

The impact of the Constitution on judicial review of administrative action in South Africa: a critical appraisal

BY

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ACT NO	YEAR	SHORT TITLE
<u>Australia</u>		
1) -	1975	Administrative Appeals Tribunal Act
2) -	1977	Administrative Decisions Judicial Review Act
<u>South Africa</u>		
3) -	1910	The Union Constitution Act
4) 32	1961	Republic of South African Constitution Act
5) 67	1962	Extradition Act
6) -	1946	American Administrative Procedure Act
7) 74	1982	Internal Security Act
8) 45	1979	Electoral Act
9) 110	1983	Republic of South African Constitution
10) 96	1991	Aliens Control Act
11) 200	1993	South African Interim Constitution Act
12) 66	1995	The Labour Relations Act
13) 68	1995	The South African Police Services Act
14) 108	1996	Republic of South Africa Constitution Act
15) 111	1998	The Correctional Services Act
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- 91) Olmstead etal v United States 277 US 438,485 (1928).
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- 93) Strickland v Inlow 485 F . 2d. 186 . (8 th . Cir 1973).
- 94) The State of Virginia v The State of Tennessee 148, US.503 (1892).

ZIMBABWE

- 95) Smith v Mutasa 1990 (3) SA 756 (ZSC).

TABLE OF ABBREVIATIONS

ACTHRA	Australian Capital Territory Human Rights Act
AD	Appellate Division
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COTP	Choice on Termination Of Pregnancy Amendment Bill
FCC	Federal Constitutional Court
ISA	Intelligence Service Act
JP	Judge President
ICCPR	International Covenant on Civil and Political Rights
LRA	Labour Relations Act
LC	Labour Court

XIII

NCOP	National Council Of Provinces
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PSA	Public Service Act
SCA	Supreme Court of Appeal
SSSBC	Safety and Security Sectorial Bargaining Council
SAPS	South African Police Services
SAPU	South African Police Union
THP	Traditional Health Practitioners Bill
NIA	National Intelligence Agency
POPCRU	The Police and Prisons Civil Rights Union

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M.M. Mongake

22 FEBRUARY 2008

DECLARATION OF MMAKGOTSO MOSINKI MONGAKE

I declare that the dissertation for the degree of Master of Laws at the University of North-West hereby submitted, has not been previously submitted by me for a degree at this University or at any other University, that it is mine in design and execution and that all sources herein used has been duly acknowledged by means of complete references.

DATED THIS THE 22 FEBRUARY 2008

.....

SIGNATURE

MMAKGOTSO MOSINKI MONGAKE

DECLARATION BY SUPERVISOR

I, Professor Melvin L.M Mbao, hereby recommend that this dissertation by Mr M.M Mongake: entitled: "The impact of the Constitution on judicial review of administrative action in South Africa: a critical appraisal", be accepted for examination.

Prof. _____

Melvin . L.M . Mbao

DEDICATION

This dissertation is dedicated to my family, the Mongake's for their endless and unwavering support and encouragement when I was on the verge of giving up. Thank you very much! And may God bless you all.

XVIII

ABSTRACT

This dissertation is concerned with the impact of the Constitution on judicial review of administrative action in South Africa,, and the lessons to be learned from other matured legal systems notably: England , Australia , USA, Germany and Namibia . Prior to 1993 , the era of parliamentary supremacy in South Africa , there existed a lacuna in administrative law review as the latter was not clearly defined and codified and the grounds of review were highly limited .

Although there were principles to guide the courts in the exercise of their inherent jurisdiction to control administrative bodies, the courts role was inhibited by the doctrine of parliamentary sovereignty and the ouster clauses. The Constitution has radically changed the way things are to be done. It has introduced a new paradigm , a culture of justification, a culture of legality, a culture of procedural fairness and a culture of consultation in decision making-process.

The grounds of judicial review have been codified and expanded under the Promotion of Administrative Justice Act (PAJA) The courts in South Africa and Namibia and Germany are independent and ready to cabin or remit any excess of power. Comparatively speaking the same cannot be said of the United Kingdom, United States of America and Australia, where the right to just administrative action has not been constitutionalized.

However, all government officials in South Africa should be trained with regard to the imperatives of the Constitution and PAJA.

CHAPTER ONE : INTRODUCTION

1.0. Introduction

This chapter is merely introductory, it serves as a prelude to other chapters. The central question in this dissertation is to determine what has been the impact of the new Constitution Act on judicial review of administrative action in South Africa. Given that larger objective, this first chapter outlines the research design adopted for the prosecution of the entire investigation .To this end, therefore, the rest of the chapter is divided in to seven sections: (1.1) background to the study, (1.2), statement of the problem, (1.3.) aims and objectives of the study, (1.4.) rationale and justification of the Study, (1.5.) data collection and methodology, (1.6.). Literature Review and (1.7.) Scope and Limitations of the Study.

1.1. Background to the study:

The ugly picture of the legacy of apartheid was graphically portrayed in these lucid and eloquent words of the late Mohammed, C.J; in the case of Makwenyane and Another,¹ where the Chief Justice said the following:

The South African Constitution represents a decisive break from and a ringing rejection of that part of the past which was disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment

¹ 1995 (6) BCLR 665 (CC)

to a democratic, universalistic, caring, and aspirationally, egalitarian ethos articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seek to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expressed in its preamble the need for a new order in which there is equality between people of all races. The past was redolent with statutes which assaulted the dignity of a person on the ground of race and colour alone, section 10 of the Constitution protects that dignity. The past permitted, accepted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour, section 8 and the preamble sought to abolish that.

The past permitted detention without trial, repressed freedoms...limited the right to vote to a minority , section 21 extended that right.²

The Constitutional Court in the President of the Republic of South Africa v the South African Rugby football Union³ had said the following about the type of public administration envisaged by the democratic Constitution and the reason for subjecting it, to a range of constitutional values, principles and duties:

Public administration is part of the executive arm of the government, it 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

² Ibid (at 757 para 262- J).

³ 1999 (10) BCLR 1059 (CC) .

ensuring that the Administration observes the 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 a labyrinthine of administrative regulations, which among 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.⁴

The Constitution makes a clarion call in section 195(1) that public administration must be governed by democratic values and principles enshrined in the Constitution, including the following:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be prompted.
- (c) Public administration must be development-orientated.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

⁴ Ibid (at 133).

- (h) Good human-resource management and career-development practices, to maximize human potential, must be cultivated.

Public administration must be broadly representative of the South African people, with employment and personal management practices based on ability, objective fairness, and the need to redress the imbalances of the past to achieve broad representation.⁵

Clearly these far-reaching principles and values that must underlie any public administration in a democratic country which prides itself of the rule of law were absent in the old South Africa of the 1961 and 1983 Constitutions which were all, based on the doctrine of parliamentary sovereignty which gave Parliament unlimited powers.

In his article Chaskalson, C. J.,⁶ as he then was, concerned about the question of abuse of power, much as the philosophers, Plato, and Aristotle were concerned, referred to an excerpt from the book of the late, Lord Denning MR, where the late Master of the Rolls said the following concerning power:

In the present century the government has concerned itself with every aspect of life. We have a welfare state and a planned state. The government departments have been given much power in many directions. They set up tribunals and inquiries. They exercise unfettered discretion. They regulate housing, planning, and social security and a host of other activities. The philosophy of the day is socialism or collectivism. But whatever

⁵ For further details on this see section 195 (1) of the Constitution Act 108 of 1996.

⁶ See Chaskalson, C. J.; In his "Legal Control of the Administrative Process" 1985 SALJ 102 (p 419).

philosophy predominate, there is always a danger to the ordinary man. That danger lies in the fact that power is capable of misuse or abuse. The great challenge to the Court therefore has been in the face of increasing power, how is the law going to cope with the misuse or abuse of it...⁷

Indeed it is not an overstatement to say that “the power of the State to interfere in the affairs of the individuals must be circumscribed and be policed by judicial review, judicial review is necessary to prevent elective dictatorship and to protect the rights of citizens from encroachment by an overweening executive or parliament and to act as a check on legislative or executive arrogance”⁸

The government ought no longer to be opaque and secret, but ought to be transparent, open, responsive and accountable to the people in accordance with the ethos, basic principles and values governing public administration.⁹ Public authorities can no longer validate their acts or assert jurisdiction by asserting public need or necessity or that the order is essential to peace and order in a blanket fashion without qualification.¹⁰

The failure to provide the unsuspecting public with information runs counter not only to the PAJA locally, but also article 9 of the Banjul Charter regionally¹¹, and internationally

⁷ See Lord Denning; (1979) The Discipline of Law, cited with approval by Chaskalson, Ibid note 54.

⁸ See Naldi, G. J; (1995) Constitutional Rights in Namibia : A Comparative Analysis with International Human Rights Juta and Company (p 22).

⁹ See section 195 (1) Ibid.

¹⁰ As in the past in terms of sections 28 and 29 of the sweeping Emergency Regulations, wherein people were detained without trial, denied access to legal representation and visitation by doctors and family members.

¹¹ The Charter was approved by the then OAU in 1981 and became operative in 1986.

article 19 of the International Covenant on Civil and Political Rights¹² and further article 19 of the Universal Declaration of Human Rights.¹³

Undoubtedly freedom of Information is important to the administrative process and in the world of secrecy and opaque government, serious wrongs can occur which may never come to light. Freedom of information legislation is a means of eliminating dark corners of government and a contribution to the new culture of transparency and openness in public administration.¹⁴ Access to information represents one of the most effective weapons available to any citizen of a state in his or her dealings with administrators representing the state¹⁵.

Our fore-fathers have always been concerned about power, that power is a heady thing, that power corrupts and that absolute power corrupts absolutely and that great men are almost always bad men.¹⁶ Our constitutional drafters were determined in their vision to establish a new order and that order was realized with the adoption of the Interim Constitution Act 200 of 1993¹⁷ and concretized finally through the adoption of the final Constitution, Act 108 of 1996.¹⁸

¹² Adopted on the 16 of December 1966 and came into force on the 23rd of March 1976.

¹³ Adopted on the 10th of December 1948.

¹⁴ See Justice Michael Kirby "Freedom of Information: The seven deadly sins" British section of the International Commission of Jurists: Fortieth Anniversary Lecture Series London .1997-12-17, cited with approval in Beukes. M: 2003. "Access to Information: the bedrock of just administrative action" SAPR/PL. VOL 18 NO 1-3 (at 17).

¹⁵ Ibid (at 17).

¹⁶ See Lord Acton, in his letter to Bishop Mandell Creighton (1887), in WWW.prhrises.org.UK.

¹⁷ The relevant provision is section 4(1) which provided that the Constitution shall be the supreme law of the land and any law inconsistent with its provisions shall to the extent of its inconsistency be of no force or effect .

¹⁸ The relevant provision is section 2 which provides that the Constitution is the supreme law of the Republic law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

1.2. Statement of the Problem:

Prior to 1993 in South Africa there existed a lacuna in judicial review of administrative action as the latter was not clearly defined and the grounds of judicial review were evolving rather slowly and not codified, with the result that there was few, if any articulated principles to guide the courts in relation to control of administrative actions.¹⁹ The new administrative law, which operates under the realm of the Constitution and the PAJA,²⁰ have codified and expanded the grounds of review as well as those relating to the locus standi in judicio of individuals and groups to litigate. This study is essentially focused on the extent to which the Constitution has impacted on the exercise of state power and discharge of public functions.

1.3. Aims and Objectives of the Study:

- (i) This study is set out to investigate, evaluate, and to critique the impact of the Constitution on judicial review of administrative action
- (ii) To explore the evolution of judicial review of administrative action.
- (iii) To compare the right to just administrative in South Africa with other foreign, mature legal systems.
- (iv) To reveal the gaps, flaws, deficiencies in judicial review prior to the adoption of the Constitution.

¹⁹ See Hoexter, C. (2000). "The future of Judicial Review in South African Administrative Law " SALJ. Vol 117 Part iii (at 384).

²⁰ Act 3 of 2000.

- (v) To suggest ways of harmonizing the common law with the Constitutional values of human dignity, equality, and freedom.

1.4. The Rationale and Justification of the Study

This dissertation is intended to benefit Law lecturers, Law students, parliamentarians and other policy makers involved in the complex decision-making processes. The target is their intellect and their mind set, to inculcate in them a culture of accountability, openness, transparency, and responsive decision-making in accordance with the tenets of public administration as envisaged in section 195 of the Constitution Act.²¹

1.5. Data Collection and Research Methodology:

A comparative method has been adopted because it is believed that it is useful in many branches of the law but in particular in the area of Administrative Law, because the nature of the leading problems and in particular the question of how government can be controlled in the interest of both the state and the citizens are common to all developed and most probably the developing nations of the world.²² Federal systems of government²³ have, in particular been, selected because they offer a fertile ground for the rise of successful constitutional judicial review.²⁴

²¹ See n. no 4 Ibid .

²² See Brown L.N. and Garner. J.F. French Administrative Law 3rd ed. Butterworths London. 1983. (p 1)

²³ Notably United states of America, Germany and Australia .

²⁴ See Shapiro .M. “ Judicial Review in Developed Democracies” in Gloppen .S; et al . 2004 .
Democratization and the Judiciary : The Accountability Function of the Courts in New Democracies.
London .Frank Cass . (p 9).

The library research or desk bound research in the nature of case law, journal articles, text books, legislation, website materials and newspapers have been the most accessible means of acquiring information. Data was also collected by attending academic seminars and workshops and conferences.

1.6. Literature Review:

A lot has been written on Administrative Law. Previous related comparative research by some other prominent writers, among them, the following: Mireku,²⁵ Brown and Garner.²⁶ Naldi,²⁷ Van Wyk et al,²⁸ and Peaff, Schneider,²⁹ and Claes³⁰ provided insightful information on the comparative approach relevant to those countries from which lessons may be learned.

The works of Currie. and Klaaren³¹, Plasket³² and the late, Mureinik ,³³ respectively provided vital information with regard to the implementation of both the AIA and the PAJA .

²⁵ Mireku, O. (2000) Constitutional Review in Federalized Systems of Government: A comparison of Germany and South Africa. Germany. Baden-Baden (p.9).

²⁶ Ibid note 18.

²⁷ Naldi,G.J. (1995) Constitutional rights in Namibia: A comparative Analysis with International Human Rights Juta and Company (p 22).

²⁸ Van Wyk, D, et al.(1994) Rights and Constitutionalism: The New South African Legal Order 1st ed Juta and Company Kenwyn..

²⁹ Peaff and Scheneider (2001) “The Promotion Of Administrative Justice Act From A German Perspective” SAJHR Vol 17 (p. 61).

³⁰ In her “Judicial Review in the European Communities : The Division of Labour between the Courts of Justice and National courts” in Baker .R. etal. (1995) Judicial Control: Comparative Essays on Judicial Review .Maastricht. Maklu, Nomos, Juridic and Samhalle . (p 109).

³¹ The Promotion Of Access To Information Act: A Commentary South Africa, Siber Ink. 2002 . (p 17).

³² “ The Exhaustion of Internal Remedies and section 7 (2) of the Promotion of Administration of Justice Act 3 of 2000” SALJ Vol (119) No 1-4 (P 51)

³³ “Reconsidering review: participation and accountability” 1993. Acta Juridica (p 35)

The celebrated works of Baxter³⁴, De Smith and Jowell³⁵, Wade and Forsyth³⁶, Weichers³⁷ to name but a few, were all unreservedly particularly helpful in placing the subject matter of judicial review of administrative action in the common law perspective.

The works of Folks,³⁸ provided valuable information on the origin of public power the nature of power and how we can ensure, that the powers are used for the purpose for which they are given and that they are used energetically and efficiently.

1.7. The Scope and Limitations of the Study

This dissertation is concerned with the impact of the Constitution on judicial review of administrative action in South Africa , and the lessons to be learned through a brief comparative study with the mature legal systems of the world notably England , Australia, United States of America , Germany and Namibia .

In order to achieve that larger objective, this study has been divided into six, interrelated chapters. Each chapter deals with a specific aspect and have been integrated to produce an internally coherent and lucid flow of arguments.

³⁴ Baxter, L. (1984) Administrative Law. Johannesburg: Juta and Co.

³⁵ De Smith, S.A., Jowell, J. (1995) Judicial review of Administrative Action 5th edition London; Sweet and Maxwell.

³⁶ Wade, H.W.R. and Forsyth, C. F. (2000) Administrative Law 8th edition Oxford: University Press.

³⁷ Wiechjers, M. (1985), Administrative Law 1st ed. Durban; Butterworths..

³⁸ Folks, D. (1982) Administrative Law 5th ed Butterworths London, (p 2).

The first part deals with the introductory part of this work and is aimed at introducing the reader to the problem under investigation .

The second chapter deals with the historical background and captures the common law position in South Africa in the apartheid era. It reflects on the deficiencies of the common law inherent powers of the courts to review administrative action and grapples with some of the challenges of the judiciary of the time under the doctrine of parliamentary sovereignty. Most importantly the judicial mindset of the time is also called into question.

The third chapter is at the heart of this dissertation and discusses the judicial control of administrative action under both the Interim and the Final the constitutions. Most importantly the effect of the adoption of the concept of constitutionalism and the entrenchment of the right to just administrative action in South Africa, are elucidated.

The fourth chapter continues the theme of chapter three and deals with and articulates the combined effect of the Constitution and the organic laws namely: the PAJA and the PAIA, on judicial review of administrative action and further amplifies the sources of such extensive and codified grounds of review of administrative action and the definition of administrative action.

The fifth chapter deals with selected comparative studies of English, Australian, American, Namibian and German administrative laws from which lessons may be learned.

Chapter six deals with our summary, conclusions and recommendations.

The most obvious limitation is that this work was limited to desk bound materials and internet, no interviews were conducted because of financial and time constraints. However it is hoped that it will make a modest contribution to the existing store of knowledge.

CHAPTER TWO: JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

UNDER THE COMMON LAW

2.0. Introduction

This chapter deals with the notion of judicial control of administrative action under the common law under the following subheadings: the meaning of judicial review, the basis and rationale of judicial review and the grounds for judicial review and the impediments of the common law.

2.1. The meaning of judicial review: Prior to the coming into force of the Interim Constitution Act 200 of 1993, the Supreme Court used its inherent powers to review administrative actions.³⁹ The supervisory jurisdiction of the court was a creature of the common law; it always stood unless it was expressly taken away by statute.⁴⁰

It has been submitted that “the court’s power to exercise judicial review was highly limited indeed, that by its ordinary nature judicial review was supervisory rather than appellate, that its manifest purpose was not to challenge the merits of administrative decisions but the form, procedure and appearance of the decision rather than the substance of the decision itself.”⁴¹

³⁹ See Hoexter, C. et al; (2002) The New Constitutional & Administrative Law Vol 2.. (at 4-5).

⁴⁰ Emery, C.T and Smyth.B. (1986) Judicial Review : Legal Limits of Official Power .London Sweet and Maxwell. (p 56-57)

⁴¹ See Clayton, R. and Tomlison .H. (1997) Judicial Review Procedure . John Willey & Sons New York. (p 31).

The inherent power of the Supreme Court to review proceedings of the lower courts, had its origin from the creation of the Supreme Court in the Cape in accordance with the historic Charter of Justice by the British Colonial authorities at the beginning of the 19th century.⁴² It was during that period that the doctrine of ultra vires was adopted in South African Law, the logic behind the doctrine was to provide an inherent rationale for judicial review, that is to say the power to review administrative action without statutory authority.

The self-justification of the ultra vires doctrine was that its application consisted of nothing other than the application of the law itself, and the law of Parliament to boot⁴³. The elementary principle of Administrative Law is that administrative authorities are established by statutes and invariably derive their powers from the statutes.⁴⁴

Administrative authorities were required to act within those powers conferred on them by statutes. An ultra vires action had no legal validity and could theoretically be ignored in so far as it placed a burden on the person affected by it. Statements are often interchangeably made by the courts or tribunals that administrative authorities exceeded jurisdiction or lacked jurisdiction, what they actually meant was that the administrative authority acted ultra vires.⁴⁵

⁴² See Taits.J. (1985) The Inherent Jurisdiction of the Supreme Court . (p 1-9).

⁴³ See Baxter, L. (1984) Administrative Law . 1st ed . Cape town . Juta and Company. (p 303).

⁴⁴ Except in exceptional circumstances as in the case of England , where the power to act were sometimes derived from the Royal Prerogatives.

⁴⁵ See Bailey, S.H. et al; (1977) Cases and Materials in Administrative Law .London . Sweet and Maxwell. (p 154).

The Cape Supreme Court asserted its inherent jurisdiction first in the case of Central Road Board v Mentjies,⁴⁶ a case that concerned the levying of rates for the purpose of road building. However, because no money was ever spent in the district of Graaff-Reniet and the defendant had persistently refused to pay rates, the Court, per Bell. J, decided that the Board was not able to levy rates in one area for expenditure in another. The learned Judge rejected the argument that the defendant's only remedy was to petition the Legislature. It has since been argued⁴⁷ that the decision of Bell .J., was based on those principles of sound reason and substantial justice which every court must follow in doing justice to the litigants, for he also referred to the liberitarian principles of the English common law and commented that "...it is as old as the Magna Carta that the Crown shall not take or imprison any man, nor pass upon, nor condemn him, unless by the law of the land..."

2.2. The grounds of review under the common law: The classical case on the grounds of review was the celebrated judgment of Innes, C. J; in the case of Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council⁴⁸ where the court said:

whenever a public body has a duty imposed on it by statute ,and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of, and to set aside or

⁴⁶ (1855) 2 Searle 165.

⁴⁷ See Baxter Op cit n. 51 at 304 .

⁴⁸ 1903 TS 111 .

correct them, this is no special machinery created by the Legislature it is a right inherent in the Court.⁴⁹

The above decision was followed by Corbett, J.A; in Johannesburg Stock Exchange v Witwatersrand Nigel,⁵⁰ where the learned Judge said the following about the grounds of review:

It must be shown that the President failed to apply his mind to the relevant issues in accordance with the behest of the statutes and the tenets of natural justice, such failure might be shown by proof of, 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 discretion conferred upon him and took into account irrelevant considerations or ignored afore-stated relevant ones, or that the decision of the President was so grossly unreasonable as to warrant an inference that he had failed to apply his mind to the matter in a manner afore-stated.⁵¹

The courts have developed other grounds of review over the years; the list includes but is not limited to the following:

2.2.1. Situations of excess of powers

In the case of University of Pretoria v Minister of Education,⁵² the facts were as follows: the Council had selected and purported to appoint the Rector of the University and had

⁴⁹ Ibid (at 115) .

⁵⁰ 1988 (3) SA 132 (AD) .

⁵¹ Ibid (at 152 A-B).

⁵² 1948(4) SA 79 (TPD).

sought approval from the Minister of Education who had then withheld his approval, resulting in a deadlock.

The attitude of the applicant was that section 6 of the Act conferred on them full powers and absolute discretion to appoint the Rector and approached the court seeking a declaratory order that regulation 11 was inconsistent with or repugnant to their absolute right.

The central issue to be determined by the court was the proper construction to be placed on section 6,⁵³ of Act 13 of 1930 and regulation 11,⁵⁴ there under. There was no doubt in the mind of the court the words “in such manner as may be prescribed by regulation” imposed a restriction upon the council’s authority to appoint the Rector.

In resolving the issue and dismissing the application the court referred to the case of Attorney General v Trethowan,⁵⁵ where a similar language⁵⁶ was employed and approved the interpretation placed on that phrase and said the following:

If my interpretation of the words “in the manner prescribed by regulations” is correct section 6 of Act 13 of 1930

⁵³ The relevant section provided that “ the Rector of the University shall be appointed by Council in the manner prescribed by statutes ...”

⁵⁴ Regulation 11 of section 6 of the Act provided that “ the Rector shall be appointed at an ordinary meeting of the Council, after consultation with the Senate and subject to the approval of the Minister...”

⁵⁵ [1932] AC, 526

⁵⁶ In that case similar words were found in section 5 of the Colonial Laws Validity Act 1865 which conferred upon the State Legislature full powers to make laws respecting its constitution, power and procedures provided that the laws should have been passed in such “manner and form” as might be required by Act of Parliament” In that case Privy Council had affirmed the decision of the Supreme Court of Australia that the proviso requiring the consent of the majority of the electors fell within the meaning of the words “manner and form”, that it was competent for the New South Wales Legislature to enact clause requiring a referendum.

permitted the imposition by regulation of restraints upon the powers of Council.⁵⁷

2.2.2. Situations of usurpation of powers

In the case of University of Cape Town and Another v The Minister of Education and Culture (House of Assembly and House of Representatives and Others)⁵⁸, the Minister, purporting to be acting in terms of section 25 of the University Act 61 of 1955, withheld part of the subsidies of the University as a sequel to the Council of the University's failure to comply with certain conditions which were allegedly directed at the prevention and punishment of certain conduct of staff and students.

The University applied for an order declaring the conditions invalid on the following grounds: -

- (1) that the imposition of such conditions exceeded the powers conferred by the legislature in terms of section 25 of the enabling Act;
- (2) that they were vague, and
- (3) that they were unreasonable.

The Court, in setting the decision aside held that :

that the conditions were based on an ulterior motive to combat unlawlessness or what was considered as

⁵⁷ Ibid n. 69 (at 85-86).

⁵⁸ 1988 (3) SA 203 (CPD)

revolutionary conduct, a motive unconnected to section.
25;⁵⁹

that the conditions were void for uncertainty;⁶⁰ and
that the placing of the Universities under pressure to
pass or sanction sentence that may or may not,
depending on its severity, stave off withdrawal of
Universities subsidies was not only an unwarranted
intrusion upon Council's powers to administer
discipline but an intolerable interference with its duty
and the applicants rights to have those powers
exercised freely and fairly.⁶¹

In the case of Moleah v University of Transkei and Others,⁶² the case concerned the suspension of the Principal and Vice –Chancellor of the University of Transkei by the University Council. In an application by the applicant to review the decision of the respondent on the ground that the Council had acted ultra vires, the court in setting the Council's decision aside found that:

there were serious social, and personal implications inherent in being suspended from duty; that the applicant had held a high position in the University , was barred from going to work and from pursuing his occupation and was seen by the community as such and that the implied power to suspend must have been shown to have been necessary to properly conduct an investigation as envisaged in section 8 of Act 23 of 1976;

⁵⁹ Ibid (at 212- F-G)

⁶⁰ Ibid (at 215 –B-C)

⁶¹ Ibid (at 217 B-C).

⁶² 1998 (2) SA 522 (TkHC).

that it was not shown that the implied power to suspend was reasonably necessary or incidental to the implied power to investigate;⁶³ and that the suspension of the Principal pending the disciplinary enquiry was a usurpation of the powers of the Minister and that the Council acted ultra vires in suspending the Principal.⁶⁴

2.2.3. Situations of acting under dictations

In Mabi and Others v Venterspost Town Council and Another,⁶⁵ the case concerned the cancellation of residential permits issued by the Council and wherein the applicants had been paying rent and wherein in fact only one of the applicants was the holder of the permit. On an application to review and set aside the decision, the Court held that:

for the Superintendent so to give effect to the instructions of a person not charged with the duty of considering cancellation under the Regulations was not ... a proper discharge of his functions under the Regulations, that he allowed the other to usurp his functions and gave the matter no consideration himself.⁶⁶

2.2.4. Situations of Error of law

In Hira and Another v Boysen and Another⁶⁷ the respondent had imposed a fine of R100-00 on the appellant and his friend, for having criticized the Department of

⁶³ Ibid (at 540 F-541-A).

⁶⁴ Ibid (at 541-I-J).

⁶⁵ 1950 (2) SA 793 (WLD).

⁶⁶ Ibid (at 800).

⁶⁷ 1992 (4) SA 69 (AD).

Education, in the then Department of the House of Delegates. On appeal, the court in, setting aside the decision had this to say:

where it could be shown that the enquirer, who made a finding of guilty had so misinterpreted the paragraph under which a person was charged that he applied the wrong criterion, and that had the correct criterion been applied there would not have been grounds for finding of guilty, the court was entitled to review and set aside the decision.⁶⁸

2.3. The impediments of the common law

2.3.1. Failure of the court to recognize unreasonableness as an independent ground of review:

In Union Government v Union Steel Corporation,⁶⁹ the court aquo had set aside the Minister's decision,⁷⁰ and had referred the matter to the relevant Minister to exercise his discretion in conformity with the Act. After finding that the Plaintiff "had proved that the plants both at New Castle and Vereeniging were capable of producing at least 50,000 tons of pig iron per annum and 50, 000 tons of steel per annum" (a condition precedent for the Minister to exercise his discretion properly).

⁶⁸ Ibid (at 95 E).

⁶⁹ 1928 (AD) 220

⁷⁰ The refusal by the relevant Minister to pay the corporation.

On appeal by the Minister, the respondent had contended that the required exercise of discretion by the Minister was unreasonable and unlawful while the Minister had argued otherwise.

The appeal court held:

that there was no authority that I know of, and none had been cited for the proposition that a court of law will interfere with the exercise of discretion on a mere ground of its unreasonableness;

that it was true that the word was used in cases on the subject but nowhere had it been held that unreasonableness was sufficient ground for interference; and

that emphasis has always been laid for the necessity of unreasonableness being so gross that something else can be inferred from it, either that it was inexplicable except on the assumption of malafide or ulterior motive.⁷¹

2.3.2 The rigid classification of functions in to administrative, quasi-judicial and judicial functions :

The mindset of the judiciary at that time was constrained to believe that the rules of natural justice applied only to functions of a judicial nature and not acts or decisions which were purely administrative in nature.

⁷¹ Ibid (at 237).

The danger of such classification, appeared vividly in the case of Pretoria City Council v Modimola⁷², a case that concerned expropriation of property and to which the rules of natural justice ought to have been applied but were not applied. Botha, J.A, in giving a unanimous judgment had said the following:

In the absence of a provision prescribing a quasi-judicial enquiry as a prerequisite to the exercise of the power of expropriation, the act of expropriation is a purely administrative act.⁷³

In a similar vein, in the case of Laubscher v Native Commissioner Piet Retief,⁷⁴ the case that concerned an unsuccessful application of residential permit, in a restricted area, Reynolds, A.J.A; had expressed himself as follows:

It would be a very difficult thing to set a formula which would satisfactorily distinguish in all cases administrative duties from quasi –judicial duties of a person like the Commissioner ...fortunately it is not necessary to do that in this particular case... for the duties of the Commissioner to grant or refuse to grant an application for the necessary permission are clearly purely administrative duties.⁷⁵

It is respectfully submitted that the cases of Modimola and Laubscher were wrongly decided .

⁷² 1966 (3) SA 250(A).

⁷³ Ibid (at 263 F-G).

⁷⁴ 1958 (1) SA 548(A).

⁷⁵ Ibid (at 550 F-H).

That form of approach received criticism from Schreiner, J.A, in Pretoria North Town Council v A1 Electric Ice-cream Factory PTY (Ltd),⁷⁶ where the learned judge expressed himself as follows:

the classification of discretions 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 the classification and even some disagreements as to the usefulness of such classification when achieved.⁷⁷

2.3.3 The doctrine of Parliamentary sovereignty

The other problem that the Courts were faced with was the doctrine of parliamentary sovereignty. It is instructive to note in that disconcerting, but bold statement of Stratford, A,C.J; in the case of Sachs v Minister of Justice⁷⁸ where the Judge said the following:

Parliament may make any encroachment it chooses upon the life, liberty, and property of any individual subject to its sway and it is the function of the court to give effect to its will.⁷⁹

⁷⁶ 1953 (3) SA 1 (A).

⁷⁷ Ibid (at 263)

⁷⁸ 1934 (AD) (at 11-37).

⁷⁹ Ibid (at 37).

Parliamentary sovereignty gave the apartheid legislature free reign in its attack on the basic principles of equality and human dignity inherent in the common law ⁸⁰. In that connection the agonizing words of Stratford A.C.J. in the case of Ndlwana v Hofmeyr No and Others,⁸¹ where the Judge said the following are particularly relevant :

Parliament's will, therefore as expressed in an Act of Parliament cannot now in this country, as it cannot in England be questioned by a court of law whose function is to enforce that will, not to question it; and that it ... is senseless to speak of an Act of Sovereign law making body as ultra vires.. there cannot be any exceeding power when the power is limitless. ⁸²

2.3.4 The ouster clauses

Perhaps the most serious impediment was the ouster clauses, the legislative provisions that were intended to prevent the courts from exercising their review powers on specific administrative decisions, thus giving administrators carte blanche powers to act as they pleased, without the standard of legality, fairness and reasonableness.⁸³

It was in fact the routine of the apartheid government to oust the jurisdiction of the Courts to enquire into the legal validity of certain laws or conduct.⁸⁴ That was particularly true of the provisions of section 29(6) of Act 74 of 1982, the Internal Security Act.⁸⁵

⁸⁰ Hoexter, C. etal..(2001) The New Constitutional & administrative Law vol (1) . (p 53).

⁸¹ 1937 (AD).

⁸² *Ibid* (at 237).

⁸³ Hoexter, C. etal. (2002) The New Constitutional and administrative Law. Vol (2) .(p 305).

⁸⁴ Ian Currie and De Waal.(2005) The Bill of Rights Handbook. 7th ed. (p 704).

⁸⁵ The Section provides that “ no Court of law shall have jurisdiction to pronounce any action taken in terms of this section or to order the release of any Person detained in terms of the provisions of this

The South African case law is replete with appalling decisions on security matters. One would only refer to a few. In the case of the Staats President v UDF,⁸⁶ the case arose out of a challenge to the validity of the emergency regulations. The majority of the Appellate Division came to the conclusion that the ouster clause contained in section 5B of the Public Safety Act,⁸⁷ effectively prevented the review of emergency regulations, where the challenge was brought on the ground of vagueness. The Court reasoned out that:

though the regulations were vague and therefore invalid
they were not beyond the powers of the State President
or ultra-vires.⁸⁸

The above disappointing decision was followed with reluctance by Friedman J, in the case of Natal Indian Congress⁸⁹ where the Judge said the following:

I regret that the application must fail. I used the word “regret” advisedly. In general one of the traditional roles of the Court is to act as watch-dogs 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 and without favour or prejudice, safeguarding

section”

⁸⁶ 1988 (4) SA 830 (A).

