

Chapter 23A

Public Administration

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195. Basic values and principles governing public administration

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - a. A high standard of professional ethics must be promoted and maintained.
 - b. Efficient, economic and effective use of resources must be promoted.
 - c. Public administration must be development-oriented.
 - d. Services must be provided 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.
 - h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
2. The above principles apply to
 - a. administration in every sphere of government;
 - b. organs of state; and
 - c. public enterprises.

3. National legislation must ensure the promotion of the values and principles listed in subsection (1).
4. The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
5. Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
6. The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

196. Public Service Commission

1. There is a single Public Service Commission for the Republic.
 2. The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.
 3. Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.
 4. The powers and functions of the Commission are —
 - a. to promote the values and principles set out in section 195, throughout the public service;
 - b. to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
 - c. to propose measures to ensure effective and efficient performance within the public service;
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- d. to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
 - e. to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and
 - f. either of its own accord or on receipt of any complaint —
 - i. to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
 - ii. to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
 - iii. to monitor and investigate adherence to applicable procedures in the public service; and

- iv. to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and
 - g. to exercise or perform the additional powers or functions prescribed by an Act of Parliament.
- 5. The Commission is accountable to the National Assembly.
- 6. The Commission must report at least once a year in terms of subsection (4)(e)
 - a. to the National Assembly; and
 - b. in respect of its activities in a province, to the legislature of that province.'
- 7. The Commission has the following 14 commissioners appointed by the President:
 - a. Five commissioners approved by the National Assembly in accordance with subsection (8)(a); and
 - b. one commissioner for each province nominated by the Premier of the province in accordance with subsection (8)(b).
- 8.
 - a. A commissioner appointed in terms of subsection (7)(a) must be —
 - i. recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and
 - ii. approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.
 - b. A commissioner nominated by the Premier of a province must be —
 - i. recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and
 - ii. approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.
- 9. An Act of Parliament must regulate the procedure for the appointment of commissioners.
- 10. A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is —
 - a. a South African citizen; and
 - b. a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.
- 11. A commissioner may be removed from office only on —
 - a. the ground of misconduct, incapacity or incompetence;

- b. a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
 - c. the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.
- 12. The President must remove the relevant commissioner from office upon —
 - a. the adoption by the Assembly of a resolution calling for that commissioner's removal; or
 - b. written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.
- 13. Commissioners referred to in subsection (7)(b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

197. Public Service

- 1. Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.
- 2. The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
- 3. No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.
- 4. Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.¹

23A.1 Principles and objectives of public administration in a constitutional democracy

The relationship that a democratic state has with its inhabitants manifests itself in two ways: it exercises immense power and control over them on the one hand, and it is duty bound to protect them and provide them with public goods on the other. Its duty to protect and to distribute public goods has long been restricted and controlled by a multitude of common law and statutory sources. The entrenchment of the right to just administrative action² and a constellation of other constitutional and statutory mechanisms have brought the bureaucratic processes of government into line with the values and the principles enshrined in the Final Constitution.

Public administration encompasses the delivery of public services to citizens in a manner that contributes to the country's general survival and prosperity.³ Public administration is, for the purposes of this chapter, a field of study concerned

1 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

2 FC s 33.

with administrative processes and the practical implementation by government of policies, laws and orders of court.

In recent years, public administration theory has occasionally shown a heavy orientation toward critical theory and post-modern philosophical notions of government, governance, and power. However, most working public administration scholars support a classical definition of the term 'public administration' that gives appropriate weight to constitutionality, service, bureaucratic forms of organisation, and hierarchical government.⁴

The adjective 'public' usually denotes 'government' (serving the public interest), though it may encompass non-profit organisations such as those of civil society, or any entity and its management not specifically acting in self-interest. In practice, then, public administration is concerned with the day-to-day running of the state through the implementation of laws and policies. It does not include the affairs of policy-making organs like the Cabinet, the President and Deputy-President, or with provincial Premiers and Executive Councils. But it does embrace the various so-called line departments at national and provincial level, such as the Trade and Industry, Justice, Agriculture. The carrying out of public administration and the provision of public services gives rise to 'administrative action'.⁵

Public administration, at minimum, involves what Hoexter refers to as administrative 'acts'.⁶ An 'administrative act' (which is a component of 'administrative action') is an act (conduct) which implements or gives effect to a policy, a piece of legislation or an adjudicative decision.⁷ In *Grey's Marine Hout Bay*, Nugent JA held that:

Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so . . . Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.⁸

3 See G Van der Waldt & A Hembold *The Constitution and a New Public Administration* (1995) 1-2, 6-7. Van der Waldt and Hembold note that when the state comes into being as a physical and organisational entity, it must be in a position to deliver such basic goods as health care, education, and physical protection.

4 Van der Waldt & Heinbold (supra) at 6-7.

5 For more on FC s 33, see J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2002) Chapter 61. See also C Hoexter *The New Constitutional & Administrative Law, Vol II* (2002) 28; L Baxter *Administrative Law* (1984) 94-101.

6 See Hoexter (supra) at 28.

7 See Hoexter (supra) at 28; *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) ('New Clicks') at para 592 (Sachs J).

