that the empowering legislation has set.\(^55\) These boundaries may relate to such issues as territorial area within which the power may be exercised,\(^56\) the time within which a decision must be taken,\(^57\) the subjects over whom an

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\(^54\) In *Sinovich v Hercules Municipal Council* 1946 AD 783, 802-803 Schreiner JA said that the ‘law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby.’ It must be borne in mind that review concerns itself with the regularity of decisions, rather than with whether they are correct. In this sense, and subject to the right to reasonable administrative action (discussed in chapter 9 below), administrative officials are indeed able to make wrong, or bad, decisions that are nonetheless unassailable on review.

\(^55\) See *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A), 751E-I.

\(^56\) See for example, *Herbst v Ditmar* 1970 (1) SA 238 (T) and *Minister of Law and Order, KwaNdebele v Mathebe* 1990 (1) SA 114 (A).

\(^57\) For example, when, in terms of s56 of the Labour Relations Act 66 of 1955, a registered trade union or registered employers’ organisation applies to a bargaining council or statutory council for admission to it as a party, the council must, within 90 days of receiving the application, decide whether to grant or refuse it ‘and must advise the applicant of its decision, failing which the council is deemed to have refused the applicant admission’. A second example of the same jurisdictional limit is to be found in s29(8) of the Labour Relations Act. In terms of this section, the National Economic, Development and Labour Council (NEDLAC) is given 90 days to perform certain functions and to report to the registrar of labour relations as part of the process of registering bargaining councils.
administrative functionary may exercise power\(^{58}\) and the existence of other facts and circumstances that may operate as pre-conditions for the exercise of discretion.\(^{59}\) Put another way, a decision-maker will only be able to exercise the power of choice which the legislature has vested in him or her, once the jurisdictional pre-conditions for the exercise of that power are present or have been complied with.\(^{60}\) These preconditions are commonly referred to as jurisdictional facts.\(^{61}\) Apart from the more absolute jurisdictional facts, the formulae which Parliament uses to create jurisdictional facts tends to fall into two broad categories. Sometimes it uses relatively objective language – if the Minister has ‘reason to believe’ – while in other cases, it uses more subjective language – ‘if, in the Minister’s opinion’ or ‘if the Minister is satisfied’. In yet other instances, it may not spell out expressly what the jurisdictional preconditions for an exercise of power are – ‘the Minister may ...’.\(^{62}\)

South African law on the reviewability of jurisdictional facts is far from satisfactory.\(^{63}\) The

\(^{58}\) The system of apartheid provides any number of usually unsavoury examples of this idea: indeed, an entire department of state existed from 1910 until 1994 to deal exclusively with black (African) people. For example, in order to enforce influx control legislation, commissioners had power, in terms of s29 of the Blacks (Urban Areas) Consolidation Act 25 of 1945, to declare certain black people ‘idle’ or ‘undesirable’ and to deal with them in particularly harsh ways thereafter. These examples aside, more universal and less controversial examples of administrative agencies having jurisdiction over particular sectors of the community include the Health Professions Council of South Africa, the Association of Law Societies, both of which regulate professions, and the Commission for Conciliation, Mediation and Arbitration, created by the Labour Relations Act 66 of 1995 which has jurisdiction to settle disputes between employers and employees.

\(^{59}\) This is the most problematic aspect of the jurisdictional fact doctrine and is dealt with at length below.

\(^{60}\) This distinction between the pre-conditions for the exercise of power and the discretion to exercise the power was drawn by Van Heerden JA in Duncan v Minister of Law and Order 1986 (2) SA 805 (A), a case involving the power, vested in peace officers, to arrest without warrant on the formation of a reasonable suspicion that the arrestee had committed a Schedule 1 offence. He held that if ‘the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie he may arrest the subject. In other words, he then has a discretion as to whether or not to exercise that power’ (at 818G). See too Hussein v Chong Fook Kam [1970] AC 942, 948: ‘To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case.’

\(^{61}\) See South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 31 (C), 34F-H.

\(^{62}\) There are numerous variants of these formulae, which probably makes the point on its own that the language used is an unreliable indicator of the justiciability of the facts or circumstances which must be present as prerequisites for any exercise of power.

\(^{63}\) This is due, in large measure, to the fact that the relevant legal principles have been fashioned by the ‘emergency jurisprudence’ of the 1980s as well as other earlier epochs of judicial restraint. See for instance, Sachs v Minister of Justice 1934 AD 11 and Winter v Administrator in Executive Committee
courts have tended to approach jurisdictional facts in a particularly formalistic way. If the ‘reason to believe’ formula is used in a statute, the presence or absence of the necessary facts or circumstances is said to be objectively justiciable.\(^{64}\) If the ‘opinion’ or ‘is satisfied’ formula is used, the presence or absence of jurisdictional facts is said to be subjectively justiciable.\(^{65}\) If no jurisdictional facts are expressly set out in the empowering legislation, according to the Appellate Division, ‘there is nothing which can be adjudicated upon apart from the exercise of the power itself’\(^{66}\) leaving the administrative functionary in such a case as the ‘sole arbiter of the necessity or expediency of exercising his powers’.\(^{67}\)

In order to assess whether the pre-1994 approach to subjectively framed jurisdictional facts is consonant with the Constitution and its values – and hence to determine how courts should interpret s6(2)(b) of the Promotion of Administrative Justice Act – it is necessary to do four things: first, to revisit what Gauntlett refers to as the case upon which the more recent Appellate Division cases rely,\(^{68}\) **South African Defence and Aid Fund v Minister of...**

\(^{64}\) See by way of example Minister of Law and Order v Hurley 1986 (3) SA 568 (A).

\(^{65}\) See by way of example Minister of Law and Order v Dempsey 1988 (3) SA 19 (A). The distinction between the two was drawn by Rabie CJ in Minister of Law and Order v Hurley supra, 578H-579B: ‘I cannot accept the argument that the Legislature intended that the officer who contemplates making an arrest should be the sole judge as to whether there are reasonable grounds for such action. Having regard, once again, to the serious consequences which an arrest under s29(1) has for the person concerned, it seems to me, firstly, that, if the Legislature had intended that the question whether reasonable grounds existed for a belief as required by s29(1) should be left entirely to the subjective judgment of the officer making, or causing, the arrest, it would have used language which made that intention clear. I may refer, in this connection, to the language used by the Legislature in ss(1) of s28 of the Act. Paragraph (a) of this section empowers the Minister to order the detention of a person “if in his opinion there is reason to apprehend” that that person “will commit an offence referred to in s54(1), (2) or (3)”, whereas para (c) of the subsection empowers him to issue such an order “if he has reason to suspect” that a person who has been convicted of an offence mentioned in Schedule 2 to the Act engages in or is likely to engage in activities which endanger the security of the State, etc. The language used in para (a) of s28(1) is in subjective terms, and I have little doubt that, if the Minister were to state that he issued an order since there was, in his opinion, reason to apprehend that a particular person would commit an offence referred to in s54(1) of the Act, the Court would not be entitled to query his judgment.’

\(^{66}\) Van der Westhuizen NO v United Democratic Front 1989 (2) SA 242 (A).

\(^{67}\) At 251C-D.

secondly, to examine the reasoning which underpins those Appellate Division cases; thirdly, to examine how similar empowering provisions which involve issues less contentious that security and emergency powers have been dealt with by the courts; and fourthly, to examine the approach taken by courts in some other jurisdictions. When this has been done an approach to reviewing jurisdictional facts will be suggested that is compatible with the culture of justification upon which the constitutional state rests.

(ii) The South African Defence and Aid Fund Case

The objective/subjective distinction was drawn in the following terms by Corbett J in the South African Defence and Aid Fund case, a case in which the plaintiff had been declared an unlawful organisation in terms of s2(3) of the Suppression of Communism Act 34 of 1950:

‘Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power. ... On the other hand it may fall into the category comprised by instances when the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense, but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a court of law. The court can interfere and declare the exercise of the power invalid on the ground of a non observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the prerequisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter’.

The two factors which influenced Corbett J to conclude that the prerequisites of the power

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69 1967 (1) SA 31 (C).
70 At 34H-35D.
to proscribe an organisation were not objectively justiciable were the subjective wording of the empowerment – ‘if the State President is satisfied’ – and, given the nature of the subject matter which had to be considered, the ‘improbability of the legislature having intended these matters to be the possible subject matter of an objective enquiry by the courts’.71

The consequences of these two factors was that ‘a declaration by the State President under sec 2(2), such as the one made in the present case, cannot be declared invalid merely on the ground that his decision that one or other of the matters described in paras (a) to (e) of that section existed was, objectively speaking, wrong or founded upon incorrect facts. On the other hand, the declaration could be declared invalid if it were shown that his decision was actuated by mala fides or ulterior motive or that he had failed to apply his mind to the matter’.72 Most importantly, Corbett J set out how the State President should satisfy himself of the existence of the preconditions for his exercise of power. He must, Corbett J said, ‘have before him some information relating to such matters as the aims and objects of the organisation in question, its membership, organisation and control, the nature and scope of its activities, what its purpose is and what it professes to be’.73

Far from giving decision-makers a free hand because they have been given a subjective discretion, Corbett J’s judgment contains important controls on the exercise of such power: if the jurisdictional fact is the formation of the opinion, the crux is whether that opinion was formed rationally. It is, therefore, only certain opinions that qualify as opinions that trigger the discretionary power. The importance of this aspect of the judgment and the fact that it was ignored by the subsequent Appellate Division decisions is commented on by Gauntlett, who makes two points.74 First, he says that it is ‘implicit that the supervisory review function of the courts encompasses an enquiry into the existence of facts before the functionary

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71 At 35E-F. The relevant section of the Act is quoted at 32E-G.
72 At 35F-G.
73 At 33H.
74 At 220.
such that, simply stated, he could reach the decision. Secondly, he says that, understood in this way, the judgment is not at odds with comparative Commonwealth jurisprudence and gives expression to the proposition, at the heart of review generally, that the determination of the existence of the facts upon which the opinion or belief is based lies within the province of the court, while their evaluation lies principally within the power of the functionary.

(iii) Jurisdictional Facts Through the Cases

In Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa an empowering provision vested a power of detention in the Administrator-General of what was then known as South West Africa if he was satisfied of certain matters relating to the conduct of the person to be detained. The court below had held that the jurisdictional fact – the Administrator-General’s satisfaction – was objectively justiciable. On appeal, Rabie CJ held that the court below had erred because it had been held on numerous occasions that ‘wanneer ‘n Wet iemand magtig om die een of ander handeling te verrig of die een of ander besluit te neem wanneer hy van die bestaan van die een of ander feit of omstandigheid oortuig (“satisfied”) is en hy dan ‘n besluit neem of ‘n handeling verrig omdat hy aldus

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75 For a good illustration of this point see R v Nkala 1962 (1) SA 248 (SR), 249H-250B. The appellants had been convicted for refusing to give their names to a policeman in circumstances in which he reasonably suspected them of having committed an offence. In dealing with the formation of the suspicion, Hathorn J held: ‘As I have pointed out, there are two essentials to the offence, first, a wilful trespass and, secondly, a refusal to leave after a request to do so by the owner or his agent. The sergeant had reasonable grounds for suspecting that the second essential was fulfilled. It is true that the manager did not, in fact, have the necessary authority from the owner in the particular circumstances. But it seems to me that it was reasonable for the sergeant to have suspected that the manager had the authority. He was after all in charge of the store. However at no time did the sergeant apply his mind to the question whether there had been a wilful trespass and he made no enquiries in that direction. He thus had no information upon which to base a suspicion. That being so, it cannot be said that he reasonably suspected that the appellants had wilfully trespassed.’

76 The leading case of Secretary of Education and Science v Tameside Metropolitan Borough Council 1977 AC 1014 to which the South African Defence and Aid Fund case was compared by Gauntlett is discussed below.

77 1987 (1) SA 695 (A).

78 Katofa v Administrator-General for South West Africa 1985 (4) SA 211 (SWA) 218H-J.
Rabie CJ’s view was to predominate in the Appellate Division. So, in Minister of Law and Order v Dempsey, Hefer JA confirmed that regulation 3(1) of the Emergency Regulations conferred a subjective discretion to arrest on security force members when they formed the opinion that to do so was necessary for certain stated purposes. After setting out what he termed the four essential elements of regulation 3(1), Hefer JA held that it was ‘obvious’ that no-one could be arrested unless ‘his detention is considered to be necessary for at least one of the stated purposes’, that it was ‘equally obvious that the question of the necessity for detention has in terms of reg 3(1) been left for decision to members of the Forces and to no-one else’, that it was ‘plainly an instance’ in which, in Corbett J’s words in the South African Defence and Aid Fund case, ‘the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power’ and that it was ‘trite that it is not the function of the Court in such a case to enquire into the

79 At 731I-732A.
80 At 735J- 736A. Rabie CJ’s judgment was concurred in by Jansen JA. Trengove JA, with whom Botha JA concurred, differed from Rabie CJ on where the onus lay. Van Heerden JA found it unnecessary to offer a view on the onus. Trengove JA’s judgment will be dealt with below.
81 1998 (3) SA 19 (A).
82 Regulation 3(1) provided: ‘A member of a Security Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the safety of the public or the maintenance of public order or for the termination of the state of emergency and may, under a written order signed by any member of a Security Force, detain or cause to be detained any such person in custody in a prison.’ Regulation 3(3) provided: ‘The Minister may without notice to any person and without hearing any person, by notice signed by him and addressed to the head of a prison, order that a person arrested and detained in terms of subregulation (1), be further detained, and in that prison, for the period specified in a notice or for so long as these regulations remain in force.’
83 At 33J-34A, Hefer JA held: ‘Regulation 3(1) has four essential elements. They are (1) that an opinion must be formed (2) by a member of a Force (3) that the detention of a particular person is necessary (4) for any of the purposes mentioned in the regulations.’
84 1967 (1) SA 31(C), 35A-B.
correctness of the opinion’. The cumulative effect of these supposedly self-evident propositions was that when a member of a Security Force ‘forms the opinion that the detention is necessary for any of the purposes mentioned in the regulation and an arrest is made, the correctness of his opinion cannot be questioned’ although the exercise of the discretion is subject to challenge on the usual grounds.

The weakness of the Dempsey judgment and its ilk lies in the fact that they purport to apply the South African Defence and Aid Fund case but do so selectively. Hefer JA assumed that a subjective discretion was created on the basis of the language of the regulations. (This is true of Hurley’s case too, in which Rabie CJ drew a distinction between objective and subjective discretions on the basis, exclusively, of the formula that had been used to create the discretion.) No mention is made in Dempsey of the nature of the subject matter of the opinion and its susceptibility to objective assessment. Similarly, the elements that contribute to the formation of a proper opinion – the pre-opinion information – are not mentioned in Dempsey. By focusing then on only part of this process – whether the opinion was formed, rather than how it was formed – the Appellate Division concentrated on the grant of power at the expense of its complement, the limitations on that power.

The Appellate Division was, of course, free to overrule the South African Defence and Aid Fund case if it wished to. Far from doing this, it purported to apply it. In its selective application of the case, however, it took issue with a line of cases that had been more faithful to Corbett J’s judgment. In the first, Katofa v Administrator-General for South West Africa, Levy J held that, in order to be satisfied of the existence of the required state of affairs, the respondent had to have ‘reason to be satisfied’. This meant that the ‘mere ipse dixit of the Administrator-General would therefore not be sufficient’ to discharge the onus of justifying the detention. In his concurring judgment, Berker JP cited with approval the

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85 At 34A-C.
86 At 35B-C.
87 1985 (4) SA 211 (SWA).
88 At 221I.
89 At 222E.
English case of Secretary of State for Education and Science v Tameside Metropolitan Borough Council\(^90\) to establish the proposition that, despite subjective language, the justiciability of a jurisdictional fact ultimately depends on what the state of satisfaction refers to. In other words, he concluded that the provision in question created an objectively justiciable jurisdictional fact because of the nature of the subject matter of the enquiry. On the return day of the rule nisi which had been issued, the court, in the second judgment – Katofa v Administrator-General for South West Africa\(^91\) – reiterated that the empowering provision created an objectively justiciable jurisdictional fact, that the respondent was required, in order to be satisfied, to form a ‘rational belief arrived at on the strength of information supplied to him’ and that consequently the ‘ipse dixit by the Administrator-General in the original replying affidavit, that “ek was toe, en is nog daarvan oortuig dat die aangehoudene ’n persoon is soos bedoel in art 2 van die proklomasiie” does not provide an answer in law where the legality of the detention has been challenged’.\(^92\)

In the Appellate Division,\(^93\) Rabie CJ and Jansen JA had held that the empowering provision created subjectively justiciable jurisdictional facts and that a statement by the detaining authority that he was satisfied that the detainee was a person who ‘qualified’ for detention in terms of the empowering provision was sufficient to discharge the onus.\(^94\) Trengove JA, with whom Botha JA concurred, took a different view. He held that although the empowering provision rendered the jurisdictional facts subjectively justiciable, that did not mean that, to discharge the onus, the detaining authority could merely depose to his satisfaction concerning the existence of the jurisdictional facts. For Trengove JA the nub of the issue was whether the Administrator-General had shown that he had applied his

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\(^90\) 1977 AC 1014.
\(^91\) 1986 (1) SA 800 (SWA).
\(^92\) At 807B-E.
\(^93\) Kabinet van die Tussentydse Regering vir Suidwes Afrika v Katofa 1987 (1) SA 695 (A).
\(^94\) See, in particular, 731B-C where Rabie CJ stated: ‘Ek kan met hierdie sienswyse nie saamstem nie. Ek aanvaar dat, om daarvan oortuig te gewees het dat die aangehoudene ’n persoon is soos bedoel in art 2 van Prok AG 26 van 1978, die Administrateur Generaal ’n rede, of redes, vir sy oortuiging moes gehad het, maar dit beteken nog nie dat hy die rede(s) aan die Hof moes verstrek het sodat die Hof dit kon oorweg om te kyk of dit redelikerwys tot sy oortuiging kon gelui het nie.’ See too 731G-732A and 735J-736A.
mind properly to whether the respondent should have been detained.\textsuperscript{95} In order to discharge that onus, the detaining authority was required to show, at least, that he was alive to the effect of the empowering provision. In deciding that the onus had not been discharged, Trengove JA held:\textsuperscript{96}

‘Dit blyk nie uit die passasies dat die Administrateur-Generaal hoegenaamd bewus was van die strekking, en die kumulatiewe werking, van subparas (a) en (b) van art 2 van die proklamasie nie. Dit is immers ‘n voorvereiste vir die behoorlike uitoefening van sy diskresie. Om te sê dat hy daarvan oortuig was, en nog is, dat die aangehoudene ‘n persoon is soos bedoel in art 2 van die proklamasie is eintlik nikseggend tensy dit ook uit sy verklaring blyk dat hy presies geweet het wat die strekking van die twee subparagrawe is. Dit is verder ‘n voorvereiste vir die uitoefening van sy diskresie, dat die Administrateur-Generaal oortuig moet wees van die feitlike omstandigede wat in die subparagrawe uiteengesit word. Hy mag geen ander omstandigede of oorwegings in ag neem nie. Die Administrateur-Generaal het ook nie in die betrokke passasies die redes vir sy oortuiging, of die gegewens waarop dit gegrond is, verstrek nie. Dit is dus nie moontlik om te sê of die Administrateur-Generaal te goeder trou geglo het dat die gegewens waarop sy oortuiging gegrond is binne die bestek van subparas (a) en (b) van art 2 val nie en of daardie gegewens hoegenaamd vatbaar is vir die afleiding wat hy daarvan gemaak het nie.’

A number of Provincial Division decisions also tried to restrict the power of decision-makers who have been granted subjectively framed discretions by concentrating on how the decision-maker’s opinion was formed. For example, in Dempsey v Minister of Law and Order\textsuperscript{97} Marais J held that, in order to form a proper opinion in terms of the Emergency Regulations, an arresting member of the security forces had to apply his or her mind to whether the detention was necessary, as opposed to desirable, to the necessity of the detention, as opposed to the necessity of the arrest on its own and to the necessity of the detention in relation to the purposes set out in the regulations.\textsuperscript{98} This involved the

\textsuperscript{95} At 741H.
\textsuperscript{96} At 743F-H.
\textsuperscript{97} 1986 (4) SA 530 (C). This decision was overruled in Minister of Law and Order v Dempsey 1988 (3) SA 19 (A), discussed above.
\textsuperscript{98} At 531I-532B.
consideration of alternatives less drastic than emergency arrest and detention.\(^99\) This approach is the most faithful to South African Defence and Aid Fund because it requires a rational connection between the consideration of the factual circumstances and the formation of the opinion. The fundamental error in the dominant line of cases is the assumption that a subjectively justiciable jurisdictional fact is created simply because of the subjectively phrased formula used by the legislator. Ironically this false premise can be traced back to the case that was otherwise – and correctly – celebrated as a major victory for human rights, Hurley v Minister of Law and Order.\(^{100}\)

(iv) Jurisdictional Facts and Non-Security Matters

The weakness of the approach taken by the Appellate Division is well illustrated by a case involving a local government by-election. In Le Grange v Boksburgse Stadsraad\(^{101}\) the scheme created by the Municipal Elections Ordinance 16 of 1970 (T) was that if one of a number of states of affairs defined in the Ordinance pertained, a casual vacancy occurred. So, for instance, if a councillor became a Member of Parliament or, as in the case of the third respondent, a councillor was convicted of an offence of which dishonesty is an element, a casual vacancy occurred. The Town Clerk was then required to inform the Mayor that a casual vacancy had occurred and then, if the Mayor was satisfied that a casual vacancy had occurred, he or she was required to announce the vacancy so that a by-election could be held.\(^{102}\)

The Mayor of Boksburg had refused to announce a vacancy after the third respondent had been convicted of election fraud. It was argued that if the Mayor was not satisfied that a

\(^{99}\) At 542E-G. See too Bishop of the Roman Catholic Church of the Diocese of Port Elizabeth v Minister of Law and Order EPD 1 August 1986 (case no. 1101/86) unreported, which was also overruled on appeal. See further chapter 9 below. See also Plasket ‘Clipping Dempsey’s Wings: The Consideration of Alternatives to Reg 3(1) of the Emergency Regulations’ (1987) 3 SAJHR 76.

\(^{100}\) 1985 (4) SA 709 (D), 725C. This specific weakness in the decision was commented upon at the time by Baxter ‘Section 29 of the Internal Security Act and the Rule of Law’ November 1985 Reality 5-6.

\(^{101}\) 1991 (3) SA 222 (W).

\(^{102}\) At 226A-C.
vacancy existed, a court could not usurp his powers by declaring that a vacancy did, in fact, exist. Flemming J accepted that the ‘satisfaction’ of the Mayor was in the nature of a jurisdictional fact, a condition precedent to declaring a by-election. On the nature of the jurisdictional fact, he held:

‘In die afgelope jaar of wat is in die Appelaadeling heelwat regspraak geskep oor die objektiewe beregting van ‘n besluitneming wat aanwesig en gegrond moet wees voordat volgende stappe daarop gebou word. Ek sien geen probleme in as so ‘n objektiewe beregting hier toegepas word nie. Die aanduidings is in die breë juis ten gunste daarvan. Artikel 30(1) word volgens die werkelike feite beoordeel en nie die burgemeester se subjektiewe konklusies nie. Dit sou onhoudbaar wees as ‘n tussenverkiesing moet volg omdat die burgemeester “oortuig is” terwyl objektiewe bepaling van feite toon dat art 30 die betrokke raadslid nie tref nie. Dit is ook, met inagneming van die beleid van die ordonnansie, oendoeltreffend as ‘n vakature inderdaad ontstaan maar ‘n tussenverkiesing teruggenhoud kan word omdat die burgemeester subjektief nie “oortuig is” dat die rede vir die vakature inderdaad aanwesig is nie. So ‘n onwerkbaarheid kan ook onstaan as ‘n burgemeester iemand is wat homself nie kan oortuig nie of wat homself nie wil laat oortuig nie. Die wenslike toestand dat die stadsraad funksioneer met sy volle komplement van verteenwoordigers vir alle wyke sou om meer as een rede gefrustreer kon word.’

Writing in 1986, Professor Tony Matthews made the point, later illustrated by Le Grange, that in ‘non-security cases, phrases like “reason to believe” and “is satisfied” have not been given the subjective interpretation which they have magically acquired in the sphere of internal security’. He proceeded to say:

‘Common sense, apart from legal authority, appears to dictate the rule that a person cannot be of the opinion or satisfied that a certain state of affairs exists unless there are grounds upon which the opinion or satisfaction is based. Only in an “Alice through the looking glass” world would an irrational,
manufactured or fictional judgment be graced with the description “opinion”, “state of satisfaction”, and the like. Until recently, courts that have understood this perfectly well in a non security context appear to have taken leave of good sense once there is a legislative or ministerial incantation of the national security justification’.

(v) Comparative Perspectives

The problem with the dominant approach in the Appellate Division is simply that, as it has been expressed by Mary Matthews, the courts concentrated on the wording rather than the meaning of the provision in question. Apart from the fact that such an approach is not true to the formulation in South African Defence and Aid Fund, it is also an approach which has been rejected in other systems of public law compatible with our own. For instance, in Secretary for Education and Science v Tameside Metropolitan Borough Council, a statutory provision gave the appellant power to give directions to a local authority as to the exercise of its powers or performance of its duties if he was ‘satisfied’ that the Council had acted or intended to act unreasonably. It was held, both in the Court of Appeal and in the House of Lords, that the appellant’s state of satisfaction was objectively justiciable. In the main judgment in the House of Lords, Wilberforce LJ held as follows:

‘The section is framed in a “subjective” form – if the Secretary of State “is satisfied.” This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the

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‘OK for Starters’ (1986) 2 SAJHR 333, 336. See too at 337 where she said: ‘The conclusion to be drawn from all this is that an opinion, suspicion or satisfaction must have reference external to the person who forms it. There must be some objective ground upon which it is based and this is not a linguistic quibble but a conceptual necessity. If such objective grounds must, of conceptual necessity, exist, whatever the linguistic formulation of the discretion which has been conferred on the relevant official, then the subjectivity or objectivity of the discretion can no longer feasibly be tied to the language used.’

\[\text{\textsuperscript{108}}\]

1977 AC 1014.

\[\text{\textsuperscript{109}}\]

See the judgment of Denning MR at 1025B-F and at 1026C-G, the judgment of Scarman LJ, at 1030A-1031 F and the judgment of Geoffrey Lane LJ at 1034C-D.

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See the judgment of Dilhorn LJ at 1054, Diplock LJ at 1064-1065, Salmon LJ at 1070 and Russell LJ at 1074. The main judgment was given by Wilberforce LJ and the relevant passage is quoted below.

\[\text{\textsuperscript{111}}\]

At 1047D-E.
existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: See *Secretary of State for Employment v ALSEF (No 2) [1972] 2 QB 455*, per Lord Denning MR, at p493.

Similarly in the Zimbabwean case of *Minister of Home Affairs v Austin* a detention power activated when ‘it appears to the Minister that it is expedient in the interests of public safety that’ a particular person or class of person be detained, was held to be objectively justiciable. Dumbutshena CJ held that, although the appropriate provisions were cast in subjective terms, ‘the Minister has to examine objective facts. It is the consideration of those objective facts or information that will determine whether the Minister has acted reasonably or unreasonably in deciding to detain them’. In spelling out precisely what this meant, Dumbutshena CJ held that there ‘must be sufficient information and material upon which to act’ and that the court ‘in its approach to the assessment of facts or any evidence, must be satisfied that those facts and evidence exist to justify the detention’.

(vi) The Constitutional Dimension: the Culture of Justification

In *Ynuico Limited v Minister of Trade and Industry* Van Dijkhorst J referred to the Constitutional Court the issues of whether a statutory provision that granted the respondent far reaching powers exercisable ‘whenever he deems it necessary or expedient in the public interest’ was in conflict with the right to lawful administrative action. During the course of his judgment, Van Dijkhorst J set out the competing views on the issue. On the one hand, the power was ‘so subjective that neither the official himself nor the public who

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112 1986 (4) SA 281 (ZSC).
113 At 293H-I.
114 At 294D-E.
115 1995 (11) BCLR 1453 (T).
116 At 1466D-E.
will be subjected to his decision will know in advance what criteria are to be applied. In fact the official is authorised to do as he deems fit’. The effect would be that the official’s actions will have been placed ‘beyond the pale of the court’s control (except on very limited grounds)’. On the other hand, given the intangible, changing and contested nature of the public interest, the fact that Parliament cannot prescribe in advance what will be in the public interest and because, practically speaking, such a decision will have to be delegated ‘to the man on the spot’, it makes no real difference whether the discretion is vested in subjective or objective language – ‘the public is no better informed in advance if the power is to be exercised in the public interest per se and when it is to be exercised when the official deems it to be in the public interest’. In deciding that the issue should be referred to the Constitutional Court, he concluded that it ‘may well be that the test of objective reasonableness expounded in Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (A) at 577I-579I is now more acceptable than the subjective test of Omar and Others v Minister of Law and Order and Others 1987 (3) SA 859 (A) at 892D-G.’

Unfortunately, Van Dijkhorst J’s observations were not dealt with by the Constitutional Court because the applicant abandoned its argument on this issue. If this issue had been argued, it may well have been held that while the challenged legislation was not unconstitutional simply because it created a broad discretion, a new approach was needed in respect of how such discretions, and subjectively phrased discretions in general, ought to be controlled by the courts on review. A discussion on how such discretionary powers should be controlled so as to bring the law into step with the values of the Constitution follows.

In a series of cases stretching from Nakkuda Ali v Jayaratne to Inland Revenue

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117 At 1472A-B.
118 At 1472B-C.
119 At 1472D-F.
120 See Ynuico Ltd v Minister of Trade and Industry 1996 (6) BCLR 798 (CC).
Commissioners v Rossminster Ltd\(^{122}\) the English courts exorcised the notorious war-time decision of the House of Lords, Liversidge v Anderson\(^{123}\), from the body of English administrative law. It is time to do the same thing in South Africa and face the fact that in its approach to subjectively framed jurisdictional facts, the Appellate Division was wrong in such cases as Katofa and Dempsey. The need to face this fact is driven by the changed nature of South African administrative law. It is a system that operates, not in a state of siege any longer, but within a democratic framework and within a constitutional system that is based upon the rule of law and values of accountability, responsiveness and openness.

Two specific and related changes are needed to the way courts review subjectively phrased jurisdictional facts. The first calls for a shift in emphasis from the formula in the empowering legislation to the subject matter of the belief, suspicion, opinion or state of satisfaction. Guidance can be obtained from the rather cautious terms of the South African Defence and Aid Fund case but it is not definitive because of its understandable deference to the intention of the then supreme legislature. The question no longer need be whether Parliament intended to create a subjective jurisdictional fact but rather whether the court is institutionally competent to assess objectively whether the facts or circumstances required by the empowering provision exist. This means that s6(2)(b) of the Promotion of Administrative Justice Act must be interpreted in accordance with the approach to jurisdictional facts that was adopted by the House of Lords in Tameside, by the Zimbabwean Supreme Court in Austen, by the court in what was then South West Africa in the first two Katofa cases and by Flemming J in Le Grange. In enquiring into whether a mandatory and material condition in an empowering provision has been complied with a court may thus enquire objectively into the existence of all facts and circumstances that serve as preconditions for the exercise of a discretion in all cases except those in which the existence of such preconditions is a matter of ‘pure judgment’. That is all that can be left of subjective jurisdictional facts: it can be no other way in a constitutional state that requires that exercises of public power be justified.

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\(^{122}\) [1980] AC 952, 1011.

\(^{123}\) [1942] AC 206.
The second change that is necessary to bring the law of jurisdictional facts into the democratic era operates on the intersection between the jurisdictional fact doctrine and review for reasonableness. It relates to the way in which decision-makers who have been vested with a subjective discretion involving matters of ‘pure judgment’ form their belief, suspicion, opinion or state of satisfaction. Courts are able to examine the rationality of the decision-making process, its faithfulness to the aims of the empowering legislation and the reasonableness of its effects. In other words, even when a subjective discretion, properly so called, is reviewed, courts acting in terms of the applicable provisions of s6(2) of the Promotion of Administrative Justice Act may review for unreasonableness the belief, suspicion, opinion or state of satisfaction that must be formed as a prelude to the exercise of power.124

The approach set out above is not new. It was suggested in 1984 by Baxter but his views were ignored by the Appellate Division as it entrenched subjective discretions as virtual ouster clauses. He wrote at the time:125

‘To sum up, it is suggested that the following approach is the one which best reconciles respect for administrative expertise with the need for judicial protection against erroneous administrative action: The legal and factual qualifications attaching to the power conferred are subject to final determination on review only if they are matters which the court is equally competent (from a functional and evidential point of view) to evaluate. If instead they are matters which are best left to the final decision of the public authority, the court may still examine the decision which the public authority reached in order to determine whether, in the light of the evidence before the public authority or the legislation governing it, the decision is one which can reasonably be supported.’

Such an approach to the review of jurisdictional facts is no flight of fancy bound to render effective administration impossible: it is, as has been shown, supported in an underdeveloped form in the South African Defence and Aid Fund case; it is supported by well established and respected case law in comparative jurisdictions; it has been accepted

124 See on the grounds of review for unreasonableness, 9.3.3 below.
125 At 474.
in cases in South Africa that did not involve ‘sensitive’ matters like security matters; it enjoys the twin virtues of being practical and principled; and it is what the Constitution – the supreme law – requires. Furthermore, the first steps in this development have already been taken. In Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration\(^\text{126}\) held that a subjectively framed jurisdictional fact – that permitted the respondent the discretion to remove restrictions on the use of land if he was satisfied that it was desirable to do so – was required to pass the test of objective rationality.\(^\text{127}\)

(c) Unconstitutional Administrative Action

The primary purpose of s6(2)(i) of the Act is to allow for the development of grounds of review that may not be recognized at present, and to cater for grounds – such as vagueness and disproportionality – that are not expressly mentioned in s6(2).\(^\text{128}\) It also serves a second purpose: it serves as the appropriate ground of review when administrative action falls foul directly of constitutional provisions such as fundamental rights in the Bill of Rights. In this sense, this ground of review is a particular manifestation of the broader principle of legality upon which the Constitution as a whole rests and which is protected in s33(1) through the right to lawful administrative action. It differs from the usual grounds of review for lawfulness in that it involves a direct application of the Constitution rather than application through s33(1). It must also be borne in mind that when the administrative action is not legislative in nature, there can be no question of the decision-maker justifying his or her actions in terms of s36 of the Constitution. In such cases, the administrative action will not constitute a law of general application. It is, rather, an administrative act of specific application.\(^\text{129}\)

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\(^{126}\) 2001 (4) SA 294 (C).

\(^{127}\) At 321C. See by way of contrast, the ‘business as usual’ approach to a similar issue of Mynhardt J in Strauss v The Master 2001 (1) SA 649 (T), 657F-G.

\(^{128}\) These grounds will be discussed in chapter 9 below.

\(^{129}\) See Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal 1999 (2) BCLR 151 (CC), 167H (paragraph 42). See too the discussion below on Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO 2000 (4) SA 973 (C).
In Matukane v Laerskool Potgietersrus¹³⁰ the respondent, a state-aided school that had formerly provided education for white children, had refused to admit black children. It had done so, Spoelstra J found, on a racial basis. This amounted to unfair discrimination. Spoelstra J held that ‘a decision unfairly denying a child admission to a school on the ground of race is impermissible and unconstitutional’¹³¹ and that, whatever the powers to admit children to or to deny them admission to the school may be, those powers could not be exercised in conflict with the Constitution.¹³²

In Rattigan v Chief Immigration Officer, Zimbabwe¹³³ three women who were citizens of Zimbabwe challenged the decisions of the respondent to refuse residence permits to their foreign husbands. The respondent had adopted a policy that foreign husbands could only be granted residents permits if they were dependent on their wives or if they possessed skills that were needed in Zimbabwe, intended to invest substantial capital in the Zimbabwean economy or were retired and had sufficient funds to support themselves without reliance on public funds.¹³⁴ Gubbay CJ held that the decisions in question infringed the fundamental rights of the applicants to move freely in the country, to reside anywhere in the country and to enter and leave the country.¹³⁵ He held that although the Zimbabwean Constitution did not contain a fundamental right protecting family life, ‘to prohibit the husbands from residing in Zimbabwe and so disable them from living with their wives in the country of which they are citizens and to which they owe allegiance, is in effect to undermine and devalue the protection of freedom of movement accorded to each of the

¹³⁰ 1996 (3) SA 223 (T).
¹³¹ At 231D.
¹³² At 234D. Other, more traditional, ways of arriving at the same conclusion would be to say that the legislation that empowered the school to decide on who to admit did not authorise it to discriminate unfairly or that the race of applying students is a factor that is irrelevant to the exercise of power concerned. It is well known that some of the grounds of review tend to overlap. One could, no doubt, fit the facts to other grounds of review too, such as bad faith, ulterior motive or improper purpose.
¹³³ 1995 (2) SA 182 (ZSC).
¹³⁴ At 185B-D.
¹³⁵ At 191B.
wives as a member of a family unit'.

Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO\textsuperscript{137} is an illustration of an erroneous application of the ground of review envisaged by s692)(i). The applicant challenged the validity of a decision of the first respondent – the chairperson of a commission of enquiry into match fixing in international cricket – that neither the television nor the audio service provided by the applicant would be permitted at and during the sitting of the commission. It was common cause that the first respondent had a discretionary power, in terms of s4 of the Commissions Act 8 of 1947, to act as he had if he considered it necessary or desirable to do so. In reaching his decision that the presence of the electronic media was not desirable, the first respondent weighed against each other the intrusiveness of the electronic coverage and its potentially negative effect on witnesses, and the public's right to know what was transpiring in the commission. He conceded, however, that he did not consider the exclusion of the electronic media to constitute an infringement of the right of freedom of the press and other media\textsuperscript{138} and of the public to receive information.\textsuperscript{139} Brand J held that he was incorrect in this respect:\textsuperscript{140}

‘Consequently, the argument that a prohibition of a radio broadcaster’s right to broadcast directly does not interfere with the right of that medium because it still has the same rights as the print media, in my view, amounts to a non sequitur. The equivalent of the newspaper journalist’s shorthand notes to the radio broadcaster is not shorthand notes but an audio recording. I do not think it can be argued that a prohibition against a newspaper journalist taking shorthand notes would not constitute an infringement of that journalist’s rights under s16(1)(a). I believe that, by the same token, to prevent a radio broadcaster from utilizing its broadcasting and recording equipment constitutes an infringement of its rights contemplated by s16(1)(a) of the Constitution.’

Having found that the first respondent had ‘failed to appreciate that a refusal of applicant’s

\footnotesize{\begin{itemize}
\item At 190I. See too In re: Wood and Hansard 1995 (2) SA 191 (ZSC) and Salem v Chief Immigration Officer 1995 (1) BCLR 78 (ZS).
\item 2000 (4) SA 973 (C). See further Plasket ‘Unconstitutional Administrative Action: the Case of the King Commission and the Media’ (2001) 118 SALJ 659.
\item Constitution, s16(1)(a).
\item Constitution, s16(1)(b).
\item At 987E-F (paragraph 45).
\end{itemize}}
request to record and broadcast the proceedings would constitute an infringement of applicant’s constitutional rights’, Brand J also held that the first respondent had failed to ‘appreciate that such infringement could only be justified under s36 of the Constitution and, consequently, failed to exercise his discretion … in a proper manner’. Brand J then proceeded to engage in the exercise of applying s36 of the Constitution, concluding that the first respondent’s decision did not constitute a reasonable and justifiable limitation of the right to freedom of expression.

Brand J was incorrect to apply s36 of the Constitution to the exercise of power in question. The section did not apply because the decision of the first respondent was not a law of general application but an administrative act of specific application. If the empowering provision, s4 of the Commissions Act, was being challenged and had been found to have infringed a fundamental right, s36 would have come into play in the second part of the two stage approach applied to determine the constitutional validity of laws. The logical inconsistency in Brand J’s approach is this: if s36 applied when courts determined the validity of administrative action, it would be notionally possible to have unlawful administrative action, unreasonable administrative action or procedurally unfair administrative action being held to be valid, despite these defects. This would have been the result if Brand J had concluded that despite the first respondent not having applied his mind properly and having ignored relevant considerations in the form of the right to freedom of expression, his decision was nonetheless reasonable and justifiable. That is simply not possible in a constitutional state founded on constitutional supremacy and the rule of law.

Despite the erroneous application of s36, the limitation analysis undertaken by the court is of some interest. What it amounts to is an analysis of the reasonableness of the administrative action in question. In concluding that the decision to exclude the electronic

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141 At 987H-I (paragraph 47).
142 At 988A-992A. (paragraphs 48-63).
143 See Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal supra, 167H (paragraph 42).
144 See S v Makwanyane 1995 (6) BCLR 665 (CC), 707E-708B (paragraphs 100-102).
media was unreasonable, Brand J found that the right to freedom of expression was of such importance that the first respondent ought to have held that it outweighed the other considerations that he took into account\footnote{At 990D-991D (paragraphs 58-60).} and that he failed to consider less drastic alternatives than an outright prohibition of live radio and television coverage.\footnote{At 991D-H (paragraph 61).}

‘As to the consideration of less restrictive means to protect the interests of witnesses, which essentially form the basis for first respondent’s concern, it appears from the record of the proceedings before the commission that counsel for the objectors did not distinguish between television and radio. They objected to both on the same basis. This failure to distinguish between the two electronic media was perpetuated in first respondent’s ruling as well as on first respondent’s papers before this Court. In fact, when first respondent refers to the OJ Simpson-like performance by the electronic media which occurred when Cronje gave evidence, it is apparent that his complaint is directed mainly at the intrusive effect of the video cameras. Applicant’s case is that its radio microphones would be far less intrusive than video cameras. It appears to me that this must be so and that first respondent ought to have considered the compromise of allowing radio but excluding television cameras. Moreover, Cainer indicated to first respondent that, from a technical point of view, it would be possible for first respondent to impose restrictions which would render the presence of radio broadcasting and recording equipment even less obtrusive. He also tendered on behalf of applicant to be subjected to such restrictions. It does not appear from respondent’s papers that first respondent considered the possibility of removing the objections against the presence of radio by imposing some or all of the restrictions suggested by Cainer instead of imposing a blanket prohibition on all electronic media.’

Stripped of the erroneous application of s36 of the Constitution, Brand J found that: the first respondent had failed to apply his mind properly in that he ignored a relevant consideration, namely that his decision to exclude the electronic media would constitute an infringement of the fundamental right to freedom of expression and was unreasonable on that account; that his decision was also unreasonable because he failed to accord any weight to the importance of the fundamental right in question; and further that the decision was unreasonable because the first respondent failed to consider less drastic alternatives to the course of conduct that he decided upon, resulting in disproportion between the decision
and its purposes.

The cases dealing with unconstitutional administrative action are, in reality, no more than a category of cases that have applied the right to lawful administrative action with reference, not to a specific ordinary statutory empowerment, but with reference, directly, to the Constitution: the exercise of power in Matukane amounted to unlawful administrative action because no valid statute authorized the school management to discriminate unfairly against black children. The ‘unconstitutional administrative action’ ground of review applies directly and is more appropriate to administrative action that is legislative in nature. If, for instance, subordinate legislation is properly made in terms of an empowering provision but infringes a fundamental right, its validity will be determined in the same way as primary legislation. If it amounts to law of general application, s36 of the Constitution will be applied to determine whether, despite the infringement of a fundamental right, the subordinate legislation is, nonetheless, valid.147 In this way, the common law basis for challenging subordinate legislation based on unreasonableness, as articulated in Kruse v Johnson148 and the long line of South African cases that have applied it, has been superceded by the direct application of the Constitution.149

8.3. Conclusion

It is submitted that the appropriate provisions of s6(2) of the Promotion of Administrative Justice Act are, indeed, in compliance with the Parliament’s constitutional mandate to give effect to the fundamental right to lawful administrative action. In doing so it has not been necessary to break much new ground. The main reason for this is that the common law rules on what constituted lawful administrative action differ little if at all from the corresponding constitutional concept of legality.

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147 See for an example of subordinate legislation being set aside in this way, Government of the Republic of South Africa v the Sunday Times Newspaper 1995 (2) BCLR 182 (T).
148 [1898] 2 QB 91.
149 See further, Chapter 9 below.
As has been suggested above, the main aspect of the right that requires development is that aspect relating to the review of jurisdictional facts, particularly subjectively framed jurisdictional facts. Two related developments are called for in order to render the common law position compatible with the Constitution and its values: first, s6(2)(b) of the Promotion of Administrative Justice Act must be interpreted in a way that gives effect to substance over form and values consistency with the Constitution above a simplistic deference to the will of the legislature, by emphasising the subject matter of the jurisdictional fact rather than the formula used to create it; secondly, it requires the application of the constitutional standard of reasonableness to the formation of the required belief, suspicion, opinion or state of satisfaction. If courts develop these components of review in the way suggested, there can be little doubt that, for its part, s6(2)(b) will have succeeded in giving effect to the right to lawful administrative action.

The provisions of s6(2)(i) are of considerable importance for two reasons: first, it allows for the direct application of the Bill of Rights or other provisions of the Constitution to administrative decision-making; secondly, it serves to ensure that courts can read into s6(2) grounds of review that are not expressly stated in the section and it allows for the integration of new grounds of review that may be developed in the future. In this sense, s6(2)(i) is not only an eminently sensible provision but one that also serves to ensure that the right to lawful administrative action (and, indeed, the rights to reasonable and procedurally fair administrative action as well) is given effect to by the Act.
CHAPTER NINE: THE RIGHT TO REASONABLE ADMINISTRATIVE ACTION

9.1. Reasonableness and Rationality

In a well-worn and often quoted passage in Council of Civil Service Unions v Minister for the Civil Service, Diplock LJ observed that the grounds of review could be classified under three heads – ‘illegality’, ‘irrationality’ and ‘procedural impropriety’. Of the second – irrationality – he meant what is usually referred to as Wednesbury unreasonableness which ‘applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it’. In this way, two terms – irrationality and unreasonableness – which are not, in a strict sense, synonymous have been run into each other by the courts to control three distinct parts of the administrative decision-making process, namely, the rationality or reasonableness of the way decisions are made, of their purpose and of their effects. This point is made, in the context of Wednesbury unreasonableness, by Jowell:

‘Nevertheless, it is possible to discern three categories of case that fall under the general rubric of unreasonableness:

(a) Where there has been an extreme defect in the decision-making process. The assessment here focuses upon the reasoning or justification for the decision; upon the quality of the argument

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1 [1984] 3 All ER 935 (HL), 950h-i.
2 At 951a-b.
3 A decision to reduce the speed limit to 20 km per hour, may be a rational way of reducing road accidents but, given its other effects, it will be unreasonable. See further De Smith, Woolf and Jowell, 559 (paragraph 13-019) who say: ‘Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness.’
4 See Baxter, 496-497 and De Smith, Woolf and Jowell, 551 (paragraph 13-005).
5 ‘Judicial Review of the Substance of Official Decisions’ 1993 Acta Juridica 117, 120. See too De Smith Woolf and Jowell, 549 (paragraph 13-001): ‘We now turn to the third general ground of review, which is variously known as unreasonableness or, increasingly, irrationality, and sometimes as the abuse of power. Under this ground the question asked is not whether the decision-maker strayed outside the purposes defined by the governing statute (the test of “illegality”), nor whether the decision was procedurally unfair (the test of “procedural proprietary”). The question here is whether the power under which the decision maker acts, a power normally conferring a broad discretion, has been improperly exercised.’ See too De Smith, Woolf and Jowell, 551 (paragraph 13-005).
supporting the decision. We see here: (i) decisions taken in bad faith; (ii) decisions based on considerations wrongly taken into account or ignored, or given inappropriate weight; and (iii) strictly "irrational" decisions, namely those justified by inadequate evidence or reasoning.

(b) Decisions taken in violation of common law principles governing the exercise of official power. In the absence of express intent to the contrary, these principles apply even where discretion has been conferred in the widest terms. The principles of (i) equality and (ii) legal certainty fall under this head.

(c) Oppressive decisions are ones which have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result.'

Although pre-1994 South African common law differs from English law in respect of whether unreasonableness on its own is a ground of review,⁶ the two systems are now much closer because s24(d) of the interim Constitution and s33(1) of the final Constitution introduced reasonableness – in the guise of justifiability in the interim Constitution – as a ground of review. Now the Promotion of Administrative Justice Act seeks to give effect to the fundamental right to reasonable administrative action contained in the Constitution.

9.2. The Development of Review for Unreasonableness

9.2.1. The Common Law Prior to 1994

Three strands of unreasonableness are identifiable in common law review in South Africa.⁷ The first, which ostensibly applies to administrative acts in general, disavows unreasonableness as a ground of review on its own. The second strand allows for review for unreasonableness when the administrative decision is of a judicial character. The third strand recognises that subordinate legislation may be reviewed for unreasonableness on its own.

(a) Symptomatic Unreasonableness: the Formal Test

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⁶ See below.
⁷ Baxter, 477-479.
The standard formulation for judicial interference with a discretionary power on the basis of its unreasonableness was set out in Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd. In issue was the validity of a decision, taken in terms of the Iron and Steel Industry Encouragement Act 41 of 1922 not to pay a production incentive to the company because the Minister was not satisfied, as he was required to be in terms of the Act, that the plant in question was capable of producing at least 50 000 tons of iron or steel per annum. It was argued that the Minister's decision was unreasonable. Stratford JA dealt with this submission as follows:

In my judgment, however, the unreasonableness of the Minister by itself affords no grounds for a court's interference with the exercise of his discretion. The only assumption in the Act is that the Minister, whoever he may be, and whatsoever mental type he may be, shall honestly bring his mind to bear upon the real question he has to decide. There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true, the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "inexplicable except on the assumption of mala fides or ulterior motive", see African Realty Trust v Johannesburg Municipality (1906 TH 179) or that it amounts to

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8 1928 AD 220.
9 At 222-223.
10 At 236-237. A distinct and specialized deviation from the gross unreasonableness standard is to be found in cases dealing with the review of taxations of bills of costs. The basis of the broader approach in these matters is the institutional competence of judges to determine the reasonableness or otherwise of decisions of taxing masters. Because of this there is no need for deference. This was stated in explicit terms by Millin J in Wellworths Bazaars Ltd v Chandlers Ltd 1947 (4) SA 453 (T), 457-458: 'The law, as I conceive it to be, is that in general the discretion of a Taxing Master will not be disturbed unless it is found that he did not exercise a proper discretion, for example, by disregarding factors which were proper for him to consider or by considering matters which it was improper for him to consider, or by giving a ruling which the Court can see no reasonable person would have given. That is the general principle. But that principle has had engrafted upon it something else, and that is this: There is a certain class of case where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion. Examples of that class of case are these: First of all, the question whether the employment of more than one counsel was justified in the case. It is apparent that a Judge is in a better position to decide such a matter than the Taxing Master could be. Another example is when questions of relevancy of evidence arise. The Taxing Master may disallow the costs of an affidavit because he is of opinion that the affidavit was not relevant to any issue in the case. It is clear that the Judge must be in a better position to decide that point than the Taxing Master. So there has developed what I call a graft on the main principle. The Court will feel it its duty to correct the Taxing Master and substitute its own opinion for his opinion when the matter is one in which the Court is at least as well able to judge as the Taxing Master is.'
proof that the person on whom the discretion is conferred, has not applied his mind to the matter.’

In National Transport Commission v Chetty’s Motor Transport (Pty) Ltd Holmes JA added a gloss to Union Steel. He held that decisions of the appellant stood unless, on review, it was found, in the first place, that it had failed to apply its mind to the issue in accordance with the directions of the statute or if its decision was ‘grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid – a formidable onus’. This formulation makes review for unreasonableness extremely difficult and was criticized by Henning J in Bangtoo Brothers v National Transport Commission who said that ‘the acknowledgment of degrees of gross unreasonableness might well be regarded as importing a notion of super-superlatives’. A similar point has been made by Mahomed who has described Stratford JA’s formulation in Union Steel as inhibiting and debilitating.

(b) The Extended Formal Test

In Theron v Ring van Wellington van die N.G. Sending Kerk in Suid-Afrika the court split on the standard of unreasonableness required to set aside the decision of a disciplinary tribunal of a church. Two judges of appeal (Muller JA and Botha JA) preferred the Union Steel standard, two others (Jansen JA and Van Blerk ACJ) preferred a less exacting

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11 1972 (3) SA 726 (A).
12 At 735G. In Vanderbijl Park Health Committee v Wilson 1950 (1) SA 447 (A), 459 Watermeyer CJ explained the difference between unreasonableness and gross unreasonableness as follows: ‘A course of conduct or a particular act is surely unreasonable when it does not accord with the normal conduct of a reasonable man. It may differ only in minor respects; if it does it may not even be unreasonable, but if it differs in important respects it certainly becomes unreasonable and if it differs in very important respects it becomes grossly unreasonable.’
13 1973 (4) SA 667 (N).
14 At 683H. See too the remarks of Miller J in Chetty’s Motor Transport (Pty) Ltd v National Transport Commission 1972 (1) SA 156 (N), 159D: ‘It seems to me that to stigmatise a decision as being unreasonable to a gross degree is, in cases of the type now under consideration, to say that the decision is indefensible on any legitimate ground.’
16 1976 (2) SA 1 (A).
standard and one (Hofmeyr JA) did not decide this issue. In this way, Jansen JA's judgment raised the possibility of review for unreasonableness on its own. Jansen JA's starting point was the presumption that when the legislature grants powers to officials, it intends those powers to be used reasonably. Courts could therefore set aside decisions which could not reasonably have been taken on the evidence available to the decision-maker. Jansen JA's analysis of unreasonableness as a ground of review was restricted to the 'no evidence rule'. He also limited the application of the standard of review to so-called purely judicial decisions — those that involve the application of clear rules, principles or standards as opposed to those involving a high degree of policy.

Although neither the Appellate Division or the Supreme Court of Appeal have formally approved Jansen JA's approach to unreasonableness, his judgment has been influential. For instance, in Hira v Booysen, Corbett CJ referred to Jansen JA's judgment as a 'penetrating judgment'. In more concrete terms, the influence of Jansen JA's judgment is palpable in Kotze JA's judgment in WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board. In this case, the appellant had applied, in terms of the Road Transportation Act 74 of 1977, to a local road transportation board (the LRTB) for a public road transportation permit to authorise it to convey mining roof bolts and related mining equipment to various mines. This application was unsuccessful, as was an appeal to the National Transport Commission (the NTC).

Before the LRTB, the appellant had led evidence to establish that it was able to provide a satisfactory service and that the nature of roof bolts and the patterns of their use rendered

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17 See Chaskalson 'The Past Then Years: a Balance Sheet and Some Indicators for the Future' (1989) 5 SAJHR 293, 299 who wrote: 'Much of administrative law has been made by the courts and, where necessary, the courts can develop the law to meet the exigencies of the times. Courts have done this in other countries and the judgment of Jansen JA in Theron v Ring van Wellington van die N.G. Sending Kerk in Südafrika (1976 (2) SA 1 (A)) shows that there is no reason why this should not be done in South Africa.'
18 1992 (4) SA 69 (A), 91C-G.
19 1982 (4) SA 427 (A).
20 For the facts, see 433H-442A.
their transportation by the South African Railways and Harbours Administration (the SAR and H) impractical and uneconomical for a number of reasons. The applicant’s witnesses were either not cross examined at all or were asked a few inconsequential questions by the legal representative of the SAR and H, the only objector.\(^{21}\) No evidence was adduced by the SAR and H but it was nonetheless argued on its behalf that the application ought to be dismissed because the appellant had not established that the SAR and H was unable to transport the roof bolts.\(^{22}\) The LRTB dismissed the application because it took the view that the transportation service offered by the SAR and H was adequate and sufficient for the conveyance of the roof bolts.\(^{23}\) On appeal to the NTC, one witness, a director of the appellant, gave evidence to supplement the record to an extent. Once again the SAR and H did not adduce evidence. After it dismissed the appeal, the NTC refused to furnish reasons for its decision when it was requested to do so by the appellant. In his answering affidavit in the review, the chairperson of the LRTB said that the appellant’s application to it had been refused because the appellant had failed to discharge the onus of proving that the SAR and H’s service was not satisfactory and sufficient to meet the transportation requirements of the public.\(^{24}\) In his answering affidavit, the chairperson of the NTC said that despite the evidence adduced before the LRTB and the NTC, it ‘was satisfied that the Railway Administration was able (‘in staat is’) to provide a satisfactory service and that additional services were not necessary or in the public interest’.\(^{25}\) The court below had concluded that it could not be said that the NTC’s finding was so wrong that it was entitled to interfere.\(^{26}\)

On appeal, Kotze JA identified the main issue as whether the appellant had established

\(^{21}\) At 447H-448A.

\(^{22}\) The argument of the legal representative for the SAR and H drew the following response from counsel for the appellant when he argued before the LRTB, at 438H: ‘Ek moet eerlik waar sê, ek dink Mnr Laas en ek was nie vanoggend in die selfde plek gewees nie, maar ek dink dit is daaraan te wyte dat ons waarskynlik die Wet verkeerd lees, een van ons of die ander van ons.’

\(^{23}\) At 439E-F.

\(^{24}\) At 441D-E.

\(^{25}\) At 441E-F.