⁸⁷ Act 3 of 1953.

⁸⁸ Ibid n. 83 (at 855 I-J).

⁸⁹ 1989(3) SA 588 (D and CLD).

the interests of both the State and its officers on the one hand and those of the Citizens on the other.⁹⁰

It must be remembered that the decision in the Staats President v UDF case contradicted the earlier full bench decision in Natal Newspapers (Pty) v State President of the Republic of South Africa,⁹¹ where the following was said :

in our opinion there is no difference in principle between one species of ultra vires and another. Parliament did not intend to oust the jurisdiction of the Courts where the State President acted beyond his powers under the Act. Accordingly in our view section 5B does not preclude the Court from investigating whether or not the State President acted ultra vires the Act.⁹²

On the contrary in the most far-reaching judgment the Appellate Division confirmed the bold judgment of Leon, J; in the case of Hurley v Minister of Law and Order⁹³ wherein the arrest and detention was declared unlawful and of no force and effect , for want of reasonable grounds to believe that the detainee was a threat to the national security,⁹⁴ Rabie, C.J; had found in that case, that:

The question whether a police officer had the (required belief) condition precedent, when he made an arrest in reliance on section 29 (1) of the Internal Security Act is objectively tested and justifiable and if he has reason to believe, carry the implication that the belief must be based

⁹⁰ Ibid (at 594 H-B).

⁹¹ 1986 (4) SA 1109 (N) (at 1118 G-H).

⁹² Ibid (at 1118 G-H).

⁹³ 1985 (4) SA 709 (D).

⁹⁴ Ibid (at 725 I-J).

on reasonable grounds and the courts must be entitled to enquire whether the belief was reasonably held.⁹⁵

The court had also found that, the onus of proof was on the appellant and he had failed to discharge it, and accordingly came to the conclusion that Coetzee had no reasonable grounds to believe, that the applicant was indeed a threat to national security and dismissed the appeal.⁹⁶

The late Murenik had subjected Hefer, C.J.'s judgment to a trenchant criticism for having excluded an objective approach in the case of Mbane v Minister of Police and Others⁹⁷ where the learned author in his article,⁹⁸ said the following :

when we say that a person has reason to believe something we do not mean that he has a reason to believe it , which might cover the case in which he has a bad reason. We mean that he has good reason to believe, just as when we say that someone has reason to doubt something, we mean that he has good reason to doubt it. The statement that a person has reason to believe or to doubt means that his belief or doubt is rational or reasonable. So a regulation that requires a person to have reason for his belief, ask of him the same as a regulation that requires him to have

⁹⁵ See Minister of Law and Order v Hurley and Another 1986 (3) SA 549 (A) (at 579 E-F).

⁹⁶ Ibid (at 589 H-C).

⁹⁷ See 1982 (1) SA 223 (TkSc) , in particular (at 230) where Hefer CJ , on an urgent application by the applicant's wife for rule nisi , calling upon the respondents to show cause why their detention of his husband could not be declared unlawful and him released immediately. In dismissing the application the judge had reasoned that "it was not open to the court to enquire into the question whether the respondent in that case had reason to believe that the applicant's husband had committed an offence or intended to commit one , that the belief was demonstrated in his affidavit and that that was the end on that part of the enquiry "

⁹⁸ Murenik, E; " Liversidge in Decay" 1985 . SALJ- Vol 102. 77-91.

reasonable cause for his belief, both regulations require that his belief should be reasonable.....⁹⁹

Indeed the judge's approach in the above matter, was more executive minded than the executive themselves. The courts have also insisted that not only should the administrative act be authorized but also that it should be exercised in a fair manner, and I turn there on.

2.4. Procedural fairness under the common law

The requirement that the administrative act not only be authorized, but also that it should be exercised in a fair manner, find expression in the ancient principles of natural justice which dictate that, persons affected by administrative action should be afforded a fair and unbiased hearing before a decision is taken. The principles are usually expressed in the form of two latin maxims: *nemo iudex in sua causa* (no one may be a judge in his own cause) and *audi alteram partem* (hear the other side).¹⁰⁰ Lord Denning, MR, in Kanda v Government of Malaya,¹⁰¹ had expressed himself as follows regarding the two maxims:

The rule against bias is one thing, the right to be heard is another, the two are the essential characteristics of what may be termed natural justice;
they are the twin pillars supporting it;
they have been recently expressed to mean impartiality and fairness; and

⁹⁹ Murenik ,E. n. 95 (at 79).

¹⁰⁰ The two requirements are referred to as the twin pillars of natural justice . See Gordon, Ibid (p 22).

¹⁰¹ [1962] A.C .322.

that they are separate concepts governed by separate considerations.¹⁰²

In view of the importance of the maxims to our Administrative Law the concepts are unpacked hereunder:

2.4.1. Nemo iudex in sua causa rule

The rule as explained above requires that the affected party must be heard by an impartial and unbiased tribunal. This is a fundamental doctrine of natural justice, which has its origin in the English law, to which we all subscribe. The leading case in the English law is the case of R v Sussex Justices, Ex parte, McCarthy¹⁰³ where the Lord Hewart, C.J; expressed himself as follows:

Justice must not only be done, but must manifestly and undoubtedly be seen to be done.¹⁰⁴

The above oft- quoted passage of Lord Hewart; was followed with approval in the case of Metropolitan Properties v Lannon,¹⁰⁵ where Lord Denning, MR said:

In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or the mind of the Chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other.

¹⁰² Ibid (at 337).

¹⁰³ [1923] A11 ER 233.

¹⁰⁴ Ibid (at 334)

¹⁰⁵ [1968] 3 A11 ER 304 .

The court looks at the impression which will be given to other people. Even if he was impartial as could be nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit his decision cannot stand.

Nevertheless these must appear to be a real likelihood of bias, surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice or Chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The court would not enquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. ...Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking: The judge was biased.¹⁰⁶

The leading case in South African law on the question of bias is the case of the President of the Republic of South Africa and Others v South African Rugby Football Union,¹⁰⁷ where five Justices of the Constitutional Court were accused of being biased against the SARFU in favour of the President's decision to appoint a Commission of Inquiry. The Court in considering and rejecting the allegations of bias laid down the test as follows:

¹⁰⁶ Ibid (at 330 para A).

¹⁰⁷ 1999 (7) BCLR 725 (CC).

Whether a reasonably, objective and informed person would on the correct facts reasonably apprehend that the judge had not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submission by counsel.¹⁰⁸

The Courts in South Africa have, from decades ago, taken the question of the impartiality of the courts very seriously, thus in the case of R v Chondi,¹⁰⁹ Krause, JP, had said the following regarding impartiality:

it is a matter of gravest public policy that the impartiality of the courts should not be doubted or that the fairness of a trial should be questioned, otherwise the only bulwark of the liberty of the subject in these times of revolutionary tendencies would be undermined.¹¹⁰

Conversely it has been argued that the path of criticism is the public way, the wrong-headed are permitted to err therein: provided that members of public abstain from imputing improper motives to those taking part in the administration of justice, they are immune. "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respect, even though outspoken comments of ordinary men"¹¹¹

It is also a hallowed maxim of our law, that if the a judicial officer has any interest in the outcome of the matter before him, no matter how small the interest might be,¹¹² he is

¹⁰⁸ Ibid (at para 48 D-E).

¹⁰⁹ 1933 (OPD) 267 (at 271).

¹¹⁰ Ibid (at 271).

¹¹¹ per Lord Atkin, in Ambard v Attorney General For Trinidad of Tobago [1936] A.C.322 (at 335).

¹¹² Provided De minimis rule apply. There has since been a departure from the rule as the following line of cases will indicate: R v Camborne Justices, Ex parte Pearse [1954] 2 All ER 850 (HL), where the House of Lords said "a real likelihood of biased must be proved before proceedings could be vitiated on the ground of interest (at 855), Jacobs v Tugela and Mapumolo Rural Licensing Board 1964 (1) SA 45 D& C.L.D, where the court said "the onus is on the applicant to prove that the

disqualified.¹¹³ A biased judge who continues to remain on the bench in the trial of an accused after refusing application for recusal commits an irregularity every time he remains on the bench of the trial of the accused.¹¹⁴

It has been said that the decision-maker must divest himself of interests and must be disinterested. The following categories of interests, though not hard and fast create conflicts of interest and an impression to the average lay person that there is a real danger of bias, the list include the following - pecuniary interest, personal interest, and prejudice.¹¹⁵

2.4.2. The situations of creating bias

South African case law is replete with examples and I turn thereon.

(i) Situations of pecuniary interest

In Rose v Johannesburg Local Road Transportation Board,¹¹⁶ the Chairman of the Road Transportation Board which controlled the grant or refusal of exemption certificates regulating the commercial operation of self drive car hire services was also a director of three other powerful companies, all of which were controlled by him. One of the

interest was too great and not remote" (at 47) and R v Gough [1993] 2ALL ER 724 (HL), where the House of Lords said "the only special category of cases in which it is unnecessary to enquire whether there was any real likelihood of bias relates to circumstances where a person acting in judicial capacity had a direct pecuniary interest in the outcome of the proceedings" (at 732).

¹¹³ See Sergeant and Dale (1877) QBD, per Lush J (at 567) Quoted with approval by Hoexter, J; "the Chairman of the Board, a Mr Huddle would have recused himself, that the argument that if a man of Mr Huddles calibre were to be excluded from being a member of the Respondent's Board because of having an interest in company remotely connected with the applicants or objectors it would be difficult to get a person to act on such a Board did not hold, that it was difficult to believe that in South Africa there is no such person who is not connected" opcit note 10.

¹¹⁴ Per Centiliviers CJ, in R v Milne and Erleigh (6) 1951 (1) SA 1 (A).

¹¹⁵ Baxter, L; (1984) Administrative Law. Cape town: Juta and Co. (p 561).

¹¹⁶ 1947 (4) SA272 (WLD).

companies was the largest operator of taxis in Johannesburg and stood to gain by exclusion of competitors.

The Chairman had refused to recuse himself at the hearing. The Court rejected the argument that it was difficult to get persons without, or not having an interest in the occupation concerned, of the Chairman's calibre and set aside the decision of the Board and held as follows:

People interested in public transportation must be enabled to feel assured that their applications to enter or continue to operate, would be considered and decided according to the rule of reason and justice.¹¹⁷

(ii) Situations of blood relationship

In Liebenberg v Brakpan Liquor licensing Board¹¹⁸ a mayor of the municipality insisted against the advice of the Chairman of the Board and the Under-Secretary for Justice, on sitting as a member of the Liquor Licensing Board when it heard competing applications including one from the brother to the mayor, and where eventually the license was granted to the brother. Solomon, J.A; found:

that the mayor's blood relationship was enough to give rise to the fear of real likelihood of bias; that the right of everyone to equal justice before the law and rule of law requires that every party in a matter should be entitled to what must appear to be fair, impartial and unbiased consideration of his case and that it is not absurd to disqualify a brother sitting as a judge in a competition

¹¹⁷ Ibid n. 16 per Lucas, A..J (at 290).

¹¹⁸ 1944 SA (WLD) 52.

between his own brother and others for a grant of liquor license in order to maintain purity in the administration of the Liquor Act.¹¹⁹

In the case of S v Bam,¹²⁰ the accused was convicted of having kept cattle unlawfully. The Magistrate had presided on the matter, even though his wife was a witness for the state. The court held that it did not matter that the wife was acting in her official capacity when giving evidence. The court, in setting aside the conviction had found that:

The likelihood of bias follows naturally from the marital bond, and that an accused or his legal representative who finds it necessary to apply for the recusal of the judicial officer is confronted with an unenviable task and the propriety of his motives should not be lightly questioned.

(iii) Situation of past prejudice / Pre-determining issues or where the decision-maker does not approach the matter with an open mind

In Patel v Witbank Town Council,¹²¹ the mayor had stated sometime prior to the sitting of the committee in an application by an “Asiatic” for a general dealer license, “that as long as he remained in Council he would move heaven and earth to resist any Indian acquiring a general dealer’s license” The court, per Tindall, J; set aside the decision of the refusal to grant a certificate and ordered for a fresh hearing,¹²² because of the prejudice on the part of the mayor.

¹¹⁹ Ibid (at 61).

¹²⁰ 1972 (4) SA 41 (C).

¹²¹ 1931(TPD)284.

¹²² Ibid (at 291).

2.4.3 .The audi alteram partem rule

The principle has deep historical lineage, dating back from antiquity. One Judge traced it from the events in the garden of Eden. In the case of R v Chancellor of the University of Cambridge,¹²³ wherein Dr Bently was stripped of his academic degrees of Bachelor of Arts and Doctor of Divinity without a hearing, for having been contemptuous of the University court hearing against him, Fortesque, J., had said the following:

...even God himself did not pass sentence upon Adam
before he was called upon to make his defence, “Adam”
God said “ where art thou?”

The rule entails the following: adequate notice of the intended action, the right to be heard in person or through a legal representative; the right to present or controvert evidence, the right to cross-examine witnesses.¹²⁴ The courts had later extended the audi alteram partem rule to include the duty to act fairly and to protect legitimate expectations.

In view of the importance of the latter two principles in the review of proceedings, it is instructive to refer to the case law articulating the essential content of the rule:

In the case of Administrator Transvaal and Others v Traub and Others,¹²⁵ the court, per Corbett, C.J, in accepting the doctrine of legitimate expectation in South African Law had found:

¹²³ (1723) 1 Str 557.

¹²⁴ See Baxter Ibid n. 51 (at 542-557).

¹²⁵ 1989(4) SA 731 (A).

that the failure by the appellant to appoint the respondents to the positions of Senior House Officers, without a hearing when it has been the practice of the appellant to appoint them, but because of the outspokenness of the respondents with regard to the deplorable conditions of the hospital, was fatally flawed.¹²⁶

2.4.4. The duty to act fairly

The principle dates back from antiquity, originate from our common law heritage, thus in the case of Board of Education v Rice and Others,¹²⁷ Lord Loreburn, L.C; had said:

...they must act in good faith and fairly listen to both sides, for the duty to act fairly lies on everyone who decides anything.¹²⁸

In Ridge v Baldwin,¹²⁹ a Chief constable was dismissed in absentia without notice of the proposed action, particulars of the grounds of dismissal and an opportunity of putting his case. Although the appeal failed Harman, L.J; having referred to what was said by Lord Loreburn above said:

I see a great deal of force in the view that the defendants were bound to give the plaintiff an opportunity of being heard before dismissing him.

¹²⁶ Ibid (at page 762 D-E).

¹²⁷ [1911] A.C . 179.

¹²⁸ Ibid (at 182)

¹²⁹ [1964] AC 40.

Lord Reid, M.R., had made the following observation:

there I find an unbroken line of authority to the effect that an officer cannot be lawfully dismissed without first telling him, what is alleged against him and hearing his defense or explanation.¹³⁰

The speeches of Lord Ried; show that an administrative body may in a proper case, be bound to give a person who is affected by the decision an opportunity of making representations. It all depends on whether he had some rights or interests, or I would add some legitimate expectation, of which it would not be fair to deprive him, what he had to say.¹³¹

In Re K (K) an Infant,¹³² an immigration case, Lord Parker had this to say :

Even if they were acting in administrative capacity, they were under a duty to act fairly, which meant they should have given the immigrant an opportunity of satisfying them that he was under 16 years.

In Roberts v Chairman, Local Road Transportation Board¹³³ the court recognised that the National Transport Commission was under a duty to act fairly, but ruled that it had not acted unfairly.¹³⁴

¹³⁰ See Lord Ried judgment, in Ried v Baldwin [1963] 2 All ER, 56 (HL), (at 72).

¹³¹ See the speeches of Lord Ried available at [http:// books.google.com/books](http://books.google.com/books), in International Law Reports. C.J..Greenwood, Lauterpacht, 1985.Law (at 710)

¹³² [1967] 2 QB 617.

¹³³ 1980 (2) SA 480 (C).

¹³⁴ Ibid (at 495-6)

In Lawson v Cape Town Municipality¹³⁵ the court equated the duty to observe the audi alteram partem rule with the duty to act fairly. In setting aside the refusal to renew a license the court held that:

the respondent was under a duty to act fairly by disclosing to the applicant the contents of an adverse police reports.¹³⁶

2.4.5. Legitimate expectations under the common law

The origin of the doctrine of legitimate expectation has also deep historical roots and could be traced from the late Lord Denning, MR, in Schmidt and Another v The Secretary of State for Home Affairs¹³⁷ The case concerned the refusal of extension of permits of entry of students of scientology in United Kingdom, although the Court of Appeal had held that the appellant did not have legitimate expectation, the Master of the Rolls had said the following :

It would not be fair to deprive him without hearing what he had to say.¹³⁸

In South Africa it manifested itself first in the case of Everett v Minister of Interior¹³⁹ where the applicant, a British national, was accosted with a notice of withdrawal of a temporary residential permit, which was extended from time to time by the Minister of Interior, and where the notice was not adequate to allow her to make representation before her temporary residential permit could be withdrawn .

¹³⁵ 1982 (4) SA 1 (C).

¹³⁶ *Ibid* (at 12 E -F).

¹³⁷ [1969] 1 All ER AC 904 ,

¹³⁸ *Ibid* (at 908-909-F).

¹³⁹ 1981 (2) SA 453 (CPD).

In an application to the court to set aside the notice withdrawing her residential permit, the applicant argued that the Minister's decision was contrary to the rules of natural justice in the sense that she was not offered an opportunity of making representations to the respondent both prior to and subsequent to the respondent's decision and alternatively that the notice ought to be set aside on the basis that it was unreasonable.

The court concluded that:

the applicant was not afforded sufficient time to make representation, that she was entitled to a reasonable time to make representation and that the audi alteram partem rule ought to have been followed.¹⁴⁰

Secondly, Howie, J, in Lunt v University of Cape Town and Another,¹⁴¹ regarding the refusal to readmit a student to pursue her chosen career on the ground that the student was not making good academic progress, and without having given that student a hearing, was of the view that:

the tenets of basic fairness suggested that the applicant should not have been saddled with the stigma of being unsuitable for her chosen career without being heard, that the decision was punitive, disciplinary in character or censorious to a damning degree.¹⁴²

The doctrine was finally accepted in South African Law in Traub in 1989 as already indicated.

¹⁴⁰ Ibid (at 459 –G-H).

¹⁴¹ 1989 (2) SA 438 (CPD).

¹⁴² Ibid (at 446 para I-J).

2.5. Summary

From the afore-going discussions, it is apparent that the courts as sentinels of individual liberties have been ready to cabin or remit excesses of power in administrative decisions and the weapon used by the courts invariably has been the doctrine of ultra -vires either in the narrow or wider sense. The narrow application of the doctrine ultra-vires refers to legality, situations of excess of power or situations of want of lawful authority. The wider sense of the doctrine refers to situations of abuse of power. However, because of the doctrine of parliamentary sovereignty and the ouster clauses the power of the courts to review administrative action was highly limited.

CHAPTER THREE: JUDICIAL CONTROL OF ADMINISTRATIVE ACTION UNDER THE NEW CONSTITUTIONAL DISPENSATION

3.0 Introduction

This chapter is at the hub of this dissertation, it focuses squarely on the impact of the Constitution, on judicial review of administrative action. In order to realise the daunting and challenging task that lies ahead, and for the purpose of logic, this chapter has been divided into the following sub-themes which are interrelated and interwoven to give a coherent whole: judicial control of administrative action under the Interim Constitution, the Preamble to the Interim Constitution, Sections 23, 24, the Postamble to the Interim Constitution, Judicial control of administrative action under the Final Constitution Act 108 of 1996, the Preamble to the final Constitution, Sections 1, 2, 32, 33 and 195 of the final Constitution. Where appropriate reference is made to South African cases as authorities in order to buttress my argument. Foreign cases are also referred to in order to advance a persuasive argument.

3.1. Judicial control of administrative action under the Interim Constitution.

Judicial control of administrative action under the Interim Constitution can be explained by reference to the following provisions of that Constitution:

- (a) The Preamble to the Interim Constitution provided that:
 - there is a need to create a new order in which all South Africans will be entitled to a common South African

citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

The import of the Pre-amble to the Interim Constitution was that it carried with it the equality provision,¹⁴³ which outlawed discrimination of any form and therefore laid the basis for control of the exercise of control of public power through the enforcement of the Bill of Rights.

(b) The Post-amble to the Interim Constitution which provided:

that the Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering, injustice and a future founded on human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

Equally the significance of the post-amble is that it did not only give us the grim picture of the past but committed us to a future where human rights values were to be respected, protected, promoted and fulfilled.¹⁴⁴

(c) Section 4 of the Interim Constitution which provided that:

¹⁴³ See the repealed section 8 of the Interim Constitution and the identical provision in section 9 of the current Constitution. The achievement of equality is not only a right but also a fundamental value in terms of section 1 of the final Constitution.

¹⁴⁴ See the provisions of section 7 (2) of the Final Constitution.

This Constitution shall be the supreme law of the Republic and law or act inconsistent with its provisions shall unless otherwise provided expressly or by necessary implication in this Constitution be of no force and effect to the extent of the inconsistency.

Section 4 was of cardinal value to the control of public power by proclaiming the Constitution as the grund norm, the fundamental law of the country.

(d) 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.

The effect of section 23 was to constitutionalize the right of access to information in the interim period pending the adoption of the Final Constitution and the enactment of the relevant legislation enacted there-under to give effect to that right to give effect

3.2. Constitutionalization of the right to administrative justice

Section 24, provided that 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 expectation 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

- (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.

What emerged from the peremptory terms,¹⁴⁵ of section of section 24 is the following imperatives: administrative action must be lawful, procedurally fair where the rights or interest or legitimate expectations are affected, that the affected person must be furnished with reasons and that the administrative action must be justified in relation to the reasons given.

The following line of cases are intended to amplify the impact of section 24 in respect of the constitutional principles contained therein:

(a) The requirement of lawfulness / legality principle

In Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council,¹⁴⁶ the appellants, rate payers were dissatisfied with the levying of municipal rates. They had unsuccessfully approached the Witwaterand Local Division¹⁴⁷ seeking a declaratory order setting the rates imposed by resolutions aside, they then appealed to the Supreme Court of Appeal.¹⁴⁸ The Supreme Court of Appeal raised the question mero moto as to whether it had jurisdiction to deal with the matter.

The Supreme Court of Appeal reasoned that, although the impugned decision appeared to have constituted administrative action, in terms of item 17 of Schedule 6 to the

¹⁴⁵ The Constitution had used the obligatory word "shall"

¹⁴⁶ 1998(12) BCLR 1458(CC).

¹⁴⁷ See Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 19997 (5) BCLR 657 (W).

¹⁴⁸ See Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (6) BCLR 671 (SCA).

Final Constitution the matter was to be disposed of as if the Final Constitution had not been enacted, unless the interest of justice required otherwise, that the attack on the administrative action in question on the ground of unlawfulness fell within the jurisdiction of the Constitutional Court and for that reason outside the jurisdiction of its predecessor, the Appellate Division.¹⁴⁹ The Supreme Court of Appeal did not entertain the appeal on the merits but instead referred the matter to the Constitutional Court for adjudication on the following questions:

- (a) Whether or not the administrative action constituted by the impugned resolutions was consistent with the Interim Constitution ? and
- (b) Whether or not the Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon an attack on such administrative action on the ground that it fell to be set aside, reviewed or corrected at common law ?

The Constitutional Court dismissed the appeal and answered the two questions in the negative, however it had added in respect of the last question that “in respect of issues under the Interim Constitution which may in future come before the Supreme Court of Appeal, including matters within the purview of section 24 of the Interim Constitution, it was in the interest of justice for that Court to exercise the jurisdiction conferred upon it by chapter 8 of the Final Constitution”

The Constitutional Court had also said the following in relation to the lawfulness principle:

¹⁴⁹ That was because of the express provision of section 101 (5) of the Interim Constitution.

It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon it by law. At least in this sense then the principle of legality is implied within the terms of the Constitution.¹⁵⁰

Relevant to the question of the relationship between the common law grounds of review and the constitutional grounds of review, the Court stated the matter thus

there is of course no doubt that the common law principles of ultra vires remain under the new constitutional order. However they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to administrative action the principle of legality is enshrined in section 24(a)¹⁵¹ and in relation to legislative and executive acts that do not constitute administrative action, the principle of legality is necessarily implicit in the Constitution, the question whether the various local governments acted intra-vires in that case remained a constitutional question.¹⁵²

In Commissioner of Custom and Excise v Container Logistics Pty, Commissioner of Custom and Excise v Rennies Group Ltd t/a Reinfright¹⁵³ the Commissioner had sought in an unsuccessful appeal to hold the agents of the principals, Conlog and Renfreight, herein referred to as the respondents, liable for unpaid custom duties and

¹⁵⁰ Ibid (at 1483, para 58).

¹⁵¹ Ibid (at para 59).

¹⁵² Ibid (at 1483, para 59).

¹⁵³ 1999(3) SA 771(SCA).

other charges in respect of goods landed in Durban where they were cleared for export to Mozambique, when the duties due on the goods were not paid .

The Court, had found that neither the Commissioner nor the Controller foresaw that the system could fail, that if seasoned custom officials like them did not foresee it , it would have been difficult for the clearing officials to have done so and that it could not be said that the respondents had relied unreasonably on the integrity of the system.¹⁵⁴

The learned judge had agreed with the finding in Fedsure case, that administrative action must be lawful and procedurally fair, consistent with the provision of section 24 of the Interim Constitution.¹⁵⁵

However apparently with the doubt still lingering in his mind, as to the relationship between the Constitution and the common law grounds of review Hefer, J.A; said the following:

judicial review under the Constitution and under the common law are different concepts (the Constitution and the Common law each dealing with the same subject matter);
that in the field of Administrative law constitutional review is concerned with constitutional legality of administrative action the question being whether or

¹⁵⁴ Ibid (at 785 D-) , per, Hefer,,J..A.

¹⁵⁵ Ibid (at 785 H-I).

not the action is consistent with the constitution .. the criterion being the Constitution itself;

that ...the Common law was essentially concerned with the legality of administrative action and the question was whether or not the act was in accordance with the behests of Statute and the requirements of natural justice...;¹⁵⁶

I cannot imagine that the intention was to do a way with this type of review, no doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional. An action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. Although it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality, it does not follow that the common law grounds of review had ceased to exist What is lawful and procedurally fair within the purview of section 24 is for the courts to decide ...where there is no inconsistency the common law grounds were intended to be intact...;¹⁵⁷ and

that there was no indication in the Interim Constitution that once the court finds that the administrative action was not in accordance with the empowering legislation or the requirements of natural justice interference was only permissible on constitutional grounds . Section 35(3) is a strong indication that it was not the intention

¹⁵⁶ Ibid (at 785-J).

¹⁵⁷ Ibid (at 786 F-G).

to abolish the common law but to bring it in line with the spirit purport, object of the Bill of Rights.¹⁵⁸

Chaskalson, C.J; repudiated the approach adopted by Hefer, J.A; in Container Logistics supra¹⁵⁹ by saying the following, in Pharmaceutical manufacturers Association of South Africa and Another : In Re Ex Parte President of the Republic of South Africa and Others,¹⁶⁰

there are no two systems of law each dealing with the same subject matter each having similar requirements each operating in its own field each having its own High Court, 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 the Constitutional control;¹⁶¹ what would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the constitution according to the doctrine of legality, in this respect, at least, constitutional law and common law are intertwined and there can be no difference between them; and that the same is true of Constitutional law and common law in respect of validity of administrative decisions within the purview of section 24 of the Interim Constitution, and that what is lawful administrative action, procedurally fair administrative action and administrative action justifiable

¹⁵⁸ Ibid (at 786-G).

¹⁵⁹ Ibid see n 211,212 and 213.

¹⁶⁰ 2000 (2) SA 674 (CC) (at para.33) , for the facts in detail see n 214 infra.

¹⁶¹ Ibid Para 44 (at 696 B-C).

to the reasons given for it cannot mean one thing under the Constitution and another thing under the common law.¹⁶²

In the case of Bato –Star Fishing Pty (Ltd) v The Minister of Environmental Affairs and Tourism and Others,¹⁶³ the Cape High Court¹⁶⁴ in review proceedings arising from the appellant dissatisfaction with fishing allocation quotas had found in favour of the appellant. The Supreme Court of Appeal¹⁶⁵ overturned that decision.

In an application of special leave to appeal to the Constitutional Court against the judgment of the Supreme Court of Appeal, O, Regan, J, in addressing the issue of the relationship between the common law grounds of review and the constitutional grounds of review observed that:

under our new constitutional order the control of public power is always a constitutional matter, that there are no two systems of law regulating administrative action, but only one system of law grounded in the Constitution, the Court's power to review administrative action no longer flows directly from the common law but from the PAJA and the Constitution itself;

¹⁶² Ibid (at para 50).

¹⁶³ 2004 (4) SA 490 (CC).

¹⁶⁴ See Phambili Fisheries (Pty) Ltd and Another v Minister of Environmental Affairs and Tourism and Others, case no 1171/2002, 27 November 2002, wherein the court in granting the application had found among others that the Chief Director of the Department of Environmental Affairs acted arbitrarily, capriciously, irrationally and without reason and that he ignored relevant considerations and took account extraneous ones

¹⁶⁵ See Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and [2003] 2All SA 616 (SCA).

that the grund norm of administrative action is now to be found in the first place not in the doctrine of ultra vires nor in the doctrine of Parliamentary sovereignty nor in the common law itself but in the principles of our Constitution, the common law informs the provisions of PAJA and the Constitution and derives its force from the latter,

and

that the extent to which the common law remains relevant to administrative review will have to be developed on a case by case basis, as the courts interpret and apply the provisions of PAJA and the Constitution, the grounds of judicial review have now been codified under section 6 of the PAJA.¹⁶⁶

(b) Legitimate Expectations under the Interim Constitution

In Premier, Mpumalanga and Another v Executive Committee, Association Of State-Aided School, Eastern Transvaal,¹⁶⁷ the Constitutional Court per O Regan J, in a matter concerning the termination of the payment of bursaries with retroactive effect by the appellant and without affording the respondent an opportunity to be heard, had said the following in setting aside the decision:

The appellant breached procedural fairness within the meaning of S 24(b) to the Interim Constitution.¹⁶⁸

On the contrary, in the case of University of Western Cape and Others v Member of the Executive Committee for Health and Social Welfare Services,¹⁶⁹ The facts of the

¹⁶⁶ See para 22 & 25 in Ibid n. 68.

¹⁶⁷ 1999 (2) SA 91 (CC).

¹⁶⁸ Ibid (at 110 para FG), their rights or legitimate expectations.

¹⁶⁹ 1998 (3) SA 124 (CPD)

case were common cause. The matter was brought to court by way of an urgent application by the applicants who, amongst others, sought to compel the respondents to appoint them in various acting positions.

It was the respondent's contention that they had a discretion to make appointments and in making those appointments had the obligation to observe the provisions of section 11(1)¹⁷⁰ of the Public Service Act, Proclamation 103 of 1994, that the positions ought to have been advertised internally and externally. The applicants on the other hand had contended that there was no need for the posts to be advertised externally.

Hlope, J; who considered the matter held that:

No one had a legitimate expectation to do something contrary to law or of preventing a functionary from discharging his statutory duty;¹⁷¹

that the interest of good administration demands that a public body should act fairly and should implement whatever promise it may have made so long as the implementation thereof was not interfering with its statutory duty;

that the respondents had a statutory duty to act in accordance with the provisions of section 11 in making appointments to the Public Service;

¹⁷⁰ The relevant section provides that "In the making of any appointment or the filling of any post in the Public Service: (a) no person who qualifies for the appointment, transfer, or promotion [concerned shall be favoured or prejudiced and (b) only the qualifications level of training, merit, efficiency and the suitability of the person who qualify for the appointment, promotion or transfer in question and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or filling of the post shall be taken in to consideration"

¹⁷¹ Ibid n 233 (at 134 C-D).

that the undertakings or promises made in conflict with statutory duty to make appointments could be enforced by the courts; and
that the applicant's expectation was not legitimate, as knew that the respondents had a statutory duty to make appointments to posts which had to be advertised and that the Public Service Commission had never waived the requirement that the posts had to be advertised.¹⁷²

The court also noted the following points as important in advertising posts in the management echelons, both outside and inside the Public Service:

to ensure efficiency in Public Administration;
to ensure that all potential candidates whether from the Public Service or outside it were made aware of the existence of posts in order to apply;
to ensure that the person ultimately appointed was the person best qualified for the post;
to promote transparency in public administration.¹⁷³
that the prevailing philosophy of the government of the day was transparency and accountability on the part of the administration ; that it may well have been that the applicants were suitably qualified for the posts , however there was no evidence that they were the most suitably qualified persons and even if they were qualified why would they have to fear competing with other suitably

¹⁷² Ibid n 233 (at 134- E-H).

¹⁷³ Ibid n .233 (at 136- G –137 B).

qualified candidates who could only be made aware of the existence of the posts through advertising;¹⁷⁴ and that it was in the interest of good governance that the posts be advertised and that failure to advertise the post in question was fatal and accordingly dismissed the application.¹⁷⁵

(c) The duty to act fairly

In Claude Neon Ltd v Germiston City Council and Another¹⁷⁶ the first respondent had refused to accept the applicant's tender application and had further refused to condone his late submission of tender documents, had granted the tender and the contract pursuant thereto, to the second respondent.

To complicate matters, the second respondent had on his own admission made an express promise and an undertaking, that when the tender documents were ready the applicants would be notified in good time to submit their applications. The second respondent later disputed the promises and the undertakings made and referred to them as gestures of courtesy.