This definition emphasizes the operational side of the state: since policies, laws and judgments are not self-executing; they have to be put into operation by public authorities responsible for administering them. Administrative acts include 'every conceivable aspect of government activity' — 'granting a licence, promoting a clerk, stamping a passport, arresting a suspect, [and] paying out a pension.'⁹ In fact, as Boule, Harris and Hoexter put it:

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A feature of the modern state is that the administration is the most active branch of the state system, and in terms of the extensive authority delegated to it performs all of the functions which characterise contemporary government: formulating policy, regulating, policing, providing services, settling disputes, acting entrepreneurially, consuming, and controlling the economy.¹⁰

The public administration thus wields enormous power. Where the public administrators' conduct is administrative action, the conduct falls to be dealt with in the realm of administrative law, with its ensuing consequences. But when is the conduct of the state public and what is the exercise of public power? In *Police and Prison Unions v Minister of Correctional Services*, Plasket J noted that 'what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim.'¹¹ The learned judge went on to assert that if a power is derived from statute, the body exercising that power is 'presumptively public'.¹² Thus, public power is exercised by a government actor or the state that derives its force from the Final Constitution as well as legislation. In *Steenkamp*, Moseneke DCJ wrote:

When a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals. It bears repetition that the exercise and control of public power is always a constitutional matter. Section 195 of the Constitution further qualifies the exercise of public power by requiring that public administration be accountable, transparent and fair.¹³

In a similar vein, this chapter offers a functional account of the constitutional parameters of public power. It does not proffer a forensic analysis of the 'idea' of the South African bureaucracy.

8 *Greys Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* [2005] 3 All SA 33 (SCA) at para 24.

9 Hoexter (supra) at 28-31.

10 L Boule, B Harris & C Hoexter *Constitutional & Administrative Law* (1989) 85.

11 [2006] 2 All SA 175 (E) at para 51.

12 Ibid at para 55.

13 *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* (unreported, CCT Case No 71/05, 28 September 2006) ('*Steenkamp*') at para 20 (footnotes omitted).

The wording of FC Chapter 10 suggests that the public service is a narrower concept than public administration. The Constitutional Court has found, however, that

'Public administration' and 'public service' are not terms of art which have such clearly distinct meanings. On the contrary, they are expressions which are often used interchangeably to connote the organisation as well as the public officials through which an executive implements that which it is empowered to implement.¹⁴

Presently, public administration in South Africa, as envisaged by the Department thereof, embraces three types of agencies:

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1. *Administrative agencies*, such as the Department of Public Service and Administration ('DPSA')¹⁵, which provide services directly to other national departments and provincial administrations but not directly to the public;
2. *Service delivery agencies*, such as the departments of Health, Home Affairs and the South African Revenue Services, which deliver services directly to the public;¹⁶ and
3. *Statutory agencies*, such as the Public Service Commission ('PSC') and the Auditor-General, which are established in terms of the Constitution or other legislation as entities independent from the executive with regulatory and monitoring functions in respect of the public service.¹⁷

To frame the significance of the public administration and the requirement of a functioning public service, it is worth pausing to consider how differently South Africa's apartheid state ran its government. That administration governed all South Africans in a manner that bore the taint of racism and other forms of discrimination. As the Constitutional Court pointed out in *SARFU III*:

Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically

14 See *Premier, Western Cape v President of the RSA*, 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC), ('*Premier, Western Cape*') at para 47. The Court, in this instance, made the point that public administration and public service are necessarily linked to each other and are not entirely independent. It therefore rejected the opposite proposition proffered by the applicants. Following the *Premier, Western Cape* Court, I use the terms public administration and public service interchangeably in this chapter.

15 The DPSA manages the development of administrative policies and the legislative framework for transforming the public service. The policy and the legislative transformation process of recent years has moved from restructuring the fractured employee component to focussing on the restructuring and the modernisation of the public service.

16 The service delivery agencies are presumably the agencies which the public have the most interaction with, and would be the agencies which perform 'administrative acts' and carry out 'administrative actions'.

17 *DPSA Green Paper on Transforming Public Service Delivery* (17 December 1996) at para 7 available at <http://www.info.gov.za/greenpapers/1996/transformingpublic.htm> (last accessed, 14 April 2007).

and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability.¹⁸

The idea of organizing the administration of the state around the values and principles set out in the Final Constitution marks a major departure from the sinister manner in which many apartheid laws were executed. In our recent past, the emphasis was on power, not on duty. The contents of FC s 195-197, then, are crucial for two reasons. First, they reinforce the fact that we have moved away, both in theory and in practice, from the secretive law-making and the discriminatory policies of the pre-constitutional era. Our new dispensation requires transparency, accountability openness and responsiveness to the public.¹⁹ Secondly, by making itself accountable, the public service, and therefore the public administration, theoretically raises public confidence in the government's ability to create and to maintain a functioning democracy.

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However, while we have experienced a move away from apartheid-style state conduct, all indications are that the current government and its public administration have yet to observe fully the principles of transparency, accountability and responsiveness. Reports of negligence, fraud and corruption are seldom out of news headlines. Moreover, the Public Service Commission has consistently found that the public service and public administration have failed to meet their obligations in terms of FC s 195.²⁰

The sometimes wayward nature of current government officials has not left us in disarray. The Final Constitution, various statutory sources and the common law have all operated as an effective check on abuses of power and omissions of duty.

23A.2 structure and function: chapter 10

Public administration is structured around and functions according to the provisions of FC ss 195-197 and the attendant enabling legislation, the Public Service Act ('PSA'), the Public Service Commission Act ('PSCA') and their respective regulations. The Constitutional Court pointed out in *Premier, Western Cape* that:

Chapter 10 applies to all aspects of public administration prescribing the basic values and principles that have to be adhered to, making it clear that they apply to 'administration in every sphere of government'. The public service is one of the administrations referred to, but the administrations of public enterprises and other organs of state by which 'public goods' are provided, are also subject to the general requirements of the chapter. Special requirements are laid down for the public service

18 *President of the Republic of South Africa v South Africa Rugby Football Union* 2001 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) ('SARFU III') at para 133.