\(^{26}\) At 444A-B.
that the NTC had failed to have regard to the evidence in respect of whether the SAR and H could provide a satisfactory service in the circumstances. He took into account and emphasised four particular aspects. In the first place, he held that even though the NTC was not obliged to give reasons for its decisions, an inference adverse to it and supportive of the argument that it ignored the evidence could be drawn where ‘as here, the only evidence presented is impressive and acceptable, remains unchallenged in cross examination and uncontradicted by other evidence’. Secondly, he pointed to the fact that, at no stage, had any member of the LRTB or the NTC suggested ‘that the facts testified to by the witnesses were incorrect or unacceptable or that the matter would be decided on a basis other than the said facts’. Thirdly, he observed that there had been no suggestion that ‘there was any fact or matter which would be taken into account by the Commission other than the facts and matters which had been adverted to in the course of argument’. Fourthly, Kotze JA pointed out that ‘no doubt was expressed at any stage upon the authenticity of the contents of the letters from the mining companies’ which all supported the appellant. From these factors Kotze JA concluded as follows:

'It follows that the conclusion to be arrived at, on the balance of probabilities, is that the Commission, by reason of ignoring the evidence, failed to apply its mind to the question, firstly, whether the appellant discharged the onus of proving that the transportation facilities provided by the Railway Administration were not satisfactory and sufficient to meet the transportation requirements of the mining industry within the area outlined in the application, or to the question, secondly, whether having regard to the circumstances it was expedient in the public interest to grant the permits applied for. It seems clear that on the evidence it should have come to a conclusion opposite to the one it did arrive at and that, in ignoring the cogency of the uncontradicted evidence presented to it, the Commission, in coming to the conclusion that the Railway Administration is able to provide a satisfactory service and that additional services are not necessary or in the public interest, arrived at a grossly unreasonable decision – one to which no reasonable body could in the circumstances of the present matter have come.'

27 At 447B-C.
28 At 448D-E.
29 At 448E-F.
30 At 448F-G.
31 At 448G.
32 At 448G-449A.
(c) Subordinate Legislation

The test for unreasonableness when the validity of subordinate legislation is challenged is set out in the famous English case of *Kruse v Johnson*[^33] which has been followed by South African courts on numerous occasions and, indeed, has never been questioned in this country.[^34] The appellant in that case challenged the validity of a by-law which forbade anyone from playing music or singing in any public place or highway within 50 yards of a dwelling house after being requested by a constable, the inmate of a house or his or her servant to desist from playing music or singing. Lord Russell CJ set out the test for unreasonableness as follows:[^35]

> ‘But unreasonable in what sense? If, for instance, they [the by-laws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, “Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires”’ But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.’

The application of *Kruse v Johnson* in South Africa is illustrated, in particular, by two cases discussed below.

In the first, *R v Carelse*,[^36] the validity of a regulation which purported to segregate the use of beaches on the basis of race was challenged when Carelse had been prosecuted for swimming at a ‘whites only’ beach. The regulation in question was made by the Governor-General purporting to act in terms of s10 of the Seashore Act 21 of 1935 which granted

[^33]: [1898] 2 QB 91, 99.
[^34]: See for example *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, 173 in which Stratford ACJ said: ‘When therefore the question of the unreasonableness of a by-law arises it is the function of this Court to decide the matter on the facts of the case, and it is now accepted that Lord Russell’s test is the one to be applied.’ See too Plasket and Furman *Subordinate Legislation and Unreasonableness: the Application of Kruse v Johnson* [1898] 2 QB 91 by the South African Courts’ (1984) 47 THRHR 416.
[^35]: At 99-100.
[^36]: 1943 CPD 242.
him power to make regulations not inconsistent with the Act ‘concerning the use of the seashore’ and ‘concerning bathing in the sea’. 37 From a description of the areas set aside for whites and blacks to swim, it would appear that the whites got all the sand while the blacks got all the rocks. 38 The result was that the regulation was set aside because it was unreasonable, being manifestly unjust. 39

R v Hildick-Smith 40 was an appeal by the state against the acquittal of a mine manager on a charge of contravening certain racially-based job reservation provisions contained in regulations promulgated under the Mines, Works and Machinery Act 12 of 1911. The respondent had allowed a worker who was not white to perform a job reserved for whites. The court set aside the regulation. Tindall J held that if ‘a regulation is unequal in its operation between different classes, it can only be justified by powers conferred by the enabling statute’, that the regulation in question had to be tested by its effect and that its effect was ‘to discriminate against a large section of the population on the ground of colour’. 41 Krause J, in a concurring judgment, identified the problem in slightly different terms. He held that the restrictions imposed by the regulation on ‘the rights of the citizen to so employ skilled and competent coloured persons or of such persons to be so employed, could never have been contemplated by the Legislature and are unreasonable and even capricious and arbitrary’. 42

(d) Legislative Intent and Ouster

The Kruse formula is sometimes seen as a mini bill of rights of the common law. This is a description that is borne out by cases such as Carelse and Hildick-Smith. It is also,

37 At 245-246.
38 See the description of the area at 254-256 which was given after the court hearing the appeal held an inspection in loco.
39 At 257.
40 1924 TPD 69.
41 At 76.
42 At 90.
however, a description that cannot be taken too far: at common law, review for unreasonableness, in any of the three senses described above, exists by virtue of a presumed legislative intent that powers delegated to administrators will not be exercised unreasonably. It is, in other words, always subject to the legislature authorising unreasonable administrative action.

The susceptibility of review for unreasonableness to exclusion is well illustrated by two judgments of the Appellate Division, given 20 years apart but dealing with the same issues. In Minister of the Interior v Lockhat, a proclamation made under the Group Areas Act 41 of 1950 having the effect that large numbers of people would be forced to move from their homes to another racial group area, or be forcibly removed from their homes, was challenged on the basis of its unreasonableness. In upholding the validity of the proclamation, Holmes JA held that the power to act unreasonably, while not expressly given by the legislature, was implied. The Act, he held, ‘represents a colossal social experiment and a long term policy … . Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future substantial inequalities’. The second judgment, S v Adams; S v Werner, involved the prosecution of people living in the wrong group area. The proclamation was once again challenged on the basis of its unreasonableness. It was argued that, after the passage of 20 years, the legislature’s mandate to act unreasonably ‘within the foreseeable future’ could no longer apply. Rumpff CJ did not accept this argument and simply applied Lockhat.

44 See, for example, Minister of Posts and Telegraphs v Rasool 1934 AD 167, 173 and R v Abdurahman 1950 (3) SA 136 (A), 149C.
45 1961 (2) SA 587 (A).
46 At 602C-F.
47 1981 (1) SA 187 (A).
48 Perhaps the most complete emasculation of review for unreasonableness was to be found in the Reservation of Separate Amenities Act 49 of 1953. It specifically provided that public amenities could be reserved for the use of particular race groups with no consideration of equality. In other words, this statute specifically undermined even the discredited ‘separate but equal’ doctrine of equality.
The second significant weakness of review for unreasonableness was its vulnerability to ouster clauses. In *Natal Indian Congress v State President* 49 Friedman J held that the crux of the reasoning of the majority in *Staatspresident v United Democratic Front* 50 was that all implied restrictions on the power of subordinate legislators, being judge-made requirements for validity, rather than legislatively intended restrictions on delegated powers, fell outside the ultra vires principle. This meant that the implied restriction on the promulgation of unfair, unjust or unreasonable subordinate legislation could not operate in the face of an ouster clause. 51

Since April 1994, the weaknesses set out above have largely been removed. The supremacy of the Constitution means that all exercises of public power are subject to it and that the jurisdiction of courts to determine the lawfulness, reasonableness and procedural fairness of administrative action cannot be ousted except by means of a law of general application that meets the criteria for the valid limitation of fundamental rights set out in s36(1) of the Constitution. It also means that legislative intent, while still important, is not as decisive as it previously was because the legislature can only exercise its powers within the four corners of the Constitution and, in particular, within the substantive limits set by the Bill of Rights. 52

(e) The Development of the Common Law

There can be little doubt that the deference evident in the *Union Steel* test has stultified judicial review of administrative action in South Africa. 53 As courts in other jurisdictions,

49 1989 (3) SA 588 (D).
50 1988 (4) SA 830 (A).
51 See chapter 7 above for a discussion on ouster clauses and their constitutionality.
52 See in particular, *Matiso v Officer Commanding, Port Elizabeth Prison* 1994 (3) SA 80 (SE). See too *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Parte Application of the President of the Republic of South Africa* 2000 (3) BCLR 241 (CC).
particularly in England, were beginning to come to terms with the need to develop new techniques to control the ever-increasing power of the modern administrative state, South African courts applied, unquestioningly, a test for abuse of power that did not bear much relevance to the changing conception of the state and its powers of regulation. Indeed, Union Steel itself involved the validity of a decision to withhold economic incentives at a time when state involvement in developing the economy was novel. But the state of the 1920’s and the state of the 1970’s, 1980’s and 1990’s were very different. By the last quarter of the 20th century it had largely been recognised that the modern state was not only a night-watchman but also a benefactor, that it did not only prescribe and regulate but that it also promoted social and economic interests and provided such necessities of life as housing, education, health care, welfare and minimum conditions of employment.

The changing nature of the functions of the state brought with it a change in conception of rights: that, for instance, entrepreneurs had rights, rather than privileges, to economic incentives, that welfare recipients were not the objects of charity by the state, subject to cancellation at will, but enjoyed rights to their grants. In short, in the modern state, what may once have been regarded as privileges are now regarded, in the terminology of Reich, as a new form of property. Despite this, and as late as 1979, in a case involving review for unreasonableness, one is able to find an explicit statement to the effect that the

55 See Chaskalson ‘Legal Control of the Administrative Process’ (1985) 102 SALJ 419, 422-423, who, writing about Theron's case said: ‘It has the merit of relative simplicity and the advantage that it allows greater freedom to the courts than does the formal test for exercising their historic role of protecting individuals against the power of the state and its officials. It also brings our law closer to developments which have taken place in the field of administrative law in England during this century. I mention this because the narrower and more formal approach of some of the earlier decisions in our courts may have been the result of the influence of English law. It would be ironic if that influence which was inconsistent with our own common law and which has now been left behind by the English courts, should survive in South Africa and determine the future course of judicial control of the administrative process.’
granting of a road transportation permit involves the granting of a privilege: in *W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board*\(^{58}\) Van Reenen J held:

‘The applicant made much of its alleged right to trade and that it did not seek an indulgence but a claim of right. I fail to appreciate this approach. It is difficult to conceive how it can be said that the business of hauling goods along public roads is a right, when the exercise of that “right” is dependant upon – (a) proof to the satisfaction of eg. the Commission that no adequate facilities of a like kind exists; and (b) the favourable exercise of the Commission’s discretion in favour of the intending haulier. It is common experience that in an advancing and proliferating community, many individual rights have been lost, some entirely, and others replaced by permissions.’

On the above approach, it is not difficult to see the basis for a deferential attitude to review for unreasonableness – to trace the line from *Union Steel* to *Johannesburg Local Road Transportation Board v David Morton Transport (Pty) Ltd*.\(^{59}\) Even allowing for a proper degree of deference when policy-laden decisions are taken by specialist tribunals, it is difficult to understand why the same test has been applied consistently to all types of administrative action, except for subordinate legislation: *Theron’s case*, while it has been welcomed by most writers – and criticized by at least one\(^{60}\) – has not been embraced with much fondness by the courts, even though its influence is apparent in *W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board*.\(^{61}\)

The lack of any consistent and principled development of review for unreasonableness, especially as executive power expanded in South Africa, was undoubtedly a major systemic weakness in South African administrative law. This flaw was pointed out by Mahomed who said that ‘[f]undamental to the resentment which most aggrieved citizens feel when a discretion has been exercised against them is the complaint that the official

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\(^{58}\) TPD 22 May 1979 (case number 2029/79) unreported. But see by way of contrast *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (A), 449B-C and *Tabakain v District Commissioner, Salisbury* 1974 (1) SA 604 (R), 606E-F.

\(^{59}\) 1976 (1) SA 887 (A).

\(^{60}\) Goldblatt ‘Constitutional and Administrative Law’ 1976 *Annual Survey* 1, 9-10.

concerned acted unreasonably. A credible system of law should be able to afford redress when such a complaint is based on legitimate and justifiable grounds’. 62 This weakness is all the more striking because the vast majority of the population had no access to the ballot box, before April 1994, as a means of redressing their grievances. 63

Within this context, Friedman JP’s judgment in Standard Bank of Bophuthatswana Ltd v Reynolds NO 64 assumes particular significance because it gave Jansen JA’s approach in Theron the stamp of approval in the post-1994 administrative law of the democratic constitutional South African state. In so doing, Friedman JP engaged with the issue of the appropriateness of the Union Steel test, even though the decision in question, taken by a member of the Industrial Court, was the type of decision contemplated in Theron. He held that the Union Steel test, ‘in view of the testing rights given to the courts in the Constitution of the Republic of South Africa Act 1993, does not accord with the modern approach to judicial review’ and that ‘it is necessary that the courts adopt the less stringent test of “unreasonableness” rather than the more restricted one of “gross unreasonableness”’. 65

9.2.3. Comparative Perspectives

Every developed system of administrative law recognises the need to ensure that administrators do not abuse their discretion by acting unreasonably, irrationally, unjustifiably, arbitrarily, capriciously or in a manner in which a legitimate end is achieved

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64  1995 (3) BCLR 305 (B). Note that at the time this judgment was delivered it was widely assumed that the fundamental right to administrative justice and the common law equivalent existed side by side. Consequently, post-1994 cases are to be found in which judges purported to apply common law grounds of review. See for instance Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight 1999 (8) BCLR 833 (SCA). This view has now been held to be incorrect. See Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC).
65  At 325E-G.
at the cost of imposing undue hardships on individuals. This jurisdiction to review the substance of administrative action is labeled differently in different jurisdictions but it is a universally accepted, albeit contentious, basis for interference by courts in the administrative arena. Indeed, the idea that underpins this ground of review is foundational to the constitutional state and is derived from the rule of law itself: in *S v Makwanyane* 66 Ackermann J held that the ‘idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution’. This view was confirmed in *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Parte Application of the President of the Republic of South Africa* 67 in which Chaskalson P stated that it was a ‘requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary’ and that, in order to be constitutionally valid, the exercise of such power was required, at least, to be ‘rationally related to the purpose for which the power was given’ from an objective point of view. Not surprisingly, given this foundation, one finds the jurisdiction to review administrative action for unreasonableness in one guise or another running through the administrative law of most, if not all, civilised countries. In England, much of the English-speaking Commonwealth, and countries which are influenced by English law, it takes the form of Wednesbury unreasonableness. 68 This fact is illustrated by the Zimbabwean case

66 1995 (6) BCLR 665 (CC), 725H-726C (paragraph 156). See too the Indian case of *State of Andhra Pradesh v Raja Reddy* AIR 1967 SC 1458, 1468 in which Subba Rao J observed in the course of developing the doctrine of non-arbitrariness in administrative law – a type of constitutionally inspired Wednesbury unreasonableness doctrine – that ‘official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately’.

67 2000 (3) BCLR 241 (CC), 272H-273B (paragraphs 85 and 86).

of Nyoni v Secretary for the Public Service, Labour and Social Welfare\textsuperscript{69} in which Gillespie J held that Wednesbury unreasonableness rather than gross unreasonableness was the appropriate standard of review.\textsuperscript{70}

In the United States of America, review for reasonableness appears to take place principally through s706 of the Federal Administrative Procedure Act which provides, inter alia, that administrative action may be challenged if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’. The arbitrary and capricious ground of review has been held in Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co\textsuperscript{71} to apply when ‘an agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise’\textsuperscript{72}

In Europe and in countries with legal systems influenced by the systems of European countries, the principle of proportionality, in particular, plays a significant role in ensuring that administrative powers are exercised rationally and reasonably. The essence of this principle is that administrative action, in order not to constitute an abuse of discretion, should be suitable or appropriate, necessary in the sense of being the least restrictive alternative available to the administrator, and proportional in the narrow sense in that it strikes a reasonable balance between prejudice to the individual and advantage to the

\begin{footnotesize}
\begin{itemize}
\item[70] 1997 (2) ZLR 516 (H).
\item[71] See especially at 523E-529A.
\item[72] 463 US 29 (1983), 44.
\end{itemize}
\end{footnotesize}
9.3. The Fundamental Right Defined

9.3.1. Section 24(d) of the Interim Constitution

Section 24(d) of the interim Constitution created a fundamental right to ‘administrative action which is justifiable in relation to the reasons given for it’ where a person’s rights were affected or threatened. This formulation continued to function after the coming into operation of the final Constitution, by virtue of item 23(2)(b) of Schedule 6 of the Constitution, until the Promotion of Administrative Justice Act had been passed. This right has received attention from both academic writers and the courts. The views of both writers and judges will be considered below.

(a) The Writers

It would appear that the intention of the drafters of s24(d) was to create a fundamental right akin (at the least) to a right to reasonable administrative action. They used the rather curious ‘justifiability’ formula instead of the more familiar term ‘reasonableness’ because some of the parties to the constitutional negotiations were unhappy about using the term ‘reasonableness’. Mureinik, who was responsible for introducing the term ‘justifiable’ in

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74 For the sake of simplicity reference has been made in this section to s24(d) even where, strictly speaking, the reference ought to be to the transitional provision. The Act was promulgated on 3 February 2000. It was, with the exception of s4 and s10, only brought into effect on 30 November 2000. It is not clear when the two remaining sections will be brought into operation.

75 Du Plessis and Corder Understanding South Africa’s Transitional Bill of Rights Cape Town, Juta and Co: 1994, 169.
place of ‘reasonable’ explained the background to the adoption of s24(d) as follows:76  

Paragraph (d) uses the term “justifiable” instead of “reasonable”. The wording derives from dissension during the drafting. In one of their early reports, the drafters of the Bill opposed the entrenchment of review of administrative decisions for unreasonableness on the ground that that would have “far reaching consequences for South African administrative law” (Technical Committee on Fundamental Rights During the Transition 7th progress report (29 July 1993) 6). This was a very curious objection – after all, much of the Bill, and the Constitution of which it is part, will have cataclysmic consequences for South African law – and it sparked fierce debate. At that stage there appeared to be two sources of resistance among political negotiators to the notion of review for unreasonableness. The one was the usual – and legitimate – anxiety that that idea might be abused by the courts to usurp the policy making prerogatives of the executives. The other was an anxiety arising from a somewhat irrational distrust of the word “reasonable”. In an effort to allay these concerns, I proposed a compromise administrative justice clause to certain political negotiators. The compromise clause tried to meet the first anxiety by defining the scope of the review jurisdiction in a way which attempted to guard against the kind of abuse feared. Paragraphs (2) and (3) of the compromise clause (below) embody this effort. And it tried to meet the second anxiety by replacing the word “reasonable” with “justifiable”, which I take to mean the same thing, but which is apparently freer of the connotations which dismay those who fear “reasonableness”. The compromise clause read as follows:

“Compromise Administrative Justice Clause:

18(1) Every person shall have the right not to be affected adversely by a decision made in the exercise of public power which is unlawful, procedurally unfair or not justifiable.

(2) A decision shall not be considered justifiable unless:

(a) a plausible answer can be given to any reasonable objection to the decision;
(b) a plausible explanation can be given why the decision was chosen in preference to any arguably superior alternative; and
(c) a rational connection can be shown between the premises of the decision (including any evidence or argument on which it purports to be based) and the decision itself.

(3) In deciding whether a decision is justifiable, the [designated authority] shall not usurp the prerogative of the decisionmaker to make such policy choices as the decisionmaker considers desirable in the interests of good governance, and it shall respect and uphold every such choice.

(4) Every person shall have the right to be furnished with reasons in writing for any decision, made in the exercise of public power, which affects him or her adversely.”

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In the end, as can be seen from the administrative justice clause actually enacted ... the legitimate anxiety was ignored, and no wording was adopted to guard against it; but the irrational anxiety was met, and the word “justifiable”, the sole survivor of the compromise clause, somehow found its way into the final product.’

It is apparent that Mureinik considered that s24(d) created a right to reasonableness review in all but name.77 Indeed, he wrote that the effect of s24(d) was to overrule two aspects of pre-1994 orthodoxy – that unreasonableness was not a ground of review on its own and that an extraordinary degree of unreasonableness was required before a court would set aside a decision on this basis.78 He concluded that s24(d) meant that courts could now review administrative action for reasonableness on its own.79 Other writers have given the right a similar meaning. Burns, for instance, has argued that the section requires that administrative action must be rational, reasonable and proportionate.80 Barrie, on the interpretation of s24(d) of the interim Constitution and s33(1) of the final Constitution, wrote that both contemplated reasonableness as the ‘former requires that administrative action be rational and capable of being reasonably sustained having due regard to the reasons underlying the decision’ and the ‘latter demands reasonableness in so many words’.81 De Waal, Currie and Erasmus interpreted s24(d) in much the same way:82

‘Subsection (d) of the right in item 23(2) (b) of Schedule 6 in effect requires rational administrative action, granting courts a wide power to review the reasonableness of an administrative decision. “Justifiable” is likely to be interpreted as synonymous with “reasonable”, especially since “justifiable” was substituted for “reasonable” during the process of drafting of the subsection, with the intention that the former term would cover the same ground as the latter. In avoiding the use of “reasonable”, the drafters perhaps wished to distinguish the approach taken to reasonableness in administrative law (an assessment of the justifiability of a decision) from that used in criminal law or delict (an assessment of whether conduct measures up to an objective standard). By contrast with the

78 Mureinik, op cit, 39-40.
79 At 40. See too Klaaren ‘Administrative Justice’ in Chaskalson et al, 25-16B.
complexities of this formulation, s33 of the 1996 Constitution grants a right simply to reasonable administrative action.’

Du Plessis and Corder, on the other hand, appear to favour a more restricted interpretation of the section. They argue that the term justifiability ‘goes some way towards incorporating a standard of “reasonableness” for valid administrative action, but it should be noted that such action need only be “justifiable in relation to the reasons given for it”. We prefer to view s24(d) as giving the right to a rational, coherent decision-making process, which will tend to produce a reasonable result, but which may on occasion not do so’.83 Similarly, Davis and Marcus, after observing that s24(d) created an important right to open and transparent administrative action, wrote that it may well have created a narrower right than would have been the case if the term ‘reasonable administrative action’ had been used ‘since a decision may be justifiable whereas the reasons given need not necessarily have an objectively reasonable basis’.84 They submitted that s24(d) required administrative action to be ‘rational, coherent and capable of being reasonably sustained having due regard to the reasons for such decisions’ – that a rational link between the decision and the reasons for it was contemplated.85 Devenish has suggested that s24(d) was likely to have an effect on symptomatic unreasonableness as a ground of review but stopped short of equating justifiability and reasonableness. Instead, he said that the section ‘indicates unequivocally that the courts will be able to review administrative action on the grounds of unreasonableness of some kind’.86

One writer has approached s24(d) from a different perspective. De Ville87 has argued that s24(d) simply introduced the European notion of proportionality. He argued that proportionality of governmental action is a fundamental component of a constitutional

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83 Understanding South Africa’s Transitional Bill of Rights Cape Town, Juta and Co: 1994, 169.
85 At 161.
state and that the text of s24(d) supported such an interpretation:

“The word “justifiable” in subsection 24(d) is very open ended. The fact that a right to justifiable administrative action is recognised in addition to the right to lawful administrative action (subs 24(a)), suggests an intention to create and entrench a new requirement of legality. It is submitted that no requirement will better serve the purpose of subsection 24(d) than proportionality. Only administrative action which is suitable and necessary to attain the statutorily prescribed purpose and which does not result in harm to an individual(s) which is out of proportion to the gains to the community can indeed be said to be “justifiable”.

These then are the interpretations of s24(d) offered by the academic writers. The views range from the assertion that the section introduced something akin to, but less than, a right to review for reasonableness, to the assertion that it contemplated proportionality, to the assertion that review for reasonableness is contemplated. What emerges from these views are the following: first, the drafters of the section, by pandering to the irrational antipathy of some towards the term ‘reasonable’ created a great deal of confusion; secondly, by linking the requirement of justifiability directly to the reasons in the way in which they did, the drafters compounded the confusion which they created; and thirdly, for these reasons, they did not, through s24(d), impel South African administrative law into a new era of official accountability as a less complicated provision could have. Despite their best efforts, however, they succeeded in creating, in all but name, a right to reasonable administrative action.

88 At 362-364.
89 At 365. He also says at 365: ‘The desire expressed in the preamble to establish a (material) constitutional state (the principle of proportionality being a formal principle upon which such a state is based), strengthens the argument for an interpretation of section 24(d) which demands proportionality when an individual’s rights are affected or threatened by administrative action.’
90 See Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 41-42; Davis and Marcus in Davis, Cheadle and Haysom (eds), op cit, 160-161. See too Yarntex (Pty) Ltd v East London Transitional Local Council ECD undated judgment (case number EL 202/98) unreported, 10 where Jansen J read s24(c) and s24(d) together. He held: ‘In order to succeed in its claim the plaintiff is required to prove that a decision of the defendant was not justifiable in relation to the reasons given for it. This postulates a situation where reasons have been made public or where reasons have been requested and given.’ Obviously, this approach would mean that the right to rationality review only arises through requests for reasons, a doubtful proposition.
(b) The Judges

The difficulties which the academic writers have had in defining the right created by s24(d) have, to some extent, been reflected in the cases. Despite this, a start has been made by the courts to develop, as was suggested by Mureinik, a theory of what makes a decision justifiable or unjustifiable. That said, however, the courts have not fleshed out the right in all of its manifestations. The first fleeting reference to s24(d) in the cases is to be found in *Qozoleni v Minister of Law and Order*, a case involving the constitutionality of the common law rules of docket privilege. In discussing the requirements of reasonableness and justifiability in s33(1), the limitation section of the Bill of Rights, and the proportionality test developed by the Canadian courts in the limitation analysis, Froneman J equated s24(d) and s33(1). He said that the Canadian case of *R v Oakes* provides that, to satisfy the Canadian Charter’s limitation clause (which differs from section 33(1), but also refers to reasonableness as a criterion for limitation) the interest underlying the limitation must be of sufficient importance to outweigh the right that was infringed, and the means used to protect that interest must be proportional to the object of the limitation ... . This formulation, or at least the second portion thereof, echoes the provision of section 24(d) of the Constitution ... .

The relationship of s24(d) with the symptomatic unreasonableness standard was alluded to in *Maharaj v Chairman of the Liquor Board*, a statutory review in terms of the Liquor Act 27 of 1989, as well as in terms of s24 of the interim Constitution. In terms of s131(a) of the Act gross unreasonableness is a ground of review. Nicholson J observed that the statutory grounds of review were much narrower than the constitutional ground contained in s24(d) and ‘to the extent that they limit an applicant’s rights to review the present respondent are inconsistent with the said provisions of the Constitution’. He proceeded

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91 1994 (1) BCLR 75 (E).
93 At 90D-F.
94 1997(2) BCLR 248 (N).
95 At 251D.
to decide the matter on the basis that the respondent’s decision was grossly unreasonable, but stated that even if he was wrong in this respect, the respondent ‘manifestly cannot justify his decision even with the reasons furnished in his answering affidavit in this application. Had I not been satisfied that the respondent’s decision was the product of gross unreasonableness, I would have referred the matter to the Constitutional Court as the Supreme Court does not have jurisdiction to enquire into the constitutionality of any Act of Parliament’. At 251E-F.

In Kotze v Minister of Health Spoelstra J held that s24(d) widened the scope of review in that it enabled a court to set aside administrative action if an administrator’s reasons for acting showed that his or her decision was not based on ‘accurate findings of fact and a correct application of the law’. He observed that the consequence of this finding was that the distinction between review and appeal had been eroded to a large extent as, for a review under s24(d) to succeed, a court was required to conclude that ‘the reasons advanced for the action under review are not supported by the facts or the law or both’. In Roman v Williams NO Van Deventer J went further. He held that s24(d) envisaged the ‘requirement of proportionality between means and ends and that the role of the courts in judicial review is no longer limited to the way in which an administrative decision was reached but now extends to its substance and merits’: on this basis he held that for administrative action to be justifiable in relation to the reasons for it, it must meet the requirements of suitability, necessity and proportionality. This, in turn, meant that administrative action could be tested for reasonableness and that the gross

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96 At 251E-F.
97 1996 (3) BCLR 417 (T).
98 At 425E-G. Spoelstra J’s statement that s24(d) of the interim Constitution requires that administrative action, to avoid successful challenge for unreasonableness, must be shown to be ‘adequately just or right’, and that s24(d) of the interim Constitution had ‘largely eroded’ the difference between review and appeal should not be taken at face value. In the first place, these statements are qualified in the same paragraph of the judgment in which they appear and secondly, they are simply not correct: see Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC), discussed below, in this regard. The grounds of review have undoubtedly been expanded by the Constitution but they remain grounds of review.
99 1997 (9) BCLR 1267 (C).
100 At 1275E-1276C.
In Carephone (Pty) Ltd v Marcus NO\textsuperscript{102} Froneman DJP held that s24(d) introduced ‘a requirement of rationality in the merit or outcome of the administrative decision’ which went beyond ‘mere procedural impropriety as a ground of review, or irrationality only as evidence of procedural impropriety’.\textsuperscript{103} The essence of this ground of review, he held, was whether there existed, in an administrative decision, ‘a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at’.\textsuperscript{104} Carephone has been confirmed by the Labour Appeal Court in Shoprite Checkers (Pty) Ltd v Ramdaw NO\textsuperscript{105} in which Zondo JP held that ‘although the terms “justifiable” and “rational” may not, strictly speaking, be synonymously, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in Carephone. In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable’.\textsuperscript{106}

(c) Conclusions

It is submitted that those who have suggested that s24(d) did not create a right to review for unreasonableness, to use the terminology of the common law, are incorrect. Friedman JP, while claiming to develop the common law in Standard Bank of Bophuthatswana Ltd v Reynolds NO\textsuperscript{107} demonstrated clearly that the gross unreasonableness standard is inappropriate in a constitutional state and that, in view of the enhanced power of review vested in the courts, unreasonableness on its own – Wednesbury unreasonableness, in

\textsuperscript{101} At 1278H-I.
\textsuperscript{102} 1998 (10) BCLR 1326 (LAC).
\textsuperscript{103} At 1336E (paragraph 31).
\textsuperscript{104} At 1337E-G (paragraph 37).
\textsuperscript{105} 2001 (4) SA 1038 (LAC). See too Derby-Lewis v Chairman, Amnesty Committee of the Truth and Reconciliation Commission 2001 (3) SA 1033 (C), 1065F.
\textsuperscript{106} At XXX (paragraph 25).
\textsuperscript{107} 1995 (3) BCLR 305 (B).
other words – was the appropriate standard of review. It has been shown above that review for unreasonableness, although the formulae used to describe it may vary, is a common thread that runs through the administrative law of virtually every civilised country and owes its existence to the rule of law. Within this context, s24(d) was nothing other than a rather inelegant and less than precise attempt to capture this universal concept. This is confirmed in Carephone (Pty) Ltd v Marcus NO in which Froneman DJP held that ‘justifiable’ meant ‘able to be legally or morally justified, able to be shown to be just, reasonable or correct’, a formulation which is similar to, but perhaps slightly wider than, Diplock LJ’s explanation of what constitutes Wednesbury unreasonableness in Council of Civil Service Unions v Minister for the Civil Service: that it ‘applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’.

9.3.2. Section 33 of the Final Constitution

Section 33(1) of the final Constitution resolves the problem of scope which s24(d) of the interim Constitution created. It provides that everyone has the right to reasonable administrative action, in addition to the rights to lawful and procedurally fair administrative action. This formulation removes a number of difficulties which the justifiability formula created, not the least of which was the ostensible linkage between justifiability and reasons – between s24(d) and s24(c). Now, s33(1)’s guarantee of reasonable administrative action ‘allows the court to examine the substantive justification for the administrative action

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108 At 325E-G.
109 Supra.
110 At 1336F (paragraph 32).
111 [1984] 3 All ER 935 (HL).
112 At 951a-b.
113 See in this respect, Yarntex (Pty) Ltd v East London Transitional Local Council ECD undated judgment (case no EL202/98) unreported; Moletsane v Premier of the Orange Free State 1995 (9) BCLR 1285 (O).
taken\textsuperscript{114} without being hindered by the oblique wording of s24(d).\textsuperscript{115}

9.3.3. The Promotion of Administrative Justice Act

Section 6(2) of the Act lists the grounds of review for lawfulness, procedural fairness and reasonableness. Those grounds that relate to review for reasonableness are: that the administrative action was taken ‘because irrelevant considerations were taken into account or relevant considerations were not considered’,\textsuperscript{116} in bad faith\textsuperscript{117} or arbitrarily or capriciously;\textsuperscript{118} that the administrative action was not rationally connected to either ‘the purpose for which it was taken’, the ‘purpose of the empowering provision’, the ‘information before the administrator’ or the ‘reasons given for it by the administrator’;\textsuperscript{119} or that the ‘exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function’.\textsuperscript{120} The final ground of review, which does not relate to reasonableness directly, is that the administrative action is ‘otherwise unconstitutional or unlawful’.\textsuperscript{121}

The definition of unreasonableness drawn from these grounds of review is incomplete in at least three respects. First, it does not specifically empower a court to review administrative action for vagueness or uncertainty. Secondly, it does not explicitly enjoin administrators to consider alternatives, to favour the least drastic alternative and otherwise to balance means and ends. In other words, the definition does not explicitly require

\textsuperscript{114} Davis and Marcus ‘Administrative Justice’ in Davis Cheadle and Haysom (eds) \textit{Fundamental Rights in the Constitution} Cape Town, Juta and Co: 1997, 155, 163.
\textsuperscript{115} See too Devenish \textit{A Commentary on South Africa’s Bill of Rights} Durban, Butterworths: 1999, 473-475.
\textsuperscript{116} Section 6(2)(e)(iii).
\textsuperscript{117} Section 6(2)(e)(v).
\textsuperscript{118} Section 6(2)(e)(vi).
\textsuperscript{119} Section 6(2)(f)(ii).
\textsuperscript{120} Section 6(2)(h).
\textsuperscript{121} Section 6(2)(i).
administrators to act proportionately. Thirdly, it does not explicitly state that a violation of the principle of equality is a ground for review for unreasonableness. These issues will be discussed below after the other named grounds of review have been considered.

In the discussion that follows it must be borne in mind that even though the concept of review for unreasonableness is now codified in the Act it does not necessarily mean that the bounds of unreasonableness are any easier to identify than they have been in the past, or that the difficulties that have always beset review for unreasonableness have now been removed. It must also be borne in mind that which specific ground of review is relied upon by a court to set aside a particular exercise of administrative power may be arbitrary in the sense that many of the facets of unreasonableness overlap and can often be used interchangeably, and that terms are not used consistently by lawyers or judges.

(a) Relevancy

Section 6(2)(e)(iii) of the Act provides that administrative action may be reviewed if ‘irrelevant considerations were taken into account or relevant considerations were not considered’. This is a well recognised common law ground of review. The primary

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122 On a similar issue but within a different context, Jowell says of review for unreasonableness in English law: ‘Recent attempts in English law to reformulate unreasonableness into “a decision so unreasonable that no person acting reasonably could have come to it”, or a decision which elicits the exclamation: “My goodness, that is certainly wrong!” do help to give an indication of the flavour of the conduct that qualifies as being within the concept of unreasonableness, but are no more helpful as guides to its precise parameters.’ (‘Judicial Review of the Substance of Official Decisions’ 1993 Acta Juridica 117, 120.

123 Baxter, 497. For example, a decision that is contrary to the evidence placed before the decision-maker can just as easily and accurately be described as having been taken on the basis of relevant considerations having been ignored, in bad faith, arbitrarily and capriciously or unjustifiably and irrationally. No doubt other labels could also be used to describe this unreasonable exercise of power. See too North West Townships Ltd v Administrator, Transvaal 1975 (4) SA 1 (T), 8G in which it was held that a failure on the part of an administrative decision-maker to apply his or her mind included ‘capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles’.

124 See the statement of the grounds of review at common law contained in Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A), 152A-D.
importance of this ground of review is that the stipulation of what is relevant to an exercise of power (and what is not) is one of the principal ways in which discretion can be structured.\textsuperscript{125} Usually, these matters are not exhaustively set out in the empowering legislation and have to be inferred from its tenor.\textsuperscript{126} The fact that courts do often determine relevancy by inference in this way shows, in the words of Wade and Forsyth, how ‘fallacious it is to suppose that powers conferred in unrestricted language confer unrestricted power’.\textsuperscript{127} Generally speaking, when an administrative decision-maker has taken relevant considerations into account, a court on review will not concern itself with the weight the decision-maker attached to each. The decision as to the relative importance of each in the exercise of administrative discretion is considered to fall within the decision-maker’s zone of choice, and intervention on this basis would amount to a usurpation of the administrative function by the court.\textsuperscript{128} It would normally, in other words, transgress the boundary between review and appeal.\textsuperscript{129}

There is one aspect of relevancy that requires re-assessment in the light of the Constitution’s commitment to open, accountable and responsive administration and to the culture of justification. That is the question of the weight attached by an administrator to relevant considerations especially in the form of the rights contained in the Bill of Rights. In other words, the issue involved is whether the right to reasonable administrative action extends beyond the common law in that the weight attached to fundamental rights, when

\textsuperscript{125} Baxter, 501.
\textsuperscript{126} Baxter, 502.
\textsuperscript{127} Wade and Forsyth, 406.
\textsuperscript{128} Baxter, 505.
\textsuperscript{129} As a ground of review, relevancy has been uncontroversial in South African law until Minister of Law and Order v Dempsey 1988 (3) SA 19 (A) in which Hefer JA departed from the established principles to hold that unless the relevant considerations or those factors which may not be considered are spelt out in the empowering provision, it lies exclusively within the power of the administrative decision-maker to determine what is relevant or irrelevant to the decision, as well as to the weight to be attached to those considerations which he or she has decided are relevant. (At 35D-E. See too Sisulu v State President 1988 (4) SA 731 (T). The error of this view of the law is patent. See Cachalia and Plasket ‘Procedural Protection for Detainees and Representatives for Release’ (1989) 5 SAJHR 73, 77. See further Mahomed ‘Disciplining Administrative Power – Some South African Prospects, Impediments and Needs’ (1989) 5 SAJHR 345, 349.)
they have to be weighed against other considerations, such as the safety of the public or economic development for instance, is justiciable on review.\textsuperscript{130} The common law recognizes that when something must be taken into account in the decision-making process, it must be taken into account properly. To this limited extent, at least, the courts have been prepared to intervene on questions of weight. The principle is set out in \textit{Bangtoo Brothers v National Transport Commission}\textsuperscript{131} in which Henning J held that it was ‘essential that the tribunal is essentially obliged to consider all relevant and material information placed before it. To pay mere lip service to this obligation is not sufficient, just as it would be a dereliction of duty to hear representations which are pertinent, and then to ignore them’. While courts will, no doubt, be careful to ensure that they maintain the distinction between appeal and review – that they maintain their distance from the administrative decision-making process – they are, at the same time, under a stricter duty than before to ensure that the executive respects, protects, promotes and fulfills the rights contained in the Bill of Rights.\textsuperscript{132}

This may mean that the courts will be required to play a more active and interventionist role in judicial review of administrative decision-making in line with the enhanced substantive review jurisdiction which flows from the Constitution.\textsuperscript{133} In other words, the courts will be

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\textsuperscript{130} It has been held that ‘the more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account’ (\textit{CREEDNZ v Governor-General} [1981] 1 NZLR 172). This approach to the relevance of fundamental rights in administrative decision-making has been applied by the English courts in relation to the (non justiciable) fundamental rights contained in the European Convention on Human Rights and Fundamental Freedoms of 1950: the Convention is ‘treated by the courts as a factor to be taken into account, presumably by implication in statutes passed since that date’ (Wade and Forsyth, 410.) The authors say that this is ‘one aspect of the increasing desire of the judiciary to give some legal effect to the Convention, which Parliament has failed to incorporate into the law of the land’.

\textsuperscript{131} 1973 (4) SA 667 (N), 685A-C.

\textsuperscript{132} The state, in general, is under this duty in terms of s7(2) of the Constitution. As the arm of government charged with ensuring compliance with the Constitution on the part of the legislature and the executive, s7(2) read with s2 and s8(1), must be taken to place a positive duty on the courts to ensure proper compliance.

\textsuperscript{133} See Baxter, 320, who says of review and justiciability: ‘The power to review is, in a sense, a power of government and it does not merely involve a mechanical “application of the law to the facts”. The outer boundary of review is a matter of political significance; and it ebbs and flows in sympathy with the continuously fluctuating interrelationship of the three organs of government.’ While the Constitution does not say where the line is to be drawn between the three organs of government, and
called upon to ensure that when a provision of the supreme law is relevant to a decision, it is taken into account and that it is taken into account properly. Given the immense power of the bureaucracy in the modern state, it would allow the executive to slip the net of constitutionalism if the courts were not prepared to assert themselves in this way.\footnote{134} In all likelihood the question of the weight to be attached to fundamental rights in particular instances, and especially when rights clash, will usually be decided on the broader basis of rationality in terms of s6(2)(e)(vi), s6(2)(f)(ii) or s6(2)(h) of the Act.\footnote{135} Ultimately, this is a question of proportionality, which is also at the heart of the Constitution.

(b) Bad Faith

Doubt has been expressed by some commentators as to whether bad faith is a common law ground of review on its own.\footnote{136} Most writers take a contrary view and argue that it is a ground of review in its own right.\footnote{137} Whichever of these schools of thought is correct is

\footnote{134}{By applying a more lenient standard of review to administrative decision-making than to legislation, the courts would be in danger of sanctioning a situation where the executive may be tempted to do things by way of delegated powers rather than legislation to avoid the full force of the Bill of Rights. Such an approach has been criticized as long ago as 1895 in Sigcau v The Queen 1895 12 SC 256.}

\footnote{135}{For an analogous situation, in which the issue of weight was dealt with in terms of Wednesbury unreasonableness, see West Glamorgan County Council v Rafferty; R v Secretary of State for Wales, ex parte Gilhaney [1987] 1 WLR 457 (CA), especially at 474H-478C.}

\footnote{136}{Wiechers, at 254-257 has argued that it is not, although non-compliance with the requirement of good faith may have an impact on whether a court will review administrative action even when internal remedies have not been exhausted, or whether a court will remit a decision to the administrative functionary in question or substitute its own decision for the functionary’s invalid decision (at 256-257). His argument, in essence, is that bad faith presupposes an awareness (or imputed awareness) on the part of the administrative functionary that he or she is acting wrongfully – the administrative functionary ‘knows or should know that, but for its ignorance, negligence or failure to comply with requirements for validity, its act would be invalid because of excess of power, non-compliance with formal requirements, use of powers for an ulterior purpose or the unreasonableness of its consequences, but nevertheless persists in performing the invalid act’ (at 254). As a result, he argues, it is logically impossible for an administrative act to be valid in every respect but to be performed nonetheless in bad faith (at 255).}

\footnote{137}{Baxter, for instance, argues that the view of Wiechers is not borne out by the cases. His view is that even if cases involving dishonesty – the worst form of bad faith – are rare, ‘a principle is not disproved by the paucity of its application’ (at 515). He argues further that, from the earliest cases, courts have been certain about one ground of review and that is bad faith (at 516).}
now irrelevant because s6(2)(e)(v) of the Act provides that administrative action may be reviewed if the action was taken in bad faith. It would have been surprising if this had not been the case: first, the Constitutional Court, in President of the Republic of South Africa v South African Rugby Football Union138 singled out good faith as an element of the principle of legality, an aspect of the rule of law, which is enshrined in the Constitution as a founding value; secondly, a duty to act in good faith, and a corresponding proscription on acting in bad faith, is consonant with the values and principles that govern public administration contained in s195(1) of the Constitution, particularly those provisions that require a high standard of professional ethics,139 the impartial, fair, equitable and unbiased provision of services,140 the accountability of public administration,141 and transparency;142 thirdly, even without the above provisions, political morality would require that public powers entrusted to public officials ought to be exercised honestly and otherwise in good faith.143 It is important to bear in mind that bad faith comes in a variety of shapes and forms and does not necessarily involve dishonesty.144 Baxter explains the position as follows:145

‘The courts used the term “mala fides”. This was unfortunate because the term is used in both a strict and loose sense. In its strictest usage, “mala fides” refers to fraud, dishonesty or corruption; but it is also often used in the cases in a less pejorative way to refer to the wrongful use of power even where the official concerned has been perfectly honest. As the various grounds of review for abuse of discretion became clearer, the flexibility of this term enabled it to be used misleadingly as a rubric for all forms of abuse: thus when judges said that they would only review the action in question if there

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138 1999 (10) BCLR 1059 (CC), 1123C-D (paragraph 148).
139 Section 195(1)(a).
140 Section 195(1)(d).
141 Section 195(1)(f).
142 Section 195(1)(g).
143 The essence of bad faith in administrative law is the fraudulent or malicious exercise of power. De Smith, Woolf and Jowell, at 554 (paragraph 13-012) explain what this means: ‘A power is exercised fraudulently if its repository intends to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.’
144 It is also important to bear in mind that the grounds of review tend to overlap and more than one ground may apply to one particular administrative act.
145 At 516-517. See too De Smith, Woolf and Jowell at 553 (paragraph 13-010): ‘Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with motives such as fraud (or dishonesty), malice or personal self interest.’
had been “mala fides” this did not necessarily imply that they would only set aside decisions which had been actuated by dishonest motives. As they had begun to appreciate this, judges have had to emphasise that “mala fides” does not necessarily imply dishonesty.’

Pillay v Licensing Officer, Umkomaas\(^\text{146}\) affords a prime example of the stricter usage of the term bad faith. The applicant had applied to the first respondent, who had been appointed by the Umkomaas Town Board, for a fresh produce dealers licence. Five of the seven members of the Town Board, together with other residents, had objected against his application. The application was refused and the applicant appealed to the Town Board. The five members of the Town Board who had objected recused themselves. That left the Town Board without a quorum. The applicant was thereby denied his right to appeal.\(^\text{147}\) In issuing a mandamus to compel the issue of the licence, Dove-Wilson JP held:\(^\text{148}\)

> ‘In my opinion a similar element to fraud is found in the circumstances of the present case. We cannot acquit the five members of this board of knowing that any decision given by the licensing officer was subject to an appeal to themselves. In that knowledge they deliberately lodged objections and attempted to influence his judgment in the direction of a refusal to issue the certificate, and so disqualified themselves from entertaining the appeal, and rendered it impossible. Their conduct has been so extraordinary that, in the absence of any explanation, and they have given none, they cannot complain if we can only regard it as tainted by want of good faith.’

Radebe v Minister of Law and Order\(^\text{149}\) provides an example of the ‘less pejorative’ version of bad faith. It involved an application for the release of one Theophilus Mashiyane who, having found himself at the wrong place at the wrong time, had been arrested and detained in terms of the Emergency Regulations which had come into force three days before.\(^\text{150}\)

\(^{146}\) 1930 NLR 111.

\(^{147}\) At 113-114.

\(^{148}\) At 117. See too Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) in which the Appellate Division dismissed an appeal against a decision in which the court below had ordered the appellant to issue a certificate authorising the respondent to carry on business as a fresh produce dealer on a particular site. (At 493D.) The respondent’s papers disclosed a ‘fraudulent conspiracy on the part of the Location Superintendent and other location officials in the employ of the Council to deprive respondent of his rights’. (At 494F-G.)

\(^{149}\) 1987 (1) SA 586 (W).

\(^{150}\) At 588E-589A.
Mashiyane was spending the night with his girlfriend, the applicant, in her university residence room, when the residence was raided by the police. When the police discovered that Mashiyane was employed by an American media company as a sound-man, he was arrested and detained. At 589D-I. The police had no knowledge of Mashiyane, they were not looking for him and his presence at the residence when the raid occurred was fortuitous. At 594H. On these facts, Goldstone J held that the decision to arrest Mashiyane was taken in bad faith. It is clear from the context, however, that the term was used to connote a failure on the part of the arresting member of the police to properly apply his mind to the matter: they could not, on the facts available to them, have held an honest belief that his arrest and detention were necessary for one of the purposes envisaged by the Emergency Regulations.

The bad faith of the decision-maker in Similela v Member of the Executive Council for Education, Province of the Eastern Cape lay between the fraudulent conspiracy in Pillay and the cynical failure to apply the mind in Radebe. The respondents had transferred all of the teachers at a school that was beset by problems ranging, according to the investigation of a task team, from poor results to some teachers lacking ‘commitment to their profession’. Francis AJ, in setting aside the transfers, held that the only reasonable inference to be drawn from the failure of the respondents to institute disciplinary proceedings against suspected wrong-doers was that ‘the decision to remove the applicants from their posts under the guise of a purported secondment and then transfer was nothing more than an attempt to avoid putting the allegations of the task team to the test and to deny the applicants an opportunity of placing their versions before an independent decision-maker’.

(c) Arbitrariness and Caprice

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151 At 589D-I.
152 At 594H.
153 At 595H.
155 At 22 (paragraph 51).
Section 6(2)(e)(vi) of the Act provides that administrative action that is arbitrary or capricious is subject to review. The word ‘arbitrary’ in its ordinary sense means, according to the Oxford Paperback Dictionary, ‘based on random choice or impulse, not on reason’. According to the same dictionary, ‘caprice’ means ‘a whim’ and ‘capricious’ means ‘guided by caprice, impulsive’. These definitions accord closely with the legal definition of the terms, usually used in combination, as in the Act, to describe purposeless, irrational or unreasonable administrative action: in Johannesburg Liquor Licensing Board v Kuhn\(^{156}\) Holmes JA held that arbitrariness connotated ‘caprice, or the exercise of the will instead of reason or principle, without a consideration of the merits’.

In a leading case on symptomatic unreasonableness, it was held that if an exercise of administrative power is grossly unreasonable, it may be inferred from this fact that the decision-maker must have failed to apply his or her mind, and thus abused his or her discretion by either acting in bad faith, for an improper motive, arbitrarily or capriciously.\(^{157}\) It is obvious why administrative action that is arbitrary or capricious is considered to be unreasonable: it will not be in accordance with the behests of the provision empowering the decision-maker and will thus make the decision-maker, rather than the legislature, the person or body who decides on the limits of the decision-maker’s powers. It has been held that the rule of law requires that any exercise of public power in a constitutional state, in order to be valid, may not be arbitrary.\(^{158}\) This is so, in the words of Ackermann J in S v Makwanyane,\(^{159}\) because the ‘idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law; arbitrary action is at odds with this culture of justification.

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\(^{156}\) 1963 (4) SA 666 (A), 671.

\(^{157}\) National Transport Commission v Chetty’s Motor Transport (Pty) Ltd 1972 (3) SA 726 (A), 735G.

\(^{158}\) Pharmaceutical Manufacturers Association of South Africa: In Re; Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 272H (paragraph 85).

\(^{159}\) 1995 (6) BCLR 665 (CC), 725I-726B (paragraph 156).
Francis AJ in Similela v Member of the Executive Council for Education\(^\text{160}\) identified arbitrary and capricious administrative action in what he described as the ‘shotgun’ approach of the respondents to transfer every teacher from a school that was, in the view of the respondents, underperforming. He pointed out that no attempt had been made to identify those teachers who may have been responsible for the unsatisfactory state of affairs at the school and to discipline them.\(^\text{161}\) The approach taken instead, of ‘removing the entire staff of the school from their posts on the basis of untested allegations, was inherently unfair, irrational, disproportionate and contrary to the interests of education in the Province, and unconstitutional.’\(^\text{162}\) He concluded further that the respondents’ actions did not meet the standard of rationality and non-arbitrariness required of them by the Constitution:\(^\text{163}\)

\[55.1\] By deciding to remove the entire staff of the school for what they perceived to be the unacceptable performance of the institution as a whole, the respondents failed to discharge their duty to protect the interests of individual educators whose performance was affected only by those adverse conditions.

\[55.2\] The decision was plainly arbitrary in the sense that no proper investigation was conducted to identify the educators who were responsible for the school’s alleged poor performance, and no action

\(^\text{160}\) LC 17 May 2001 (case no P267/2000) unreported. See too Livestock and Meat Industry Control Board v Robert S Williams (Pty) Ltd 1963 (4) SA 592 (T) in which the respondent (which carried on business as a butchery under the authority of a certificate issued by the appellant) moved premises from Harrison Street to Loveday Street to Joubert Street in central Johannesburg over a period of about four months. These premises were all within a few hundred metres of each other. On each occasion the respondent applied for the transfer of the certificate. On the last occasion the application was refused. In setting aside the appellant’s decision and ordering it to issue the certificate, Dowling AJP held: ‘We have, therefore, this position. There had been a successful application by the applicant some three months before the present application. On the occasion of the present application, on the same facts and figures, the Board executed a sudden volte-face and refused the application on the grounds stated. Having regard to the fact that there had been no apparent change in the picture, excepting that so far as the applicant is concerned the picture might have changed favourably to it in view of the steady increase of population of Johannesburg, it is difficult to understand how the Board found itself able to refuse the application. It is possible in theory that it had not fully considered the applicability of the amended section on the occasion of the earlier application. But it does not say so. It was invited to give its reasons. It was not bound to give its reasons, but if it did not give satisfactory reasons then an inference might be drawn against it. Prima facie the refusal of the application was in the circumstances, in our opinion, arbitrary or capricious and grossly unreasonable.’ (At 598A-C.)

\(^\text{161}\) At 21 (paragraphs 49 and 50).

\(^\text{162}\) At 22 (paragraph 54).

\(^\text{163}\) At 23 (paragraph 55).
was taken against them alone.

55.3 The rational response of a responsible educational authority to an under-performing school is to take steps to identify the responsible educators and to take action in respect of them. A blanket decision to remove all the educators is an abrogation of the duty to institute a proper investigation, and is wholly disproportional.’

In Cash Paymaster Services (Pty) Ltd v Province of the Eastern Cape\textsuperscript{164} the award of a tender was successfully challenged for lack of rationality. The court held that a range of irregularities vitiated the decision of the Provincial Tender Board. One was its arbitrary approach which was the result of pressure having been placed on it to deal with the matter urgently. Pickard JP dealt with this irregularity as follows:\textsuperscript{165}

‘It is however clear from the deliberations of the Board that the Board expressed grave concern at the fact that it was not in possession of all relevant information that it required to make a justifiable decision. Nevertheless it allowed itself to be blinded by the so-called “urgency” and to overlook their lack of information and knowledge and to make what turned out at the end to be an arbitrary and incorrect decision. This decision must be arbitrary if the Board did not have the information that it considered essential for purposes of making its decision. Haste can barely be used as an excuse for coming to incorrect conclusions on inadequate facts.’

(d) Lack of Justifiability

The ground of review provided for in s6(2)(f)(ii) of the Act deals with what may be termed, from the perspective of the decision-making process, unjustifiable decisions: Jowell has described this aspect of unreasonableness as relating to administrative decisions that are ‘irrational in the strict sense of the term’ as where there is ‘an absence of evidence in support of the decision, where there is an absence of logical connection between the evidence and the ostensible reason for the decision, where the reasons display no logical justification for the decision, or where the reasons themselves are simply unintelligible’\textsuperscript{166}. Section 6(2)(f)(ii) is to the effect that administrative action is subject to challenge if it is not

\begin{footnotesize}
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\item[\textsuperscript{164}] [1997] 4 All SA 363 (Ck).
\item[\textsuperscript{165}] At 381a-c.
\item[\textsuperscript{166}] ‘Judicial Review of the Substance of Official Decisions’ 1993 \textit{Acta Juridica} 117, 122-123.
\end{itemize}
\end{footnotesize}
It should be noted, however, that many other examples are to be found even within the strictures of the gross unreasonableness paradigm of pre-1994 common law. WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board 1982 (4) SA 427 (A) is a case in point. (See too Theron v Ring van Wellington van die NG Sendingkerk in Suid Afrika 1976 (2) SA 1 (A).) It was held in that case that the respondent's decision was grossly unreasonable because there was no rational connection between the evidence and the decision. On the reasonable evidence principle, see Baxter, 497-501. See too Nyoni v Secretary for the Public Service, Labour and Social Welfare 1997 (2) ZLR 516 (H), 528E-529A, in which Gillespie J held: 'One is able therefore to state that the irrationality of a decision, in that it has no basis in evidence, is an acceptable ground of review. It will be established not only where there is no evidence upon which the decision can be based, but also where the evidence, although present, was so inadequate that no finding could reasonably be based thereon. Or, put another way, that no person properly applying his mind to the issue could reach such a conclusion. It is not necessary to go so far as to conclude that the decision is such that there must have been improper motive. In no case, however, may the enquiry degenerate into a mere re-evaluation of the merits of the decision. The mere fact that the reviewing judge might have come to a different conclusion is no ground for interference.'

In Kotze v Minister of Health the applicant, a senior member of the respondent’s department, had applied to review and set aside a decision of the Director-General refusing him early retirement on medical grounds. He alleged that the decision had been taken on incorrect facts, that he had a right to be heard on issues which were taken into account but which did not form part of his application and that the Director-General had misconceived the basis of his application for early retirement on medical grounds. Spoelstra J found that the Director-General’s decision was not justifiable because she had reached her conclusion in the face of the medical evidence, including the evidence of doctors appointed by the department itself. This amounted to working from an assumption that the doctors involved had not done their work properly and had been guilty of gross dereliction of duty in assessing the applicant’s medical condition, an assumption which was ‘completely groundless and unjustified’. He concluded that the disregard of these medical opinions...
'in the absence of facts to prove that they are ill-informed opinions, gives rise to an inference that she failed to properly apply her mind to the issue she had to decide and that she did not reach her conclusion on facts that were relevant to the issues before her'.