In an application by the applicant to set aside the decision by the first respondent to award the tender to the second respondent and the contract pursuant thereto, the court found as follows:

that there was an unequivocal undertaking made to the applicant by respondent's agent to the applicant that he would notify the applicant timeously when the documents

¹⁷⁴ Ibid n. 233 (at 137- C-D).

¹⁷⁵ Ibid n. 233 (at 138- I- 139 -A).

¹⁷⁶ 1995 (3) SA 710 (W).

were ready so as to be able to collect those tender documents and to apply and that the applicants accepted and relied upon that undertaking;¹⁷⁷

that the undertaking was not simply a gesture of courtesy nor was it to be regarded simply as a gentleman's agreement upon being relied upon and accepted by the applicant;¹⁷⁸

that the late submission was as a consequence of the undertaking and promise to be provided with information by respondent's agent while still waiting;¹⁷⁹ and

that the conduct of the respondent's agent in giving an undertaking to advise the applicant about the submission of timeous tender was an administrative act.¹⁸⁰

The court accordingly set aside the decision of the first respondent of awarding the tender and the contract pursuant thereto, to the second respondent for breach of procedural fairness within the meaning of section 24(b),¹⁸¹ and finally ordered the first respondent to call for fresh tenders.

In Jenkins v Government of the Republic of South Africa¹⁸² the applicant was deprived of his benefit of a housing lease which he enjoyed over 18 months and the use of a motor vehicle without a hearing. In an application by him of a rule nisi calling on the respondents to show cause why he was not entitled to the continued use

¹⁷⁷ Ibid n 242 (at 717 I-J).

¹⁷⁸ Ibid n 242 (at 718 G-H).

¹⁷⁹ Ibid n 242 (at 718-J).

¹⁸⁰ Ibid n 242 (at 719 G-I).

¹⁸¹ Ibid (at 720- G)

¹⁸² 1996 (3) SA 1083 (Tk SC).

of a motor vehicle and the occupation of the house, the Transkei Provincial Division ,
per, Dukada, A.J; in granting a rule nisi held that:

the continued use of the official motor vehicle by the
applicant and the occupation of the premises leased on his
behalf for more than 18 months generated a reasonable
and genuine expectation; that he would be given a
hearing should the government eventually decide to
withdraw such benefits; and
that in the premises the decision to withdraw the benefits
without prior consultation with the applicant was
fundamentally flawed and was to be set aside in terms of
section 24 (b) of the Constitution.¹⁸³

(d) The duty to give reasons

In the landmark case on the duty to give reasons, establishing a new culture of
accountability and justification Maharaj v Chairman of Liquor Board ,¹⁸⁴ the applicant
had applied for a liquor store license which was refused by the respondent without
reasons. It was the attitude of the respondent that the Board was not obliged to furnish the
respondent with reasons in terms of section 130 of the Liquor Act 27 of 1989.

Dissatisfied with the respondent's decision, the applicant then applied to the Natal
Provincial Division, in order to have the respondent's decision reviewed and set aside.
The applicant's action was based on sections 23 and 24 of the Interim Constitution.
Nicholson, J; held that:

the Licensing Board could not hide behind section 130
of the Liquor Act and refuse to furnish the respondent

¹⁸³ Ibid (at 1095 A-C).

¹⁸⁴ 1997 (1) SA 273 (NPD).

with reasons, that the provisions of the Constitution referred to above unequivocally provided that the reasons be given, and that the provisions of the liquor Act had to yield to the provisions of the Constitution;¹⁸⁵

that if the respondent felt that there were deficiencies concerning whether or not, the granting of license was in the public interest it could never have been right, 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;¹⁸⁶ and

that even without the aid of the wider powers of section 24(b) of the Constitution, the audi alteram partem principle of the common law applied, because a party whose rights were to be the subject of enquiry was entitled to be informed of the facts and information gleaned by the authority which may be detrimental to her interest and that she be given opportunity to reply thereto for that is a trite law.¹⁸⁷

In view of the fact that the word “interest” in section 24 (c) was a vexed question, it is necessary to determine its proper meaning.

(e) What does the word “interest” mean ?

In Xu v Minister van Binnelandse sake, Tsang v Minister Van Binnelandse sake¹⁸⁸ both applicants had applied for orders obliging the respondent to furnish them with reasons in writing in terms of section 24(c) of the Constitution Act 200 of 1993 respectively. In

¹⁸⁵ Ibid (at 277 A-B).

¹⁸⁶ Ibid (at 277 G-H) .

¹⁸⁷ Ibid n. 333 (at 283- D).

¹⁸⁸ 1995 (1)SA 185 (T).

Xu's case in particular an order was applied for the review of the respondent's refusal to issue him with a temporary residential permit in terms of the Aliens Control Act 96 of 1991 and in Tsang's case for an order against the respondent's refusal to extend his temporary residential permit and his subsequent refusal to supply him with the new one in terms of that Act.

The court, per Stafford, J, in dismissing the application had read the term "interest" as narrowly as possible, giving rise to a feeling that aliens are not bearers of rights but receivers of privileges, the court had accordingly held:

that there could be no question of the applicant's having rights capable of being affected or threatened by the respondent unless they have rights, interests in or legitimate expectations of the continued residence in the Republic;¹⁸⁹

that it was a settled law that the State had an absolute and exclusive discretion as to whether it would allow foreign nationals in its territory;¹⁹⁰

that the applicant's had no rights, "interests" in or legitimate expectations of continued residence in South Africa capable of being affected by the respondent's conduct; and

that the respondent's refusal to furnish them with reasons was not contrary to the provisions of section 24(c) of the Constitution.¹⁹¹

¹⁸⁹ Ibid (at 192 F-G), The "narrow" reading of the word "interest" was followed with approval unfortunately in the following similar cases Naidov v Minister of Home Affairs and Others 1995 (7) BCLR 891 (T) (at 901C-G) and Parek v Minister of Home Affairs and Another 1996 (2) SA 710 (D&CLD) (at 713-E-F)

¹⁹⁰ Ibid (at 192 G-H)

¹⁹¹ Ibid (at 194 D-E).

The Constitutional Court in Ferreira v Levin No.¹⁹² held that it was enough if the complainant affected directly by the conduct complained of and that he or she need not need not be affected personally.¹⁹³

Summary

The most significant impact of the Interim Constitution on judicial review of administrative action is that it constitutionalized the rights to lawful administrative action, procedurally fair administrative action including legitimate expectations, right to be furnished with reasons and the audi alteram partem rule is implied. However there was a general apathy and unwillingness on the part of some of the judges to embrace the ethos of the new regime especially in interpreting the Aliens Control Act and in developing the common law in accordance with the spirit, purport, object of the Bill of Rights,¹⁹⁴ as apparent from the immigration cases to which reference was made.

3.3. 0. Judicial control of administrative action under the Final Constitution

On the 7 February 1997 the Constitution Act 108 of 1996 came in to effect. The most important provisions for our purpose and relevant to the control of administrative action are the following:

3.3.1 The Preamble to the Final Constitution which among others provides as follows:

¹⁹² 1996 (1) SA 984 (CC).

¹⁹³ Ibid (at para 32-33), It is respectfully submitted that the interpretation placed on the word "interest" in the latter case be preferred.

¹⁹⁴ See the mandatory provisions of section 39 (2) of the Final Constitution.

We the people of South Africa, recognizing the injustices of our past,...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 the government is based on the will of the people and every citizen is equally protected by the law , improve the quality of life of all citizens and free the potential of every person...

3.3.2 Section 1 of the Constitution , which provides that the Republic of South Africa is one sovereign, democratic state founded on the following values :

- (a) Human dignity, 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, national common voters roll, regular elections and a multi party system of democratic government to ensure accountability, responsiveness and openness .

What is of cardinal importance for our present purpose in section 1 is “the rule of law” principle which is further buttressed by the supremacy clause in section 2.

In view of the importance of the rule of law principle to our law, it is necessary to unpack the principle further:

3.3.3 The rule of law principle

the following meanings have been attributed to the rule of law –

that the affected party may always resort to the court of law if the legal pedigree is not in order and that the court would invalidate the act;

that government must be conducted within the framework of recognized rules and principles which restrict discretionary power,

that disputes be decided by Judges who are wholly independent from the executive, and

that the law should be even handed between the government and the citizens.¹⁹⁵

It must also be consistently borne in mind that the principle of legality which is at the core of our Constitution has universal relevance and an ancient classical lineage. It finds expression in the philosophical writings of Plato who once said “where the law is overruled or obsolete, I see destruction hanging over the community, where it is sovereign over the authorities and they its humble servants, I discern the presence of salvation and every blessing heaven send to society.”¹⁹⁶ The principle also enjoyed support from the writings of Aristotle who said “he who bids the law rule, may be deemed to bid God and reason alone rule, but he who bids the man’s rule adds an element of the beast, for desire is a wild beast and passion perverts the minds of rulers, even when they are the best of men, the law is reason unaffected by desire.”¹⁹⁷

¹⁹⁵ See Pharmaceutical case, n.162.

¹⁹⁶ See “ The Laws of Plato (as translated by Taylor) 1934 99-100 also cited with approval in Mathews . A . S. 1986. State Security and The Rule of Law – Dilemmas of the Apartheid Society , (at 5 - 6).

¹⁹⁷ See “ The Politics of Aristotle (as translated by Jowett Oxford, 1885 1-102 also cited with approval in Mathews , Opcit. n 206.

The International Commission of Jurists Meeting held in New Delhi, India in 1959 (hereinafter called the Declaration of Delhi) had said the following about the rule of law-

that the legislature have the responsibility to abstain from enacting retroactive penal legislation, it must not discriminate in its laws between, one citizen and another, not to interfere with freedom of religious belief, not deny members of Society the right to responsible government, not place restrictions on the freedom of speech, assembly or association and must provide procedural mechanisms for the protection of such rights;

that the power granted to the executive should be undertaken within the narrowest possible limits;

that the extent and purpose of delegated powers should be defined as well as the procedures by which such delegated power was to be brought into effect, right of access to the court where the personal and property rights of the person are adversely affected by the executive, the right to adequate remedy, absent judicial review, there must be antecedent procedures of hearing, enquiry and consultations through which parties whose rights or interests would be affected can have adequate opportunity to make representation; and

that the judiciary should be independent and have irremovable safeguards.¹⁹⁸

¹⁹⁸ See New Delhi, India Congress, .5-10.01.1959, also available in [http:// www. IC.J.Org](http://www.ICJ.Org) at (2).

The Declaration of Delhi was reaffirmed in Lagos, Nigeria in January 1961 at The African Conference on the Rule of Law under the aegis of the International Commission of Jurists where a resolution entitled The Law of Lagos was accepted.¹⁹⁹

The practical implication of the New Delhi and the Lagos Declaration is ,that the new constitutional dispensation demands that administrative decisions be lawful.

At the centre of the control of administrative action under the Final Constitution is the peremptory provision of section 33(1), that administrative action must be lawful, reasonable and procedurally fair.

The Constitutional Court as the guardian of the Constitution has not been disappointing and the following cases bears testimony thereto:

(a) The legality/ lawfulness principle

The Legality principle which is an aspect of the rule of law, was re-affirmed in the President of the Republic of South Africa and Others v South African Rugby Football Union and Others²⁰⁰, the case was an appeal by the President against the findings by the High Court, that the President had irrevocably abdicated his responsibility to the Minister , that his exercise of the powers were invalid because the respondents were not afforded a hearing by the President prior to his decision to appoint a commission and that he had failed to apply his mind to the relevant issues.

¹⁹⁹ See "The Law of Lagos 1961 ,available in <http://www.chr.up.ac.za/hr>.

²⁰⁰ 2000(1) SA 1 (CC).

Central to the issue was whether or not the exercise of the powers conferred upon the President by section 84(2) (f) of the Constitution Act constituted administrative action.²⁰¹

After considering the matter and in upholding the appeal, the Court had found as follows:

that “in section 33 the adjective “administrative” and not “executive” was used to qualify action and that , that suggested that the test for determining whether the conduct constituted administrative action was not the question whether the action concerned was performed by a member of the executive arm of government. What mattered was not so much the functionary as the function. The question was whether or not the task itself was administrative or not ? that it may very well be... that some legislative acts may constitutes administrative action;

that similarly, judicial officers may from time to time perform administrative tasks. The focus of enquiry as to whether the conduct was administrative action was not an arm of the government to which the relevant actor belongs, but on the nature of the power he or she was exercising;²⁰²

that in determining whether or not an action should be characterised as implementation of legislation or formulation of policy may be difficult ...it depended primarily upon the nature of power ...the source of power though not necessarily decisive was a relevant factor , so too was the nature of power , its subject matter whether it involved the exercise of and how it

²⁰¹ Ibid (at para 140-H).

²⁰² Ibid (67 at para 141A-C).

was closely related to public duty and it was closely related to policy matters which were not administrative and to the implementation of legislation which was;

that difficult boundaries had to be drawn in deciding what should and what should not be characterised as administrative action for the purpose of section 33, that would need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical administration and that can best be done on a case by case basis;²⁰³

that the appointment of inquiry was adjunct to the policy formulation responsibility of the President when the President appointed a Commission of inquiry into rugby, he was not implementing legislation, he was exercising original constitutional power vested in him alone. Neither the subject matter nor the exercise of that power was administrative in character, and that the appointment of the Commission did not therefore constitute administrative action within the meaning of section 33;²⁰⁴

that although the presidential powers in terms of section 84(2) of the Constitution were subject to the constitutional constraints of legality, in appointing the Commission, he acted in good faith and without misconstruing the nature of his powers. That contrary to the past of Parliamentary sovereignty the constraints of exercise of public power, under the new

²⁰³ Ibid (67-68 at paras 143 F-B).

²⁰⁴ Ibid (70 at para 157 E-F).

constitutional dispensation lay not in the administrative law but are found throughout the Constitution, including the right and corresponding obligation that there be just administrative action;²⁰⁵ and

that it was not established by the respondents, that the President acted arbitrarily, capriciously, in bad faith, in furtherance of ulterior or improper purpose or that he misconceived the nature of his discretion when he appointed a Commission.²⁰⁶

In the Pharmaceutical Manufacturers Association of South Africa : In Re Ex parte President of the Republic of South Africa and Others,²⁰⁷ the case arose from the decision of Fabricius's dismissal of the applicant's application in the court a quo, where the applicants had sought to challenge the decision of the President in bringing Act 132 of 1998 into effect. In that case²⁰⁸ the court held that although the President had brought the Act prematurely into force, when he was acting within his powers, in good faith, and acting on the basis of an incorrect advice his decision was not reviewable.

Dissatisfied with Fabricius' decision, the applicants had sought leave to appeal from him which was also refused. The applicants then had applied for and were granted leave by the Supreme Court of Appeal to appeal to the Full Bench of the Transvaal High Court

²⁰⁵ Ibid (70-71 at para 148 -G-B).

²⁰⁶ Ibid (99 -112 at paras 224 and 260 respectively).

²⁰⁷ 2000 (3) SA 241 (CC).

²⁰⁸ Ex parte : President of the Republic of South Africa NO and Others 1999 (8) BCLR 885 (T)

The Full Bench had then reversed the decision of Fabricius, A.J, holding that Proclamation R49²⁰⁹ was null and void and of no force and effect.²¹⁰

Amongst the reasons advanced by the Full Bench were that:

it is well established that delegated powers must be exercised within the limits of the authority that was conferred, if not the purported exercise of power was unlawful and a Court is entitled to set it aside as it would set aside an unlawful act of any other functionary who had acted outside the powers conferred upon it by the legislature;²¹¹ and that insofar as he purported to exercise any discretion that was conferred upon him by the legislature he did so prematurely and without yet having the authority to do so. His act was accordingly of no force, the Act was not validly brought into effect and accordingly the earlier legislation was not lawfully repealed.²¹²

It is noteworthy that the Chief Justice having recapped the provision of section 4 of the interim Constitution had also said

that the said section “laid down the foundation for the control of public power and that is consistent with the provision of section 2, and 44(4) of Act 108 of 1996 which provided that “the exercise of its legislative authority Parliament must act in accordance with and

²⁰⁹ Proclamation R49 issued by the President purported to bring in to operation the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 (herein after called the Act)

²¹⁰ See Pharmaceutical Manufacturers Association of SA and Another : In re Ex parte President of the Republic of South Africa and Others 1999(4) SA 788 (T).

²¹¹ Ibid (at 797 A-D).

²¹² Ibid (at 797- I-798-B).

within the limits of the constitution, that the exercise of all public power must comply with the Constitution which is the Supreme Law and the doctrine of legality which is part of that law”

that the question whether the President acted in intra-vires or ultra-vires in bringing the act into force when he did, is accordingly a constitutional matter; and that the finding that he acted ultravires was the finding that he acted in a manner that was inconsistent with the constitution.²¹³

In dealing with the question of control of public power, the Court referred to *Boulle, Harris and Hoexter*,²¹⁴ where it was pointed out unambiguously that:

in a Constitutional State there are by definition legal limits to power and that the Courts are bestowed with Judicial authority including the competency to determine the legality of various activities of public authorities.

The following line of cases to which the Court had referred is an indication of the new order and new culture of doing things.²¹⁵

²¹³ Ibid para 19-20.

²¹⁴ Constitutional and Administrative Law 1989 : Basic principles.

²¹⁵ The President of the Republic of South Africa and Another v Hugo,²¹⁵ and said “the power of the President to reprieve or to pardon was dealt with under section 82(1) of the Interim Constitution and not under the prerogative of the common law.” Fedsure Life Assurance LTD and Others v Greater Johannesburg Metropolitan Council & Others, and said: the question of legality had to be dealt with under the Constitution and not under the Common law principle of ultravires and SARFU (3) and said: the President’s power to appoint a commission and the exercise of that power had to be dealt with under section 84(2) of the 1996 Constitution and the doctrine of legality and not under the common law principles of the prerogatives.²¹⁵

In dealing with the question of constitutional validity of the President's decision to bring the act in to force, the Court found that the President decision was not an administrative action,²¹⁶ that it was a public power to be carried out lawfully and consistently with the provisions of the Constitution. The court noted that the President was wrongly advised and mistakenly thought it was appropriate to bring the Act in to force.²¹⁷

The cardinal issue which was to be decided by the court was whether the court can interfere with a decision made in good faith by the President in the exercise of such power?

In answering the question the Court had regard to the history and referred to the case of Shidiack v Union Government,²¹⁸ where the court had said the following :

it is settled law that where a matter is left to the discretion or to the determination of the public officer and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the results...No review would lie if he had duly and honestly applied his mind to the question which has been left to his discretion; and

that interference would be possible and right if such officer had acted mala fide or from ulterior or improper motive, if he had not applied his mind to the matter or exercised his discretion at all or if he had disregarded the

²¹⁶ Ibid n 302 (at para 79).

²¹⁷ Ibid (at para 80).

²¹⁸ 1912 (AD) 642.

express provisions of the Statutes and grant relief. But it would be unable to interfere with a due and honest exercise of discretion even if it considered the decision inequitable or wrong.²¹⁹

The Court found that to the extent that the Shidiak's case, required public officials to exercise their powers in good faith and in accordance with other requirements mentioned by Innes, C.J; was consistent with the foundational principle of "the rule of law" enshrined in the Constitution, that however the Constitution required more, that it places further significant constitutional constraints upon the exercise of public power, through the Bill of Rights and the founding principle enshrining the rule of law.²²⁰

The Court found that it is a requirement of the rule of law, that the exercise of public power by the executive and other functionaries should not be arbitrary, that the decisions must be rationally-related to the purpose for which the power was given. Otherwise they are in effect arbitrary and inconsistent with that requirement; that if it did not it fell short of the standards demanded by our Constitution.²²¹ That the test for rationality was objective, otherwise the decision which when viewed objectively was in fact irrational might pass the constitutional muster simply because the person who took it mistakenly and in good faith believed it to be rational, that such a conclusion

²¹⁹ Ibid (at 651-652) per, Innes, C.J.

²²⁰ Reference here was made to the principle of legality, the obligation to act in good faith and not to misconstrue the powers and the right to just administrative action, see SARFU 3 above para 148.

²²¹ Ibid n 383 (at para 85).

would place form above substance and undermine an important constitutional principle.²²²

The Court found that, the Act was not brought into force with the regulatory infrastructure in existence or ready to be put in place, that the schedules were not determined, and the Act was brought in to force in error and that, the absence of the schedules was fundamental,²²³ to the efficacy of the Act.

The Court finally concluded that:

the fact that the President mistakenly believed that it was appropriate to bring the Act into force and acted in good faith in doing so, does not put the matter beyond the reach of the court's powers of review;

what the Constitution required was that public power vested in the executive and other functionaries be exercised in an objectively rational manner, and that the President through no fault of his own failed to act in an objective rational manner;²²⁴ and

that there was no rational basis for the decision except a suggestion that a fundamental error had occurred but the decision itself was clearly irrational.²²⁵

(b) The duty to act reasonably

In the Government of the Republic of South Africa and Others v Grootboom and Others,²²⁶ a case concerning the provision of housing,²²⁷ as a socio-economic right,

²²² Ibid (at para 86).

²²³ Ibid paras (at 87 and 88).

²²⁴ Ibid (at para 89).

²²⁵ Ibid ((at para 90).

the issue was whether or not the government's housing programme had complied with the constitutional obligation imposed by section 26(1) of the Constitution.

The Court held that Section 26 (2) of the Constitution requires the state to devise and implement, within its available resources, a comprehensive and coordinated programme progressively to realize the right to adequate housing and that programme had to include measures that were reasonable both in their conception and implementation.²²⁸

In assessing the reasonableness of the of the measures adopted by the State the Court considered housing problems in their social, economic and historical context and the capacity of institutions responsible for implementing the programme and said:

the programme must be balanced and flexible and make appropriate provisions for attention to housing crises and to short, medium and long term needs;
a programme that excludes a significant section of society cannot be said to be reasonable;
conditions do not remain static and therefore the programme would need continuous review;²²⁹

reasonableness must also be understood in the context of the Bill of Rights as whole. The rights of access to adequate housing is entrenched because we value

²²⁶ 2000(11) BCLR 1169 (CC).

²²⁷ The relevant constitutional provision is section 26 which provides that :
subsection (1) Everyone have the right of access to adequate housing and most importantly for our purpose ,
subsection (2) which provides that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right.

²²⁸ Ibid n 315 (at para 42).

²²⁹ Ibid n. 315 (at para 43) per, Jacobson, J.

human beings and want to ensure that they are afforded their basic human needs;

a society must seek to ensure that the basic necessities of life are provided to all if it is to be a Society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and the extent of the denial of the right they endeavor to realize; and

that those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril must not be ignored by measures aimed at realization of the right.²³⁰

The Court concluded that the State housing programme was not reasonable 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 or crises situations.

Similarly in the case of Minister of Health and Others v Treatment Action Campaign and Others²³¹ where the refusal of government to roll out nevirapine to pregnant mothers and newly born babies where it was medically indicated was in misuse, the Court adopted an objective test in evaluating government's policy and opined that:

the policy of confining nevirapine to research and training sites failed to address the needs of mothers and newly born babies who did not have access to those sites, failed to distinguish between the evaluation of

²³⁰ See Ibid (at paras 44).

²³¹ 2002 (10) BCLR 1033 (CC).

the programme for reducing mother to child transmission and the need to provide access to health care services required by those who do not have access to the sites.²³²

Relevant to the evaluation process the Court referred to the judgment of Jacob J in Grootboom,²³³ and said:

the fact that research and training sites will provide crucial data on which a comprehensive programme for mother to child transmission can be developed that does not mean that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation, nevirapine must be withheld from mothers and babies who do not have access to research and training sites neither could it be reasonably withheld.²³⁴

The Court went further and said to the extent that the government limited the supply of nevirapine to its research and training sites; it was the poor outside the catchments area of the sites who would suffer there was a difference between those who could afford to pay for services and those who could not afford which the state policy failed take into account.²³⁵

The Court acknowledged the daunting challenge confronting the government the provision of education, land, housing, food and social security, but said that:

²³² Ibid (at para 67 –F).

²³³ See in particular para 44 already cited in, n. 319 to this text.

²³⁴ See Ibid n. 320 (at para 68).

²³⁵ Ibid (at para 70 D-E).

they were nevertheless the rights entrenched in the Constitution and that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of the rights and that the government policy was rigid, that it was not reasonable to restrict the use of nevirapine to research and training sites.²³⁶

Consistent with the duty to act lawfully and reasonably there is a duty to act fairly and I turn thereon:

3.3.4. Procedural fairness under the Final Constitution

In the case of De Lille V The Speaker of National Assembly,²³⁷ where a member of Parliament was suspended without a salary. Hlophe, J; made the following observation:

that the suspension of the applicant for 15 days without pay and without having being offered the opportunity, to controvert and contradict the evidence was contrary to the rules of natural justice;

that the appellant was not offered a fair hearing, that the ANC adhoc Committee could not be a Prosecutor , a Judge and a Complainant in its own cause;

that it therefore contravened the nemo iudex insua causa rule, that the ANC prejudged the issue - which was to be decided, its decision was tainted with bias against the appellant; and

²³⁶ Ibid (at para 94).

²³⁷ 1998 (7) BCLR 916 (C).

that, No one had the power to act mala-fide, Parliament included and the Constitution did not intend to authorize bias.²³⁸

The reason according to him was simple, “justice must be rooted in confidence, and confidence is destroyed when right minded people go away thinking the Judge was biased.”²³⁹

The Judge found that, our state is no longer parliamentary state, it is constitutional State, founded on the principles of the Supremacy of the Constitution and the rule of law ,that the Constitution showed a clear intention to break a way from the history of parliamentary supremacy.²⁴⁰

In the unsuccessful appeal case,²⁴¹ the late Mohammed, C.J, in deciding whether or not the National Assembly had lawful authority to suspend the respondent from parliament said the following :

the enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996; it is the supreme law, not parliament; and

²³⁸ Ibid (at para 18F-H) The court had also referred to the Judgment of Chaskalson, C.J, in the case of Executive Council Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995(4) SA 877 (CC) (at paras 61-62), where Chaskalson CJ, had said the following: The New Constitution established a fundamentally different order to that which previously existed , parliament can no longer claim supreme power, it is subject to limitations imposed by the Constitution, it is subject in all respects to the provisions of the Constitution and has only the power vested in it by the Constitution expressly or by necessary implication, that the new order envisaged by the preamble to the Interim Constitution has been realised in terms of section 4 to the Interim Constitution.

²³⁹ See Metropolitan properties Co (FGC) Ltd v Lannon and Others [1969]1 QB577 CA

²⁴⁰ Ibid (at para 30).

²⁴¹ The Speaker of National Assembly v De Lille and Another 1999 (4) SA 863 (SCA)

that it is the ultimate source of lawful authority in the country, no Parliament however bona fide or eminent its membership, no President however formidable be his reputation or scholarship and no official however efficient or well meaning can make any law or perform any act which is not sanctioned by the Constitution.²⁴²

3.3.5. The duty of consultation and procedural fairness

In Doctors for Life international v The Speaker of National Assembly,²⁴³ Parliament had enacted four health statutes, namely, The Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilization Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004, and the Dental Technicians Amendment Act 24 of 2004.

At the heart of the applicant's complaint was that during the legislative process leading to the enactment of the above statute, the National Council of Provinces (NCOP) and the provincial legislatures did not comply with their constitutional obligations as required by the provisions of sections 72(1)(a)²⁴⁴ and 118(1)(a)²⁴⁵ of the Constitution to facilitate

²⁴² Ibid (at para 14 I-B). Comparatively speaking elsewhere in the region in a similar situation, in Smith v Mutasa 1990 (3) SA 756 (ZSC), the Zimbabwean Supreme Court, per Dambutshena, C.J, said the following "that the parliament of Zimbabwe had no authority to deprive Mr Ian Smith, the erstwhile Prime minister of Rhodesia who rebelled against the Crown by unilaterally declaring the Colony independent of his salary, it is true that that the parliament is supreme in the legislative field assigned to it by the Constitution however parliament cannot step outside the bounds of authority prescribed to it by the Constitution. (at 761 G).

²⁴³ CCT 12/05

²⁴⁴ The relevant section provides as follows:

(i) The National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its Committees.

(ii) Conduct its business in an open manner and hold its sittings and that of the committee in public...

²⁴⁵ The relevant section provides that a provincial legislature must:

public participation. The applicant had accepted that the National Assembly had fulfilled its constitutional obligation to facilitate public involvement in connection with the health legislation as required by section 59(1)(a) of the Constitution Act 108 of 1996.²⁴⁶

The issues for our purpose were as follows:

What was the nature and the scope of the duty to facilitate public involvement comprehended in section 72(1)(a) and 118(1)(a) of the Constitution ? and

Whether or not the NCOP and the provincial legislature complied with the constitutional obligation to facilitate public involvement as contemplated by sections 72(1)(a) and 118(1)(a) of the Constitution?

In answering these questions, the Constitutional Court found that the answer rested on two propositions:

First, that section 72(1)(a) imposed an obligation on the NCOP to facilitate public involvement in the legislative process and those of its committees, that the word “must” in the section denotes an obligation. The Court referred to the equivalent of section 72(1)(a) viz section 59(1)(a),²⁴⁷ and in particular to the judgment in the case of King and

(a) facilitate public involvement in the legislative and other processes of the legislature and its committees ;and

(b) conduct its business in an open manner and hold its sittings and those of its committees in public...

²⁴⁶ The relevant section provides that The National Assembly must:

(a) Facilitate public involvement in the legislative and other processes of the Assembly and committees; and

(b) Conduct its business in an open manner, and hold its sittings , and those of its committees in public ...

²⁴⁷ See Ibid n. 365 for the reading of the relevant provision.

Others v Attorneys Fidelity Fund Board of Control and Another²⁴⁸ where the Supreme Court of Appeal held that the section imposes an obligation on Parliament to facilitate public involvement in its legislative process²⁴⁹ and found that holding to be plainly correct.²⁵⁰

The Court referred to three provisions of the Constitution namely section 72 of the Constitution relevant to the NCOP²⁵¹, section 59 relevant to the National Assembly²⁵² and section 118, identical provisions relevant to the Provincial Legislatures.²⁵³ The Court found that the provisions of section 72(1) (a) and 118 clearly imposed a duty on the NCOP and the Provincial Legislatures to facilitate public involvement in their respective legislative processes.²⁵⁴

The Court found that the contentions of the parties required the Court to consider the meaning and scope of the duty to facilitate public involvement that, that duty must be construed and understood in the light of the following:

- (i) the constitutional role of the NCOP in the national legislative process and in particular, its relationship with the Provincial Legislatures;
- (ii) the right to political participation under international and foreign law; and
- (iii) the nature of our constitutional democracy, and that the three gave the context within which to determine the meaning and scope of the duty to facilitate public

²⁴⁸ 2006(1) SA 474(SCA).

²⁴⁹ Ibid (at para 19).

²⁵⁰ Ibid n 362 (at para 14).

²⁵¹ For a full outline of the provision , see n .384.

²⁵² For a full outline of the provision , see n. 386.

²⁵³ For a full outline of the provision, see n. 385.

²⁵⁴ Ibid n. 383 (at para 75).

involvement in the legislative process.

In determining the NCOP constitutional role, the court found that the legislative authority is vested in Parliament, consisting of two houses - the National Assembly and the NCOP,²⁵⁵ that the role of the NCOP was to represent provinces, to ensure that their provincial interests were taken into account in the national sphere of government. “ It does that by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces”²⁵⁶

The Court further found that the NCOP functions were similar to those of the National Assembly but that the NCOP was performing its functions from a vantage point of representing the interest of province, that its role was both unique and fundamental to the basic structure of our government.²⁵⁷

The Court found that the procedure for enacting legislature under the Constitution required institutional cooperation and communication between the national and provincial legislatures.²⁵⁸

The court found that the duty to facilitate public involvement was an aspect of the right to political participation and that International and Regional Human Rights instruments provided useful guide to the duty to facilitate public participation.²⁵⁹

²⁵⁵ See section 43 of the Constitution.

²⁵⁶ See section 42(4) of the Constitution, which captures the role of the NCOP.

²⁵⁷ Section 40 provides that : “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.”

²⁵⁸ Ibid n. 383. Para 81.

The court found that the right to political participation consists of two elements namely

a general right to take part in the conduct of public affairs,

and

a specific right to vote and to be elected.²⁶⁰

The Court further referred to Article 25 of the International Covenant on Civil and Political Rights (ICCPR),²⁶¹ and further to Article 21 of the Universal Declaration of Human Rights (UDHR).²⁶² The court found that the ICCPR not only guaranteed a right but also an opportunity to take part in the conduct of public affairs, and that imposed a positive obligation on the state to ensure that their citizens have the opportunity to exercise their right to political participation.

The Court further found that the right to political participation must be understood in the light of the of Article 19 of the ICCPR,²⁶³ on freedom of expression, that the two Articles taken together imposed a duty on states to facilitate participation in the conduct

²⁵⁹ Ibid para 89.

²⁶⁰ The Court had referred to the work of Ebberson "The Notion of Public Participation in International Environmental Law" (1997) 8 Yearbook of International Environmental Law 51 at 70-2

²⁶¹ "Every citizen shall have right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

²⁶² The relevant Article provides equally as follows :Everyone has the right to take part in the Government of his country directly or through freely chosen representatives

²⁶³ The relevant Article provides in sub -article 2 that :Everyone shall have freedom expression which shall include the freedom to seek ,receive and impart information and ideas of all kinds regardless of frontiers either orally in writing or in print in the form of art or through any other media of his choice .

of public affairs and ensure that citizens have the necessary information and effective opportunity to exercise their right to political participation.²⁶⁴

Regionally the court referred to the Banjul Charter (the African Charter on Human and Peoples Right, which is more specific than the ICCPR, in terms of spelling out the obligation's of state parties to ensure that people are well informed of the rights in the African Charter. The relevant Articles are: 9²⁶⁵, 13²⁶⁶ and 25.²⁶⁷ Similarly the Court referred to the Inter American Convention on Fundamental Rights, in particular Article 23.²⁶⁸ The court finally referred to Article 4²⁶⁹ of the Commonwealth Declaration of 1991. The Court further referred to the Inter American Democratic Charter²⁷⁰.