19 See *New Clicks* (supra) at paras 620-625.

20 See *Public Service Commission White Paper on Transforming Public Service Delivery Government Gazette* 18340 18 Sept 1997. Ideally the White Paper would serve as the practice manual for the public service.

as a distinct administration, and it is in this context that the public service is referred to as being 'within public administration'.²¹

The three sections of Chapter 10 are organised as follows:

1. FC s 195 sets out the principles which 'must' apply to public administration, describes who such principles apply to, and provides for the enactment of national legislation in order to give effect to the principles as well as to provide for the organisation and structure of the public administration;
2. FC s 196 provides for the creation of the Public Service Commission ('PSC'); the PSC must promote the values and principles laid out in FC s 195, investigate the public administration and public service, and report its findings on the public service to the National Assembly or provincial government; and
3. FC s 197 provides for the creation of a public service which functions within the public administration. National legislation must provide for the structure and the organisation of the public service.

Chapter 10 would appear to envisage the enactment of at least three pieces of enabling legislation in order to provide for the requisite amplification and adequate implementation of its provisions: Thus far, only two pieces of enabling legislation have been enacted — the PSA in 1994 and the PSCA in 1997.

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23A.3 FC s 195: values and principles governing public administration

FC s 195 makes it *peremptory* for South Africa's public administration to take account of and implement its enumerated values and principles. Furthermore, the notion of good and efficient *management* of the public administration forms a crucial aspect of running government as a business enterprise: that is, the state is required to provide specific services to its client (the public), and the public pays for such services upfront, or by way of rates and taxes. The Final Constitution, enabling legislation, and where applicable, the common law, frame the relationship between the state (represented by government) and the public. These 'constants' are there to ensure that the government, which has been put into power by the people, does its job of serving the public in a just and fair manner, without fear or favour, and within the parameters laid down by the law.

FC s 195 (3) requires enactment of national legislation which gives effect to the principles contained in FC s 195(1). As yet, no single piece of legislation designed to cover the principles and the values enumerated in subsection 1 has been enacted.

That said, various pieces of other legislation give voice to 'fragments' of subsection 1: the Public Service Act²² ('PSA'), the Promotion of Administrative Justice Act²³ ('PAJA'), the Promotion of Access to Information Act²⁴ ('PAIA'), the Public Finance

21 *Premier, Western Cape* (supra) at para 44.

22 Act 103 of 1994.

23 Act 3 of 2000.

Management Act²⁵ ('PFMA'), the Municipal Systems Act²⁶ ('MSA') and the Public Service Commission Act²⁷ ('PSC Act').²⁸ Moreover, the Department of Public Service and Administration and the PSC have a number of internal policy documents that incorporate the provisions of subsection 1 and thus seek to regulate the public service from within.²⁹

The main objective of the PSA is to look after the actual machinery of public administration. This machinery provides the structural configuration of the public

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service and the regulatory mechanisms thereof at national and provincial levels. It does not seek to provide South Africans with *protection* when there is a violation by the 'administration' of the requirements of FC s 195.

Of course, other legislation like PAJA and PAIA, promote FC s 195(1) values and principles. For example, the preamble of PAJA states that it was enacted pursuant to the promotion of an efficient administration and good governance; and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.³⁰ These objectives clearly resonate with FC s 195.³¹ Other sections within PAIA recognise that the secretive and the unresponsive culture of public bodies in the past led to abuses of power and human rights violations. PAIA, generally, fosters a culture of transparency and accountability in public and private bodies by granting citizens an effective right of access to

24 Act 2 of 2000.

25 Act 1 of 1999.

26 Act 32 of 2000. This Act is a component of the legislation which governs local government. The Act emphasises the requirement of an efficient, effective and transparent local public administration which is resonant with the constitutional principles of public administration and which aims to provide a framework for local public administration and human resource development. See *Johannesburg Municipal Pension Fund & Others v City of Johannesburg & Others* 2005 (6) SA 273 (W) (*Johannesburg Municipal Pension Fund*) at para 13.

27 Act 46 of 1997.

28 See *Democratic Alliance Western Cape v Western Cape Minister of Local Government and Another* [2006] 1 All SA 384 (C) at para 5.

29 As noted by the Constitutional Court in *SARFU III*, the public administration is subject to a variety of constitutional controls. *SARFU III* (supra) at para 133. The various pieces of legislation to which I have referred have all been enacted pursuant to constitutional instruction. The Protected Disclosures Act seeks to promote accountability, prevent corruption and protect so-called 'whistle-blowers'. Act 26 of 2000. The policy documents are usually internal, but some are available on government websites and on request.

30 See also Municipal Systems Act 32 of 2000.

31 Unlike FC ss 32 and 33, FC s 195 does not form part of the Bill of Rights. It is, however, like the rest of the Final Constitution, covered by and enforceable under FC 2, the supremacy clause. FC s 2 reads: 'This Constitution is the supreme law of the Republic; law or conduct which is inconsistent with it is invalid, and the obligations imposed by it, must be fulfilled.'

information. The PSA — the enabling legislation envisaged by FC s 197 — requires that public administration must 'function' and 'be structured' by national legislation and that national legislation must regulate the 'terms and conditions of employment in the public service'.

Does the lack of a single piece of legislation to 'guard' these ideals leave an unconstitutional gap in our law? Or are FC s 195, FC s 196³² and other applicable legislation — operating in conjunction with one another — sufficient for the present? While extant constitutional and statutory provisions may go a long way towards defining what ethical and accountable conduct means in the context of public administration, the absence of the super-ordinate legislation contemplated by FC s 195 would appear to constitute an unconstitutional abdication of responsibility by our national government. It goes without saying that the absence of such a statute has been a hindrance to the development of meaningful FC s 195 jurisprudence.