Roman v Williams NO involved an application to review the decision of the respondent, acting under authority delegated to him by the Commissioner of Prisons, to re-imprison the applicant who had, after serving part of a prison sentence, been placed under correctional supervision. The applicant had breached various of the conditions of his release during the period of correctional supervision. Van Deventer J took the view that administrative action, to be justifiable in relation to the reasons given for it, ‘must meet the three requirements of suitability, necessity and proportionality’ and involved testing the administrative action for reasonableness. Van Deventer J concluded that the respondent was entitled to take into account the applicant’s general contempt for the rights of others as well as the breaches of his correctional supervision conditions. He held, as a result, that the decision to cancel the applicant’s correctional supervision was justifiable in relation to the reasons given for it.

The most influential decision on s24(d) of the interim Constitution is Carephone (Pty) Ltd v Marcus NO, an appeal against the dismissal, by the Labour Court, of an application to

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171 At 426A-B. See too Cash Paymaster Services (Pty) Ltd v Province of the Eastern Cape supra, 387d-f (the judgment of Pickard JP) and at 391h where Ebrahim AJ held: ‘The reasons furnished by the Board for its decision are clearly unconvincing. The decision is completely at variance to the recommendations of the Technical Committee. Moreover, the Board has failed to lay any basis for the rejection of the committee’s reasoned and properly arrived at decision to recommend that one of the other tenderers should be awarded the contract.’

172 1997 (9) BCLR 1267 (C).

173 For the facts see 1269D-1272F. The basis upon which the decision was taken is contained in a set of minutes of a meeting between the applicant, the respondent and the applicant’s supervisor, reproduced at 1271F-1272E.

174 At 1276C.

175 At 1278H-I.

176 At 1281D-1282E.

177 1998 (10) BCLR 1326 (LAC). This decision was particularly important for labour law because it resolved the question of the breadth of review of arbitration awards made by commissioners of the Commission for Conciliation, Mediation and Arbitration in terms of the Labour Relations Act 66 of 1995. See in this regard Grant ‘The Review of Arbitration Awards in Terms of the Labour Relations
review a decision of a commissioner of the Commission for Conciliation, Mediation and Arbitration (the CCMA). In an arbitration before the first respondent, the appellant had unsuccessfully applied for a postponement on three occasions. The arbitration had eventually proceeded in the absence of the appellant’s legal representatives. The commissioner found against the appellant on the merits, ordering it to pay certain of its former employees compensation for wrongfully dismissing them. After holding that the exercise of power by a CCMA commissioner hearing an arbitration was administrative action,\textsuperscript{178} Froneman DJP proceeded to examine the standard of review in terms of the Constitution. He accepted that the Constitution, and particularly s24(d), extended the scope of review in that s24(d) ‘introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground of review, or irrationality only as evidence of procedural impropriety’.\textsuperscript{179} He warned against an understanding of this provision that would collapse the distinction between review and appeal: the word ‘justifiable’, he stated, meant ‘able to be legally or morally justified, able to be shown to be just, reasonable or correct; defensible’ rather than ‘just’, ‘justified’ or ‘correct’.\textsuperscript{180}

Froneman DJP went on to observe that, in applying s24(d), ‘value judgments will have to be made which will, almost inevitably, involve consideration of the “merits” of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness

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\textsuperscript{178} At 1332I-1334B (paragraphs 15-19). For a contrary and unsupportable view see \textit{Shoprite Checkers (Pty) Ltd v Ramdaw NO} (2000) 21 ILJ 1232 (LC).

\textsuperscript{179} At 1336E (paragraph 31).

\textsuperscript{180} At 1336F (paragraph 32). See too at 1337B-D (paragraph 35): ‘When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness.’ See too the comments of Kroon J in \textit{County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration} (1999) 20 ILJ 1701 (LAC), 1705G-1707B (paragraphs 6-10).
thereof, but to determine whether the outcome is rationally justifiable, the process will be in order'. 176 Finally, on the essence on the ground of review created by s24(d), Froneman DJP held: 177

Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as “reasonableness”, “rationality”, “proportionality” and the like. (cf for example Craig, Administrative Law, above, at 337-349; Schwarze, European Administrative Law, 1992 at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA.’

In applying the law as set out above to the facts, and after observing that, if the court was considering an appeal from a decision of a lower court to refuse an application for a postponement, it would not have had a basis to interfere with the decision, 178 Froneman DJP concluded: 179

‘But this is not an appeal from a court of law. It is a review of a decision of a tribunal where the statutory requirements for its functioning are less congenial to the granting of postponements than is the case in a court of law. The commissioner rejected as inadequate the reasons given for the need to postpone, mainly on the basis that preparations for the case could have been made earlier and that the appellant and his legal representatives failed to explain why adequate alternative arrangements could not have been made once the original legal representative became unable to continue with the case. There was sufficient material before him to come to that conclusion rationally and objectively. He weighed up the prejudice that would follow for the appellant from a refusal of a postponement, against the prejudice the employees would suffer if a postponement was granted, and noted the absence of a solution to this predicament on the basis of a costs order. Once again his reasoning was rationally connected to the material before him. His decision and the reasons he gave for it, do not

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176 At 1337D-E (paragraph 36).
177 At 1337E-G (paragraph 37).
178 At 1341I-1342B (paragraph 56).
179 At 1342B-F (paragraph 57).
support an inference of misconduct, irregularity or impropriety. The decision not to postpone and to continue the proceedings are rationally justifiable in terms of the reasons given for the decision by the commissioner. He thus did not exceed the substantive constitutional limits to the exercise of his powers in arbitration under the LRA. There was no basis to review his decision in the Labour Court. It follows that Mlambo J’s order must stand.’

(e) Oppressive Exercises of Administrative Power

Section 6(2)(h) of the Act provides that administrative action will be reviewable if ‘the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function’. This formulation is similar to that applied in England in the form of Wednesbury unreasonableness. In the light of the fact that the preceding grounds of review have covered a great deal of the ground envisaged by Wednesbury unreasonableness, this ground of review is best understood to refer to the review of administrative action that is harsh or unduly oppressive in its operation. The reviewing court is concerned in this instance with ‘the objective effect’ of the decision-maker’s exercise of discretion. 180 This is not a concept foreign to South African administrative law. It embodies, in all its essentials except two, the idea of symptomatic unreasonableness. It differs only in respect of the degree of unreasonableness required – mere unreasonableness, as opposed to gross unreasonableness181 – and it is no longer necessary for the reviewing court to infer from the unreasonableness of the result that some other defect in the decision-making process must have been present, because now unreasonableness on its own is a ground of review.

A good example of this ground of review (albeit prior to 1994) is to be found in Shifidi v

181 On this distinction, see Vanderbijl Park Health Committee v Wilson 1950 (1) SA 447 (A), 459.
Administrator-General of South West Africa.\textsuperscript{182} The applicant’s father had been murdered by a group of soldiers who had been ordered to forcefully disrupt a lawful meeting held on a soccer field in Katutura township, Windhoek, dressed in civilian clothes and armed with weapons such as pangas, assegais and bows and arrows. Apart from committing the murder, the soldiers had also assaulted various other people. An inquest was held and the inquest magistrate’s finding was that the deceased had been killed unlawfully by an unknown person or group of unknown people. Subsequent to the inquest, the Attorney-General instituted a prosecution against six soldiers for the murder of the deceased and for public violence. On the morning on which their trial was to commence a certificate, purportedly issued in terms of s103ter of the Defence Act 44 of 1957, was handed in. This had the effect of stopping the trial and thus indemnifying the accused from the criminal and civil consequences of their actions.\textsuperscript{183}

The certificate had been issued after the State President had considered the report required by the section. Although it was not before the court, a document drafted by a state legal advisor with a view to the possible use of s103ter was made available to the applicant pursuant to discovery. It purported to be a summary of the evidence given in the inquest but was so inaccurate that Levy J commented on its ‘obvious bias’ and the fact that it

\textsuperscript{182} 1989 (4) SA 631 (SWA).

\textsuperscript{183} Section 103ter(2) provided that no civil or criminal proceedings could be instituted or continued against, inter alia, members of the South African Defence Force (the SADF) ‘by reason of any act advised, commanded, ordered, directed or done in good faith ... for the purposes of or in connection with the prevention or suppression of terrorism in any operational area’. Section 103ter(3) provided that a ‘certificate signed by the Minister [of Justice] stating that an act specified therein was advised, commanded, ordered, directed or done for the purposes of or in connection with the prevention or suppression of terrorism in an operational area, shall on its mere production by any person in any proceedings in a court of law be conclusive proof that that act was advised, commanded, ordered, directed or done for those purposes or in that connection by ... the South African Defence Force’. (In the territory of South West Africa, the first respondent had the power to sign such a certificate.) In terms of s103ter(4), if proceedings had already been instituted and the State President formed the opinion that those proceedings related to the type of incident contemplated by the section and that it was in the national interest that such proceedings be stopped, he could authorise the Minister of Justice to issue a certificate stopping the proceedings. Before issuing such a directive, the State President was required by s103ter(5) to first consider a report from the Minister ‘setting forth the circumstances under which the act in question took place as well as the factors indicating that that act was advised, commanded, ordered, directed or done in good faith and for the purposes of, or in connection with the prevention or suppression of terrorism in an operational area’. 
created a ‘totally wrong impression’. Levy J concluded that the State President must have been given an erroneous impression of the facts and because of that, his decision was invalid:

‘Had the State President known the truth, would he still have arrived at the opinion which he did? I am satisfied that he would not and furthermore that no reasonable person could have come to such opinion. If he had the true facts, I am satisfied his opinion is grossly unreasonable.

I am satisfied that, had the State President been told:

1. that a bona fide political meeting was being held,
2. on a football field,
3. in a suburb of Windhoek,
4. when the meeting was deliberately broken up by members of the military unit known as Battalion R101, wearing civilian dress,
5. armed with primitive weapons, including bows and arrows, assegai and pangas, and that
6. as a result a person attending such meeting was killed;

he would not have formulated the opinion which he did. He could only have done so had he not applied his mind.’

(f) Other Grounds

(i) Vagueness and Uncertainty

The most note-worthy omission from the grounds of review listed in s6(2) of the Act is the omission of the ground of vagueness or uncertainty. At common law administrative action of any type that suffers from this malady is liable to be set aside. If the Act cannot be interpreted to include vagueness or uncertainty as a ground of review, either s1(c) of the Constitution or the common law may serve to plug the gap. The idea that those who

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184 At 645B and G.
185 At 645G-J.
186 There is no explanation why this ground of review was omitted, especially in the light of the fact that it was included in every draft of the bill.
are vested with administrative powers must exercise them in such a way that those affected by them know what to do or to abstain from doing is an aspect of the rule of law: it is a specific aspect of the broader principle that laws and other instruments having legal effects should be clear. To this extent, at least, it shares a common pedigree with unreasonableness. It is similar to unreasonableness in the sense that vague or uncertain exercises of administrative power cannot be said to be rational and, indeed, can be said to be arbitrary and capricious. They will also tend to be unreasonable in their effects if only because vagueness or uncertainty will tend to effect the breadth of operation of the instrument in question and make its outer boundaries difficult to specify. Moreover, Baxter has pointed out that in earlier cases it was accepted that vagueness and uncertainty were regarded as manifestations of unreasonableness and that the suggestion to the contrary in R v Jopp does not, in fact, debunk this view unequivocally. He also argues that it makes little difference from a practical point of view because how a particular ground of review is characterised is nothing more than a classification of convenience.

There appear to be two ways of implying the power to review administrative action for vagueness or uncertainty into the provisions of s6(2) of the Act. First, if administrative action that is vague or uncertain is in conflict with the rule of law, it will be included in

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188 See the discussion of Mathews on what he terms the procedural justice theories of the rule of law in Kahn (ed) Fiat Justitia: Essays in Memory of Oliver Deneys Schreiner Cape Town, Juta and Co: 1983, 294, 296-300. But see Steyn Uitleg van Wette (5ed) Cape Town, Juta nad Co:1981, 229-230 who refers to Voet rather than the rule of law as authority for the proposition that vague instruments are invalid. The issue appears to have been resolved by the Constitutional Court: in Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC), 865D (paragraph 47), O' Regan J held that the rule of law envisaged that rules be stated in a 'clear and accessible manner'.

189 1949 (4) SA 11 (N), 13-14. This case is still cited for purposes of establishing the test for vagueness or uncertainty. Broome J held, at 13-14: ‘Where it is claimed that a bye-law is void for unreasonableness, the Court will no doubt interpret it benevolently, will support it if possible and will give credit to those who administer it that they will do so reasonably. But these principles have no application where the only claim is that the bye-law or regulation is void for uncertainty. In that case the Court must first construe the bye-law or regulation, applying the usual canons of construction with no bias towards “benevolence”. Having ascertained the meaning, the Court must then ask itself whether the bye-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter.’

190 Baxter, 529, footnote 269.
s6(2)(i) in that the administrative action concerned will be ‘otherwise unconstitutional or unlawful’. On the other hand, vague or uncertain exercises of administrative power may be regarded as reviewable because they are arbitrary or capricious, as contemplated by s6(2)(e)(vi), are not rationally connected to the purpose for which they were taken or the purpose of the empowering provision, as contemplated by s6(2)(f)(ii), or are simply unreasonable as envisaged by s6(2)(h).191

(ii) Disproportionality and Failure to Consider Alternatives

In his influential article, ‘A Bridge to Where? Introducing the Interim Bill of Rights’,192 Mureinik wrote of the need for courts to develop a theoretical framework within which to determine the justifiability, or reasonableness, of administrative decisions, in terms of the Constitution. He continued:193

‘A good starting point would be to recognize that the justifiability of an administrative decision is a matter not of second guessing the policy choices it entails, which is the prerogative of the decision-maker, but rather of the soundness of the process of deciding which went into its making. It is suggested that an administrative decision cannot be taken to be justifiable unless (a) the decision-maker has considered all the serious objections to the decision taken and has answers which plausibly meet them; (b) the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and (c) there is a rational connection between premises and conclusion – between the information (evidence and argument) before the decision-maker and the decision taken.’

This duty on decision-makers to consider alternatives and to opt for the least restrictive option where possible was given explicit recognition in the various drafts of what became the Promotion of Administrative Justice Act, from the first draft to the second last. It appears to have been deleted shortly before being placed before Parliament. In the second last draft (that was the topic of public representations before the Parliamentary Justice Council for Welfare, Eastern Cape 2001 (8) BCLR 899 (SE).

191 For post-1994 cases on vagueness, neither of which explored the question of the jurisprudential peg on which this ground of review was to hang, see Midrand/Rabie Ridge/Ivory Park Metropolitan Substructure v Lanmer (Pty) Ltd 2001 (2) SA 516 (T) and Mahambahlala v Member of the Executive Council for Welfare, Eastern Cape 2001 (8) BCLR 899 (SE).


193 At 41.
Committee) s7(1)(g) provided that administrative action could be reviewed for unreasonableness if there was any ‘disproportionality between the adverse and beneficial consequences of the action’ or ‘less restrictive means to achieve the purpose for which the action was taken’. The draft immediately prior to that had, rather than set out grounds of review, listed duties that were imposed on administrators in order to give effect to the fundamental right to just administrative action. In defining the duty to act reasonably, the draft, in s8(1)(m), provided that in order for administrative action to be reasonable:

‘(a) the administrator must weigh all interests directly involved;
(b) the administrator must consider all reasonable less restrictive means to achieve the purpose for which the action is taken and endeavour to follow the less burdensome possibility;
(c) the administrator must weigh up the adverse effect of the administrative action which may not be disproportionate to the benefits of the action;
(d) the administrator must weigh up the nature of the rights involved, especially a right contained in the Constitution.’

The obvious question that arises is whether the omission in the Act means that a court may not review an administrative act for unreasonableness where a decision-maker has taken a decision in favour of the most drastic option available, even where less drastic options were available and practical. For example, would a court dismiss a claim for unlawful arrest in a case in which a motorist has been arrested without warrant by a policeman within whose presence the motorist failed to put a coin in a parking metre?194 Or, would Mr Hook have failed, if he had been in South Africa, to set aside the decision to revoke his permission to trade for his minor infringement of the rules of public decency?195 It is

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194 On the requirement of proportionality when the power of arrest is exercised, see Plasket ‘Controlling the Power to Arrest Without Warrant Through the Constitution’ (1998) 11 SACJ 173, 190-194.
195 See R v Barnsley Metropolitan Borough Council, ex parte Hook [1976] 3 All ER 452 (CA). In this case, a street trader who had been trading in Barnsley for six years had his permission to trade in a local market revoked because, on one particular evening and after trading hours, he had urinated in a side street near the market, the toilets in the vicinity having been locked. He had been seen by two council employees who reported the incident. Denning MR, in setting aside the decision held: ‘So in this case if Mr Hook did misbehave, I should have thought the right thing would have been to take him before the justices under the byelaws, when some small fine might have been inflicted. It is quite wrong that the corporation should inflict on him the grave penalty of depriving him of his livelihood. That is a far more serious penalty than anything the justices could inflict. He is a man of good character, and ought not to be penalised thus. On that ground alone, apart from the others, the decision of the corporation cannot stand.’ (At 457a-b.)
submitted that the answer to the above questions is in the negative. The Act could not have intended that the consideration of alternatives and issues of proportionality be excluded. Parliament did not have the power to do this as its constitutional mandate was to pass national legislation to give effect to the right to just administrative action, which includes the right to reasonable administrative action. The consideration of alternatives and the proportionality of administrative action are part of the right in its common law form and, therefore, of its constitutional form too. This is demonstrated by the cases cited below. Parliament was not given the power to determine what reasonable administrative action was, but rather to ensure that this right is given effect to. The formulation of s6(2) allows for such an interpretation.

The first illustrative case is Dempsey v Minister of Law and Order. In it Marais J held that a proper decision to arrest and detain a person in terms of the emergency regulations then in force could not be formed unless the arresting member of the security forces gave consideration to other less drastic ways of dealing with the arrestee, such as arresting him or her under the ordinary law of the land. He held:

'I return to Captain Oosthuizen's explanation of his decision to arrest and detain Sister Harkin. It is plain that his opinion stated in reg 3 (1) was based solely and exclusively upon her conduct that day. As he saw it, she had been guilty of unlawful conduct of the kind described by him and had interfered with police action and with the restoration and maintenance of public order. I interpolate here that it follows that she had thus rendered herself liable to arrest in terms of the ordinary law of the land and

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196 1986 (4) SA 530 (C).
197 At 541I-542C. See too Bishop of the Roman Catholic Church of the Diocese of Port Elizabeth v Minister of Law and Order ECD 1 August 1986 (case no.1101/86) unreported. The principle was somewhat diluted first in the full bench decision of Ngumba v State President 1987 (1) SA 456 (E) and then in the Appellate Division in Minister of Law and Order v Dempsey 1988 (3) SA 19 (A) and Ngumba v State President 1988 (4) SA 224 (A). See for comment on the above cases Plasket 'Clipping Dempsey's Wings: the Consideration of Alternatives to Regulation 3(1) of the Emergency Regulations' (1987) 3 SAJHR 76. Even though the idea of proportionality was limited by the subjective terms of the discretion conferred on members of the security forces, the Appellate Division did not disavow it completely. Indeed, in the judgment of Hefer JA in Dempsey (at 40F-G) he held: 'Although I have certain reservations on which I need not elaborate in view of the conclusion at which I have arrived, I am prepared to accept for present purposes that, had Captain Oosthuizen not considered the two matters referred to by the learned Judge, a finding that he did not properly exercise his mind would be justified. But what has to be determined first is whether the finding that he did not consider them is correct. And it is at this level, in my view, that the Court's reasoning fails.'
Captain Oosthuizen must be taken to have been aware of that. His affidavit is silent on what seems to me to be a crucial factor in the circumstances of this particular case, namely why a conventional arrest and prosecution in accordance with the ordinary law of the land would not have served to put an end to any threat to public order which she may have then represented. I can only conclude that he failed to consider it. If he had considered it and concluded that it would not have sufficed, I would have expected him to say so and to explain why it would not have sufficed. Before he could conscientiously conclude that her arrest and detention in terms of the emergency regulations was necessary, I think that it is manifest that he would have to consider this obvious alternative. Certainly resort to that alternative would have put an end to any further participation by her in that day’s events just as effectively as an arrest under the emergency regulations would have done. As for the future, there is no suggestion in Captain Oosthuizen’s affidavit that he even applied his mind to that question.”

In *Waks v Jacobs* a conservative town council’s decision to segregate public amenities had been challenged. One of the reasons that it had given for segregating parks on racial lines was that this would stop incidents that had been reported to it of ‘bad behaviour’ by black people at some of the parks. Eloff DJP held that this was not the true reason for the decision but even if it was, the council should have considered control measures to eliminate the bad behaviour rather than the drastic step of prohibiting members of all races except for whites from using the parks.

The same principle was applied in *Traub v Administrator, Transvaal*. This case was a postscript to the more well known matter in which the same applicant had established a legitimate expectation to a hearing prior to the taking of a decision as to whether she should have been employed as a senior house officer at the Baragwanath Hospital in Soweto. She had been refused the post (which was offered to interns such as her as a matter of course) because she was one of a number of medical personnel at the hospital who had written a letter critical of the hospital administration. Goldstone J had ordered that she be granted a hearing as a matter of urgency. After she had been heard, a decision was taken not to employ her. She took that decision on review. Goldstone J, who also heard

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1990 (1) SA 913 (T).
199 At 922H. See too *National Union of Mineworkers v Government Mining Engineer* 1990 (2) SA 638 (W), 643H-J.
200 1989 (2) SA 396 (T).
this second application, held that the applicant had been treated unfairly and unjustly by
the person who had heard her representations and taken the decision, and that he had
failed to take into account relevant factors – in the form of every factor that weighed in
favour of the applicant – and had taken into account irrelevant considerations.

Goldstone J decided that, rather than remit the matter for another hearing, he would order
that the applicant be appointed to the post. In deciding to make this order, he was required
first to determine whether the decision that the applicant should be appointed was a
foregone conclusion. In holding that it was and that a refusal to appoint the applicant would
be unreasonable, he took into account, inter alia, that she had played a minor role in the
publication of the critical letter, she had been influenced by the ‘long tale of frustration’ of
longer serving medical personnel, those errors that there were in the letter were no basis
for refusing to appoint her because ‘having regard to the nature of the appointment in the
context of the relationship between the Province and the faculty of medicine at the
University of the Witwatersrand, to disrupt the applicant’s career more than it has already
been disrupted can only be seen as vindictive and grossly disproportionate to her "crime"
and that any criticisms that could be levelled against the conduct of the applicant ‘could not
lead any reasonable, intelligent and unbiased person to conclude that she is unsuitable for
appointment’ especially if her qualifications and positive attributes were compared to her
minor role in the publication of the letter.\textsuperscript{201}

More recently, the disproportion between cost and benefit was held to vitiate a decision by
the Provincial Tender Board to award certain tenders in \textit{Cash Paymasters Services (Pty)
Ltd v Province of the Eastern Cape}.\textsuperscript{202} The companies to whom the tenders had been

\textsuperscript{201} At 418C-420F. See too \textit{Diepsloot Residents’ and Landowners’ Association v Administrator, Transvaal} 1994 (3) SA 336 (A) in which the Appellate Division accepted that, in order to justify the
anticipated infringement of the rights of property owners that would result from the establishment of
an informal settlement, the respondent had been required to act reasonably and that he could not be
said to have acted reasonably if he had failed to ‘take certain reasonably practicable precautions or
to adopt another reasonably practicable method of achieving the purpose of the power by which the
extent of the interference will be lessened’ (at 346H).

\textsuperscript{202} [1997] 4 All SA 363 (Ck).
awarded would have supplied the services in question at a cost substantially more than the next most expensive tenderer. This was described by Pickard JP as an ‘enormous price to pay for an extremely doubtful empowerment and/or development ideal if it is that at all’\textsuperscript{203} and that it appeared that ‘in order to benefit a handful of four black successful entrepreneurs, the Tender Board was willing to have the tender price on the total contract increased by a differential of at least R131 million (on their figures) but more likely than not R220 million ... in order to benefit these few individuals’.\textsuperscript{204} Ebrahim AJ held that the Tender Board had thought that it could do as it pleased and that the ‘perceived benefits that would accrue to the disadvantaged members of this Province were totally disproportionate to the additional cost involved in awarding tenders to third and fourth respondents’.\textsuperscript{205}

These decisions are not surprising, or at least ought not to be: the idea of weighing up the various alternative courses of action available to a decision-maker and settling on the most suitable is an idea that is deeply embedded in the legal system. It is particularly evident in sentencing in criminal law and the imposition of sanctions in disciplinary proceedings in labour law. But it goes further than these examples, embodying what Jowell and Lester refer to as ‘a basic principle of fairness’.\textsuperscript{206} Proportionality is, and this is evident from the sentencing process in particular, a central aspect of judicial decision-making. It is also, through s36 of the Constitution, a requirement for the constitutional exercise of legislative power, at least to the extent that the exercise of such power infringes or threatens fundamental rights. It would be strange then if the executive and its administration was not required to act proportionally when exercising powers vested in it directly by the Constitution or delegated to it by a legislature. More than that, such a conclusion would be untenable especially when it is borne in mind that all public power must, in terms of the rule

\textsuperscript{203} At 379h.
\textsuperscript{204} At 385c.
\textsuperscript{205} At 393i.
of law on which the Constitution is based, be rational. Proportionality is part of the rationality required by the rule of law. The cases cited above are merely illustrations of the fact that it has long been recognised that proportionality is indeed part of South African administrative law. As in England, it is only recently that the courts have begun to label it. It is nothing more or less than an aspect of reasonable and rational administrative decision-making and hence part of the right to reasonable administrative action.

What must be made of the legislature’s failure to specifically codify proportionality as a ground of review in the Promotion of Administrative Justice Act? If it was the intention of the legislature to exclude this aspect of the right, it may well have acted beyond its powers and consequently was guilty of deliberately acting unconstitutionally: it is hard to envisage a reasonable and justifiable basis for Parliament’s omission. An alternative view is compatible with Parliament acting constitutionally. It is that it was not necessary that a specific provision require of administrative decision-makers that they consider alternatives and otherwise act proportionally: these duties are implicit in the proscription on failing to

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207 Pharmaceutical Manufacturers Association of South Africa: In re; Ex Parte Application of the Republic of South Africa 2000 (3) BCLR 241 (CC), 272H (paragraph 85).

208 Jowell and Lester, op cit, 52 speaking specifically of the application of the principle in Germany, say that it is ‘regarded as a consequence of the Rechtstaat or the Constitutional State, under which state power may only encroach upon individual freedom to the extent that it is indispensable for the protection of the public interest’. That the same applies in South Africa is evident from the judgment of Ackermann J in S v Makwanyane 1995 (6) BCLR 665 (CC), 725I-726C (paragraph 156). See too Minister of Public Works v Kyalami Ridge Environmental Association 2001 (7) BCLR 652 CC), 679F-G (paragraph 101) in which Chaskalson P stated: ‘Where as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights is relevant to determining what fairness requires.’

209 Baxter recognised this fact as long ago as 1984 when he wrote: ‘The principle of proportionality would seem to be compatible with both English and South African law and it presents yet another facet of review for unreasonableness. There is the danger that courts may be tempted to second-guess public authorities as far as the proper degree of action to be taken is concerned. If, however, they confine themselves to intervention only where the degree of action is so excessive that no reasonable man would consider it to be appropriate, recognition of disproportionality as a ground of review would not constitute a departure from the normal principles of review.’ (At 529.) It would appear that the attempts to have proportionality recognised as a separate ground of review distinct from reasonableness are unlikely to succeed and, in fact, are irrelevant if it is simply part of the broader right to reasonable administrative action.
take into account relevant considerations; on acting arbitrarily or capriciously; on administrative action not being rationally connected to the purpose for which it was taken or the purpose of the empowering provision; or on exercising power or performing a function so unreasonably that no reasonable person would have exercised that power or performed that function. If, for some reason, this analysis was not to find favour, the consideration of alternatives and other requirements of proportionality should be recognised and developed through the catch-all s6(2)(i) that allows for the judicial review of administrative action on the ground of it being ‘otherwise unconstitutional or unlawful’.

(iii) Inequality

The test for unreasonableness that applied at common law in respect of subordinate legislation identified partiality and inequality in the application of the subordinate legislation as one of four facets of unreasonableness but this non-discrimination principle goes further to include other forms of administrative action as well. This aspect of unreasonableness is well illustrated by Tayob v Ermelo Local Road Transportation Board in which the appellant was successful in reviewing a decision of the respondent to refuse him a renewal of a first class taxi exemption. Such an exemption permitted the conveyance of whites, whereas a second class taxi exemption permitted the conveyance of people who were not white. The respondent had taken the view that only whites should be allowed to convey white passengers and had refused the appellant’s application because he was not white. Centlivres CJ held that to ‘decline to grant an exemption, which is applied for, on

210 Section 6(2)(e)(iv). See Dempsey v Minister of Law and Order, supra.
212 Section 6(2)(f).
213 Section 6(2)(h). See Traub v Administrator, Transvaal 1989 (2) SA 396 (T); Cash Paymaster Services (Pty) Ltd v Province of the Eastern Cape [1997] 4 All SA 363 (Ck).
214 See Kruse v Johnson [1898] 2 QB 91, 99. See too 9.2.1(c) above.
215 See Baxter, 526-527; Jowell ‘Judicial Review of the Substance of Official Decisions’ 1993 Acta Juridica 117, 123-124. Often, however, an administrative act that is discriminatory or unequal in its operation will be set aside on other grounds such as that the decision-maker took into account an irrelevant consideration in the form of the race, for instance, of the adversely affected party.
216 1951 (4) SA 440 (A).
the ground that the applicant is a member of a particular race or class would, in my opinion, be unreasonable'. 217 He also held that complaints against the appellant that had been lodged by two racist organisations could not be relied upon by the respondent to justify its decision: being complaints about the appellant’s race, rather than the service he provided, they were irrelevant to the decision. 218

The legislature’s failure to provide specifically in the Promotion of Administrative Justice Act that unequal or discriminatory administrative action is reviewable is not as serious an omission as might appear to be the case at first glance. It can hardly be contended that the omission means that administrative decision-makers are free to treat people unequally or to discriminate. That would run counter to s9 of the Constitution. Consequently, administrative action that suffers from this type of defect will be liable to be set aside in terms of s6(2)(i) in that it will be ‘otherwise unconstitutional or unlawful’. 219 Unequal or discriminatory administrative action may also be set aside on other grounds such as the taking into account of irrelevant considerations, bad faith, arbitrariness and caprice, lack of rationality and unreasonableness per se.

9.4. Conclusion

It is perhaps in the creation of the fundamental right to reasonable administrative action that s33 of the Constitution has contributed most to the cause of administrative justice in a democratic system of government based on the values of the rule of law and of openness, accountability and responsiveness. Union Government (Minister of Mines and Industry) v Union Steel Corporation (South Africa) Ltd 220 has stood in the way of the proper

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217 At 447E-F.
218 At 448A.
219 See for example Matukane v Laerskool Potgietersrus 1996 (3) SA 223 (T) and the discussion on s6(2)(i) at 8.5.3 above.
220 1928 AD 220.
development of rationality review for years. Its demise is to be welcomed.\textsuperscript{221} The fundamental right to reasonable administrative action and the corresponding and consequent rejection of the gross unreasonableness standard of review has ushered South African administrative law into the 21\textsuperscript{st} century. South African law on the judicial review of administrative action has, in other words, and if only on the formal level, been brought into line with the law of comparative jurisdictions – open and democratic societies that are based on human dignity, equality and freedom, and that also take seriously the rule of law and the values of openness, accountability and responsiveness.

This does not mean that review for unreasonableness is not bound to generate difficult problems. It will always do that because it involves the courts in the review of the substance of decisions – how discretionary powers were exercised and their effects – rather than the comparatively neutral and less controversial question of whether exercises of power fell within or outside the jurisdictional limits defined by a statute. For this reason review for unreasonableness is bound to take courts closer to the merits of administrative decision-making, to the issue of whether the decision is right or wrong. This is often the source of controversy because the courts, when exercising this jurisdiction, are inevitably going to be operating that much closer to the divide between judicial and executive authority that is safeguarded by the doctrine of the separation of powers. That is not to say that the courts should treat the power to review for unreasonableness as though the old standard still applies. There is a pressing need to develop the new standard for, as Mahomed has argued, a credible system of administrative law must enable a court to come to the assistance of an individual who complains properly that he or she has been the victim of unreasonable administrative action.\textsuperscript{222}

\textsuperscript{221} In ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 \textit{SAJHR} 31, 40, Mureinik expressed the same sentiment when he wrote that s24(d) of the interim Constitution dealt the gross unreasonableness ‘doctrine of deep deference a blow which all friends of official accountability will wish to be mortal’.

At the outset of the democratic era Mureinik wrote of the need for judges to develop a concept of justification that was consonant with the ethos of the Constitution.\textsuperscript{223} Important as that aspect undoubtedly is, it is as important that judges also develop a theory of deference. This is so because prior to 1994, \textit{Union Steel} built into every review for unreasonableness a standard, immutable and often inappropriately high degree of deference to the decision-maker. There was thus never any need for judges to consider the issue because on the face of it every administrative decision-maker was accorded the same degree of deference, irrespective of the subject matter of the decision, of his or her expertise or lack thereof, of whether the subject matter involved a high degree of policy or was a simple factual issue or whether the court was institutionally competent to review for unreasonableness on its own.

Jansen JA’s judgment in \textit{Theron v Ring van Wellington van die NG Sending Kerk in Suid Afrika}\textsuperscript{224} was a response to this unnuanced approach. The statement that the extended formal standard was suitable to what Jansen JA termed purely judicial decisions is little more than a statement to the effect that when a court is reviewing the court-like, or adjudicative, activities of the administration, it is institutionally competent to determine whether the decision-maker’ decision was justifiable on the evidence: that there was less reason to defer to the choices made by the decision-maker in such cases because a court will be in as good a position to take the decision as the decision-maker.

Without saying so, and while paying lip-service to \textit{Union Steel}, Kotze JA in \textit{WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board}\textsuperscript{225} approached the reasonableness of the decisions of the Local Road Transportation Board and the National Transport Commission on exactly the same basis: the court was institutionally competent to assess whether the evidence that had been led justified the decision taken. This weighing and assessing of evidence and the drawing of conclusions from it is, after

\begin{itemize}
\item \textsuperscript{223} ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 \textit{SAJHR} 31, 40-41.
\item \textsuperscript{224} 1976 (2) SA 1 (A).
\item \textsuperscript{225} 1982 (4) SA 427 (A).
\end{itemize}
all, at the heart of the judicial function. A far more overt example of precisely the same idea is to be found in Wellworths Bazaars Ltd v Chandlers Ltd in the discreet field of the review for reasonableness of bills of costs. It is hard to imagine a person better qualified to determine the reasonableness of fees charged by counsel than a former senior counsel.

From the above examples, it can be inferred that the idea of a sliding scale of deference is not entirely unknown to South African courts despite the inhibiting effect of Union Steel. Within the context of s33 of the Constitution and the terms of s6(2) of the Promotion of Administrative Justice Act, courts will have to confront the question of deference squarely. They cannot, in other words, hide behind Union Steel any longer. If courts are guided by comparative jurisprudence, particularly of the English speaking Commonwealth countries, as they are invited to be by s39(1) of the Constitution, they will find a more developed approach to deference: they will find, in broad terms, that courts are less ready to set aside for unreasonableness decisions of a managerial or policy nature, at one end of the spectrum, and are more amenable to set aside for unreasonableness factual decisions, decisions that involve the application of legal techniques or skills, such as weighing and assessing evidence, or decisions that have a bearing on fundamental rights.

The grounds of review for unreasonableness, as codified in s6(2) of the Promotion of Administrative Justice Act, have been discussed at some length above. It will be recalled that not all aspects of unreasonableness as a ground of review have been expressly included in the section. This raises the question of whether the legislature has given effect to the right to reasonable administrative action as it was required to do by the Constitution. It is submitted that properly interpreted (and with help from the catch-all s6(2)(i)) s6(2) has succeeded in complying with the constitutional injunction. This interpretation requires an

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226 1947 (4) SA 453 (T).
understanding of review for unreasonableness that includes as some of its facets vagueness or uncertainty, disproportion between means and ends and the failure to consider alternatives and exercises of administrative power that discriminate or operate unequally. It is submitted that this understanding of review for unreasonableness must be taken to have informed the legislature when it passed s6(2) because an interpretation that shoots any shorter will be unconstitutional for want of compliance with the constitutional instruction to the legislature to give effect to the rights to just administrative action.
CHAPTER TEN: THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

10.1. Natural Justice at Common Law

10.1.1. Introduction

To emphasise the importance of procedural rights, Frankfurter J observed (albeit in a case involving coerced confessions in a criminal trial) in *McNabb v United States*¹ that the ‘history of liberty has largely been the history of observance of procedural safeguards’.² Not surprisingly then, the concept of procedural fairness³ is a universal feature of systems of administrative law based on the rule of law or similar doctrine.⁴ In administrative law, procedural fairness is an important part of the various mechanisms and techniques used by courts to control the exercises of power by administrative functionaries.⁵ The essence of the concept is that those who are affected by official decisions are entitled, prior to any

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¹ 318 US 332 (1953).
² At 347.
³ Some writers have sought to draw a distinction between the terms ‘natural justice’ and ‘procedural fairness’. In truth, this is a distinction without a difference. See for instance, *O'Reilly v Mackman* [1983] 2 AC 237, 275, in which Diplock LJ said simply that the rules of natural justice ‘mean no more than the duty to act fairly’.
⁴ Baxter, 536-538. See too Aronson and Dyer *Judicial Review of Administrative Action* LBC Information Services: 1996, 385 who say that the principle of ‘common sense and common decency’ that people should be afforded fair and unbiased hearings before decisions are taken against them is ‘a principle shared by all democratic societies and probably all systems of jurisprudence. It has been written into national constitutions, international agreements, statutes, contracts and codes of conduct, and it is part of the fabric of the common law’.
⁵ See Wade and Forsyth who say, at 463: ‘By developing the principles of natural justice the courts have devised a kind of code of fair administrative procedure. Just as they can control the substance of what public authorities do by means of the rules relating to reasonableness, improper purpose, and so forth, so through the principles of natural justice they can control the procedure by which they do it. It may seem less obvious that they are entitled to take this further step, thereby imposing a particular procedural technique on government departments and statutory authorities generally. Yet in doing so they have provided doctrines that are an essential part of any system of administrative justice. Natural justice plays much the same part in British law as does “due process of law” in the Constitution of the United States. In particular, it has a very wide general application in the numerous areas of discretionary administrative power. For however wide the powers of the state and however extensive the discretion they confer, it is always possible to require them to be exercised in a manner that is procedurally fair.’
decision being taken,\(^6\) to be heard by an unbiased decision-maker.\(^7\) There are three important reasons why this should be so. First, accurate and informed decision-making is facilitated. Secondly, the public interest tends to be furthered by this mode of decision-making. Thirdly, such decision-making tends to have important process value in its own right.\(^8\) Fair procedures also tend to enhance the legitimacy of administrative decisions and for this reason may be regarded as ‘fundamental principles of good administration’.\(^9\)

Because of these considerations the courts tend to insist, as a matter of policy, that administrative functionaries comply with the rules of natural justice.\(^10\) If, in other words, a decision is tainted by procedural unfairness, a court will set it aside no matter how

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\(^6\) Exceptionally, a hearing may be given after a decision. In *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A), 750C-F Corbett CJ stated: ‘Generally speaking, in my view, the audi principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken … . Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken … . This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken.’ For a more recent discussion of this issue, see *Minister of Safety and Security v Vilikazi* [2000] 3 All SA 95 (N), 99i-100h. See too, Baxter, 587-588.

\(^7\) Baxter, 536. See too *Wade and Forsyth*, 494 who observe that the rule that administrative decision-makers are required to give fair hearings is ‘broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing; but in deference to the traditional dichotomy, that rule has always been treated separately’.

\(^8\) Baxter, 538; Baxter ‘Fairness and Natural Justice in English and South African Administrative Law’ (1979) 96 SALJ 607, 634-638. See too *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A), 13B-C. In *Janse van Rensburg NO v Minister of Trade and Industry NO* 2000 (11) BCLR 1235 (CC), 1247A-B (paragraph 24) Goldstone J said that the observance of the rules of procedural fairness ‘ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner’. See further, Aronson and Dyer, op cit, 393.

\(^9\) Baxter, 540. *Wade and Forsyth*, 463 say that procedural protection for the subject of administrative power is important: ‘As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable.’ See too O’Regan ‘Rules for Rule-Making: Administrative Law and Subordinate Legislation’ 1993 *Acta Juridica* 157, 159 who says that one of the functions of administrative law ‘must be to ensure fairness so that particular individuals or groups are not oppressively or improperly treated’.

\(^10\) Baxter, 540. But see the contrary view espoused by Wiechers at 226-227. This view was discussed and rejected in *President of Bophuthatswana v Sefularo* 1994 (4) SA 96 (BA), 101H-103G.
convincing the merits may appear to be. The reason why this is so is captured in two famous statements of the English courts: in R v Sussex Justices, ex parte McCarthy Lord Hewart CJ observed that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’; in John v Rees Megarry J stated that ‘the path of the law is strewn with examples of open and shut cases which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change’.

10.1.2. The Two Legs of Natural Justice

The rules of natural justice have at their apex two related principles: that a person may not be a judge in his or her own cause – the rule against bias – and that decision-makers must hear affected parties before settling on final decisions, or in limited circumstances, after reaching final decisions.14

(a) The Rule Against Bias

The rationale for the rule against bias, in judicial as well as administrative decision-making, has been identified by Denning MR in Metropolitan Properties Co (FCG) Ltd v Lannon as

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11 President of Bophuthutswana v Sefularo supra, 103D-F; Traub v Administrator, Transvaal 1989 (1) SA 397 (W), 403D-E in which Goldstone J stated that ‘if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity’; Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T), 390B-C in which Kirk-Cohen J stated: ‘The merits or demerits of the true condition of the applicants are irrelevant if they have not been accorded their due rights to a prior hearing.’; Bushula v Permanent Secretary, Department of Welfare, Eastern Cape 2000 (2) SA 849 (E), 856I-857B; Minister of Safety and Security v Vilikazi supra, 101b-d. See too Wade and Forsyth, 471-473 and 498.

12 [1924] 1 KB 256, 295.


14 A hearing after the event in an exception to the general rule and will be permissible where an empowering provision authorises urgent and ex parte action and, possibly, where there will be a significant time lapse between the decision and its implementation, the administrative functionary retains an open mind and the individual is not prejudiced. See Baxter, 587-588.

15 [1969] 1 QB 577 (CA), 599F.
the need to engender confidence in the administration of justice: ‘Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: “The judge was biased”.’ This rationale, together with the idea that justice must be seen to be done, tends to explain why it is not only actual bias that vitiates a decision (and also gives rise to a duty on the part of the decision-maker to recuse himself or herself) but also perceptions of bias that are reasonably held.

The test for disqualifying bias was once the subject of controversy. Courts had expressed differing views as to whether the test was whether disqualifying bias had to founded on a reasonable suspicion or whether the appropriate standard was rather that a real likelihood of bias existed. That controversy has now been put to rest in both the administrative and judicial settings. In BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union the Appellate Division clarified the issue unequivocally. Hoexter JA distinguished between the two tests for disqualifying bias by holding that whereas a real likelihood connoted significantly more than a 50 percent probability, a reasonable suspicion demanded a ‘less exacting’ standard of proof. He held that the reasonable suspicion test was to be applied. His reasoning is expressed in the following passage:

'It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de minimis principle) he is disqualified, no matter how small that interest may be. ... The law does not seek, in such a case to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a...

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17 1992 (3) SA 673 (A).
18 Note that the point had been left open in the judgment in Council of Review, South African Defence Force v Monnig 1992 (3) SA 482 (A), which was decided ten days earlier.
19 At 690E-H.
20 At 694G-695B.
lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.’

The same test has been accepted as the correct test when bias in judicial proceedings is alleged. The correctness of the BTR Sarmcol case was accepted in President of the Republic of South Africa v South African Rugby Football Union (2), an application for the recusal of a number of justices of the Constitutional Court. The only gloss of note that has been added is terminological: the Constitutional Court preferred the term ‘reasonable apprehension’ to ‘reasonable suspicion’ because of the ‘inappropriate connotations which flow from the use of the word “suspicion” in this context’.22

(b) The Right to be Heard

(i) Thresholds to the Right

It has been observed that how the courts deal with issues of procedural fairness, and particularly the right to a hearing in the administrative process, tends to serve as an indicator of judicial activism or judicial restraint.23 As with all general rules, one must be careful to recognise that it is not necessarily a statement of universal application. Having said this, however, the narrow view taken by the courts in South Africa to the right to be heard, during the period from the early 1960s to the late 1980s, coincides with a period of judicial restraint in public law in the wake of the constitutional crisis of the 1950s and the increasingly repressive measures adopted by the government in the wake of the

21 1999 (7) BCLR 725 (CC), 747C-748E (paragraphs 35-38). See too SACCAWU v Irvin and Johnson Ltd (Seafoods Division Fish Processing) 2000 (8) BCLR 886 (CC); R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272 (HL).
22 At 748D (paragraph 38).
23 Baxter, 337.
Sharpeville massacre of 1960.\textsuperscript{24} It is no coincidence then that, as the Appellate Division became more activist in defence of individual rights in the late 1980s and emerged from its lengthy period of restraint, some of its more important decisions dealt with the right to a hearing in administrative law.\textsuperscript{25}

During the period of restraint the courts had engaged various techniques to limit the scope of the right to be heard.\textsuperscript{26} These techniques included, in the first place, an apparent over-eagerness to find implied legislative exclusions of the right to be heard;\textsuperscript{27} secondly, prior to 1989, the courts delimited strictly the type of interest that was required to be affected. It was only if rights, liberty or property stood to be adversely affected by an administrative decision that an affected person had a right to be heard;\textsuperscript{28} thirdly, the courts classified the administrative function in question as a means of determining formulaically whether an affected person should be entitled to be heard. If the function was described as judicial or

\begin{itemize}
\item Forsyth ‘A Harbinger of a Renaissance in Administrative Law’ (1990) 107 SALJ 387, 395 says of judicial performance in the field of procedural protection in South African administrative law: ‘Whatever may be thought about the attitude of the South African courts to legitimate expectations prior to Traub, even the most charitable of commentators would find it difficult, if not impossible, to say something good about the attitude to natural justice adopted by the South African courts since the late 1950s.’
\item See Chapter 1 above. See too Forsyth ‘Audi Alteram Partem Since Administrator, Transvaal v Traub’ in Kahn (ed) The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa Cape Town, Juta and Co: 1995, 189, 189 who commences his work as follows: ‘When I first studied and then wrote about natural justice in South Africa, the law was in a state of confusion. Although the principle of audi alteram partem had been described by South African judges as “sacred” and equated to “fundamental fairness”, in fact it was more praised than applied. An authoritarian government and public service were generally not minded to listen to what those affected by their decisions had to say about their proposals; and the courts were not astute to see that they did. The catalogue of persons denied a hearing makes sombre reading...’
\item Baxter, 573-574 described the problem as follows: ‘We have seen that one of the principle objectives of natural justice is accuracy in decision-making. A decision-maker can never be sure that he is properly acquainted with all the considerations relevant to his decision unless he has heard the views of everyone involved. This is why Lord Loreburn LC considered a fair hearing to be “a duty lying upon everyone who decides anything”. And the same may be said of the principle against bias, which seeks to promote objective, and to eliminate corrupt, decision-making. The simplicity of this reasoning has been lost in a morass of conceptual confusion.’
\item See for what is perhaps one of the more notorious examples of this phenomenon Omar v Minister of Law and Order 1987 (3) SA 859 (A). See too N v Minister of Law and Order 1986 (3) SA 921 (C).
\end{itemize}
quasi-judicial, a hearing was required but if the decision was described as purely administrative or legislative, no hearing was called for. In the late 1980s and early 1990s the Appellate Division delivered a series of particularly important judgments that altered, fundamentally, the approach to the right to a hearing. The single most important development was, without doubt, the acceptance into South African law of the doctrine of legitimate expectation.

(ii) The Doctrine of Legitimate Expectation

In the process of judicially-driven administrative law reform in the late 1980s and early 1990s, the single case that would probably be acknowledged to be the most important of the entire period is Administrator, Transvaal v Traub. Its importance lies in the fact that it broke the shackles of the rights, liberty and property threshold to the right to be heard and expanded it by adding to it the more flexible and fairer threshold of legitimate expectation.

29 See for example Laubscher v Native Commissioner, Piet Retief, supra, 553C-554C; Hack v Venterspost Municipality 1950 (1) SA 172 (W), 189-190; Minister of the Interior v Mariam 1961 (4) SA 740 (A), 751H-752A; South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A), 270D-E. See too, Baxter, 573-577.

30 See for example Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A); Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A); Administrator, Natal v Sibiya 1992 (4) SA 532 (A); South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A); Minister of Education and Training v Ndlou 1993 (1) SA 89 (A); Administrator, Cape v Ikapa Town Council 1990 (2) SA 882 (A).

31 1989 (4) SA 731 (A). Writing in 1984, Baxter bemoaned the state of the law on the applicability of the right to a hearing, describing it as a ‘chaotic jumble of contradictory decisions and conceptual confusion’. He proceeded to write: ‘Much of this confusion was unravelled in England in the watershed decision of Ridge v Baldwin; [[1964] AC 40] in South Africa, however, the confusion still reigns ... . Much of the difficulty could be remedied by a South African decision, couched in the grand style of Lord Reid’s judgment in Ridge v Baldwin: this is possible because what the judges have done, so they can undo.’ (At 572.) It is no exaggeration of its importance to South African administrative law to say that Traub is the type of case that Baxter had in mind.

32 See Hoexter 1991 Supplement to Baxter’s Administrative Law Cape Town, Juta and Co: 1992, 74-78 for a discussion of Traub and related developments. See too Forsyth ‘Audi Alteram Partem Since Administrator, Transvaal v Traub’ in Kahn, op cit, 189, 202 who describes the doctrine thus: ‘It holds that where a decision-maker, through either an express promise or the adoption of a regular practice, leads those affected to gain the legitimate expectation that he will decide in a particular way, then that expectation is protected by law.’ He says of Traub that it has ‘transformed the South African law of procedural protection into a vital and expanding corpus of law replacing the moribund formalism that
The case arose from criticism that had been leveled at the management of the Baragwanath Hospital in Soweto by doctors employed there. The criticism had been contained in a letter to a medical journal and had been signed by 101 doctors employed at the hospital. The six respondents, all of whom had signed the letter, were either interns or senior house officers at the hospital. The latter positions were filled by former interns for six month periods and for which they had to apply. The interns applied for the posts and the two respondents who were already senior house officers applied for the extension of their appointments. These appointments, together with favourable recommendations from the appropriate heads of department, were forwarded to the deciding authority. All of the applications were refused because the respondents had signed the letter to the journal. It was common cause that the automatic appointment of senior house officers and the extension of the appointments of senior house officers that had been recommended by heads of department was a practice of long standing at the hospital.

The respondents had argued that, although the refusal to appoint them had not affected their rights, liberty or property, they had a legitimate expectation to a hearing based on the invariable practice of appointing and extending the appointments of interns and senior house officers respectively. After a survey of the state of the law in other comparable situations, Goldstone J held that the applicants were entitled to be heard. The basis of his judgment was the following passage (at 400 I-J):

'The respondents’ case, as made out by the second respondent, is that the applicants having been parties to the letter published in the South African Medical Journal, makes them unsuitable for the appointment as senior house officers. That is a decision which undoubtedly prejudicially affects the rights of the applicants. Not only does the decision deny their appointments, but it also could prejudicially affect their professional careers. A decision that a professional person is unsuitable for a post is potentially of the utmost importance and will, if it remains, be a permanent blot on his good name.' Later he located the right to be heard within the framework of the fairness doctrine (at 401E): ‘To have found the present applicants unsuitable for appointment to the position of senior house officers, without having heard them, was unfair, and there is nothing in the Act which sanctions or justifies that unfairness.'
jurisdictions in which the doctrine of legitimate expectation had been accepted, Corbett CJ concluded that a similar development was called for in South Africa.  

‘There are many cases where one can visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of “liberty, property and existing rights” would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected.’

Corbett CJ warned that the concept of legitimate expectation could, if not properly managed, be an ‘unruly horse’ and should be applied with some caution.

(iii) The Legacy of Traub and the Duty to Act Fairly

There is little doubt that Traub is one of the most significant cases for the development of South African administrative law. Forsyth identifies three specific aspects of the judgment that make it so important: first, Corbett CJ unequivocally rejected the much criticized classification of functions approach to the applicability of the right to a hearing, thereby exorcising a cause of some of the more unfair denials by the courts of the right to procedurally fair administrative action; secondly, and centrally, Corbett CJ rejected the idea that the right to be heard only applied when liberty, property or existing rights stood to be adversely affected by an administrative decision, extending this threshold to circumstances in which a legitimate expectation stood to be affected; thirdly, the judgment resolved the issue of whether the right to be heard was a right that arose from

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35 At 761D-F. The doctrine is generally regarded to have its genesis, in English law, in the judgment of Denning MR in Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149. See De Smith, Woolf and Jowell, 418 (paragraph 8-040) and Forsyth ‘A Harbinger of a Renaissance in Administrative Law’ (1990) 107 SALJ 387, 395. It is evident that the doctrine is widely applied in European, North American and Commonwealth jurisdictions. See further Grogan ‘When is the “Expectation” of a Hearing “Legitimate”?’ (1990) 6 SAJHR 36.

36 For a thorough analysis of the effect of Traub and how the doctrine of legitimate expectation has developed and been applied in South Africa, see Malan ‘Ten Years After Traub: The Doctrine of Legitimate Expectation in South African Administrative Law’ (2000) 117 SALJ 520.

37 ‘Audi Alteram Partem Since Administrator, Transvaal v Traub’ in Kahn, op cit, 189, 191-192.

38 At 192.
the express or implied terms of an empowering provision or was a common law right that applied unless it had been expressly or impliedly excluded by the empowering provision. Corbett CJ confirmed that the latter was the correct position.39

The legacy of Traub extends beyond these three aspects. In a more general sense it freed the right to procedural fairness from the rigidity wrought by a formulaic application that did not necessarily relate to the central concept of fairness.40 At the same time, however, it stands in danger of being taken to create its own new set of rigid rules to be formulaically applied. It does this in two ways: first, the warning that Corbett CJ issued that the doctrine may be an ‘unruly horse’ and should consequently be handled with care is a call for a restrictive approach to the right to be heard outside of the rights, property and liberty formula; and secondly because the doctrine has tended to be regarded as the new boundary of the right to be heard, it may place a fetter on the law’s ability to achieve appropriate procedural fairness in all cases.41 In this sense – and one does not want to look a gift horse in the mouth – the doctrine of legitimate expectation may serve as an inhibiting factor in the development of procedural fairness under the Constitution and the Promotion of Administrative Justice Act.42

39 At 192.
40 On the result of an earlier and more far-reaching process of reform by the English courts, De Smith, Woolf and Jowell, at 401(para 8-002), say: ‘Whichever term is used, the time has come to make a break with the artificial constraints surrounding the situation in which natural justice or the duty to act fairly are required. The previous distinctions were already comatose and should be formally declared moribund. The entitlement to fair procedures no longer depends upon the adjudicative analogy, nor whether the authority is required or empowered to decide matters analogous to a lis inter partes. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decision will affect in widely different situations, subject only to well-established exceptions.’
41 It is clear from the cases that, in order for a legitimate expectation to arise, an applicant must be able to point to either an undertaking or a prior practice. This being so, the limits of the doctrine are evident: it applies to those who had the ‘decency’ to guarantee fairness through their own conduct by either acting in a particular way or undertaking to do so, but it does not apply to those decision-makers who act unfairly uniformly and never allow themselves to create the impression that they will act fairly.
42 This issue will be discussed fully below.
Whether this is so or not depends on the relationship between the duty to act fairly\textsuperscript{43} that is said to rest on anyone who is called upon to decide anything (in the exercise of public power)\textsuperscript{44} and the doctrine of legitimate expectation. In the immediate post-Traub era this issue arose in a series of cases involving the transfer of public servants without a hearing. In \textit{Hlongwa v Minister of Justice, KwaZulu},\textsuperscript{45} Didcott J held that it was incumbent on a decision-maker to grant a public servant a hearing before taking a decision on whether to transfer him. In \textit{Ngema v Minister of Justice, KwaZulu; Chule v Minister of Justice, KwaZulu}\textsuperscript{46} Levinsohn J held that Didcott J was incorrect and that transfers were occupational hazards of employment in the public service. He held that a prior course of conduct or an undertaking were the only ways in which a legitimate expectation could be created, that no such expectation triggered a right to be heard in the case before him and that the time was not right for the development of the duty to act fairly beyond the limits of the doctrine of legitimate expectation.\textsuperscript{47}

These issues were also dealt with in an application and an appeal from the judgment in the application in the erstwhile Transkei. The facts in \textit{Gemi v Minister of Justice, Transkei}\textsuperscript{48} were that the applicant had applied to be transferred from his post in Umtata to a post in Butterworth near his home. It having come to the respondent’s attention that the applicant was running a night school in Butterworth, and it being assumed that this may have accounted for his absence from work on occasions and his less than satisfactory performance at work, a decision was taken to transfer him to Mount Frere, about 100 kilometres from Umtata in the opposite direction to Butterworth. Pickering AJ held that the applicant was, in terms of the legitimate expectation doctrine, entitled to be

\textsuperscript{43} See \textit{Ridge v Baldwin} [1964] AC 40 (HL).
\textsuperscript{44} See \textit{Board of Education v Rice} [1911] AC 179 (HL), 182.
\textsuperscript{45} 1993 (2) SA 269 (D). Didcott J held, in respect of the basis for the right to be heard, (at 272D) that ‘a person in the applicant’s position, and I say nothing about people who are in positions different from hers, does enjoy at present a benefit or advantage or privilege of being posted where she is, which she could reasonably have expected to retain and which it would have been unfair to deny to her without prior consultation, and the opportunity to make representations’.
\textsuperscript{46} 1992 (4) SA 349 (N).
\textsuperscript{47} At 360D-361H.
\textsuperscript{48} 1993 (3) SA 276 (Tk).
heard before such a decision, which adversely affected him, could be taken. There was, in this case, no question of a prior practice or an undertaking. The crux of his reasoning was the following:49

'It seems to me, with respect, that the views of Professors Hlophe and Grogan are correct. Officials entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly the decision-maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would in most instances be obliged to afford the person affected by the decision a hearing prior to coming to his decision. Officials are not relieved of this duty except to the extent that a departure from the rules of natural justice is expressly or impliedly sanctioned by the relevant enabling legislation. In the absence of such statutory authorisation a departure from the rules of natural justice can only be justified in circumstances where it is necessary to promote some value or end of equal or greater significance than natural justice or, to put it differently, 'where circumstances are so exceptional as to justify such a departure'. (Per Leon J in Dhlamini v Minister of Education and Training and Others 1984 (3) SA 255 (N) at 257H.)'