Thirdly the Court considered the nature and scope of the right to political participation in International law, and found that the precise nature and scope of the right to political participation in the conduct of public affairs is a matter left to individual states through

²⁶⁴ Ibid n. 383 (at para 92)

²⁶⁵ Article 9 provides that:

(1) Everyone shall have the right to receive information

(2) Every individual shall have the right to express and disseminate his opinions within the law

²⁶⁶ Article 13 provides as follows :

(1) Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law .

²⁶⁷ Article 25 provides that :

States parties to the present Charter shall have the duty to promote and ensure through teaching education and publication , the respect of the right and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding obligations and duties are understood .

²⁶⁸ The relevant Article provides that all citizens shall enjoy the right and opportunity to take part in the conduct of public affairs directly or through freely chosen representatives .

²⁶⁹ The relevant Article proclaims the individual's inalienable right to participate by means of free and democratic process in framing the society in which he or she lives .

²⁷⁰ In particular the Preamble which reaffirms the participatory nature of democracy in the American countries in different aspects of public life contribute to the consolidation of democratic values and to freedom and solidarity in the hemisphere and further Article 2 of the said Charter which provides that representative democracy is strengthened and deepened by permanent , ethical and responsible participation of the citizenry within the legal framework conforming to the respective constitutional order.

laws and policies and that states are to establish policies and means by which individual citizens exercise the right to participate in the conduct of public affairs in national constitutions and other laws.²⁷¹

The Court found that in South Africa, the traditional means of public participation was through the Imbizo /Lekgotla or bosberaad which is a particular consultative process followed in African countries used to discuss issues affecting the community .

The court further found that the forum was used by government, was a practical and symbolic part of our democratic process and a form of participatory democracy.²⁷²

The Court also found that the idea of public participation had deep historical roots dating back from the Middle-Ages and was also guaranteed by the Magna Carta, the First Amendment to the United States Constitution,²⁷³ and Article 17 of the Basic Law of the Federal Republic of Germany.²⁷⁴ The Court referred further to the Constitution of Tanzania²⁷⁵ and similarly to the Constitution of Portugal,²⁷⁶ and to the Constitution of

²⁷¹ See the Human Right Committee General Comment No 25. The right to participate in public affairs , voting rights and the right.

²⁷² Ibid n 383 para 101.

²⁷³ Which provides in similar terms that: "the people have the right to petition the government for redress of grievance"

²⁷⁴ Which provides in similar terms that : " Everyone has the right individually or jointly with others to address written requests or complaints to the competent authorities or to the legislature complaints to Parliament or Other appropriate authorities"

²⁷⁵ In particular Article 21 (2) which provides that : " Every citizen has the right and freedom to participate fully in the process leading to the decision on matters affecting him , his well-being or the nation"

²⁷⁶ In particular Article 52(1) which provides that: " all citizens have the right to present individually or jointly with others petitions , representations ,claims or complaints to the organs of the sovereignty organs of government of autonomous regions or any authority for the purpose of defending their rights ...and he right to informed within a reasonable time of the k results of the respective consideration"

Columbia.²⁷⁷ Finally the Court referred to section 19 of the Constitution²⁷⁸ and said the duty to facilitate public involvement was a manifestation of International law right to political participation and that, the right in the Constitution was more specific than the one in Article 25 of the ICCPR.²⁷⁹

The Court finally found that the Constitutional Assembly in framing the Constitution was not content with the right to vote as an expression of the right to political participation, but opted for a more expansive role in the conduct of public affairs by placing a higher value on public participation.²⁸⁰ The Court drew support from an excerpt from the Ms N. Mokonyane, a Gauteng member of the NCOP where she said the following:

we were also inspired by the idea of participatory democracy as well as a system in which the people of our country will on an ongoing basis participate in and have a say in every aspect of their lives, in workplaces, communities, streets and schools.²⁸¹

²⁷⁷ Which provides in Article 103 that: "the people's means of participating includes the vote, plebiscite, referendums, popular consultation, the open town council meeting, legislative initiative and the recall of officials"

²⁷⁸ The relevant section provides that: Every citizen is free to make political choices, which includes the right: (a) to form a political party,

(b) to participate in the activities of, or recruit members for, a political party

(c) to campaign for a political party or cause.

(2)...to free, fair and regular elections for any legislative body...

(3) Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution and to do so in secret.

²⁷⁹ Ibid n383 para 107.

²⁸⁰ Ibid para 108.

²⁸¹ See the Proceedings of the National Council of Provinces, 4 November 2005 (at 102-3).

On the issue of the nature of the South African constitutional democracy, the Court found that the International law shared a common notion that a nation sovereign authority is one that belongs to its citizens, who themselves should participate in government though the form of participation varies in degrees.²⁸²

The Court referred to the Preamble to Constitution which provides inter alia that:

Lays the foundation for a democratic and open ,society
in which government is based on the will of the people.²⁸³

The Court further found that public participation is further demanded by the provisions of sections 59, 72 and 118 of the Constitution already outlined above and said through these provisions the public had reserved for itself part of the sovereign legislative authority that they have otherwise delegated to the representative bodies that they have created,²⁸⁴ and that our constitutional democracy was based on the will of the people.²⁸⁵

The Court referred further to the founding values as including a multi party system of democratic government to ensure accountability, responsiveness and openness.²⁸⁶ The court further found that, that our constitutional democracy is not only representative but also contains participatory elements.²⁸⁷

The Court traced the nature of this country's constitutional democracy from the historical foundations of the People's Power as an alternative to the undemocratic

²⁸² Ibid n 383(at para 109).

²⁸³ The Preamble to the Constitution .

²⁸⁴ Ibid n. 110.

²⁸⁵ See the preamble to the Constitution.

²⁸⁶ See section 1 (d) of the Constitution.

²⁸⁷ Ibid n.383(at para 111).

system of apartheid, a system that denied the people a say in the making of laws which governed them,²⁸⁸ that consistent with the participatory nature of our democracy Parliament had developed the concept of the People's Assembly, which gives meaning to the People's Parliament by building on the legacy of active participation by the public as reflected in the Kliptown gathering of 1955.²⁸⁹

The Court noted the importance that the Commission on Public Participation attached to public participation in the context of our constitutional democracy,²⁹⁰ and added its voice in the following manner :

in the overall scheme of our Constitution the representative and participatory elements of our democracy should not be seen as been in tension with each other, they must be seen as mutually supportive; that general elections, the foundation of representative democracy, would be meaningless without massive participation by the voters;

that the participation by voters provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, they identify themselves with the institutions of government and becomes familiar with the laws as they are made; and

that it strengthens legitimacy in the eyes of the people, finally because of its open and public character it acts as a counterweight to secret lobbying and influence peddling,

²⁸⁸ Ibid (at para 112).

²⁸⁹ I must add that the Kliptown gathering culminated in the writing of the Freedom Charter amongst whose principles was that the People shall govern.

²⁹⁰ Ibid n. 383 (at para 114).

participatory democracy is of special importance to those who are relatively disempowered, in a country like ours where great disparities of wealth and influence exist.²⁹¹

The Court on this aspect concluded that the democratic government that was contemplated was partly representative and partly participatory, accountable, responsive and transparent and made provision for public participation in the law-making process and that Parliament therefore must function in accordance with the principles of our participatory democracy.²⁹²

On the question of meaning and the scope of the duty to facilitate public involvement, the Court found that public involvement was not a unique South African concept, that it was used in the United States of America in the context of rule-making by administrative agencies as a requirement in the rule-making process by those agencies.

In the international terrain, the Court found that there were a growing number of International instruments which made provision for the principle of public participation in particular in the context of environmental issues.²⁹³ The Court noted that the phrase "public participation" was commonly used to refer to active participation of the public in

²⁹¹ Ibid (at para 115).

²⁹² Ibid (at para 116).

²⁹³ The court referred to the Rio Conference on Environment and Development of 1992, where 150 States agreed that :

"environmental issues are best handled with the participation of all concerned citizens...and that States shall facilitate and encourage public awareness and participation by making information widely available"

the decision-making process and that the words “pubic involvement” and “public participation” were often used interchangeably.²⁹⁴

The Court noted that the phrase “facilitate public involvement” was a broad concept relating to the duty to ensure public participation in the law making process and singled out the key words “facilitate” and “involvement” in order to define them. The Court found that the word to “facilitate” meant “to make easy or easier promote or help forward”,²⁹⁵ that the dictionary definition of “involve” included to bring a person in to a matter”,²⁹⁶ whilst “participation” was defined as “taking part with others in an action or matter ...the active involvement of members of the community or organization in decisions which affected them”²⁹⁷

The Court further found that the plain and ordinary meaning of the words “public involvement or public participation” refers to “the process by which the public participates in something , that facilitation of the public involvement in the legislative process therefore meant the taking of steps to ensure that the public participate in the legislative process” and that that was the plain meaning of section 72(1) (a).²⁹⁸ The Court found that construction to be consistent with the participatory nature of our democracy; that the Constitution calls for an open and transparent government and

²⁹⁴ Ibid n. 383 (at para 118).

²⁹⁵ The New Shorter Oxford English Dictionary. 5th ed Oxford .Claredon Press. (1993).(p.903).

²⁹⁶ Ibid (at 1412).

²⁹⁷ Ibid (at 2109).

²⁹⁸ Ibid n. 383 (at para 120).

required public participation in the making of laws by Parliament and deliberative legislative assemblies.²⁹⁹

The Court noted that although Parliament and the provincial legislatures have a wide measure of discretion,³⁰⁰ and although what was required by section 72(1) (a) could vary from one case to the next, the NCOP must nonetheless act reasonably in carrying out its duties to facilitate public involvement in its process.³⁰¹

The Court referred to what was said by Sachs, J. in New Clicks where the judge made the following observation:

...what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say, what amounts to a reasonable opportunity will depend on the circumstances of each case.³⁰²

The Court found that the standard of reasonableness is used throughout the Constitution, for example in regard to the government fulfilment of the positive obligation to realise socio-economic rights; and was specifically used in the context of public access to the proceedings of the NCOP and its committees.³⁰³

²⁹⁹ See Minister of Health and Another No v New Clicks South Africa Pty Ltd and Others 2006 (2) SA 311 (CC) (at paras 111-3).

³⁰⁰ Ibid (at para 124).

³⁰¹ Ibid (at para 125).

³⁰² Ibid n. 485(at para 630).

³⁰³ Section 72(1) (b) provides that reasonable measures may be taken to regulate access to the proceedings of the NCOP or its committees. .. and section 72(2) permitted the exclusion of the Public or the media from a sitting of the committee, if it is reasonable and justifiable to do so in an open and democratic society, and that the test was objective. See further Ibid (at para 127).

The Court found that the question whether the legislature had acted reasonably depended on a number of factors, which were: the nature and importance of the legislation, the intensity of its impact on the public and that reasonableness also take into account time and expense, however the saving of money and time in itself did not justify inadequate opportunities for public involvement.³⁰⁴

The Court noted that of central importance was that, the legislature must have taken steps to afford the public reasonable opportunity to participate effectively in the law-making process and that depended on two legs namely the duty to provide meaningful opportunity for public participation and the duty to take measures to ensure that the public have the ability to take advantage of the opportunity provided.³⁰⁵

On the duty to take steps to facilitate public involvement, the Court found that:

consistent with that duty, Parliament and the provincial legislature must provide notice of and information about legislation under consideration and the opportunities for participation that are available, including the provision of education information and learning, consistent with Article 25 of the African Charter which imposes an obligation on state parties to promote and ensure through teaching, education and publication, the right to political participation.³⁰⁶

³⁰⁴ Ibid (at para 128).

³⁰⁵ Ibid (at para 129).

³⁰⁶ Ibid (at para 131).

The Court found that the above practice was also consistent with the interpretation of the ICCPR by the U.N. Human Rights Committee where it said:

whatever form of constitution or government is in force the ICCPR requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.³⁰⁷

The Court found that the NCOP and the Provincial legislatures should create conditions that are conducive to the effective exercise of the right to participate in the law-making process and that, that could be realised in various ways including road shows, regional workshops, radio programs and publications, aimed at educating and informing the public about ways to influence Parliament.³⁰⁸

Consistent with the above, the Court also recognised the report of the Inter-Parliamentary Union on South Africa, where it acknowledged the important role Parliament of South Africa had played in the following terms :

a whole set of activities have been developed, public education office, which had developed democracy road shows with the aim of taking parliament to the people, the use of broadcasting, the use of more campaigns, targeted on organized civic education for rural women and the youth, and the use of Parliamentary web site, to reach out to the public.³⁰⁹

³⁰⁷ See Human Right Committee General Comments No 25 Ibid note 457 (at para 1).

³⁰⁸ Ibid n. 383(at para 132).

³⁰⁹ Report to the Second World Conference of Speakers of Parliaments, New York 7-9 September 2005 (at 21).

With regard to the nature and powers of the NCOP to facilitate public participation in the law-making process, the Court found that, that the Constitution valued public participation in the law-making process, that it was apparent from the powers and duties of the legislative organs of state that the Constitution contemplated that the public will participate in the law-making process.

The Court found those powers included to summon any person, to give evidence or to produce documents³¹⁰, to require any institution or person to report to it,³¹¹ to receive petitions, representations, or submissions from any interested person or institution,³¹² and that in addition when it makes rules and orders it must do so with due regard to the representative and participatory elements in our democracy, accountability, transparency, and public involvement.³¹³ It must conduct its business in an open manner and hold its sittings and that of its committees in public.³¹⁴ It must provide public access to its proceedings and those of its committees³¹⁵ and may not exclude the public from the sittings of its committees unless it is reasonable and justifiable to do so in an open and democratic society.³¹⁶ Similar provisions apply to the National Assembly, and the Provincial legislatures,³¹⁷ and all of them facilitate public participation.³¹⁸

³¹⁰ Section 69 (a) of the Constitution.

³¹¹ Section 69 (b) of the Constitution.

³¹² Section 69 (d) of the Constitution.

³¹³ Section 70 (1)(b) of the Constitution.

³¹⁴ Section 72 (1) (b) of the Constitution.

³¹⁵ Section 72 (1) (b) of the Constitution.

³¹⁶ Section 72(2) of the Constitution.

³¹⁷ Section 115 of the Constitution.

³¹⁸ Ibid n. 383 (at para 136).

The Court referred further to what was said by Chaskalson, C.J; in New Clicks , where learned judge expressed himself as follows concerning section 59

the Preamble to the Constitution sets as a goal the establishment of a society based on democratic values , social justice and fundamental human rights and declares that the Constitution lays the foundation for a democratic and open society ...and section 1 establishing the founding values included, as part of those values a multi party system of democratic government, to ensure accountability, responsiveness and openness;

that it was apparent from section 57(1)(b) that the democratic government that was contemplated was a participatory democracy which is accountable, transparent and makes provision for public involvement; and

that consistent with that was section 59(1) of the Constitution and similar provisions relating to the NCOP, the provincial legislatures and the local government and that the Constitution calls for an open and transparent government and requires public participation in the making of laws and deliberative legislative assemblies.³¹⁹

Similarly the Court referred to the case of King , where the following observation was made regarding public involvement:

Public involvement might include public participation through the submission of commentary and representation but that is not definitive nor exhaustive of its content. It is plain that by imposing on parliament the obligation to facilitate public involvement in its process, the Constitution

³¹⁹ Ibid n 485 (at paras 111-3)

sets a base standard but then leaves Parliament significant leeway in fulfilling it.³²⁰

The Court noted that public participation in the law making process of the NCOP was the end to be achieved and that to hold otherwise would have been contrary to the participatory nature of South African democracy and the Constitution's commitment to the principles of accountability, responsiveness and openness.³²¹

The Court noted that the conventional method of public participation in the parliamentary process of law-making was through written submissions or oral representations on the Bill under consideration by parliament or through a combination of both written and oral submissions³²² and that those methods were consistently followed by both Parliament and Provincial legislatures as evidenced by the respective rules.³²³ Consistent to that approach was the Parliamentary Workshop on Public participation's observation that:

the instruments of public participation include public hearings and the constitutional obligation to ensure that the views of the broader public are heard by conducting public hearings about draft legislation and amendments to legislation is vigorously implemented at both national and provincial levels.³²⁴

³²⁰ Ibid n 390(at para 22).

³²¹ Ibid n 383(at para 141).

³²² Ibid(at para 142).

³²³ Reference was made to the Joint Rules of Parliament Rule 6(1) (ii) Rules of the NCOP ,Rule 5(1) (c) (iii), Standing Rules of the Eastern Cape Provincial legislature, Rule 32.1 .

³²⁴ See Parliament of the Republic of South Africa People's voices : shaping the future Report of the People's Assembly 2005 in Announcements , Tabling and Committee Reports No 63.5 June 2006 . (at section 1.1).

The Court also referred to the Human Rights Committee's observation to the effect that:

prior consultations such as public hearings or consultation with the most interested groups ...have evolved as public policy in the conduct of public affairs under ICCPR ... the public exercise influence through debate and dialogue with their representatives or through their capacity to organize themselves.³²⁵

The next question to be decided by the Court was whether or not the NCOP and the provincial legislature complied with the imperatives of public involvement?

In considering the issue the Court made two observations:

the Constitution contemplated that national legislation must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf, that no such legislation was in place and the provinces followed a different but substantially similar procedure and that whatever procedure had been followed must have been in compliance with the mandatory provisions of section 118(1) (a) of the Constitution;

that when the Bills were referred to the NCOP representations that were received by the National Assembly were also forwarded to the NCOP presumably for its information, to determine how best the provincial interests may be catered for in the law making process; and

that however the NCOP could not have had regard to those representations only, without more in complying

³²⁵ See Human Rights Committee, General Comments No 25 Ibid 457 (at para 8).

with its duty to facilitate public involvement in its legislative process and those of its committees and the same was true of the provincial legislatures and that both the NCOP and the provincial legislatures have a crucial role to play to ensure that the provincial interests are represented by giving people in the provinces an opportunity to participate in their respective legislative process.³²⁶

It was against that background that the steps taken by the NCOP and the various provinces to facilitate public involvement were to be reviewed, but first to be considered was the evidence of the NCOP Select Committee.

Commenting on the evidence of the Select Committee, the Court found:

that it included several broad and sweeping claims among other things that, the NCOP Select Committee and the respective provincial portfolio committees have conformed with the requirements of sections 59, 72, and 118 of the Constitution by holding public hearings ...by inviting members of the public to participate either by making written or submissions and by extensively advertising the fact that the committee will be meeting in relation to one or more of the contested Bills.³²⁷

The Court found that the allegations were largely unsupported by documentary evidence, that some of the allegations were inconsistent with the documents furnished by the

³²⁶ Ibid n 383 (at para 150).

³²⁷ Ibid (at para 153).

respondents and with what the Court was told in oral argument, that there were no suggestion on record that the NCOP had held public hearings or invited written representation on any of the Bills.

With regard to the provincial legislatures the Court found that some but not all provincial legislatures held hearings, that some provincial legislatures considered written representations that were submitted to them but it was not clear on record whether any of them invited new or supplementary representation from the public.³²⁸

In the result the Court found, that it had to deal with a great deal of evidence that left much to be desired, which was unfortunate because the facts were crucial in determining whether or not the NCOP had complied with its constitutional obligations.³²⁹ The Court accepted the view that the NCOP Select Committee had taken the view that it was desirable to hold public in respect to the Choice on Termination of Pregnancy Amendment Act (CTOP) and the Traditional Health Practitioner's Bill (THP) pursuant to the requests by interested parties in the provinces.³³⁰

On the question whether the duty of the NCOP to facilitate public involvement in the legislative process could be met through public hearings conducted by provincial legislatures, the Court found that there were functional and practical considerations that

³²⁸ Ibid (at para 154).

³²⁹ Ibid (at para 155).

³³⁰ Ibid (at paras 156, 157 and 158).

weighed in favour of conducting public hearings in the provinces than at the seat of the NCOP in Cape Town.³³¹

Following from the above, the Court found that :

there was a common interest between the NCOP and the provincial legislatures pertaining to legislation affecting provinces, that they both had a constitutional obligation to ensure that the provincial interests were taken in to account in the national legislative process;

that least three members of each provincial delegation were members of the provincial legislature, sat and took part in the provincial committees of their respective legislature;

that the committees were the engine rooms of the provincial legislature considered legislation and have a conferring mandate on the NCOP and were thus where hearings are held and submissions considered;³³²

that on the practical side, if the NCOP was to conduct provincial hearings it could have allocated substantial amount of time and money to send its committee members to each province;

on the other hand ordinary people might not have been able to have attended the hearings of the NCOP conducted in Cape Town due to financial and other constraints;

that the holding of hearing in the provinces was of great value to the provincial community and provided them

³³¹ Ibid (at para 159).

³³² Ibid (at para 160).

with the opportunity to be present when the laws were made and to take part in the law making process; and that it would have been a waste of government limited resources if both the NCOP and the provincial legislature were to conduct separate public hearings in the provinces.³³³

The Court was satisfied that the question whether or not the provincial hearings conducted by the provincial legislatures were sufficient to satisfy the obligation of the NCOP under section 72((1) (a) depended on the facts and the nature of the process of facilitating public involvement that had occurred in the provinces, including the extent to which the NCOP delegations were involved and had access to information gathered during the process and that it was reasonable for members of the NCOP to have taken a decision to conduct public hearings in provinces, provided that the provinces in fact hold those hearings and those proceedings are attended by NCOP members or that the NCOP had accessed the reports of those proceedings and that once the NCOP had decided upon a particular mode of involving the public in the legislative process and had notified interested parties, it must be held to its decision unless satisfactory explanation is given for failure to give effect to that decision.³³⁴

³³³ Ibid (at para 161).

³³⁴ Ibid n 383 (at paras 164 and 165).

In Matatiele Municipality and Others v The President of the Republic of South Africa and Others, (Matatiele (2))³³⁵ Parliament had adopted the Twelfth Amendment to the Constitution, which altered the basis for determining provincial boundaries, the provincial boundaries were no longer based on Magisterial districts, but were now to be determined on the basis of municipal areas, the consequences of which the boundary between the Provinces of Kwazulu-Natal and Eastern Cape was altered. Among the other changes, the area that previously formed the local Municipality of Matatiele had been transferred from Kwazulu- Natal to the Eastern Cape, consequently creating new municipal boundaries.³³⁶

It was that transfer of Matatiele Local Municipality which was at the centre of the constitutional challenge. The matter was heard as one of urgency on the 14 February 2006. Although there were substantial issues on the papers as to whether the Twelfth Amendment had been adopted in accordance with the procedures as set out in the Constitution, that point was not pursued in argument. It also appeared that it was conceded on behalf of the applicants that the Twelfth Amendment had been adopted in accordance with the provisions of the Constitution.³³⁷

In the course of considering the matter it had appeared to the Court that there was substantial issues on the papers as to whether the Twelfth Amendment had been adopted in accordance with the procedures as set out in the Constitution.³³⁸

³³⁵ 2007(1)BCLR 47 (CC).

³³⁶ Ibid (at para 2)

³³⁷ Ibid (at para 5)

³³⁸ Ibid (at para 6).

It also appeared that the municipal elections were to be held on the 1 March 2006 and that it was impractical to attend to those matters prior to that date, but all the same, it was necessary to give an indication as to whether the elections should go ahead. Inevitably on the 27 February 2006, the Court delivered its judgment rejecting the applicant main argument.³³⁹ The Court further ruled that the elections should go ahead.³⁴⁰ The Court did not finally decide the constitutional validity of the Twelfth Amendment or the Repeal Act nor dealt with the question whether the appellant were entitled to approach the Court directly.

The Court further held that Parliament had the constitutional authority to re-draw the provincial boundaries and to affect municipal boundaries, in so far as that was necessary for the purpose of altering provincial boundaries.³⁴¹ The Court further held that in altering the provincial boundaries the Twelfth Amendment did not usurp the powers of conferred on the Municipal Demarcation Board by section 155 (3) (b) of the Constitution and therefore not inconsistent with the Constitution on that ground.³⁴²

The main issue was whether the affected communities were adequately consulted?

On that issue the Court made the following observation:

that our Constitution contemplated a democracy that is representative and also that it contained elements of participatory democracy;³⁴³ a democratic and open

³³⁹ The argument that in adopting the Twelfth amendment, Parliament unconstitutionally usurped the powers of the Municipality Demarcation Board to re-determine boundaries contrary to section 155(3) b of the Constitution.

³⁴⁰ See Matatiele Municipality and Others v The State President of the Republic of South Africa and Others 2006(5) BCLR 622 (CC) (dubbed Matatiele 1) (at para 80).

³⁴¹ Ibid (at para 83).

³⁴² Ibid (at para 85).

³⁴³ Ibid n 139 (at para 40)

society based on the will of the people;³⁴⁴ and that, that was consistent with the provision of section 118 (1) (a) of the Constitution.

The Court,³⁴⁵ further found that:

when the provincial legislatures made rules ...they were required to do so with regard to representative and participatory democracy, accountability, transparency and public involvement;³⁴⁶

that the provincial legislatures were required to hold public hearings,³⁴⁷ and to receive petitions, representations or submissions from any interested persons or institutions;³⁴⁸

that they were required to conduct their business in an open manner and hold their sittings and those of their committees in public;³⁴⁹ and

that may not exclude the Public from the sittings of their committees unless it is reasonable and justifiable to do so in an open and democratic society.³⁵⁰

Having articulated the constitutional requirements of consultation, the next issue to be decided was whether or not the provincial legislatures of Kwazulu-Natal and the Eastern Cape have complied with the provisions of section 118(a) of the Constitution.

³⁴⁴ See the Preamble to the Constitution

³⁴⁵ Ibid n. 121(at para 56).

³⁴⁶ See section 116 (1) (b) of the Constitution , for similar provisions in relation to the National Assembly see section 57 (1) (b) of the Constitution, and section 70 (1) (b) in relation to the national Council of Provinces .

³⁴⁷ See section 115 (a) (b) of the Constitution .

³⁴⁸ See section 115 (d) of the Constitution.

³⁴⁹ See section 118 (1) (b) of the Constitution .

³⁵⁰ See section 118 (2) of the Constitution.

The Court found that the Eastern Cape had complied with its duty to facilitate public involvement in relation to the constitutional amendment by holding public hearings in the affected areas.³⁵¹

On the other hand, the Court found that the Kwazulu-Natal provincial legislature had acted unconstitutionally in failing to hold public hearings or invite written representations.³⁵²

The Court advanced the following reasons for its holding of on the part of the Kwazulu -Natal provincial legislature:

that the legislation involved was a constitutional amendment that would have altered the boundary of Kwazulu-Natal and would have had the effect of relocating the whole Communities from one province to another;

that the legislation in question had a direct and profound impact on a discrete and identifiable section of the population (by the stroke of a pen the people of Matatiele were to be relocated from the province of Kwazulu-Natal in to the province of the Eastern Cape;

that it was true that they were not physically relocated, they remain in the same homes and in the same streets.. and in the same neighborhoods. But the difference was that they now lived in another province which is not their choice; and

³⁵¹ Ibid n. 121 (at para 73).

³⁵² Ibid (para 84).

that the attachment of individuals to provinces in which they lived should not be underestimated.³⁵³

The Court referred to what was said by M.R. Justice Field in The State of Virginia v The State of Tennessee³⁵⁴ where the Justice said the following:

there are natural sentiments and affections which grow up for places in which persons had long lived, the attachment to province, to home and to family, on which is based all that is dearest and most valuable in life.³⁵⁵

The Court further observed that:

the fundamental rights of citizenship including the right to enter and to remain in and to reside anywhere in the Republic was affected,³⁵⁶ that citizens of South Africa, whether rich or poor, have the right to live in the province of their choice;³⁵⁷

that the proposed boundary alteration threatened an important and not easily reversible change to the provincial status of a clearly defined section of the population;

that the consequences of such amendment were of considerable symbolic importance,

that they affected the identity of the people to be transferred; and

³⁵³ Ibid (at para 79).

³⁵⁴ 148. U.S.503 .(1892).

³⁵⁵ Ibid (at para at 524).

³⁵⁶ See section 21 (3) of the Constitution.

³⁵⁷ See Ibid n. 121 (at para 80).

that of great practical importance, they changed the structures and personnel responsible for their welfare payments, health services and education.³⁵⁸

The Court found that the provincial legislature of Kwazulu-Natal was the legislative organ of the State entrusted by the Constitution to safeguard the interest of the province, in particular its territorial integrity, that the need for consultation with the people of Matatiele was intense particularly because the Municipal Demarcation Board entrusted with a constitutional authority to determine municipal boundaries, having consulted and listened to the people came to a completely different conclusion.³⁵⁹

In summary the Doctors for life International and the Matatiele decisions teach us that there is a new order, or culture of doing things, they are both instructive on the culture of adequate consultation, adequate representation and adequate involvement of all communal structures in legislative decision-making, the re-drawing of municipal boundaries and indeed in all other processes that may affect communities in future.

In the case of Billy Lesedi Masethla v The President of the Republic of South Africa and Another,³⁶⁰ concerning the suspension and the unilateral amendment of conditions of service of the applicant and the eventual termination of his employment, the trial judge, Du Plessis, J, had dismissed two review applications brought by the applicant against the President.³⁶¹

³⁵⁸ Ibid (at para 81).

³⁵⁹ Ibid (at para 82)

³⁶⁰ CCT 01/ 07.

³⁶¹ The judgement of the Court was unreported at the time of writing.

The court aqou found that the President had effectively dismissed Masetlha, though he had done so unilaterally by bringing forward the expiry date of his contract, that section 209³⁶² of the Constitution which granted the President the power to appoint the heads of intelligence services had to be read as implicitly also granting him the right to terminate that appointment.³⁶³

Dissatisfied with the findings of the Pretoria High Court, the applicant approached the Constitutional Court directly seeking declaratory orders in the following terms: that the President had no powers to suspend him from his post or to alter unilaterally his terms of employment. Alternatively he sought an order setting aside the two decisions of the High Court as irregular.³⁶⁴

The main issue to decided by the Constitutional Court was whether the amendment of the applicant's term of office or to dismiss him was constitutionally permissible.³⁶⁵

With regard to the constitutional validity of the president's power to dismiss, the it is respectfully submitted that the majority judgment of Moseneke, D,C,J exhibited a

³⁶² The relevant section is section 209(2) of the Constitution which empowers the President to appoint the head of the NIA, it provides that "the president as head of the national executive must appoint a woman or a man as head of each Intelligence Service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility"

³⁶³ See Sam Sole in his article entitled "Masethla v Mbeki: Round 7" in Mail & Guardian Online [http: www.mg.co.za](http://www.mg.co.za) (at 1).

³⁶⁴ Ibid (at para 4).

³⁶⁵ Ibid (at para 25) per Honourable Moseneke. DCJ.

high degree of judicial self-restraint and seemed not to advance the cause of human rights in terms of section 39(2), as it appears from the following paragraphs :

the power to dismiss is necessary in order to exercise the power to appoint ...without the competence to dismiss the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office whatever the circumstances might be; that would indeed lead to absurdity and severely undermine the constitutional pursuit of the security of this country, and its people, that is why the power to dismiss is an essential collary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution; there is no doubt that the power to appoint under section 209(2) of the Constitution and the power under the ISA implied the power to dismiss; and I cannot find any valid reason, why as suggested by the applicant the power to dismiss may be inferred from the provisions of section 3(3) of ISA but not from those of section 209(2) of the Constitution.³⁶⁶

The Deputy Chief Justice had also found that the President had dismissed the appellant pursuant to section 209(2),³⁶⁷ when he in fact purported to act in terms of 12(2) read with section 12(4) of the (Public Service Act) PSA.³⁶⁸

³⁶⁶ Ibid(at paras 68-69).

³⁶⁷ Ibid (at para 71)

³⁶⁸ See (para 46) It is respectively submitted that the invocation of section 209(2) was an afterthought intended to legitimize an unlawful act because the President's letter dated 22 March 2006 ,at the penultimate paragraph (46) of the judgement came late after the decision was taken .One is not allowed to plead continuously, pleading must be closed at a particular time.

It is also regrettable,³⁶⁹ that the Deputy Chief Justice had rejected the contention that the head of the Agency may “only” be dismissed by his or her consent.³⁷⁰ It is also regrettable indeed that he had found that the facts of the case were distinguishable,³⁷¹ from the locus classicus decisions and towering principles or tenets of natural justice of common law heritage reinstated in the cases of Administrator Transvaal and Others v Zenzile and Others³⁷² and Traub and Others.³⁷³

It is respectfully submitted that decision of the Deputy Chief Justice in so far as it pertains to the finding that “there had been an irretrievable breakdown of the relationship of trust between the President and the applicant, that re-instatement of Masetlha would have been in-appropriate” is welcomed, taking into account the fact that the applicant’s salary, allowances and benefits would remain unaffected by the non-reinstatement.³⁷⁴

In the dissenting judgment of profound constitutional and legal importance, which must be preferred to that of the Deputy Chief Justice for its advancement of democracy and the cause of human rights, Ngcobo, J; was of the view that:

³⁶⁹ It is respectfully submitted that the audi alteram partem ought to have been inferred and applied in the circumstances of the case, as there was no emergency and the applicant was cooperative on the facts.

³⁷⁰ Thus sanctioning unilateral decision.