23A.4 Judicial constructions of fc s 195

In *Trend Fashions (Pty) Ltd v Commissioner for SARS and Another*, the Cape High Court found that 'the Commissioner [of SARS] (and his officials) as part of the public administration, are obliged by virtue of the provisions of section 195(1) of the Constitution of South Africa, 1996, to apply the democratic principles enshrined in the Constitution and should act both ethically and accountably

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and without arbitrariness.¹³³ As a result, the *Trend Fashions* court found that the existence of a tacit term is to be inferred into any contract with SARS — this tacit term could be inferred from a duty resting on organs of state to act ethically and accountably in terms of FC s 195(1). In *Commissioner for SARS v Hawker Air Services (Pty) Ltd; SARS v Hawker Aviation Services Partnership and Others*, the High Court reached a similar conclusion.³⁴ It wrote, of SARS and of the public administration in general, that:

Even, if SARS has a lawful and justifiable claim against a particular party then the applicant must surely act within the bounds of the law and not to subvert the law by misusing the process of the court actuated by impermissible ulterior purpose. The applicant and concomitantly SARS are part of the nation's public administration and they should act both ethically and accountably and not with an ulterior purpose. The very essence of public accountability is encapsulated in section 195(1)(f) of the Constitution which provides succinctly: 'Public administration must be accountable'. *The doctrine of public accountability is one of the most important facets of modern public*

32 Section 196 establishes the PSC. The PSC operates as a watchdog over the public service as a whole and attempts to enforce FCs 195(1).

33 2006 (2) BCLR 304 (C). This matter involved the demand of payments by the respondents upon the detention of imported shoes pending certain investigations. In respect of the claim for repayment of the provisional payments made in respect of two of the detained consignments, the court held that it was a tacit term of the agreement concluded between the respondents and the applicants (at the time of releasing the consignments when the provisional payments were made) that the provisional payments should be refunded in the event that the Commissioner failed to complete his investigation.

34 2006 (4) SA 292 (SCA), [2005] 1 All SA 215 (T).

*law. Its fundamental purpose is to check the over-zealous and sweeping misuse of power by the public administrator in a democratic State.*³⁵ (My emphasis)

The *Trend Fashions* court and *Hawker Aviation Services* court reinforce two basic principles: that state conduct must be subject to public scrutiny in a functioning democracy; and that courts must be alive to the manner in which state power is exercised.

The Constitutional Court has played an active role in shaping our understanding of how the state, in a constitutional order committed to the rule of law, must respond to its citizens. In *S v Makwanyane*, Ackermann J wrote:

We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where *State action must be such that it is capable of being analysed and justified rationally*. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.³⁶

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This need to create a culture of justification — especially in relationships between state and subjects — was articulated most powerfully by the Constitutional Court in *Pharmaceutical Manufacturers*:

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.³⁷

The Constitutional Court has, therefore, consistently held that the constitutional standard for the exercise of state power is (a) non-arbitrariness and (b) a rational connection between the public power exercised and the decision rendered or the objective to be achieved. In *Police and Prison Unions v Minister of Correctional Services & Others*, Plasket J, in traversing the source and the meaning of public

35 The learned judge goes on say:

The revenue service indeed plays a vital role in the public interest of collecting revenue because the economic well-being of the nation is a legitimate imperative to attain developmental goals to improve the quality of life of all citizens. In pursuit of this objective the revenue service is required to act in a highly principled way. It has an overriding duty to collect taxes in an efficient and effective manner from the one who is really owning rather than engaging in an illegitimate punitive expedition against another even though where the two are separate entities but may be inter-connected in some way or another. Unless provided for by law, the revenue service cannot willy-nilly shift the tax liability of one entity to another. To do so constitutes misuse of fiscal power. In such certain circumstances a court of law will not come to the assistance of the applicant when the applicant acts with an ulterior purpose by not only misusing its fiscal powers but also abusing the process of the court.

Ibid at para 25.

36 *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156.

37 *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 85.

power and the exercise thereof, found that courts play a critical role in determining whether public power has been properly exercised:

[O]ne of the important roles that courts play in societies such as ours, and in our legal tradition, is to ensure that when statutory powers (and other public powers sourced in common law or in customary law) are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner.³⁸

For our immediate purposes, it is interesting to note that when matters regarding the conduct of public officials or organs of state have come before South African courts, they have used FC 195(1) values and principles as benchmarks against which state actions are measured.

In *Steenkamp NO v The Provincial Tender Board of the Eastern Cape*, the Constitutional Court had to grapple with the issue of government liability for conduct that led to a monetary loss by the complainant. The Constitutional Court split as to the government's responsibility. However, of greater import than the outcome is that FC s 195 informs both the majority and the dissenting judgments. As Deputy Chief Justice Moseneke writes:

There are indeed other cogent reasons why the application involves constitutional issues. First, when a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals. It bears repetition that the exercise and control of public power is always a constitutional matter. Section 195 of the Constitution further qualifies the exercise of public power by requiring that public administration be accountable, transparent and fair.³⁹

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Lower courts have made similar use of FC s 195. In *Waters v Khayalami Metropolitan Council*, the High Court found that FC s 195(1)(g) requires that transparency be fostered through the provision of timely, accessible and accurate information to the public.⁴⁰ The High Court struck down the Khayalami Council's actions on the grounds that they were inconsistent with constitutional principles of transparency, the right to lawful, fair and reasonable administrative action, the right to freedom of expression and a founding commitment to multi-party democracy. Navsa J wrote that the Khayalami Council, in coming to

grips with how an open and accountable society ought to operate[,] . . . has to recognise that in a democratic society those who hold power and are responsible for public administration ought to be open to criticism. It is the very cornerstone of democratic government.⁴¹

38 [2006] 2 All SA 175 (E) ('*Police and Prison Unions*') at para 56. See also *Kate v MEC for Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE), [2005] 1 All SA 745 (SE) at paras 1-6; *Johannesburg Municipal Pension Fund* (supra) at para 9 and paras 15-17.

39 *Steenkamp* (supra) at para 20 (footnotes omitted).

40 1997 (3) SA 476 (W).

41 *Ibid* at page 24.