Pickering AJ's judgment was upheld on appeal, in Minister of Justice, Transkei v Gemi.50 Goldin JA held that undertakings and courses of conduct were not the only ways in which legitimate expectations could arise51 and that Corbett CJ in Traub had not intended these to be exhaustive of the bases upon which the doctrine could be invoked.52 The court regarded the doctrine to be a part of the wider doctrine of fairness – a specific manifestation of the duty to act fairly.

Few would quibble with the result in Gemi. It offends one's sense of fairness that a person should not be allowed a say in whether he should be transferred further away from his home than he already was. It is not an answer to say that transfers are an occupational hazard for public servants. That is, with respect, akin to saying that convictions are a risk run by all those who are charged with offences: the fact that a

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49 At 288D-F.
50 1994 (3) SA 28 (TkA).
51 At 32A.
52 At 32H.
person may be convicted heightens the need for a hearing precisely because of the adverse consequences for the accused if the court convicts him or her. The point of departure for Forsyth is not necessarily the result but the methodology. He argues that the doctrine of legitimate expectation and the fairness doctrine are distinct aspects of procedural justice in administrative law and ought not to be confused. For Forsyth, the mistake that led to the heretical conclusion was a misunderstanding of the nature and purpose of the doctrine of legitimate expectation. He takes issue with Hlophe who had argued that fairness activates an expectation to be heard whenever discretionary power is exercised and Grogan who had argued that if fairness dictates that a person should be heard, he or she can be said to have a legitimate expectation to be heard. He states that 'the doctrine of legitimate expectations was developed in England (and elsewhere in Europe … ) after the duty to act fairly had developed, in order further to extend the reach of the audi alteram partem principle. The doctrine is thus not intended to remedy the absence of a duty to act fairly; it is a supplement to it. Therefore it is to distort the concept to use it to extend the reach of the audi alteram partem principle to areas where no rights are involved and there has been no promise or past practice on which to rely. Those areas are the proper concern of the duty to act fairly.'

Forsyth’s argument has substance: a clear distinction is drawn in English law between the various triggers for the right to be heard. Indeed, this is stated explicitly in Schmidt v Secretary of State for Home Affairs in which Denning MR held that whether a person is entitled to be heard prior to administrative action being taken ‘all depends on whether

53 ‘Audi Alteram Partem Since Administrator, Transvaal v Traub’, op cit, 204-205. He refers to the decisions of Didcott J in Hlongwa and Pickering AJ in Gemi as ‘heretical’. He states, at 205: ‘In both these cases the decision was based upon the civil servant’s expectation of being allowed to retain the advantage of his or her present posting. But in neither case was any promise of consultation made or was there any past practice to justify the expectation. The duty to act fairly simpliciter, if adopted by the courts, might well require consultation in the case of some such transfers; but the doctrine of legitimate expectations addresses a different issue.’


56 At 205, footnote 93.

57 [1969] 2 Ch 149 (CA).
he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say’. 58 In other words, English law may be said to go further than requiring rights to be adversely affected or legitimate expectations to be threatened before a right to be heard is triggered: fairness also dictates that certain interests should not be adversely affected without a hearing being afforded to the person who stands to be prejudiced by the decision.\footnote{59} Seen in this light, the doctrine of legitimate expectation is simply a particular application of the broader principle of fairness: it is fair to hear a person when an administrator has, either through a course of conduct or by having given an undertaking, created the reasonable belief that he or she will deal with a particular issue in a particular way, and that administrator is considering taking a decision that will be at odds with his or her previous conduct or will be in breach of the undertaking.

It is sometimes said that the interests at stake in application-type cases amount to rights, if one adheres to the so-called determination theory of rights, rather than the so-called deprivation theory.\footnote{60} But that is, in reality, repackaging new wine in old skins. The truth of the matter is that when a right to be heard in these instances is recognised, it is

\footnote{58} At 170. This dictum is quoted with approval by Corbett CJ in \textit{Traub} at 754f-J. See too \textit{Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union [1971] 1 All ER 1148 (CA), 1154f-h. Elias in ‘Legitimate Expectation and Judicial Review’ in Jowell and Oliver (eds) \textit{New Directions in Judicial Review} London, Stevens and Sons: 1988, 40 stresses that Denning MR, in \textit{Schmidt}, ‘treated legitimate expectation cases as a species distinct both from rights and interests’.

\footnote{59} The most obvious cases in this category are those that involve applications for licences or permits – cases in which people apply for rights or benefits. A person in these circumstances does not enjoy a right that stands to be adversely affected, as where a right or benefit that has been granted is taken away. At best, such a person can be said to have a right to have the application for the right or benefit properly considered, but that begs the question as to whether he or she should be heard. See Craig who says (at 289) of the position in English law: ‘It seems clear on principle that the technical distinction between rights and privileges should not be determinative of the applicability of procedural protection. Many interests may be extremely important to an individual even though they would not warrant the label “right” or “Hohfeldian right”. The absence of a substantive right to a particular benefit should not lead to the conclusion that procedural rights are inapplicable, and the term legitimate expectation should not be manipulated to reach this end.’

accorded procedural protection because it would be unfair to deny a right to be heard. In other words, the interest at stake is regarded as being of sufficient importance to warrant procedural protection.\textsuperscript{61} One does not have to stretch the concept of rights, or bend the legitimate expectation doctrine in such cases: all that is required is an application of the more flexible duty to act fairly, which is widely recognised but not always acknowledged. The duty to act fairly, which seeks to determine the types of interests that do indeed require procedural protection and those that do not, may be said to be constructed of the following.\textsuperscript{62}

\begin{quote}
(1) Whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly'.
(2) The inference will be more compelling in the case of any decision which may adversely affect a person’s rights or interests or when a person has a legitimate expectation of being fairly treated.
(3) The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative, or too remote to qualify for a fair hearing. Whether this is so will depend on all the circumstances but a fair hearing ought no longer to be rejected out of hand, for example, simply because the decision-maker is acting in a “legislative” capacity.
(4) Special circumstances may create an exception which negatives the duty to act fairly. The inference can be rebutted by the needs of national security, or because of other characteristics of the particular function. For example, a decision to allocate scarce resources amongst a large number of contenders which needs to be made with despatch may be inconsistent with the obligation to hold a fair hearing. …
(5) What fairness requires will vary according to the circumstances. …
(6) Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-
\end{quote}

\textsuperscript{61} See De Smith, Woolf and Jowell, 403 (paragraph 8-007) who say that a strict application of the right to a hearing to cases that involve deprivations and expectations but not to those involving applications would ‘result in anomalies and injustice for there are situations where a refusal of an application could adversely affect an interest deserving of protection by means of a fair hearing. For example, the refusal of an application for a passport not only prevents the exercise of a basic liberty to travel, but may also cast aspersions on a person’s character. It would seem unfair to deny an applicant for planning permission procedural protection (as is provided by statute) so that he may argue in favour of his interest in developing his land. It would also seem unfair to deny an applicant for a licence to export goods the opportunity to make representation in support of his application (such an opportunity not presently provided by statute).

\textsuperscript{62} De Smith, Woolf and Jowell, 405-407 (paragraph 8-011).
There is little clarity (and a measure of obfuscation) on what the duty to act fairly entails in practice, certainly in respect to the threshold of the right to be heard,\textsuperscript{63} even though the fairness doctrine has been accepted as part of South African administrative law, on the level of theory at least, for some time. In \textit{Roberts v Chairman, Local Road Transportation Board (2)},\textsuperscript{64} for instance, Friedman J appeared to accept that the respondent was required to act fairly but the judgment as a whole tends to indicate that he was talking about the standard rules of natural justice: the classification of functions approach in the judgment is at odds with the duty to act fairly that he purported to endorse.\textsuperscript{65} In \textit{Lawson v Cape Town Municipality},\textsuperscript{66} more significantly, Comrie AJ held that the respondent was ‘was under a duty to act fairly towards applicant by disclosing to him the adverse police report – or at least its substance – and by affording him an opportunity of dealing with it, before forming its opinion under s5(2)(a) and refusing the application for a licence’.

By the early 1990s the duty to act fairly was relatively well entrenched, even if there still existed a fair degree of conceptual confusion: writing in 1991, Hoexter was able to comment that the ‘[e]ver-growing judicial cynicism concerning the utility of the classification of functions has led to an increased use of the terminology of fairness’ and to point to an impressive list of cases to illustrate her point.\textsuperscript{67} And in \textit{Traub} itself Corbett CJ located the legitimate expectation doctrine within the broader context of

\textsuperscript{63} See Malan ‘Ten Years After Traub: The Doctrine of Legitimate Expectation in South African Administrative Law’ (2000) 117 \textit{SALJ} 520, 538 who says that while the duty to act fairly has been accepted by the South African courts, ‘the concept has been received into our law in a haphazard manner, with the result that there is a lack of clarity regarding the implications of the duty to act fairly’.

\textsuperscript{64} 1980 (2) \textit{SA} 480 (C).

\textsuperscript{65} For criticism of this case, see Baxter ‘Busfare Increases and Administrative Irregularities’ (1981) 98 \textit{SALJ} 308.

\textsuperscript{66} 1982 (4) \textit{SA} 1 (C), 12F.

\textsuperscript{67} 1991 Supplement to Baxter’s Administrative Law Cape Town, Juta and Co: 1992, 86. It should be borne in mind that the classification of functions was finally and irrevocably discarded in \textit{South African Roads Board v Johannesburg City Council} 1991 (4) \textit{SA} 1 (A).
fairness when he observed that, in England and other commonwealth countries, there had since the 1950s, ‘been “a dramatic and, indeed, radical change in the scope of judicial review”; and that this change had been described “by no means critically, as an upsurge of judicial activism”. One aspect of this change in the scope of judicial review was, of course, the evolution of the legitimate expectation principle. And it was evolved, as I read the cases, in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case’.68 More importantly, perhaps, Corbett CJ held expressly that the doctrine of legitimate expectation was a part of the duty to act fairly and that in determining what fairness requires ‘[m]any features will come into play including the nature of the decision and the relationship of those involved before the decision was taken ...; and a relevant factor might be the observance by the decision-maker in the past of some established procedure or practice. It is in this context that the existence of a legitimate expectation may impose on the decision-maker a duty to hear the person affected by his decision as part of his obligation to act fairly’.69

More important developments have occurred more recently. Ironically, the Supreme Court of Appeal made these developments after 1994 and in reliance on the common law rather than the constitutional right to procedurally fair administrative action: in Du Preez v Truth and Reconciliation Commission,70 Corbett CJ held that ‘the solution to the problems raised by the issues in this case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner71 and that the right to a hearing was ‘but one facet, albeit an important one, of

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68 At 761A-B.
69 At 758G-759A. This passage was taken, in Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (TkA) to mean that the doctrine of legitimate expectation and the duty to act fairly were the same thing and, consequently, that the legitimate expectation doctrine could be activated even in the absence of a prior course of conduct or an undertaking.
70 1997 (3) SA 204 (A).
71 At 230I.
the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly'.

"I am of the view that likewise in the present case the Commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings. As I have indicated, the subject-matter of inquiries conducted by the Committee is "gross violations of human rights". Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, inter alia, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the Commission may accuse or condemn persons in the position of appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly.'

On the question of whether the courts have accepted that the duty to act fairly entails a broadening of the rights and legitimate expectations threshold to include certain interests, the Supreme Court of Appeal has not given an unequivocal answer. It is submitted, however, that the answer to this question must be in the affirmative: in the first place, when the courts embraced the fairness doctrine, and they have now done so with some enthusiasm, they did so without qualification and, as has been shown above, cited cases that specifically spoke of procedural protection for interests as well as rights and legitimate expectations. Despite this, there are no express dicta to this effect. Indeed, one has to scrounge through the cases to find support for the proposition. There is a hint that interests that do not amount to rights may warrant procedural protection in Du Preez v Truth and Reconciliation Commission in the passage quoted above: while the testimony of victims before the committee of the respondent would no doubt implicate the appellants in gross violations of human rights, neither the committee or the respondent could visit any adverse consequences upon the appellants as a

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72 At 231G.
73 At 233C-E. The most recent endorsement of the duty to act fairly to emanate from the Supreme Court of Appeal is Chairman, Board of Tariffs and Trade v Brenco Incorporated 2001 (4) SA 511 (SCA).
74 Supra.
result. It is true that they could have been charged with the commission of offences in
due course and that their reputations may have been adversely affected by having
serious allegations of reprehensible conduct leveled against them but it is stretching the
concept of a right to suggest that the interests at stake amounted to rights.\textsuperscript{75}

Despite the indications in this case of a relaxing of the rights and legitimate expectation
threshold, Malan suggests that it may be reading too much into this case to conclude
that the court went this far without saying so expressly and dealing with the cases that
have postulated the stricter threshold.\textsuperscript{76} He suggests, however, that authority for this
proposition is to be found in the later decision of Director, Mineral Development,
Gauteng Region v Save the Vaal Environment.\textsuperscript{77} There are, once again, indications in
this decision that the threshold has been relaxed but one has to reach this conclusion
by inference. The issue involved was whether the respondents were entitled to be
heard before a decision on whether to grant a mining licence was to be taken. The
court held that the respondents were entitled to be heard. In reaching this conclusion,
Olivier JA appeared to accept the correctness of the respondent’s proposition – at the
very least by not repudiating it – that the right to a hearing is triggered when ‘a statute
empowers a public official or body to do an act or give a decision prejudicially affecting
a person in his or her liberty or property or existing rights or interests, or whenever such
a person has a legitimate expectation of a hearing’.\textsuperscript{78}

Later, after having set out the matters that the appellant was required to consider in

\textsuperscript{75} The difficulty of distinguishing between rights in the strict sense and other interests can, says Craig
(at 293, footnote 75), be ‘problematic precisely because the definition of what constitutes a right is
itself contentious’. Note that in South African Roads Board v Johannesburg City Council 1991 (4) SA
1 (A), 9C-E Milne JA held that the respondent was entitled to be heard before a decision to proclaim a
toll road was taken because its rights were prejudicially affected. With great respect, it is stretching the
concept of a right to hold that because a local authority would have to re-allocate resources or
even allocate more resources than before its rights were affected. It is submitted that despite the term
right being used to activate the right to a hearing, the court, in reality, held that the respondent had to
be heard because its interests were prejudicially affected.

\textsuperscript{76} Op cit, 540.

\textsuperscript{77} 1999 (8) BCLR 845 (SCA).

\textsuperscript{78} At 850H-I (paragraph 9(a). (Emphasis added).
arriving at a decision, Olivier JA held that they were ‘environmental matters about which the respondents have legitimate concerns’. And on the argument raised by the appellants that no rights were infringed by the issuing of a mining licence because no mining operations could commence before an environmental management program had been approved, Olivier JA held:

‘The argument cannot be sustained. The issue of a licence in terms of s 9 enables the holder to proceed with the preparation of an environmental management programme, which, if approved, will enable him to commence mining operations. Without the s 9 licence he cannot seek such approval. The granting of the s 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays “… the necessary foundation for a possible decision … ” which may have grave results. In such a case the audi rule applies to the consideration of the preliminary decision (see Van Wyk NO v Van der Merwe 1957 (1) SA 181 (A) at 188B - 189A). In my view, this is such a case.’

Finally, Olivier JA dealt with the argument that, given the two stages that were contemplated by the legislation, it would amount to an unnecessary and costly duplication to require a hearing at both stages. He held that the granting of the mining licence – the first stage – may subject objectors to ‘potential jeopardy’, concluding as follows:

‘Nothing in s 9 or in the rest of the Act either expressly or by necessary implication excludes the application of the rule, and there are no considerations of public policy militating against its application. On the contrary, the application of the rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the Brundtland Report: World Commission on Environment and Development, ‘Our Common Future’ Oxford University Press 1987). Our Constitution, by including

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79 At 852B (paragraph 13).
80 At 852I-853B (paragraph 17).
81 At 853E-F (paragraph 19).
82 At 853G-854A (paragraph 20).
environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.’

Perhaps the best way to regard Du Preez and Save the Vaal Environment is that they have simply given expression to what has been a gradual and almost imperceptible process of approaching the right to procedural fairness less formalistically and more on the basis of the value of fairness. Whatever the Supreme Court of Appeal may have left unsaid, the effect of the two judgments (when read with Traub and the South African Roads Board case) is, undoubtedly, that courts in South Africa, like their counterparts in England are now prepared to extend procedural protection to interests that fall short of rights and that do not arise from a legitimate expectation. This is the natural consequence of the rejection of the classification of functions and the adoption of the fairness doctrine.\(^{83}\) It also makes it possible to avoid the artificiality of maintaining the threshold of rights being affected but applying the determination theory of rights to define what a right is for these purposes. It is apparent from the cases\(^{84}\) that the lower threshold infiltrated our law some time ago – and Hlongwa and Gemi are good examples of this – through a misapplication of the legitimate expectation doctrine or directly through the fairness doctrine, as exemplified in Lawson. What Du Preez and Save the Vaal Environment have done is simply to recognise the result of this infiltration.

(iv) The Content of the Duty to Hear

The cases on the duty to hear the other side are clear on at least one thing: the right to

\(^{83}\) See Malan, op cit, 541 who says: ‘The idea that a duty of fairness applies to decisions that affect a person’s “interests” may sound heretical to South African lawyers, who are accustomed to the “existing rights” formula. However, to say that a decision which affects a person’s interests must be taken in a procedurally fair manner amounts to little more than saying that a person who is affected by the exercise of an administrative function must be afforded an opportunity of being heard or that a decision that involves civil or legal consequences for a person must comply with the audi rule.’

\(^{84}\) The more important cases will be discussed at 10.2.2(b) below.
a hearing is flexible in the sense that its content is case specific. In some instances, a hearing may be required to be court-like, with parties enjoying the rights to adduce oral evidence and to cross examine witnesses. In other instances, the right to be heard may be much leaner and may not even include the right to present oral testimony or argument. The touchstone for determining what is required in any particular case is the concept of fairness.

Whatever the content of the right in particular cases, and irrespective of all of its

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85 See Doody v Secretary of State for the Home Department [1993] 3 All ER 92 (HL), 106d-h, cited with approval in Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A), 231I-232C and in Chairman, Board on Tariffs and Trade v Brenco Inc 2001 (4) SA 511 (SCA), 520H-521E (paragraph 13). See too Baxter, 542 who says: ‘Fair hearings need not necessarily meet all the formal standards of the proceedings adopted by courts of law. The vagaries of the administrative process demand much less formality and much greater flexibility.’ See too Russell v Duke of Norfolk [1949] 1 All ER 109 (CA), 118E in which Tucker LJ stated: ‘The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.’ In South Africa, Rumpff CJ, in Oberholzer v Padraad van Outjo 1974 (4) SA 870 (A), 875F-G held as follows in relation to a challenge to the closing of a road: ‘n Aansoek om sluiting van ’n pad, al is dit ’n privaat pad, is vanselfsprekend van belang vir beide die persoon wat die pad wil sluit en vir persone wat geregig is om die pad te gebruik. Indien ’n aansoeikdoener gronde voor die Padraad lê, in geskrif of mondeling, waarom die aansoeikdoener die toestemming van die Padraad behoort te kry om die pad te sluit, sou mens verwag, as ’n elementêre vereiste van natuurlike regverdigheid, dat die Padraad daardie gronde aan ’n beswaarmaker (indien daar is) bekend sou stel, sodat laasgenoemde daarop kan antwoord. Omgekeer, sou mens verwag dat ’n beswaarmaker se gronde van beswaar aan ’n aansoeikdoener bekend gemaak sou word, sodat laasgenoemde daarop kan antwoord. Indien dit nie gebeur nie, weet ek nie hoe dit moontlik vir die Raad is om die “aansoek” “in die lig van ontvange besware” te oorweeg nie, soos art. 46 (3) (c) dit vereis. Dit wil nie sê dat mondelinge vertoë altyd nodig is nie. Dit sou van die besonderhede van elke geval afhang wat billik sou wees teenoor die betrokke persone.’

86 The hearings of the Amnesty Committee of the Truth and Reconciliation Commission afford an example of hearings that, in all material respects, were similar to civil proceedings in a court. It was important that this was so: amnesty for committing gross violations of human rights was not simply there for the asking. Those who had admitted to such conduct were required to prove that their acts fell within the terms for amnesty prescribed by the Promotion of National Unity and Reconciliation Act 34 of 1995 and to have their versions tested by parties having an interest, such as their victims.

87 See for example Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal 1999 (2) BCLR 151 (CC), in which even less was required. The Constitutional Court held that the right to procedural fairness required no more in the circumstances than notice being given of the provincial government’s intention to stop paying subsidies. See more generally, Corder ‘The Content of the Audi Alteram Partem Rule in South African Administrative Law’ (1980) 43 THRHR 156, 163-164.

88 Marlin v Jockey Club of South Africa 1942 AD 112, 126; Turner v Jockey Club of South Africa 1974 (3) SA 633 (A), 645F-H.
possible elements, the courts recognise that the right has a minimum, core, content. If an administrative decision-maker fails to meet these core elements of the right, any subsequent decision will be liable to be set aside on the basis of its non-compliance with the rules of procedural fairness. These core elements are that a person who may be prejudicially affected by a decision must be given notice of the intended action and must be given a proper opportunity to state his or her case.

The notice requirement, in particular, appears to be applied strictly. In the appellant had been convicted for failing to comply with an order issued by a superintendent to leave the ‘location’ of Duncan Village because of his failure to pay rent for the house in which he and his family lived. After holding that a person in the position of the appellant had a right to a hearing before such action was taken, Wynne J held that procedural fairness required a formal warning followed by an opportunity to make either oral or written representations. In a concurring judgment, O’Hagan J held

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89 See in this respect, Corder ‘The Content of the Audi Alteram Partem Rule in South African Administrative Law’ (1980) 43 THRHR 156.
90 Baxter, 543-544. In Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E), 854H, Van Rensburg J held: ‘Although no specific, all-encompassing test can be laid down for determining whether a hearing is fair, two fundamental requirements need to be satisfied before a hearing can be said to be fair, namely there must be notice of the contemplated action and a proper opportunity to be heard.’ See too Administrator, Transvaal v Theletsane 1991 (2) SA 192 (A), 206C-D. In Twinning v New Jersey 211 US 78 (1908), 110-111, the court stated that these requirements of due process ‘seem to be universally prescribed in all systems of law established by civilized countries’. Much the same sentiment was expressed by Wessells JA in Builders Ltd v Union Government (Minister of Finance) 1928 AD 46, 58 when he spoke of the right to a hearing being a principle ‘common to all systems of jurisprudence’.
91 Baxter, 544 states the principle as follows: ‘An opportunity to be heard presupposes adequate notice of intended administrative action. Whether this is required by statute or not, an affected party must be given adequate notice of the possibility that administrative action may be taken against him.’ At 545 he continues: ‘For the hearing itself to be a fair one, the notice of the impending action should also specify the salient factors motivating the proposed action. Without this the affected individual cannot hope to prepare his objections adequately. ... It is, of course, axiomatic that the notice should also stipulate when and where the opportunity to be heard may be exercised, although it need not expressly invite him to make representations.’
92 1960 (2) SA 108 (E).
93 At 117H-118F.
that the appellant, despite having been warned, had not been given proper notice.\textsuperscript{94} 

‘The evidence in the present case shows that the appellant was warned on several occasions that unless he paid the arrears owing by him, his certificate relating to his dwelling would be cancelled. The assistant manager of the native affairs department admitted, however, that he had been given no warning that he would be ordered to leave the location. The actual order of the 16th October, 1958, was the first intimation the appellant had of this fact. While the appellant might have had no answer at all to a threat to evict him from the house for which he could or would not apparently pay, he could have had reasons to put before the superintendent showing why he should be allowed to remain in the location.’

Adequate notice serves no purpose on its own. Its purpose is to enable the affected party to have a fair opportunity to present his or her case. The core of this duty was set out by Colman J in \textit{Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture}.\textsuperscript{95}

‘It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice

\textsuperscript{94} At 22B-D. In \textit{Du Preez v Truth and Reconciliation Commission}, supra, Corbett CJ held that fairness demanded that the appellants had to be given reasonable and timeous notice of a hearing at which they would be implicated in the commission of a gross violation of human rights (at 233C-G) and of the substance of the allegations against them (at 234H-I). See too \textit{Fredericks v Stellenbosch Divisional Council 1977 (3) SA 113 (C), 116C-H; Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E), 855F-I} in which Van Rensburg J held: ‘The generalised notice procedure adopted by the respondents ... cannot be considered as constituting proper notice of the action that Van Deventer, as the delegee of the first respondent, was contemplating. Before so drastic a step as cancellation of a disability grant can be considered, the recipient of the grant should, in my judgment, be given proper notice by the Department of Welfare of its intention to review the grant. By proper notice I mean that adequate steps should be taken to ensure that the beneficiary under the grant receives such notice. Then again it would not be sufficient to simply state generally that social grants would be reviewed annually and that reviewing would commence in 1996. The recipient of a grant would, in my view, be entitled to individual notice that his grant is to be reviewed.. The notice should inform him of the salient factors which will fall to be considered and should further state when and where the opportunity to be heard may be exercised.’

\textsuperscript{95} 1980 (3) SA 476 (T), 486D-G. Note that Baxter, at 546, says that ‘Colman J’s dismissal of the formal features of a trial, such as cross examination, et cetera, is put a little too strongly. Everything depends upon the circumstances; and even these features may be appropriate in particular cases. The test is always one of “fundamental fairness” and for this reason the principles of natural justice are always flexible’.
if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the lastmentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.’

The dangers, and unfairness, of ‘instant trials’ are well known in criminal procedure. Those dangers and that unfairness also infects administrative action taken in the absence of a proper opportunity being afforded to affected parties to prepare their cases. In Turner v Jockey Club of South Africa a jockey charged in a domestic tribunal with misconduct was only informed of the charge against him at the commencement of the hearing. His failure immediately to protest his innocence was held against him. Not surprisingly, Botha JA held that the hearing was unfair in these circumstances. In contradistinction, while the right to legal representation is an important aspect of the right to a fair criminal trial, and is so vital that its infringement will usually result in the setting aside of proceedings, there is no general right to be legally represented in administrative proceedings in the absence of a statutory or contractual provision to this effect.

Finally, the fairness of a hearing would be illusory if a party was not given proper disclosure of the case that he or she will be called upon to meet. This point is made with eloquence by Feetham J in Kadalie v Hemsworth NO:

‘A man cannot meet charges of which he has no knowledge; a man who has to give evidence that he is of a respectable and deserving character is merely beating the air if the tribunal before which he goes declines to give him any indication of the points against him which have to be met; how

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96 1974 (3) SA 633 (A), 651H-653H.
97 See for instance, Hlantlalala v Dyantyi NO 1999 (2) SACR 541 (SCA).
98 Dabner v South African Railways and Harbours 1920 AD 583; Cuppan v Cape Display Supply Chain Services 1995 (4) SA 175 (D).
99 1928 TPD 495, 506-597. See too Lawson v Cape Town Municipality 1982 (4) SA 1 (C), 12E-F in which a refusal to renew a licence was set aside because the respondent had failed to disclose to the applicant the contents of a police report.
for instance is a man to anticipate a charge that he has been declared a prohibited immigrant and offer satisfactory evidence to the contrary, when the point has never been put to him? I do not suggest that the pass officer was called upon to supply the applicant with detailed statements and reports; but I think that, in view of the terms of the attorneys' letters, the application fora certificate should not have been disposed of until the main points of what I may call the counter case had been brought to the applicant's notice; and that under the circumstances failure to give the applicant any indication of these points was not merely an unreasonable way of dealing with the matter, but involved in effect a denial to the applicant of any adequate opportunity of stating his case, and that there was therefore a gross irregularity which justifies this Court in setting aside the sub-commissioner's decision.'

This aspect of procedural fairness does not only apply to the facts that a person is required to meet: it is also unfair to keep a person in the dark about a policy that may be applied in his or her case.

10.2. The Constitution

10.2.1. The Rule of Law and Procedural Fairness

Much like the principle of legality, the idea of procedural fairness is universal to all civilized legal systems. It is thus an important aspect of constitutionalism:

'Constitutionalism predicates not only that administrative action should conform to legal prescriptions, but that such action should at least be rational and not arbitrary. Authority to take administrative action is necessarily conditional upon the existence of certain circumstances, and

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100 See Baxter, 547-548: ‘This principle has been emphasised in dozens of cases where administrative agencies have acted upon information, allegations, objections or assumptions of which the affected individual was unaware and hence not in a position to challenge. On the other hand, the formality of a criminal charge is scarcely warranted except in cases of gravity, involving disciplinary action analogous to that of criminal conviction.’ He also states, at 548 that a distinction should be drawn between the ‘information, assumptions and opinions upon which a decision is based and the evaluation thereof during the process of the decision itself. The administration cannot be expected to share with the individual every phase of its final decision-making process’. See too Chairman, Board on Tariffs and Trade v Brenco Inc 2001 (4) SA 511 (SCA), 532F-H (paragraph 42).

101 See for example, Tseleng v Unemployment Insurance Board 1995 (2) BCLR 138 (T), 150G-151G.

102 Baxter, 536-538.

103 Baxter, 538.
choices can only be made where the possible alternatives are known. A decision-maker can only be sure that he is properly apprised of the facts, circumstances, and alternative possibilities, if, in addition to making his own enquiries, he has heard the submissions of the persons likely to be affected by his decision.’

The duty to exercise administrative power fairly is widely regarded as part of the rule of law.\textsuperscript{104} Thus, De Smith and Brazier say of the rule of law:\textsuperscript{105}

‘The concept is one of open texture; it lends itself to an extremely wide range of interpretations. One can at least say that the concept is intended to imply (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and (ii) that the law should conform to certain minimum standards of justice, both substantive and procedural. Thus, the law affecting individual liberty ought to be reasonably certain or predictable; where the law confers wide discretionary powers there should be adequate safeguards against their abuse; like should be treated alike, and unfair discrimination must not be sanctioned by law; a person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal; and so forth.’

In the South African context, while the Constitutional Court has considered various components of the rule of law, contained in s1(c) as a founding value of the

\textsuperscript{104} See in particular, Jowell ‘The Rule of Law Today’ in Jowell and Oliver (eds) The Changing Constitution (3ed) Oxford, Clarendon Press: 1994: 57, 68-71. At 69 Jowell says: ‘British public administration is deeply infused with the notion that adjudicative mechanisms of one form or another are necessary to provide procedural checks on discretion in order to comply with the Rule of Law.’ See too Mathews ‘The Rule of Law – A Reassessment’ in Kahn (ed) Fiat Justitita: Essays in Memory of Oliver Deneys Schreiner Cape Town, Juta and Co: 1983, 294, 296-302; Estaban The Rule of Law in the European Constitution The Hague, Kluwer Law International: 1998, 169-170. But see Galligan Due Process and Fair Procedures Oxford, Clarendon Press: 1996, 178-186 who argues that although due process as a procedural concept may have been part of the rule of law, it was understood to refer to the procedures of the courts. He continues, at 184, on whether this notion of the rule of law could be said to have been extended to administrative decision-making: ‘To limit the powers of any authority to those conferred by law is indeed a principle of great constitutional importance. However, like many great principles, it was hollow in the middle, for it said nothing about the way administrative bodies ought to make their decisions and conduct their affairs, nor did it provide an effective system of scrutiny and accountability. Most particularly, Dicey’s expression of the rule of law says nothing about the procedures to be followed, makes no commitment to a principle of procedural due process. And yet the development of procedural due process in administration is one vital way of extending the general idea of the rule of law beyond the strictly adjudicative sphere.’

Constitution, it has not, as yet, expressed itself unequivocally on its procedural content. When it does, it is submitted that it will in all probability hold that the fundamental right to procedurally fair administrative action stems from the rule of law: in President of the Republic of South Africa v South African Rugby Football Union (2)\textsuperscript{106} the court appeared to accept that a general duty to act fairly rested on those exercising public power but it hastened to add that this did not mean that every time public power was to be exercised those affected by it were entitled to be heard, because the right to a hearing is case specific and depends on the circumstances in each instance. The court held that in the circumstances before it, the dictates of procedural fairness did not require the respondent to be given a hearing prior to a commission being appointed.

10.2.2. The Right to Procedural Fairness Defined

It will be noted that neither the interim Constitution or the final Constitution drew a distinction between the two cardinal aspects of procedural fairness, the right to an unbiased decision and the right to be heard. The Promotion of Administrative Justice Act draws this distinction and deals with the two in separate sections. It thus preserves the traditional approach to the twin legs of the concept. As the issues raised by the two principal components of procedural fairness differ substantially, the same separate approach has been adopted here.

(a) The Rule Against Bias

The right to an unbiased hearing, as part of the broader right to procedural fairness has received little judicial attention in the administrative law context\textsuperscript{107} between 27 April

\textsuperscript{106} 1999 (10) BCLR 1059 (CC), 1149C-1150F (paragraphs 217-221). See too De Lange v Smuts NO 1998 (7) BCLR 779 (CC), 799D-H (paragraph 46) in which Ackermann J cited with approval views of the rule of law that expressly included procedural fairness in judicial and administrative adjudication.

\textsuperscript{107} On its application in the context of judicial decision-making, however, see S v Collier 1995 (8) BCLR 975 (C); Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa 1996 (3) SA 1095 (Tt); President of the Republic of South Africa v South African Rugby Football Union (2) 1999 (7) BCLR 725 (CC); SACCAWU v Irvin and Johnson Ltd
1994 and the coming into operation of the Promotion of Administrative Justice Act. The reasons for this are probably two-fold: first, allegations of bias are usually difficult to establish and disqualifying bias in public decision-making is probably relatively rare; and secondly, the law is now settled and uncontroversial.

Both of these points are evident in the way that the issue of bias was dealt with in Hamata v Chairperson, Peninsular Technikon Disciplinary Committee. The applicant, who had published a false report on prostitution on the campus of the technikon that he attended, had been found guilty by a disciplinary committee of conduct which had brought discredit on the technikon. He lost internal appeals to a structure called the council disciplinary committee and the council of the technikon itself.

In response to the article, which caused a measure of concern and even anger on the campus, the rector had, prior to the proceedings against the applicant, issued a circular aimed at informing students of the technikon’s investigations in an attempt to reduce the sense of outrage felt by many students, especially female students. When the technikon’s council eventually confirmed a decision of the disciplinary committee to expel the applicant, the rector served as chairperson and took part in this decision. It was argued on behalf of the applicant that the decision against him was tainted by bias as the rector had, by issuing the circular pre-judged the matter. This argument was rejected by the court. Hlophe JP and Brand J held that because the rector held certain prima facie views did not mean that he was biased and, indeed, there was no indication that he had convinced himself of the applicant’s guilt and was unpersuadable that he was innocent. One cannot quibble with this conclusion.

It was also argued that the council’s confirmation of the expulsion was tainted by bias for another reason: the three members of the council who had sat as the council

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(Seafoods Division Fish Processing) 2000 (8) BCLR 886 (C).
108 2000 (4) SA 621 (C).
109 At 642I-J (paragraph 70).
disciplinary committee remained in attendance when the council decided the appeal from their decision. They did not, however, take part in the decision-making process of the council. The court held that their presence throughout the council’s deliberations did not constitute disqualifying bias:110

‘We should not lose sight of the fact that one is here dealing with disciplinary hearings presided over largely by laymen. Therefore they cannot be expected to observe all the finer niceties that would have been observed by a court of law. It appears that every effort was made to give the first applicant a fair opportunity to be heard before an impartial tribunal. Whilst almost certainly in judicial proceedings it would have been irregular for the three members of council to sit at the CDC [council disciplinary committee] level and later at the council level, we are of the view that, in all the circumstances of this case, it cannot be held that their presence whilst deliberations were taking place at the council level constituted a fatal irregularity.’

The correctness of this conclusion is open to doubt. While it is true that reviewing courts do not expect the same standards of procedural formality of administrative functionaries as they do of judicial officers, that relates to the right to a fair hearing, rather than to a decision from an unbiased decision-maker. Indeed, the Appellate Division held, in BTR Sarmcol111 that the same rules apply in respect of judicial officers and lay litigants and that the law requires ‘conspicuous impartiality’. And as long ago as 1947, Lucas AJ held, in Rose v Johannesburg Local Road Transportation Board112 that members of administrative tribunals were under the same duties of impartiality that apply to judges: it is, he held, ‘their duty to abstain from any action which might indicate a likelihood of bias’.113 In Hamata, the fact that the decision-makers whose decision was the subject matter of an appeal sat through the deliberations on whether their decision was correct or not must surely have engendered in right-minded people the impression of bias.

The issue of bias arose in even more controversial circumstances in De Lille v Speaker of the National Assembly.114 The applicant had been excluded from the National

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110 At 643H-I (paragraph 73).
111 Supra, 694G-695B.
112 1947 (4) SA 272 (W).
113 At 289.
114 1998 (7) BCLR 916 (C).
Assembly by resolution after a committee, dominated by the ruling party, had recommended this exclusion because the applicant had accused various members of the ruling party of having been spies for the apartheid regime. The proceedings of the committee were beset with irregularities. Hlophe J held, inter alia, that the decision of the committee was tainted by bias. The majority party had voted in favour of establishing the committee despite the fact that the applicant had withdrawn her remarks unreservedly on the instructions of the Speaker. The minority parties had taken the view that this was sufficient. The committee was dominated by members of the majority party, the parties being represented on it in proportion to their strength in the National Assembly. The chairperson of the committee was drawn from the ranks of the majority party. In all of these circumstances, Hlophe J held, the decision-maker had been biased:

‘The record clearly reveals that at no stage was the first applicant given a real and meaningful hearing. The ANC was the complainant (the aggrieved party); then the prosecutor (through the ad hoc committee which it dominated); and ultimately the judge (through the National Assembly) in its own cause. This violated the rules of natural justice. Even though the Court would not likely infer or presume the existence of actual bias or mala fides in any given case without the benefit of oral evidence, in casu there are many undisputed facts which have been highlighted above. Mr Trengove correctly argued that in all circumstances of the case the inference that the ad hoc committee was in fact biased was irresistible. On all fours the ad hoc committee acted mala fide. No one has power to act mala fide, Parliament included. The Constitution (Constitution of the Republic of South Africa Act 108 of 1996) also does not intend to authorise bias.’

The correctness or otherwise of this conclusion was not dealt with by the Supreme Court of Appeal which confirmed the decision on a narrow legality ground. It must be queried, however, whether in the circumstances, it can be said that the committee should have been composed differently in order to avoid the finding of bias. It is true that, on the evidence, actual bias in the form of a fixed and unalterable pre-judgment on the part of the members of the majority party was established: but in a democratic

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115 See the judgment from 921F-923D (paragraphs 6-7).
116 At 927F-H (paragraph 18).
117 Speaker of the National Assembly v De Lille [1999] 4 All SA 241 (SCA).
institution like the National Assembly in which seats are allocated on the basis of the principle of proportional representation\textsuperscript{118} and which functions on the basis of the party system, it is submitted that the form of bias stemming from the composition of the committee on its own is a form of institutional bias that the Constitution and related legislation regulating the internal functions of the National Assembly would countenance. That does not mean that the members of the majority party are given a free hand when they sit on such a committee to act in a partisan way. They are required, like any other administrative functionary exercising public power to act lawfully, reasonably and in a procedurally fair manner: indeed, Hlophe J found that the committee had acted in bad faith and unlawfully and that it had also acted procedurally unfairly by pre-judging the issue and not giving the applicant an opportunity to state her case.

(b) The Right to be Heard

Section 24(b) of the interim Constitution provided that every person had a fundamental right to ‘procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened’.\textsuperscript{119} Section 33(1) of the final Constitution simply provides that everyone has the right to administrative action that is ‘lawful, reasonable and procedurally fair’. The threshold requirements of the interim Constitution have re-emerged in the Promotion of Administrative Justice Act, as will be seen below.

\textsuperscript{118} Constitution, s46(1).
\textsuperscript{119} See Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 39 who said of s24(b) that it required at a minimum that a court ‘consider whether any decision within its ambit can be taken to have been decided fairly if the person affected has not first been heard. And the person affected will not ordinarily be taken to have been heard if the case which he or she has to meet has not been disclosed, and an opportunity given to reply to it. The pressure which this paragraph consequently puts on officials to disclose upon which they propose to act, and debate it with those whom it affects, clearly also fosters the enterprise of encouraging decisions to be justified’. See too Davis and Marcus ‘Administrative Justice’ in Davis, Cheadle and Haysom (eds) Fundamental Rights in the Constitution Cape Town, Juta and Co: 1997, 155, 159; Devenish A Commentary on the South African Bill of Rights Durban, Butterworths: 1999, 466-467.
The academic writers have generally taken the view that s24(b) of the interim Constitution expanded the common law’s boundaries of the right to be heard. Mureinik saw this expansion as an inevitable consequence of a constitutional arrangement that has as a particularly important pillar a culture of justification. He saw s24(b) as a provision that would foster ‘the enterprise of encouraging decisions to be justified’. Du Plessis and Corder, who were part of the team that drafted Chapter 3 of the interim Constitution, saw s24(b) as probably extending the common law right to natural justice: it involved, at least, that decision-makers were required to comply with the common law requirements and ‘could be taken to establish a “general duty to act fairly”, in a procedural sense ... where rights or legitimate expectations are affected or threatened’. 

The courts, on the level of theory, have also asserted that the constitutional right to procedural fairness is broader than the common law equivalent but the cases that give content to this assertion are limited. In Van Huyssteen NO v Minister of Environmental Affairs and Tourism Farlam J rejected a submission to the effect that s24(b) was merely a codification of the common law. He held that the right to be heard and the right to an unbiased hearing were only part of a broader principle of fairness and that a generous interpretation of the right to procedurally fair administrative action was required, which would avoid the ‘austerity of tabulated legalism’. In consequence, s24(b) entitled a person to what were described by the House of Lords in Wiseman v Borneman as the ‘principles and procedures ... which, in (the) particular situation or

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120 Mureinik, op cit, 39.
121 Understanding South Africa’s Transitional Bill of Rights Cape Town, Juta and Co: 1994, 169.
122 1995 (8) BCLR 1191 (C).
123 At 1212J-1213A.
124 At 1213H, citing Marlin v Durban Turf Club 1942 AD 112, 126 in support of this proposition in respect of the common law.
125 At 1214E-H, citing with approval Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC), 328-329, which, in turn, had been approved by the Constitutional Court in S v Zuma 1995 (4) BCLR 401 (CC), 410H-411B (paragraph 14).
126 [1971] AC 297 (HL), 308H-309B. See too the more recent decision of Doody v Secretary of State for the Home Department [1993] 3 All ER 92 (HL).
set of circumstances, are right and just and fair’.\textsuperscript{127} It will be seen below that despite these views that the constitutional right to procedurally fair administrative action is more expansive than its common law equivalent, the cases that reflect this are not without their difficulties because they tend to be based on a distortion of the doctrine of legitimate expectation.

It will be recalled from the discussion above that, in \textit{Gemi v Minister of Justice, Transkei}\textsuperscript{128} it was held that a legitimate expectation, and hence the entitlement to be heard, arose from the adverse effects of the decision that was taken against the applicant, despite the absence of a prior practice or an undertaking. The judgment is crafted in the style of a judgment applying the fairness doctrine and, indeed, Pickering AJ's reliance on the doctrine of legitimate expectation has drawn criticism for this reason.\textsuperscript{129} Since that decision, there have been others, particularly since 1994 that have adopted much the same approach in either applying the common law or the fundamental right to procedurally fair administrative action. It will be recalled too that

\textsuperscript{127} At 1214B. See too Jenkins \textit{v Government of the Republic of South Africa} 1996 (8) BCLR 1059 (Tk), 1067A-I, in which Dukada AJ followed the lead of Farlam J in \textit{Van Huyssteen}. While O'Regan J did not refer to \textit{Van Huyssteen} in her judgment in \textit{Premier, Province of Mpumalanga \textit{v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal} 1999 92) BCLR 151 (CC) she also appeared to accept that the right to procedural fairness envisaged by s24(b) extended beyond the right to a hearing and the right to an unbiased hearing. In relation to a decision to stop the payment of subsidies to certain schools she held (at 165G-166C (paragraph 38)): 'In all these circumstances, it is clear that the governing bodies of schools had a legitimate expectation that government bursaries would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to terminate such payment. Such legitimate expectation, therefore, is one which has intertwined substantive and procedural aspects as discussed above. There can be no doubt that, when the second applicant notified school principals on 5 August 1995 that he intended to terminate bursaries he could not do so unless he gave reasonable notice prior to termination. Once, however, he had given reasonable notice there would have been no obligation to consult with the governing bodies or the schools concerned. This legitimate expectation, therefore, is one which has intertwined substantive and procedural aspects as discussed above. There can be no doubt that, when the second applicant notified school principals on 5 August 1995 that he intended to terminate bursaries with effect from July 1995, no reasonable notice of termination had been given to the respondent’s members. It is equally clear that the letter of 31 August 1995 does not constitute reasonable notice because, at best for the second applicant, it represented a decision to terminate the payment of bursaries with effect from a date more than a month before the date of that letter.'

\textsuperscript{128} 1993 (3) SA 276 (Tk).

the fundamental right, whether in terms of s24(b) of the interim Constitution, item 23(2)(b) of Schedule 6 – the transitional provision – or s3 of the Promotion of Administrative Justice Act all required, for the right to be activated, that a right or legitimate expectation be affected or threatened. It is only s33(1) of the final Constitution that does not prescribe this threshold.

As the cases discussed above\(^{130}\) tend to indicate, the common law contemplates interests also being protected through the application of fair procedures. Three post-1994 cases will be discussed to illustrate the point that at least some courts have been prepared to venture beyond the rights and legitimate expectation boundary in applying the right to procedurally fair administrative action. These cases have not been discussed at all by the Supreme Court of Appeal or the Constitutional Court, despite the opportunity for those courts to deal with them. In effect, these cases form part of a line that extends from *Hlongwa* and *Gemi* but may suffer from the same weakness of applying the doctrine of legitimate expectation inappropriately.

The first case is *Foulds v Minister of Home Affairs*.\(^{131}\) The applicant had applied for a permanent residence permit, which had been refused. He claimed to have been entitled to a hearing prior to the adverse decision having been taken against him. What distinguished this case from those of many other non-South Africans seeking to stay in the country were the facts that the applicant had special skills and that he had been accorded permanent residence rights before. The applicant’s complaint was that, in refusing to grant the application, the respondent acted on the basis of prejudicial information that had not been disclosed to him. He claimed that he had either a right or a legitimate expectation that had been adversely affected or threatened by the decision, thus activating his right to procedural fairness. Streicher J held that neither his rights nor property had been affected by the decision.\(^{132}\)

\(^{130}\) See 10.1.2(b)(iii) above.

\(^{131}\) 1996 (4) SA 137 (W).

\(^{132}\) At 142F-143A.
Streicher J held that the legitimate expectation doctrine had been developed in order to ‘make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case’ and that the ‘extent of the duty to act fairly will vary greatly from case to case. Not only a regular practice followed in the past, but also the nature of the decision and the relationship of those involved before the decision was taken are relevant in determining the extent of the duty’. In applying this to the facts, he held:

‘The applicant is not a complete outsider. He was never given any reason to expect that he would eventually be granted permanent resident status but he is a person who has lived in this country with his family for approximately three years. He was granted a temporary residence permit to take up employment in this country and when he was dismissed by his employer he was granted a temporary residence permit to work for his own account. He has in fact established a business in this country and would be prejudicially affected if he has to leave this country. In these circumstances, and having regard to the provisions of the Act, it was a reasonable and legitimate expectation that the Board, being a body created by the Legislature to consider applications for permanent residence, would properly and fairly consider the applicant's application and give him an opportunity to deal with adverse information obtained by it and with adverse policy considerations insofar as there were no special circumstances or reasons justifying the non-disclosure of such information and policy considerations to him and insofar as they had not already been dealt with by the applicant in his application.’

In Governing Body of Tafelberg School v Head of Western Cape Education Department the applicant argued that it had a legitimate expectation of a hearing in respect of disciplinary decision taken by the respondent and concerning a learner at the school. The learner had been found to have stolen a computer hard drive from the school. The applicant, after a hearing, had found the learner guilty and had come to the decision that the only appropriate penalty in the circumstances was expulsion from the

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133 At 145I-146A.
134 At 149G-I.
135 [1999] 4 All SA 573 (C).
school. It made this recommendation to the respondent, who had the power to expel learners on the recommendation of a governing body. The effect of such a recommendation was that the learner was automatically suspended from the school. The respondent decided that the learner should not be expelled and instructed the applicant to re-admit him to the school. This decision was reached in part at least on the basis of written representation made to the respondent by the father of the learner. No opportunity was given to the applicant to state its case or deal with the representations. This failure on the part of the respondent formed the nub of the applicant’s case.

Thring J’s starting point was that the applicant had an interest in the decision because the ‘maintenance of proper discipline amongst its pupils is, or ought to be, a matter of fundamental importance to those in authority at any decent school and, in particular, to its governing body’. He proceeded to say that it was obvious that a governing body ‘must have a very real interest in the disciplinary measures which are taken (or not taken) in any case of misconduct on the part of one of its pupils, whether such measures are taken (or not taken) by itself or by the respondent. It must also have an interest in seeing to it that discipline at the school is not undermined’. It was, Thring J held, the materially adverse effect of the respondent’s decision on this interest that gave rise, as part of the duty to act fairly, to a legitimate expectation that the applicant would be heard prior to any decision being taken by the respondent. He concluded that the applicant’s ‘legitimate interest in and, indeed, its statutorily protected obligation to maintain proper discipline at the school are directly and substantially affected by the respondent’s decision: how can it not be unfair for the respondent to deny the applicant the opportunity to respond to material representations received by the respondent which may influence him to come to a decision which may adversely affect the

136 At 579d-e.
137 At 579h.
138 At 580e-g.
The respondent’s failure to afford the applicant a hearing consequently constituted an infringement of the applicant’s fundamental right to procedurally fair administrative action as envisaged by item 23(2)(b) of Schedule 6 of the Constitution.

Maharaj v Chairman, Liquor Board is a typical case of the right to be heard being applied to an application for a licence. The applicant’s application for a liquor licence had been refused by the respondent, apparently because he considered it to be against the public interest to grant the application. Nicholson J accepted the correctness of Farlam J’s view, in Van Huyssteen NO v Minister of Environmental Affairs and Tourism that s24(b) of the interim Constitution envisaged a broader right to procedural fairness than the common law and that it envisaged the principles of fairness – ‘the principles and procedures which in the particular situation or set of circumstances are right and just and fair’. He proceeded to hold that the respondent had failed to act fairly in the circumstances:

‘It seems to me that, if the respondent felt there were deficiencies concerning whether the grant of the licence was in the public interest, it could never have been right and just and fair to simply refuse the application without informing the applicant of such deficiencies and affording the applicant an opportunity of supplementing the application. Even without the aid of the wider powers provided by s 24(b) of the Constitution, I am of the view that the audi alteram partem principle as contained in our common law applied. As the applicant was never told in what respects her application was not in the public interest I am of the view that the maxim was not satisfied. It is not for her to second guess the opinions of the respondent. It is trite law that a party whose rights are to be the subject of an enquiry is entitled to be informed of the facts and information gleaned by the authority in question which may be detrimental to her interests and that she be given an opportunity to reply thereto.’

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139 At 580j-581a.
140 1997 (1) SA 273 (N).
141 1995 (9) BCLR 1191 (C).
142 At 277F.
143 At 277G-I.
Whether the fundamental right to procedurally fair administrative action is, indeed, as wide in its application as Nicholson J believed was put in question, albeit obiter, by Chaskalson P in Minister of Public Works v Kyalami Ridge Environmental Association. In this matter, the respondent had challenged a decision of the government to provide temporary shelter to flood victims who had lost their homes in Alexandra. The temporary shelter was to be provided in the grounds of the Leeuwkop Prison on land owned by the state. One of the arguments raised by the respondent was that the provision of shelter to homeless people by the state would impact negatively on the prices of the fixed property of its members and the character of the neighbourhood, and that, as their rights were affected, they had been entitled to be heard prior to the decision being taken. After stating that the law of nuisance is to the effect that a person may only complain about the use to which another puts his or her property if that use is unreasonable, Chaskalson P concluded that, as the use to which the government had put the prison grounds in this case was reasonable, no rights (or legitimate expectations) of the respondent’s members had been infringed. They were, he held, not entitled to a hearing in terms of item 23(2)(b) of Schedule 6 of the Constitution and the interest that they had in the values of their properties and the character of their neighbourhood was not sufficient to warrant procedural protection. On the issue of whether interests on their own may attract procedural protection, Chaskalson P held:

‘The question whether persons with interests other than “legal rights” or legitimate expectations can claim the protection of the procedural fairness provisions of s33 was left open by this Court in Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal. It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to protection, but it is open to greater doubt whether this is so in the case of persons whose interests fall short of actual or prospective rights. It is not necessary however, to decide these issues in the present case, and they can again be left open. I am willing to assume for the purposes of this judgment that procedural fairness may be required for administrative decisions affecting a material interest short of an enforceable or prospective right.’

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144 2001 (7) BCLR 652 (CC).
145 At 679A-C (paragraph 99).
146 At 679D-E (paragraph 100).
This judgment raises the spectre of the common law right to be heard being broader than the constitutional equivalent – the opposite of the interpretation that Farlam J and those judges who cited Van Huyssteen with approval arrived at. It would also be strange to find that in the circumstances that gave rise to the inclusion in the interim Constitution and, more particularly, the final Constitution, of a fundamental right to just administrative action, it was intended that the common law should be trimmed back, or, perhaps, frozen in time. Surely, the decision on the part of the drafters of s33(1) of the Constitution to omit the various (and varied) thresholds of s24 of the interim Constitution evinced an intention to free the right to procedurally fair administrative action from the strictures of the rights and legitimate expectation threshold? If this is so, s3 of the Promotion of Administrative Justice Act does not properly give effect to this right. This is an issue that will be explored further below, when the terms of the Act, as they apply to the right to procedurally fair administrative action are discussed.

10.3. The Promotion of Administrative Justice Act

10.3.1 The Rule Against Bias

Section 6(2)(a)(iii) of the Act provides that an administrative action may be reviewed if the administrative decision-maker in question ‘was biased or reasonably suspected of bias’. This section codifies the test for bias that was authoritatively endorsed by the erstwhile Appellate Division in BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union.147

10.3.2. The General Right to be Heard

(a) The Terms of Section 3 of the Act

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147 1992 (3) SA 673 (A).
Section 3(1) of the Promotion of Administrative Justice Act provides, in the first place, that administrative action that ‘materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair’. Section 3(2)(a) recognises that procedural fairness is a flexible concept, which ‘depends on the circumstances of each case’, while s3(2)(b) sets out the minimum content of the right to procedural fairness as:

(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons in terms of section 5.’

In addition to these minimum requirements, s3(3) provides that ‘an administrator may, in his or her or its discretion, also give a person … an opportunity to’ obtain assistance or legal representation in appropriate circumstances, ‘present and dispute information and argument’ and ‘appear in person’.

Section 3(4) allows for a departure from the minimum requirements if to do so is ‘reasonable and justifiable in the circumstances’. In determining this issue, an administrator is required, in terms of s3(4)(b), to consider all relevant factors, including:

(i) the objects of the empowering provisions;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.’

If a fair, but different, procedure is contained in a specific empowering provision to that set out in s3(2), an ‘administrator may act in accordance with that different procedure’.