³⁷¹ Ibid (at para 75)

³⁷² See n. 501 Infra, where Hoexter JA had laid the criterion for the applicability of the audi doctrine in the following terms: was the public official empowered to give the decision affecting the existing rights of the individual and secondly was the right of the individual to be heard before a decision was taken excluded either expressly or impliedly (at 36)

³⁷³ Ibid n. 153 where Corbet JA had said the following about the audi doctrine when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights the latter has the right to be heard before a decision is taken ... (at 748).

³⁷⁴ See (paras 89 and 91) respectively.

that the President had no power to unilaterally alter the term of the head of NIA, that the power to alter the term of office of the applicant was constrained by the principle of the rule of law in particular the doctrine of legality; that therefore the power to unilaterally alter the term of office was inconsistent with the rule of law and could not be implied; and that the President was in breach of the rule of law, as he was required to consult with the applicant prior to altering his term of office.³⁷⁵

The learned Judge's decision found support from the following reasons:

the requirements of the rule of law, that the exercise of public power should not be arbitrary, is not limited to non-rational decisions;

it refers to a wider concept and deeper principle of fundamental fairness, it does not only demand that decisions must be rationally related to the purpose for which the power was given;

the constitution requires more; it places further significant constraint on how public power is exercised through the Bill of Rights and the founding principle enshrining the rule of law;

section 33 of the Constitution for example, required that administrative action must, among other things be procedurally fair, section 34 of the Constitution contemplated a public hearing that is fair; and

that the right to fair hearing contemplated in section 34 affirmed the rule of law.³⁷⁶

³⁷⁵ See (para 108) in Ngcobo, J's judgement.

The Judge went further and found that the provisions of Section 33 and 34 did not immunize from the constitutional review decisions which had been arrived at by a procedure which was clearly unfair. The Constitution does not adopt a different attitude when it comes to the exercise of executive powers and sanction the making of decisions arrived at by procedures that are clearly unfair, the rule of law imposes a duty on those who exercise executive powers not only to refrain from acting arbitrarily but also to act fairly when making decisions adversely affecting individual rights.³⁷⁷

The Judge further found that one of the goals that we had fashioned for ourselves in section 1 of the Constitution was the establishment of society based on democratic values, social justice and fundamental human rights. The Judge referred further to the Preamble³⁷⁸ and further to section 1.³⁷⁹ It became clear to the Judge, that the democratic government that is contemplated was a participatory democracy, which is accountable, transparent and required participation in decision-making.³⁸⁰

The Judge referred to Section 34 of the Constitution and found:

that it required the judiciary and other tribunals that resolve disputes through the application of the law to conduct their proceedings in a fair manner; and

³⁷⁶ See (para 179) Ibid.

³⁷⁷ See (para 180)

³⁷⁸ Where it provides that the constitution "lays the foundation for a democratic and open society"

³⁷⁹ The Judge found that Section 1 of the Constitution which established the founding values of the State include as part of those values a Multi party system of democratic government to ensure accountability, responsiveness and openness.

³⁸⁰ See (para 181) Ibid.

that it would be incongruous to free the executive and other functionaries who exercise public power but whose conduct does not amount to administrative action from the values of accountability, responsiveness and openness.³⁸¹

The Judge further referred to the case of Carmichele v Minister of Safety and Security and Another (Center for Applied legal studies Intervening)³⁸⁵ where it was said “Our Constitution is not merely a formal document regulating public power, it is a document which embodies... an objective normative value system”³⁸² The Judge reasoned that the normative value system was a fundamental constitutional value for all areas of law and acts as a guiding principle and a stimulus for the Legislature, the Executive and the Judiciary,³⁸³ it imposed a duty on decision makers to act fairly.³⁸⁴

The Judge found that acting fairly provides the decision maker with an opportunity to hear the side of the individual to be affected by the decision. It enables decision makers to make a decision after considering all relevant facts and circumstances and minimizes arbitrariness and that there is an inter-relationship between failure to act fairly and arbitrariness. That relationship was brought about by the requirement of the rule of law which eschews arbitrariness in the exercise of public power and which has both a procedural³⁸⁵ and substantive component.³⁸⁶

³⁸¹ See (para 182) Ibid.

³⁸⁵ 2001 (10) BCLR 995 (CC).

³⁸² Ibid per Ackermann et Goldstone, JJ (at para 54).

³⁸³ The Judge found support from the German Constitutional Court in 39 BverfGE, 1 at 41 which was cited with approval in Du Plessis and Other v De Klerk and Another 1996 (3) SA 850 (CC) and Carmichele above (at para 54).

³⁸⁴ For further on that See n. 281 (at para 183) .

³⁸⁵ The procedural component is concerned with the manner in which the decision was taken, it imposes an obligation on the decision maker to act fairly.

Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. To hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review, though a reasonable balance must be struck between the need to protect the individual from unfair decisions exercised by public officials and desirability of avoiding undue judicial interference in the administration.³⁸⁷

In the Judge's opinion the procedural aspect of the rule of law is generally expressed in the maxim "audi alteram partem" (the audi principle) which provides that no one should be condemned unheard, the maxim reflects the fundamental principle of fairness that underlies or ought to underlie any just and credible legal order,³⁸⁸ the maxim provided an insurance against arbitrariness, expressed the principle of natural justice, that prior consultation ensured that the decision maker had all the facts prior to taking a decision and that, that is essential to rationality, the sworn enemy of arbitrariness.³⁸⁹

The judge's opinion was further to the effect that:

the new constitutional order incorporated the common law constitutional principles and gave them greater substance;³⁹⁰ that it was clear from the provisions of section 39 (3) of the Constitution,³⁹¹ that the Constitution was not

³⁸⁶ See (para 184) Ibid.

³⁸⁷ Ibid 184.

³⁸⁸ For that see Minister of the Interior v Bechler and Others; Beier v Minister of interior and Others 1948 (3) SA 409 (AD) per Tindall, A.C.J (at 451) .

³⁸⁹ For all these see n 281 (at para 187).

³⁹⁰ Specifically mentioned was the rule of law .

³⁹¹ The relevant provision provides that "the Bill of Rights does not deny the existence of any other rights

intended to be the exhaustive code of all the rights and that is why section 39 (2) requires that the common law must be developed and interpreted to promote the spirit purport and objects of the bill of rights;³⁹²

that the executive and other functionaries have a duty to act fairly; and

that the President in removing the head of NIA was constrained by the requirement of the duty to act fairly.³⁹³

With regard to whether or not the President had the power to unilaterally alter the conditions of service of the head of NIA, the Judge opined that there were powerful considerations which militated against implying the power to unilaterally alter the fixed term of office of the head of NIA that had been agreed upon, that the unilateral alteration of the term was inconsistent with the requirement not to act arbitrarily which is an aspect of the rule of law; the power to unilaterally alter the term of office was not necessary for the exercise of the power to appoint; the exercise of the power to alter the terms of office of the head of NIA after affording him / her a prior hearing on the reasons for the proposed alteration of his/ her term of office and on condition that will be applicable to the proposed alteration could not render the power to appoint unworkable.³⁹⁴

The Judge also found that it was implicit if not explicitly contemplated in section 12(4)(c) that there must be an agreement between the head of the NIA and the President

or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill ”

³⁹² See (para 188) Ibid.

³⁹³ See (para 189) Ibid.

³⁹⁴ See (para 193) Ibid.

on the terms on which the term of office may be altered, the procedure to be followed, the grounds and the conditions that would be applicable to the alteration and that, that was inconsistent with the unilateral power to alter the term of office.³⁹⁵

The judge added that at the bare minimum the head of NIA ought to have been informed of the proposed alteration of the term of office, the reasons for it, he ought to have been allowed to comment on those matters,³⁹⁶ because the applicant was not obstructive or refused to cooperate.³⁹⁷

The Judge also found that although the relationship between the President and the head of NIA had a contractual aspect, the President was however not a private employer who need not listen to any representation and was entitled to act arbitrarily as he pleased but was acting as a head of a constitutional state.

The President's powers were derived from the Constitution and the provisions of the applicable statute and were subject to the constitutional constraints in their exercise.³⁹⁸ Even if the President, when he removed the head of NIA from the office, was exercising executive power that power could not be allowed to relieve him of the duty to act fairly.³⁹⁹ The President was obliged to comply with the duty to act fairly in making the decision to alter the term of office of the applicant.⁴⁰⁰

³⁹⁵ See (para 194) Ibid.

³⁹⁶ See (para 195) Ibid.

³⁹⁷ See (para 197) Ibid.

³⁹⁸ See (para 198) Ibid.

³⁹⁹ See (para 199) Ibid.

⁴⁰⁰ See (para 200) Ibid.

To sum up, the Judge found that the President had no power to act unilaterally in altering the term of office of the applicant, that he was bound to consult,⁴⁰¹ to have afforded the applicant an opportunity to make representations on whether the term of office should be altered,⁴⁰² that the matter was not urgent nor was the applicant obstructive,⁴⁰³ and that accordingly the President acted beyond his powers as conferred by the provisions of Section 209 (2) of the Constitution and Section 3 (3) (a) of ISA read with section 3B (1) (a) and 12 (4)(c) of the PSA and therefore in breach of the doctrine of legality, and that the President's conduct was inconsistent with the Constitution.⁴⁰⁴ It is respectfully submitted that the correct view of the minority judgment should be preferred over the wrong decision of the majority.

Summary

Judicial control under the final Constitution is found in various provisions of the Constitution, amongst them the following: the Bill of Rights, the supremacy clause of the Constitution, sections 165 , 172 ,167 , the rule of law, which includes the doctrine of legality and finally on the right to a just administrative action, section 33. The focus on this chapter was in the main on section 33(1), which in peremptory terms provided that everyone has a right to lawful, reasonable and procedurally fair administrative action. The said section has brought in a new paradigm shift in administrative law. It has brought in a culture of legality, and the courts have interpreted the duty to

⁴⁰¹ See (para 204) Ibid.

⁴⁰² See (para 205) Ibid.

⁴⁰³ See (para 206) Ibid.

⁴⁰⁴ See (para 207) Ibid.

procedural fairness to include the culture of proceeding fairly and the culture of consultation.

In the next chapter relevant to this chapter, focus would be on the organic legislation which gives effect to the rights in sections 32 and 33 or operationalize these constitutional rights.

CHAPTER FOUR: ORGANIC LEGISLATION AND JUDICIAL REVIEW

4.0. Introduction:

This chapter is linked to the previous chapter, wherein it was pointed out that national legislation must be enacted to give effect to the rights in section 32 and 33 of the Constitution. This chapter therefore deals with these constitutional imperatives namely: the Promotion of Access to Information Act,⁴⁰⁵ hereinafter called (PAIA) and the Promotion of Administrative Justice Act.⁴⁰⁶ For the purpose of brevity the chapter has been divided into the following subheadings: the Preamble to the said legislations, their objectives, definition of administrative action under the PAJA, procedural fairness under the PAJA, time frames, remedies, the codified grounds of review under the PAJA. Where appropriate reference is made to case law to buttress the argument. It is to these organic legislations that I am turning on:

4.1. The PAIA

Indeed the importance of the Promotion of Access to Information Act⁴⁰⁷ (PAIA) and the Promotion of Administrative Justice Act the (PAJA) cannot be overemphasized, read with section 195, they constitute part and parcel of a constitutional project of establishing a democratic system of government. In the First Certification case, it was

⁴⁰⁵ Act 2 of 2000.

⁴⁰⁶ Act 3 of 2000, (Herein after called the PAJA).

⁴⁰⁷ Act 2 of 2000.

said that the entrenchment of the right of access to information was directed at promoting good governance.⁴⁰⁸

The apartheid government had graphically demonstrated that an authoritarian state exercises its powers arbitrarily without reason or explanation. On the other hand, the hallmark of an open and democratic society is that the government will be required to account for its use of power.⁴⁰⁹ The actions of government and indeed its decisions should be informed by rational considerations that are explicable to those affected by decisions, as democracy is government by explanation.

It “does, therefore, follow that when the government refuses to speak candidly or intelligibly or at all, the AIA allows the citizens to find out what its government is up to, it gives them access to the records, meetings, occasions where policy was formulated and decisions taken for the use of power”⁴¹⁰

(i) The Preamble to PAIA

The Preamble to PAIA recognised that the system of government in South Africa before 27 April 1994, among 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. The Preamble also remind us of the solemn obligation of the state to

⁴⁰⁸ See *Infra*, n. 168 (at Para 85).

⁴⁰⁹ See Currie, I. and Klaaren J. 2002. The Promotion Of Access to Information Act: Commentary. Pretoria . Siber Ink . (at 17).

⁴¹⁰ Currie and Klaaren Ibid (at 17).

protect, respect , promote and fulfill the rights in the Bill of Rights which is the cornerstone of democracy in South Africa .

(ii)The objects of PAIA

The Preamble captures the object or purpose of the Act amongst others as: to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information,⁴¹¹ to actively 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 their rights.

4.2. THE PAJA

(i) The Preamble to the PAJA

The second paragraph to PAJA Preamble reiterates that section 33 of the Constitution required national legislation to be enacted in order to give effect to the right contemplated in section 33(1) viz : the right to lawful, reasonable and procedurally fair administrative action” to provide for the review of administrative action by a court or where appropriate an independent and impartial tribunal and that there is a

⁴¹¹ The relevant provisions are Ss 9(a) (i) and (II) which respectively provide for the “giving effect to the constitutional right of access to information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights” and further ss 9 (c) which provides “for the giving effect to the constitutional obligations of the state of promoting a human rights culture and social justice by public bodies..” and ss 9(e) which generally provides “for the promotion of transparency, accountability and effective governance of all public and private bodies ..” and lastly the Act , acts as an educational tool to everyone to: (i) understand their rights in terms of the Act in order (ii) to effectively scrutinize and participate in decision making by public bodies that affects their rights”

duty imposed on the state to give effect to those rights and to promote an efficient administration.

(ii) The objectives of the PAJA

They are captured as “the promotion of an efficient administration and good governance and the creation of a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of public function” These are emphasized within the context of giving effect to the right to just administrative action”⁴¹² and that is also in keeping with the basic values and principles governing public administration.⁴¹³

4.2.1. Definition of administrative action under the PAJA

The Act give us a cumbersome all embracing definition of “administrative action” It defines “administrative action” as any decision taken, or any failure to take a decision by:

- (a) an organ of state, when –
 - (i) exercising power in terms of the Constitution or a Provincial Constitution, or
 - (ii) exercising public power or performing public function in terms of any legislation, or
- (b) a natural or juristic person, other than an organ of state, when exercising public power or performing public function in terms of an empowering provision,

⁴¹² See the fourth, penultimate paragraph to the Preamble to the PAJA.

⁴¹³ See n.14 Ibid.

which adversely affects the rights of any person and which has a direct, external legal effect , but does not include , the following:

- (i) the executive powers or functions of the National Executive
- (j) the executive powers or functions of the Provincial Executive
- (k) the executive powers or functions of a municipal council,
- (l) the legislative functions of Parliament , Provincial legislature or municipal council
- (m) the judicial functions of a judicial officer of a court , referred to in section 166 of the Constitution...
- (n) a decision to institute or continue prosecution
- (o) any decision taken or failure to take decision in terms of any provisions of the Promotion of Access to Information Act, and
- (p) any decision taken or failure to take decision , in terms of section 4(1)⁴¹⁴

In the case of Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates and Others⁴¹⁵ was a sequel from the decision of the judgment in the case of Eisenberg and Associates v Minister of Home Affairs and Others⁴¹⁶ wherein the respondent sought and was granted an order declaring the regulations made in terms of the Immigration Act⁴¹⁷ unconstitutional by the Cape High Court, in that the Minister

⁴¹⁴ See section 1(i) of the Promotion of Administrative Justice Act 3 of 2000.

⁴¹⁵ 2003(8) BCLR 838 (CC) , the Court, per, Chaskalson ,C.J (at 61).

⁴¹⁶ 2003(5) BCLR 514 (C).

⁴¹⁷ 13 of 2002.

flouted the notice and comment procedure.⁴¹⁸ The Minister sought to apply for a certificate in terms of rule 18 of the rules of the Constitutional Court.⁴¹⁹

The Constitutional Court upon consideration of the matter had found that, the High Court had erred in construing the Act as it did, that it ought to have held that the notice and comment provisions of section 7 are not applicable to the regulations made under section 52 and upheld the appeal". the Constitutional Court had advanced the following reasons in finding that the Minister's decision was not administrative action:

that the definition of decision does not refer to making of regulations that the definition of administrative action specifically excluded any decision taken or failure to take decision in terms of section 4(1)⁴²⁰, that it may be open to doubt whether reliance could be placed on the PAJA in the circumstances of the case;⁴²¹

and

that in each case it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before action is taken ... that whether or not such provisions are made the administrative action must ordinarily be carried out consistently with the PAJA.⁴²²

⁴¹⁸ See Regulations 7 of the Immigration Act 13 of 2004 which amongst others provides as follows: The Minister shall have power to make regulations called for, or conducive to the implementation of this Act and in making regulations in terms of this Act, the Minister shall –

- (a) Publish and table in Parliament his or her intention of adopting regulations specifying their Subject matter and soliciting public comments during a period not shorter than 21 calendar days
- (b) having considered public comments received, publish and table in Parliament draft regulations
- (c) soliciting further comments during a period not shorter than 21 calendar days
- (d) publish the final regulations together with a summary of comments which have not been accommodated and the reasons for their rejection.

⁴¹⁹ Providing for direct access to the Court

⁴²⁰ See para b (ii) of the definition of administrative action in section 1 of the PAJA.

⁴²¹ Ibid n. 78 (at para 52).

⁴²² The Court did not consider it necessary whether a statute can specifically exclude or limit the application of such provisions without contravening the Constitution because that issue did not arise

In the case of Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others ⁴²³ the applicant had launched two applications wherein he sought to interdict the respondent and the poundkeepers of Weenen and Dundee from impounding his livestock and where he secondly sought an order declaring the provisions of section 8, 10(2), 12, 16(1), 29(1), 33,34,37 and 41(4) of the Pound Ordinance of Kwazulu- Natal ⁴²⁴ to be inconsistent with the Constitution.

The High Court granted the following interdict orders:

- (i) an interdict order restraining the respondent from impounding the livestock and secondly had upheld the constitutional challenge, that section 16 (1), 29(1), 33, and 34 of the Ordinance permitted self help and therefore violate the right of access to the court guaranteed in section 34 of the Constitution;
- (ii) that section 8,10(2), 12,16 (1), 29(1), 37 and 41(4) violated section 33 and 34 of the Constitution in that they made no provision for prior notice to the livestock owner or that they required notice only if the owner was known, that the impounding provisions were inconsistent with section 3(1) and (2) of the PAJA and that section 29 (1) discriminated against the applicant on the basis of race and landlessness in that it required a person who assesses the damages to be either a voter or a land owner;
- (iii) that section 16 (1) was inconsistent with section 25(1) of the Constitution, in that it permitted arbitrary deprivation of property; that no reading-in nor severance

in the circumstances of the case in casu.

⁴²³ 2004 (5) BCLR 547 (N).

⁴²⁴ No 32 of 1947.

was appropriate in the circumstances of the case and referred the matter for confirmation of invalidity by the Constitutional Court in terms of section 172 (2) (a) of the Constitution.⁴²⁵

In the Constitutional Court in Xolisile Zondi v Member of the Executive Council for Traditional and Local Government Affairs and three Others⁴²⁶ the Court in considering the constitutional validity of the impugned provisions found as follows:

that the impugned provisions involved the exercise of public power derived from the Ordinance , that section 8 of the Ordinance,⁴²⁷ (the decision to impound animals) , section 12⁴²⁸ (making decision in relation to the disposal of injured or dead animals and the destruction of animals) involved the performance of a public duty , and that similarly the Magistrate in issuing instructions in regard to the destruction or disposal of vicious animals (section 10(2),⁴²⁹ or re -offer for sale or destruction of animals that remained unsold after an

⁴²⁵ It must be stated in parenthesis that section 16 (1) of the said Ordinance was indeed declared unconstitutional but the order of unconstitutionality was suspended for 12 months pending the enactment of legislation by the provincial legislature correcting the unconstitutionality as apparent from (para 135) sub paras (e), (1-2) of the Constitutional Court Judgment.

⁴²⁶ 2005 (3) SA 589 (CC).

⁴²⁷ Notice to owners of impounded animals- whenever the name of the owner of any impounded animal is known to the pound keeper he shall forthwith send through the post or otherwise a written notice addressed to such owner at his place of residence informing him of the fact that such animal has been impounded.

⁴²⁸ Death or injury to impounded animals – if any impounded animal dies or is destroyed or is injured, the Poundkeeper shall enter in his pound book a description of such animal and the cause of its death or injury or , if it laws destroyed on instructions , particulars of such instructions”

⁴²⁹ If any impounded animal shall prove to be dangerously vicious or shall appear to be worthless owing to any serious and incurable defect, disablement or disease, the Poundkeeper shall submit a report in writing to the magistrate who shall have authority to issue such instruction in regard to its destruction or other disposal as he may see fit, but only upon notice to the owner of the animal if he is known.”

auction (section 37),⁴³⁰ performs a public duty. So too does the police officer in issuing instructions in regard to destruction or disposal of animals that are too vicious to be driven to the pound Section 41(4);⁴³¹ that the exercise of powers conferred by the impugned provisions constituted administrative action;⁴³² that the combined effect of sections 16(1) 33, 34, and 37 from the start to finish was to deny the livestock owner the protection of the judicial process and the supervision exercised by a court through its rules over the process of execution; that manifestly the scheme does not contemplate an involvement of the courts, that the execution process created ,by sections 33, 34, and 37 does not go through the ordinary courts , that the ordinary civil process of execution is not employed , that the land owner is permitted to bypass the courts and to recover damages through the execution process carried out by a private businessperson or an official of the Municipality without the court's intervention;⁴³³ that the combined effect of sections 16(1) 33, 34, and 37 was to limit the right against self-help guaranteed in section 34 of the Constitution ⁴³⁴, that the right of

⁴³⁰ The relevant section is headed "Animals unsuccessfully offered for sale- If no offer is made for any animal put up for sale the pound keeper shall report to the Magistrate accordingly and state the estimated value of the animal and the fees , charges and the other expenses incurred in respect thereof and the Magistrate may give the Poundkeeper such instructions as he may deem proper whether the animal is to be re-offered for sale or is to be destroyed or otherwise disposed off: provided that whenever a donkey or a pig has been un successfully offered for sale the Poundkeeper may destroy the same at any time after the conclusion of the sale"

⁴³¹ The relevant Section provides as follows "if the police officer is satisfied that the animal is too vicious intractable or wild to be driven to the pound he shall have authority to issue instructions in regard to its destruction or other disposal as he may see fit but only upon notice to the owner if he is known"

⁴³² Ibid n. 95 at para 105.

⁴³³ Ibid n. 95 at para 75.

⁴³⁴ Ibid n. 95 at para 78.

access to courts is an aspect of the rule of law and one of the foundational values of our constitutional democracy, and that that is why the constitutional democracy assigned the resolution of disputes to a court or where appropriate another independent and impartial tribunal or forum⁴³⁵, that it was in the context of the right guaranteed in section 34 that the right of access to the courts must be understood;⁴³⁶

that the impounding scheme triggered by section 16(1) followed by sections 33,34 and 37 of the Ordinance was liable to abuse by unscrupulous landowners undeniably bringing hardship against landless African stockowners as in the circumstances of the case;

that impounding livestock may have far-reaching consequences leading to a loss of the only asset, as the livestock may be the only available asset and forming the only source of livelihood that keeps people in the vicious circle of poverty and landlessness which has historically been perpetuated on them; and

that therefore the impounding scheme permitted by the combined effect of sections 16(1), 33,34 and 37 of the Ordinance cannot be said to be reasonable and justifiable under the Constitution and was therefore inconsistent with the Constitution.⁴³⁷

⁴³⁵ See section 34 of the Constitution.

⁴³⁶ Ibid n. 95 (at Para 82)

⁴³⁷ Ibid n.95 (at paras 94 and 961) respectively.

As to the findings of the High Court that section 29(1),⁴³⁸ of the Ordinance discriminated against the Plaintiff on the grounds of colour and landownership, the Court referred to what was said in the case of Ex Parte Speaker of Kwazulu - Natal Provincial Legislature : In re Kwazulu- Natal Amakhosi and Iziphakanyiswa Amendment of 1995; Ex Parte Speaker of the Kwazulu – Natal Provincial Legislature : In re Payment of Salaries , Allowances and Other Privileges to the Inkonyama Bill of 1995, where the Court expressed itself as follows “the purpose and effect of the statutes are relevant in determining its constitutionality”⁴³⁹

The Court accordingly found that section 29(1) of the Ordinance

was manifestly and fundamentally racist in its purpose and effect, that its purpose and effect were to discriminate on the basis of race a ground listed in section 9 (3) ⁴⁴⁰, of the Constitution that its purpose cannot be reconciled with our Constitution, in particular the Bill of Rights, that such a provision the object of which is manifestly racist, was incapable of being read in conformity with our Constitution, that section 29(1) limited the right of equality as guaranteed in section 9(3) of the Constitution and that such

⁴³⁸ The relevant section provided as follows “if the owner of any land other than ordinary grassland on which any animal has trespassed has, in consequence of such trespass suffered damages in an amount exceeding the applicable trespass fee contemplated by section 27, he may in the prescribed manner within the period of ninety –six hours of discovery of such trespass have the extent of such damage monetarily assessed by two disinterested persons each of whom shall either be a land owner or a voter as defined in section 1 of the Electoral Act 45 of 1979.....”

⁴³⁹ 1996(7) BCLR 903 at para 19.

⁴⁴⁰ The relevant section provides that “ The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds , including race ,gender, sex, pregnancy , marital status , ethnic or social origin ,colour sexual orientation ,age, disability , religion ,conscience believe ,culture , language and birth”

limitation can hardly be reasonable or justifiable under Our new constitutional order;⁴⁴¹ and that sections 12 and 37 were indeed silent on whether the notice should be given to the stockowner but that whether by their silence they excluded notice and hearing was a matter of construction .⁴⁴²

The Constitutional Court was in that regard persuaded by what was said in the case of Transvaal Agricultural Union v Minister of Land Affairs and Another ⁴⁴³ where the following obiter was said “ the mere fact that the legislation does not specifically make provision for such a hearing does not mean that indeed there is no such right, that it is well established that when a statute empowers public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights the latter has a right to be heard before the decision is taken”

With regard to the Constitutional validity of sections 8,10(2) and 41(4) the Constitutional Court found that:

there was nothing in the language of those provisions that suggested that by failing to require steps to ascertain the identity of the owner where that could be done with reasonable diligence the said sections intended to exclude such steps from being taken , the impugned provisions were capable of being construed consistently with the Constitution to require notice to the stock owner where the stock owner can with the exercise of reasonable diligence

⁴⁴¹ Ibid n 95 (at paras 96 and 97) respectfully.

⁴⁴² Ibid n. 95 (at para 108).

⁴⁴³ 1997 (2) SA 621 (CC).

be established and that thus construed the said sections are consistent with the Constitution.⁴⁴⁴

The Court accordingly refused to uphold the constitutional invalidity of the said sections.

In Johannesburg Municipal Pension Fund v City of Johannesburg⁴⁴⁵ the applicant had interdicted the respondent's attempted decision to terminate the applicants pension funds. Contrary to their intended decision, the respondent had in the past amongst others furnished the following guarantees "no job losses, no negative changes to medical and pension benefits, no negative changes to conditions of employment, and had further expressly committed himself that the guarantees were binding"⁴⁴⁶.

Malan, J; had found as follows:

that it appeared from the constitutional and statutory framework that the decision to terminate the funds constituted "administrative action" (as intended in the PAJA) in that it was a decision taken by an organ of the State in the exercise of public power under the Constitution or executing a public power or performing a public function in terms of the Local Government Municipal Systems Act,⁴⁴⁷ that in the public service employment context it has been recognised that powers affecting the rights, property or legitimate expectations of workers are subject to administrative law review;⁴⁴⁸

⁴⁴⁴ Ibid n.95 (at paras 116).

⁴⁴⁵ 2005 (6) SA 273 (WLD).

⁴⁴⁶ Ibid (at para 18).

⁴⁴⁷ Act 32 of 2000.

⁴⁴⁸ Ibid n. 167 (para 14 at 288 D-F).

that there was merit in the applicant's contention that PAJA was not and could not be exhaustive of the right to administrative action and that to hold otherwise would be to subvert the principle of constitutional supremacy,⁴⁴⁹ and that even if the conduct in question did not constitute administrative action for the purposes of the PAJA and section 33 of the Constitution could not be invoked directly, it was nevertheless subject to constitutional scrutiny under section 195 of the Constitution.⁴⁵⁰

The Court further found that contrary to the respondent's contentions, the City's decision was subject to the principles of administrative law on the following basis :

the City had acted in its capacity as a public authority and exercised public powers and its decision did "constitute administrative action" as defined in section 1 of the PAJA;⁴⁵¹

that in the context of public service employment powers affecting the rights, property and legitimate expectation of workers were subject to administrative law;⁴⁵²

that section 33 of the Constitution which did not define administrative action was available to the applicant;⁴⁵³

that section 195 (1) of the Constitution required the public administrators to be accountable, to act lawfully , to act fairly and not arbitrarily, to act honestly and

⁴⁴⁹ Ibid (para 15 at 289-E).

⁴⁵⁰ Ibid n. 14.

⁴⁵¹ Ibid n 167(para 13- 14 at 287-D and 288 D).

⁴⁵² Ibid (para 14 at 288E).

⁴⁵³ Ibid para 15 at 289C).

ethically and to be bound by their lawful undertakings;⁴⁵⁴

that the communiqué was binding in administrative law;⁴⁵⁵ and

that the city's unilateral decision at the local level was contrary to the collective agreement and constituted unfair labour practice as defined in section 186 (2) (a) of the Labour Relations Act and also constituted an unfair labour practice in terms of section 23 of the Constitution .⁴⁵⁶

In SAPU and Another v National Commissioner of the South African Police Services and Another,⁴⁵⁷ the applicants, had sought as a matter of agency an interim interdict directing the National Commissioner of South African Police Service (herein after called the SAPS) from implementing an eight hour shift system in respect of members of the SAPS engaged in line activity duties across the country pending either the final determination by the Labour Court of a review of the Commissioner's decision in-terms of section 158(1) (h) of the Labour Relations Act,⁴⁵⁸ or the resolution of disputes through the procedures of the Safety and Security Sectoral Bargaining Council which ever was the first.

The principal cause of the Union's action was based on the right to just administrative action as contemplated in section 33 of the Constitution. They contended that the SAPS was an organ of state; that the decision to scrap the twelve hour shift in favour of the

⁴⁵⁴ Ibid (para 16 at 289 G-H).

⁴⁵⁵ Ibid (para 19 at 292-F).

⁴⁵⁶ Ibid (para 20 at 293 -J).

⁴⁵⁷ [2006] BCLR 42 (LC).

⁴⁵⁸ Act 66 of 1995.

adapted eight hour shift constituted “administrative action” reviewable under section 6 of the PAJA because relevant considerations were not taken into account. They further contended that the action was procedurally unfair, arbitrary or capricious and irrational⁴⁵⁹.

The Court found as follows:

in order for the unions to succeed, they were required to show that their complaint fell within the purview of the protection afforded by the right to just administrative action;⁴⁶⁰

that since the introduction of a fundamental Constitution in 1994 there was no longer any doubt that judicial review of administrative action was part of our Constitutional Law; and

that section 33⁴⁶¹ of the Constitution enshrined the fundamental right to just administrative action and that the PAJA was the legislation referred to in section 33(3).⁴⁶²

The Court reviewed case law on the judicial control of public power.⁴⁶³

However the court had found that:

that there was nothing public about setting the working hours of police officers nor was there any public law

⁴⁵⁹ Ibid (para 39 at 52 G-I).

⁴⁶⁰ Ibid (para 40 at 52-J).

⁴⁶¹ Ibid n 1.

⁴⁶² Ibid n 200 (para 41 at 53-A).

⁴⁶³ The Court referred to what was said in Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others , where the Court said the following: “ The control of public power by the Courts through judicial reason is and always has been a constitutional matter.”

concerned the matter fell more readily within the domain of contractual regulation of private employment relation;

that the nature of power exercised and the function performed in the setting or agreeing of shift times did not relate to government's conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance;⁴⁶⁴ and

that the powers and functions involved in switching the shift arrangements were not of public nature and that they resided within the commercial or private domain of labour relations.⁴⁶⁵

With regard to the meaning of external legal effect the Court had referred to the case of Grey's Marine Houtbay v Minister of Public Works,⁴⁶⁶ where the Court "stated that the person affected must be someone not in government".

Accordingly the court held that:

the members of the South African Police Services were not persons outside the organs of the State;
that they were insiders and that the Commissioner's decision was an internal matter of departmental organization and that the Commissioner's decision was not administrative action,⁴⁶⁷ and thus not reviewable under the PAJA or directly under section 33 of the Constitution;⁴⁶⁸ and

⁴⁶⁴ Ibid n 200 (at para 51)

⁴⁶⁵ Ibid (para 56 (at 57-E).

⁴⁶⁶ Infra n .214 (at 458).

⁴⁶⁷ Ibid n. 201 (at para 57).

⁴⁶⁸ Ibid para 58 (at 57 I-J).

that there was no express contractual duty to consult before taking the decision of implementing the eight hour shift across the board⁴⁶⁹ that the right or legitimate expectation to procedural fairness did not arise and there was no violation of contractual, statutory or constitutional right to a fair process.⁴⁷⁰

On the contrary, in POCRU and Others v Minister of Correctional Services and Others⁴⁷¹ the applicants Seventy Six Correctional Service Officials at Middledrift Prison were summarily dismissed for refusing to work over Christmas and New year holidays. On appeal the Chairman of the Appeal Board had dismissed the preliminary point raised by the appellant then, “that the appeal was prematurely convened because they were not afforded a hearing in terms of the Departmental Disciplinary Code, that they were unable to formulate grounds of appeal in the absence of record, and that their dismissals were procedurally and substantively flawed and were accordingly of no force and effect”

Although the respondents had conceded that the department was bound by its Disciplinary Code and that it was not adhered to before dismissals or at the appeal, they had argued that the High Court ‘s jurisdiction was limited in labour matters to the unfair labour practice jurisdiction of the Labour Court. The respondents had also argued that the dismissals were not review- able in terms of the Promotion of Administrative Justice Act

⁴⁶⁹ Ibid para 86 (at 65 H-J).