However, courts have also held that there are limits to what the public should expect from the state in effectively and in efficiently carrying out its functions. In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*, the municipal council had decided to launch a summons to recover rates due to it.⁴² The High Court decided that the launch of a summons was not administrative action. It rather signalled the start of a court process. The High Court wrote:

There is a constitutional obligation to foster a public administration which is efficient, effective and accountable to the broader public. To expect the plaintiff to afford its debtors a hearing prior to employment of the ordinary civil process to enforce payment is unreasonable and would create administrative inefficiency, a consequence that runs counter to the aforesaid constitutional objectives.⁴³

Unfortunately, the *Eastern Metropolitan Substructure* court failed to consider whether the decision of the Municipality to recover the debts constituted a 'decision' for the purposes of PAJA, and if so, whether that may have had a bearing on the outcome. Plasket J put it neatly when he wrote that:

The subservience of the [Department of Correctional Services] 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 specified in section 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the Constitution and the PAJA.⁴⁴

The inextricable link between FC s 195 and FC s 33, as well as PAJA, cannot be overstated. When a public entity is alleged to have misused or abused its powers, a whole range of legal controls come into play: first, a public entity is 'subservient' to FC s 195; second, it may be that FC s 33 was infringed; third, legislation

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governing the specific power of that entity may have been infringed; and fourth, the action brought by the aggrieved party may be governed by PAJA. A combination of any or all of these controls may be applicable in a specific matter. Such was the case in *Steenkamp*. In this regard, Moseneke DCJ held that the requirement of FC s 217 (which deals with state procurement), must be read together with administrative justice right in FC 33 and the basic values governing public administration set out in FC s 195(1).⁴⁵ In fact, all legislation enacted pursuant to constitutional directive, and which grants certain powers to the state when it interacts with the public in its various forms, implicates the right to administrative action⁴⁶ and every impugned action of the state must be assessed in light of the duties imposed by FC s 195.

42 2001 (4) SA 661 (W), 2001 (4) BCLR 344

43 Ibid at para 16.

44 Ibid at para 54.

45 *Steenkamp* (supra) at para 33.

46 See PSC *State of the Public Service Report 2006* (April 2006) 34. The Report notes that with regard to the public service specifically, the principle of acting without bias, and with fairness and impartiality, PAJA plays an essential role:

In *Reuters Group PLC & Others v Viljoen NO & Others*, the applicants' launched a constitutional attack on the National Prosecuting Authority's honesty and integrity.⁴⁷ The High Court characterized the applicant's argument in terms of five inter-related propositions regarding the role of public officials in a constitutional state committed to the rule of law: (1) public officials are bound to act honestly and ethically; (2) they are bound by their lawful undertakings; (3) they may not embark on a course of conduct calculated to mislead or to create a false impression; (4) they are bound to make full disclosure of all material facts before seeking to exercise or to invoke the exercise of any power in circumstances where the affected parties are denied a hearing; and (5) they are bound to act fairly and lawfully.⁴⁸ The applicants contended that the respondents had undertaken to give

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timeous notice of any application for international co-operation, and, in giving such undertaking, had created a legitimate expectation that it would be honoured.

The High Court held that respondent's failure to honour that undertaking violated the principles enunciated above, and, in particular, FC s 33, FC s 195 and the rule of law.⁴⁹ The *Reuters* court specifically found that the correspondence between the parties showed that the respondents had made certain promises to the applicants as alleged and failed to honour them.⁵⁰ The court further found that the respondents' disingenuous behaviour constituted a breach of their obligation to behave in an open

A distinguishing feature that sets our democracy apart from Apartheid is the constitutional commitment to Just Service Delivery that is embodied in this principle. Not only is the capacity for this in the Public Service fundamental to redressing the legacy of the past, but it is also important for legitimising public administration thereby stabilizing our democracy. Here again, the necessary legal, normative and regulatory framework is in place. The primary legal instrument is the Promotion of Administrative Justice Act (PAJA) of 2000. At a normative level, the White Paper on the Transformation of the Public Service has been translated in the Batho Pele principles.

With the PAJA, the Public Service is as yet to abide by it. Work needs to be done to enable the Public Service to comply with the PAJA, and senior management seriously needs the capacity to inculcate the Batho Pele principles as the underlying ethos of the Public Service.

The PAJA requires departments to have mechanisms for explaining administrative action and redress where necessary. Most critically this Act requires public officials to understand what constitutes lawful administration and what does not.

The capacity to establish mechanisms for explaining administrative actions and redress as envisaged in the PAJA is totally lacking in public service. This needs urgent attention particularly at senior management.

Ibid at 34.

47 [2001] JOL 8645 (C) ('*Reuters*'). The applicants were members of the press who challenged the respondents' decision on the grounds of honesty and integrity in public administration. The respondents were members of the National Director of Public Prosecutions and were attempting to obtain a certain videotape for the purposes of the trial, and had allegedly undertaken to give the applicants prior notice should they apply for international assistance. However, the National Director of Public Prosecutions then went ahead and applied for international assistance without informing the applicants.

48 Ibid at paras 2-4.

49 *Reuters* (supra) at para 4.