(b) The First Hurdle: Material and Adverse Effect

The first difficulty that s3 manifests is that it provides that for an administrative act to activate the right to be treated in a procedurally fair manner, the aggrieved person must
have had his or her rights or legitimate expectations materially and adversely affected.148 This formulation is at odds with the definition of administrative action contained in s1. This definition provides that certain types of official or private actions, which it defines positively and negatively, and which adversely affect rights are administrative actions and subject to review in terms of s6(1). The result is that there is no fit between the definition in s1 and the first threshold in s3(1).

Without delving into the precise meaning or significance of the term ‘materially and adversely’, as opposed to ‘adversely’, it is possible that the victim of administrative action that adversely affects rights will be denied procedural protection, because of a failure to meet the materiality requirement. The person whose legitimate expectations are adversely affected, and who seeks procedural protection, will discover that the decision that affected him or her thus is only administrative action for the narrow purpose of allowing for natural justice to be applied, but that he or she cannot complain about an infringement of the principle of legality – about an infringement of the right to lawful administrative action – because the action concerned is not administrative action for the purposes of the definition in s1.149

Currie and Klaaren appear to have little difficulty with this formulation.150 While they concede that the differences between s1 and s3 present ‘something of a logical puzzle’, they take the view that the section could have been even worse: ‘While this part of the Act is certainly not as coherent as it could be, interpreters of the Act are required to

148 Section 3(1).
149 See Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484, 515, who says of this problem: ‘Oddly enough, the Act is more lenient in relation to procedural protection: in terms of s3, this requirement applies where administrative action “materially and adversely affects … rights or legitimate expectations”. However, logic dictates that action affecting mere legitimate expectations will not qualify as “administrative action” at all in terms of s1 of the Act – and, therefore, that legitimate expectations can never be protected under it, notwithstanding the terms of s3. Our courts may find a way of overcoming this logic, of course, but this mind-boggling fact will remain: the drafters of the Act have taken the demands of fairness more seriously than those of lawfulness’.
attempt to make sense of it.\textsuperscript{151} They also have an explanation for it. They ascribe it to a ‘drafting error, attributable to the Parliamentary Committee’s amendments to the definition of administrative action, which did not fit the Law Commission’s design for the remainder of the Act’.\textsuperscript{152}

If this is so and s3(1) reads as it does because someone did not proofread the bill that went through two houses of Parliament and the President’s office, there is surely something that can be done about it: if the section is narrower than the right to procedurally fair administrative action because Parliament irrationally, erroneously and inefficiently included restrictions that it did not intend, the section is unconstitutional because it can not be said to give effect to the fundamental right, as is required by s33(3) of the Constitution. If, on the assumption that s36(1) has any application in cases such as this, it would be impossible to justify the s3(1): an objectively irrational exercise of legislative power can, of necessity never be said to be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.\textsuperscript{153} Even if the section is not, for some reason, unconstitutional, if it was drafted in error, the least that one could expect of those that wield legislative power in a democratic system of government designed to ensure ‘accountability, responsiveness and openness’\textsuperscript{154} is that the section will be amended to reflect Parliament’s true intention in accordance with the constitutional injunction given to it by s33(3) of the Constitution.

(c) The Second Hurdle: Rights and Legitimate Expectations

\textsuperscript{151} At 93 (paragraph 3.4).
\textsuperscript{152} At 93 (paragraph 3.4).
\textsuperscript{153} See Pharmaceutical Manufacturers Association of South Africa: In Re; Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC), 272H-273B (paragraphs 85 and 86) in which it was held that every exercise of public power, in order to meet the requirements of s1(c) of the Constitution – the founding values of constitutional supremacy and the rule of law – must be objectively rational. In that case, the President mistakenly and irrationally brought an Act of Parliament into operation prematurely.
\textsuperscript{154} Constitution, s1(d).
By limiting the application of the right to be heard contemplated by s3(1) to situations where rights or legitimate expectations are materially and adversely affected by the administrative action concerned, the legislature has narrowed both the fundamental right created by s33(1) of the Constitution and the common law and has consequently closed out the fairness doctrine that recognises that some interests that are not rights and are not activated by a promise or course of conduct are sufficiently important to require procedural protection. This interpretation may result in the section being unconstitutional for want of compliance with the constitutional injunction to the legislature to give effect to the right to procedurally fair administrative action. If it is reasonably possible to interpret the Act so as to avoid an unconstitutional result, the Act should be so interpreted.\(^\text{155}\) Such an interpretation is indeed possible. In fact, there are two possible ways of giving effect to the right in such a way as to vindicate Farlam J’s suggested approach to its interpretation in *Van Huyssteen NO v Minister of Environmental Affairs and Tourism*.\(^\text{156}\)

In the first instance, s6(2)(c) provides, as a separate ground of review, that administrative action may be challenged if it was procedurally unfair. (This ground of review must be taken to relate only to the right to be heard, because s6(2)(a)(iii) provides for challenges to administrative action taken by an administrator who was biased or reasonably suspected of being biased.) Section 6(2)(c) can either be interpreted to refer back to s3 and s4 – to be the ground of review that a person would rely on when his or her rights or legitimate expectations have been materially and adversely affected by an administrative action, or when administrative action that materially and adversely affects the public has been taken otherwise than in accordance with the provisions of s4 – or it can be interpreted more generously and purposively to provide a broader penumbra of protection when administrative action has been taken in violation of the duty that rests on every administrative functionary to act

\(^{155}\) On ‘reading down’ see De Waal, Currie and Erasmus *The Bill of Rights Handbook* (4ed) Cape Town, Juta and Co: 2001, 70-75. For a good example of ‘reading down’ see *S v Malgas* 2001 (2) SA 1222 (SCA).

\(^{156}\) 1995 (9) BCLR 1191 (C).
fairly. The first interpretation is one that smacks of the ‘austerity of tabulated legalism’ while the second gives to individuals the full measure of their fundamental right to procedural fairness.\textsuperscript{157}

In addition the second interpretation accords more closely than the first with the values of the Constitution in that it is more compatible with the values of accountability, responsiveness and openness contained in s1(d). It also accords with the South African common law that has accepted and applied the fairness doctrine and has accepted that in certain cases procedural protection must be accorded even where rights are not affected – for instance, in cases involving prospective rights or other interests that have sometimes been labelled incorrectly as legitimate expectations. Finally it accords too with the approach to the scope and ambit of the right to procedurally fair administrative action in comparative jurisdictions: one need look no further than the endorsement of Doody v Secretary of State for the Home Department\textsuperscript{158} particularly by the Supreme Court of Appeal in Du Preez v Truth and Reconciliation Commission\textsuperscript{159} and Chairman, Board on Tarriffs and Trade v Brenco Inc.\textsuperscript{160} This interpretation of the right to procedural fairness finds favour with Currie and Klaaren who reason that it is the interpretation that will properly give effect to the fundamental right.\textsuperscript{161}

The second interpretation is based on the same essential reasoning. It is simply that s6(2)(i), the catch-all provision, is included in the Act for circumstances such as this where the drafters of the Act may not have given proper effect to the fundamental right to just administrative action, and to allow for the development of grounds of review that may not have been in their contemplation at the time that the Act was passed. This section has the effect of ensuring that there can seldom if ever be disharmony between

\textsuperscript{157} See Minister of Home Affairs (Bermuda) v Fisher 1980 AC 319 (PC), 328-329 and R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (SCC), 395-396, both of which were cited with approval in S v Zuma 1995 (4) BCLR 401 (CC), 410H-411E (paragraphs 14 and 15).

\textsuperscript{158} [1993] 3 All ER 92 (HL).

\textsuperscript{159} 1997 (3) SA 204 (A).

\textsuperscript{160} 2001 (4) SA 511 (SCA).

\textsuperscript{161} Op cit, 163 (paragraph 6.14).
the common law grounds of review and the statutory equivalents based on the fundamental right to just administrative action. It makes little difference which of the two interpretations is preferred, from a practical point of view. The result in both cases is that the right to procedural fairness contemplated by the Act does not lag behind that of the common law, a result that the Constitution with its regimen of accountability, responsiveness and openness could surely not be taken to contemplate.

(d) Comments on the Content of the Right to be Heard

The content of the right to be heard as set out in s3 of the Act resembles the common law content of the right. The section includes the notion of the flexibility of the right to be heard\textsuperscript{162} and includes the essentials of the right in the form of adequate notice, a right to make representations and to be informed of the case that has to be met.\textsuperscript{163} In addition, the section makes provision for the discretionary additions to the right that have been recognised by the common law, namely, when appropriate, to be legally represented, to lead and challenge evidence and to argue one’s case and to appear in person.\textsuperscript{164} It also seeks to provide a formula to allow for departures from the standards set in s3(2) and s3(3) – to codify the circumstances in which it is not necessary for an administrator to give a person a hearing despite the fact that he or she is a person whose rights or legitimate expectations are in danger of being materially and adversely affected. In so doing, s3(4) seeks to provide a formula for determining when the right to be heard must bow to a value or end of greater importance in the circumstances.\textsuperscript{165}

The relationship between the elements of a fair hearing, on the one hand, and the

\textsuperscript{162} Section 3(2)(a).
\textsuperscript{163} Section 3(2)(b).
\textsuperscript{164} Section 3(3).
\textsuperscript{165} See Gemi v Minister of Justice, Transkei 1993 (2) SA 276 (Tk), 288D-F and Deacon v Controller of Customs and Excise 1999 (2) SA 905 (SE), 914H-915G.
circumstances in which administrative functionaries may depart from them is explained as follows by Currie and Klaaren:\textsuperscript{166}

‘The Act’s core/non-core distinction appears at first to place a list of minimum procedures beyond the circumstances-based enquiry. The five elements of s3(2)(b) are compulsory, whatever the circumstances of the case. However, s3(4) then restores the common law position by providing that there can be a departure from the required procedures of s3(2) if “reasonable and justifiable in the circumstances”. The nett result is that the core procedures are not compulsory at all. The Act gives them considerable emphasis and provides in essence that they should be followed in most cases and that departures from them are exceptional, but, in the end, the fairness of the procedures used depends on the circumstances of the case.’

The first three elements of s3(2)(b) – notice, an opportunity to be heard and being informed of the case to be met – are the minimum requirements of the common law for a fair hearing.\textsuperscript{167} If an administrative official takes a decision in circumstances in which the right to be heard has not been excluded in one way or another, and he or she fails to give the person affected by the decision the benefit of these elements of natural justice, the decision will be a nullity. As a matter of policy, a court will set such a decision aside.\textsuperscript{168} It will do so because the right to be heard is not a technical requirement of the law but an important part of controlling the powers of the administration. It seeks to ensure that when a decision is taken, the decision-maker, even if he or she takes a foolish decision in the end, at least has all the facts and circumstances that are necessary for a proper decision. The decision-maker, in these circumstances, is ‘more likely to apply his or her mind to the matter in a fair and regular manner’.\textsuperscript{169} In the language of s1(d) of the Constitution, the right to procedurally fair

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\textsuperscript{165} Op cit, 95 (paragraph 3.6). The authors refer to ‘core’ and ‘non-core’ elements of the right to a hearing. By these terms they mean the five elements listed in s3(2)(b) and the three elements listed in s3(3) respectively.
\textsuperscript{166} See 10.1.2 (b) (iv) above.
\textsuperscript{167} See 10.1.1 above and the cases there cited.
\textsuperscript{168} See 10.1.1 above and the cases there cited.
\textsuperscript{169} Janse van Rensburg NO v Minister of Trade and Industry 2000 (11) BCLR 1235 (CC), 1247A-B (paragraph 24). See too Gemi v Minister of Justice, Transkei 1993 (2) SA 276 (Tk), 288D-E in which Pickering AJ held that administrative functionaries ‘entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly the decision-maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would in most instances be obliged to afford the person affected by the
administrative action enhances the values of accountability, responsiveness and openness.

The last two elements of s3(2)(b), namely the requirements that notice of any rights of review or internal appeal be given and that ‘adequate notice of the right to request reasons’ be given, may require different treatment because they serve different purposes. In the first place, these are formalities that are required to be complied with after the decision in question is taken, unlike compliance with the first three elements which are a priori requirements for a valid decision. Secondly, they are not requirements to ensure that informed and accurate decisions are taken in the furtherance of the public interest. They are requirements that will provide the aggrieved person with the knowledge (but not necessarily the resources) that he or she requires to challenge a decision that went against him or her. In this sense they resemble mandatory procedures or conditions for the valid exercise of administrative power, rather than aspects of procedural fairness.\(^\text{170}\) Thirdly, these elements of s3(2) are fundamentally different to the conventional procedural fairness elements: circumstances of urgency, or the need to avoid frustrating the purpose of a power by giving notice that it will be used, or the like, may serve as good grounds for not affording a person the right to a hearing before a decision is taken, but the grounds upon which a person can reasonably and justifiably not be informed of his or her right to review or appeal or his or her right to request reasons are difficult to imagine.

If any purpose is to be served by these provisions, the courts will have to adopt a robust approach to their enforcement: if the appropriate relief for non-compliance, without good reason, is a mandamus to compel the administrative official concerned to comply

\(^{170}\) For an example of a case in which it was held that a failure to give reasons for a decision and to inform the aggrieved person of his or her right to appeal against an adverse decision vitiated a decision, see Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E). In this case the legislation that regulated the suspension of social grants was interpreted to visit nullity upon administrative acts that did not comply with these procedures.
with the requirements, then these provisions will serve no purpose at all; they are intended to discipline the conduct of administrators who are required to be committed not only to accountability, responsiveness and openness but also to constitutional supremacy and the rule of law, who are required to respect, protect, promote and fulfil the fundamental rights of those whom they serve and who are also required to be committed to the democratic values and principles of the Constitution such as the promotion and maintenance of high standards of professional ethics and the provision of services impartially, fairly, equitably and without bias. As with the giving of reasons, compliance with these requirements, when administrators are forced into the habit, will, no doubt, prove to be ‘healthful’.

10.3.3. Administrative Action Affecting the Public

(a) The Terms of Section 4 of the Act

Section 4(1) vests a set of choices in an administrator faced with the possibility of taking administrative action that will affect the public generally. He, she or it is required to decide whether:

‘(a) to hold a public enquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3.’

171 Constitution, s1(c).
172 Constitution, s7(2).
173 Constitution, s195(1)(a).
174 Constitution, s195(1)(d).
175 Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA), 194C (paragraph 16 of the judgment of Schutz JA).
If the administrator decides to hold an enquiry, he, she or it must first decide whether to conduct the enquiry himself, herself or itself or to appoint someone else or a panel to perform this function. Then the enquirer is required to decide on the procedure to be followed. This procedure must include a public hearing and comply with prescribed procedures for public enquiries. The enquirer is then required to conduct the hearing in accordance with the prescribed procedure, compile a written report and furnish reasons for ‘any administrative action taken or recommended’, and, ‘as soon as possible, publish a summary of the report and particulars of where and when it may be inspected and copied’ as well as convey the above information ‘by such other means of communication which the administrator considers effective’ to the relevant sector of the public.

If, on the other hand, the administrator favours a notice and comment procedure, he, she or it must:

(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
(b) consider any comments received;
(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.’

An administrator may depart from any of the above procedures if to do so is reasonable and justifiable in the circumstances, he, she or it having considered all relevant factors including the five factors mentioned above in the context of departing from the requirements of individual procedural fairness.

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176 Section 4(2)(a).
177 Section 4(2)(b)(i).
178 Section 4(2)(b)(ii).
179 Section 4(2)(b)(iii).
180 Section 4(2)(b)(iv)(aa). These details must be published in English and one other official language in the Gazette or the relevant provincial Gazette.
182 Section 4(3).
183 Section 4(4).
(b) The Context of Section 4 of the Act

Writing in 1993, O'Regan observed that in South African law there were no integrated and coherent rules for the making of subordinate legislation so as to enhance such values as accountability, participation and rationality.\textsuperscript{184} She proceeded to suggest what could be done to change this situation:\textsuperscript{185}

‘There is a range of mechanisms that administrative law could adopt to ensure that subordinate legislation is fair, efficient, rational, and seen to be rational. Methods that could be adopted to achieve this include the structuring of rule-making institutions to enable public or interest-group participation; the adoption of procedures requiring notification and consultation prior to the making of subordinate legislation; the giving of reasons for the legislation adopted; the establishment of a central drafting office to which all subordinate legislation should be referred prior to promulgation; effective legislative scrutiny of subordinate legislation; compulsory, periodic review of all subordinate legislation; the introduction of a national register of subordinate legislation; and, of course, the adoption of appropriate standards of judicial review for subordinate legislation.’

The Bill of Rights, and the Constitution more generally, has taken care of the last of the suggestions by providing a new and more expansive basis for judicial review than the common law. So, for instance, subordinate law-making authority of the most extensive nature – the power to amend an Act of Parliament -- was held to be an unconstitutional violation of the separation of powers in \textit{Executive Council of the Western Cape Legislature v President of the Republic of South Africa}\textsuperscript{186} and a regulation that prohibited the publication of the report of a commission of enquiry before it had been released for publication by the President or tabled in Parliament was set aside as an unreasonable and unjustifiable infringement of the right to freedom of expression in


\textsuperscript{185} Also at 168.

\textsuperscript{186} 1995 (10) BCLR 1289 (CC).
Most of the other suggestions made by O’ Regan were taken up by the South African Law Commission team that drafted the original bill of what is now the Promotion of Administrative Justice Act. All of these suggestions but s4 of the Act were jettisoned by the legislature.\(^{188}\) It would appear that at least some of the proposals were considered to be impractical and the government was reluctant to create more institutions such as the Administrative Review Council in circumstances in which many of the institutions it had created were producing little while absorbing immense amounts of resources at great cost to the tax-payer. In the place of the proposed institutions and mechanisms, the Act makes provision for the Minister, by way of regulation, to: establish an advisory council to monitor the application of the Act and to advise the Minister on such matters as ‘the appropriateness of publishing uniform rules and standards which must be complied with in the taking of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state’\(^{189}\) and the ‘appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards’;\(^{190}\) and to provide for the ‘compilation and publication of protocols for the drafting of rules and standards’.\(^{191}\) It will be noted that the Minister is under no duty to establish the advisory council or to make regulations on any of the issues set out in s10(2); he ‘may’ make such regulations,

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\(^{187}\) 1995 (2) BCLR 182 (T).

\(^{188}\) See for instance: s11 which placed an obligation on the Chief State Law Advisor to publish protocols for the drafting of rules and standards (ie subordinate legislation and policies or guidelines) and, together with an Administrative Review Council, to provide training to drafters of rules and standards; s12 which required administrators wishing to make a rule to ‘take appropriate steps to communicate the rule to those likely to be affected by it’; s13 placed obligations on administrators and the Administrative Review Council to compile and maintain up to date registers and indexes of rules and standards; s14 created an Administrative Review Council and s15 imposed various duties upon it aimed at making it the engine room of on-going administrative law reform.

\(^{189}\) Section 10(2)(a)(i).

\(^{190}\) Section 10(2)(a)(iv).

\(^{191}\) Section 10(2)(b).
while s10(1) provides, in contradistinction, that he ‘must’ make regulations that relate to such matters as the procedures contemplated by s4.

Despite the fact that the rules for the making of subordinate legislation are not as extensive as one may have wished, s4 is of considerable importance because it extends, for the first time, the right to procedural fairness into a sphere of administrative activity of immense importance: the common law was clear that the administrative action of making subordinate legislation did not attract natural justice. The position was set out thus by Milne JA in South African Roads Board v Johannesburg City Council:\textsuperscript{192}

> ‘I am not persuaded that the categorisation of statutory powers of action or decision into executive (or administrative) and legislative should in all cases provide the criterion as to whether the repository of the power is obliged in exercising it to observe the dictates of natural justice. It seems to me rather that a distinction should be drawn between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals. ... It is not necessary in this case to consider how large such a group of individuals may be.

In the case of the former ((a) above), which would usually be legislative in character, it would be true to say that in general, to use the words of Botha JA in Modimola’s case supra, where a public authority is empowered to take a decision prejudicially affecting the members of a whole community, the public authority is normally guided solely by what it believes to be best for the community as a whole and is not obliged to consider the particular interests of individual members of that community. Consequently it may be argued that failure to give individuals affected a hearing does not violate any rule of natural justice.

As to the latter type of power ((b) above), on the other hand, which depending on the circumstances, might be categorised as either administrative or as legislative or which might fall into the grey area in between, it would seem that the repository should normally, and in the absence of a contrary indication in the statute, be obliged to afford the particular party prejudicially affected a hearing before exercising the power.’

The reasons usually given for excluding the right to procedural fairness from the subordinate law-making process are that the democratic process, rather than the

\textsuperscript{192} 1991 (4) SA 1 (A), 12E-13A.
courts, is better suited to the control of legislative functions, and that because legislation tends to be general in its impact, a potentially unmanageably large and diffuse group of affected individuals is created, making it practically impossible to provide a hearing. These reasons are, however, more glib than real. In the first place, it is not necessarily true that the political process can meaningfully and effectively hold to account those who are empowered to make subordinate legislation. It may be possible in a small municipality, for example, but the lines of accountability grow fainter as the administrator moves further from the public that he or she serves. A great deal of subordinate legislation is made by officials in the national sphere of government, far removed from those who will be affected by their enactments. Mureinik makes the point that responsiveness and accountability ring hollow when ‘there is in general nothing to stop an official from drafting a major regulation in the morning, taking it to the Minister for signature that afternoon, and promulgating it in the Government Gazette that week. By a process which is entirely unresponsive to the wishes and the interests of the governed, a regulation may consequently be made that decides, or even takes away, the rights of hundreds of thousands of people’.  

The second objection – that the group affected is large and amorphous – has not proved to be a problem in South Africa in cases in which specific statutes have prescribed notice and comment procedures before subordinate legislation can be promulgated, or in cases in which legislation has followed a public enquiry of one sort or another. It is also not regarded as a major obstacle to efficient administration in systems, such as that of the United States of America, where notice and comment procedures or public enquiries are general preconditions for the making of rules that

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194 For some examples of statutes that prescribe notice and comment procedures, for the relatively well established, but informal, practice of legislators (both primary and subordinate) inviting comment from members of the public on proposed legislation, and on the utilisation of enquiries in South Africa, see Baxter, 203-205 and Baxter ‘Rule-Making and Policy Formulation in South African Administrative Law Reform’ 1993 Acta Juridica 176, 186-188 (hereafter referred to as ‘Rule-Making’).
have substantive effect. Indeed, a number of advantages flow from the adoption of such procedures that may even commend themselves to the most cynical of administrators:

‘The “notice and comment” rule-making process constitutes a “surrogate political process” that helps to compensate for the fact that democratically-elected representatives do not make the actual choices embodied in the standards that are produced by the administration. The solicitation of public comment also helps to inform the public authority. In addition, analytical public comments serve to highlight inconsistencies or lapses in the reasoning underlying proposed rules. Sometimes the very requirement that a process be followed at all serves to prevent the promulgation of hasty, ill-considered regulations that might actually prove to be a problem in themselves rather than a solution. Finally, the process provides a record upon which the final action of the public authority can be evaluated by a court applying the usual standards of judicial review.’

It is worth bearing in mind that such procedures also have costs and dangers: the most obvious is the potential for an over-judicialization and over-elongation of the rule-making process that could result in the making of subordinate legislation taking an inordinately long time, with the attendant consequences of administrative inactivity and seizure in the administrative system.

195 See generally, Davis and Pierce Administrative Law Treatise (3ed) Vol 1 Aspen Publishers Inc: 1994, 287-288 who summarise the rule making process as follows: ‘Section 553 of the Administrative Procedure Act (APA) creates three different procedures for issuing a rule. First, interpretive rules, rules of procedure and rules that fall within a series of specific exceptions … can be issued without following any statutorily prescribed procedure except issuance of the rule itself and publication of the rule in the Federal Register. Second, legislative rules that are substantive in nature, except for rules that are specifically exempt, can be issued only by following a three-step procedure: (1) issuance of public notice of the proposed rule, (2) receipt and consideration of comments from all interested persons, and (3) issuance of the rule, incorporating a statement of its basis and purpose. This notice and comment procedure for issuing legislative rules with substantive impact is usually referred to as informal rulemaking. The third procedure is commonly called formal rulemaking. Like informal rulemaking, it begins with public notice of a proposed rule and ends with issuance of the final rule. Between those two steps, however, the agency must conduct an oral evidentiary hearing that is closely analogous to the oral evidentiary hearing that takes place in judicial adjudications of disputes between individuals.’ See too Baxter, 205-206 and Mureinik ‘Reconsidering Review: Participation and Accountability’ 1993 Acta Juridica 35, 38.

196 Baxter ‘Rule-Making’, 179. See too Baxter, 216, who says: ‘Despite this there is actually some efficiency value in participation. Participation often helps to bring all the necessary information to the attention of the administrator. Even if the administrator denies that this is conducive to efficiency, he must agree that it serves the purpose of accuracy. Where participation assists neither criterion in the end, it is still a price that ought to be paid for the virtue of acceptability.’

(c) Comments on the Content of Section 4 of the Act

Section 4 of the Act is designed to extend the right to procedural fairness beyond the limit set by Milne JA in the South African Roads Board case. It does so by requiring administrators who are contemplating making subordinate legislation to either initiate a notice and comment process, institute a public enquiry, to do both or, where authorised to do so, to follow a different procedure that is fair. It will be noted that the right to the s4 procedures is activated when the rule-making process will ‘materially and adversely affect the rights of the public’. This threshold is meant to exclude from the ambit of s4 the formulation of policies not having the force of law and subordinate legislation of a purely procedural nature, such as regulations that prescribe the forms that must be completed to apply for a permit or licence. In this sense, the term ‘materially and adversely’ serves something of the same purpose as the express exclusion from the rule-making procedures in the American legislation.

The term is meant, in other words, to ensure that only administrative acts of general impact that have more than a trivial impact on the rights of members of the public would attract one or other of the procedures mentioned in s4. In addition to the question of adverse effect, courts faced with whether administrative action was procedurally fair in terms of s4 will have to ascertain whether it affected the rights of the public. This would appear to be the Act’s way of describing the idea of rules of general application – legislative rules, in other words.\(^\text{198}\) It has been suggested by Currie and Klaaren that, in

\(^{198}\) Legislative administrative acts are notoriously difficult to identify on the fringes, as it were. For this reason, some courts have resorted to what they term the ‘by-law analogy’ where an administrative act is sufficiently legislative in nature to be treated as such, even if, in strict terms, it is not legislation. See the English cases of Fawcett Properties Ltd v Buckingham County Council [1961] AC 636, 679 and Mixnam’s Properties Ltd v Chertsey Urban District Council [1964] 1 QB 214 (CA), 235 and the South African case of Sv Meer 1981 (1) SA 739 (N), overruled on appeal in S v Meer 1981 (4) SA 604 (A). On the by-law analogy generally, see Plasket The Regulation of Road Transportation in South Africa unpublished LLM thesis, University of Natal: 1986, 260-262. On the distinction between rule-making and adjudication, see O’Regan ‘Rules for Rule-Making: Administrative Law and Subordinate Legislation’ 1993 Acta Juridica 157, 160-162.
interpreting the term ‘materially and adversely’ the ‘significance of the effect on the public should be judged collectively, not individually’ because it is the ‘cumulative effect that is of importance for the triggering of s4 public procedures’. It is submitted that this analysis misses the mark. The ‘effect’ requirement is meant to identify administrative action of a legislative or quasi-legislative type and one of the more important hallmarks of legislation is that it changes the law. It often does so by interfering with existing rights. The ‘public’ requirement is meant to distinguish rule-making from adjudication. The requirement is a composite one that must be understood as such. When it is broken up and interpreted piece-meal as Currie and Klaaren have done, the result is one which is apt to cause confusion in an already confused section.

A problem that is bound to arise is the consequence of an administrator deciding that s4 applies when in fact s3 applies, or that s3 applies when s4 applies. More often than not, this will not be a problem. When an administrator is planning to make regulations that are not purely procedural, he or she will know that he or she must apply s4. There may, however, be difficult cases in which the administrator is not sure which section applies. In such cases, there is no reason why both sections cannot be used in a belt and braces type of approach: if people can be identified whose rights or legitimate expectations are materially and adversely affected in a substantially different way to the rights of the public at large, these people would be entitled to adequate notice and all of the other requirements of s3. In other words, such people would be entitled to the more personalized form of procedural protection envisaged by that section, rather than the more impersonal procedures of s4. It would make little difference to the end result of the hearing. Once adequate notice has been given, the reasonable opportunity to be make representations would in all but the most exceptional of cases be satisfied by the public enquiry of s4(1)(a), the notice and comment procedure of s4(1)(b), the combination of both envisaged by s4(1)(c) or the fair but different procedure envisaged by s4(1)(d). In the exceptional cases where none of these forms of hearing were

199 The Promotion of Administrative Justice Act Benchbook, op cit, 117 (paragraph 4.8).
200 See Blackpool Corporation v Locker [1948] 1 KB 349, 368.
appropriate, s4(1)(e) makes specific provision for the administrator to ‘follow another appropriate procedure which gives effect to s3’.

Erroneous decisions as to whether s3 or s4 applies may nonetheless have significant consequences. If a person who should have been given adequate notice was not, or one or more of the other requirements of s3 were not met in circumstances when they should have been, an affected person will obviously be entitled to the setting aside of the administrative action that was taken in violation of his or her right to procedural fairness. Similarly, if a number of individuals were given notice and the other requirements of s3 were met in relation to them but the rights of the public were adversely affected by the administrative action concerned, any affected member of the public would similarly be entitled to the setting aside of the administrative action because his or her rights to procedural fairness in terms of s4 were violated.

It is noteworthy that s4(2) makes no mention of the giving of notice to members of the public when a public enquiry is to be held. This failure cannot absolve an administrator from giving such notice: at the very least, the common law requirement of adequate notice being given would plug the gap left by Parliament. In stark contrast, s4(3)(a) places a specific duty on an administrator who has decided to follow a notice and comment procedure to ‘take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them’. By definition, however, those affected by the proposed administrative action will be the public, or a section thereof. Presumably, s4(3)(a) is not intended to force the administrator into trying to identify everyone who will be materially and adversely affected by his or her proposed course of action but rather to opt for a way of giving notice that is adequate and appropriate in the circumstances. In so doing, it would no doubt be adequate and appropriate to publish notice of the notice and comment

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201 Currie and Klaaren The Promotion of Administrative Justice Act Handbook, op cit, 113-114 (paragraph 4.4) submit that the reference to s3 in s4(1)(e) may have been a mistake. They say that the ‘wording derived from the Law Commission’s draft and making more sense in the context of that draft than it does in the Act, has been left unamended. This is s4(1)(e) ….’
procedure in newspapers and to give notice to interest groups known to the administrator.

Both public enquiries and notice and comment procedures leave paper trails that will facilitate challenges to the administrative action that flows from them. In the case of public enquiries, s4(2)(b)(iii) places an obligation on administrators to ‘compile a written report on the enquiry and give reasons for any administrative action taken or recommended’. Apart from this it would be likely that, in most cases, a record would be kept of such proceedings. A person would be able to obtain a copy of such a record in terms of the Promotion of Access to Information Act. Because notice and comment procedures envisage written representations, such processes also generate a record. Section 4(3) does not place an obligation on an administrator who has conducted a notice and comment process to write a report or give reasons for any action taken thereafter. This omission is puzzling. Despite this omission, s5 of the Act would allow for an affected person to request reasons for any action taken in consequence of the notice and comment process.

Finally, s1 of the Act excludes from the definition of administrative action the decision of an administrator to opt for one rather than another of the procedural mechanisms of s4(1), or, indeed, a failure to take such a decision. This exclusion is strange to say the least. An administrator who makes such a decision is plainly involved in the conduct of administrative action. If he or she was not, he or she would not be taking decisions as to which procedure to apply in respect of administrative action that affects the rights of the public. If he or she failed to take any decision, when required to do so because s4 applies, once again he or she would, by definition, be engaged in administrative action. The first piece of this nonsense that Parliament has passed is probably harmless. The decision to opt for a notice and comment procedure rather than a public enquiry, for instance, would be extremely difficult to set aside on review, not because it is inherently unreviewable or is not administrative action, but because, when an administrator chooses as he or she is entitled to between different appropriate procedures, it would
be almost impossible to establish a ground of review and if one did, it would probably be well nigh impossible to establish prejudice. The second piece of nonsense is different. In this case, the administrator has obviously, and by definition, acted in violation of the right of an affected person to procedurally fair administrative action. Indeed, this is how the right is usually violated – by an administrator’s failure. If Parliament’s intention was to shield administrators from review in terms of the Act for procedurally unfair administrative acts that affect the public, the result is unconstitutional: it violates not only s33(1) of the Constitution, but also s34, the fundamental right of access to court.

10.4 Conclusion

In the body of this chapter the provisions of the Promotion of Administrative Justice Act that relate to the fundamental right to procedurally fair administrative action have been discussed in some detail. In this conclusion the broad contours of that discussion will be set out. In essence, the procedural fairness provisions fall into three categories: those that make little or no change to the position that obtained prior to the interim Constitution being passed, those that have altered the common law in a most substantial and fundamental way and those that represent regression in the quest for fairness in the administrative process. These three issues will be dealt with in turn below.

First, it has been argued above that the rule against bias is the least controversial and most stable of the two pillars of procedural fairness. The common law on the test to determine the appearance of bias was settled by the erstwhile Appellate Division as long ago as 1992⁵ and, more recently, was affirmed by the Constitutional Court.⁶ There has been no suggestion that s24(b) of the interim Constitution or item 23(2)(b) of

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⁵ BTR Sarmcol Industries South Africa (Pty) Ltd v Metal and Allied Workers Union 1992 (3) SA 673 (A).
⁶ President of the Republic of South Africa v South African Rugby Football Union (2) 1999 (7) BCLR 725 (CC).
Schedule 6 of the final Constitution has changed this position. Section 6(2)(a)(iii) of the Promotion of Administrative Justice Act now includes the rule against bias as a ground of review. In so doing it uses the test set in BTR Sarmcol, the reasonable suspicion test. There is thus a snug fit, in relation to this aspect of the right to procedurally fair administrative action, between the common law, the interim Constitution, the final Constitution and the Act. No more need be said about the rule against bias on this account.

Secondly, s4 of the Act has introduced a concept of procedural fairness that is of immense significance because it is unlikely that the common law would ever have been developed to the point that a right to be heard would be recognised prior to the passing of subordinate legislation or the adoption of other measures that affect the public generally. The limits of the application of procedural fairness at common law were set in the South African Roads Board204 case and were unlikely to be extended much. While s4 has not been brought into operation yet, its impact, when it is, will be significant not only for lawyers but also for organs of civil society interested in participation in the process of rule-making: apart from the inevitable legal issues that will arise about the interpretation and application of the section, it will also raise interesting political and social issues relating to which bodies will use the section and how. Will it be used by powerful interests to ‘capture their regulators’ or will it be used effectively by community organisations and the like to enhance democratic participation and accountability? In either event, s4 must be welcomed as an innovative addition to the right to procedurally fair administrative action. The challenge facing the courts will be to make the section effective in its operation – to give to everyone the protection that the section promises – while avoiding the problem of allowing the process of rule-making to be unduly stalled and held to ransom by people opposed to particular legislative or regulatory schemes. This should not happen if only because of the relative simplicity and absence of technicality in the section. The regulations that must be promulgated to give procedural flesh to the bones of s4 will be very important in this regard.

204 1991 (4) SA 1 (A).
Thirdly, the same positive view cannot be expressed about the Act’s treatment of the general right to be heard, contained in s3. It has been shown above that the common law has, since Traub at least,\textsuperscript{205} been based expressly and consciously on the duty to act fairly. The fairness doctrine is premised on the idea that, irrespective of the administrative act involved, every decision-maker is required to act fairly in all cases. It therefore rejects the classification of functions as a way to determine the applicability of the rules of procedural fairness in favour of a more flexible and variable application of the rules suited to each particular form of administrative action. An integral part of this approach has been the breaking down of the rigidly applied ‘rights, liberty and property’ threshold to the applicability of the rules of procedural fairness. The courts are willing to provide procedural protection even when interests that fall short of rights or prospective rights are in danger of being adversely affected by administrative action. A specific manifestation of such interests that are accorded procedural protection are legitimate expectations that have either been created by decision-makers invariably acting in particular ways or undertaking to act in particular ways.

There may have been something to say for the formulation adopted in s24(b) of the interim Constitution – that the right to procedurally fair administrative action is available to a person whose rights or legitimate expectations have been affected or threatened – if our courts, in the exercise of their common law review jurisdiction, had adopted a truncated form of the duty to act fairly. There is no indication in Traub or its progeny that this was the intention: the fairness doctrine was adopted lock, stock and barrel. It is also clear that, while certain judges may have been labouring under something of a misapprehension as to what the legitimate expectation doctrine entailed, and hence applied it incorrectly, they had applied the duty to act fairly and imposed obligations on

\textsuperscript{205} Traub, particularly at 758G-759A and 761A-B, contains a clear acceptance of the fairness doctrine and all it entails. It is also the first in a line of cases emanating from the Appellate Division and Supreme Court of Appeal to embrace the doctrine. While earlier cases in provincial divisions have used fairness terminology, it is not altogether clear that the judges in those cases were aware of the full import of this.
decision-makers to give hearings, in the absence of a right or a legitimate expectation properly so-called. Other courts, including the erstwhile Appellate Division, have manipulated the concept of a right, in effect elevating an interest into a right for purposes of recognising a right to a hearing where the facts call out for one.

These cases should not, it is submitted, be read as a rejection of the duty to act fairly. Rather they represent attempts to grapple with the outer edges of the duty (within the context, it should be remembered, of a large body of particularly hostile precedent, despite Traub and cases like it) by reaching for the more familiar concepts of legitimate expectations and rights and making them do the job, inappropriately in the circumstances, of interests. These cases are indicative of a move towards fairness of result and a move away from the formalism that has dogged South African administrative law for so long in the field of procedural fairness. They are, in other words, indicative of a move away from the parsimonious approach to procedural protection that caused so much unfairness in the past and a move towards an approach that is based on values of accountability, responsiveness and openness – in Mureinik’s terms, this represents a shift in judicial attitude from an approach in which it is asked why a person should be heard before a decision is taken against him or her, to one in which it is asked instead why a person should not be heard.

It is a great pity that the drafters of the interim Constitution chose to draft into s24(b) the thresholds of rights and legitimate expectations and to exclude interests. Two of the drafters concede that s24(b) created a pale version of the duty to act fairly: Du Plessis

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206 Gemi v Minister of Justice, Transkei 1993 (3) SA 276 (Tk), Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (TkA) and Hlongwa v Minister of Justice, KwaZulu 1993 (2) SA 349 (N) are pre-1994 examples of this. It is suggested that few would find fault with the result in these cases – that prior to taking a decision to transfer a public servant, a decision-maker is required to give him or her a hearing – although, as argued above, the methodology is open to doubt.

207 The most obvious example of this is South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) in which the resource allocation of the respondent organ of state, which would be affected by the decision to proclaim a road through its jurisdiction a toll road, was said to affect its rights. Traub v Administrator, Transvaal 1989 (1) SA 397 (W) is a further example.

and Corder say that the section ‘could be taken to establish a “general duty to act fairly”, in a procedural sense, in our law, where rights or legitimate expectations are affected or threatened’. Despite this, and it should be remembered that the effect of s24(b) was maintained through item 23(2)(b) of Schedule 6 of the final Constitution until the Promotion of Administrative Justice Act came into force, courts have continued to expand the boundaries of the right to procedural fairness. As with the common law cases, the courts have had to manipulate the concepts of rights or legitimate expectations to give effect to the duty to act fairly: Foulds v Minister of Home Affairs and Governing Body of Tafelberg School v Head of Western Cape Education Department are good examples of this. In neither could it be said that an established practice or undertaking existed that could have created a legitimate expectation to be heard. Instead the duty to act fairly was forced into the shape of the legitimate expectation doctrine.

As with the cases dealt with above, it is suggested that few would quibble with the result in these cases: in Foulds the applicant was not a stranger to South Africa. He had been a permanent resident in the past, had contributed significantly to the national economy and had skills that were needed in the country. He was, in reality, entitled to a hearing for the simple reasons that his interest in being granted permanent residence was different to, and greater than, that of most first time applicants. He was in a position similar to a person who had been granted a licence, had engaged in activities sanctioned by that licence and was applying for its renewal. It was this that made his interest sufficiently important to warrant a hearing before an adverse decision could be taken against him. Similarly, in Governing Body of Tafelberg School, the importance of the issue to the role of the governing body in the governance of the school made the

210 1996 (4) SA 137 (W).
211 [1999] 4 All SA 573 (C).
212 See for an example of this type of case, Mafuya v Mutare City Council 1984 (2) SA 124 (ZHC).
governing body's interest in the respondent’s decision significant enough to warrant the protection of a right to be heard.

These cases simply cannot be explained on the basis of the doctrine of legitimate expectation, unless one accepts that in South Africa, a variant of that doctrine has developed that is at odds with the doctrine elsewhere in the world. That is a conclusion that should be avoided. It is also an option that the Constitutional Court, at least, is unlikely to sanction: in Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal213 O’Regan J held that the concept of legitimate expectation in s24(b) of the interim Constitution ‘needs to be interpreted in the light of the concept of “legitimate expectation” that sprang from Lord Denning’s judgment in Schmidt and that has been adopted in a wide variety of jurisdictions as mentioned above’. It is submitted that instead of trying to manipulate the doctrine of legitimate expectation, courts should rather face up to the fact that if they are to ensure procedural fairness in a modern democratic society committed to accountability, responsiveness and openness they will simply have to recognise that there are indeed interests that fall short of rights that warrant protection because of their importance: Craig could have been writing about the South African situation when he wrote that the ‘absence of a substantive right to a particular benefit should not lead to the conclusion that procedural rights are inapplicable, and the term legitimate expectation should not be manipulated to reach this end’.214 In a sense, the problem of finding a way of invoking the right to a hearing when the facts cry out for one, in the cases cited above, are the product of the formulation that the drafters of s24(b) of the interim Constitution settled for as part of the horse-trading that

213 1999 (2) BCLR 151 (CC), 164J (paragraph 36).
214 At 289. The courts will not have to start with a clean slate in this process: the application-type cases are an example of the recognition of interests that fall short of being rights even if they are, by sleight of hand, treated as rights; and there is sufficient comparative law on the issue to mean that South African courts would not have to re-invent the wheel.
characterised the formulation of the interim Constitution as a whole. But in the case of s24(b) a serious weakness in this process is disclosed as the effect of the inclusion of this right in the form it took had the potential to ‘stultify beneficial developments’.

One would have hoped that when Parliament passed the Promotion of Administrative Justice Act, it would have been alive to these problems and would have been astute to ensure that the right to procedurally fair administrative action was properly and comprehensively defined, so as to properly give effect to it. Unfortunately, this did not happen despite the fact that the South African Law Commission draft bill, that drafted later by Professor Sarkin and that drafted within the Department of Justice and placed before the Parliamentary Committee on Justice for the purposes of public hearings, all defined the threshold to the right to include rights, legitimate expectations and interests. What makes the omission of interests puzzling is the fact that, in the South African Law Commission draft, in a footnote to s4(1), the inclusion of interests is cogently motivated. The drafters stated that while they realized that s33 of the Constitution read with item 23(2)(b) of Schedule 6 did not mention interests specifically, the omission in the Act of interests ‘will leave without an entitlement to the administrative justice protections in this section many persons who, for instance, are applicants for licences, pensions or other benefits to which they have no existing rights,

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215 See in this regard, Du Plessis and Corder, op cit, 167 say of s24 in particular: ‘The formulation of this series of rights, as eventually adopted, shows abundant signs of the compromise which it is, engineered by essentially two protagonists. On the one hand, there were those parties which, either used to, or anticipating, being in government, did not wish to grant a conservative, unrepresentative and unpredictable judiciary too much power to intervene with executive discretion. On the other, were those parties, likely to continue to be in opposition to any future government, whose political approach was based in a distrust of all wielders of power, and a concern to establish as effective a checking mechanism as possible: the courts seemed to be the best organ of state to discharge this function’.

216 Forsyth ‘Audi Alteram Partem Since Administrator, Transvaal v Traub’ in Kahn (ed), op cit, 189, 196, footnote 45.

217 It would appear that unhappiness within the cabinet about certain aspects of the South African Law Commission bill led to it being abandoned and Professor Sarkin being approached to draft an alternative version. His draft suffered the same fate and was replaced by an internally drafted version that was the version of the bill upon which representations were made to the Committee. It is not clear when or why the change was made that saw the threshold to the right to be heard being trimmed to omit interests.
or who fall within neither the “promise” nor “past practice” categories normally associated with legitimate expectations’.

The omission is not a small matter of form. It is an attempt to place a brake not only on future developments but also on developments that have already occurred elsewhere in the democratic world and, indeed, in South African common law, albeit in a less than clear and jurisprudentially sound form. Section 39(3) of the Constitution provides that the ‘Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill’ and s39(2) provides that when developing the common law or interpreting statutes courts must ‘promote the spirit, purport and objects of the Bill of Rights’. In Pharmaceutical Manufacturers Association of South Africa: In re; Ex Parte Application of the President of the Republic of South Africa Chaskalson P, in dealing with the relationship between the Constitution and the common law held that the ‘common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the “spirit, purport and objects of the Bill of Rights”. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes’.

It is submitted on the basis of the above that even if the Act is interpreted to exclude interests from procedural protection (and such exclusion is constitutional) that will not be the end of the matter: South Africans will not be consigned to suffer second class procedural protection in the sphere of administrative law because the common law properly interpreted in accordance with the spirit, purport and objects of the Bill of Rights will ensure that the duty to act fairly, as understood in comparative jurisdictions, will allow for the right to be heard even when mere interests are at stake in appropriate cases. Understood thus, the common law serves as a fail-safe in case the Act is

218 2000 (3) BCLR 241 (CC), 262D-F (paragraph 49).]
interpreted restrictively. It is submitted, however, that the Act does not have to be, and indeed, should not be, interpreted in this way: an interpretation that would further the development of a democratic system of governance based on accountability, responsiveness and openness would allow for the reading in of the broader protection of interests either in the ground of review contemplated by s6(2)(c) or in the catch-all of s6(2)(i), that, after all, has been included in the Act so that the statutory definitions of the grounds of review are not cast in stone. It is only in this way that it will be possible to say that s33(1) of the Constitution, when read with the Act, has given everyone the full measure of their fundamental right to procedurally fair administrative action.
CHAPTER ELEVEN: THE RIGHTS TO REASONS AND TO INFORMATION

11.1 The Right to Reasons

11.1.1 Reasons and Their Importance

It has been seen above that the interim Constitution brought about a legal revolution: apart from such obvious changes to the constitutional fabric of South Africa as the introduction of democratic governance and the abandonment of the doctrine of parliamentary sovereignty, it entrusted the judiciary with a special and central role in controlling the exercise of public power. The final Constitution has not changed this at all. Indeed, it may be argued that with the inclusion of justiciable socio-economic rights in the Bill of Rights, the courts have greater licence than ever before to intrude into the terrain of the executive. While judges are quick to assert that it is not their role to second-guess the policy choices of the executive, it is clear that they have substantial power to scrutinise the substance of the executive’s policies and programs that relate to the environment, land, housing, health care, the provision of food, water and social security and education in particular for compliance with the Constitution’s injunction that, through reasonable legislative and other measures, access to these entitlements be made available and progressively realized within the availability of resources.

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1 Pharmaceutical Manufacturers Association of South Africa: In re; Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 (CC).
2 Constitution, s24.
3 Constitution, s25.
4 Constitution, s26.
5 Constitution, s27.
6 Constitution, s29.
7 See in this respect, Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC). See too Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza 2001 (10) BCLR 1039 (SCA), particularly at 1047F (paragraph 15) in which Cameron JA criticised the conduct of the appellant in the way in which it dealt with an application intended to benefit thousands of disability grant beneficiaries whose grants had been cancelled in a manner that was in violation of the right to procedurally fair administrative action. He held: ‘All of this speaks of a contempt for people and processes that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government’s decisions in the
In fulfilling their function of scrutinising exercises of public power for constitutional compatibility, courts are guided by the principle of legality that requires not only that all exercises of public power are authorised by law but also that they are rational and, hence, are not arbitrary. In respect of administrative action, s33(1) of the Constitution gives specific expression to these concepts by providing that everyone has a fundamental right to lawful, reasonable and procedurally fair administrative action. Within this constitutional environment that places so much emphasis on rationality and justification for the exercise of power, the right to demand reasons for adverse administrative action, contained in s33(2), follows like day follows night, is an indispensable adjunct to the fundamental rights entrenched in s33(1) and is an important mechanism to ensure that public powers of an administrative nature are exercised in accordance with the values of accountability, responsiveness and openness. Section 33(2) of the Constitution is thus a mechanism that strengthens the hand of the judiciary, if it is properly interpreted and applied, to serve as an effective buttress between the executive and the populace and to develop what Mureinik called a culture of justification in terms of which ‘every exercise of power is expected to be justified’.

The giving of reasons is not merely a mechanical procedural step. It is certainly of prime importance for those adversely affected by administrative action and probably too for the public at large who have an obvious interest in public powers being exercised in the public

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area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that “people’s needs must be responded to”. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.

8 Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC), 1483D-E (paragraph 58); Pharmaceutical Manufacturers Association of South Africa: In re; Ex Parte Application of the President of the Republic of South Africa, supra, 251H-252B (paragraphs 17) and 272H-273B (paragraphs 85 and 86).

9 See R v Pretoria Timber Co Ltd 1950 (3) SA 163 (A).

interest.\textsuperscript{11} It is also important for the administration itself, particularly a public administration
such as that in South Africa that is placed under a constitutional duty to act ethically, efficiently, impartially, fairly, equitably, without bias and accountably.\textsuperscript{12} In a passage that has been cited with approval in cases involving the fundamental right to reasons in the Constitution,\textsuperscript{13} Baxter says of the importance of reasons:\textsuperscript{14}

\begin{quote}
'In the first place, a duty to give reasons entails a duty to rationalize the decision. Reasons therefore
help to structure the exercise of discretion, and the necessity of explaining why a decision is reached
requires one to address one’s mind to the decisional referents which ought to be taken into account.
Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to
know why a decision was reached. This is not only fair: it is also conducive to public confidence in
the administrative decision-making process. Thirdly – and probably a major reason for the reluctance
to give reasons – rational criticism of a decision may only be made when the reasons for it are know.
This subjects the administration to public scrutiny and it also provides an important basis for appeal
or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant
has been refused on grounds which he is able to correct for the purpose of future applications.'
\end{quote}

In similar vein, and writing of the situation in India where the courts imposed a duty to give
reasons on the administration within a few years of the Constitution of 1947 coming into

\textsuperscript{11} See for instance, Steyn v Estate Agents’ Board 1980 (2) SA 334 (T), 336A-C in which Nicholas J
held: ‘The reasons for a decision of the Estate Agents Board are of fundamental importance in the
consideration of an appeal under s 31 of the Act. Without full and proper reasons, it is extremely
difficult for the Court of appeal to do justice to the appellant and the other interests concerned. The
Board should set out the facts on which its conclusion is based and its reasons for finding those facts.
Without full reasons the Court of appeal cannot determine whether the Board has taken into account
matters which it should not have taken into account, or left out of account matters which it should
have taken into account. And, unless an appellant knows all the reasons why the Board has found
against him, he may be deprived of the opportunity of showing that the Board was wrong. Ideally, the
reasons given should be such as to satisfy the Court of appeal that the Board has brought an
intelligent and judicial consideration to bear on all the salient and essential features of the matter.’

\textsuperscript{12} Constitution, s195(1).

\textsuperscript{13} See Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA), 192B-D (paragraph 5 of
the judgment of Schutz JA), Pascoal v Voorsitter van die Drankraad NO [1997] 2 All SA 504 (NC),
506h-507c and Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial
Government 2001 (8) BCLR 844 (E), 854C-D.

\textsuperscript{14} At 228. See, in relation to the giving of reasons in judicial decision-making, Mphahlele v First National
Bank of South Africa Ltd 1999 (3) BCLR 253 (CC), 257C-F (paragraph 12). Goldstone J stressed the
importance of reasons as a hedge against arbitrariness and as a vehicle for accountability. In this
sense, he held, the giving of reasons for judicial decisions was part of the rule of law.
effect, Sorabjee says that the underlying rationale of this requirement is that ‘disclosure of reasons ensures proper application of mind, reduces the possibility of casualness and minimises whim and caprice, and thereby serves to provide legal protection to persons against arbitrary official conduct’.\textsuperscript{15} It thus serves to make judicial review itself effective as the function of the court may be hampered by the silence of the administration on how it reached a decision that is under challenge, and is required by a democratic constitutional order that values open government.\textsuperscript{16} Finally, he makes the important point that ‘[s]ecrecy is the main bulwark of inefficient and corrupt administration. Disclosure of reasons makes a wholesome dent in the veil of secrecy. Sunlight is a good disinfectant’.\textsuperscript{17} The Council of Europe considers reason-giving to be so important that it says that the ‘written statement of reasons for any administrative act is a fundamental requirement in a state governed by the rule of law, as it is the point where judicial or other control is placed’.\textsuperscript{18}

In \textit{Transnet Ltd v Goodman Brothers (Pty) Ltd}\textsuperscript{19} Olivier JA located the right to reasons for administrative decisions within the broader context of giving effect to the right to equality which ‘pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally. The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action’. In a concurring judgment in the same case Schutz JA made the valuable point that once public bodies developed the habit of giving reasons they would find the exercise to be what he termed a ‘healthful one’.\textsuperscript{20}

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{15}
\item ‘Obliging Government to Control Itself: Recent Developments in Indian Administrative Law’ [1994] \textit{PL} 39, 42.
\item Sorabjee, \textit{op cit}, 42-44.
\item Sorabjee, \textit{op cit}, 44.
\item Supra, 189G-H (paragraph 42).
\item At 194D (paragraph 16).
\end{enumerate}
\end{footnotesize}
11.1.2 The Common Law

Despite the obvious importance of reason-giving, for all of the reasons cited above, the common law has never recognised a general duty on administrative functionaries to give reasons for their decisions.21 It was unlikely that the courts in South Africa would have developed the common law to recognise a right to reasons, if the Constitution had not done so. The explanations for the failure of the courts to develop such a duty tend to be obfuscatory and far from convincing but it is an inescapable reality that the courts considered it to be inappropriate to impose such a duty on administrators.22 From time to time, however, the legislature decides that administrators should give reasons for their actions. As a result one will find law, in South Africa and elsewhere, on what constitute reasons for administrative action. The importance of the leading cases, prior to the coming into operation of the interim Constitution, that will be discussed below, lies in the fact that, in both cases, the highest court in the land set out what the duty to give reasons, when it was imposed by a statute, entailed. It is submitted that these cases are still good law because they articulate the duty in a way that is entirely consistent with its purpose and because they are also consistent with the culture of justification that underpins the Constitution.

21 Baxter, 741. There are two limited exceptions to the common law rule. The first is that there is a duty to give reasons in cases where a person has a right of appeal from an administrative decision. See Marshall Cavendish Ltd v Publications Board 1969 (4) SA 1 (C), 3E-H. See too Sundarjee Investments (Pty) Ltd v De Vos Hugo NO 1959 (2) SA 367 (T), 372E. The second is where the circumstances are such that a hearing after a decision is taken is warranted. See Bill v Minister of Law and Order 1987 (1) SA 265 (W). (Note that this case is merely illustrative of the principle. It was overruled on appeal, in Omar v Minister of Law and Order 1987 (3) SA 859 (A) because the Appellate Division held that the Emergency Regulations excluded the right to a hearing both before and after the decision to extent a detention was taken.) In both of these instances the right to reasons flows from the principle that a fair hearing requires adequate disclosure of the case that has to be met. See in this regard Kadalie v Hemsworth NO 1928 TPD 495.

22 Baxter, 741.
The first case is Sachs v Minister of Justice.23 The appellant, a trade unionist, had been restricted by the respondent, acting in terms of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914, from being in certain specified areas. In terms of s1(12) of the Act the Minister was empowered to issue a notice to this effect if he was ‘satisfied’ that a person was, in a particular area, ‘promoting feelings of hostility between the European inhabitants of the Union on the one hand an any other section of the inhabitants of the Union on the other hand’. Section 1(13) provided that a person who had been restricted in this way could request reasons from the Minister and a statement of the information upon which the Minister acted and that the Minister was obliged to ‘furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue such notice as can, in his opinion, be disclosed without detriment to public policy’. The Minister’s exercise of power was challenged on the basis that he had not afforded Sachs a hearing prior to taking action against him and had not furnished him with adequate reasons and information.