⁴⁷⁰ Ibid para 87 (at 65 C-D)

⁴⁷¹ [2006] 4 BLLR 385 (E).

3 of 2000 because they did not constitute administrative action as defined in the Act.

The principal issue for our purpose to be decided was:

Whether or not the decisions that are being challenged were “administrative decisions” and whether or not they are reviewable in terms of section 6 of the PAJA 3 of 2000 ?

The Court found that the procedure followed deviated from the prescribed procedure in a number of ways all of which were prejudicial to the applicants ‘s case amongst them the following:

that they were never informed of a formal investigation in their conduct as they were entitled to in terms of Clause 7.1.they were given 48 hours within which to make representations as to why they should not be dismissed instead of the prescribed time frame;⁴⁷²

that they were not informed of the date , time and venue of the hearing;

they were never informed of their rights;

that they were not furnished with summaries of investigation reports or copies of statements made by witnesses;⁴⁷³

that the Disciplinary Procedure envisaged a right to an oral hearing , whereas the proceeding followed involved only the consideration of written representation; that consequently the applicant’s right to state their case and

⁴⁷² Ibid para 31(at 397).

⁴⁷³ Ibid para 32 (at F-J).

to submit evidence and to call witnesses in terms of
were all violated; and⁴⁷⁴

that viewed from that perspective the process could only
be described as a bizarre, especially when the point
was taken that the Chairperson dismissed the point
in limine that the appeal tribunal was prematurely
convened as no disciplinary enquiry was held.⁴⁷⁵

The Court referred to what was said by Nugent JA in Grey's Marine HoutBay Pty
(Ltd) and Others v Minister of Public works and Others,⁴⁷⁶ regarding the definition
of administrative action:

the cumbersome definition of that term in PAJA serves
not so much to attribute meaning to the term as to
limit its meaning by surrounding it with a palisade of
qualifications.

Equally critical of the definition of "administrative action" Plasket, J, quoted with
approval what was said by Hoexter where the learned author expressed herself as
follows:

The definition of administrative action in the Act is
both extremely narrow and highly convoluted, a strange
and unlikely cocktail of the South African , Australian
and German ingredients.⁴⁷⁷

⁴⁷⁴ Ibid para 33 (at 397-398 I-B).

⁴⁷⁵ Ibid para 34 (at 398 C-E).

⁴⁷⁶ *Infra*, n. 246 (at para 21).

⁴⁷⁷ Hoexter, C. (2002) The New constitutional and Administrative Law (vol 2) 'Cape Town: Juta and
Co. at 100- 101.'

On the question of decision for the purpose of PAJA the Court referred to section 1(v) (a) and (g) of the PAJA.⁴⁷⁸

The Court explored literature of the common law heritage of lasting values, as founded in the case of Administrator Transvaal and Others v Zenzile and Others,⁴⁷⁹, where Hoexter JA expressed himself as follows regarding those lasting values

“... The element of public service injected by statute necessarily entails so, I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct”⁴⁸⁰

The Court found that the elusive concept of public power was not limited to exercises of power that impacted on the public at large, that indeed many administrative acts do not.⁴⁸¹

⁴⁷⁸ The relevant provision provides that decision “means any decision of administrative nature made, proposed to be made or required to be made as the case may be under the empowering provision” It includes the decision relating to the “making, suspending, revoking, or refusing to make an order award or determination” and doing or refusing to do any other act or a thing of administrative nature”

⁴⁷⁹ 1991(1) SA 21 (AD).

⁴⁸⁰ Ibid (at 34 B-D).

⁴⁸¹ The examples are numerous in deed and include the following: the power to arrest which undoubtedly would have a significant impact on the arrestee, see Plasket again in his “Controlling the Power to Arrest Without Warrant Through the Constitution” (1998) 11 SACJ 173. and the granting of a person amnesty from civil and criminal prosecution for his or her politically motivated crimes see for example Derby Lewis & Another v Chairman of the Committee on Amnesty of The Truth & Reconciliation Commission and Others 2001(3) SA1033 (C)

The Court referred to the dissenting judgment of Schreiner JA in Mustapha and Another v Receiver of Revenue, Lichtenburg and Others,⁴⁸² where the Judge stated that :

where the Minister exercises statutory power having contractual aspect he acted as State Official not as a private owner who need listen to no representation and is entitled to act as arbitrarily as he pleases as long as he breaks no contract and as long as he acted within the limitations of power expressed or implied by statute⁴⁸³

In the opinion of the Court:

the power to employ and dismiss Correctional Officers; the subservience of the respondents to the Constitution generally and section 195 in particular; the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes stated in section 2 of the Correctional Services Act, all strengthened the view that the powers that were sought to be reviewed were the Public powers as envisaged by the common law, the Constitution and the PAJA;⁴⁸⁴ that there was no doubt that the respondents only had the powers to discipline in terms of the prescribed procedure, they had no power to abandon it and to discipline employees in terms of an ad hoc procedure that they decided was expedient in the circumstances;⁴⁸⁵

⁴⁸² 1958 (3) SA 343(AD).

⁴⁸³ Ibid (at para 347 D-G).

⁴⁸⁴ Ibid n. 217 para 54 (at 407 E-D).

⁴⁸⁵ Ibid n. 217 para 66 (at 412 G-I-413A-B).

that by doing so they violated the appellant's right to lawful administrative action because of lack of authority to take administrative action that they took and that therefore the provisions of sections 6(2) (a) (i) and 6 (2) (b) of the PAJA ⁴⁸⁶ respectively have been violated; that the appeal procedure suffered the same defects as the hearing procedure, that the Chairperson of the appeal hearing was robbed of the jurisdiction to hear appeal because of lack of compliance with the procedural preconditions;

that there was no valid disciplinary hearing in the first instance, and no record of evidence on which to appeal, the irregularity was compounded by letting the initiator to lead evidence with the purpose of creating a record and justifying the abandonment of the prescribed procedure and that the decision of the Chairperson was vitiated by those material irregularities and was further invalid because the administrative action that he took was materially influenced by errors of law as envisaged by section 6 (2) (d) of the PAJA,⁴⁸⁷

that by failing to apply the disciplinary procedure that was agreed upon and was fair, but different to the core minimum procedural rights envisaged by section 3(2)(b) of the PAJA, the respondent violated the applicant's rights to

⁴⁸⁶ The relevant sections provide respectively as follows : A court or tribunal has the power to judicially review an administrative action if the administrator who took it : (a) was not authorized to do so by the empowering provision and

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with .

⁴⁸⁷ Ibid para 69 (at 414 A-C).

procedurally fair administrative action as contemplated by section 6(2)(c) of the PAJA;⁴⁸⁸

that even in terms of the procedure imposed by the respondent they violated the right of the applicant to procedurally fair administrative action;

that the notice of 48 hours cannot by any stretch of imagination be said to be adequate notice of the nature and purpose of the proposed administrative action as envisaged by section 3(2)(b)(1) of the PAJA...;

that the purpose of that requirement was to give proper effect to the actual opportunity to be heard not serve as an end in itself;

that its purpose was to allow affected person/s proper opportunity to consider his or her position and to prepare his or her defence;⁴⁸⁹

that the short period of notice could not be said to have been a reasonable opportunity to make representation as envisaged by section 3(2) (b) (ii) of the PAJA; and

that the notice that the applicants were given did not inform them of any right of review or internal appeal as it was required to do so in terms of section 3(2) (b) (iv) of the PAJA and it also failed to inform them of the right to request written reasons in terms of section 5 of the PAJA, as it was required in terms of section 3(2)(b)(v) of the PAJA.⁴⁹⁰

Finally the Court found that the law operates on the presumption that a fair appeal cannot cure the irregularity of a an unfair hearing of the first instance, that that presumption

⁴⁸⁸ Ibid para 70 (at 414 D-G).

⁴⁸⁹ See Baxter Ibid footnote 21(at 544-545) and further Corder "The Content of Audi .Alteram Partem Rule in South African Administrative Law" (1980) 43 THRHR (at 156-161).

⁴⁹⁰ Ibid n. 217 ,para 73 (at 415 G-H – 416 A-B).

remained undisturbed in the circumstances of the case, that the appeal was not intended to be a complete re-hearing and was intended to be an appeal on record. That the appeal itself was shot through with irregularities and was a nullity.

With the greatest of respect, one finds the decision bad in law for the applicants had right or legitimate expectation to be consulted that the Commissioner would not alter the shifts unilaterally and the duty to act fairly ought to have been inferred.

It is humbly submitted that the above findings by Plasket, J.A; were correct and ought to be preferred to the earlier decision in SAPU case and is shared by Woolf and Jowell, who had said:

the private company which had chosen to run a prison though motivated by considerations of commercial profit should be regarded at least in some of its activities as subject to public law, the prisoners for whose custody and care it is responsible are in prison in consequence of an order of the court and the purpose and the nature of their detention is a matter of public concern and interest.⁴⁹¹

In Grey's Marine Hout Bay and Others v The Minister of Public Works and Others,⁴⁹² the case that arose from Cleaver, J's decision of the then applicant's application, in the High Court to review and set aside the decision of the Minister of Public Works who had let Lot 86 A of Hout Bay to Bluefin, a group of women with deep roots in

⁴⁹¹ Desmith, S.A, Woolf, H and Jowell, J (1995). Judicial Review of Administrative Action. 5th ed. London: Sweet and Maxwell (at para 3-031).

⁴⁹² 2005 (6) SA 313 (SCA).

Hout Bay who wished to enter the fishing industry from which they were historically excluded. That Court *a quo* had also set aside a temporary interdict which was previously granted.⁴⁹³ The appellant consequently sought leave to appeal with that Court.

It was the appellant's contention in the Supreme Court of Appeal that the proposed development of Lot 86 A would contravene one or more of the legislative measures regulating the use of immovable property.

They referred, for example, to the Land Use Planning Ordinance 15 of 1985 which prohibited the use of property for a purpose other than that for which it was zoned and to the Environmental Conservation Act 107 of 1998 which required environmental impact assessment to be made before certain properties were developed.

The principal relief sought by the appellant was an order setting aside the Minister's decision. The appellant sought an interdict restraining Bluefin from constructing anything on the property and the adjacent jetty before there had been an environmental impact assessment as contemplated by the Environmental Conservation Act 73 of 1979.

Most importantly the appellants also asserted that their rights to procedurally fair administrative action conferred by section 3 of the Promotion of Administrative Justice Act 3 of 2000 was violated. Central to the appellant's contention was the

⁴⁹³ The case is cited as [2004] 3 All SA 446 (C).

argument that they were not consulted or invited to comment on Bluefin 's request to lease the property before it was approved by the Minister and further that the Minister's decision ought to have been set aside in terms of section 6 of the PAJA because it was irrational and arbitrary.⁴⁹⁴

The Supreme Court of Appeal had no difficulty in finding that the Minister's decision "constituted administrative action" because the Minister's decision was made in the exercise of public power conferred by legislation, in the ordinary course of administering the property of the State with immediate and direct legal consequences.⁴⁹⁵

The Court further noted that section 3(1) of the PAJA conferred the right to procedural fairness only in respect of administrative action that materially and adversely affected the rights and legitimate expectations of any person. However the Court found that there was no suggestion in the case in point that the right in broader terms was conferred by the Constitution itself.⁴⁹⁶

The Court held as follows in the process of dismissing the appeal :

it was not shown that any rights or even property rights of any of the appellants (or of any other person) had been adversely affected by the Minister's decision;

⁴⁹⁴ Ibid n. 185 (para 18 at 321B-C)

⁴⁹⁵ Ibid (para 28 at 325 D-E).

⁴⁹⁶ Ibid (para 29 at 325-F).

that none of the appellants had any rights to use the property that had been let or to resist its use by others; nor was any cause made out that their right of occupation of their own premises had been unlawfully compromised;⁴⁹⁷ and

it was not shown that any of the appellants or any other person had a legitimate expectation that the property would be left vacant and even that they would be consulted or their comments invited before it was let⁴⁹⁸ and that there were no proper grounds for finding that the Ministers decision was arbitrary or irrational.⁴⁹⁹

In Bullock NO and Others v Provincial Government North-West Province and Another⁵⁰⁰ the Tranvaal Yacht Club had been the lessee of the Hartebeespoort dam foreshore for 30 yrs in terms of successive leases. It had constructed substantial improvement which were difficult to remove, including a crane attached to the concrete foundation, used hoist yachts with fixed hulls in the dam and the construction of higher and lower embankment within the remaining walls, and a concrete apple.

Hartzenberg, J; had in the court aquo decided that the decision of the Premier to grant then second respondent a lease was not “administrative action” and not reviewable under the PAJA and was correct as not being influenced by mistake. The appellants, in their appeal against the decision had alleged that the Premier’s decision was administrative

⁴⁹⁷ Ibid n. 186 (para 30 at 326 F-G-A).

⁴⁹⁸ Ibid (para 32 at 326- E).

⁴⁹⁹ Ibid (para 35 at 327-F).

⁵⁰⁰ 2004(5) SA 252 (SCA).

action and was reviewable under the PAJA; that they had a right to a legitimate expectation that their lease agreement would be renewed and that they will be offered a proper hearing before a decision was taken whether or not to renew the lease.

The Court found as follows in upholding the appeal:

that the dictates of fairness required that the appellants be afforded an opportunity to make representations to the first respondent before a decision whether or not to renew a lease was taken;⁵⁰¹ and

that the decision by the Premier to grant the second respondent a lease of the relevant foreshore was an “administrative action” within the meaning of section 33 of the Constitution, that the appellants had a legitimate expectation to make a representation before the Premier made a decision on whether or not to grant the lease to the second respondent.⁵⁰²

In Du Bois v Stompdrift Kamanassie Besproeiings raad⁵⁰³ the applicant had hired a picnic and a camping site from the respondent and had conducted business on the site. The applicant had also approached the respondent with a view to entering into a long term lease on the site. Instead the respondent had decided to put the lease out to tender. The tender documents were received including that of the applicant. The respondent had decided at the meeting not to accept any of the tenders. Prior to the meeting a sub-committee of the respondent had inspected the site and had reported its findings

⁵⁰¹ Ibid n. 199 (at para 23).

⁵⁰² Ibid (para 24 A-B).

⁵⁰³ 2002 5 SA 186(CPD).

which were critical of the applicant's management of the site to the respondent. The contents of the report which were critical of the applicants management were never conveyed to the applicant.

It also emerged from the minutes of the meeting that the respondent had also relied on the second report (the Water Control Officer's report) which had been prepared two years previously, which contained numerous complaints regarding the applicant's management of the site. The applicant was not informed that the respondent intended relying on the Water Control Officer's report. The respondent had refused to furnish the applicant with reasons for its decision not to accept the tender.

The applicant (hereinafter called the appellant) then applied to the Cape Provincial Division to have the respondent's decision in so far as it amounted to refusal to accept his tender set aside on review.

The appellant had averred that the respondent had violated his right to a procedurally fair administrative action, in that he was not informed or given an opportunity, at least to respond to the information adverse to him which was in the possession of the respondent and which he intended to rely on.

The court considered the appellant's case in terms of the (PAJA).

In setting the decision aside, the Court referred to what was said by Lord Mustill in Doody v Secretary of State for the Home Department and Other Appeals⁵⁰⁴ in these words:

fairness will always require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf, either before the decision is taken with a view to producing favorable results or after it is taken with a view to procuring its modification or both; and
and that since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest, fairness will very often require that he is informed of gist of the case which he has to answer.⁵⁰⁵

With regard to the right to have information adversely affecting the person's right, the court referred to what was said in the case of Foulds v Minister of Home Affairs and Others,⁵⁰⁶ to wit:

in these circumstances and having regard to the provisions of the Act⁵⁰⁷, it is 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

⁵⁰⁴ (1993) 3 A11 ER 92 (HL).

⁵⁰⁵ Ibid (at para 5 and 6).

⁵⁰⁶ 1996 (4) SA 137 (W).

⁵⁰⁷ Reference here was made to the Aliens Control Act 96 of 1991.

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.

Accordingly the court held that the board was obliged to disclose to the applicant adverse information obtained, adverse policy considerations and to give the applicant an opportunity to respond thereto. Because of its failure to do so its decision was fatally flawed.⁵⁰⁸

The Court also found that the application of the audi alteram partem Rule in tendering procedures, as a right depends on the circumstances of each case as provided for in terms of section .3(1)⁵⁰⁹

Most importantly the Court in setting the decision of the Court aquo aside noted the following;

that the board had, in accordance with the provisions of Section 3(3) of the PAJA; a discretion to take certain further steps to enable procedural fairness to take its course;

that the board could have, for example, in the exercise of its discretion allowed the appellant to present written comments on the allegations made against him or to present his case orally; and

that the board did not take any such steps, clearly because it was totally unaware of the exercise of such statutory discretion.⁵¹⁰

⁵⁰⁸ Ibid n .224 (at 149H-150A).

⁵⁰⁹ Ibid n. 221 .

⁵¹⁰ Ibid n. 331 (at 190 D-E).

In Kiva v Minister of Correctional Services and Another⁵¹¹ the facts were as follows: the applicant, a Deputy Director of Correctional Services, had applied for promotion to the post of the Area Commissioner and was refused promotion without reasons. The applicant had then applied to the court to set aside the decision of the respondent, the Minister of Correctional Services.

The applicant had relied on section 5 of the PAJA. The issue in this case was whether or not the applicant was entitled to written reasons, within the meaning of section 5. The Court in deciding the issue found that the decision not to promote was an act of administrative nature because it concerned the bureaucratic management of the Department,⁵¹² and that it had a real, direct and immediate impact on the applicant and that it was “an administrative action” within the meaning of the PAJA.⁵¹³

The Court found that the right to reasons was intended to make judicial review effective and that it could also be said that, that right affected the right of access to court entrenched in section 34 of the Constitution and emphasized the following:

without reasons an affected person is not able adequately to consider whether he or she should challenge a decision by way of review;
that it was also evident that the applicant without reasons could not determine whether he was not victim of an unfair labour practice in violation of the right to

⁵¹¹ [2007] 1 BLLR 88 (E).

⁵¹² Ibid (at paras 27 and 28).

⁵¹³ Ibid (at para 28).

fair labour practice entrenched in section 23(1) of the Constitution;⁵¹⁴ and

that the applicant 's rights to..., just administrative action, to access to the Court and to fair labour practices had been materially and adversely affected by the administrative action concerned and that he was entitled to be furnished with the reasons not to promote him.⁵¹⁵

The protracted litigation in the case of Z Sidumo and Another v Rustenburg Platinum Mines Ltd and Others⁵¹⁶ was a sequel to the appellant's dismissal by the mine's Internal disciplinary inquiry and an internal appeal for the alleged failure to apply established and detailed individual search procedures resulting in production loss to the approximate value of R500 000.

Dissatisfied with the decision of the disciplinary inquiry, the applicant referred the matter to the CCMA (the Commission for Conciliation Mediation and Arbitration), as an unfair dismissal dispute. The conciliation failed. Thereafter the applicant had successfully challenged his dismissal under the compulsory arbitration of the LRA administered by the CCMA. The Commissioner of CCMA had found the applicant guilty of misconduct,⁵¹⁷ but had found that the dismissal was not an appropriate or fair sanction because the misconduct was unintentional or a mistake, there were no losses suffered, the applicant was not dishonest, he had a fifteen years clean service record and that the

⁵¹⁴ Ibid n. 736 (at para 31).

⁵¹⁵ Ibid (at para 32).

⁵¹⁶ CCT 85/06.

⁵¹⁷ The Commissioner had sentenced the applicant to corrective or progressive discipline, had reinstated the applicant with a three months compensation, subject to a warning valid for three months.

offence committed by him did not go into the heart of the relationship with the employer which was one of trust.⁵¹⁸

The mine outraged by the decision of the Commissioner, then applied to the Labour Court for the review of the Commissioner's award. The Labour Court dismissed the application with costs. The mine appealed to the Labour Appeal Court which also dismissed the appeal with costs. The mine did not tire but appealed to the Supreme Court of Appeal. The Supreme Court of Appeal overturned the decision of both the Labour Court and the Labour Appeal Court and substituted the finding of the Commissioner with a determination that the dismissal was fair.⁵¹⁹

The applicant then sought leave to appeal to the Constitutional Court against the judgment of the Supreme Court of Appeal.

The crucial issue to be determined by the Court was whether or not the compulsory statutory arbitration undertaken by the CCMA in terms of the LRA, constituted "administrative action" within the meaning of section 1 of PAJA and therefore reviewable under the standards set thereunder, rather than that provided under the LRA ?

In addressing the issue, Navsa AJ, had found that:

the compulsory arbitration of the Commissioner

⁵¹⁸ See Ibid n. 275, per Navsa, A.J ; (at para 21).

⁵¹⁹ Ibid (at para 9)

under the CCMA constituted administrative action;⁵²⁰ that the PAJA did not apply;⁵²¹ that section 145⁵²² of the LRA was suffused by the constitutional requirement of reasonableness and that applying that standard it would not only give effect to a right to fair labour practice but would also give effect to a right to lawful, reasonable and procedurally fair administrative action;⁵²³ and that it could not be said that the conclusion to which the Commissioner had arrived at was the one to which a reasonable decision maker could not have reached.⁵²⁴

In her concurring judgement, O' Reagan, J; found as follows that:

in the pre constitutional era the classifications of functions in administrative law had been proven to unsatisfactory basis of determining the scope of judicial review and was firmly rejected by the courts; that the understanding of the mutual exclusivity of sections 33 and 34 would lead up to a formalistic jurisprudence based on a distinction between administrative and judicial or adjudicative decisions

⁵²⁰ Ibid (at paras 88-94).

⁵²¹ Ibid (at paras 97-104) It is respectfully submitted that the finding by Navsa , A.J; that the compulsory arbitration by the Commissioner constituted administrative action but that the PAJA did not apply was a contradiction in terms because the Act is explicit as to what is and what is not "administrative action"

⁵²² The relevant section provide in part that "Any party to the dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award..

(a)....

(2) A defect referred to in subsection means-

(a)that the Commissioner

(i)committed misconduct ...

(ii)committed a *gross irregularity*...

(iii)exceeded the Commissioners powers

⁵²³ Ibid (at paras 106-110)

⁵²⁴ Ibid (at para 119)

respectively, which is at odds with the substantive vision of our Constitution;⁵²⁵ and

that there was no reason why from the separation of powers perspective the conduct of the CCMA was to be immuned from the scrutiny under section 33, that to seek to draw a line between administrative and adjudicative decisions of administrative tribunal would lead directly to the arid classifications of our old administrative law and that the preferred approach should be the one based on a substantive understanding of section 33;⁵²⁶

that the content of section 33 was straightforward, that it requires administrative action to be lawful, reasonable and procedurally fair, and further that it requires written reasons to be given for administrative action adversely affecting the rights of individuals;

that section 33 should be understood as one of the key constitutional provisions giving life to the constitutional values of accountability, responsiveness and openness found in section 1 of our Constitution.;⁵²⁷

that the purposive constitutional interpretation allows the CCMA to be held to the standard test of section 33, that the CCMA was not an institution for private agreed arbitration but a state institution for the resolution of disputes ...speedily and cheaply;

that although no appeal lies from the CCMA, the LRA expressly required that the decisions of the CCMA as an administrative tribunal be scrutinized by the Labour

⁵²⁵ Ibid (at para 135)

⁵²⁶ Ibid (at para 137)

⁵²⁷ Ibid (at para 138).

Court to ensure that they act lawfully, reasonably, and procedurally fairly;⁵²⁸ and that although the LRA had already provided for the scrutiny on review of the decisions of the CCMA by the Labour Court, no further delay would have been caused by that scrutiny being on the basis of constitutional standards established in section 33, that the need for speedy and cheap resolution of disputes did not mean that the CCMA should not be held accountable for its decisions nor that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and procedurally fairly.⁵²⁹

The judge accordingly agreed with the decision of Navsa, A,J; that the arbitrations by Commissioners constituted “administrative action” within the meaning of section 33 of the Constitution and concurred with the order he had proposed.⁵³⁰

In a dissenting judgment of considerable constitutional importance, Ngcobo, J; found that the functions performed by the CCMA Commissioner involved a determination of facts and the application of legal principles in order to decide whether or not the dismissal was fair and that arbitration involved litigation.⁵³¹

The Judge also found that the CCMA arbitration proceedings bore the hallmarks of a judicial function in that there was a lis between the employer and the worker in

⁵²⁸ Ibid (paras 139-140).

⁵²⁹ Ibid (para 140).

⁵³⁰ Ibid (at 141).

⁵³¹ Ibid (at 207).

which a tribunal was called upon to apply a recognised body of rules in a fair and impartial manner. The judge found further that the CCMA Commissioners are virtually clothed with all the powers of judicial officers in a court of law, including the power to make a finding of contempt of commission and that the process of legal evaluation involved in the decision as to whether the dismissal was fair or not and to issue an award was clearly judicial in nature.⁵³²

The judge noted that the following considerations militate against the finding that the CCMA commissioner performed an administrative action:

the CCMA commissioners must be independent, impartial and conduct their proceedings in public, that they must be independent of state any political party, trade union, employer organization federation of trade union or federation of employer organization,⁵³³ it derives its powers from section 34 of the Constitution and its functions are not different from the Labour Court and the latter was entitled,⁵³⁴ to make an order that the CCMA commissioner was entitled to make.⁵³⁵

The judge accordingly found as follows that:

that both the Constitution and the rule of law imposed constraints on the exercise of public power;

⁵³² Ibid (at para 208).

⁵³³ See the provisions of 138 and 113 of the LRA respectively.

⁵³⁴ See section 191 (6) of the LRA

⁵³⁵ For further on that see (paras 216,217 and 218 respectively) Ibid .

that those constraints are found throughout the Constitution including the right to just administrative action;⁵³⁶

that the new constitutional order did not reintroduce the classification of public power into judicial , quasi judicial and purely administrative functions , that what it requires is the classification of state conduct into conduct which constituted administrative action and which didn't and that section 33 and the PAJA made that necessary in order to determine the constitutional constraints applicable;⁵³⁷

that to hold that the conduct of the CCMA arbitration proceedings does not constitute administrative action did not free the commissioner from the values of accountability, responsiveness and openness , the founding values of our constitutional democracy which bound every official who exercise public power, and that the Commissioner was no exception;

that the Constitution as the supreme law regulates the exercise of public power in different ways including through the application of the Bill of Rights, the right to just administrative action and the rule of law that the latter requires those who exercises public power must do so in accordance with the law and the Constitution; and

that the commissioners apart from the requirement of accountability, responsiveness and openness were

⁵³⁶ Ibid (at para 223).

⁵³⁷ Ibid (at para 231)

required to comply with the provisions of the LRA and the Constitution in particular section 33 and 34.⁵³⁸

The judge found himself unable to agree with Navsa, A,J; that the conduct of an arbitration proceedings concerning an unfair dismissal by the commissioner appointed in terms of the LRA by the CCMA constituted “administrative action” within the meaning of section 33 and that it was unnecessary to consider whether or not the PAJA applied.⁵³⁹

In evaluating the decision of the Commissioner, the judge also took account of the fact that the Commissioners are not expected to give detailed and impeccable reasons for their decisions, that however had lead to unsubstantiated statements being made in awards, without reasons it was difficult to determine whether statements made had any basis in evidence or whether material factors were ignored.⁵⁴⁰

The learned judge accordingly found that at the bare minimum an award should set out the facts and the reasons for the conclusion; that it should not be necessary for the reviewing court to “ask what did the Commissioner mean by this statement”, that the reviewing court should not be left to speculate on what the commissioner had in mind that the award was not a model of clarity but was open to attack on allegation of gross irregularity.⁵⁴¹

⁵³⁸ Ibid (at para232).

⁵³⁹ Ibid (at para 240).

⁵⁴⁰ Ibid (at para 282).

⁵⁴¹ Ibid (paras 282-284).

Finally however the judge found that the commissioner had not ignored any material factors in evaluating the fairness or otherwise of the sanction imposed by the employer; that it could not be said that the employer did not have a fair trial resulting in gross irregularity that the commissioner's award was not manifestly unfair to the employer and inevitably came to the conclusion that the commissioner did not exceed his powers under the LRA nor committed misconduct,⁵⁴² and agreed with the proposed order of Navsa, A.J.

In another concurring opinion, Sachs, J; agreeing with the conclusions arrived at and the order proposed by Navsa, A,J; had this to say;

the matter ought not to have been approached from the rigid compartmentalization of say judicial function or administrative action ? but that the approach ought to have allowed judicial reasoning to embrace fluid concepts of hybridity and permeability; and that to ask those questions was a display of undue subordination to the formal classification of rights and insufficient regard for the manner in which the rights overlap and the basic values animate and bind discrete rights together.⁵⁴³

The learned judge further noted that an attempt at pure classification was doomed from the start, whether the commissioner was performing administrative function in a judicial context or a judicial function in an administrative context the activity was intrinsically the same and that the reality was that the function of the commissioner was a hybrid one

⁵⁴² Ibid (para 289).

⁵⁴³ Ibid (at paras 142-143).

composed of an amalgam of three separate but intermingling constitutional rights.⁵⁴⁴ He pointed out that;

the acceptance of hybridity was based on the fact that protected rights in a constitutional democracy overlap, intersect and mutually reinforce each other;

that although the rights might collide there was no intrinsic or categorical incompatibility between the rights themselves and that the task of the courts was to balance and reconcile the constitutional interests involved;⁵⁴⁵

that the key to the case was to interpret and apply section 145 in a manner that was compatible with the values of reasonableness and fair dealing that an open and democratic society demanded, that it would have been inappropriate to restrict the review of the commissioner 's decision to the narrow grounds of procedural misconduct premised on the first reading of section 145(2);

that the labour law setting based on speedy resolution of dispute had made the full application the PAJA-type review inappropriate;⁵⁴⁶

that the values of fair dealing that underlie section 33 must be respected, that although the right to fair labour practice was at the centre of the analysis the outcome of arbitration process must not fall outside the bounds

⁵⁴⁴ Ibid (para 147).

⁵⁴⁵ Ibid (at para 148).

⁵⁴⁶ Ibid (at para 158)

of reason, that accepting it would hardly represent a fair outcome; and

that fair hearing within the meaning of section 34 demanded that at the very least there be some reasonably sustainable fit between the evidence and the outcome.⁵⁴⁷

Without diluting the cogency of Navsa AJ's judgment, it is respectfully submitted that; Ngcobo, J's pragmatic display, of the wide range of approaches to the question of control of public power through amongst others the Constitution itself, the rule of law principle, the supremacy of the Constitution doctrine, the Bill of Rights, the right to just administrative action and the right to fair public hearing before an independent tribunal is instructive.

In a similar vein, had O'Reagan, J; for demystifying the old dichotomy or classification of functions between administrative and judicial functions which bedeviled our Administrative Law.

In the same mould, Sachs, J; for his lucid and eloquent approach to the control of public power is admirable casting away the old adage of categorizing functions into administrative and judicial functions, allowing hybridity and permeability in the protection of human rights and by reminding us that human rights are interdependent , interrelated, indivisible and mutually inclusive; that the courts should find a way of reconciling conflicting rights and finally by finding that the values of fair dealing in

⁵⁴⁷ Ibid (at para 158).

section 33 and the adjudicatory element of fair hearing in section 34 demanded that at the very least there be some reasonable fit between the evidence and the outcome.

4.3 Procedural Fairness under the PAJA

The Act provides details as to the procedures to be followed, before administrative decision is taken, and makes a distinction between administrative action “affecting any person” and administrative action “affecting the public”, the former is governed by the provisions of section 3 and the latter by the provisions of section 4.⁵⁴⁸

4.3.1 Procedural fair administrative action affecting any person (any individual)

Section 3(1) provides that “administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair”. Taken to its logical meaning it means when the rights and legitimate expectations are not materially and adversely affected then, the person would not be entitled to procedural fairness.

Subsection 3(2) (a) provides that a fair administrative procedure depends on the circumstances of each case Subsection 3(2)(b) Provides that in order to give effect to the right to procedural fair administrative action, an administrator, subject to subsection (4) must give a person referred to in subsection 1:adequate notice of the nature and purpose

⁵⁴⁸ See De Wall et al. (2001) The Bill of Rights Hand Book .5th ed .. Cape Town: Juta and Co, Ltd (at 510).

of the proposed administrative action; a reasonable opportunity to make representation;
clear statement of administrative action; adequate notice of any right of review or

internal appeal, where applicable and adequate notice of the right to request reasons
in terms of section 5.⁵⁴⁹

4.3.2 Procedurally fair administrative action affecting the Public

As stated above the relevant provision is section 4 (1) of the PAJA and provides an administrator with “a wide choice of procedure” in the following manner : In cases where administrative action materially and adversely affects the rights of the public, an administrator in order to give effect to the right to procedurally fair administrative action, must decide whether –

- (a) to hold a public inquiry in terms of subsection (2)
- (b) to follow a notice and comment procedure in terms of subsection (3)
- (c) to follow a procedure which is fair but different ...
- (d) where the administrator is empowered to by an empowering provision to follow the procedure which is fair but different, to follow that procedure

⁵⁴⁹ The relevant section provides as follows: (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 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 the administrator fails to furnish adequate reasons for the administrative action it must subject to subsection 4 and in the absence of proof to the contrary be presumed in any proceeding for judicial review that the administrative action was taken without good reason.

(4) An administrator may depart from the requirement to furnish reasons if it is reasonable and justifiable in the circumstances, and must inform the person making the request of such a departure...”