50 Ibid at paras 34-36.

and transparent manner.⁵¹ The court concluded that a declaration of invalidity was the only appropriate remedy under the circumstances.⁵²

Treatment Action Campaign v Minister of Health offers a further example of the courts' interpretation of FC s 195(1).⁵³ In this matter, counsel for the applicant argued that FC s 195 creates justiciable rights. The High Court, in finding the respondent Ministry accountable,⁵⁴ agreed and noted that this point of law had been recognised in several decisions.⁵⁵

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An opposite conclusion was reached on this point of law in *Institute for Democracy in SA and Others v African National Congress and Others*⁵⁶ ('IDASA'). The High Court in IDASA held that the language and syntax of FC s 195(1) is 'not couched' in the form of rights, especially when compared with the clear provisions of

51 Ibid at para 44.

52 Ibid at para 47.

53 2005 (6) SA 363 (T) ('*Treatment Action Campaign v Minister of Health*'). This matter turned solely on the liability for costs of an application made by the TAC for access to certain information. In making its finding, the High Court held that the Minister and her department had not complied with the constitutional obligations imposed upon them by FC s 195(1)(a), (which compels a high standard of professional ethics), FC s 195(1)(f), (which compels that public administration acts with accountability) and FC s 195(1)(g), (which requires transparency as well as the furnishing of timely and accurate access to information to the public.) The Minister had published references to 'annexures' in the version of the operational plan they released to the public in November 2003 when such annexures were not part of the operational plan. They failed to correct these errors in the published version of the operational plan and continued to make the incorrect version available to the public from their website until as late as October 2004. (The application was heard in November 2004.) For all these reasons, the court held the Ministry in breach of its constitutional obligations.

54 Ibid at 369.

55 See Premier, Western Cape (supra) at para 44; Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzza and Others 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 at para 15 n 23; Reuters Group plc and Others v Viljoen NO and Others (supra) at para 46; Nextcom (Pty) Ltd v Funde NO and Others 2000 (4) SA 491 (T), 506J - 507E; Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) at paras 9-14; SARFU III (supra) at para 133. In Johannesburg Municipal Pension Fund v City of Johannesburg, the High Court offered a similar assessment of the justiciability of FC s 195:

There appears to be merit in the applicants' contention that PAJA is not and cannot be exhaustive of the right to administrative justice. To hold otherwise would be subversive of the principle of constitutional supremacy. . . . But even if the conduct in question does not constitute 'administrative action' as defined in PAJA and that s 33 of the Constitution cannot be invoked directly, the conduct is subject to constitutional scrutiny under s 195 of the Constitution. Constitutional review is independent of the guarantee of administrative justice, and public administration is subject to a range of other constitutional controls including the Bill of Rights and s 195. . . . Section 195 expresses the broad values and principles upon which public administration is founded. This, however, does not lead to the conclusion that it does not also give rise to justiciable rights: the requirements of s 195 are expressly incorporated into the [Municipal] Systems Act and they have been relied upon in several cases.

Ibid at paras 15-17.

56 2005 (5) SA 39 (C), 2005 (10) BCLR 995 (C).

Chapter 2 [the Bill of Rights].⁵⁷ The judge therefore found that reliance upon FC s 195(1) for the purposes of demonstrating the infringement of a right was inapposite.

The Supreme Court of Appeal, in *Transnet v Chirwa*, has subsequently found that FC s 195(1) does not confer a right – even though the cause of action in the instant matter was against an organ of state bound by FC s 195.⁵⁸ The concurring judgment agreed with this conclusion.⁵⁹

IDASA and *Transnet* offer a minority view on this point. The better part of the extant jurisprudence on public administration suggests that courts are not reluctant to hold the state accountable where it engages in conduct contrary to any of the nine principles enunciated in FC s 195(1). The Constitutional Court has yet to offer a definitive statement on the subject.

It may be that FC s 195(1) serves merely as an interpretative tool which guides a court's finding that the rule of law doctrine, FC s 33, or another justiciable right in the Bill of Rights has been violated. However, it would be absurd to contend that the phrasing of FC s 195(1), or its location in the Final Constitution (outside the Bill of Rights), makes its justiciability constitutionally impossible.⁶⁰

The crisp question then is whether individuals – who are not the direct bearers of any rights that might be found in FC s 195, but who are, importantly, the beneficiaries of a duty owed by the government – can claim that FC s 195 creates justiciable rights? At the very least, the existence of the duties delineated in FC s 195 create an expectation on the part of the public that government will act in a certain manner. Were a member of the public or a state employee to lack legal recourse where an abrogation of FC s 195 duties occurs, FC s 195(1) would lack meaningful content. So while there may not as yet be a straightforward answer to the question of whether FC s 195(1) confers 'rights', it seems impossible to deny

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that it creates legitimate expectations that the state will indeed conduct itself in a particular manner. If the super-ordinate legislation contemplated in FC s 195(3) existed, then it would, inevitably, provide for causes of action related to the

57 Ibid at para 40.

58 *Transnet Ltd v Chirwa* (2006) 27 ILJ 2294 (SCA)(Mthiyane JA) at para 16. That FC s 195 contained justiciable rights was an argument offered in the alternative by the applicant.

59 Conradie JA, in his concurring judgment, cited *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*') at para 21. *NICRO* held that FC s 1 did not create discrete rights upon which litigants could rely. With respect, this holding was incorrectly relied on by Conradie J. FC s 1 is an explanatory provision. See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13. The values contained in FC s 1 are expressed as rights and duties elsewhere in the Final Constitution. The text of FC s 1 is therefore materially different from that of FC s 195(1). Conradie J's reliance on the text of the former to interpret the latter is, as a result, inapt. The Supreme Court of Appeal decision was, at the time of writing, under appeal in the Constitutional Court.