The statement of reasons that the Minister furnished was a rather detailed statement to the effect that he had satisfied himself that Sachs was a person who had been engaged in promoting feelings of hostility between blacks and whites because, ‘as an avowed and professed communist he prominently and actively associated himself, both in public and in private, with propaganda’ that vilified whites as ‘robbers and oppressors of the Native inhabitants of the Union’, incited blacks to disobey segregationist laws, spread the view that the courts denied justice to blacks because they were presided over by whites, incited blacks ‘to enforce, by revolutionary and other violent means, equality with the European inhabitants of the Union’ and incited blacks to ‘abolish the present form of government of the country by the European race and to displace that government by a republic governed by natives only’. The Minister refused to divulge any information because, he said, to do so would be detrimental to public policy.24 Stratford ACJ held that the court was not able to go behind the Minister’s refusal to furnish information. On the issue of what constitutes

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23 1934 AD 11.
24 At 34-35.
reasons, he held (citing with approval the judgment of Tindall J in the court below) that reasons are ‘the reasons for the conclusion that the person is promoting feelings of hostility’; that a ‘mere re-iteration of the finding that the person is promoting feelings of hostility would not be sufficient to constitute reasons; and that the reasons given ‘must state the general effect of the Minister’s findings in regard to the person’s acts’.25

In Nkondo v Minister of Law and Order26 the Minister had issued notices ordering the detention of a number of people in terms of s28 of the Internal Security Act 74 of 1982. He was empowered to order detentions in terms of this section if, inter alia, he was satisfied that the person to be detained ‘engages in activities which endanger or are calculated to endanger the security of the State or the maintenance of law and order …’.27 He was required, by s28(3)(b) of the Act, to provide reasons for the detention of each person and as much of the information that induced him to take his decision as could, in his opinion, be disclosed without prejudice to the public interest. In each case he had issued a notice that had stated:28

‘Statement by the Minister of Law and Order in terms of s 28 (3) (b ) of the Internal Security Act 74 of 1982
(a ) Reason for the detention of (name of person) in accordance with a notice issued in terms of s 28 (1) of the Internal Security Act 1982:
  I am satisfied that the said (name of person) engages in activities which endanger the maintenance of law and order.
(b )Information which induced me to issue the said notice:

25 At 40. In other words, the reasons of a decision-maker are constituted, says Baxter at 229, by ‘explanations as to why it settles upon its final choice’. See too Marshall Cavendish Ltd v Publications Board 1969 (4) SA 1 (C), 3G-H, in which Diemont J held in an appeal against a decision to ban a book: ‘It is not enough that the words of the statute are recited back to the publisher, nor is it enough to refer to “certain passages appearing on pp. 101, 102 and 103 of the book”. The publisher who wishes to prosecute an appeal should be told which passages are objectionable and why in the opinion of the Board they are objectionable.’
26 1986 (2) SA 756 (A).
27 Section 28(1) contains the bases upon which the Minister was empowered to order detentions. Section 28(1)(b) has been cited because it was relied upon by the Minister to justify the detention of the detainees in this case.
28 The notice issued by the Minister, which was essentially similar in respect of each detainee, is set out at 770F-G.
By acts and utterances the said (name of person) did himself and in collaboration with other persons attempt to create a revolutionary climate in the Republic of South Africa thereby causing a situation endangering the maintenance of law and order.

No other information can, in my opinion, be disclosed without detriment to the public interest.'

Rabie CJ held that this statement did not comply with the requirements of s28(3)(b).

‘Section 28 (9) provides that a person who has been served with a copy of a notice of detention (which copy must be accompanied by the Minister's statement as referred to in s 28 (3) (b)) may make "representations in I writing to the Minister relating to his detention or release". These provisions show, in my view, that the Legislature intended that the person on whom a notice has been served should have a fair opportunity of dealing with the reasons furnished by the Minister for his detention and of persuading the Minister that the issue of the order was unjustified. Merely to be informed of the statutory ground on which the Minister found against him would hardly give the person concerned a fair opportunity of making representations to the Minister as envisaged by s 28 (9). In the written statement which accompanied each of the notices issued by the Minister in the three cases with which we are here concerned, the Minister informed the person concerned on what statutory ground he had ordered his detention, but in doing that he did not, in my opinion, inform that person of his reasons for doing so, as required by s 28 (3) (b ).'

In place of a general duty to furnish reasons, the courts may draw an adverse inference, in some cases, from the failure of an administrative decision-maker to furnish reasons.

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29 At 772H-773I. See too 775B where Rabie CJ held: ‘Paragraphs (a), (b ) and (c ) of s 28 (1) set out various grounds on which the Minister can act, and I cannot accept the proposition that, if the Minister acts on one of these grounds and informs the person concerned of that fact by repeating the relevant words in the relevant paragraph, that ground thereby assumes the character of "reasons" within the meaning of that term in s 28 (3) (b ).’ See further 775J-776B, where he held: ‘The Minister did not therein inform the persons concerned why he ordered their detention. What he did, was to inform them - in very vague and general terms - that at some time in the past (note the use of the past tense) they "did'... attempt to create a revolutionary climate in the Republic of South Africa thereby causing a situation endangering the maintenance of law and order". What the Minister did not do, was to set forth the reasons for their detention. The purpose of a detention order is to prevent the commission of certain crimes, or the endangering of the maintenance of law and order, etc, as set out in s 28 (1), and the Minister did not inform the persons against whom he issued notices in the cases with which we are here concerned why he had ordered their detention on the ground of what they had said or done at some unspecified time in the past.’

30 The position was set out as follows by Innes CJ in Judes v District Registrar of Mining Rights, Krugersdorp 1907 TS 1046, 1051-1052: ‘The only question which has given me any trouble in this matter is whether reasons should not have been given by the Registrar for his decision. I an clear that reasons cannot be demanded for the mere purpose of appealing against them, because there is no appeal from the decision of the Registrar. But a refusal to give reasons might be an important
In WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board, Kotze JA observed that administrative decision-makers refused to furnish reasons at their own risk and held that where ‘the only evidence presented is impressive and acceptable, remains unchallenged in cross-examination and uncontracted by other evidence, then the failure to give reasons does tend to support an inference that the evidence was ignored’. This is hardly an adequate substitute for a proper duty to give reasons because the inference can only be drawn if there is enough other evidence to take the applicant close to discharging the onus. It is no help at all for the applicant who simply does not know the basis upon which an adverse decision was taken. In this sense the possibility of an adverse inference being drawn would probably encourage many decision-makers to be more secretive, rather than more open, about the reasons for their decisions. It will be seen below that this unsatisfactory position has been remedied, as was suggested by Baxter: s5(3) of the Promotion of Administrative Justice Act provides that if an administrative decision-maker ‘fails to furnish adequate reasons for an administrative action, it must, subject to subsection 4 and in the absence of proof to the contrary, be

\[\text{element in deciding whether the decision had been bona fide, or whether it had not been influenced by ulterior or improper motives.}\]

\[\text{31} \quad 1982 (4) SA 427 (A).\]

\[\text{32} \quad \text{At 448C-E. See too Pretoria North Town Council v A1 Electric Ice Cream Factory (Pty) Ltd 1953 (3) SA 1 (A), 168-E; Livestock and Meat Industry Control Board v Robert S Williams (Pty) Ltd 1963 (4) SA 592 (T), 398A-C; National Transport Commission v Chetty’s Motor Transport (Pty) Ltd 1972 (3) SA 726 (A), 736F-G; Nasionale Vervoerkommissie v Sonnex (Edms) Bpk 1986 (3) SA 70 (A), 83F-G and 84A-B.}\]

\[\text{33} \quad \text{The weight of authority would appear to be that a refusal to give reasons on its own is not sufficient for an inference to be drawn that the decision-maker had no reasons for the decision, although some judges appear to favour this approach. See for instance Mafuya v Mutare City Council 1984 (2) SA 124 (ZH), 133F in which Dumbutshena JP held that a refusal to give reasons is ‘in itself evidence of bad faith’. The less robust approach is exemplified by Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A), 81G in which Ogilvie Thompson JA held: ‘[E]ven where there exists no legal obligation to give reasons for the exercise of discretion in a certain way, the failure to furnish reasons may – I emphasise it is “may”, not “must” – lend colour to an inference of arbitrariness.’ See too Nasionale Vervoerkommissie v Sonnex (Edms) Bpk supra, 83F-G: ‘Hoe sterker die saak wat uitgemaak is, hoe sterker die moontlike afleiding wat kan volg op ‘n versuim om redes te verstrek.’}\]

\[\text{34} \quad \text{For examples of the weak protection afforded by the possibility of an adverse inference being drawn, see Rajah v Ventersdorp Town Council 1952 (4) SA 351 (T), Edwards and Sons (Pvt) Ltd v Stumbles NO 1963 (2) SA 140 (SR) and Madikizela v State President, Republic of Transkei 1986 (2) SA 180 (Tk).}\]

\[\text{35} \quad \text{At 748.}\]
presumed in any proceedings for judicial review that the administrative action was taken without good reason’.

11.1.3 Comparative Jurisdictions

It will be seen from what follows that the duty to furnish reasons for administrative decisions has been developed in a number of other comparative jurisdictions. These developments have taken the form of common law development, sometimes influenced by constitutional values, and statutory enactments. What has begun to emerge in the law relating to the furnishing of reasons is that the process of judicial review is weakened by the absence of a duty to give reasons and that it is often unfair to allow decision-makers to take what are often far reaching decisions and those who are adversely affected by them are left in the dark as to the basis for such decisions. This boils down to an acceptance that the duty to give reasons is an important part of a system of administrative law that is aimed at ensuring the accountability of those who wield administrative power. In a sense, it is a mechanism to give effect to that most basic of first principles of administrative law that there is no such thing as an unfettered discretion.

The duty to give reasons was first developed by the Indian courts and, indeed, it is probably true to say that, in Commonwealth jurisdictions, the Indian courts have developed the duty most extensively. It has, as a result, been said that reason-giving for administrative decisions ‘is considered to be the third principle of natural justice’.

The initial motivation for the development of the duty by the Indian courts was to limit the possibility of arbitrary administrative action by forcing the administrative decision-making process into the open and to prevent administrative decision-makers from benefiting from their silence as to their reasons for acting, thereby making it extremely difficult for courts to exercise their review

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jurisdiction effectively.\textsuperscript{37} In addition, however, the duty to give reasons was increasingly regarded as an essential aspect of the standards of procedural fairness that administrative decision-making was expected to comply with. This was exemplified by Bhagwati J in \textit{Siemens Engineering Company v Union of India}\textsuperscript{38} when he held that the requirement of reason-giving ‘is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law’.

While the motivation for the initial development of the duty to give reasons may be said to lie in the rule of law in general terms, it has also been given a more overt constitutional dimension: Sorabjee states that ‘the obligation to give reasons has been given a constitutional sanction by the Supreme Court in its landmark decision of \textit{SP Gupta v Union of India}. The court deduced the citizen’s right to know and the right to have information from the guarantee of free speech in the Indian Constitution and from the concept of open government inherent in a democratic system. Accordingly it is the constitutional obligation of authorities and adjudicators to disclose reasons for their orders’.\textsuperscript{39}

In Canada, as elsewhere, the law’s starting point was that there was no obligation resting on administrative decision-makers to give reasons for their decisions, and for a long time, the courts were unwilling to change this position. Three of the provinces, however, have enacted legislation to regulate the exercise of administrative power and, in each, a duty to give reasons has been created.\textsuperscript{40} In line with other jurisdictions, the Canadian courts have, in relatively recent times, begun to develop a duty to furnish reasons, as part of the duty

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\textsuperscript{37} Sorabjee, op cit, 42, citing the earliest case to develop the duty, \textit{Vedachala Mudaliar v State of Madras} AIR 1952 Madras 276, and the more recent decision of \textit{Gautam v Union of India} 1993 (1) SCC 78. See too \textit{Maneka Gandhi v Union of India} AIR 1978 SC 597, 613 in which Chandrachud J held: ‘Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to keep the reasons away from judicial scrutiny.’ (Quoted from Takwani, op cit, 179.)

\textsuperscript{38} AIR 1976 SC 1785, 1789. (Quoted from Takwani, op cit, 175.)

\textsuperscript{39} Sorabjee, op cit, 43-44.

\textsuperscript{40} See generally, Mullan \textit{Administrative Law} Toronto, Irwin Books: 2001, 306-318.
to act in a procedurally fair manner. The duty to give reasons is not a blanket one: the duty will be activated when the nature of the interest of the affected person is sufficiently important, where an appeal lies to a higher authority or in similar circumstances. Mullan observes that while the Supreme Court of Canada has now established the principle that administrators are under a duty to furnish reasons in certain instances, much of the detail of the practical application of the principle remains to be developed.

In Australia, the development of a general common law duty to give reasons suffered something of a body blow when, in Public Service Board of New South Wales v Orsmond, a majority of the court held that the appellant was not duty bound to give reasons for its decision to dismiss the appeal of the respondent against a decision not to appoint him to a post for which he had applied. In the Court of Appeal, Kirby P had held that a duty to give reasons arose as part of the duty to act fairly and that it existed not only when an appeal lay from the decision involved but also where the absence of reasons ‘would diminish a facility to have the decision otherwise tested by judicial review to ensure that it complies with the law and to ensure that matters have been taken into account which should have been taken into account or that matters have not been taken into account which ought not to have been taken into account’. Gibbs CJ for a unanimous court upheld the appeal. He held simply that there was ‘no rule of common law, and no principle of natural justice, requiring the Board to give reasons for its decision, however desirable it might be thought that it should have done so’. He also expressed the view that the development of such a duty was not a job for the courts and should be left, instead, to the legislature. Aronson and Dyer submit that this decision has probably put paid to any idea of the development of the common law to recognise a general duty to give reasons.

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42 Mullan, op cit, 312.
44 Orsmond v Public Service Board of New South Wales [1984] 3 NSWLR 447 (CA), 467.
45 At 670.
46 At 670.
must be borne in mind, however, that the Administrative Appeals Tribunal Act of 1975 and the Administrative Decisions (Judicial Review) Act of 1977, both of which operate on a federal level, and statutes in Victoria, Queensland and the Australian Capital Territory, all provide statutory rights to reasons. To an extent at least these statutes make up for the common law's defect.

In England there is no general duty to give reasons although the common law's failure has been tempered by significant legislative intervention: for instance, the Tribunal and Inquiries Act of 1992 requires that tribunals to which it applies are required to give reasons for their decisions on request. In addition, the courts have developed the common law to recognise that there are instances in which fairness dictates that reasons must be given. The most obvious cases are those in which the affected person either has a right to be heard before a decision is taken, or has a right to appeal from an adverse decision and requires reasons to be able to exercise that right meaningfully. This type of case may be described as a conventional procedural fairness case: the right to reasons flows logically from the requirement of natural justice that a person is entitled to know the case that he or she has to meet.

The second line of cases is quite different. It has been held that a duty to give reasons may arise, as an incident of fairness, from the fact that the interest involved is sufficiently important in law or because 'the decision appears aberrant' in which event 'fairness may require reasons so that the recipient may know whether the aberration is in the legal sense

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48 Aronson and Dyer, op cit, 580-581.
50 De Smith, Woolf and Jowell, 462 (paragraph 9-047); Wade and Forsyth, 942.
51 Doody v Secretary of State for the Home Department [1993] 3 All ER 92 (HL) falls into this category.
real (and so challengable) or apparent”. On the present state of affairs and prospects for the future, De Smith, Woolf and Jowell say:

‘Legislation may be required before we are likely to see a general legal obligation on administrators to give reasons for their decisions. Nonetheless, both administrators and the courts are recognising in an ever growing number of situations that the requirements of good administration require reasons to be given (at least on request) and that in their absence injustice can result. As this appreciation increases it can be expected that there will be a progressive readiness on the part of the courts, in particular situations, to find inherent in the duty to act with procedural fairness an implied obligation that, at least on request, an administrative body should give reasons for its decisions. The courts having developed a preference for the use of the term “fairness” to that of “natural justice” will now invariably infer a requirement of fairness in the decision-making process, in the absence of a clear contrary intent manifest in the relevant statutory or other framework. It is a part of that requirement of fairness that the obligation to give reasons is being extended by the courts pragmatically from one situation to another. At the time when new administrative processes are introduced they are likely to incorporate the same obligation. In this way the absence of a general requirement should in time become progressively less important.’

In Ireland, even before the Freedom of Information Act of 1997 provided a general right to reasons, the courts had departed from the English position of there being no general duty to give reasons. In much the same way as in India, Irish judges recognised the right to reasons to give effect to fairness and to make judicial review effective and thus to give effect to constitutional justice. In Western Europe, the position is that, in terms of the European Community Treaty, institutions of the European Community are bound to give reasons for their decisions. In most of the member states a general duty to give reasons

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52 R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242 (QB), 263A-C. See too R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310 (CA); R v City of London Corporation, ex parte Matson [1997] 1 WLR 765 (CA); Secretary of State for the Home Department, ex parte Fayed [1997] 1 All ER 228 (CA). For comment on these and other cases see Neill, op cit, 174-183. For a summary of the law see De Smith, Woolf and Jowell, 462-465 (paragraph 9-047).

53 At 472-473 (paragraphs 9-059 and 9-060). See too Wade and Forsyth, 544-545.


exists, usually through statute, but in the countries where there is no general duty, a fairly extensive duty, along the lines of the position in England, is enforced by the courts.\textsuperscript{56} In the United States of America the Administrative Procedure Act distinguishes between formal and informal adjudication. In the case of the former, ‘on the record’-type decision-making, s557(3)(A) requires of decision-makers that the provides ‘a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record’. In the case of informal adjudication, s555(e) provides that a decision-maker must provide ‘a brief statement of the grounds for denial’ in the case of decisions in which a ‘written application, petition or other request ... made in connection with any agency proceedings’ is refused. The Supreme Court has held, however, that in the numerous cases not covered by s555(e) courts may still require reasons for decision-makers’ decisions so that proper effect may be given to s706(2)(A) which enjoins courts to ensure that administrative action is not arbitrary, capricious or otherwise unlawful: in order to fulfil their review functions courts are able to insist that administrative decision-makers provide reasons for such decisions.\textsuperscript{57}

From the above rather terse review of the comparative jurisprudence, it can be concluded that there is an overwhelming trend in democratic systems to require administrative decision-makers to give reasons for their decisions. It is noteworthy that in the absence of a general statutory duty, the courts have shown a willingness to dilute that absence of a common law duty by developing a more limited but nonetheless fairly extensive duty based on fairness – the development of reason-giving as the third leg of procedural fairness – and as a means of making judicial review effective – a hedge against arbitrary administrative action. These developments ought to be seen within the context of what Mustill LJ identified, in \textit{Doody v Secretary of State for the Home Department},\textsuperscript{58} as ‘the continuing momentum in administrative law towards openness of decision-making’.

\textsuperscript{56} Schwarze, op cit, 1385-1400.
\textsuperscript{58} Supra, 111f.
11.1.4 The Constitution

Section 24(c) of the interim Constitution introduced the fundamental right to reasons into South African administrative law. It provided that every person had the right to be ‘furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public’. Du Plessis and Corder say the following of this section and its inception:\textsuperscript{59}

‘Section 24(c) contains a remedy which up till now has been absent from our common law. Its importance in establishing a climate of accountability in state administration cannot be exaggerated. Its status as a constitutional right lends it further weight. The negotiating parties were unanimous in their support for the inclusion of this provision, but there were concerns as to its effect on the workings of the public administration, in terms of cost, time and skills, particularly as the reasons have to be supplied in writing. Thus one encounters a specific limitation of this right in that reasons cannot be claimed if they have already “been made public”.

Section 33(2) of the final Constitution provides that ‘[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons’. It will be noted that s33(2) applies only when a person’s rights are adversely affected, as opposed to the threshold of rights and interests contemplated by s24(c) of the interim Constitution. Secondly, s33(2) does not seek to draw the distinction between reasons that have been made public and those that have not, and that may thus be requested. Thirdly, s33(2) has not operated on its own because the transitional provision contained in item 23(2)(b) of Schedule 6 of the Constitution kept s24(c) in force until the Promotion of Administrative Justice Act came into force. The courts have interpreted s24(c) and its

\textsuperscript{59} Understanding South Africa’s Transitional Bill of Rights Cape Town, Juta and Co: 1994, 169.
equivalent transitional provision on a number of occasions. The more important of these
decisions will now be discussed.

The first case to deal with s24(c) of the interim Constitution was Xu v Minister van
Binnelandse Sake. Two aliens had sought reasons for decisions to refuse one a
temporary residence permit and to refuse the other an extension of his temporary
residence permit. Stafford J held that they were not entitled to reasons because they had
not proved that any right or interest had been affected by the administrative actions
concerned. After referring to statistics proffered by the respondent he stated that if every
person was entitled to reasons for decisions from the respondents department, the result
would be chaos and, consequently, an onus rested on people who sought reasons to set
out in their requests the right, interest or legitimate expectation that had allegedly been
affected or threatened. This case was followed in Naidenov v Minister of Home Affairs.

In this matter too, an alien sought reasons for the decision not to extend his temporary
residence permit. Spoelstra J held that he did not have an interest in the matter sufficient
to activate s24(c). He held that what was required was an interest ‘which entitles the holder
to judicial protection in regard to that interest’ and that the applicant’s interest, which fell
short of this standard, ‘can probably be described as a wish to remain in this country or a
wish not to be returned to his own country’. In Moletsane v Premier of the Free State a
teacher sought reasons for the decision to suspend her from her employment. The

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60 On these sections generally, see Plasket and Khoza ‘The Fundamental Right to Reasons for
Administrative Action’ (2001) 22 ILJ 52; De Waal, Currie and Erasmus The Bill of Rights Handbook
(4ed) Cape Town, Juta and Co: 2001, 519-524; Devenish A Commentary on the South African Bill of
Rights Durban, Butterworths: 1999, 467-468 and 475-478; Davis and Marcus ‘Administrative Justice’
in Davis, Cheadle and Haysom (eds) Fundamental Rights in the Constitution Cape Town, Juta and
Co: 1997, 155, 159-160; Burns Administrative Law Under the 1996 Constitution Durban, Butterworths: 1998, 196-198; Devenish, Govender and Hulme Administrative Law and Justice in
61 1995 (1) BCLR 62 (T).
62 At 68G-I.
63 At 68J-69A.
64 1995 (7) BCLR 891 (T).
65 At 901I-J.
66 1995 (9) BCLR 1285 (O).
At 1287F.

At 1288F.

At 1288B.

Baxter, 742.

This was the mistake that the Minister made in *Nkondo v Minister of Law and Order* supra which led to Rabie CJ holding (at 775B) that he could not accept that if the Minister acted in terms of one of a number of empowering provisions 'and informs the person concerned of that fact by repeating the relevant words in the relevant paragraph, that ground thereby assumes the character the character of "reasons" within the meaning of that term in s28(3)(b)'.

At 229.

Moletsane's case is open to criticism. In the first place, it is at odds with Appellate Division authority on what constitutes reasons. Hancke J held that a 'regurgitation of the empowering clause of the statute' constituted reasons. This is clearly erroneous and evinces a confusion of reasons and grounds. If as Baxter says, an administrator's reasons are his or her explanations as to why he or she decided in a particular way the statement furnished to Ms Moletsane that she had been suspended in terms of a particular section of a particular act pending an investigation into allegations of misconduct did not provide her with an explanation of the decision. All that she was told was that action was taken against her in terms of an Act that allowed that action to be taken pending an investigation into misconduct. This interpretation of the fundamental right to reasons also did not promote the values that underlie an open and democratic society based on
freedom and equality’ as was required by s35(1) of the interim Constitution. The result was that Ms Moletsane was in no position to challenge her suspension and remained in the dark as to why, precisely, she had been suspended. The judgment, in other words, did nothing to foster the culture of justification that the Constitution was meant to engender.73

This case may be compared to Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government.74 In terms of a regulation made in terms of the Social Assistance Act 59 of 1992, the respondent, when he refused an application for, or suspended, a social grant, was required to furnish reasons in writing and to advise the affected person of his or her right to appeal against the decision.75 In an apparent attempt to comply with this regulation, the respondent provided people whose applications for disability grants he wished to refuse or whose disability grants he wished to suspend with standard form letters that contained five statements of what he claimed were reasons. Beside each was a box. The respondent would tick the appropriate box to indicate to the affected person why his or her application had been refused or his or her grant had been suspended. The five categories were ‘not disabled’, condition is treatable’, specialist report is required’, ‘medical form incomplete’ and ‘not enough objective medical information’.76

The applicant, claiming standing to sue in the public interest, sought, inter alia, a declarator that these were not reasons. Pillay AJ granted this order. In respect of the first two grounds, he held that they did not constitute reasons because they ‘disclose nothing of the reasoning process or the information upon which it is based’ and that, as a result, ‘a rejected applicant or a beneficiary whose grant has been cancelled, is in no better position attempting to exercise their right of appeal against such decision than they would be were

73 For a discussion on this aspect of the judgment see Plasket and Khoza ‘The Fundamental Right to Reasons for Administrative Action’ (2001) 22 ILJ 52.
74 2001 (8) BCLR 844 (E).
75 In Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E), it had been held that a failure to furnish reasons had the effect of invalidating the decision to suspend a social grant.
76 At 848G.
they applying for the grant for the first time'.77 In respect of the remaining three grounds, he held, in addition, that they disclosed grounds of review, as in each case, the import was that a decision adverse to a beneficiary was taken despite the decision-maker acknowledging that he was not in possession of information which he had identified as relevant to the decision.78 He concluded by stating that these grounds suffered from a further problem that took them out of the category of reasons: they ‘do not educate the beneficiary concerned about what to address specifically in an appeal or a new application. It does not instil confidence in the process, and certainly fails to improve the rational quality of the decision arrived at’.79

Pillay AJ’s judgment is, it is submitted, correct. The five statements in the standard form letter were, in fact, conclusions rather than reasons. In arriving at this result, Pillay AJ was guided not only by the Appellate Division authorities on what constitutes reasons for administrative actions, but also by a purposive interpretation of the term ‘reasons’: in effect, he held that what purported to be reasons could not be reasons because it did not perform the function that reasons are required to perform in an open and democratic state such as South Africa. In other words, the statements could not be reasons because they did not contribute to the enhancement of accountability, responsiveness and openness – the very values that s33(1) and s33(2) of the Constitution are meant to give effect to.80

77 At 856D-E.
78 At 856F.
79 At 856G-H. See too Pascoal v Voorsitter van die Drankraad NO [1997] 2 All SA 504 (NC) in which Van Der Walt J held that a statement to the effect that the decision-maker was not satisfied that the granting of the liquor licence would be in the public interest did not constitute reasons. He held at 506e-f: ‘In die lig daarvan is dit steeds totaal sinneloos om vir ‘n bepaalde applikant bloot te sê dat sy aansoek nie aan die vereistes van die openbare belang voldoen nie, sonder om aan te toon wat die openbare belang in die omstandighede van die bepaalde geval vereis en waarom die aansoek nie aan sodanige vereistes voldoen nie. Die eerste respondent het dus in wese geen redes vir sy weiering aan applikante openbaar nie.’
80 See Corder ‘Administrative Justice, A Cornerstone of South Africa’s Democracy’ (1998) 14 SAJHR 38, 41 who says that the core values of the rights-based conception of public law envisaged by the Constitution are ‘openness of action, participation in decision-making, justification for decisions made, and accountability for administrative action. The importance of the constitutional requirements of lawfulness, procedural fairness, reason-giving and justification for administrative action to such a conception of democracy, is self-evident’.
The second issue to emerge from Moletsane is the adequacy of the reasons. It is submitted that Hancke J’s rule of thumb should be treated with some caution. The giving of reasons for a decision involves connecting the facts and the law, weighting and weighing possible alternative courses of action and arriving at a solution that ought to be the most suitable in the circumstances. It may be tempting to say that the seriousness of the issue dictates the detail required of the reason-giver but this tends to obscure the fact that the complexity of an issue is not necessarily related to its seriousness. One should be careful to equate the seriousness with which administrators deal with peoples’ problems with the size of the issue. The cancellation of a person’s social grant of R500.00 per month is every bit as important to an indigent person as a decision by a customs and excise official to declare forfeit a luxury vehicle of a multi-millionaire. It is probably true that the multi-millionaire is more likely than the indigent pensioner to take the decision on review but that is no licence, and indeed, the worst of motives, to give the one very detailed and meticulously drafted reasons and to give the other skeletal reasons. What is called for is the furnishing of reasons that adequately serve the purpose of the fundamental right in the context of each case. The standard, in every case, should be that the reason given for an administrative act should be ‘adequate, clear and sufficient’.81

Indeed, in Rean International Supply Company (Pty) Ltd v Mpumalanga Gaming Board82 Kirk-Cohen J approached the issue of the adequacy of reasons on this basis, holding that it ‘is impossible to lay down a general rule of what could constitute adequate or proper reasons, for each case must depend on its own facts’.83 In this matter the respondent had provided a large amount of information concerning its decision to refuse the applicant a licence to conduct business in the gaming industry. It had also furnished five reasons for the decision. The applicant contended that the reasons were not adequate and sought what Kirk-Cohen J described as ‘an unwarranted request for further particulars’ and an

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82 1999 (8) BCLR 918 (T).
83 At 926F.
‘attempt on paper to interrogate the respondent and seek judicial sanction for such interrogation’. At 926G-H. He rejected the argument of the applicants that sought to equate the ‘reasons of an administrative body to a judgment of the High Court’ and held that ‘the Constitution does not envisage the imposition of that obligation or duty upon the members of an administrative body for the simple fact that they are not judges and it cannot be expected of them’. What can be expected of administrative decision-makers, however, is that their reasons are intelligible and deal adequately with the arguments before them. In addition, courts on review should take a pragmatic approach to the interpretation of statements of reasons, bearing in mind that they may appear to be lacking if considered out of context but may be adequate when viewed in the context of the decision-making process as a whole.

In ABBM Printing and Publishing Co (Pty) Ltd v Transnet Ltd one of the issues was whether the respondent, an organ of state, had acted administratively when calling for and deciding on tenders, and was hence obliged to furnish an unsuccessful tenderer with reasons for failing to accept its tender. Schwartzman J held that the answer was in the affirmative as the applicant, having been the successful tenderer for the past 16 years and wishing to continue to be, had an interest in the tender process and the respondent’s administrative decision had affected its rights and interests. This conclusion was reached despite the fact that the respondent’s conditions for tendering had stated that it was not obliged to accept the lowest tender, or any tender at all, and that it would not furnish reasons for the rejection of tenders. Schwartzman J held that the respondent had not discharged the onus resting upon it to establish that the applicant had waived its fundamental right to reasons or ought to be estopped from relying on it.

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84 At 926G-H.
85 At 926J.
86 At 927A-E. See too De Smith, Woolf and Jowell, 465-469 (paragraphs 9-049 to 9-053), which Kirk-Cohen J cited with approval.
87 1997 (10) BCLR 1429 (W).
88 At 1436H (paragraph 16.2).
89 At 1436I-1437B (paragraph 17).
On essentially similar facts, in Goodman Brothers (Pty) Ltd v Transnet Ltd, Blieden J arrived at much the same conclusions. In this matter, however, in addition to an order to compel the furnishing of reasons, the applicants sought an order declaring that the tender condition that stated that reasons would not be furnished was invalid because it conflicted with the fundamental right to reasons. In arriving at the conclusion that the tender condition was invalid, Blieden J stated that it was not ‘open to the respondent to rely on such a clause even though the applicant may have agreed thereto. It is contrary to the spirit of the Constitution for the respondent to require anyone with whom it deals to waive his constitutional rights’. In due course, the Supreme Court of Appeal upheld the judgment of Blieden J in Transnet Ltd v Goodman Brothers (Pty) Ltd, holding that Transnet Ltd had acted administratively when it considered tenders and that the respondent was entitled to reasons because its rights and interests were adversely affected by such administrative action. The court expressly overruled Heher J’s judgment in the SA Metal Machinery Co Ltd case, holding that the right affected was the right to just administrative action because, without reasons being furnished, the tenderer would be deprived of the opportunity to take the matter further, by way of review, one presumes.

11.1.5 The Promotion of Administrative Justice Act

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90 1998 (8) BCLR 1024 (W).
91 At 1033C.
92 2001 (2) BCLR 176 (SCA). In the light of this case, it is unnecessary to discuss SA Metal Machinery Co Ltd v Transnet Ltd 1999 (1) BCLR 58 (W), in which Heher J had held that Schwartzman J, in ABBM Printing and Publishing Co (Pty) Ltd v Transnet Ltd, supra, was clearly wrong in arriving at the conclusion that the consideration of tenders was administrative action. In Goodman Brothers (Pty) Ltd v Transnet Ltd supra, Blieden J had, in turn, held that Heher J was clearly wrong in this respect. Blieden J’s view was to prevail in the Supreme Court of Appeal.
93 Schutz JA said in his judgment that the appellant had abandoned its reliance on waiver. Nonetheless, Olivier JA dealt with this issue in his judgment. He held that questions of the waiver of fundamental rights must be dealt with in terms of s36(1) of the Constitution because a waiver amounts to a limitation of a fundamental right: ‘One must be careful not to allow all forms of waiver, estoppel, acquiescence, etc to undermine the fundamental rights guaranteed in the Bill of Rights. In my view, a strict interpretation of section 36(1) is indicated. Transnet has not made out a case that the waiver it relies upon is warranted by a law of general application.’ (At 191A-B (paragraph 48). As this statement was obiter, the difficult issue of whether fundamental rights can be waived, if so, which ones can and cannot be waived and how they can be waived remain open. It must be stated, however, that Olivier JA’s statement is far from clear.
94 At 193E-194A (paragraphs10-12).
Section 5 of the Promotion of Administrative Justice Act makes provision for the giving of reasons. It is thus intended to be the statutory means of giving effect to the right contained in s33(2) of the Constitution. The section may be broken down into three distinct parts: those subsections that deal with the duty directly, those that make provision for departures from the duty and those that provide for the automatic giving of reasons for certain types of administrative action.

Sections 5(1), 5(2) and 5(3) deal with the duty itself. These sections provide:

‘(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.’

Sections 5(4) and 5(5) set criteria for departures from the duty to give reasons. Section 5(4)(a) allows administrators to refuse to give reasons in circumstances in which it is reasonable and justifiable to so refuse, but he or she must ‘forthwith inform the person making the request of such departure’. In terms of s5(4)(b) such an administrator, in determining whether he or she may refuse to give reasons, must apply the similar criteria to those a court would in terms of s36(1) of the Constitution to determine whether a law of general application that infringes a fundamental right is reasonable and justifiable. In other words, the administrator must consider ‘all relevant factors’, including specifically:

‘(i) the objects of the empowering provision;
(ii) the nature, purpose and likely effect of the administrative action concerned;
(iii) the nature and the extent of the departure;
(iv) the relation between the departure and its purpose;
(v) the importance of the purpose of the departure; and
(vi) the need to promote an efficient administration and good governance.’

Section 5(5) is based on a recognition that a number of statutes make provision for the giving of reasons. It provides that in such cases, provided that the provisions of the statute are fair, the administrator may act in terms thereof, rather than in terms of s5 of the Act.

Section 5(6) gives the Minister power, having been so requested by an administrator, to provide, by way of notice in the Gazette, that in the case of certain specified administrative actions or particular groups or classes of administrative actions, administrators will give reasons for their decisions automatically to those whose rights are adversely affected.

Section 5 as a whole is more concerned with the process in terms of which reasons are to be given or withheld than with the substance of the right. This is understandable in the light of the relative simplicity of the substantive issues. That is not to say that the section is beyond criticism. The time period of 90 days afforded to administrators within which reasons must be furnished bears special mention. It is unlikely that the legislature intended to authorise the administration to sit out a period of grace of 89 days before giving reasons on the last day but this is probably how some administrators, at least, will interpret this provision. It will probably be necessary for a court to clarify this point and to hold administrators who may be minded to interpret the provision as a licence to indolence to the standards of professionalism envisaged by s195(1) of the Constitution. For an administrator who aspires to such standards it will be obvious that what the legislature intended was that reasons must be furnished as soon as possible but not later than 90 days after a request.

Secondly, the wisdom of vesting a discretion in administrators to refuse to give reasons is open to doubt, as is the constitutionality of the method used to achieve this end. What s5(4) amounts to is a licence given to administrators to ignore a fundamental right. Instead of allowing such ad hoc, and potentially arbitrary, deviations from the Constitution, it would be far better for the legislature to legislate specific limitations of the right to reasons in particular statutes. That said, however, it is hard to imagine circumstances in which a
refusal to furnish reasons for a decision can meet the criteria of s5(4)(b). Even if the section is constitutional, it is an unwise policy choice: anyone who has had experience of the South African administration will know that the section will spawn a great deal of unnecessary litigation that will only succeed in prejudicing the applicant who will have to bring two applications – one to set aside the decision to refuse to furnish reasons, and to compel reasons to be furnished, and one on the merits of the decision in question – instead of one. On a more positive note, it is to be welcomed that the legislature has seen fit to empower the Minister to determine the circumstances in which reasons will be given automatically. This is a rare instance of Parliament departing from its parsimonious approach to administrative justice that underpins most of the Act. It is to be hoped that the Minister will exercise the power given to him.

11.2. The Right to Information

11.2.1. Introduction

The right of access to information, first entrenched as a fundamental right in s23 of the interim Constitution, then extended by s32 of the final Constitution and now regulated by the Promotion of Access to Information Act 2 of 2000, is important for the development of a system of administrative law founded upon values of accountability, responsiveness and openness. It self-evidently promotes these values if the inner workings of the administration can be laid open to scrutiny by those affected by administrative decisions or, indeed, by the public in general. The importance of such a regimen lies in the fact that the rationality of administrative decisions can be tested against the backdrop of all of the information available to the decision-maker or, at least, the information that ought to have been available to him or her. In a sense, the right of access to information can be used to check that the decision-maker has given proper reasons that are based on all of the information before him or her. In the light of the right of access to information, it would be a short-sighted administrator who tries to pull the wool over the eyes of a person who has requested reasons.
The right of access to information has a much wider application than the administrative law context. Indeed, the initial litigation on the application of this right centred on the rights of criminal accused to the contents of the dockets containing the evidence that the state would rely on in their trials, the corresponding right of access to dockets in civil proceedings that had flowed from or were connected to earlier completed or abandoned criminal proceedings, and the constitutionality of the rules of docket privilege in criminal procedure and the 'once privileged, always privileged' rule of civil procedure. Although it has been relied upon in a wide variety of circumstances (some of which will be mentioned below) it is probably true to say that it has not realized its full potential as a mechanism that is designed to give effect to the founding value of accountability, responsiveness and openness for purposes of democratic governance. For instance, it has been used fairly extensively as an adjunct to legal or administrative proceedings but has yet to be enforced by the media in the exercise of its rights to freedom of the press and other media and freedom to receive and impart information and ideas.

11.2.2. The Position Prior to 1994

The common law does not recognise a general right of access to official information. This may well be the result of the Diceyan view of the rule of law that is to the effect that the

95 See for example S v Majavu 1994 (2) BCLR 56 (Ck), Phato v Attorney-General, Eastern Cape 1994 (5) BCLR 99 (E) and Shabalala v Attorney-General, Transvaal 1995 (12) BCLR 1593 (CC), Qozoleni v Minister of Law and Order 1994 (1) BCLR 75 (E) and Khala v Minister of Safety and Security 1994 (2) BCLR 89 (W).

96 The importance of freedom of information provisions is stressed by Baxter who wrote, in 1984: 'Secrecy is an undoubted cause of maladministration, yet it still permeates many facets of the administrative process. The perennial avalanche of official reports and statistics tends to conceal the fact that much information of real importance is withheld from the public. This is particularly true in South Africa.’ He also observed that access to information ‘is a necessary prerequisite for public accountability and an essential feature of modern democratic theory’. (At 233. See further at 234-235.)

97 Constitution, s16(1)(a).

98 Constitution, s16(1)(b).

99 Baxter, 235.
state and its functionaries are subject to the ordinary law of the land applied by the ordinary courts. Implicit in this is the idea that the state is simply another legal person capable of suing and being sued, in the same way as any other legal subject. From this private law approach to public law a range of assumptions flow, such as that the state, when it litigates, is as free to take technical points and to hide behind them at the expense of the merits as the private individual, and that in the same way that an individual does not have to disclose private information to anyone because of his or her right to privacy, so too the state may take the view that the information in its possession is not for public consumption. This approach, which typifies the way the state as litigant is treated by the courts in South Africa, ignores the public interest and the fact that the state exists for the people and not the other way around.\(^{100}\) That said, however, the law contains a range of limited and specific exceptions to the general rule.

In the administrative law context, in particular, the rules of procedural fairness and the procedure for review specified in rule 53 of the High Court Rules allow for a measure of disclosure of information. In order to give notice to an affected person of the case that he or she has to meet, prior to a hearing, an administrator is required to give the affected person sufficient information to prepare his or her case. This does not mean, however, that full disclosure of all relevant information is called for. The gist of the information is all that is required.\(^{101}\) Secondly, when review proceedings are instituted in accordance with the provisions of rule 53, the respondent is called upon ‘to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so’.

\(^{100}\) A notable exception to this approach is to be found in the judgment of Cameron JA in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza 2001 (10) BCLR 1039 (SCA), especially at 1047A-I (paragraphs 14-15) in which the conduct of the appellants was criticized for being out of step with what could be expected of functionaries of the state who are bound by the Constitution and its values.

\(^{101}\) See Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T), 486G in which Colman J held that the rules of natural justice required that a person ‘be put in possession of such information as will render his right to make representations a real, and not an illusory one’. See further, chapter 10 above.
The most obvious right of access to information is that granted by the rules of discovery in civil litigation.\textsuperscript{102} The purpose of discovery is to ensure that both parties are aware of, and have possession of (if they so wish) the documents upon which the other party will rely. Discovery only takes place when the pleadings have closed so it is of limited value as a means of ensuring open government. In certain instances the courts recognise a right to what amounts to pre-litigation discovery in proceedings for Anton Piller orders: if an applicant alleges that he or she has a cause of action against another, that the respondent is in possession of evidence that will enable the applicant to prove his or her claim and that he or she believes that the respondent will destroy or hide this evidence, and hence will not discover it when pleadings close in due course, the applicant may be granted an order that will authorise the sheriff to demand the handing over of the evidence or to search for it on the respondent’s premises and to seize it as evidence for the proceedings that the applicant intends to institute.\textsuperscript{103} Anton Piller orders have been sought on a number of occasions against the state in South Africa. In the first case, \textit{Ex Parte Matshini},\textsuperscript{104} the applicants sought an Anton Piller order to search two police stations for equipment used by the police to inflict electric shock torture on them. The court accepted that such a remedy could be granted but it held that the applicants were not entitled to the remedy in this instance because they did not need the evidence in question in order to be able to succeed in their damages claims. In other words, the applicants were denied a remedy because their case was too strong.\textsuperscript{105} It has subsequently been held that \textit{Matshini} was wrong in requiring such a strict level of necessity in order to justify the granting of the order. As a result, Anton Piller orders against the state are granted or refused on the same basis as they would be against a person alleged to be breaching the copyright of another.\textsuperscript{106}

\textsuperscript{102} See rule 35 of the High Court Rules and rule 23 of the Magistrates’ Courts Rules. Discovery provisions are also to be found in the rules of specialist courts such as the Land Claims Court and the Labour Court.


\textsuperscript{104} 1986 (3) SA 605 (E).


\textsuperscript{106} See \textit{Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam} supra.
Despite the availability of procedures such as the Anton Piller order and some legislation that allows for limited access to information in specific circumstances, the predominant approach to access to information prior to 1994 has been to limit access in order to further the culture of secrecy that pervaded the administration of the apartheid state. Two illustrations of this culture of secrecy will suffice for present purposes. The first concerns the Information Scandal and the state’s response to it. During the 1970s, a secret program to influence people in favour of the policy of apartheid was set in motion. This involved the creation or purchase of publications (like the Citizen newspaper) in South Africa and abroad, as vehicles to promote the policy of the ruling party. Not surprisingly, those who ran this secret project began to divert some of the secret funds at their disposal to their own secret projects, their individual enrichment. When the scandal was uncovered, initially by newspaper journalists, and when the political dust had settled, the government responded by passing the Protection of Information Act 84 of 1982 which replaced the Official Secrets Act 16 of 1956, made for greater secrecy and created more severe penalties for ‘whistle-blowing’, and the Secret Service Account Act 56 of 1978 which allowed for appropriations to a secret account that would only be audited to the extent that the Minister responsible permitted. The government’s response to the Information Scandal was to make provision for more secrecy: the ‘veil of secrecy’ was ‘more tightly drawn over clandestine activities despite alarming intimations of possible improprieties and perhaps even crimes’.

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107 Baxter, 235 says that the ‘general legislation that does exist aims not at facilitating access [to information] but at preventing it. See generally Matthews The Darker Reaches of Government Cape Town, Juta and Co: 1978. On the purpose of the right of access to information within this specific context, see Phato v Attorney General, Eastern Cape supra, 113C-H. See too SA Metal Machinery Co Ltd v Transnet Ltd 1999 (1) BCLR 58 (W), 64G-H.

108 Baxter 288 who says of the Information Scandal ‘revealed corruption and the misappropriation of public funds on a massive scale – all the direct result of the provision for secret departmental accounts’. See too Matthews, op cit, 233-235.

109 Matthews, op cit, 234.
The second example of secret government is even more sinister. As part of what the government described as a ‘total strategy’ to counter what it termed a ‘total onslaught’ against it, the State Security Council (the SCC) was created by the State Security Council Act 64 of 1972. By 1984, it was said that this body rivalled the Cabinet in the field of policy formulation.\textsuperscript{110} This is not surprising because the SCC’s members included the President and the core of the Cabinet, in the form of the Ministers of Defence, Law and Order, Foreign Affairs and Justice, as well as the most senior defence, police and intelligence functionaries. It functioned, at its height, as an inner cabinet. It was at the apex of the National Security Management System (the NSMS), a secret and parallel system of government that functioned from the national level to local level through the Secretariat of the SSC, a National Joint Management Centre, Joint Management Centres (JMCs), Sub JMCs, Mini JMCs and Local Management Centres. These structures were dominated by the South African Defence Force (the SADF) and the South African Police (the SAP), particularly intelligence operatives in the former and Security Branch members in the latter.\textsuperscript{111} While the full story of the involvement of these structures in the targeting of political opponents of the government during the 1980s is still to emerge, it is clear that they played a role in the functioning of the hit squads of the SADF and the SAP. Although the security policemen who applied unsuccessfully for amnesty for the murders of Mathew Goniwe, Fort Calata, Sparrow Mkhonto and Sicelo Mhlauli, denied knowledge of the source of the decision to commit the murders, an inquest court had earlier found that a signal from the chairman of the Eastern Cape JMC to the Secretariat of the SCC that recommended that Goniwe, Calata and one other be ‘permanently removed from society’ was intended to be a recommendation that they be murdered. They were, indeed, murdered in the most

\textsuperscript{110} Baxter, 111. Cawthra Policing in South Africa London, New Jersey and Cape Town, Zed Books Ltd and David Phillip: 1993, 23 says that the SCC lay dormant for a period, as a result of infighting and inter-departmental infighting, until it was revived by State President PW Botha in the early 1980s.

brutal manner within three weeks of this signal being dispatched.\footnote{See Inquest into the Deaths of Mathew Giniwe, Sparrow Mkhonto, Fort Calata and Sicelo Mhlauli SECLD 28 May 1994 (Inquest No CC7/93) unreported and amnesty applications of EA Taylor (case no 3917/96), GJ Lotz (3921/96), NJ Janse Van Rensburg (3919/96), H Snyman (3918/96), JM Van Zyl (5637/96), HB Du Plessis (4384/96) and EA De Kok (0066/96).} This example illustrates the dangers of secrecy in the starkest of terms: it is not long before secrecy begets lawlessness on the part of those who are meant to uphold the law, and its own warped justifications. It is precisely because of this type of secret, unresponsive and unaccountable government that the drafters of the Constitution saw the need to entrench, as an essential feature of the South African state, the value of ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness’ and to give it content by, inter alia, creating a fundamental right of access to information.

11.2.3. The Interim Constitution

Section 23 of the interim Constitution created the rather unusual right of access to information. It provided that ‘[e]very person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights’. It can be seen that the right is qualified: in essence, a person only has a right of access to information if he or she requires it; if it is required for the exercise or protection of a right; and if the information sought is held by the state or an organ of state. Most of the cases that have dealt with what an organ of state is have been cases in which the right of access to information has been relied upon. They have been discussed in detail above.\footnote{See chapter 4 above.} It has been held in Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting\footnote{1996 (3) SA 800 (T).} that the right that an applicant for information claims to be exercising or protecting must be a fundamental right contained in the Bill of Rights.\footnote{At 813A-B.} This interpretation has, however, been held by Cameron J in Van Niekerk v Pretoria City
Council\textsuperscript{116} to be incorrect for three reasons: first, s23 spoke of any right and if the legislature had wanted to limit the application of the section to fundamental rights it would have said so;\textsuperscript{117} secondly, the expression ‘any of his or her rights’ is used in other provisions in the Bill of Rights to refer to rights other than fundamental rights and it is presumed that when the legislature uses the same words in different parts of a statute it intends them to have the same meaning;\textsuperscript{118} and thirdly, the narrower approach ‘unwarrantably attenuates the impact s23 was designed to have in attaining an open and democratic society’.\textsuperscript{119} Cameron J’s interpretation of the ambit of the right has now been accepted as correct by the Supreme Court of Appeal in Cape Metropolitan Council v Metro Inspection Services Western Cape CC.\textsuperscript{120} Secondly, the courts have held that information is required for purposes of the section if it is reasonably required for the exercise or protection of a right.\textsuperscript{121} The utility of s23 is well illustrated by Uni Windows CC v East London Municipality.\textsuperscript{122} In this matter, the applicant, a building contractor, applied for an order to compel the respondent to allow the applicant access to all information held by it in relation to a building project of the applicant’s. That project involved the construction of a complex of cluster homes on land that had been rezoned to allow for this. The plans had been approved by an official of the respondent and building had commenced when another official ordered the building to stop because the size of the houses did not conform to the

\textsuperscript{116} 1997 (3) SA 839 (T).
\textsuperscript{117} At 844C-845E.
\textsuperscript{118} At 845E-J.
\textsuperscript{119} At 846F.
\textsuperscript{120} 2001 (10) BCLR 1026 (SCA), 1036 E (paragraph 27). See too ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1997 (10) BCLR 1429 (W), 1437E-H (paragraph 19); Inkatha Freedom Party v Truth and Reconciliation Commission 2000 (5) BCLR 534 (C), 542D-E; Ngubane v Meisch NO 2001 (1) SA 425 (N), 428B-E.
\textsuperscript{121} Khala v Minister of Safety and Security supra, 95B-E; Phato v Attorney-General, Eastern Cape supra, 113C-114D; Shabalala v Attorney-General, Transvaal 1994 (6) BCLR 85 (T), 100J-101B; ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd supra, 1437I-1438B (paragraphs 20-21); Ngubane v Meisch NO supra, 430C-431E. But see for a narrow (and incorrect) approach to this issue Inkatha Freedom Party v Truth and Reconciliation Commission supra, 550J-551D in which Davis J held, in effect, that necessity meant more than reasonable necessity: the applicant for information had to require the information in the sense that, without it, he or she could not exercise or protect the right involved.
\textsuperscript{122} 1995 (8) BCLR 1091 (E).
conditions of the rezoning. It emerged on investigation that the official who had approved the plans had not considered the rezoning conditions. This necessitated an amendment to the rezoning conditions, whereupon building operations recommenced. The applicant’s case was that it required the information in order to investigate whether it had a cause of action against anyone for damages due to the delays that had been occasioned by the cessation of building operations. The respondent took the view that, as the applicant was not the owner of the land upon which the buildings were being constructed, it had no right of action against the respondent and hence had no need for the information. Leach J held that this contention was misconceived:

‘The issue is not whether or not the applicant could sue the respondent for damages for having interrupted its building activities … but, rather whether the documentation which the respondent holds is required for the exercise or protection of any of the applicant’s rights. Section 23 of the Constitution does not entitle any Tom, Dick or Harry to have access to documentation being held by an organ of State, but if a person can show that such a body is in possession of information which is required for the exercise or protection of any of his or her rights, he is entitled to access thereto. It is not a requirement of section 23 that such a person shall only have a right of access to information if the right which he or she wishes to protect or exercise lies against the State or any of its organs of government. Thus, for example, a party injured in a motor vehicle collision who wishes to sue the third party insurer would seem to me to have a right of access to a police docket relating to the accident which gave rise to his or her injuries notwithstanding such injured person having no right to claim damages from the police.’

The consequences of the right of access to information for the way organs of state conduct themselves is illustrated by Van Niekerk v Pretoria City Council. The applicant’s domestic electrical equipment had been damaged by a power surge. He claimed damages from the respondent because, he alleged, the power surge had been caused by a faulty transformer under the control of the respondent. The respondent’s electricity department had prepared a report on the incident, which the applicant claimed on the basis of the right of access to information. The respondent refused to provide him with a copy of the report and he

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123 At 1095F-H.
124 Supra.
applied for an order to compel it to do so. One of the defences that the respondent raised was that a legal professional privilege attached to the report. Cameron J rejected this defence in the following terms:125

11.2.4. The Final Constitution

Item IX of Schedule 4 of the interim Constitution bound the Constitutional Assembly, when drafting the final Constitution to make provision for ‘freedom of information so that there can be open and accountable administration at all levels of Government’. Section 32 of the final Constitution is the product of this obligation. It provides:

‘(1) Everyone has the right of access to –
   (a) any information held by the state; and
   (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.’

This section had to be read with item 23(1) of Schedule 6 which provided that the legislation envisaged by s32, s33 and s9(4) of the Constitution ‘must be enacted within three years of the date on which the new Constitution took effect’ and item 23(2)(a) which provided that until that occurs, s32(1) of the Constitution was to regarded to read that ‘[e]very person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights’.126

The effect of these provisions was, therefore, to place the s32 of the Constitution on ice, as it were, until freedom of information legislation to give effect to the right had been enacted. It also had a second effect which is apparent from some of the cases decided in

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125 At 849E-G.
126 See for comment on the Constitutional Assembly’s decision to entrench the right as it did, to provide for national legislation to give effect to it, and to create a transitional measure in the interim, In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC), 1291D-1292G (paragraphs 82-87).
As these values were implicit in the interim Constitution’s right was applied within the context of the final Constitution’s values. What this meant was that the right was interpreted against the backdrop of s1 of the Constitution and in order to give effect to the value of accountability, responsiveness and openness in the furtherance of democratic governance.

11.2.5. The Promotion of Access to Information Act 2 of 2000

(a) Purpose and Scheme

As was the case with the Promotion of Administrative Justice Act, the Promotion of Access to Information Act was rammed through Parliament in order to meet the three year deadline set by the Constitution. In addition, it was also not brought into operation immediately because the necessary administrative preconditions for its functioning were not in place. Most of the Act has now been brought into operation. In its preamble the Act acknowledges the need for open government legislation, recognising that ‘the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations’. With this in mind, the preamble states further that the primary purposes of the Act are to ‘foster a culture of transparency and accountability in public and private bodies’ and actively to promote ‘a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights’.

Rather curiously, s2(1) of the Act instructs courts interpreting any provision of the Act to ‘prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects’. The main

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127 As these values were implicit in the interim Constitution, this may not be of great practical significance, as Van Niekerk v Pretoria City Council supra tends to illustrate. On the place of s32 in the wider context of the type of administration envisaged by the Constitution, see President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC), 1114I-1115E (paragraphs 132-134). See too Inkatha Freedom Party v Truth and Reconciliation Commission supra, 550D.
objects are set out in s9. It provides that the Act has five aims which are: to give effect to the right entrenched in s32 of the Constitution to a relatively unrestricted right of access to information held by public bodies and a more limited right of access to information held by private bodies;\textsuperscript{128} to give effect to these rights subject to justifiable limits that recognise and balance competing rights and interests such as privacy, confidentiality and ‘effective, efficient and good governance’;\textsuperscript{129} to give effect to a positive obligation that rests upon the state to promote a ‘human rights culture and social justice’ by allowing public bodies to request information from private bodies in certain circumstances;\textsuperscript{130} to ‘establish voluntary and mandatory mechanisms or procedures to give effect to’ the right of access to information ‘in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible’; \textsuperscript{131} and to ‘promote transparency, accountability and effective governance of all public and private bodies’ by ‘empowering and educating everyone’ in respect of their rights under the Act and how to exercise these rights, the functions and operation of public bodies and to ‘effectively scrutinise, and participate in, decision-making by public bodies that affects their rights’.\textsuperscript{132}

In respect of the application of the Act in general, the following bear mention: the Act applies to access to what it terms records of both public and private bodies irrespective of when a record that has been requested came into existence;\textsuperscript{133} the Act trumps any other legislation that ‘prohibits or restricts the disclosure of a record of a public body or private body’ and which is ‘materially inconsistent with an object, or a specific provision, of this Act’;\textsuperscript{134} the Act may not be construed in such a way as to prevent access to a record held by either a public or private body in terms of the National Environmental Management Act

\textsuperscript{128} Section 9(a).
\textsuperscript{129} Section 9(b).
\textsuperscript{130} Section 9(c). This section must be read with s50.
\textsuperscript{131} Section 9(d).
\textsuperscript{132} Section 9(e).
\textsuperscript{133} Section 3. For the definitions of a private body, a public body and a record, see s1.
\textsuperscript{134} Section 5.
107 of 1998; \(^\text{135}\) the Act may not be used as a means of obtaining discovery in criminal or civil proceedings once those proceedings have commenced and as long as ‘the production of or access to that record’ for purposes of the proceedings ‘is provided for in another law’. \(^\text{136}\) Importantly, s10 places an obligation on the Human Rights Commission to compile a guide on how to use the Act. It must publish the guide in all of the official languages, must do so within 18 months of s10 coming into force and must update the guide at least every two years.