(e) to follow another appropriate procedure which gives effect to section (3)

4.3.3 The holding of inquiry

Section 4(2) regulates the procedures to be followed in holding a public enquiry and provides as follows: If the administrator decides to hold a public enquiry

- (i) The administrator must conduct the public enquiry or appoint a suitably qualified person or panel of persons to do so,
- (j) The administrator or the person or panel referred to above must determine the procedure for the public enquiry, which must include public hearing, conduct of enquiry in accordance with the procedure, compilation of written report on the enquiry, the giving of reasons for administrative action taken or recommended, the publication in English and at least in one other official languages in the Gazette, a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied and the conveyance by such other means of communication which the administrator considers effective, of such information to the public concerned.

4.3.4 The notice and comment procedure

The notice and comment procedure is regulated by section 4(3) of PAJA which provides that if the administrator had decided to follow the notice and comment procedure the administrator must take appropriate steps to communicate administrative action to those likely to be materially and adversely affected by it and call for comments from them, consider any comments received, decide whether or not to take administrative action with or without changes, comply with the procedure to be followed with regard to the notice and comment procedure as prescribed.

4.3.5 Justifiable departure from the procedures in subsections 1,2 and 3 of section 4

Section 4(4) (a) and (b) provides the administrator with an option for a reasonable and justifiable departure from the procedures as set out in subsections 1,2 and 3 and commands the administrator to take all relevant factors, including the following in to account : the object of the empowering provision, the nature and purpose of and the need to take the administrative action, the urgency of taking administrative action or the urgency of the matter and the need to promote efficient administration and good governance. Thus the Court in Minister of Home Affairs v Eisenberg held;

that in circumstances of the case “the Act⁵⁵⁰ did not call for special procedures to be followed for making regulations in terms of section 52 , and that even if the PAJA was applicable to the making of regulations and failure to comply with section 4 (1) was subject to review, the Minister was not obliged to comply with section 4(1)”⁵⁵¹.

4.3.6 The time frames

⁵⁵⁰ Act 96 of 1991.

⁵⁵¹ Ibid n.78 (at para 53).

The following time frames must be strictly observed by both the administrator and the person(s) seeking judicial remedies:

- (i) Any proceedings for judicial review in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days;
- (ii) 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 on which he or she became aware of the action request written reasons;
- (iii) An administrator to whom a request for written reasons has been made must within 90 days of receipt of request provide the person seeking the reasons, the reasons in writing; and
- (iv) If an administrator had failed to provide the reasons within the prescribed period it shall be presumed in any judicial review proceedings, in the absence of any proof to the contrary, that the administrative action was taken without good reasons⁵⁵²

4.3.7. Codified Grounds of review under PAJA

Indeed section 6 of the PAJA gives us an elaborate list of grounds of review, the list include the following; where the administrator was not authorized to do so by the empowering provision, an unauthorized delegation, bias or reasonable suspected of bias, the action was procedurally unfair, where the decision was reached in bad faith, where the decision was arbitrarily or capriciously arrived at, the list is not exhaustive.⁵⁵³

⁵⁵² For full explanation of the time frames see section 7 of the PAJA

⁵⁵³ For a more comprehensive view of the grounds of review see section 6 (2) of the PAJA.

4.3.8 The remedies in judicial review proceedings under the PAJA

The following remedies are open to the court or tribunal which may grant an order that is just and equitable including the following: directing the administrator to give reasons, to act in the manner the court or tribunal requires, may interdict an administrator from acting in a particular manner, set aside the administrative action, or remit the matter for reconsideration by the administrator, the list is not exhaustive.⁵⁵⁴

(i) The meaning of appropriate and equitable relief

In Fose v Minister of Safety and Security⁵⁵⁵ the Court in determining the meaning said

“appropriate relief” will in essence be a relief that is required to protect and enforce the Constitution; depending on the circumstances of the case the relief may be a declaration of rights, interdict mandamus or such relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced; and that if necessary to do so the Court may even have to fashion new remedies to secure the protection and enforcement of these all important rights.⁵⁵⁶

In August and Another v Electoral Commission and Others⁵⁵⁷ the Court in the course of determining what was “appropriate and equitable relief” referred to section 38 of the Constitution and said prisoners other than those who were expressly excluded by the 1998 Electoral Act who have registered either previously or in consequence of the

⁵⁵⁴ See section 8 of the PAJA for an exhaustive list of remedies .

⁵⁵⁵ 1997 (3) SA 286 (CC)

⁵⁵⁶ Ibid (at para 19)

⁵⁵⁷ 1999(3) SA 1 (CC)

order, were entitled to vote in the then on coming elections, the Court did not give specific directions as to what was required to be done but that the Commission had to indicate how it would comply with the order.⁵⁵⁸

In Pretoria City Council v Walker⁵⁵⁹ The Court expressed the view that:

“appropriate relief” would be relief which was tailored to the needs of a particular case, that in stead of withholding amounts lawfully owing by him to the Council the respondent could have applied to court for declaration of rights or a mandamus to vindicate breach of his section 8 rights;

by means of such an order the Council would have been compelled to take appropriate steps as soon as possible to eliminate unfair discrimination and the court would then have given further ancillary order or directive as might have been necessary to ensure proper execution of its order and to report back to the court; and that absolution from an instant was not an appropriate relief.⁵⁶⁰

While in the same issue, in Premier Mpumalanga the Court said “it would often be appropriate to refer the matter back to the relevant organ of state however that was not the relevant case;...time had long past and the period for which the bursaries were required had expired; it would have been futile to return the matter to the applicant at that stage for he could not have given parents and School Governing Bodies

⁵⁵⁸ Ibid (at paras 38-39).

⁵⁵⁹ 1998(2)SA 363 (CC)

⁵⁶⁰ Ibid (at paras 95 H -97 E-F)

reasonable notice that he intended to terminate bursaries which he had in fact terminated by the passage of time”⁵⁶¹

In Mohammed and Another v President of the Republic of South Africa and Others⁵⁶²

the Court in addressing the issue here at hand opined that:

the applicants would have been entitled to an order for costs in their favour, not only because of the success in their suit but because they had raised against the government constitutional issues of general importance; however it would not have been appropriate to make such an order...the litigants on behalf of Mohammed was funded by United State Government; ...and

that any additional costs that might have been incurred were negligible.⁵⁶³

In Minister of Health and Others v Treatment Action Campaign and Others⁵⁶⁴ the Court

faced with that issue said:

where a breach of any right has taken place including a socio economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement would provide guidance as “the appropriate relief” in a particular case; wherever necessary that might include a mandamus and the exercise of supervisory jurisdiction;

⁵⁶¹ See n. 149(at 52 F-I)

⁵⁶² 2001(3) SA 893 (CC)

⁵⁶³ Ibid (at para 73)

⁵⁶⁴ 2002(10) BCLR 1033 (CC)

South African courts have wide range of powers at their disposal to ensure that the Constitution is upheld; these included mandatory as well as structural interdicts; how they must be exercised depends on the circumstances of each particular case due regard been had to the roles of the legislature and the executive in a democracy; and that what must be made clear, however is that when it is appropriate to do so courts might and if need be must use their wide powers to make orders that affect policy as well as legislation.⁵⁶⁵

Summary

This chapter was about the definition of administrative action and the constitutional imperatives thereto. What emerged from the chapter is that besides the codification of the grounds of review, the PAJA actually operationalises or gives effect to the imperatives of section 33 of the Constitution. It requires administrators to follow fair procedures. It does not matter whether the decision is a denial of a promotion, a refusal of extension of lease, or a dismissal. The PAJA calls for the provision of reasons, adequate notice of the intended course of action to those likely to be affected by an administrative action, provision of adequate opportunity to comment, to inform people affected by the decision of the right to review or appeal, allow them an opportunity to be represented by lawyers, to give them adequate opportunity to controvert and contradict arguments that go against them, the list is not exhaustive. The number of cases to which reference had been made, indicates that the courts are on the right track

Section 33 has brought a greater measure of administrative accountability and transparency in the complex process of public administration. That transparency is also

⁵⁶⁵ Ibid (at paras 106-113).

buttressed by Section 32.⁵⁶⁶ The two sections, demand greater consultations with those cognate provisions Section 33 and 32 facilitated participatory democracy as opposed to likely to be materially and adversely affected by proposed decisions.⁵⁶⁷ The participatory nature of our democracy is further reinforced by section 1 (d) of the Constitution, and sections 3 and 4 of the PAJA in respect of the decisions affecting individuals and the public at large.

The stage is now set to draw lines of comparison of judicial review of administrative action in England, Australia, America, Namibia and Germany from which lessons may be learned.

⁵⁶⁶ The right of everyone to have access to information held by the State.

⁵⁶⁷ See Mureinik. (1993) "Reconsidering Review: Participation and Accountability" *Acta Juridica* (at 35).

CHAPTER FIVE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN COMPARATIVE PERSPECTIVE

5.0 Introduction:

This chapter seeks to draw areas of comparisons on approaches of to judicial control of administrative action in different constitutional democratic models, particularly those in mature legal systems. For this purpose we have selected the English model, the emerging commonwealth democratic model of Australia, Germany and the American models, with a view to establishing important areas of commonality and differences from which lessons could be learned.

One must hasten to add that the comparative method is useful in many branches of the law, but it is of particular importance in the area of Administrative Law because the nature of the leading problems and in particular the question of how government can be controlled in the interest of both the state and the citizens, are common to all the developed and most probably the developing nations of the world.⁵⁶⁸

Whilst it is difficult to compare the historical parallels in the selected countries, because the English and the Americans did not experience the harsh realities of apartheid as South

⁵⁶⁸ See Brown L. N. and Garner. J.F.(1983). French Administrative Law 3rd ed. Butterworth London: Butterworths (p 1)

Africans and as most probably the Namibians have experienced, one needs to concede at the outset that, the principles and the doctrines of the English Administrative law⁵⁶⁹ have penetrated, influenced and continued to shape the systems of Administrative Law both in South Africa and Namibia⁵⁷⁰.

5.1 Judicial Review in England

Scholars trace the origins of judicial review under the English law to Dr. Bonham's case,⁵⁷¹ and in that regard Sir Edward Coke, the late Chief Justice of the Court of Common Pleas, had stated:

when an Act of Parliament is against common right and reason or repugnant or impossible to be performed the common law will control it and adjudge such an act to be void.⁵⁷²

The British constitutional democracy is monarchical in form. It is based on straight majority of winner takes all and is biased towards rapid political decision-making. Contrary to the South African system of constitutional democracy, the English legislature is “sovereign” and no judicial body possess the authority to declare as unconstitutional

⁵⁶⁹ I am speaking about the doctrine of legitimate expectation subsumed under the rules of natural justice and the modified version of the American due process which would be invariably referred to in this paper)

⁵⁷⁰ See. Sanders . AJGM . (1981) 14 “The characteristic features of South African Law” CILSA-328 -335 [1610].

⁵⁷² Ibid (at 118) and for more on the subject see Brigham; J “ Judicial review : Definition and Much More From Answers” . Com in Wiki Answers. Community (at 1).

and prevent enforcement of a statute duly enacted by the British Parliament .⁵⁷³ In view of the importance of the doctrine to our subject matter its meaning, practical implication are unpacked hereunder.

(a) The meaning of the doctrine of Parliamentary Sovereignty

A.V. Dicey defined the concept thus “the principle of Parliamentary Sovereignty” means neither more or less than this, namely that Parliament has under, the English Constitution, the right to make or unmake any law whatever, and further that no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament.⁵⁷⁴

(b) The cardinal aspects of the doctrine of Parliamentary Sovereignty

The cardinal aspects of the doctrine which must be noted are

- (i) that Parliament is omniscient which means it can legislate on any subject-matter and in terms it chooses; and
- (ii) that no other institution constitute a source of law superior to Parliament, or can declare an Act parliament invalid.

(c) The implications of the doctrine of Parliamentary Sovereignty

The pervasive power of Parliament in the United Kingdom finds illustration in Burma Oil, CO v Lord Advocate⁵⁷⁵ in which the Court of Appeal held that compensation was payable to a British Company whose far- eastern installations had been destroyed by British Army during World War II to prevent their capture by the Japanese. In order to

⁵⁷³ See Dr Almon Leroy Way, Jr “Comparative Government British and American Constitutional Democracy” in [http://www. Geocities. Com/way-leroy](http://www.Geocities.Com/way-leroy) Comparative Government, US and British systems (at 1).

⁵⁷⁴ See A.V. Dicey.(1982) An Introduction to the Study of the Law of the Constitution.10th ed London: Macmillan Press.(P xxxiv-xxxv), See also Prof Mbao,M.L.M. “ The doctrine of sovereignty of Parliament” PPL 201 Lecture Notes (p1).

⁵⁷⁵ [1964] 2 A ll E.R.348 (HL).

avoid paying damages, the British government successfully introduced the War Damage Act, 1965 which, retrospectively provided that no compensation would be payable for the destruction of civilian property necessitated by the defence of the realm. Lord Hodson in the House of Lords opined that the accepted opinion of writers and Judges down to and including the period of 1914 war was to the effect that no compensation was payable when the prerogative have been used in an emergency as a power to do anything necessary for the defence of the realm.⁵⁷⁶

The implications of the doctrine are far reaching, indeed in Mazimbamuto v Lardner Burke⁵⁷⁷ Lord Reid held:

It often said that it would be unconstitutional for the United Kingdom Parliament to do certain things meaning that the moral, political and other reasons against doing them are strong that most people would regard it as highly improper if Parliament did those things; but that does not mean that it is beyond the power of Parliament to do such things; and that if Parliament choose to do any of them, the Court would not hold the Act of Parliament invalid⁵⁷⁸

In Pickin v British Railway Board,⁵⁷⁹ the appellant claimed that the Board had fraudulently misled Parliament into passing a Private Act by stating that the Board had complied with the requirements regarding notification to interested parties. The House of Lords cited, with approval, the earlier case of Edinburgh and Dalkeith Railway Co v Wanchope⁵⁸⁰ and stated that the Courts had to obey an enactment that appeared on the face of it to be an Act of Parliament and did not have the power to

⁵⁷⁶ Ibid (at 378- C).

⁵⁷⁷ [1968] 3 All E.R. 573 (HL).

⁵⁷⁸ Ibid (723-B)

⁵⁷⁹ [1974] AC 765.

⁵⁸⁰ [1842]

examine the internal proceedings of Parliament in order to determine whether the Act had been obtained by irregularity or fraud.

According to Sir Edward Coke, the British Parliament is absolute it is a sovereign and an uncontrollable authority in making, confining, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations, civil, military or maritime; it can alter the established religion of the realm and create afresh even the Constitution of the United Kingdom; it is omnipotent.⁵⁸¹ Parliament can do everything but make a woman a man.⁵⁸² It can do anything it wishes to do and no court of law may set aside a parliamentary statute on unconstitutional grounds; Parliament and ultimately the House of Commons have the power of final decision concerning the content of the Constitution, the true meaning, and proper application, of a particular part of the Constitution.⁵⁸³ Parliament rather than the court of law is the guardian of the British Constitution.⁵⁸⁴

The essential function of judicial review was well captured by Lord Hailsham, L.C, as he then was, in Chief Constable of the North Wales Police v Evans,⁵⁸⁵ where the Lord Chancellor had said the following :

... remember in every case that the purpose ...is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the

⁵⁸¹ See Dicey, A.V., n. 578 citing Sir Edward Coke with approval.

⁵⁸² See De Lome cited with approval by Dicey, A.V, note 578 (at p 43.).

⁵⁸³ Dr.Almon Leroy Way, Jr. Ibid (at p. 2).

⁵⁸⁴ Dr Almon Leroy Way Jr. Ibid (at p. 5).

⁵⁸⁵ [1982] 1 W L R 1155.

authority constituted by law to decide the matters in question.⁵⁸⁶

Comparatively speaking the English law approach to the review of administrative action was more or less similar to our own prior to the adoption of the Constitution , thus Lord Greene, M.R; in the case of Associated Provincial Picture Houses v Wednesbury Corporation⁵⁸⁷ in confirming the decision of Collins .J , that the exercise of discretion by the Wednesbury Corporation to exclude Children under15 years from cinematograph entertainment on Sunday, whether accompanied by their Parent or Guardian was not unreasonable and therefore not ultra vires, said

the law recognizes certain principles on which the discretion must be exercised but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law; that the said principles are well understood;

real exercise of discretion, if in the statute conferring discretion, there is to be found expressly or by implication matters to which the authority exercising discretion ought to have regard in exercising discretion, they must have regard to those matters; and

that conversely if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question they must disregard those matters ...expressions have been given of the sorts of things where the power of local authorities came to be considered to give rise to interference by the courts namely:- bad faith, dishonesty,

⁵⁸⁶ Ibid (at 1160)

⁵⁸⁷ [1947] 2 All ER 680.

those of course stand by themselves, unreasonableness, attention given to extraneous circumstances, disregard to public policy ...have been considered as matters that are relevant for consideration.⁵⁸⁸

Speaking of judicial review of administrative action Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service⁵⁸⁹ referred to three heads or grounds of review namely:-

(i) Illegality by which he meant 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* justiciable question to be decided in the event of dispute by those persons, Judges, by which the judicial power of state is exercisable.

(ii) Irrationality by which he meant what has been succinctly referred to as the Wednesbury unreasonableness; that applied to a decision 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. It is a ground which can stand on its feet by which a decision may be attacked by judicial review.

(iii) Procedural impropriety which he said included natural justice and is overridden by national security otherwise, national security would have been seriously compromised.⁵⁹⁰

⁵⁸⁸ Ibid (at 682 F-H)

⁵⁸⁹ [1985] 3 All ER (HL).

⁵⁹⁰ Ibid (at 950 J-A).

(d) Subjective discretion

In the most notorious war time decision, in the case of Liversidge v Anderson⁵⁹¹ the House of Lords were called upon to construe a regulation giving the Home Secretary the power to order the detention of any person, “if the Secretary had reasonable cause to believe, that a person is of hostile origin or associations and that therefore it was necessary to exercise control over him”. Put simple, the daunting task for their Lordships to decide was, whether the jurisdictional facts to the exercise of the Secretary’s power - the reasonable cause for him to believe, should be construed objectively, so that the court of law could enquire into the reasonableness of his belief or subjectively so that it could not?

The majority of their Lordships, after a close scrutiny of jurisdictional facts, concluded that it was ambiguous, although it could, and ordinarily would require the Secretary in fact to have reasonable cause for his belief, so that the Court might review the reasonableness of his belief, that it could also mean that the Home Secretary was required merely to think that he had reasonable cause for his belief.⁵⁹² As to the question whether when two meanings were possible ought the Court not to have adopted an interpretation best securing the liberty of the subject, thus adopting an objective interpretation, their Lordships said No! and added that, that presumption did not apply in wartime to a measure enacted to protect the safety of the State”⁵⁹³

⁵⁹¹ [1942] AC 206 (HL).

⁵⁹² Ibid n 36(at 206-H).

⁵⁹³ Ibid n 36 at (218-263) .

In a most liberal dissenting judgment which seems to have advanced the cause of human rights, especially individual liberty, Lord Atkin said the following:

I, view with apprehension the attitude of judges, who on a mere question of construction when face to face with the claims involving the liberty of the subject, show themselves more executive-minded than the executive. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified by law;

I, protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the Minister...

I, know only one authority which might justify the suggested method of construction: the question is whether the words if a man has,... can mean if a man thinks he has, I am of the opinion that they cannot, and that the case should be decided accordingly.⁵⁹⁴

Perhaps the wind is blowing in the right direction in England, through the incorporation of the Human Right Act of 1998. The Act incorporates of the European Convention on Human Rights into domestic law.

⁵⁹⁴ Ibid n 38 (at 244-5)

5.2 Judicial Review in Australia

Until the middle of the 1970's, the Australian system of Administrative Law was very much like the system in England, based on the common law.⁵⁹⁵ The most final administrative decisions were taken within departments of state. Some administrative decisions were capable of being reviewed by specialist tribunals particularly where the rights of individuals were involved.⁵⁹⁶ For other decisions the only available challenge was through judicial review and the major weapon was that of the doctrine of error of law.

The most significant features for the purpose of this study and relevant to the South African administrative law are the following:

The Administrative Decisions Judicial Review Act of 1977

The Commonwealth Parliament passed this legislation which effectively codified the principles of judicial review and had also conferred judicial review jurisdiction on the Federal Court which is parallel to its jurisdiction under the Constitution.

⁵⁹⁵ See Justice Garry Downes, A.M., 2007, in "speeches and Papers : Comparative Administrative Law Australia and Thailand" in <http://www.aat.gov.au/speeches> papers (at 3).

⁵⁹⁶ Justice Garry Downes Ibid examples included planning and building approvals and the payment of pension.

The following grounds have been codified under the Administrative Decisions Act 1977:

1. Breach of the rules of natural justice.
2. Failure to observe procedures required by law.
3. Lack of jurisdiction to make decisions.
4. Decisions not authorized by law.
5. Improper exercise of power including the following:
 - i) Taking irrelevant considerations into account in the exercise of power.
 - ii) Failure to take relevant considerations into account in the exercise of power.
 - iii) An exercise of power for an improper purpose.
 - iv) An exercise of power resulting in an uncertainty
6. A decision involving an error of law.
7. Decisions induced or effected by fraud.
8. Decisions without evidence or material to justify such decisions.
9. Decisions otherwise contrary to law.

The Administrative Appeals Tribunal Act 1975

The Act established an Administrative Appeals Tribunal to be a general tribunal for the review of the Commonwealth administrative decisions. The tribunal has no common law jurisdiction, unlike Australian courts. It derives its power from the Commonwealth individual Acts of Parliament.⁵⁹⁷ The tribunal gives reasons for its decisions.⁵⁹⁸

⁵⁹⁷ See Ibid n. 128 (at 5).

⁵⁹⁸ Examples of such tribunals include Taxation Boards of Review, Guardianship and Mental Health

The Australians Reforms of the 1970's

The establishment of the Administrative Appeals Tribunal was part of the adoption in Australia of a completely new regime of Administrative Law. The Administrative Appeals Tribunals are just part of the larger package. The establishment of the Federal Court of Australia was itself part of the scheme. Part of the jurisdiction of the court came under the Administrative Decisions Judicial Review Act.

The significance of the Act to our study is that it imposes a statutory obligation upon decision makers to give reasons for their decisions, while the common law had stopped short of requiring reasons for all administrative decisions. Without reasons it is difficult to challenge the decisions because normally there is nothing upon which to base a challenge. The legislative scheme has also included the establishment of Administrative Review Council to advise the Government on all matters of Administrative Law and the establishment of the office of Ombudsman.⁵⁹⁹

The operation of the Administrative Appeals Tribunal

The unique nature of the Administrative Appeal Tribunal is that, in its decision- making function it should make the "correct or preferable decision". The concept "correct or

Tribunals.

⁵⁹⁹ See Ibid n 128 (at 5).

preferable decision” means the power of substitution,⁶⁰⁰ which originates from section 43 of the Administrative Appeals Tribunal Act of 1975 which authorizes the tribunal to set aside the decision under review and make a decision “ in substitution for the decision set aside.⁶⁰¹”

In Drake v Minister for Immigration and Ethnic Affairs⁶⁰² the Federal Court accepted that it was appropriate for the Administrative Appeals Tribunal to have regard to relevant government policy but not to regard such policy as determinative where, on material before the tribunal, the correct or preferable decision departed from the policy. Nevertheless the Court recognised the significance of government policy and the caution that the tribunal should exercise before departing from it.

In Drake and Minister for Immigration and Multicultural and Ethnic Affairs⁶⁰³ the Court recognised that laying down policy “ is essentially a political function to be performed by the Minister who is responsible to the parliament, the tribunal should adopt a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary”⁶⁰⁴

⁶⁰⁰ It is respectfully submitted that the position in Australia in stark contrast to the South African situation. In Premier Mpumalanga, the Court recognised that although the general rule is that a court would not substitute its decision for that of the original decision-maker our courts have recognised that where it is appropriate for the courts to do so (at para 50). In Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T), Hiemstra, J; as he then was identified the principles for departure from the general rule as follows “ where the end result is a fore gone conclusion, or where it would merely be a waste of time to order the tribunal to reconsider the matter and where the tribunal or functionary had exhibited bias or incompetence to such a degree that it would be unfair to submit to the same jurisdiction again” (at 76-D-G).

⁶⁰¹ See Justice, Garry Downes A.M “ Speech to the Inaugural Conference of the New South Wales Chapter of the Council of Australasian Tribunals 28 May 2004 (P 11) available at <http://www.aat.gov.au/speeches> papers and research.

⁶⁰² (1979) 2 ALD 60

⁶⁰³ (No. 2) 1979 2 ALD 634

⁶⁰⁴ Ibid (at 69-79)

Although the Tribunal gives considerable weight to executive government policy in making its decisions it is not bound by that policy, it places emphasis on doing justice in individual cases and strives to achieve that in every case. However there are situations in which individual interest must yield to the interest of the majority as expressed in government policy.⁶⁰⁵

The following are the powers of Administrative Appeals Tribunal on review of an administrative decision

- (1) To affirm the decision under review.
- (2) To vary the decision under review.
- (3) To set aside the decision under review and to:
 - (a) make a fresh decision in substitution for the decision under review : or
 - (b) remit the matter for reconsiderations in accordance with any directions or recommendations of the Tribunal.

Finally the Administrative Appeals Tribunal Act provides that the decisions of the Tribunal shall be the final administrative decision subject only to the appeal to the Federal Court.⁶⁰⁶

The Procedures of Administrative Appeals Tribunals on review of administrative decision

The legislation establishing the Administrative Appeals Tribunal ⁶⁰⁷ requires it to make “hearings” the centerpiece of its reconsideration of administrative decisions. Accordingly

⁶⁰⁵ Ibid n. 577 (at 6)

⁶⁰⁶ Ibid (at 6).

decisions are preceded by a hearing at which the claimant and the government agency are usually, but not always, represented by lawyers. At the hearing oral evidence is given , the rulings are also made whether written evidence should be received and considered by the Tribunal .⁶⁰⁸

5.3 Judicial Review in the United States of America

The American position has been somewhat satisfactory as evident from what follows. In the case of Marbury v Madison⁶⁰⁹ the Supreme Court was confronted with the problem of an Act of Congress, that conflicted with a provision of the United States Constitution. The question, in Marshall's words, was, whether an Act repugnant to the Constitution can become the law of the land? Marshall answered that the Constitution was the fundamental and the paramount law of the nation and consequently an Act of the legislature repugnant to the Constitution was void.

In the seminal and ground breaking judgment, Marshal, C.J. said the following as justification of the Supreme Court's power of judicial review:

It is emphatically the province and the 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. A law repugnant to the Constitution is

⁶⁰⁷ The 1975 Act .

⁶⁰⁸ Ibid n 128 (at 8).

⁶⁰⁹ Marbury V Madison, 1Cr. 137,170 (1803).

void. Courts and other departments are bound by that instrument⁶¹⁰.

The power of judicial review in the United States is nowhere to be found in the written Constitution, it was based solely upon the judicial interpretation of the Constitution in that seminal judgment in Marbury v Madison (above). Justice Marshall had determined that the Judicial Act was unconstitutional but since he did not have the explicit power to declare it invalid he appealed to the principles which he said were inherent in the Constitution :

- (a)The sovereignty of the people by which he meant that people had the right to establish fundamental principles designed to be permanent.
- (b)The people have the right to place limits on government and to allow those limits to be determined by those on whom they were imposed would have been useless.
- (c)The Constitution was written precisely to define those limits.⁶¹¹

From those principles Marshall, C.J; concluded that one had to accept the supremacy of the Constitution in reviewing legislation, for to allow the legislature to pass laws repugnant to the limits laid down in the Constitution would be to render impotent the fundamental principles upon which the people have agreed to be governed. It was from this interpretation that the power of judicial review was born.⁶¹²

⁶¹⁰ Ibid n.783 (at 177).

⁶¹¹ Ibid n. 128 (at 176-80).

⁶¹² See Stuart Hargreaves .2006 in his "Of Rights and Review: The American , Kelsen and The New Commonwealth Models" Canadian Student Law Review. in <http://www.cslr.ca/volume/1/judicial-review-American,kelsen,new-commonwealth-m> (p10).

Marshall, C.J.; had used three provisions of the Constitution to justify his arguments for judicial review. The first was Article 3, sub-article 2 which extended judicial power to all cases in Law and Equity arising from the Constitution; second was Article 6 which required the judges to pledge to support the Constitution and then said how immoral to impose this oath on them if they were to be used as instruments for violating what they swear to support. Thirdly he pointed out that in declaring what shall be the supreme law of the land [Article 6] the Constitution first mentioned and not the laws of the United States generally but those only made in pursuance of the Constitution had that rank.⁶¹³

The Chief Justice however, went further and said the following in denying the applicant a remedy:

the province of the court is solely to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform their duties in which they have a discretion, questions in their nature political or which are by constitutional laws submitted to the executive can never be made in this court.

Contrary to the British constitutional system, the American constitutional democracy is republican; there are checks and balances, necessitating delays, deliberations, negotiations, bargaining and compromise, the courts of law in cases brought before them have the power of judicial review; they can rule over the constitutionality of legislative

⁶¹³ For more on this see “Judicial Review: Definition ...” From Answers .Com .Search WikiAnswers. Community . Oxford University Press .(p 9).

enactments and the decisions and actions of the executive. The United State Supreme Court is the guardian of the Constitution.⁶¹⁴

(i) The constitutional justification for judicial review in the United States

Speaking of the legitimacy of judicial review in the context of the United States of America, Wenschsler said the powers are grounded in the Constitution and specifically referred to the Article VI, section 2⁶¹⁵ and Article III section 1⁶¹⁶ and requested Justice Learned Hand to concede positively that under those clauses state courts would at times have to decide whether state laws and constitutions or even Federal statutes were in conflict with the Federal Constitution.⁶¹⁷ He argued that it was altogether in keeping with the established practice for the Supreme Court to assume an authority; that it keeps the states, Congress, and the President within their prescribed powers.⁶¹⁸

Dworkin said “it impairs democracy when an authoritative Court makes the wrong decision about what the democratic conditions require, but no more than it does when a majoritarian legislature makes a wrong constitutional decision that is allowed to stand;

⁶¹⁴ See Dr. Almon Leroy Way Jr. opcit n. 116 (at 2)

⁶¹⁵ The relevant provision provides: “The Constitution ...shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding”

⁶¹⁶ Which provides that the Federal judicial power shall vest in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish”

⁶¹⁷ See Wenschsler, H.(1959) “Towards Neutral Principles of Constitutional Law” Cambridge: Harvard Law Review.vol.73. (p3)

⁶¹⁸ Ibid.

the possibility of error is symmetrical; that the majoritarian premise was confused; must be rejected and that judicial review was not un-democratic”⁶¹⁹

Waldron provided the following justifications: -

- a) Judges do not make their own decisions about rights, they simply enforce the decisions of the people that are embodied in Bill of Rights which itself has democratic credentials either in legislation or as part of a Constitution;
- b) Judges do have democratic credentials, they are nominated and confirmed by elected officials;
- c) Review is an additional mode of access of citizens input into the political system, sometimes as voters, lobbyists or as litigants;
- d) Judicial review acts as a security or constraint against majoritarian tyranny; when the legislative majority is unrestrained minorities or even individuals may suffer oppression in relation to majority, they may be oppressed or discriminated against or their rights denied and violated or their interest may be unduly subordinated to those of the majority.⁶²⁰

Charles L. Black, Jr. argued that “ the function of judicial review is to keep up a satisfactory high public feeling that the government had obeyed the laws of its Constitution and stood ready to obey it as it may be declared by a tribunal of independence, that it had a checking function”⁶²¹

⁶¹⁹ Dworkin, R.M. (1996) Freedom's Law: The Moral Reading Of the American Constitution. New York. Oxford University Press (P. 32-33).

⁶²⁰ Waldron, J. (2006) “The Core of the case Against Judicial Review” Yale Law School. The Yale Law Journal (P 1346-1406).

⁶²¹ Charles L.Black,Jr (1960) The People And The Court: Judicial Review in Democracy United States of America. Prentice-Hall. (P. 86) .

(ii) The Political question doctrine in the United states of America

The Courts had sometimes demonstrated judicial self- restraint by invoking the political question doctrine as evident in the judgment of Taney C.J. where the judge said the following “ it is the province of the court to expound the law not to make it and certainly it is no part of the judicial function of any court of the United States to prescribe the qualifications of voters in a State nor has it the right to determine what political privileges the citizens of the State are entitled to, unless there is an established Constitution or law to govern its decision” ⁶²²

The classical catalogue of the conditions to which the political question doctrine applies was set forth by the United States Supreme Court in the case of Baker v Carr, ⁶²³ where Brennan, J; laid down the following six principles:

- 1, “Textually constitutional commitment of the issue to a coordinate political department (examples foreign affairs and executive war powers)” or
- 2, “Lack of judicially discoverable and manageable standards for resolving it” or
- 3, “The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion” or
- 4, “The impossibility of a court’s undertaking independent resolution without expressing lack of respect due to coordinate branches of government” or
- 5, “An unusual need for questioning adherence to a political decision” or
- 6 “The potentiality of embarrassment from multifarious pronouncements by

⁶²² Luther v Borden 7 How, 1 (1849).