60 Again, many of the High Court judgments reinforce the incontrovertible proposition that public power is constrained by the Final Constitution, and that many of these constraints are spelled out in FC s 195. The principle of legality, the rule of law doctrine as well as FC s 33 turn these FC s 195 duties into justiciable constitutional obligations.

abrogation of FC s 195(1) principles. The failure of the state to promulgate such constitutionally-mandated legislation cannot free the state of its obligation to discharge the duties FC s 195 imposes. The failure to promulgate the super-ordinate legislation contemplated in FC s 195(3) leaves an unusual gap in the law with respect to the operation of the better part of the 'government machinery'. That gap must be viewed as constitutionally suspect.⁶¹

23A.5 Application of fc s 195(1)

FC s 195(1)'s values and principles should apply to the *administration in every sphere of government*,⁶² *organs of state*,⁶³ and *public enterprises*.⁶⁴ The relationship between the three spheres of government — national, provincial and local — are described in Chapter 3 (FC ss 40 and 41.)⁶⁵ Organs of state are defined, as follows, in FC s 239:

- (a) any department of state or administration in the national, provincial or local sphere of government;⁶⁶ or
- (b) any other functionary or institution —
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

61 Whether we should be alarmed by the absence of enabling legislation for FC s 195(1) depends upon one's view of the rate at which 'enabling legislation' has been churned out by Parliament. It took Parliament almost 9 years to pass the enabling legislation for cooperative governance required by FC s 41(2): Intergovernmental Relations Framework Act 13 of 2005. The absence of that legislation was neither an impediment to cooperative governance nor a barrier to judicial enforcement of the principles set out in FC Chapter 3. For more on the judicial construction of Chapter 3, and in particular FC s 41(2), in the absence of enabling legislation, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14. Similarly, the absence of enabling legislation in Chapter 10 does not in any way derogate from obligation of state, as represented by its public service within its administration, to comply with the principles articulated in Chapter 10. That said, PAJA and PAIA engage directly Chapter 10, and the gap in the law is made manifest when a matter that engages PAIA or PAJA also engages FC s 195(1).

62 FC s 195(1)(j).

63 FC s 195(1)(k).

64 FC s 196(1)(l).

65 For a discussion of FC ss 40 and 41 — FC Chapter 3 — see Woolman, Roux & Bekink 'Co-operative Government' (supra) at Chapter 14. Each distinct sphere is further described in FC Chapter 5 (the President and the National Executive), FC Chapter 6 (Provinces) and FC Chapter 7 (Local Government).

66 Departments are created by and disestablished through the provisions of the Public Service Act.

The definition of 'organ of state' is dealt with a length in Chapter 31 — Application — of this treatise.⁶⁷ 'Public Enterprises' is used twice — in Chapter 10 and in

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Part 4 of Schedule 4 — but it is not described anywhere in the Final Constitution. The Department of Public Enterprises lists the following as 'state-owned enterprises': Alexcor, Denel, South African Airways, Eskom, Transnet and Safcol. The PFMA would appear to expand that list when it refers to 'national government business enterprises' and 'national public entities'.⁶⁸

FC s 195 contemplates a sophisticated and nuanced framework — in the form of national legislation — for working out the manner in which FC s 195 applies to spheres of government, organs of state and public enterprises. Such 'national legislation' must provide for the regulation of public administration,⁶⁹ must regulate the appointment of persons who will serve in the administration,⁷⁰ may differentiate

67 For a detailed discussion of FC s 239 and the meaning of 'organ of state', see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

68 For a discussion of public enterprises in the context of public finance, see R Kriel & M Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. 'National government business enterprise' is defined, in the PFMA, as an entity which —

- (a) is a juristic person under the ownership control of the national executive;
- (b) has been assigned financial and operational authority to carry on a business opportunity;
- (c) as its principal business, provides goods or services in accordance with ordinary business principles; and
- (d) is financed fully or substantially from sources other than —
 - (i) The National Revenue Fund; or
 - (ii) By way of tax, levy or other statutory money.'

'National public entity' is defined, in the PFMA, as meaning:

- (a) a national public entity; or
- (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is —
 - (i) established in terms of national legislation;
 - (ii) fully or substantially funded either from the National Revenue Fund, or by way of tax, levy or other money imposed in terms of national legislation; and
 - (iii) accountable to Parliament.

PFMA s 1.

69 FC s 195(3).

70 FC s 195(4).

between different sectors, administrations and institutions,⁷¹ and should take into account various factors when determining the regulation of public administration.⁷²

23A.6 FC s 196: the public service commission

The Public Service Commission ('PSC' or 'Commission') oversees the government's interaction with the South African public. The Commission's role is not exclusively that of watchdog. It also acts as investigator, counsellor and whistleblower.

In *Premier, Western Cape*, the Constitutional Court noted that the current PSC has less control over the public service than its predecessors.⁷³ While the PSC carries out the various functions listed above, the 'directions' that it may give to the public service are confined to ensuring that procedures relating to employees of the public service comply with the principles set out in FC s 195.⁷⁴ The *Premier, Western Cape* Court raised, but did not answer, the question of how the PSC might

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implement such directions since this question was not squarely before the Court. That question continues to hover over the PSC.

The PSC is required to work in conjunction with other bodies, like the Auditor-General, to ensure that the Public Service complies with its constitutional mandate. As was noted by the Constitutional Court in *Second Certification Judgment*, '[t]he PSC's primary function is to promote a high standard of professional ethics in the public service'.⁷⁵ But while the PSC has important supervisory and watchdog functions, much of the PSC's work remains of 'an advisory nature'.⁷⁶ The PSC Act provides for an elaboration on the monitoring and reporting role of the Commission.⁷⁷ These functions encompass inspections, inquiries, and rule-making. The Act also provides for penalties for obstruction of the Commission and for the assignment of functions by the Commission.

As far as inspections are concerned, the Act provides that the Commission may inspect departments and other organisational components in the public service.⁷⁸ It grants the PSC access to official documents and to information from heads of those departments or organisational components or from other officers in the service of those departments or organisational components as may be necessary for the performance of the functions of the Commission under the Final Constitution or the Public Service Act.

71 FC s 195(5).

72 FC s 195(6).

73 *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) ('*Premier, Western Cape*').

74 *Ibid* at para 24. See also FC s 196(4)(d).

75 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 142.