(b) Obtaining Information

The Act draws a distinction between requests for information from public and private bodies. The distinction flows from the nature of each right as defined in s32(1) of the Constitution. In the first instance, s11 provides that a person ‘must be given access to a record of a public body’ if he or she complies with the procedures provided by the Act and access is not denied in terms of one or other of the grounds upon which such a request may lawfully be refused. Section 50(1), on the other hand, provides that a person ‘must be given access to any record of a private body’ if he or she meets three requirements, namely, that the record is required for the exercise or protection of a right, that the requester complies with the procedures of the Act for the making of a request for information and that access to the information is not subject to refusal in terms of one or other of the grounds for refusal contemplated by the Act. If the requester is a public body and requests information from a private body in the exercise or protection of rights other than its own, then, in addition to meeting the general requirements for access, it must also be acting in the public interest. \(^\text{137}\) Certain types of information – all of a public nature – are specifically excluded from the ambit of the Act. They are records of the cabinet or any cabinet committees, records relating to ‘the judicial functions’ of courts and Special

\(^{135}\) Section 6, read with the Schedule.
\(^{136}\) Section 7.
\(^{137}\) Section 50(2).
Tribunals or of judicial officers in these tribunals, or records of individual Members of Parliament or of Provincial legislatures.\textsuperscript{138}

The Act seeks, in broad terms, to give effect to the right of access to information in three ways: first, it requires that within six months of the commencement of s14, in the case of a public body, and s51, in the case of a private body, or of the coming into existence of the public or private body, a manual must be compiled by the body’s information officer or head (in at least three official languages in the case of a public body) containing such information as a description of the structure and functioning of a public body, its contact details and ‘sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject’;\textsuperscript{139} secondly, s15 and s52 place obligations on the information officer of every public body and the head of every private body to provide information, annually, to the Minister that will be available automatically and will not require a request; and thirdly, the Act creates mechanisms for individuals to request other information from public and private bodies and avenues of redress when requests are refused.\textsuperscript{140}

The grounds for refusals of requests for information held by public bodies fall into two broad categories: certain requests must be refused, while others may be refused.\textsuperscript{141} For instance, an information officer must refuse a request (subject to certain exceptions) if it ‘would involve the unreasonable disclosure of personal information about a third party, including a deceased individual’;\textsuperscript{142} if disclosure would divulge a trade secret of a third party, other information that may prejudice the commercial or financial interests of a third party or information supplied in confidence by a third party the disclosure of which may place him or her at a disadvantage in contractual or other negotiations or would prejudice

\begin{footnotesize}
\begin{enumerate}
\item Section 12.
\item In all there are nine categories of information that must appear in the manual of a public body. There are six categories of information that must appear in the manual of a private body.
\item See s17-s49, in relation to public bodies, s53-s73 in respect of private bodies and s74-s82 in relation to remedies for refusals.
\item Section 33. The grounds for refusal in respect of private bodies are more absolute. See s63-s69.
\item Section 34(1).
\end{enumerate}
\end{footnotesize}
his or her commercial interests;\(^{143}\) if the information requested is protected from disclosure by legal professional privilege;\(^{144}\) or if disclosure ‘could reasonably be expected to cause prejudice’ to either the defence, the security or the international relations of the country.\(^{145}\) An information officer has a discretion to refuse access to information if, for instance, disclosure ‘would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic’;\(^{146}\) or if the request for information is either ‘manifestly frivolous or vexatious’ or if ‘the work involved in processing the request would substantially and unreasonably divert the resources of the public body’.\(^{147}\) In most instances in which the information officer may refuse access to information, he or she must, despite the existence of grounds of refusal nonetheless allow disclosure if disclosure would reveal evidence of unlawful conduct or an ‘imminent and serious public safety or environmental risk’ and, in addition, ‘the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question’.\(^{148}\)

(c) Remedies for Refusals of Access

It is apparent from the above that the central figure in the regime created by the Act is the information officer in public bodies. It is this functionary who will decide on requests for information and upon whom the substantial duties to give effect to the tenor of the Act will fall.\(^{149}\) The Act creates an internal appeal against the decisions of certain information officers.\(^{150}\) this appeal only lies in respect of certain of the decisions taken under the Act

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\(^{143}\) Section 36.
\(^{144}\) Section 40.
\(^{145}\) Section 41.
\(^{146}\) Section 42.
\(^{147}\) Section 45.
\(^{148}\) Section 46. See s70 for the corresponding provision relating to private bodies.
\(^{149}\) See, for instance, s19 which places an obligation on information officers to assist people who request information. Note that the equivalent of the information officer in the private sphere is the head of a private body.
\(^{150}\) Section 74(1) provides for an internal appeal against decisions of the information officers of public bodies referred to in ‘paragraph (a) of the definition of “public body” in section 1”.
by the Directors-General of the departments of state in the national sphere of government, including the Directors-General of such bodies as the Secret Service and Statistics South Africa, and the Directors-General of the nine provincial governments,151 and by the Executive Director of the Independent Complaints Directorate and the Head: Sport and Recreation South Africa.152 The appeal lies to the ‘relevant authority’. This functionary will, in terms of the relevant part of the definition in s1, be: a person designated, in writing, by the President if the information officer concerned is the Director-General in the office of the President,153 the Minister responsible for any other public body in the national sphere of government, or a person designated by him or her in writing;154 or the person designated, in writing, by the Premier of a province if the information officer concerned is the Director-General of a province.155

An aggrieved person may only apply to a court for relief if he or she has exhausted the appeal process provided for by s74.156 Unsuccessful parties to appeals and other aggrieved parties are afforded a special statutory review created by s78(2) and (3), which must be instituted ‘within 30 days’. Presumably this time period is intended to run from the time when the applicant became aware of the decision that he or she wishes to take on review. In such review proceedings the court may grant relief that is just and equitable.157

Section 79 provides that, within 12 months of the section commencing, the Rules Board for Courts of Law must ‘make and implement’ rules of procedure for ‘a court in respect of applications in terms of section 78’ as well as ‘a court to hear ex parte representations’ as contemplated by s80(3)(a). Before rules have been formulated – and hence before the courts contemplated by obliquely by the section are created – the High Court will hear

151 These functionaries are listed in Column 2 of Schedule 1 of the Public Service Act (Proclamation 103 of 1994).
152 These functionaries are listed in Column 2 of Schedule 3 of the Public Service Act.
153 Section (a)(i) of the definition of ‘relevant authority’ in s1.
154 Section (a)(ii) of the definition of ‘relevant authority’ in s1.
155 Section (b)(i) of the definition of ‘relevant authority’ in s1.
156 See further on the procedure on appeal, s75-s77.
157 Section 82.
matters arising from the Act.\textsuperscript{158} In such proceedings, while the rules of evidence that generally apply are those that apply in civil proceedings, s81(3) provides that when a request for information is refused or certain other decisions are taken, the burden of establishing that the decision complies with the Act ‘rests on the party claiming that it so complies’.

11.3. Conclusion

Constitutional Principle XI of Schedule 4 of the interim Constitution required that the final Constitution make provision for a right of access to information for a specific purpose namely ‘so that there can be open and accountable administration at all levels of Government’. While the Constitutional Principles made no mention of the right to just administrative action, this right tends to serve much the same purpose, and more: not only does administrative justice give effect to the rule of law in respect of the activities of the administration, but it also serves as the mechanism for holding administrators to account for the use of the powers that have been entrusted to them. In this second sense, because the right to reasons casts light on the internal workings of the administration it, like the right of access to information, is at the heart of the quest for administrative accountability. This point was made by Jones J in relation to the right of access to information in \textit{Phato v Attorney-General, Eastern Cape}:\textsuperscript{159}

‘The arguments of counsel about how s23 must be understood should be examined against this background. The practices of the past are entirely inconsistent with modern values of openness and accountability in a democratically oriented administration. It is entirely inconsistent with what Mureinik calls the bridge to the future; that is, inconsistent with a bridge to reconciliation, national reconstruction and unity, and the justification of administrative action. How can it be anything but inconsistent with those ideals that officials can keep important information at their disposal secret from those who could and would benefit from it? The purpose of s 23 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had bearing upon the exercise or protection of rights of the individual.

\textsuperscript{158} Section 79(2).
\textsuperscript{159} 1994 (5) BCLR 99 (E), 113C-H.
This is the mischief it is designed to prevent. Under the new Constitution the State no longer has the same immunities. This is so in general terms in respect of all State activity. Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives.'

Both the right to reasons and the right of access to information are invaluable and indispensable adjuncts to the substantive rights to lawful, reasonable and procedurally fair administrative action. By opening up the administrative process to scrutiny they ensure that those aggrieved by administrative action can see for themselves how decisions adverse to them were arrived at, and can see too the information upon which those decisions were taken, can satisfy themselves of the honesty, lawfulness, fairness and rationality of the decision-making process, or confirm the absence of one or more of these qualities and can thus ensure that their fundamental rights have been respected, protected, promoted and fulfilled, or seek appropriate relief if they have not been. This point was recognised by Olivier JA in Transnet Ltd v Goodman Brothers (Pty) Ltd\textsuperscript{160} when he described the right to reasons as ‘the bulwark of the right to just administrative action’.

In a very real sense the rights to reasons and of access to information are the foundation stones of the new administrative law that is to be constructed in the image of the Constitution. They also represent the most obvious and far-reaching innovations that the new order has brought to South African administrative law. This does not mean, however, that they can solve every problem of unaccountable and unresponsive administration. Their success in the greater scheme of administrative accountability will depend, ultimately, on the inter-related approaches of three important sectors to the rights concerned. First, it is necessary for the administration to embrace the new regimen of openness and to develop an ethos that does not regard requests for reasons or information as the troublesome antics of meddlesome individuals intent on undermining public administration. As soon as the administration itself begins to work on the assumption that it must act openly and

\textsuperscript{160} 2001 (2) BCLR 176 (SCA), 189H (paragraph 42).
articulate its reasons for taking decisions, the sooner the quality of public administration will improve. The idea that secrecy and maladministration fit hand in glove is not a new one and certainly is universal in its application. Those who bear responsibility for the public administration in South Africa must ensure that they preside over a system of administration that accepts that, more often than not, secrecy carries no advantages and that openness in government has value in itself.

Secondly, the cases that have been discussed in this chapter have disclosed a range of responses from judges: in the light of some of the cases at least, it cannot be said that the courts have come to terms properly with a new order that has as one of its major premises the idea that government must be open, that it is for those who wield public power to account for their uses of that power – vested in them, one should not forget, by the people through their elected representatives – and that it is not for the individual to justify why he or she wants to be accounted to. This is a major shift in emphasis from the approach to administrative law in the pre-1994 period, and it would be naive to expect that it would simply wither and die when the country’s constitutional fundamentals changed. What this means, however, is that judges cannot simply approach the application of the rights to reasons and of access to information on a mechanical ‘business as usual’ basis: these rights are so unusual when compared to the secrecy-ridden system that prevailed before 1994 that they require judges to come to terms with, and to articulate, the purposes of these rights when called upon to apply them, and to consciously check the result against the founding values of the Constitution. They also must be guided by the idea that these rights serve no purpose on their own. They are included in the Constitution to serve a broader democratic ideal and, most importantly for judges, to make judicial review effective as a means of protecting the populace from excesses or abuses of power. In that sense, these rights go to the core of the judicial function in public law.

Thirdly, the rights to reasons and of access to information need to be used in order to serve their purpose. Even though serious problems of access to justice face the large majority of South Africans, these rights, if not exercised will not be taken seriously by the
administration and will come to be seen as 'paper rights' having no real significance for people. They are particularly valuable rights for the attainment of the type of democracy that the Constitution envisages and for unlocking the administrative process that is, after all ‘the interface between the bureaucratic state and its subjects’.161

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CHAPTER 12: PROCEDURE AND REMEDIES

12.1. Introduction

This work has, up to this point, concentrated on the substance of the rules of administrative law that the courts use to control the exercise of administrative power. The picture painted thus far is incomplete in two major respects: in the first place, while much can be said of the proposition that procedure should not be the master of the substance, the procedure for judicial review remains important and must be examined for compatibility with the substantive law; secondly, litigants aggrieved by administrative action that they believe to be unlawful, unreasonable or procedurally unfair are not interested, as some lawyers may be, in getting their names in the law reports. They want an order issued by a court that will provide them with relief that rectifies the injustice they have suffered, and they want that relief to have a positive practical effect. In other words, the substantive law of judicial review is, in a sense, subject to a bottom line: when courts make decisions, their orders must be appropriate and effective. If the law cannot provide appropriate and effective remedies for administrative injustices, it is not, in fact, capable of properly controlling the exercise of administrative power.

12.2. Procedure

12.2.1. The Current Position

Section 7(3) of the Promotion of Administrative Justice Act provides that the Rules Board for Courts of Law ‘must within one year after the date of commencement of this Act, make and implement rules of procedure for judicial review’. Section 7(4) provides that before

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1 It will be apparent to the reader that this work does not purport to cover the entire field of administrative law or, indeed, all aspects of the law relating to the judicial review of administrative action. It focuses instead on judicial review in fairly broad terms within the context of the Constitution. Its purpose is to examine and comment upon the effect of the Constitution on the judicial review of administrative action, rather than to serve as an updated text book on the subject.
these rules are implemented all proceedings for the judicial review of administrative action must be brought in the High Court or the Constitutional Court. Despite the one year period of grace given to the Rules Board, no separate rules for judicial review have been brought into force: a draft was placed before the Parliamentary Committee on Justice prior to the deadline but did not, apparently, meet with that committee’s approval. This is a necessary precondition for the creation of such rules because s7(5) of the Act provides that the rules envisaged by s7(3) ‘must, before publication in the Gazette, be approved by Parliament’. The rules that were placed before the committee were fairly similar, by all accounts, to the present rule 53 of the Uniform Rules of the High Court.

It is unlikely, both before and after the rules envisaged by s7(4) come into force, that a great many cases will be brought directly in the Constitutional Court. In the overwhelming majority of cases before these rules become operative, proceedings will be instituted in a High Court in accordance with the rules applicable to proceedings in the High Court. From a procedural perspective that means that an aggrieved party may, if he or she wishes, choose to proceed by way of application or action, unless general principles or a specific statute dictate one or the other. So, for instance, in Holgate v Minister of Justice the plaintiff proceeded by way of action to review and set aside the decision to reduce his rank and salary. More often than not, however, a litigant will choose to review an administrative action by way of an application instead because this will be the cheapest, quickest and most convenient procedure. Of course, there are occasions when such an application is inappropriate and may be dismissed because the applicant ought to have foreseen a

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2 Direct access to the Constitutional Court is granted sparingly. See Transvaal Agricultural Union v Minister of Land Affairs 1996 (12) BCLR 1573 (CC), 1579D-1581D and 1586D-E (paragraphs 16-23 and 46); Hekpoort Environmental Preservation Society v Minister of Land Affairs 1997 (11) BCLR 1537 (CC), 1539C-1541E (paragraphs 2-8); Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (10) BCLR 1289 (CC) 1301H-1302G (paragraphs15-17); Christian Education SA v Minister of Education of the Republic of South Africa 1998 (12) BCLR 1449 (CC), 1453D-1456E (paragraphs 6-12).

3 1995 (3) SA 921 (E).
dispute of fact and therefore ought to have proceeded by way of action, or when the application will be referred to oral evidence to resolve disputes of fact.⁴

In other cases – those in which administrative actions may be reviewed indirectly⁶ – a litigant may be compelled to sue by way of summons because, in these types of cases, the remedy sought is usually damages. For instance, in Hofmeyr v Minister of Justice⁶ the plaintiff had sued for damages for infringements to his personality rights that had been caused by his gaolers when he was an emergency detainee. Their conduct was unlawful because they acted under the unlawful dictation of the security branch of the South African Police and did not themselves exercise their discretion.⁷ It is also possible to review administrative action indirectly by raising as a defence in criminal proceedings the invalidity of an administrative act that creates an offence or the invalidity of an administrative decision, non-compliance with which is rendered a criminal offence.⁸

A specific rule, rule 53 of the Uniform Rules, facilitates and regulates applications to judicially review administrative action. The rule creates a procedure that may be divided into two parts. In the first part, the applicant, when he or she initiates the proceedings calls on the respondent to show cause why the decision under review should not be ‘reviewed and corrected or set aside’ and to despatch to the registrar (within 15 days) the record of the proceedings to be reviewed together with ‘such reasons as he is by law required or

⁶ 1992 (3) SA 108 (C); confirmed on appeal in Minister of Justice v Hofmeyr 1993 (3) SA 131 (A).
⁷ More common examples of these indirect review cases are cases in which damages are sought from the Minister of Safety and Security for unlawful arrests and detentions carried out by members of the South African Police Service in the course and scope of their duties. See generally Plasket ‘Controlling the Power to Arrest Without Warrant Through the Constitution’ (1998) 11 SACJ 173.
⁸ See for example Spoor ‘Prosecutions of Persons Infringing their Restriction Orders and Prosecutions of Persons Escaping from Detention’ in Haysom and Plasket (eds) Developments in Emergency Law Johannesburg, Centre for Applied Legal Studies: 1989, 84. The cases of R v Carelse 1943 CPD 242 and R v Hildick-Smith 1924 TPD 69, discussed in chapter 9, are good examples of the invalidity of administrative action being raised successfully as a defence to criminal charges.
desires to give or make’.\(^9\) When this has been done, the applicant may ‘amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit’.\(^10\) That accounts for the first part of the procedure. The second part follows, for all intents and purposes, the same type of process as any other application. In essence, therefore, the rule 53 procedure is simply an application procedure that has engrafted onto it a provision that enables an applicant to obtain the record of the proceedings under challenge and to obtain reasons if such a duty exists or the respondent wants to furnish reasons – a ‘notice of motion procedure, with certain super-added requirements’.\(^11\)

A litigant who wishes to review administrative action does not have to use rule 53 despite the apparent mandatory terms of rule 53(1), which states that ‘[s]ave where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion...’.\(^12\) In *Jockey Club of South Africa v Forbes*\(^12\) Kriegler AJA held that rule 53 was enacted for the benefit of the person wishing to review a decision and that, consequently, he or she could decide to forego its benefits.\(^13\)

‘Counsel for the Jockey Club made much of the peremptory language in which Rule 53 is couched, for example “all proceedings ... shall be ...” in subrule (1) and the repeated use of “shall” in the succeeding subrules. Clearly that use of language cannot be overlooked, but equally clearly it is to be understood conceptually and contextually. The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the Rule, slavishly – and pointlessly – to adhere to its provisions.’

Many applications for the judicial review of administrative action are, consequently, brought

\(^9\) Rule 53(1). On rule 53 in general, see Van Winsen, Cilliers, Loots and Dendy, op cit, 950-954.

\(^10\) Rule 53(4).

\(^11\) *Safcor Forwarding (Johannesburg) Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A), 675E.

\(^12\) 1993 (1) SA 649 (A).

\(^13\) At 661E-F. See too *Motaung v Mukubela NO* 1975 (1) SA 618 (O) and *South African Commercial, Catering and Allied Workers Union v President, Industrial Tribunal* 2001 (2) SA 277 (SCA).
in accordance with rule 6, the general rule regulating applications in the High Court. This flexibility is important because it serves to ensure that meaningless procedural points do not hamper access to court. This is in accordance with the relationship between substance and procedure described by Corbett JA in *Safcor Forwarding (Johannesburg) Pty) Ltd v National Transport Commission*\(^{14}\) when he held that ‘the Rules exist for the Court, rather than the Court for the Rules’.\(^{15}\) It is to be hoped that the rules that are eventually passed to replace rule 53 will take account of these views and maintain the type of procedural flexibility that the courts have fostered.

12.2.2. Judicial Review in Magistrates’ Courts?

Section 1(iv) of the Promotion of Administrative Justice Act defines a court as:

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\begin{align*}
&\text{‘(a) the Constitutional Court acting in terms of section 167 (6) (a) of the Constitution; or} \\
&\text{(b) (i) a High Court or another court of similar status; or} \\
&\text{(ii) a Magistrate’s Court, either generally or in respect of a specified class of administrative} \\
&\text{actions, designated by the Minister by notice in the Gazette and presided over by a} \\
&\text{magistrate designated in writing by the Minister after consultation with the Magistrates} \\
&\text{Commission,} \\
&\text{within whose area of jurisdiction the administrative action occurred or the administrator has his} \\
&\text{or her or its principal place of administration or the party whose rights have been affected is} \\
&\text{domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will} \\
&\text{be experienced’}. \\
\end{align*}
\]

The extension of the jurisdiction of the High Courts is an interesting and positive development in its own right which will be discussed immediately below. The vesting of judicial review jurisdiction in Magistrates’ Courts raises interesting issues of its own. It is submitted that this will not necessarily contribute to administrative justice for a number of reasons: this expansion of the jurisdiction of Magistrates’ Courts appears to be based on a simplistic notion of access to court buildings, rather than access to justice.

\[\text{\footnotemark[14]}\text{ Supra, 675J.}\]
\[\text{\footnotemark[15]}\text{ For similar sentiments see Federated Trust Ltd v Botha 1978 (3) SA 645 (A), 654C-D and Trans-Africa Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A), 278G.}\]
In the first place, it is open to doubt whether magistrates are qualified to deal with matters of administrative law. The quality of decision-making in civil matters in Magistrates’ Courts is generally low: any practitioner who has litigated in these courts can bear testimony to this. Some training in administrative law for some magistrates who will then be designated by the Minister to hear cases involving the judicial review of administrative action is not, by any stretch of the imagination, going to equip them to cope with the complexities of a discipline that far too many judges of the High Court have difficulty with. Secondly, how will classes of administrative action be designated? If, for instance, decisions of an administrative nature of local authorities are designated, this does not in any rational way draw distinctions on the basis of the difficulty or the complexity or the importance of the issue: the mere fact that the issue arises in the local sphere of government does not mean that it is bound to be a small matter, that the law will be uncomplicated or that it is of minor significance.

Thirdly, Magistrates’ Courts in the more inaccessible parts of the country – arguably where this extension of jurisdiction is most needed because of the distance from the seat of a High Court – are the most under-resourced in the country and often do not even have a full set of law reports (or, in some cases, any law reports at all), let alone access to the foreign text books and cases that are the tools of trade of administrative lawyers. Fourthly, many magistrates feel that this extension of their jurisdiction stretches an already over-extended court system to breaking point. Not only has the monetary jurisdiction of Magistrates’ Courts in civil matters been increased from R10 000.00 to R100 000.00 resulting in a large increase in the civil workload of magistrates, but in addition, a number of statutes have vested additional jurisdiction in Magistrates’ Courts: all proceedings in terms of the Extension of Security of Tenure Act 62 of 1997 must either be instituted in a Magistrates’ Court or in the Land Claims Court, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 contemplates the creation of equality courts, defined to include every Magistrates’ Court and every High Court, to hear equality.

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16 Magistrates’ Courts Act 32 of 1944, s29(1)(a), read with GN R1411 of 30 October 1998.
17 Section 17(1).
matters,\textsuperscript{18} to name two examples.\textsuperscript{19}

Rather than vest an inappropriate jurisdiction in the Magistrates’ Courts – a system of courts that is not functioning particularly well in any event – it would serve the purpose of access to justice far better for the state to bolster its legal aid system, ensure that it functions at an acceptable level of competence and professionalism, and make it possible, through funding or other appropriate means, for non-governmental organisations like the Legal Resources Centre, university legal aid clinics and other similar bodies to spread their nets much wider in providing public interest legal services, especially in the more remote parts of the country.

12.2.3. Jurisdiction

The law of jurisdiction is, for most people, a bewildering and often frightening morass of complex case law that belies the apparent simplicity of s19 of the Supreme Court Act 59 of 1959. Section 19(1)(a) provides that every ‘provincial or local division [of the High Court] shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance ...’. A common problem in administrative law is that administrative decisions are often taken in Pretoria in the head offices of organs of state in the national sphere of government, within the territorial jurisdiction of the Transvaal Provincial Division of the High Court, while the effects are felt within the territorial jurisdiction of other divisions of the High Court where those affected by such decisions reside. A right to sue in the jurisdiction in which the respondent resides or has its principal place of administration is of little practical use to most people.

\textsuperscript{18} Section 16.

\textsuperscript{19} The views of magistrates, as reflected in the text, were expressed at a South African Law Commission seminar on the Promotion of Administrative Justice Bill that the author attended in East London in 1999, at a judicial training seminar on the Promotion of Equality and Prevention of Unfair Discrimination Act at the Fish River in 2001, at which the author presented a paper, and in private conversations with certain senior magistrates in the Eastern Cape.
The common law recognizes that the cause in cases such as this will arise where the effect of the administrative action is felt. In Estate Agents Board v Lek\(^{20}\) the decision in question was taken in Johannesbrug, where the appellant had its principal place of business, but affected the respondent where he practiced as an estate agent in Cape Town. Trollip JA in dealing with the issue of whether the court below – the Cape of Good Hope Provincial Division – had jurisdiction, held: \(^{21}\)

'It held that it had jurisdiction because the Board’s decision in Johannesburg was not legally efficacious until it was duly pronounced. i.e. communicated to the respondent, which occurred in Cape Town where he received the Board’s letter (see 1978 (3) SA at 167H-168E.) Although s31(a) does require the Board to inform the aggrieved person of its decision, “in writing”, I do not think that that is a satisfactory or acceptable ground of jurisdiction in these proceedings. It is too tenuous and uncertain. For example, respondent might have received the letter while he was visiting Johannesburg or in some other province. What then? Moreover, respondent’s real cause of complaint was, not the receipt of the letter, but the actual decision of the Board and its effect on his right to practice as an estate agent. The true position was that, although the Board’s decision was taken in Johannesburg, its inhibitory effect (wherever it was pronounced or communicated) hit respondent in Cape Town where he is resident and has his business. It disqualified him from continuing to carry on his business as an estate agent, thereby diminishing pro tanto his legal capacity or personality, and effecting, as it were, a kind of capitis diminutio.'

He explained the rationale for this approach as follows: \(^{22}\)

‘Having due regard to that fact, I think that the Court a quo had jurisdiction to entertain his appeal simply on the ground that he was resident within its area of jurisdiction. After all, that was the Court immediately at hand and easily accessible to him and to which he would naturally turn for aid in seeking to have the diminution in his legal capacity or personality remedied. In the present context of our unitary judicial system of having one Supreme Court with different Divisions, as set out earlier in this judgment, convenience and common sense, are, inter alia, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause.’

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\(^{20}\) 1979 (3) SA 1048 (A).

\(^{21}\) At 1066H-1067C.

\(^{22}\) At 1067D-F. See too Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1980 (3) SA 1108 (W), 1115 G and Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A), 677 A-F. Note that even though Lek’s case involved an appeal, it was not a complete rehearing but more in the nature of a statutory review. The Safcor Forwarding case involved a common law review.
Section 1(d) of the Administrative Justice Bill defined a court to mean the Constitutional Court, a High Court or a court of similar status or a designated Magistrates’ Court ‘within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration’. This formulation of the jurisdiction of High Courts, other superior courts and designated Magistrates’ Courts was more restrictive than the common law and was bound to hamper access to the courts for the large majority of people wishing to vindicate their rights to just administrative action. It favoured the convenience of the administrator over the rights of the individual and would have made it impossible for all but the richest members of society and large companies to take decisions on review in cases in which the applicant lived in a different High Court jurisdiction to where the administrative act occurred or to the principal place of administration of the administrator.

This problem was remedied in the Act. The relevant part of the definition of a court in s1(iv) of the Act speaks of a High Court or court of similar status, or a Magistrates’ Court, in certain circumstances ‘within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced’. This definition extends the common law significantly by not only including the Lek formulation of the cause arising where the adverse effect of administrative action is felt, but, perhaps more importantly, by vesting courts with jurisdiction on the basis of an applicant’s domicile or place of residence. This is an appropriate jurisdictional arrangement for a country in which so many people are poor and will, as a result, struggle to exercise meaningful rights of access to court and to administrative justice even under the best of conditions.

12.2.4. Onus

The final procedural issue to be dealt with is the onus. The state of the law prior to 1994 was largely uncontroversial: with the exception of cases in which the liberty of the individual
was at issue, the onus to establish a reviewable irregularity rested on the applicant. Two complementary ideas appear to have animated this approach to the onus: first, it is generally accepted by the law that the party who alleges a state of affairs must prove his or her allegations; secondly, in the sphere of administrative law, it is presumed that administrators act properly, rather than improperly, and that they comply with all of the formal procedural requirements of their tasks. Should this still be the law when the right to just administrative action is a fundamental right just like the right to freedom of the person?

In During v Boesak the respondents on appeal argued that the onus to establish the lawfulness of a decision taken by the appellant, the provincial commissioner of police, to prohibit under the Emergency Regulations, a concert to celebrate the birthday of Nelson Mandela, rested on the appellant. The case is of some importance because it corrected the law in respect of the onus in arrest cases. In Minister of Law and Order v Dempsey Hefer JA had held that only part of the onus rested on the arrestor in arrest cases. If he or she established that he or she had formed the opinion that it was necessary to arrest a person in terms of the Emergency Regulations, the onus shifted to the arrestee to prove that the opinion was not properly formed. This finding was held by a unanimous Appellate Division in During to be clearly wrong: the onus rested on the arrestor to prove the lawfulness of his or her actions.

More importantly for present purposes, EM Grosskopf JA (with whom Milne JA concurred) held that the same rule ought to apply in respect of all (common law) fundamental rights. His reasoning was that two policy considerations were central to the determination of where the onus lay in arrest cases. First, it was self-evidently unfair for a court to work from

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23 See Baxter, 738-740.
24 1990 (3) SA 661 (A).
26 At 38B-I.
27 See the judgment of EM Grosskopf JA at 679G-680A. See too the judgment of Nestadt JA at 663G-H.
the premise that, if it could not decide whose version to accept, an arrested person should remain in custody and the arrestor’s version should prevail. It would be much fairer in these circumstances to give the benefit of the doubt to the person whose freedom had been taken away. Secondly, from a pragmatic point of view, as the arrestor knew why he or she arrested the arrestee, he or she should bear the onus of persuading a court that he or she acted regularly.28 Having held that Dempsey’s case had been wrongly decided, Grosskopf JA then held that the same principles should apply in respect of all instances of infringements of fundamental rights.29 He also held, however, that such cases had to be distinguished from what he termed ‘die gewone soort hersiening’ in which, presumably, fundamental rights were not in issue. In these cases, the assumption of the law – in order to promote orderly administration – is that all administrative action is, on the face of it, lawful until the contrary is proved.30 It is noteworthy that the majority of Nestadt JA, Joubert JA and Botha JA, while expressing doubts as to the correctness of the extension of the onus to all fundamental rights, did not decide on this issue but assumed for the purposes of their decision that the onus was on the appellant to justify his prohibition of the concert.31

Two important changes necessitate a re-assessment of the onus in the judicial review of administrative action. In the first place, there are no longer any ‘gewone soort hersiening sake’. All cases in which it is alleged that administrative action is either unlawful, unreasonable or procedurally unfair are now, in themselves, cases involving the potential infringement of a fundamental right. Secondly, the Constitution is now explicitly based on values of accountability, responsiveness and openness. That means that, whatever the correct position may have been before April 1994, it is now expected of administrators that they justify their decisions and their actions. These considerations aside, there is no reason why, when a court is unable to decide on which version to accept, it should automatically assume that the administrator acted lawfully, reasonably and procedurally fairly and that

28 At 674A-F.
29 At 680B.
30 At 677F-G.
31 At 663G-H.
the individual should suffer the consequences of this assumption. While the consequences of the deprivation of a person’s freedom are both obvious and serious, the same is true of a great many administrative actions. This is reason enough to treat them in the same way as instances of deprivations of freedom or, indeed, in the same way as any other case in which a fundamental right is infringed or threatened. In all such cases too, the administrator knows the basis for his or her actions better than the person adversely affected by them. From a practical point of view, there is thus no reason why the onus should not rest on administrators to justify every decision which is challenged in court. The idea that it is necessary to assume, for the sake of orderly administration, that administrative actions are regular until the contrary is proved is not a legal reason to place an onus on an aggrieved party. It is nothing more than a practical rule in organised societies, of much the same order as the assumption that most people obey the law. It should not be given more importance than that. It is to be hoped that the courts will grasp the nettle and grapple with the impact that the Constitution has had on the onus in cases in which administrative action is reviewed.

12.3. Remedies

12.3.1. Rights and Remedies

The law of remedies in South African law is largely Roman-Dutch in origin. It is characterised by two qualities, namely, a pragmatic and untechnical approach and an acceptance of the inter-relationship of rights and remedies: where a right has been infringed, a remedy will be provided. On the first aspect, Baxter says that while they may lack the variety of English law, ‘South African remedies are generally free of the complex technicalities which once surrounded those of English law and of many of the countries in the British Commonwealth. Even so, the South African remedies are not only more flexible, but probably just as comprehensive as their English counterparts’. 32 On the second aspect,

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32 Baxter, 675.
The High Court of Parliament case – held that the idea of a right without a remedy was an absurdity:

‘To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in sec. 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium.’

In the result, Baxter’s observation on the state of the law in 1984 is correct when he stated that the remedies recognised by the courts, when used singly or in combination, as the circumstances of cases dictate, ‘are capable of providing adequate relief in nearly all cases of unlawful administrative action; in principle there is little the judges cannot do if they are so minded’. Now the hands of the judges have been strengthened in two ways: first, the Constitution has enhanced their jurisdiction to hold administrative authorities (and all others bound by the Bill of Rights and the Constitution) accountable to explicit constitutional standards and secondly, their jurisdiction to grant relief for constitutional infringements is explicitly granted by s38 and s172(1) of the Constitution and potentially open-ended: courts must, as Ackermann J stated in Fose v Minister of Safety and Security, ensure that the remedies they grant are effective and approach their task from the perspective that in a country such as South Africa ‘where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated’.

12.3.2. The Constitution

The founding value of constitutional supremacy is given concrete form in s2 of the

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33 1952 (4) SA 769 (A), 780-781.
34 Baxter, 676.
35 1997 (7) BCLR 851 (CC), 888I-J (paragraph 69).
36 See too Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening 1998 (2) SA 559 (T), 570E-F
Constitution which states in as many words that the Constitution is the supreme law of the land and that 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. This section, in turn, must be read with s7(2), which places a duty on the state to ‘respect, protect, promote and fulfill’ the rights entrenched in the Bill of Rights, with s34, which creates a fundamental right of access to court, and with s38, which is the first section of the Constitution to speak in express terms of remedies. This section provides that anyone who has standing in terms of s38(a) to (e) ‘has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights’. Section 172(1) deals with the powers of courts in constitutional matters. It provides that, in the first instance, when determining a constitutional matter within its jurisdiction, a court ‘Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’. In the second place, such a court is then empowered to ‘make any order that is just and equitable’, including orders that limit the retrospective effect of declarations of invalidity or suspend orders of invalidity for set periods or under prescribed conditions. Section 173 gives constitutional recognition to the inherent jurisdiction of the superior courts. It provides that the Constitutional Court, Supreme Court of Appeal and High Courts ‘have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice’. Finally, sight should not be lost of the fact that the courts to which this array of formidable powers are given are, in terms of s165(2), ‘independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’.

In *Fose v Minister of Safety and Security* Ackermann J held that appropriate relief ‘will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined

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37 Section 172(1)(a).
38 Section 172(1)(b).
39 Supra.
in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.\textsuperscript{40} In a separate concurring judgment, Kriegler J held that the foundations of the concept of appropriate relief were that violations of fundamental rights had to be remedied,\textsuperscript{41} that ‘the harm caused by violating the Constitution is a harm to the society as a whole’ because the violator harms not only the victim but also ‘impedes the fuller realisation of our constitutional promise\textsuperscript{42} and, because of this wider impact, the ‘object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement’.\textsuperscript{43} He concluded as follows:\textsuperscript{44}

‘Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisions the role and obligations of government quite differently.’

In Hoffmann v South African Airways\textsuperscript{45} Ngcobo J dealt with the same issue in much the same way:

‘The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyse the nature of [the] constitutional

\textsuperscript{40} At 862E-F (paragraph 19).
\textsuperscript{41} At 869G (paragraph 94).
\textsuperscript{42} At 897F-G (paragraph 95).
\textsuperscript{43} At 897G (paragraph 96).
\textsuperscript{44} At 898C-D (paragraph 97).
\textsuperscript{45} 2000 (11) BCLR 1211 (CC), 1227F-G (paragraph 45).
From the above it will be apparent that the courts have been given all of the power that they can possibly need to uphold and protect the Constitution and its fundamental rights and that in order to fashion remedies for infringements of any of the rights contained in the Bill of Rights – such as the right to just administrative action – they must be guided by what justice and equity require and by what is appropriate in this context. Indeed, the interrelationship of justice, equity and appropriateness was specifically alluded to by Ngcobo J in *Hoffmann* when he stated that the meaning of the term appropriate relief was to be ‘construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make “any order that is just and equitable”. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate’.

12.3.3. The Promotion of Administrative Justice Act

Section 8 of the Promotion of Administrative Justice Act, which deals with remedies for infringements of the right to just administrative action, must be interpreted and applied in the light of the constitutional provisions and their interpretation outlined above. In other words, s8 of the Act must fit snugly into s38 and s172 in its interpretation and application. The section provides:

‘(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

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46 At 1226F-G (paragraph 42).
in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs.’

The section seeks to do at least three things. In the first place, it maintains a direct link with s172 of the Constitution by referring to the relief that courts may grant as relief that is, above all else, just and equitable. Secondly, it lists various forms of relief, some usual and others less usual in judicial review cases, as examples of the type of relief that may, in appropriate circumstances be just and equitable. In this sense, it maintains the open-ended nature of s38 and s172(1)(b) of the Constitution: the remedy must be fashioned to effectively deal with the infringement of the right. Thirdly, it expressly indicates that the rather unusual remedy of damages – compensation, in the words of s8(1)(c)(ii)(bb) – is to be considered in ‘exceptional cases’. For the rest, however, s8(1) and s8(2) contain a list of what may be termed the usual remedies for infringements of the right to just administrative action: the mandamus, the prohibitory interdict, the setting aside and remittal of decisions, and the substitution of the administrator’s decision in exceptional cases, the
declarator, the granting of temporary relief and the making of costs orders.  

12.3.4. Remedial Developments

No changes of any substance have been brought about to the usual remedies by s8(1) of the Act: whereas prior to the entrenchment of a right to just administrative action in the Constitution, courts would only usurp the functions of administrators and substitute their decisions for those of administrators in exceptional circumstances, that remained the case and has now been given concrete expression in s8(1)(c)(ii)(aa). The reason for this approach is clear: judges are not administrators and, in accordance with the doctrine of the separation of powers, it is not their function to administer. It is, however, in the realm of the more unusual remedies that the Constitution, and the Act, offer a great deal of scope for imaginative litigation and judicial decision-making in the development of new remedies that will effectively rectify unconstitutional conduct by administrative functionaries – that will be just, equitable and appropriate.

(a) Structural or Supervisory Orders

In most cases, those who seek relief from courts require and ask for no more than a once off intervention from the court: that the legal position be declared; that a respondent be ordered to do something or to abstain from doing something; that a decision be set aside; or that the defendant be ordered to pay damages. In a great number of cases, these orders are sufficient and, if the order is not complied with, the aggrieved party will be able either to execute or proceed for the defaulting party’s committal for contempt of court. In


48 Carephone (Pty) Ltd v Marcus NO 1998 (10) BCLR 1326 (LAC), 1337C (paragraph 35). See, for a relatively recent case on this issue, Derby-Lewis v Chairman, Amnesty Committee of the Truth and Reconciliation Commission 2001 (3) SA 1033 (C).

49 I am most grateful to Jeannine Bednar for supplying me with a great deal of interesting and useful research material on this topic.
constitutional litigation (including administrative law litigation), however, these remedies may not always be enough. This was recognised by Dickson in the early years of Charter litigation in Canada.50

‘The outer limits of s24 have yet to be tested but American experience teaches us that the remedial aspects of constitutional rights litigation will often be the most difficult and most important. In a very real sense the 1954 decision by the United States Supreme Court in Brown v Board of Education of Topeka that racially segregated schools was a denial of equal protection of the laws was the easy part. Almost 30 years later problems of how to enforce desegregation are still being sorted out. Similarly, American judges have been expected to run railroads and preside over state prison systems. Where the vindication of constitutional rights simply involves the nullification of past wrongs, the remedial options are quite straightforward. But where positive action is needed to correct the denial of constitutional rights, the remedial questions become more vexing.’

In South Africa, the need for creativity in developing appropriate remedies for constitutional infringements is as obvious, particularly because of the explicit imposition on the state of positive duties to protect, promote and fulfil fundamental rights (in addition to the negative obligation to respect them) and because of the programmatic nature of the socio-economic rights contained in the Bill of Rights: it is obvious that, for the state to meet its obligations to eradicate inequality, provide access to housing or provide access to health care in South African society, it will have to put in place programs that may bear fruit over a number of years, rather than overnight. If courts were called upon to compel the state to comply with its positive obligations, they would have to recognise this fact and grant remedies that are aimed at achieving programmatic reform. In response to problems such as these, courts elsewhere have concluded that to enforce constitutional rights it is sometimes necessary to develop remedies aimed at ‘far-reaching institutional and structural reform over a period of time in a manner determined by the legislative and executive branches of government’.51


This type of jurisdiction is often referred to as supervisory jurisdiction and the remedy that is granted is often referred to as a structural injunction. It involves the issuing of orders directing the legislature or executive ‘to bring about reforms defined in terms of their objective’ and the supervision by the court of the implementation of these reforms. Procedurally, a court must identify the violation of the constitution and define the reform required to remedy it; direct the organ of state involved to place a plan before it aimed at ending the violation and time frames for achieving the specified reforms; consider the plan and time frames and allow interested parties the opportunity to comment or propose alternatives; finalise the plan, order its implementation in accordance with the appropriate time frames and provide for the organ of state to report back to the court periodically on its progress; and amend or vary the order in accordance with circumstances throughout the implementation of it by the organ of state. Remedies of this nature have been developed and implemented in the United States of America, India and Canada.

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52 These remedies also have other names such as complex injunctions, orders in institutional litigation or decrees. See Bogart, op cit, 88-89. See too Chayes ‘The Role of the Judge in Public Law Litigation’ [1976] 89 Harvard Law Review 1281, 1298 who says: ‘The centrepiece of the emerging public law model is the decree. It differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it is the centrepiece. The decree seeks to adjust future behaviour, not to compensate for past wrongs. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court’s involvement with the dispute.

53 Trengove, op cit, paragraph 22.


55 The source of supervisory orders (at least in the field of constitutional litigation) is often said to be the decisions on school desegregation in Brown v Board of Education of Topeka 347 US 483 (1953) – Brown (1) and Brown v Board of Education of Topeka 349 US 294 (1954) – Brown (2). See further Griffen v County School Board of Prince Edward County 377 US 218 (1964); Green v County School Board of New Kent County, Virginia 391 US 430 (1968); Swann v Charlotte-Mecklenburg Board of Education 402 US 1 (1971); Pugh v Locke 406 F Supp 318 (1976); Spallone v United States 418 US 717 (1990).


While the law of remedies in constitutional litigation in South Africa is not as advanced as in those systems, there are indications that some judges have followed the same lead. In Government of the Republic of South Africa v Grootboom\textsuperscript{58} Yacoob J found that the appellants did not have a comprehensive housing program that could be said to be reasonable because no provision was made in it for shelter for those in desperate need. The state was, therefore, not complying with its obligation to achieve the progressive realisation of the right of access to housing, as contemplated by s26(2) of the Constitution.\textsuperscript{59} The court made an order declaring that:  
\begin{itemize}
  \item[(a)] Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing.
  \item[(b)] The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
  \item[(c)] As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.
\end{itemize}

It would be incorrect to regard Grootboom as definitive of the limits of the remedial powers of South African courts when enforcing socio-economic rights. This is illustrated by two cases that, like Grootboom, are still rather modest compared to some of the foreign cases cited above but that represent the beginnings of a development of a more proactive involvement of the courts in supervising the implementation of fundamental rights. The first case is Treatment Action Campaign v Minister of Health.\textsuperscript{61} The applicants approached the court for orders that would have the effect of forcing the state to expand its limited program

\begin{itemize}
  \item[58] 2000 (11) BCLR 1169 (CC).
  \item[59] At 1193D-1202C (paragraphs 47-69).
  \item[60] At 1209E-H (paragraph 99).
  \item[61] 2002 (4) BCLR 356 (T).
\end{itemize}
to prevent mother to child transmission of HIV/AIDS. Botha J held that the state’s failure to make the drug Nevirapine available to pregnant women and their new-born children, except at 18 so-called pilot sites, was an infringement of the right of access to health care. He issued a declarator to this effect and ordered that the respondents – the Minister of Health, in the national sphere of government, and eight of the nine Members of the Executive Council for Health, in the provincial sphere of government – were to make the drug available to ‘pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents’ present program for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled’.62 In addition, he ordered that the respondents were to ‘plan an effective comprehensive national program to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which program must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner’.63 Botha J then ordered that each respondent was to file reports, by a specified day, in which they would set out, under oath, what he or she had done to implement the plan and ‘what further steps he or she will take to implement the order … and when he or she will take each such step’.64

The second case is Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government.65 In this matter, in which the applicants sought the re-instatement of their disability grants and the reinstatement of the disability grants of all similarly placed

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62 At 387B-C.
63 At 387E-F.
64 At 387G. Note that the respondents have appealed to the Constitutional Court. The matter has been argued but, at the time of writing, judgment has not been delivered. It would, however, be surprising if the Constitutional Court held that, in principle, the relief granted by Botha J was not within his jurisdiction.
65 2001 (2) SA 609 (E).
people in the Eastern Cape province, Froneman J granted orders, on both procedural and substantive issues, that required both applicants and respondents to make choices or perform tasks and then report back to the court. At the first stage of the litigation, the applicants were required to decide whether to proceed by way of a class action or a public interest suit and were also required to place before the court their proposals for giving notice of the proceedings to all who stood to be affected. The respondents were required to provide lists of names of members of the class to the legal representatives of the applicants, to provide the name of an official who would be responsible for compliance with the order and to file an affidavit setting out how they would comply with these orders.66 In due course, a further order was issued that amended the original order in certain respects, provided for the tasks that were required to be done by the parties, set time frames for the implementation of these tasks, recorded that the first respondent had been nominated by the respondents as the person responsible for compliance and set a date for each party to report back to the court on their compliance with the order.67 Finally, after the appeal by the respondents had been dismissed by the Supreme Court of Appeal,68 Froneman J issued an order that, inter alia, directed the Welfare Department to give notice, in ways set out in the order, to members of the class to present themselves at times and places specified for purposes of reinstating deserving beneficiaries, to reinstate those who were deserving and to give reasons for refusing to reinstate to unsuccessful members of the class, and to the Legal Resources Centre (the applicants’ legal representatives) and that required the Department ‘to report to this Court and to the Legal Resources Centre on 5 April 2002 on the progress it has made with the implementation of this Order’.69

The Treatment Action Campaign and Ngxuza matters differ from the usual type of remedy that courts award – the once-off intervention so central to the traditional approach to the judicial function – in that the court in both instances remained involved in the dispute to

66 At 630C-631D.
67 At 633C-634E.
68 Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza 2001(10) BCLR 1039 (SCA).
69 Order dated 20 March 2002.
oversea the implementation of the remedy. This is more obvious in *Ngxuza* if only because the proceedings progressed beyond the first report back. Presumably, in the *Treatment Action Campaign* case, if the respondents’ appeal is not substantially successful, Botha J will retain jurisdiction to consider the reasonableness of the plans that the respondents will submit. While it is clear that there are dangers of rule by the judiciary – and problems of illegitimacy, as a result – if courts go beyond the limits of judicial authority in supervising the conduct of the executive and legislative arms of government, there is also a bottom line. If judges are not prepared to make orders in appropriate cases that direct how systemic infringements of fundamental rights are to be remedied and to oversee the implementation of the resultant corrective measures, they will revert to the status of the paper tigers they were under the system of parliamentary sovereignty: more than that, however, they will be guilty of betraying the Constitution that requires them to strike effectively at infringements and grant meaningful remedies that will allow those who have been wronged to ‘breath the fresh air of social and economic freedom’.70

(b) Compensation

In *Olitzki Property Holdings v State Tender Board*71 the court was called upon to decide two issues. They were, first, whether those provisions of the interim Constitution dealing with tendering contemplated claims for loss of profits as a remedy for non-compliance and, secondly, whether damages for lost profits was an appropriate remedy for the violation of the fundamental right to administrative justice.72 Cameron JA found that the answer to both was in the negative. In respect of the second issue, which is relevance here, he held that the award of damages was inappropriate for two primary reasons. First, the appellant was claiming a remedy that may have been appropriate for a party entitled to be awarded the tender, rather than merely to be treated lawfully and fairly in the tender process and to vindicate these rights through judicial review: as Cameron JA put it, the appellant’s claim

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70 Per Bhagwati J in *Morcha v Union of India* AIR 1984 SC 802, 837 (paragraph 41).
71 2001 (3) SA 1247 (SCA).
72 At 1253F-H (paragraph 1).
‘thus derives from a breach of fair process but it seeks to recover the equivalent of a successful outcome’.  
Secondly, even though the appellant argued that the award of damages would have the effect of vindicating the Constitution, Cameron JA held that ‘the nub of the matter is that the plaintiff in effect claims a windfall, and does so on the premise that its gain has also the public dimension of constitutional vindication’.

In the three cases discussed below, the courts broke important new ground in pragmatically developing appropriate remedies to vindicate the Constitution and provide applicants with relief that is of some immediate and practical use to them. In Mahambahlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government, the applicant had applied for a disability grant but, because of the ‘administrative sloth and inefficiency which currently bedevils the Department of Welfare of the Eastern Cape’ no decision was taken for months. After she had obtained a mandamus to compel a decision, her application for the grant was approved but the issues to be decided by the court were the date of accrual of the grant – whether she was entitled to arrears – and whether she was entitled to interest on the arrears.

Leach J held that the unreasonable delay in deciding on the applicant’s application for the grant constituted a violation of her rights to lawful and reasonable administrative action. Her only common law remedy in the circumstances, damages arising from the respondent’s negligent discharge of duties imposed by the Social Assistance Act 59 of 1992 was not a realistic option because ‘one cannot lose sight of the fact that she is in straitened financial circumstances and may well be unable to fund such an action. In those circumstances, the knowledge of a potentially successful right of action is a poor balm to relieve the loss of a social grant for five months’. Leach J then held that in these circumstances, it was necessary for him to fashion an appropriate remedy in terms of the

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73 At 1266E-F (paragraph 41).
74 At 1266F-1267A (paragraph 41).
75 2001 (9) BCLR 899 (SE).
76 At 907B.
77 At 909I-J.
Constitution. He concluded that ‘it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position in which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed’ and that ‘relief placing her in such a position would be “appropriate” as envisaged by the Constitution’.\(^78\) He ordered that the applicant be paid her grant as from three months after she applied for it, as it was common cause that a period of three months was a reasonable period for deciding on applications for grants. In respect of interest on this amount, Leach J held that once again, the common law could not avail the applicant. Nonetheless, given the importance and role of interest in the modern world, Leach J held that ‘it seems to me that in order to attempt to place the applicant in the position in which she would have been had her constitutional rights not been breached by the tardy manner in which her application for a social grant was processed, it is appropriate to order the respondents to pay interest on the amounts that she should have been paid as a social grant had it been approved with effect from 7 June 2000 to date of payment’.\(^79\)

In *Mbanga v Member of the Executive Council for Welfare*\(^80\) the same judge delivered a judgment on the same day on fairly similar facts. In this case, the social grant for which the applicant had applied was an old age pension, he had waited two and a half years for his application to be decided upon before launching proceedings for a mandamus and the regulations in force at the time he applied for his old age pension provided that a grant accrued on the date on which the application was submitted. The only issue in this case was whether the applicant was entitled to interest on the arrears due to him. On the same basis as in *Mahambahlala* Leach J held that the applicant was entitled to interest on his arrears for all but the first three months of the period between the application for it and the date of approval.\(^81\) In *Nomala v Permanent Secretary, Department of Welfare*,\(^82\) the  

\(^78\) At 911B-C.  
\(^79\) At 912E-F.  
\(^80\) 2001 (8) BCLR 821 (SE).  
\(^81\) At 830G-831A.  
\(^82\) 2001 (8) BCLR 844 (E).
applicant was a recipient of a disability grant that had been cancelled unconstitutionally. When her grant was reinstated by Pillay AJ, he also ordered that interest be paid on the amount owed her from date of cancellation to date of reinstatement.\(^{83}\)

(c) Costs Orders and Contempt of Court

There has been a disturbing increase in the incidence of officials refusing or failing to obey court orders.\(^{84}\) This trend has been commented on by various judges in the Eastern Cape in particular, where the problem appears to be most acute. The size of the problem is illustrated by the following: in one matter in the Eastern Cape Division, orders to commit the Member of the Executive Council for Welfare, her Permanent Secretary, her legal advisor and one other official were sought in respect of non-compliance with 43 orders;\(^{85}\) in the South Eastern Cape Local Division, orders have been granted, at the instance of applicants represented by one firm of attorneys, to direct the political or administrative heads of the Departments of Welfare, Education and Sport, Arts and Culture to show cause why they should not be committed for contempt in 69 matters from April 2001 to 20 February 2002.\(^{86}\) It would appear, however, that the problem is not limited to the Eastern Cape province or to the provincial sphere of government.\(^{87}\)

\(^{83}\) At 856J-858C.

\(^{84}\) See Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (Tk) in which Jafta J remarked that the paucity of authority on contempt of court against the state 'may indicate that until recently government departments complied with orders issued by courts of law. Therefore, in the past it has not become necessary for the courts to decide the matter. However, the attitude of State departments towards courts’ orders has changed lately. The number of similar applications brought before this Court has risen at an alarming rate and regrettably that is a cause for concern' (at 452C). See too East London Transitional Local Council v Member of the Executive Council of the Province of the Eastern Cape for Health [2000] 4 All SA 443 (Ck), especially at 451f-i (paragraph 31).

\(^{85}\) Booi v Jajula; Mnto v Jajula ECD (case nos 431/99 and 433/99). These matters were settled after the respondents eventually purged their contempt.

\(^{86}\) The author is grateful to Rob Martindale, the attorney who has represented the applicants in these cases, for the statistics cited above. In all but four of these cases the respondents avoided committal by complying with the orders shortly before, or even on, the return day. In two cases, the respondent’s explanation for her non-compliance were accepted and two matters have not been finalised.

\(^{87}\) See for example Lombard v Minister van Verdediging [2001] JOL 8362 (T), Magadilela v Minister of Home Affairs 2001 JDR 0019 (Tk) and Federation of Governing Bodies of South African Schools (Gauteng) v Member of the Executive Council for Education, Province of Gauteng TPD 22 February
The nature of the problem is well illustrated by the judgment of Froneman J in *Somyani v Member of the Executive Council for Welfare, Eastern Cape* which commenced as follows:

‘There were forty-one unopposed matters on the motion court roll in Port Elizabeth on 11 June 2001 where relief was sought against the respondents, as is also the case in this matter. These matters were all concerned with the failure of the respondents to do the work they are supposed to do. In most cases the failure had to do with the lack of giving proper attention to the consideration of social grants. In three cases things had proceeded to the point where the respondents were called upon to show cause why they should not be committed to prison for contempt of court because of their failure to give heed to court orders. In two of those cases agreement was reached on how to proceed without following the committal route. The present case is one where no such agreement was reached.’

He stated that the case was not an isolated incident of maladministration. Other courts had commented ‘on the provincial administration’s tardiness in complying with its constitutional and legislative duties’. He proceeded to hold that if the government chose to flout the rule of law, its constitutional duties to obey court orders and assist and protect the independence and impartiality of the courts and its more general obligation to respect, protect, promote and fulfil the Bill of Rights, ‘there is not much that the courts can do about it, except to continue to act in terms of the Constitution. But those who disregard court orders must then know that they are destroying the constitutional democracy that enables them to govern. They then bear the responsibility for betraying the ideals of those who struggled to enable them to be where they are’.

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88 SECLD undated judgment (case no 1144/01) unreported.
89 At 1.
90 At 3.
91 At 3. Froneman J had occasion to comment on the same issue in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E). He had ordered the respondents to reinstate the disability grants of three applicants with effect from the date of cancellation, to pay them within two weeks and to pay interest (at 630A-C). They had complied with most of the order but refused to pay interest of about R250.00 because one of their counsel had advised them that they did not have to comply with the order. Shortly before the judge was to deal with the issue the respondents’ counsel and their attorney paid the interest from their own pockets, thus saving their clients from exposure to committal for contempt of court (Daily Dispatch 21 October 2000 (case no A246/2000) unreported). The problem appears to afflict the Southern African region as a whole. See for some regional examples of what has been termed ‘a complete lack of respect for the rule of law’ *Legal Resources Centre (ed) Administrative Justice: Manual for Attorneys and Para-Legals* Johannesburg, Legal Resources Centre and Canadian Bar Association, 20-23. See too Baxter, 330 who suggests that the phenomenon is universal: ‘Whether a court order frustrates the political will or not, it seems that in most countries there is sometimes a tendency on the part of the administration to disobey, obstruct or attempt to circumvent the order.’ For some South African examples, see Baxter, 331, footnote 171.
Froneman J issued an order that the State Attorney was to ensure that a copy of the judgment and the order was served personally on the Premier of the province and his senior legal advisor, the legal advisor in the office of the President and the respondents; that the State Attorney was to file an affidavit confirming service; and that the matter was postponed to a day on which the respondents were to specify why there had been no appearance by them when the matter was called and how they intended complying with the order in respect of which they were in default, and to determine why a warrant for the arrest of the Permanent Secretary of the department should not be issued for the purposes of bringing him before court to show cause why he should not be found guilty of contempt of court. This order appears to have been aimed in two directions: on the one hand, it appears to have been intended to activate lines of political accountability by requiring service on the Premier and the President’s office; secondly, it retained in the hands of the court the important function of enforcing its orders through committal for contempt if needed, thus activating lines of accountability to the court itself.