⁶²³ 369 U. S.186.217 (1962)

various departments on one question”⁶²⁴

(iii) The due process of the law

The Americans pride themselves of the due process of the law.⁶²⁵ Almost every governmental action adverse to an individual’s legal claims is covered by the procedural requirements of due process presupposing that there must be a hearing of some sort.⁶²⁶

In the case of Dixon v Alabama State Board of Education,⁶²⁷ the so-called school expulsion case, in which several Negro students were expelled without notice or hearing, following student demonstrations against segregation in the neighbouring public facilities, there were conflicting reasons for expulsion with some of the members testifying as to the constitutional impermissibility of the suppression of the First Amendment protected activity. In a seminal judgment the Court of Appeals held that the due process attaches to the student’s interest in education and that notice, hearing and statement of reasons were required before expulsion.⁶²⁸

In Strickland v Inlow,⁶²⁹ a case that concerned the suspension of two girls from high school for one semester for having spiked the punch at the class party by adding malt beverage; the court had assumed, without deciding that the procedural requirements

⁶²⁴ For further information on that see http://en.wikipedia.org/wiki/Baker_v.Carr.

⁶²⁵ The equivalence of South African constitutionally recognised “procedural fairness”

⁶²⁶ See McCormack .W. 1974. “ The Purpose of Due Process : Fair Hearing or Vehicle for Judicial Review ” Texas Law Review . Vol. 52. No. 7. Nov. (at 1257).

⁶²⁷ 294 F.2d 150 (5 th Cir) 368 U.S.930 (1961).

⁶²⁸ Ibid (at 159)

⁶²⁹ 485 F.2d 186 (8 th Cir.1973).

of the due process were met in a school hearing before the board.⁶³⁰ The court found that the school regulations prohibited consumption on campus of intoxicating beverages; and that the malt beverage used contained some alcohol but could easily be found non-intoxicating.⁶³¹ There was no evidence of substances of intoxicating nature adduced, accordingly the court held that failure to prove a violation of the board's own standards resulted in the denial of the substantive due process.⁶³²

In re: Ruffalo,⁶³³ an anomalous license revocation case, the applicant was disbarred by the Ohio Supreme Court pursuant to the recommendation by the State Bar Grievance Committee. The applicant sought and obtained review from the Supreme Court which latterly held that the hearing at which the charge was proved lacked the procedural due process since there had not been any advance notice of the charge.⁶³⁴

What is also of significance for the purpose of this study and of relevance to the South African situation is the American Administrative Procedure Act,⁶³⁵ and I am turning thereon:

5.4. The Administrative Procedure Act of 1946

The United States of America has enacted the Administrative Procedure Act, to take care of all the various aspects of administrative action. The Act recognizes that, for effective

⁶³⁰ Ibid (at 190).

⁶³¹ The beverage could probably have been classified as a beer rating less than 5% alcoholic content by weight.

⁶³² Ibid n. 804 (at 192).

⁶³³ 390.U.S. 544 (1968).

⁶³⁴ Ibid (at 548-9).

⁶³⁵ 1946.

administration, administrative authorities may be required to perform the functions of other entities, like rule making and adjudication in certain cases.⁶³⁶

The Act was an attempt to bring transparency, certainty, accountability in public administration; it had also established clear checks and balances on the administrative action to avoid arbitrariness and to uphold the concept of the rule of law as apparent from what follows;

(a) any rule or regulation of administrative authority has to be published to bring it to the public.⁶³⁷ The intention here was to ensure that the people are aware of all rules and regulations before they approach the authorities to provide the scope of their operation and certainty;

(b) the Act also provides that, in case any person approaches an authority for information on rules prepared by it, then subject to the conditions mentioned in the Act, the information had to be made available to him;⁶³⁸ and

(c) the Act takes care of the adjudication procedures to be followed by administrative bodies. It makes it mandatory for all public adjudicators to follow the principle of natural justice while hearing the parties, provides for procedural matters to ensure

⁶³⁶ See Reddy A.K “Rule of Law : Legal and Judicial Reforms” Administrative Staff College on India , Centre for Good Governance , Hyderabad , November 2004 [http:// www .asci.org. in/ WSGov-pubs – 7.html](http://www.asci.org.in/WSGov-pubs-7.html) (at 7).

⁶³⁷ See Administrative Procedure Code of the U.S, Part 1, Chapter 5 and Article 552. This compares favourably with section 5 of the PAJA.

⁶³⁸ Ibid.

absence of arbitrariness and complaints procedure against any of the administrative bodies.⁶³⁹

As in South Africa however, jurisdictional facts must exist before the court can have power to review;⁶⁴⁰ a court without jurisdiction cannot enter judgment in favour of either party, it can only dismiss the case for want of jurisdiction.⁶⁴¹

5.5 Judicial Review in Namibia

(i) The salient features of the Namibian Constitution

The following salient features of the Namibian Constitution are for comparative reasons important and relevant to the South African situation and should not be lost sight of. Namibia had been declared a democratic, secular state, founded upon the principles of democracy, rule of law and justice for all.⁶⁴²

The Constitution is the fundamental and supreme law of Namibia.⁶⁴³ In the case of S v Acheson⁶⁴⁴, the late Mohamed, C.J; said the following about the Constitution:

it is not simply a statute which mechanically defines
the structure of government and the relations
between the government and the governed; and

⁶³⁹ See Ibid Article 552 (4) (B), comparable to section 33 of the PAJA.

⁶⁴⁰ Sweitzer v Industrial com. 394 I11 141, 68NE 2d 290

⁶⁴¹ Angelos License, 80 Pa D & G 49, Wisconsin Tel. Co v Wisconsin Employment Relation Board, 253 Wis 584, 34 NW 2d 844. further on this aspect see American Jurisprudence .1962. 2nd ed. vol 2 (at 631)

⁶⁴² See the Preamble and article 1(1) of the Namibian Constitution .

⁶⁴³ See the Preamble and article 1(6) of the Namibian Constitution.

⁶⁴⁴ 1991(2) SA 85 (Nm).

that it is a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation, the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.⁶⁴⁵

Judicial power is vested in the Courts⁶⁴⁶ and their independence is guaranteed. Speaking about judicial independence, O' Linn J, in S v Heita and Another⁶⁴⁷ emphasized the importance of judicial independence for effective functioning of the judiciary and without which the Constitution itself cannot survive. The learned judge went further and said:

the Courts are subject only to the Constitution and the law ... and that simply it is also not subject to the dictates of political parties even if that political party is the majority party. Similarly it is not subject to any other pressure group.⁶⁴⁸

Indeed the courts in Namibia have the power of review , as they interpret, implement and uphold the Constitution and the fundamental rights and freedoms.⁶⁴⁹ They can

⁶⁴⁵ Ibid (at 813).

⁶⁴⁶ See article 78 (1) and (2) of the Constitution respectively.

⁶⁴⁷ 1992 (3) SA 785 (Nm) .

⁶⁴⁸ Ibid (at 789).

⁶⁴⁹ See Naldi, G.J (1995) Constitutional Rights In Namibia : A Comparative Analysis with International Human Rights . Cape Town ; Juta and Co (p. 21) and article 79 (2) to the Namibian Constitution.

review the internal proceedings of Parliament.⁶⁵⁰ They can also declare legislation repugnant to the Constitution invalid.⁶⁵¹

(ii) Article 18 of the Namibian Constitution

Most fundamental for the purpose of this paper is the fact that Namibia has taken a giant step in the development of Administrative Law, through the incorporation of Article 18 in the Bill of Rights of the Constitution of Namibia⁶⁵². The said Article is entitled “Administrative Justice”, and provides as follows:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by the 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.

It has been submitted that the above Constitutional provision not only constitutes a firm basis for the development of Administrative Law in Namibia, but also serves as a catalyst for the development of democratic principles and behaviour and that through Article 18, individual's right to judicial review and extra judicial adjudication of administrative

⁶⁵⁰ See Federal Convention of Namibia v Speaker National Assembly of Namibia and Others 1994 (1) SA (Nm) 77,191-2.

⁶⁵¹ See Ex Parte Attorney General Namibia : In re Corporal punishment by Organs of State 1991(3) SA 76 (Nm).

⁶⁵² Article 18 of the Constitution of Namibia compares favourably well with section 33 of the south African Constitution.

action which was the common law ordinary right in all the Commonwealth jurisdictions has now been transformed into a fundamental right, which is constitutionally protected.⁶⁵³

The above Article shows a change from the former position in Namibia in the following respects; the Common Law requirements of fairness and reasonableness have now been constitutionalized; the group of persons who will have legal standing have been widened to include all those who have been aggrieved as opposed to those who have direct personal interest in the matter; and that those aggrieved have a constitutional right which can only be ousted by legislative action under strict conditions – to question the validity of administrative action and to seek appropriate remedy.⁶⁵⁴

It has further been noted that “Article 18 of the Constitution of Namibia offers an opportunity for the masses of the people to ensure that administrative authorities are not allowed to ride rough-shod over the rights, freedoms, interests, and reputation of individuals with impunity”⁶⁵⁵ Indeed experience had shown that in the absence of constitutional guarantees it is possible for legislation to exclude rules aimed at fair and reasonable administrative action and to oust the inherent jurisdiction of the courts to review administrative action.⁶⁵⁶

⁶⁵³ See Parker. C. (1991). “The Administrative justice provision of the Constitution of the Republic of Namibia: a Constitutional protection of judicial review and tribunal adjudication under administrative law” CTLSA. XXIV. 89 (at P. 89).

⁶⁵⁴ See Van Wyk, D et al. (1994). Rights and Constitutionalism: The New South African Legal Order 1st ed Juta and Co. Kenwyn.

⁶⁵⁵ See Parker. C. n. 63 at 103.

⁶⁵⁶ See Van Wyk, D. et al. (1991). Namibia : Constitutional and International Law Issues .Pretoria. VerLoren van Themaat Centre . University of Pretoria, (at 38).

In the case of Ohlthaver and List Finance and Trading Corporation Ltd and Others v The Minister of Regional and Local Government and Housing and Others⁶⁵⁷ the Court, having recapped the provisions of Article 18 above, said the following in upholding the appeal and setting aside the decision of the Council to rezone a residential area into a business area :

there is no doubt that where an administrative body is by statute empowered to act in its own cause it is entitled to do so provided that it acts fairly and keeps an open mind. Its decision cannot be assailed on the ground that it acted on its own cause in circumstances which according to the rules of natural justice, would in any other instance have disqualified such a body.⁶⁵⁸

In Frank and Another v Chairperson of the Immigration Selection Board⁶⁵⁹ a case concerning the refusal of the Board to grant a German national a permanent residential permit and a persistent refusal to furnish reasons pursuant to that decision, in an application to the Court for review and to set aside the decision of the Board, the Court had said the following:

the respondent was obliged to furnish reasons where such existed, that the respondent could not have ignored the provisions of Article 18 of the Constitution and that the respondent was an administrative body and that its proceedings and decisions were subject to Art 18;⁶⁶⁰ the considerations as to what was fair and reasonable differ, that an administrative body could arrive at a

⁶⁵⁷ 1996 NR 213 (SC).

⁶⁵⁸ Ibid (at 218D-E) , judgment to which Dumbutshena,,A.J.A; and the late Mohamed, C.J; concurred.

⁶⁵⁹ 1999 NR 257 (HC).

⁶⁶⁰ Ibid (at 265 A-C)

decision in a fair manner, but its decision may nevertheless be unreasonable, that on the other hand, an unreasonable decision would always be unfair, that an unfair or unreasonable decision entitles an aggrieved person to redress by the Court, but that the Court cannot judge what is reasonable or unreasonable unless the administrative body gives its reasons for arriving at its decisions,⁶⁶¹ and

that the respondent was obliged to act fairly and reasonably and to have applied its collective mind, and should not have taken into account irrelevant or extraneous facts and further that it should not have been prompted or influenced by improper or incorrect information or motive and that there were no grounds whatsoever for refusing the applicant of his permanent residential permit.⁶⁶²

In Public Service Union of Namibia and Another v Prime Minister of Namibia and Others⁶⁶³ a case concerning the purported appointment of a Permanent Secretary in the Ministry of Foreign Affairs, contrary to the provisions of Act 13 of 1995,⁶⁶⁴ in an application by the Public Service Union to review and to set aside the decision of the Prime Minister, the Court found that:

⁶⁶¹ Ibid (at 265 D-E).

⁶⁶² Ibid (at 266 D-E).

⁶⁶³ 2000 NR 82 (HC).

⁶⁶⁴ The relevant provisions for our purpose were, section 19(a) which provided that "the appointment of any person to...the post of Permanent Secretary of the President shall subject to the provisions of section 5(1) be made from the list from the list of candidates submitted to the Prime Minister by the Secretary to the cabinet" and section 5(1) provided that "the appointment of any person to the public service shall be made by the Prime Minister on recommendation the Public Service Commission in accordance with the provisions of the Act"

No one of the persons who constituted the so called list applied or was asked to assent except perhaps for the fourth respondent and that that was in breach of constitutional dictates of fairness and reasonableness but also of the law in that there was no list.⁶⁶⁵

5.5 Judicial Review in Germany

Contrary to the American position, the political question doctrine is not known to the Federal Constitutional Court (FCC), everything is adjudicable, including matters of foreign relations in line with Article 19 (4) of the German Basic Law of 1949, which is too broad in its affirmation of access to the court in cases where a subject's rights were violated by public authority.⁶⁶⁶

According to Stroink; F,⁶⁶⁷ where discretionary powers are concerned the principle of proportionality causes the courts to rigorously or intensively test the administrative decision whilst the English judiciary on the other hand will see to it that they do not take the seat of the administration with the power to administer, which is evidence of judicial self-restraint in matters of administrative nature.

⁶⁶⁵ Ibid (at 90-G).

⁶⁶⁶ See Flinterman . C. in his " Judicial control of Foreign Affairs : the Political question doctrine" in Bakker .R. et al . (1995) Judicial Control : Comparative Essays on Judicial Review . Maastricht . Maklu., Nomos , Juridiek and Sociale (P. 49).

⁶⁶⁷ In his " Judicial Control of the administration's discretionary powers" in Bakker .R. et al (1995) Ibid (P. 96)

5.5.1 Features of the Constitution of Germany

Although it is not the intention of this work to give a complete and exhaustive feature of German Administrative Law, reference is made to Article 20 featuring specifically the rule of law principle (Rechtsstaatsprinzip), Bill of Rights, Supremacy of the Constitution, (all legislation are subject to the constitutional order),⁶⁶⁸ and access to the courts are of significance to this paper. More pertinent to this is the fact that even though the German Constitution does not have the equivalent of section 33 the Rechtsstaatsprinzip requires the administration to perform its duties in a lawful, fair and accountable manner.⁶⁶⁹

The German administrators have further taken a commendable step forward by codifying the general principles of Administrative Law first in the form of the Administrative Courts Code (Verwaltungsgerichtsordnung) or the (VwGO) and secondly the General Law on Administrative Procedure (the Verwaltungsverfahrensgesetz) or the (VwVfG). These pieces of legislation form the basis of Administrative Law in Germany and in order to understand their scope of application and in particular, their interaction and relevance to South African Administrative Law, a brief exposition of them is given here.

5.5.2 The Administrative Courts code

The Administrative Courts Code deals with the composition and administration of Administrative courts and most importantly with access to the courts and competence. Access to the courts is accorded in all public law disputes which

⁶⁶⁸ See Article 20(3) of the Basic Law of Germany (BL).

⁶⁶⁹ See Rainer Peaff and Holder Shneider (2001) "The Promotion Of Administrative Justice Act from a German perspective" SAJHR vol 17 (P. 62)

are not of a constitutional nature and to the extent that such disputes have not been expressly assigned to any other court under the Federal law.⁶⁷⁰

The following features are apparent from the Article:

Administrative courts are organized in a hierarchy namely: Administrative Courts of First Instance, the Higher Administrative Courts dealing with appeals and validity of by-laws and the Federal Administrative Courts which rule on appeals on points of law against judgments of Higher Administrative Courts.⁶⁷¹

Constitutional matters do not fall under the jurisdiction of administrative courts,⁶⁷² and the Federal Constitutional Court is not overburdened and is not also losing its specific role and importance.⁶⁷³

The German system follows an inquisitorial model of procedure unlike the South African adversarial model. The courts examine the facts of the case, *ex officio*,⁶⁷⁴ calling upon the parties to attend; it is not bound by the pleadings and evidence offered by the parties. The System also allows preliminary proceedings;⁶⁷⁵ and the internal appeal mechanism has been hailed as an effective, efficient, cheap and easily accessible remedy.⁶⁷⁶

Peaff and Schneider have argued that the practice gives the administration the opportunity to control itself and to keep the number of court cases relatively low, while the comparable position in South Africa is unfortunate despite statutes dealing with particular administrative law.⁶⁷⁷

⁶⁷⁰ See Article 40 VwGO.

⁶⁷¹ See Peaff, R. and Schneider, R. Ibid n 644 (at 62).

⁶⁷² Note that as a general rule the matter is constitutional in nature if there is a dispute between constitutional organs of state viz: the Parliament, the President or government relating to the constitutional right and duties.

⁶⁷³ Note Ibid n 644 (at 63).

⁶⁷⁴ See Article 86 of the VwGO.

⁶⁷⁵ See Article 68ff of the VwGO.

⁶⁷⁶ Ibid n 644 (at 64).

⁶⁷⁷ See Peaff, R and Schneider, R. Ibid n 70 (at 64).

5.5.3 The General Law of Administrative Procedure

The most important aspect of the General law on Administrative Procedure is Article 28(1) of the VwVFG,⁶⁷⁸ other notable features of the General Law of Administrative Procedure are the citizens right to advice, and information,⁶⁷⁹ and their rights to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to enforce or defend their legal interest.⁶⁸⁰

The other relevant provisions for our purpose on the General Law on Administrative Procedure is Article 35 VwVFG,⁶⁸¹ and finally, the provision of Article 39(1) VwVFG.⁶⁸² In view of the importance of the German Article 39(1) to our Administrative Law an attempt will be made to unpack the concept: direct external legal effect:

5.5.4 Exposition of Article 39 (1)

By “direct effect” one speaks generally of the direct effect of the administrative action, if the decision is the final one in respect of the determination of individual’s rights. If the

⁶⁷⁸ The relevant Article provides that before administrative act affecting the rights of a person may be issued, an opportunity for commenting on the facts relevant to the decision must be given. Relevant to South African Law see a similar provision in section 4(3) of the PAJA.

⁶⁷⁹ See Article 25 of the VwVFFG.

⁶⁸⁰ It is respectively submitted Art 28 (1) comparable to the notice and comment procedure of section 4 (3) of the PAJA.

⁶⁸¹ The relevant section defined administrative action as follows “An administrative action shall be any order, decision, or other sovereign measure taken by an authority to regulate individual case in the sphere of public law and which is intended to have a direct, external legal effect”

⁶⁸² The Article is the equivalent of section 5 of the PAJA. It provides for “the giving of written reasons which have to accompany administrative act, that the written statements must contain the chief material and legal grounds which have caused the authority to take the decision in question and further that in the case of discretionary decisions the reasons should contain the considerations that determined the exercise of discretion”

decision requires several steps to be taken by different authorities only the last of which is directed at the individual citizens would have direct effect. All other steps taken within the sphere of public administration lack the direct effect. Thus the planning process and the license granting processes and an order to undergo medical and psychological examination, to get back a driving license which was taken away from someone convicted of drunken driving are all devoid of direct effect.⁶⁸³

“Legal effect” in respect of an action taken by an administrator would only be an administrative action in the strict sense, if it contained a legally binding determination of rights or duties. That requires that the individual’s right be established, withdrawn, changed or determined,⁶⁸⁴ and that excludes notification, expert opinion, warnings, proposals and recommendation. Hoexter had been very critical of the exclusion of advisory or investigative action.⁶⁸⁵

“External effect” this part of the definition was aimed at excluding administrative measures that are taken within the sphere of public administration only, thus administrative action that affects a person different from the authority that had engaged in the action can be said to have an external effect.

The most relevant cases are those that are rendered in the context of special status relationship, it is within this category that it is often difficult to distinguish between

⁶⁸³ See Peaff, R and Schneider, R Ibid n. 644 (P 73).

⁶⁸⁴ See Peaff, R and Schneider, R Ibid n. 644 (P 72).

⁶⁸⁵ See Hoexter, C. (2000). “The Future of Judicial Review In South African Administrative Law” Vol.(1) SALJ 117 Part 3.485 (P 515).

external and internal measures. That category comprises, among others, the following; civil servants and their employers, the National, Provincial or Local government, prisoners and the prison authorities or between students and the School or the University. Clearly in the majority of these cases some measures would adversely affect either the student, civil servant or the prisoner and given their right of access to the court they are entitled to legal protection.⁶⁸⁶

In order to overcome the problem the courts in Germany have made a distinction between basic relationship (Grundverhältnis) and the operational relationship (Betriebsverhältnis). If the person is adversely affected with respect to the basic relationship that constitute an infringement of his individual right, it is an administrative action and reviewable by the administrative courts. Examples of decisions affecting the basic relationship are denial of annual leave, failing examinations, the appointment or dismissal of a civil servant, dismissal of school or university student, e.t.c.⁶⁸⁷

On the contrary if individual rights are not infringed the measures are not considered administrative actions, the examples in this regard abound and include: home work for students, or normal tests at school, to be at the office at 8am or to work first on file A and only afterwards on file B.⁶⁸⁸ On the other hand the decision whether a civil servant should be promoted or not affects the individual right of that person is reviewable, this differentiation, the respective authors have acknowledged, is not always clear and it is up to the courts to decide the critical cases, however it is a useful

⁶⁸⁶ Peaff, R and Schneider, R. Ibid n. 644 (p 74).

⁶⁸⁷ Peaff, R and Schneider, R., Ibid. (p 74).

⁶⁸⁸ Peaf, R and Schneider, R. Ibid. 74

starting point in limiting the scope of administrative action where essential delivery of services is concerned.⁶⁸⁹

The final question to be answered in this chapter is what lessons could be learned from the above comparative analysis and I turn there on:

5.9 Lessons to be learned

From the above the following lessons could be learned: In South Africa, Germany and Namibia the right to just administrative action has been entrenched in the constitutions. The ever present vigilant eye of the Federal Constitutional Court in the cases of Germany, the Constitutional Court in South Africa and the Supreme Court in Namibia respectively allay fears that the right might be violated with impunity.

In contrast, although the USA and Australia have passed separate pieces of legislations and have established separate tribunals to deal with the review of administrative actions, the failure on the part of the Americans and the Australians to constitutionalize the right to administrative action is a fundamental flaw. This is particularly true of the USA where the political question doctrine continues to rear its ugly head.

However, the USA position on constitutional review augers slightly well than in England because of the supremacy of the Constitution and the power of the Supreme Court to enquire into the constitutional validity of legislative and the executive acts, features

⁶⁸⁹ Peaf,R and Schneider,R. Ibid .74.

absent in England where parliament and ultimately the House of Commons is sovereign and is the guardian of the Constitution.

Summary

From the above, three models of judicial review have emerged: the Kelsen model represented by Germany, South Africa and Namibia, the American model represented by USA. Australia is slightly drifting away from its Commonwealth model towards the American model.⁶⁹⁰ Lastly English Law is characterised by the commonwealth judicial review. Unlike in the cases of Germany, America, South Africa and Namibia, apparently historical forces in England did not provide a strong need for a truly independent judicial branch capable of holding the government to its constitutional obligations or of constraining one level of government in its dealing with another.

The incorporation of European law in particular the Human Right Act,⁶⁹¹ even if it does not formally grant the Lords the power to invalidate legislation,⁶⁹² provides a document that can be held up and shown as proof that the British government has violated its stated commitments.

⁶⁹⁰ Although the Consultative committee that drafted the ACTHRA had "a clear preference," to avoid the anti democratic concerns of judicial review and had rejected not only the American model and the Kelsen model as giving too much power to the judiciary. See Stuart Hargreaves, Ibid footnote 796 (at 31).

⁶⁹¹ Act 1998, adopted by Australia in July 2004, through the Australian Capital Territory (ACT) and now simply known as the Australian Capital Territory Human Rights Act 2004 (ACTHRA) is hailed as the first "*Bill of Rights*" in Australia. See further Stuart Hargreaves, Infra (at 31).

⁶⁹² Also critical of the Human Right Act, is The Right Hon Lord Hope of Craighead in his 'The Human Rights Act 1998: The Task of the Judges' in Andenas, M and Fargrieve, D. 2000, Judicial Review in International Perspective. London. Kluwer Law International, where the Law Lord said the following "the Act is an exercise of parliamentary sovereignty and had stopped short of giving the Judges the power to set aside or to disapply legislation which has been enacted at Westminster (at 417).

CHAPTER SIX : SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Contrary to the past of parliamentary sovereignty where the grounds of review of administrative action were limited , arising as they were from the common law and the independence of the courts not guaranteed in South Africa, the principle of constitutional supremacy has now constitutionalized the right to just administrative action in terms of section 33(1) and the PAJA has been enacted to give effect to that right. The grounds of review of administrative action have now been expanded, they arise from the Constitution and the PAJA and have been codified under the latter.

It does not matter who the author of an administrative action is, whether he is the President, the Commissioner of Police or Prisons, the Minister of whatever department, a Constable or a Correctional Services officer or a Chairman of the board, all their actions are without difference reviewable for want of compliance with the constitutional dictates of the right to just administrative action.⁶⁹³ The government is no longer expected to be opaque or secret but open, transparent, accountable and responsive to the people.

That transparency and openness have been buttressed by the twin organic laws namely: the PAJA and the PAIA which were enacted to give effect to the rights in section 32 (the right of access to information) and section 33 (the right to lawful reasonable and procedurally fair administrative action).

⁶⁹³ For the exceptions see section 1 of the PAJA in n 414 *opcit*, and further for an exhaustive discussion on the subject see De Ville; J.R. (2005) Judicial Review of Administrative Action in South Africa . 1st ed . Durban: Butterworths (p59-67) .

The above two sections have a symbiotic or interdependent relationship and have further, one other objective in common; to foster a culture of justification.

When the government does not speak intelligibly, rationally or reasonably or does not speak at all, the twin pieces of legislation can be used by the citizens as tools to seek proper explanations from the government.

The new administrative law operating under the realm of the Constitution requires the courts and the tribunals to be independent and that independence is guaranteed by the Constitution. The ouster clauses are now considered aberrations of the old past.

While England, Australia and the USA have shirked away from constitutionalizing the right to just administrative action, Namibia, South Africa and Germany have constitutionalized the right to just administrative action and in all the latter three countries, constitutionalism is highly protected and cherished and the right to just administrative action has been elevated to a fundamental right.

Significantly the grounds of judicial review of administrative action have also been codified in Australia and in order to bolster the good administration a Federal Court and an Administrative Appeal Tribunal have been put in place to marshal the validity or otherwise of administrative action.

Last but not least in order to give impetus to that right, in those countries where the right to just administrative action has been constitutionalized and in which constitutionalism is the norm, those whose rights to just administrative action have been adversely affected have the right of access to the courts for redress or relief.

The cliché or the label (Quasi-judicial or purely administrative) no longer matters. The courts in South Africa have no time for ouster clauses. What is more, the Constitution has put in place Chapter Nine Institutions of the Constitution to deepen the goal of lawful and efficient administration; to root out maladministration and to harness the fledgling democracy.

Quite frankly, Administrative law in South Africa has been revolutionalized by the principle of Constitutionalism. The Constitution is supreme, it is the Grund-norm.⁶⁹⁴ There has been a radical change since the coming into operation of the Interim Constitution in particular, s 24 and finally section 33 of the Constitution Act 108 of 1996 which gave everyone the right to just administrative action and gave birth to PAJA which then codified the grounds of judicial review in terms of section 6 (1) of the Act.

The scope of locus standi has been widened. The review powers of the Courts are no longer grounded in terms of the Common law and are no longer subservient to the authority of Parliament. Most importantly unreasonableness is now an independent ground of review, unlike in the past to the past.

⁶⁹⁴ See Devinish; G.E . (1998). A commentary on the South African Constitution . Durban; Butterworths. (P. 336).

Apart from the widening and the constitutionalization of the grounds of review and the expansion of locus standi, the most significant impact of the Constitution on judicial review of administrative action is that it has brought a new paradigm shift or a change in culture in the following respect:

The culture of legality: All governmental powers must sanctioned by law; this is inclusive of the rule of law principle. It does not matter whether the power is the levy of rates by Local government as in Fedsure , or the appointment of a Commission as in SARFU (3) .

The culture reasonableness and rationality in decision making: If the government's policy is irrational it can be reviewed.⁶⁹⁵ If the Minister's decision is unreasonable, it can also be reviewed by the Court⁶⁹⁶

The culture of proceeding fairly: this includes the application of audi alteram partem rule, the provision of reasons, the protection of legitimate expectations, the application of the principle of nemo iudex in sua causa.

A culture of justification: Every exercise of public power must to be justified in which the leadership given by the Government rests on the cogency of the case offered in defense of its decision, not by fear inspired by force of command. Indeed there is no

⁶⁹⁵ See Government of the Republic of South Africa v Grootboom 2001(1) SA 46 (CC)

⁶⁹⁶ See Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC)

room for clandestine or closed government. The government in what ever it does owe the governed an explanation.

The culture of consultation: This include but is not limited to the following:- notice and comment procedure, receiving of representations or submissions from interested persons or groups. It is regrettable that the government did not take heed of the salutary decisions in Doctors for Life International and Matatiele 2, with regard to the importance of the constitutional mandate of consultation with the people in accordance with our constitutional values of participative and representative democracy.

It is regrettable indeed that , the dire consequences of such lack of consultation have now spilled over to Khutsong over the demarcation of municipal boundaries and to Kwazulu-Natal and Potchefstroom with regard to the name changes respectively to name but a few sporadic incidents while the big pot is still boiling.

Truly consultation with the people will encourage what the late Mureinek ⁶⁹⁷ called, “a culture of justification”

If decisions are bad in law or are procedurally flawed and are left unchallenged then the constitutional goals of establishing a society based on democratic values, social justice and fundamental human rights will be imperiled. Worse of all the foundations for a

⁶⁹⁷ See Mureinek; E (1994) (10) “introducing the Interim Bill of Rights” SAJHR at (p 31)

democratic and open society in which the government is based on the will of the people will be seriously eroded.⁶⁹⁸

From a comparative perspective, in England the right to just administrative action is not well developed as it is not constitutionalized⁶⁹⁹. It therefore leaves the recipients of administrative law decisions susceptible to abuse. The position is the same in the United States of America⁷⁰⁰ and Australia,⁷⁰¹ because they also have chosen to enact separate pieces of legislation dealing with administrative law matters but have avoided constitutionalizing the right to just administrative action.

Whilst the point is taken that the English Law doctrines and principles of administrative law have influenced the development of the law in South Africa, Namibia and in America, South Africa, Namibia and Germany, have taken a bold and commendable step, by constitutionalizing the right to just administrative action. It remains to be seen whether the Americans and the English people would ever copy something good either from the Namibian, German or South African models of Administrative Law, which in my view are masterpieces. The best the United Kingdom could do is to codify the Common law.

⁶⁹⁸ See the Preamble to the South African Constitution.

⁶⁹⁹ There no written constitution in UK and the review grounds are not codified.

⁷⁰⁰ It is humbly submit that, this is despite the fact that in terms of the American Administrative Procedures Act of 1946 Part-1, Chapter -5, sub Chapter -2 and section 554 (4) an attempt was collectively sought to bring transparency, certainty, accountability in public administration. For more on this see further Reddy;A.K, Ibid note 796 (at 7).

⁷⁰¹ It is further humbly submitted that the position is untenable irrespective of the fact that the grounds of review of administrative action have been codified in terms of the Judicial Review Act 1977 as in South Africa, in terms of the PAJA. In any case the Administrative Appeal Tribunal whose decision is binding on government on matters of administrative nature as a final arbiter and the Federal Court with overriding jurisdiction on matters of law cannot by any stretch of imagination be considered to have the equivalent of the South African Constitutional Court with awesome powers on Constitutional matters as the guardian of the Constitution.

In order to ensure that the right to just administrative action is not flouted with impunity as in the past, there is now the Constitutional Court in South Africa, the Supreme Court in the case of Namibia and the Federal Constitutional Court in the case of Germany to act as shields and swords in the prevention of the violation of the fundamental rights of the subjects and where appropriate to provide for remedies. The Constitution through the Promotion of Administrative Justice Act has succeeded in propelling the rather backward administrative law into a democratic order.

In all the above countries the political question doctrine is unknown and that is particularly true of South Africa where the Constitutional Court had increasingly used the space provided by the new constitutional order as a legitimator of the post apartheid social transformation project as evidenced by the Grootboom, the Treatment Action Campaign and the Pharmaceutical cases to name but a few.⁷⁰²

Although a caveat,⁷⁰³ was made in South African law that the aggrieved parties ought first to exhaust internal remedies, that the relevant provision bristles with antagonism with the right of access to the court or that it places a bar on the right of access to the court,⁷⁰⁴ or on the ability of the person to approach a court for relief from unlawful, unreasonable or procedurally unfair administrative action,⁷⁰⁵ it is respectfully submitted

⁷⁰² For more on that see, Roux. T. "Legitimizing Transformation : Political Resource Allocation in South African Constitutional Court" in Gloppen .S. et al .2004 .Democratization and the Judiciary : The Accountability Function of the Courts in New Democracies. London . Frank Cass (at 93).

⁷⁰³ See section 7 (2) of the PAJA.

⁷⁰⁴ That is irrespective of the fact that the provision was a mere procedural matter design to implement the doctrine of ripeness and to prevent mootness in the proceedings.

⁷⁰⁵ See Plasket . C.2002. "The Exhaustion of Internal Remedies and Section 7 (2) of the Promotion of Administrative Justice Act 3 of 2000" SALJ . Vol (119) No 1-4 (at 60)

that the reason to demand exhaustion is based on good reasons, the doctrine of ripeness to prevent mootness in the proceedings.

It is recommended that the Legislators, the Police, the Prison officials, the Prosecutors, Administrators in the department of Home Affairs (including Custom and Excise and Immigration officials), the officials in the Tender Boards in fact all officials of government, be trained with regard to the imperatives of the Constitution and the PAJA on lawful, reasonable and procedurally fair administrative action to help consolidate the South African fledgling democracy.

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