Apart from undermining the Constitution, the conduct described above also unfairly places the burden of the government’s failure to obey court orders on its innocent victims – those who have used the law and obtained orders in their favour – instead of on the guilty. It is important that the courts act decisively and sternly to deal with the problem because their legitimacy will be prejudicially affected if they do not afford proper and effective relief for those who have sought the protection of the law. They need to stamp out the abuse before it becomes more common-place than it already is. There are three complementary ways of doing this.

The first way is for courts to grant remedies that are aimed at ensuring that those who ignore court orders are held accountable politically, if they are political office bearers, or are disciplined if they are members of the public administration. Sections 92(1) and 133(1)
of the Constitution provide that members of the executive in the national and provincial spheres of government are responsible to the President and provincial premiers respectively for the powers and functions assigned to them. Sections 92(2) and 133(2) entrench ministerial responsibility to the legislature in the national and provincial spheres of government. Sections 92(3) and 133(3) make it clear that members of the national and provincial executives must ‘act in accordance with the Constitution’. The Constitution thus provides ample authority for the President, premiers and legislators in the national and provincial spheres of government to take action if ministers or members of executive councils ignore court orders and thereby undermine the Constitution and its founding value of the rule of law. Indeed, it may be argued that they are obliged to take action – in accordance with their oaths of office – in defence of the Constitution, and failures in this respect are indications of complicity in such conduct. By the same token, if ministers and members of executive councils do not subject their employees – including Directors-General and heads of provincial departments – to disciplinary proceedings if they ignore court orders, such executive members make themselves complicit in that conduct. They, as much as their employees, would be guilty of ‘destroying the constitutional democracy that enables them to govern’. All that is needed to activate these lines of accountability is a mandamus directing service of the order, the papers and any judgment on the President or premier concerned and on the speaker of either the National Assembly or provincial legislature concerned. Even if an applicant does not seek such an order, there is no reason why a judge should make the order in any event, as Froneman J did in *Somvani*.95

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93 Note that the President and Deputy President are required to take an oath before assuming office in which they swear to ‘obey, observe, uphold and maintain the Constitution and all other law of the Republic’. Cabinet ministers, premiers of provinces, members of the executive council of provinces, members of the National Assembly, delegates to the National Council of Provinces and members of provincial legislatures are all required to take a similar oath before assuming office in which they swear to ‘obey, respect and uphold the Constitution and all other law of the Republic’. See s87, s90(3), s95, s129, s131(3), s135, s48, s62(6) and s107, read with Schedule 2, items 1-5.

94 *Somvani v Member of the Executive Council for Welfare, Eastern Cape* supra, 3.

95 The legal representatives of applicants should also as a matter of course refer matters of this type to the Public Protector and the Auditor General so that they may be investigated. It would also do no harm to alert the media so that the spotlight of public condemnation can be trained on culprits.
The second means to encourage a change of heart in those who hold the courts in contempt is aimed at their pockets. Courts have broad discretionary powers to make costs orders that are appropriate and they use costs orders to show their displeasure when litigants act reprehensibly. When public administrators act in bad faith, the courts have been known to visit upon them orders of costs de bonis propriis. When they act in defiance of the Constitution by failing to comply with court orders and are not able to provide a satisfactory explanation for their failure, the courts should likewise visit upon them costs de bonis propriis to indicate that such conduct will not be countenanced. Secondly, officials who act in this way also incur expense on behalf of the state in defending their actions. In such instances, it may be appropriate for courts to go even further and order that the recalcitrant official be ordered to pay the costs of the state. Authority for this approach is to be found in the Canadian case of Re West Nissouri Continuation Board in which members of a municipality frustrated the implementation of a statute with which they disapproved and then, when a mandamus had been issued to compel them to comply with their duties, took the matter, unsuccessfully, on appeal. The court stressed the fundamental importance of the duty resting on everyone to obey court orders and then held:

'Nor can they be allowed to use public money to pay for the results of their own misconduct – it is too often forgotten that the levying of taxes is an interference with private rights of property; that, consequently, taxes should not be levied except for public purposes; and that, when levied, they are

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96 See for a discussion of the approach of the courts to costs orders Ferreira v Levin NO; Vryenhoek v Powell NO (No 2) 1996 (4) BCLR 441 (CC), 443B-E (paragraph 3). See too Lombard v Minister van Verdediging [2001] JOL 8362 (T), 8.

97 See for instance Moeca v Addisionele Kommissaris, Bloemfontein 1981 (2) SA 357 (O), 366B-C. See too Regional Magistrate Du Preez v Walker 1976 (4) SA 879 (A); Credex Finance (Pty) Ltd v Kuhn 1977 (3) SA 482 (N).

98 (1917) 38 Ontario Law Reports 207. For a discussion of this case and its possible application in South Africa, see Plasket ‘Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials’ (2000) 117 SALJ 151.

99 For condemnation of a similar misuse of legal proceedings to frustrate the claims of a large number of indigent erstwhile disability grant recipients, see Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza 2001 (10) BCLR 1039 (SCA), especially at 1047A-I (paragraphs 14 and 15).

100 At 215-216.
charged with a trust for such purposes. A municipality is not a complaisant benefactor, a fairy godmother to lavish gifts indiscriminately – the Legislature defines the objects upon which money raised from the people by taxes can be spent – and so far not one of these can fairly be said to include paying for disobedience to a lawful order. The township’s money is in no very remote sense the money of all the rate-payers; and the money of not even fifteen or five or one percent is to be used in disputing an order the obedience of which they desire and to the obedience of which they are entitled.’

It accordingly made an order that the members of the municipality ‘indemnify the township against all costs, repaying to the township all costs, between solicitor and client, and all costs the township is obliged to pay’ and that the ‘respondents are to have all their costs payable by these individuals (or if more convenient, by the township in the first instance)’ \(^{101}\)

The duty that rests on the courts to grant appropriate relief when confronted with unconstitutional conduct means that this type of costs order may be made if it will strike effectively at the source of the violation of the Constitution, taking into account and balancing the wrong committed, the need to deter future violations, whether such an order can be complied with and fairness to all affected parties.\(^{102}\) It is submitted that costs orders of this type will indeed strike most effectively at the unacceptable flouting of court orders. It should be borne in mind that contempt of court is an issue, not only between applicant and respondent, but also between the court and the respondent.\(^{103}\)

The third method of ensuring that court orders are complied with by government functionaries is through committal for contempt of court when the respondent has been found to have willfully and in bad faith failed or neglected to obey the order in question. In such instances, courts have a discretion as to the sanction that they may impose. The punishment could be a fine, a suspended sentence of imprisonment or direct imprisonment. Courts are often loath to confront the executive or the legislature too

\(^{101}\) At 216.
\(^{102}\) Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC), 1227F-G (paragraph 45).
\(^{103}\) Federation of Governing Bodies of South African Schools (Gauteng) v Member of the Executive Council for Education, Province of Gauteng supra, 18 and 26.
squarely, exercising 'self-restraint in order to preserve the balance of government, as judges perceive this balance to be'.\textsuperscript{104} This may be understandable but it is no excuse for the courts compounding the serious problem that has developed by themselves failing to do their clear duty. With all of the power that the Constitution has vested in the courts, a failure of courage on an issue so fundamental to the rule of law and judicial independence will destroy the Constitution. In an appropriate case, particularly if the functionary has a poor record of non-compliance with court orders, direct imprisonment would serve to vindicate the dignity of the courts, entrench the idea that no-one is above the law, deter other officials from treating courts contumaciously and serve, more generally, to respect, protect, promote and fulfill the right of access to court entrenched in s34 of the Constitution. In all probability such a sentence would only have to be imposed once or twice to ensure that, in future, court orders are complied with 'diligently and without delay' (in the words of s237).

The responses to the problem of enforcing court orders against the state that have been outlined above tend to complement each other. They will ensure that those who are responsible politically for such conduct can be held to account, that the public interest – and the public purse – is not prejudiced too severely by recalcitrant officials defying and undermining the Constitution and that individual wrong-doers are dealt with in such a way that they and others who may be tempted to behave in a similar way change their ways.

\textsuperscript{104} Baxter, 328.
CHAPTER 13: CONCLUSIONS AND RECOMMENDATIONS

13.1. Introduction

In democratic states that adhere to the rule of law there is always a tension between the judiciary, on the one hand, and the legislature and the executive, on the other. It arises because the judiciary is empowered, to a greater or lesser extent, to decide on the legality of the conduct of the other two branches of government: indeed, if the rule of law is to mean anything, the executive and the legislature must accept judges peering over their shoulders. This is illustrated by the famous case of *Marbury v Madison* in which the United States Supreme Court asserted the power of judicial review for the first time. Lawrence Tribe explains Marshall CJ’s judgment as follows:

‘Marshall rested his defence of federal judicial review of the constitutionality of acts of Congress chiefly upon the following propositions. (1) “[A]ll those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.” (2) “It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. ... If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.” (3) “Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine ... would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.”’

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2 (1803) 1 Cranch 137.
This idea is not new to South Africa. It is deeply embedded in the common law, although the power of judicial review was mainly restricted to judicial supervision of administrative and executive action, rather than of original legislative power,\(^4\) and, at times, the courts did not assert their powers of review as effectively as they should have.\(^5\) As long ago as 1879, when military authorities detained the sons of two Griqua chiefs, De Villiers CJ, in \textit{In re Willem Kok and Nathaniel Balie}\(^6\) made it clear that the courts were independent and that, in order for the executive’s acts to be valid, it was required to be empowered by a law to act as it had. It was argued that, even if the detentions were invalid, the court should not order the release of the two men because of the instability that would result from the release of such troublemakers. De Villiers CJ ordered the release of the two, holding that the ‘disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country’.\(^7\)

A few years later, in \textit{Sigcau v The Queen},\(^8\) he was required to adjudicate on the validity of the detention of a Pondo chief detained on the strength of a proclamation made by the Governor-General. Once again it was argued that if the detainee was released all sorts of dire consequences would follow. De Villiers CJ held that the consequences so confidently predicted had not ensued when he had freed Kok and Balie and that even if the country was in a disturbed state he did not believe that ‘the impartial administration of justice would increase the disturbance or endanger the peace’ but would probably have the opposite

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\(^4\) But see \textit{Harris v Minister of the Interior} 1952 (2) SA 429 (A), the ‘vote case’, and \textit{Minister of the Interior v Harris} 1952 (4) SA 769 (A), the ‘High Court of Parliament case’.


\(^6\) (1879) 9 Buch 45.

\(^7\) At 66. See too the earlier case of \textit{Central Road Board v Meintjes} (1855) 2 Searle 165, 176.

\(^8\) (1895) 12 SC 256.
effect. He consequently held that the proclamation, being in effect an unauthorised usurpation by the executive of the judicial authority of the state did not have the force of law, and the detention in purported reliance upon it was invalid and unlawful.

Over 120 years later, in a very different legal and political environment, the central ideas of these judgments were articulated in Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa. Chaskalson P held that every exercise of public power was subject to the jurisdiction of the courts to ensure constitutional compatibility, and that, at a minimum, public powers, in order to be constitutional, had to be objectively rational. He also held that the Constitution had altered, in a most fundamental way, the power of the courts to control public power:

‘Prior to the coming into force of the interim Constitution, the common law was “the main crucible” for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law

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9 At 271. See too Lesapo v North West Agricultural Bank 1999 (12) BCLR 1420 (CC), 1429G-1430A (paragraph 22). Mokgoro J spoke of s34 of the Constitution, the right of access to court, as being ‘foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes’. For a similar sentiment, see the Indian case of Fertiliser Corporation Kamgar Union (Regd) v Union of India 1981 (1) SCC 568, 584 in which Krishna Iyer J spoke of it being ‘essential that the Rule of Law must wean the people away from the lawless street and woo them for the court of law’.
10 At 259F-G (paragraph 40).
11 At 272H-273B (paragraphs 85 and 86).
12 At 260I-261E (paragraph 45).
13.2. The Changing Face of the Regulation of Public Power

It is now accepted wisdom that the South African judiciary, during the apartheid era, was found wanting in respect of the protection of human rights. Because the apartheid system was built on law, and was, to a large extent, implemented through the medium of discretionary administrative powers, it is in the field of administrative law that the judiciary’s failures are perhaps most obvious.\(^{14}\) This point was made by the General Council of the Bar (the GCB) in its representations to the Truth and Reconciliation Commission on the South African legal system during the period 1960 to 1994. After querying why the courts were ‘slow to respond to the blatant abuse of administrative power which characterized the apartheid era’, the GCB submitted that ‘although the law of review of administrative actions is largely, if not entirely, judge-made, our courts failed to impose rigorous standards on officialdom, particularly in the field of legislation involving race and security’.\(^{15}\)

The judiciary’s failure to live up to the standard that De Villiers CJ set in *In re Willem Kok and Nathaniel Balie*\(^{16}\) and *Sigcau v The Queen*\(^{17}\) is well documented and is an important part of the context within which the new administrative law must be viewed and understood. Denial of the judiciary’s failures or, perhaps worse, blaming everything on Parliament and

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\(^{16}\) Supra.

\(^{17}\) Supra.
the doctrine of parliamentary sovereignty, will be most unhelpful in the quest for an understanding of why and how public power must be controlled in the democratic South Africa. It must be accepted that the judiciary was complicit in the denial of human rights in the apartheid era and that that complicity stemmed in part at least from a failure to acknowledge the aberrant and morally indefensible nature of the constitutional system from which judges drew their authority – a system based on parliamentary sovereignty severed from its political counter-balance, universal franchise and (at the very least) a reluctance on the part of most judges to acknowledge the evil (for that is precisely what it was) which Parliament and its minions created and imposed on the country, in the form of the laws of apartheid and the security laws. Such laws were usually applied without comment by judges, as if the administrative law applied in these circumstances were simply an ‘autonomous apolitical system to be evaluated solely by the traditional standards of the legal profession’.19

When Dean, writing in 1986, suggested that South African administrative law may be a ‘dismal science’, he said the following of the weaknesses of the system of administrative law:20

'It has developed within a system of government which concentrates enormous powers in the hands of the executive and the state administration and in which law has been used not to check or structure these powers, but rather to facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best. In this process the South African courts have at times appeared to be all too willing partners displaying what virtually amounts to a phobia of any judicial intervention in the exercise of powers by administrative agencies. As a result,

19 Baxter, 69. On the need for judges to recognise these defects and to approach their task under the new Constitution differently, see Qozoleni v Minister of Law and Order 1994 (1) BCLR 75 (E), 79F-80I and Matiso v Officer Commanding, Port Elizabeth Prison 1994 (3) BCLR 80 (SE), 87C-E.
administrative law often appears to be “an almost mystical field in which the executive is free to do not only whatever it wills, but also to undo whatever it has done”. Apart from this, until relatively recently, South African administrative law has been largely the creation of administrators and legal practitioners, principally judges and advocates. Without underestimating the inherent difficulty of the subject, this has meant that it is an area of the law which displays all the disadvantages of a purely pragmatic system. It is characterized by an excessive attention to detail and a lack of system and principle which make it very difficult to state or develop in a coherent fashion.’

Five years later, Corder wrote that ‘South African administrative law has until very recently languished in a rudimentary form not unlike that of the English administrative law of the late 19th Century’.21 He proceeded to write:22

‘Thus the conceptional apparatus used by the judiciary has been characterized by a formalistic reluctance to recognize the growth of executive power (to the detriment of legislative legitimacy and civil liberties) and to develop legal rights and remedies within the scope of judicial review accordingly. In this vital respect, beyond a few judgments before 1950, judicial policy in South Africa has differed radically from that of its parent body in England: it has failed signally to enforce executive accountability to the law at the same time as government policy, largely discharged through the medium of administrative discretion, has wrought wholesale changes to the socio-political economy. So repeated challenges in the courts to the implementation of apartheid or measures taken to keep it in place have fallen on deaf judicial ears.’

The interim Constitution created the bridge from an authoritarian past to a democratic future. It was based explicitly on the idea of constitutional supremacy and created from the undemocratic old order a constitutional state. In such a state those who wield public power must be able to justify their exercises of power against standards of reasonableness and rationality.23 Because of the prominence of administrative power, both historically in the apartheid state and, more generally in the modern state, the interim Constitution contained fundamental rights to what it termed administrative justice. So does the final Constitution. It is against this background that the fundamental right to just administrative action must

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22 Ibid.
be viewed and understood. For this reason, Corder submits that the form of democracy articulated by the Constitution is based on a ‘rights-based conception of public law’ which seeks, as its major aim, to prevent abuse of power and is premised on ‘openness of action, participation in decision-making, justification for decisions made and accountability for administrative action’. In conformity with this view of the purpose and rationale of judicial review of administrative action under the supreme Constitution, it will be these values of the Constitution, rather than a common law that has been developed in an undemocratic (and largely anti-democratic) setting and shaped by the doctrine of parliamentary sovereignty, that must now determine the boundaries and the contours of administrative justice. The entrenchment of rights to just administrative action in the Constitution and the fleshing out of these rights through legislation represent, without doubt, the most important reform of administrative law in South Africa’s history.

13.3. Administrative Law

In Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal O’Regan J captured the essence of the primary role of administrative law in the reconstruction of South Africa. She said that the case before her highlighted ‘the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding

26 1999 (2) BCLR 151 (CC).
that both need to be honoured'. It is in blending these two requirements in the public interest that administrative law plays an important role: on the one hand, governmental policy must be capable of effective implementation but, on the other, that implementation cannot be effected at any price and in any manner that may take the whim of the administrator concerned.

Administrative law serves both to empower administrative officials so that they can implement policies and programs and to limit the exercise of power by officials by requiring all administrative action to meet certain minimum requirements of legality, reasonableness and fairness. A proper system of administrative law should recognise, and hence be concerned with, the power at the disposal of administrative officials in the modern state and, particularly, in a modern state such as South Africa where large numbers of people are disempowered through poverty and a lack of access to justice. The judges who, after all, are required by the Constitution to hold administrative officials to proper standards of lawfulness, reasonableness and procedural fairness, must act from this understanding of the society in which they function. Their decisions, as much as those of administrators, have the potential to affect the lives of large numbers of people. In this sense the courts are as responsible as the other two branches of government for the creation of an equitable and effective system of administrative law based on the values of the Constitution.

Administrative law no longer functions within the space allowed to it by a sovereign legislature hostile to fundamental rights and a public administration hostile to accountability. Instead, it now functions within the type of constitutional system envisaged

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27 At 152I-J (paragraph 1).
28 Baxter, 2 defines what he terms general administrative law as 'the general principles of law which regulate the organization of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. See further, chapter 1 above.
by the founding values of the Constitution. These values, entrenched in s1 of the Constitution, encapsulate the essential features of the South African state. Section 1(c) and s1(d) respectively provide that the ‘Republic of South Africa is one, sovereign, democratic state’ founded on values of ‘[s]upremacy of the constitution and the rule of law’ and ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’ These values give the Constitution a capacity to control the exercise of all public power. In respect of s1(c), the Constitutional Court has held that the rule of law means that: no body or person may exercise public power or perform public functions unless the authority to do so has been conferred by law;\(^{30}\) that when such functionaries exercise power or perform functions they are required to do so in good faith and they may not misconstrue their powers;\(^{31}\) that they are required to exercise powers rationally;\(^{32}\) that, to protect fundamental rights, laws should be ‘pre-announced, general, durable and reasonably precise rules administered by regular courts or similar independent tribunals according to fair procedures’;\(^{33}\) and that rules must be stated in a ‘clear and accessible manner’.\(^{34}\) It is no accident that s1(c) forms part of the Constitution. It gives expression to a broader value that underpins every constitutional state – that every exercise of public power must be capable of rational justification. The founding values expressed in s1(d), of accountability, responsiveness and openness, are also of prime importance for purposes of constitutional control of public power because, as Froneman DJP held, in Carephone (Pty) Ltd v Marcus NO,\(^{35}\) they provide ‘the broad conceptual framework within which the executive and public administration must do its work and be assessed on review’.


\(^{31}\) President of the Republic of South Africa v South African Rugby Football Union, 1999 (10) BCLR 1059 (CC), 1123C-D (paragraph 148).

\(^{32}\) Pharmaceutical Manufacturers Association of South Africa; in re: Ex Parte Application of the President of the Republic of South Africa supra, 273F-I (paragraphs 89 and 90).


\(^{34}\) Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC), 865D (paragraph 47).

\(^{35}\) 1998 (10) BCLR 1326 (LAC), 1337B (paragraph 34).
In similar vein, the same judge, in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 36 spoke of administrative law in its constitutional setting, and the role of the courts in this setting, in the following terms:

‘Mention has already been made that the Constitution provides that the courts have a policing role to ensure that public power is exercised in accordance with the principle of legality. It also declares ours to be a democratic state (section 1). One of the foundations of democracy is that those who are chosen to rule must be accountable to those they govern. The Constitution recognizes that as a founding value of our democracy (section 1(d)). It also recognizes that modern societies need to be run by persons other than those directly elected by the people. Those in the public administration must accordingly also be subject to the foundational values of democracy, otherwise the promise of democracy may become an illusion. So the Constitution states explicitly that public administration must be governed by the democratic values and principles of the Constitution, and states specifically that public administration must accountable (section 195, particularly section 195(1)(f)). The fundamental importance of accountable public power is emphasized in the Bill of Rights chapter of the Constitution by providing that everyone has the right to administrative action that is lawful, reasonable and fair (section 33). And the courts are the final instruments to ensure the accountability of the exercise of public power (sections 34 and 165). In this way the courts become an indispensable instrument of democracy as far as the public administration of the country is concerned …’

It is within these terms that South African administrative law must be assessed and it is on this basis that the Promotion of Administrative Justice Act must be evaluated. It, after all, states in its preamble that its objects are to ‘promote an efficient administration and good governance’ and to ‘create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action’.

13.3.1. The Fundamental Right to Just Administrative Action

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36 2000 (12) BCLR 1322 (E), 1328H-1329B. See too Carephone (Pty) Ltd v Marcus NO, supra, 1333I-1334A (paragraph 19) in which Froneman DJP stated that the purpose of the administrative justice section of the Bill of Rights ‘is to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subject to those constraints’.
Prior to 1994 there was little need to define exercises of public powers or performances of public functions as administrative acts or as others forms of action, such as executive actions: if the power or function in question was not an original legislative one or a judicial one, it was reviewable on administrative law grounds. Administrative law was, in this way, made to do the work of controlling more than the exercise of administrative powers or functions. Indeed, it was for this reason that the Constitutional Court, in President of the Republic of South Africa v South African Rugby Football Union,37 stated that, prior to 1994, ‘the major source of constraint upon the exercise of public power lay in administrative law, which was developed to embrace the exercise of public power in fields which, strictly speaking, might not have constituted administration’. It is now important to draw the distinction between administrative acts and other types of acts because s33 of the Constitution – the fundamental right to just administrative action – applies only to administrative action and a range of other mechanism exist to control other forms of public power. Chapter 4 of this thesis shows that one of the results of the need to draw a distinction between administrative action and other exercises of power has been a large number of cases dealing with what is and what is not administrative action.38 It showed too that there was a measure of confusion in the cases that should be regarded as a warning sign for the proper development of administrative law. Two major problems manifested themselves.

The first was that some judges did not appear to have come to terms with the test for determining whether an exercise of power or the performance of a function was or was not an exercise of an administrative power or the performance of an administrative function. In part this may be explained by the fact that the ‘function rather than functionary’ test is, by its nature, rather vague. It requires a relatively well-developed understanding of the state and how it functions and may on this account be difficult to apply for judges who do

37 Supra, 1123E (paragraph148). See too Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra, 1474F-G (paragraph 26).
38 This trend is likely to increase as the courts are called upon to grapple with the perverse definition of an administrative act contained in s1(i) of the Promotion of Administrative Justice Act.
not have much in the way of expertise in the field of public law. Allied to this is the fact that some judges appear to assume that if an exercise of power or the performance of a function is not administrative, it follows that the power or function is freed from the types of controls that are the hallmark of administrative law. This is not the case and it is simply not correct to assume that a right to a hearing or a right to reasons can only arise through s33 of the Constitution. In short, findings that s33 does not apply is not necessarily a way of avoiding difficult issues. Once again, the problem appears to be that many judges are not adequately skilled in the concepts and techniques of public law that are part and parcel of the democratic constitutional order.

The second type of problem raised by the cases on the definition of administrative action is the tendency to squeeze exercises of power by public bodies into the familiar setting of private law, given half a chance — an approach that seeks to ‘privatise’ public law. Apart from being at odds with a Constitution that expressly provides for the horizontal application of the Bill of Rights, this approach also jars with a proper understanding of the ways in which power is exercised in the modern state. There is less excuse for this malady. One only has to read the dissenting judgment of Schreiner JA in Mustapha v Receiver of Revenue, Lichtenburg \(^{39}\) to gain a clear insight into the fact that it does not matter what vehicle is used when a public official exercises a power. Even if it takes a contractual form, the functionary is not as free to exercise powers entrusted to him or her for the public interest as he or she would be if he or she had enjoyed those powers as a private individual, to be exercised for his or her own interests. It is a great pity that the legacy of the majority in Mustapha held sway in the Supreme Court of Appeal in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC. \(^{40}\)

Many of the cases that deal with what an organ of state is mirror this problem. Once again, these cases have tended to approach the issue on a simplistic basis that has the effect of limiting the applicability or influence of the Constitution over the exercises of power or

\(^{39}\) 1958 (3) SA 343 (A).

\(^{40}\) 2001 (3) SA 1013 (SCA).
performance of functions of a range of bodies created by statute and exercising powers and performing functions in the public sphere. What these cases have tended to do is apply an inappropriate test – the control test – borrowed unquestioningly from the Canadian cases that have wrestled with whether bodies are part of the government (for purposes of their being subject to the Charter). Many of the South African cases appear to have ignored the wording of the definition of an organ of state in s239 of the Constitution – which focuses on whether the powers or functions of bodies created by statute are public powers or functions – in favour of a test that has no textual support in the Constitution. Many of the cases on the definition of an organ of state also tend to have slavishly followed the lead of Van Dijkhorst J in Directory Advertising Cost Cutters v Minster for Posts, Telecommunications and Broadcasting\textsuperscript{41} and Korf v Health Professions Council of South Africa.\textsuperscript{42} This may be another sign that many judges are not adequately schooled in adjudicating matters of a public law nature.

It is, however, in the horizontal application of the right to just administrative action that the hegemony of private law shows itself most strongly. There have not been many cases in South Africa on the exercise of administrative power by a private body, apart from those in which administrative law principles were applied through the medium of a contract, typically in disciplinary proceedings within voluntary associations. The indications are strong, however, that those seeking to extend legal control over powerful private bodies through the horizontal application of the right to just administrative action will have a long row to hoe. Once again, this points to a judiciary that is holding the line in spite of the realities of how power is exercised in the modern world and, most importantly, in the face of a Constitution that is concerned not only with the control of governmental power but superior power exercised by private persons too.

The problems that have been outlined above are not problems about the nuts and bolts of the system. They do not indicate that there is anything wrong with s33 of the

\textsuperscript{41} 1996 (3) SA 800 (T).
\textsuperscript{42} 2000 (3) BCLR 309 (T).
Constitution. They are, rather, problems of application that involve how the system constructed by s33 is made to function and whether those called upon to apply s33 are doing so in accordance with the broader scheme of the Constitution. The heart of the issue is whether there is symmetry between the content of the Constitution and how it is being applied – whether, in practice, the Constitution’s promise of administrative justice proves to be a false promise or not. The way in which the problem of asymmetry should be addressed is dealt with below. It must be stated, however, even if rather belatedly, that the problems that have been identified are not universal. Indeed, for every case in which a wrong approach was taken, one can find another case in which a correct approach was taken: but that does not mean that special attention should not be given to ensuring that the new constitutionalised administrative law has a proper foundation. Its development should not be left to chance if the problem can be remedied in other ways. The point also needs to be made that, as the conclusion to chapter 6 on standing shows, many judges have come to terms with what the Constitution requires in other respects.

13.3.2. The Promotion of Administrative Justice Act

Unlike the system of administrative law in operation prior to 27 April 1994, the new administrative law is not predominantly a creature of the common law: as has been shown above, its matrix and lodestar is the Constitution and many of its important contours are now contained in the Promotion of Administrative Justice Act. The common law still plays a role in this system, albeit a complementary, and far from dominant, role: it will fill in the gaps left by the Constitution and the Act and will be used to give meaning to many of the concepts and principles contained in both. It will be apparent to the reader that it is, in the writer’s view, open to doubt whether Parliament, in passing the Act, has in fact complied with the Constitution’s direction to it to give effect to the rights to lawful, reasonable and procedurally fair administrative action. The detailed reasoning upon which this statement is based is to be found in the preceding chapters, especially those that have dealt with the definition of administrative action, access to court and the grounds of review. That detail
will not be repeated here. Instead, the essence of the strengths and weaknesses of the Act will be outlined.

In the first place, the Act places unnecessary and, in all probability, troublesome, qualifications – borrowed from German administrative law – on the type of administrative action that is subject to the Act by requiring that administrative action, in order to qualify as such, must adversely affect rights and must have a ‘direct, external legal effect’. There is, in this respect, no fit between the Act’s definition of administrative action and the common law. While that may not, in itself, be problematic, it is clear that no thought was given to this issue at all and, indeed, it would appear that the legislature was oblivious to it and its possible consequences. Secondly, the definition of administrative action contained in s1(i) of the Act verges on the absurd: it defines certain categories of administrative action – such as decisions taken under the Promotion of Access to Information Act 2 of 2000, for instance – to be something other than administrative action. In other words, the legislature has irrationally and arbitrarily sought to exclude certain types of administrative action from the terms of the Act for no apparent reason and in so doing has given the impression of abusing legislative power: in Alice in Wonderland style, administrative action is exactly what the legislature says it is, no more and no less. That is hardly an approach that should commend itself to those who believe that public policy should be created more thoughtfully. Thirdly, the Act is wanting because it purports to give the Minister of Justice the power to exempt administrators from certain of the requirements of the Act. This section is of doubtful constitutionality.

Fourthly, the Act omits various well known and essential grounds of review such as vagueness and uncertainty and proportionality, as an aspect of review for reasonableness. Although it is possible to argue that these grounds of review must either be read into other

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43 Section 1(i). One would have imagined that the failed importation of the German concept of the negation of the essential content of a right, in s33(1) of the interim Constitution, would have served as an indication that caution should prevail in the importation of other German concepts in a field of law that has developed very differently to South African administrative law.

44 Section 2.
grounds or are contemplated by the catch-all ground of review contained in s6(2)(i), namely that the administrative action concerned is 'otherwise unlawful or unconstitutional', this is far from ideal, creates uncertainty and potential for unnecessary litigation on the scope of the grounds of review and is evidence of the legislature’s lack of understanding of the task required of it, of the subject matter of its deliberations and of the important developments in the field of administrative law in democratic countries that take seriously the same values that animate the South African Constitution.

Fifthly, by tying the right to a hearing to the doctrine of legitimate expectation, the Act may have excluded the fairness doctrine, although, once again, it may be possible to argue that the fairness doctrine is subsumed under the doctrine of legitimate expectation, as Pickering J held in Gemi v Minister of Justice, Transkei or that the fairness doctrine can be applied through the provisions of s6(2)(i). The first approach is very much a second best option because it will have the effect of giving the concept of legitimate expectation a meaning that it has nowhere else where it is applied. The second option is therefore to be preferred, although as with other grounds of review, the legislature ought to have done its work properly so that it would not be necessary to fall back on s6(2)(i) in this instance. A gap has already developed between the duty to act fairly, as developed by the courts, particularly the Supreme Court of Appeal, and the restrictive terms of the Act. It is hardly conceivable that the difference be resolved by going backwards and by South African courts deliberately impoverishing the right to procedural fairness to bring it into line with the Act.

45 1993 (2) SA 276 (Tk). Whether he was, strictly speaking, correct is open to doubt if one has regard to the development of the two doctrines in English law. See in this regard, Forsyth ‘Audi Alteram Partem Since Administrator, Transvaal v Traub’ in Kahn (ed) The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa Cape Town, Juta and Co: 1995, 189, 204-205 and footnote 93. It may be, however, that whatever their pedigrees in England, South African conditions and circumstances require a different approach along the lines taken by Pickering J and supported by Hlophe ‘Legitimate Expectation and Natural Justice: English, Australian and South African Law’ (1987) 104 SALJ 165 and Grogan ‘When is the “Expectation” of a Hearing “Legitimate”?’ (1990) 6 SAJHR 36. Such divergence would not be necessary if proper provision had been made for the operation of the fairness doctrine in s3 of the Act.

46 In Van Huysteen NO v Minister of Environmental Affairs and Tourism 1995 (8) BCLR 1191(C), Farlam J held that s24(b) of the interim Constitution entrenched the fairness doctrine. See too Jenkins v Government of the Republic of South Africa 1996 (8) BCLR 1059 (Tk).
If the fairness doctrine cannot be accommodated, s3 may be unconstitutional for not giving effect to the fundamental right to procedurally fair administrative action.

Sixthly, the Act places two significant hurdles in the way of members of the public who wish to review administrative action. In the first place, s7(1) provides that proceedings for judicial review must be instituted within 180 days of the exhaustion of any internal remedies created by a particular statute, or where no such internal remedies exist, of the date on which the affected person was either informed of the adverse administrative action, became aware of it and of the reasons for it or ‘might reasonably have been expected to have become aware of the action and the reasons’. This period of 180 days may, in terms of s9(1)(b) and s9(2) be extended for a fixed period, either by agreement between the parties or by a court on application by the party concerned and in which the court is satisfied that the interests of justice require such an extension to be granted. Section 7(2) places an obligation on a party wishing to judicially review administrative action to exhaust any internal remedies at his or her disposal before approaching a court. A court may exempt such a person from this duty if he or she brings an application in which he or she is able to establish exceptional circumstances and that the interests of justice require such an exemption. The above sections may well be unconstitutional infringements of the rights to just administrative action and of access to court.47

Despite these difficulties, which are, no doubt, going to arise in litigation under the Act sooner rather than later, there are other aspects of the Act that have advanced the cause of administrative justice in accordance with the values of the Constitution. Perhaps the most important of these are: the extension of the right to procedurally fair administrative

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action to administrative action that affects the public generally.\textsuperscript{48} This provision extends the principle set out in \textit{South African Roads Board v Johannesburg City Council};\textsuperscript{49} the sweeping away of the artificial line of cases that have held that ulterior motive is not a ground of review\textsuperscript{50} through the introduction of the grounds of review that the administrative action was taken ‘for a reason not authorised by the empowering provision’\textsuperscript{51} and ‘for an ulterior purpose or motive’;\textsuperscript{52} the closure of the debate, such as it was, on whether bad faith is a ground of review. Wiechers had argued that bad faith was not a ground of review on its own and that its only relevance was in relation to whether a court would remit a decision that had been set aside or substitute its own decision for that of the administrator.\textsuperscript{53} Baxter had argued that bad faith has always been a ground of review, even if it is not relied on very often by the courts and even though, when bad faith is present, other grounds of review are invariably also present.\textsuperscript{54} Now s6(2)(e)(v) states that administrative action may be set aside if it was taken in bad faith; the demise of the symptomatic unreasonable test of \textit{Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd}\textsuperscript{55} – that unreasonableness on its own is not a ground of review and that in order to set aside administrative action on this basis, the unreasonableness complained

\textsuperscript{48} Section 4. This section, along with s10, has not been brought into operation yet. It is a provision that is pregnant with possibilities for extending the values of openness, accountability and responsiveness in the making of subordinate legislation.


\textsuperscript{50} See for instance \textit{LF Boshoff Investments (Pty) Ltd v Cape Town Municipality} 1969 (2) SA 256 (C); \textit{Tsose v Minister of Justice} 1951 (3) SA 10 (A). But see \textit{University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)} 1988 (3) SA 203 (C) and \textit{Highstead Entertainment (Pty) Ltd t/a ‘the Club’ v Minister of Law and Order} 1993 (2) SACR 625 (C) for cases in which ulterior motive has been held to be a ground of review. See too Hoexter ‘Administrative Justice and Dishonesty’ (1994) 111 SALJ 700. It is unlikely that the former line of cases could have survived in the face of the requirements of s195(1) of the Constitution which places duties on administrators to perform their functions ethically.

\textsuperscript{51} Section 6(2)(e)(i).

\textsuperscript{52} Section 6(2)(e)(ii).

\textsuperscript{53} At 254-257.

\textsuperscript{54} At 516-517.

\textsuperscript{55} 1928 AD 220.
of must be so gross that from it can be inferred the presence of some other ground of review.\textsuperscript{56} Unreasonableness is now recognized as a ground of review on its own.\textsuperscript{57}

13.3.3. Justiciability, Standing and Remedies

It is important to bear in mind that, as has been shown above, the principles of administrative law, because of their constitutionalisation, operate in a very different context to their erstwhile common law equivalents. In concrete terms and apart from the different values that now guide the exercise of public power and influence the intensity of its control, the difference is evident in three particular areas, namely, in relation to the issue of justiciability, the rules of standing and the question of remedies for infringements of the right to just administrative action.

It is evident that the courts in South Africa have embraced a broad approach to justiciability, along the lines followed by the courts in Canada.\textsuperscript{58} South African courts consider every exercise of public power that infringes or threatens fundamental rights to be justiciable\textsuperscript{59} and do not ascribe to the English approach that holds that the exercise of certain types of powers, such as those relating to defence and foreign policy are inherently non-justiciable,\textsuperscript{60} or to the American political questions doctrine which is to much the same effect.\textsuperscript{61} While there have been cases in which the courts have shown a reluctance to engage with the extended standing provisions of s38 of the Constitution\textsuperscript{62} or have applied

\begin{itemize}
\item \textsuperscript{56} At 236-237.
\item \textsuperscript{57} Section 6(2)(h). See too the rational connection provisions of s6(2)(f)(ii).
\item \textsuperscript{58} See Operation Dismantle Inc v The Queen (1985) 18 DLR (4th) 481 (SCC).
\item \textsuperscript{59} See President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC); Mpehle v Government of the Republic of South Africa 1996 (7) BCLR 921 (C); De Lille v Speaker of the National Assembly 1998 (7) BCLR 916 (C).
\item \textsuperscript{60} See Chandler v Director of Public Prosecutions [1964] AC 763 (HL).
\item \textsuperscript{61} See Hogg Constitutional Law of Canada (3ed) (student edition) Scarborough, Ontario, Carswell: 1992, 804 (para 33.5).
\item \textsuperscript{62} See Maluleke v Member of the Executive Council, Health and Welfare, Northern Province 1999 (4) SA 467 (T). For comment on this case see Plasket ‘Standing, Welfare Rights and Administrative Justice’ (2000) 117 SALJ 647.
\end{itemize}
s38 erroneously, the idea of extended standing has increasingly been accepted and applied in accordance with the spirit, purport and objects of the Bill of Rights. Finally, even though the superior courts have always enjoyed inherent jurisdiction, and hence have always had the power to fashion new remedies, the Constitution places an imperative obligation on them to provide appropriate relief that meets the twin requirements of justice and equity when they come across infringements of or threats to fundamental rights. In addition, s172(1) (a) places an obligation on courts to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of the inconsistency. These provisions have freed the courts from the constraints of the sparingly used and conservatively applied version of the inherent jurisdiction of the common law and directed them to use their powers to strike decisively at constitutional infractions and to remedy them appropriately and creatively.

13.4. Recommendations

The recommendations for remedying the problems that have been discussed in this thesis fall into three categories. In the first place, to the extent that the judiciary is not adequately equipped to develop the new constitutionalised administrative law, judicial education may

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63 See *Prior v Battle* 1998 (8) BCLR 1013 (Tk).
64 See *Ferreira v Levin NO* 1996 (1) BCLR 1 (CC); *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 (3) SA 155 (N); *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 (3) SA 1095 (Tk); *McCarthy v Constantia Property Owners' Association* [1999] 4 All SA 1 (C); *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (8) BCLR 844 (E). Without doubt the two most important decisions in this respect are *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR (E) and *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (SCA).
65 See *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC).
66 Section 172(1)(a) gives concrete expression to s2 of the Constitution which proclaims the Constitution to be the supreme law of the land and which states that law or conduct that is inconsistent with it is invalid to the extent of the inconsistency.
67 For two interesting examples of the creative use of this power see the judgments of Leach J in *Mbanga v Member of the Executive Council for Welfare* 2001 (8) BCLR 821 (E) and *Mahambahlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2001 (9) BCLR 899 (E).
provide a solution. Secondly, certain of the problems can be solved easily enough through law reform. Thirdly, to ensure that South African administrative law does not lose touch with the values of the Constitution or, indeed, the demands of the real world, structures should be put in place that can review administrative law on an ongoing basis and serve as an engine for appropriate law reform. These three issues will be discussed in turn.

13.4.1. Judicial Education

The education or training of judges has, not only in South Africa but elsewhere too, been regarded with some cynicism by many judges. In relatively recent times, however, judicial education has become the norm in many systems, as the self-evident truth of the fact that a good legal practitioner does not necessarily make a good judge has increasingly been accepted in the legal profession itself. In addition, as legal practice has become more complex in the wake of technological developments and the ever-increasing complexity of the modern world, it has been recognised that initial and ongoing education for judges is essential if they are to do their jobs effectively and competently.68 In South Africa, in the wake of the legal revolution heralded by the transition to democratic rule in a constitutional state under a supreme constitution, the need for judicial education is even more pressing and obvious. When one considers that the South African judiciary, despite a high level of technical competence in many fields, has always shown a preference for ‘black letter law’ over philosophical or values-based approaches to legal problems and has displayed a high degree of executive-mindedness in the past when adjudicating fundamental rights issues between state and individual, the need for judicial education in the present constitutional system is apparent.69

69 Corder ‘The Judiciary and a Bill of Rights in a Changing South Africa’ in Kahn (ed) The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa Cape Town, Juta and Co: 1995, 132, 134. See further at 147 where Corder makes the point that ‘[t]his country, and its lawyers in particular, cannot continue with a technicist, literalist approach, being slaves to the letter of the law. A radical change of attitude is needed, and the reactions of many parts of the legal profession to the exercise of constitutional negotiations stresses the urgency of the
The Constitution is not just another statute that can be learnt about on the job and incrementally – like a new statute to regulate the law of negotiable instruments – because it is at the heart of the legal system and is thus potentially relevant to every issue that arises in a court. It requires a different philosophical approach to the law, compared to the overwhelmingly positivist approach in the era of parliamentary sovereignty. It places its values at centre stage in the interpretation of its provisions, the interpretation of statutes and the development of the common law and customary law: it requires judges to make value judgments in assessing the constitutionality of legislation, executive action or administrative action and this process involves ‘jurisprudential, political, sociological and economic insights into the nature of the democratic society, the proper assessment of the objectives of equality and freedom, and the permissible parameters of and limitation of those rights’, a markedly different function to the judicial function prior to 1994.70

All of these observations on the need for formal judicial education on the Constitution, and constitutional litigation, apply equally in respect of that important and specialised aspect of constitutional law, administrative law. This is all the more important because of the immense power that the administration wields, the resultant ability of administrators to affect the lives of large numbers of people through their decisions and the importance of the courts as the institutional and constitutionally-mandated bulwark between the individual and the administrator. In the new order, an ‘administrative law-by-numbers’ approach, divorced from the touchstone of the values of the Constitution and the type of society that it envisages, simply will not suffice. Given the centrality of the Constitution it is far from ideal to simply rely on the ad hoc, incremental, development of constitutional jurisprudence

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need for judicial training and education, and for an infusion of new thinking into the courts as a whole, in particular the highest court’.  
as the Constitutional Court decides issues over the years.71 After all, when judges take their oath of office, they swear or affirm that they will ‘uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law’.72 They do not swear or affirm that they will progressively realise fundamental rights as they become more familiar with the Constitution on a case by case basis!

The judicial education that is in place is aimed, in the first instance, at newly appointed judges and, to an extent, at some of those practitioners who have been identified as potential judges in the future. This training is general in nature and will often concentrate on the practicalities of running a motion court or managing a criminal trial. This is undoubtedly important but the time devoted to the Constitution, its interpretation and its application are probably insufficient, given that: none of the judges appointed before 1994 will have studied constitutional law recently (or, indeed, at a time when this subject was taken particularly seriously by law faculties around the country) or be familiar with the type of system now in place, unless they have taken the time and effort to research these issues for themselves; all of the judges appointed since 1994 will also have studied constitutional law at a time when the subject was not seen as particularly important in the curricula of the law faculties; they probably either studied the 1961 republican Constitution or the 1983 tricameral Constitution; most practitioners and judges, it is probably true to say, have little detailed knowledge of the Constitution and the experts in constitutional law and administrative law, on the bench and at the bar and side-bar, are relatively few in number.73

71 A good case for the need for judicial education is made by the confusion that was evident in many decisions on s24(d) of the interim Constitution. Hoexter makes the point that they range from ‘an insistence on symptomatic unreasonableness to the view that s24(d) does away with the distinction between review and appeal, and the result in the case often fails to match the approach to reasonableness ostensibly adopted in it’ (‘Review for Reasonableness – An Outline’ unpublished paper presented at the Law Teachers Conference, January 2002, 1). The confusion on what administrative action is and what an organ of state is are further examples of the type of confusion that can be cured very easily by judicial education.
72 Constitution, Schedule 2, item 6.
73 See Corder ‘Reviewing Review: Much Achieved, Much More to Do’ in Corder and Van Der Vijver Realising Administrative Justice Cape Town, Siber Ink: 2002, 1, 12 who says of the entrenchment of the right to administrative justice in the interim Constitution: ‘It is safe to say that most judges were
As a result, both new judges and those on the bench already will have little formal and structured education in the new order’s founding document and still less in respect of the Constitution’s impact on administrative law. To the extent that judicial education is provided for judges in general on the Constitution and administrative law, it would appear to be patchy, far from comprehensive and non-continuous. It is suggested that, if the promise of just administrative action made by s33 of the Constitution is to be fully realised, comprehensive and on-going judicial education must equip judges for the task of adjudicating administrative law issues in accordance with the values of the Constitution.

13.4.2. Law Reform

The point has been made above that, structurally, fault cannot be found with s33 of the Constitution. It contains the tripod upon which judicial review rests – the rights to lawful, reasonable and procedurally fair administrative action – and goes further to impose a duty on administrators to give reasons for their actions. The same cannot be said of the Promotion of Administrative Justice Act. It is open to grave doubt whether the legislature can be said to have fulfilled its constitutional task of giving effect to the right to just administrative action in the light of the glaring deficiencies and irrational policy choices contained in the Act.

The answer to this problem lies in law reform, in the first instance, and litigation, in the second. It is easy enough for the legislature to fix the mess it has made. It should amend the definition of administrative action to read as follows:

‘administrative action means any act performed, decision taken or rule or standard made, or which should have been performed, taken or made by –
(a) an organ of state when exercising a power in terms of the Constitution or a provincial constitution...’

caught flat-footed: administrative law has never been the strong suit of South African legal education, practitioners skilled in the field are few in numbers, and few judges had bothered to acquaint themselves with the reality of a radically altered judicial power. Needless to say, and despite urgent pleas to the contrary during the constitutional negotiations in 1993, the Department of Justice has done nothing to promote judicial education, and it is likely that many judicial officers would have greeted such an initiative as an alien affront to their dignity.’
or 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,
but does not include –

(i) the executive powers and functions of the national executive or of a provincial executive;
(ii) the legislative powers and functions of Parliament, provincial legislatures and municipal
councils; and
(iii) the judicial functions of a judicial officer.

Secondly, s1(iv)(b)(ii) – the vesting of jurisdiction in Magistrates’ Courts to judicially review
administrative actions – should be repealed for the reasons furnished in chapter 12. This
is simply an inappropriate jurisdiction to vest in magistrates at this stage of South Africa’s
constitutional development. Thirdly, s2 of the Act should be repealed in its entirety. It
serves no reasonable purpose and is probably unconstitutional. It may be wise to replace
it with an explicit statement of the obligations that the Act imposes on administrators, as
was proposed by the South African Law Commission in its bill.

It is also necessary to amend sections of the Act that deal with judicial review. In the first
place, the exclusion, in s3(1) of the Act, of interests as a threshold for the operation of the
rules of procedural fairness must be addressed. At the very least, this is necessary to cater
for application-type cases. A failure to rectify this rather startling omission will either lead
to an ad hoc distortion of the doctrine of legitimate expectation, as has occurred already
in some of the cases, unfairness being sanctioned by the courts, as has also happened in
some cases where judges have regarded the doctrine of legitimate expectation as the
outer boundary of judicial protection of procedural fairness, or a finding that the section is
unconstitutional for want of it giving proper effect to the right to just administrative action.
The legislative action needed to remedy this defect is obvious and simple: all that is
needed is the insertion of the word 'interests' between the words 'rights' and 'or legitimate
expectations' where they appear in s3(1). Secondly, the inclusion of the qualifications that,
in order to attract the right to procedural fairness, administrative action must have a
material and adverse effect on rights or legitimate expectations ought to be reconsidered.
It serves little purpose other than to confuse, complicate and send an anti-intervention
message to the courts. It too is easy enough to remedy: s3(1) should therefore be amended to read; ‘Administrative action that affects the rights, interests or legitimate expectations of any person must be procedurally fair.’ This would make the right to be heard in terms of the Act at least as wide as the common law equivalent.

Section 6(2) also requires attention, most obviously in respect of review for unreasonableness. In the first place, the inexplicable omission of vagueness or uncertainty as grounds of review should be inserted into the section. In the second place, the omission of disproportionality as a specific aspect of unreasonableness should be rectified. Once again amendments to this effect are simple. All that is needed for the first problem to be solved is the enactment of the provision in the South African Law Commission draft that was omitted. It read that a court could review administrative action if ‘the action itself ... is vague or uncertain’.74 The second problem can be solved with the following wording to replace the present s6(2)(h), as suggested by Hoexter:75

‘(h) the effect of the action is unreasonable, including any –

(i) disproportionality between the adverse and beneficial consequences of the action; and

(ii) less restrictive means to achieve the purpose for which the action was taken.’

The need for amending s7 has been discussed in some detail in chapter 7 above. Once again, the amendments that are required are far from complex. Section 7(1) can be amended to provide that proceedings for judicial review ‘in terms of section 6(1) must be instituted without unreasonable delay’ or the section could be repealed in its entirety (with consequential amendments to s9). The easiest way to deal with the defects in s7(2) is to repeal this section in its entirety too. The effect would be that the common law would determine in its flexible way whether judicial review proceedings have been instituted within a reasonable time and whether, in particular circumstances, there are good reasons why a litigant ought to have exhausted internal remedies before approaching a court for relief. These amendments would make the Act fit more snugly with the Constitution and its rights

74 Section 7(1)(f)(ii).
to just administrative action and of access to court. If Parliament does not see fit to make
the amendments suggested above, it is a matter of time before these issues will present
themselves in the courts as constitutional challenges.

13.4.3. Law Reform Oversight

One of the major features of the South African Law Commission bill was its emphasis on
ensuring ongoing law reform and a continuous review of administrative law. It sought to
achieve these aims through the proposed creation of a body that it called the
Administrative Review Council.\textsuperscript{76} Its functions were to include: enquiring into and reporting
to the Minister on internal complaints procedures, internal appeals and the judicial review
of administrative action, with a view to improvements that could be made in these areas;\textsuperscript{77}
enquiring into what the bill termed ‘the law, rules and standards for administrative action
by organs of state’ with a view to formulating a binding code of good administrative practice
and the making of recommendations on improvements to the system to ensure that
‘administrative action conforms to the rights to administrative justice as contemplated in
section 33 of the Constitution and the other provisions of the Bill of Rights and the basic
values and principles governing public administration in section 195(1) of the
Constitution’;\textsuperscript{78} enquiring into whether it is appropriate to establish tribunals, in addition to
courts, to review administrative action and specialised administrative tribunals to hear
appeals against administrative action, and to make recommendations on these issues;\textsuperscript{79}
enquiring into whether it would be appropriate to require administrators to review the
continuation of their standards periodically and to provide for the automatic lapsing of rules
and standards, and to make recommendations on these issues;\textsuperscript{80} and to ‘initiate, conduct
and co-ordinate programs for educating the public at large and the members and
employees of administrators regarding the content of this Act and the provisions of the

\textsuperscript{76} See chapter 6 of the bill.
\textsuperscript{77} Section 15(a).
\textsuperscript{78} Section 159b).
\textsuperscript{79} Section 15(c).
\textsuperscript{80} Section 15(d).
Constitution relevant to administrative action’.

The Administrative Review Council was not created. It would appear that the government’s concern was that it would be costly to create such a body and that funds were not available for this purpose. Indeed, so important was this body, in the view of the drafters of the bill, that they said that they considered it to be ‘one of the keys to harmonising the constitutional requirements of administrative justice and efficient administration and, hence, to the success of the Bill. If this capacity is not created, the Bill cannot work’. The alternative proposal, that such a body be established as part of the South African Law Commission, does not appear to have been kept alive after being suggested by the drafters of the bill. Instead, the Act contains a pale version of the law reform vision of the drafters of the South African Law Commission bill. Section 10(1) of the Act places a duty on the Minister to make regulations relating to procedures for certain administrators to comply with the requirements of the right to procedurally fair administrative action, the conduct of public enquiries and notice and comment processes, the giving of reasons and, importantly, the creation of a code of good administrative conduct ‘in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of this Act’. Section 10(2) grants the Minister a discretion to make regulations that create and empower an advisory council to monitor the Act’s application and to report to the Minister. During the course of 2000, the Department of Justice published draft regulations on the establishment of an Administrative Justice Advisory Council. They made provision for this body which, in its composition looked similar to the Administrative Review Council, to advise the Minister on most of the issues set out in s15 of the South African Law Commission draft of the bill. It would appear that no further progress has been made since then and, indeed, s10 of the Act has not been brought into force, because the regulations that must be made, in terms of s10(1), have not been made yet.

81 See footnote 35 of the South African Law Commission draft bill. It estimated that the Administrative Review Council would have cost about R980 000 per annum to establish and operate.
One may have some sympathy for the government because of the many competing claims for resources that it has to contend with. It must be stated, however, that meaningful progress in achieving a system of administrative justice that is both true to the values of responsiveness, openness and accountability, on the one hand, and is efficient and professional, on the other, will require a proper commitment to ongoing assessment and law reform oversight. The South African Law Commission was probably correct when it said that without such mechanisms the Act would not be able to function properly. The government has created a substantial number of institutions since 1994, ranging from those required by the Constitution – like the chapter 9 institutions – to a Sports Commission and a Youth Commission. Some have been successes but others have, by all accounts, consumed substantial resources for little return. It is suggested that administrative law reform and evaluation is of such importance that, even if the resources available are inadequate at present, the time is right for the government to consider the dissolution of those institutions that do not function properly so that resources can be channeled into more important institutions like an Administrative Review Council or something similar. If such a body is to have the credibility that it needs to do its work, it should not be under the control of the Minister of Justice, as the proposed Administrative Justice Advisory Council would be.

The probabilities are slim that the government will re-assess its priorities and find resources to create and fund an Administrative Review Council. That being so, the oversight role of civil society will become ever more important in the field of administrative justice, as the Act is implemented and interpreted. The importance of the Breakwater initiative has been discussed in chapter 1 and needs no repetition here. The point needs to be made, however, that initiatives like that must continue and must be encouraged. It would appear that there is every possibility that the Breakwater initiative may spawn a body that can play this important role: at the Law Teachers Conference in Grahamstown in January 2002, a proposal to create a non-governmental body, probably to be known as the South African Institute of Administrative Justice was discussed. This body’s main aims would be to provide a forum for the sharing of ideas and expertise, to enhance scholarship
and understanding of administrative justice, and to pursue the reform initiative in this area."  

13.5. The Final Word

The importance of administrative law as a means of controlling how the substantial power of the public administration is exercised is central to this thesis. Its importance to the development of a democracy founded on the values articulated in s1 of the Constitution is also a universal thread that runs through these pages. It has been shown that a great deal has been done to create the legal mechanisms necessary to ensure that South African administrative law functions in accordance with the culture of justification that the Constitution rests upon. It may be tempting to assume that the reconstruction of South African administrative law has been achieved by this but such an assumption would be a dangerous one to make and would tend to ignore the fact that, while the constitutional foundation has been laid, a great deal still needs to be done. This is a point that the Chief Justice has made in the broader context of the achievement of the type of society envisaged by the Constitution. He said:  

‘The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so.’

The reconstruction of administrative law in the image of the Constitution is also not necessarily a certainty: judicial review in a system in which the constitution is supreme may only be as effective as the judges enable it to be, or the executive permits it to be, or the legislature wants it to be. After the suffering that South Africans have endured over the years, particularly at the hands of a heartless and unaccountable public administration, a heavy responsibility rests on legislators, members of the executive branch of government,

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the judiciary and indeed, on all lawyers too, to ensure that the new system of administrative law is one that properly serves the noble purposes of the Constitution and contributes meaningfully to South Africa’s democracy.
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