In fulfilling its functions, the PSC may conduct an inquiry into any matter in respect of which it is authorised by the Final Constitution or the Public Service Act to perform.⁷⁹ For the purposes of the inquiry, the Commission may summon any person who may be able to give information of material importance concerning the subject of the inquiry or who has in his or her possession or custody or under his or her control any book, document or object which may have a bearing on the subject of the inquiry, to appear before the Commission.⁸⁰ The PSC may

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also call upon and administer an oath to, or accept an affirmation from, any person present at the inquiry who has or might have been summonsed.⁸¹ Finally, the PSC may examine or require any person who has been called upon to produce any book, document or object in his or her possession or custody or under his or her control which may have a bearing on the subject of the inquiry.⁸²

Any person who is obliged to appear, or to produce any document or information, and contravenes that obligation without sufficient cause shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.⁸³ Further, any person who hinders or obstructs the Commission in the performance of its functions under the Final Constitution or the Public Service Act shall be guilty of an offence and liable on

76 The PSC generally submits annual reports. It also submits and publicises other reports which weed out improper and inefficient administration. For example, in August 2006 the PSC released their annual financial misconduct report (2004-2005 financial year). In it, the PSC revealed that five national departments (Trade and Industry, Public Works, Justice and Constitutional Development, Home Affairs and Environmental Affairs and Tourism) failed to submit financial misconduct cases to it in terms of the Public Finance Management Act. In terms of financial irregularities found, the highest number of reported irregularities occurred in the Defence department, followed by Correctional Services and the Police Service. Fraud, theft, misappropriation of funds, gross negligence and bribery were the most common forms of misconduct found, while the positions within the Public Service most abused include Senior Accounting Clerks, Chief Financial Clerks, and in the case of the Police Service, Inspectors. Many cases of abuse were also found at senior managerial levels. This report also indicated that although 77% of state employees who were charged were found guilty, only 33% were fired. Criminal charges were instituted against 155 public servants. In the light of this widespread abuse, the PSC declared that it wished to report on national and provincial departments twice annually, not once. See A Musgrave 'Department not Reporting Misconduct' *Business Day* (4 August 2006), available at <http://www.businessday.co.za/Articles/TarkArticle.aspx?id=216634> (last accessed 18 April 2007).

77 The Act is mandated by FC s 196 and is called the Public Service Commission Act 46 of 1997.

78 PSC Act s 9.

79 PSC Act s 10(1).

80 PSC Act s 10(2)(a).

81 PSC Act s 10(2)(b).

82 PSC Act s 10(2)(c).

83 PSC Act s 10(4).

conviction to a fine or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.⁸⁴

The PSC may make rules which are not inconsistent with the Act or the Final Constitution regarding:

- (a) the investigation, monitoring and evaluation of those matters to which section 196 (4) of the Constitution relates, the procedure to be followed at any such investigation, the documents to be submitted to the Commission in connection with any such investigation, and the manner in which and the time within which the documents shall be submitted;
- (b) the powers and duties of the chairperson, the deputy chairperson or any other commissioner, and the delegation or assignment of any power and duty entrusted to the Commission by or under the Act, the Constitution or the Public Service Act to a commissioner referred to in section 196 (7) (b) of the Constitution;
- (c) the manner in which meetings of the Commission shall be convened, the procedure to be followed at those meetings and the conduct of its business, the quorum at those meetings, and the manner in which minutes of those meetings shall be kept; and
- (d) any matter required or permitted to be prescribed by rule under the Act.⁸⁵

The PSC may delegate to one or more commissioners, or to an officer or officers, any power conferred upon the Commission by or under the Act, the Final Constitution or the Public Service Act, excluding the power to delegate or the power to make rules.⁸⁶ The PSC may also authorise one or more commissioners, or an officer or officers, to perform any duty assigned to the Commission by or under the Act, the Constitution or the Public Service Act, excluding the duty to report to the National Assembly and provincial legislatures in terms of section FC s 196 (6).⁸⁷

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The PSC may revoke or amend any delegation or authorisation at any time.⁸⁸

The PSC, although not a Chapter 9 Institution, certainly functions like one.⁸⁹ The PSC is also accountable to the National Assembly, to which it must submit a report annually. The PSC must also report to a provincial legislature when it has undertaken activities in that province.

As far as the staffing of the PSC goes, the Final Constitution provides that fourteen commissioners will make up the Commission. All the Commissioners are appointed by the President. Five of the Commissioners are approved by the National

84 PSC Act s 12.

85 PSC Act s 11.

86 PSC Act s 13(1)(a).

87 PSC Act s 13(1)(b).

88 PSC Act s 13(2).

Assembly. These five persons are recommended by a committee of the National Assembly, and must be representatives from all parties represented in the National Assembly. The Assembly will then adopt a resolution which must be supported by a vote by a majority of the members for appointment of those persons by the President.

The Premier of each of the nine provinces chooses one Commissioner. These nine Commissioners are chosen through the same process as in the National Assembly.

Commissioners are appointed for a five-year term, renewable only once. They may be removed from office due to misconduct, incapacity or incompetence. They may only be removed by the President after the National Assembly has adopted a resolution supported by a majority vote of the Assembly.⁹⁰

23A.7 The public service commission report

In its 2006 State of the Public Service Report, the PSC notes that:

The four State of the Public Service Reports preceding this one, although focusing on broader issues, consistently raise the critical issue of the capacity of the Public Service. To ensure that the issue receives urgent and dedicated attention this edition of the State of the Public Service Report focuses singularly on the assessment of its strengths and weakness, and recommends ways in which it can be enhanced. The analytical approach of the report is

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predicated on the nine Constitutional values and principles for public administration that are enshrined in Chapter 10 of the Constitution as fundamental imperatives for our Public Service.⁹¹

As part of its constitutional mandate, the PSC produces and publicises an annual report that casts a critical eye on public administration and the public service. It does so by measuring the public service's conduct and performance against each of the nine principles and values of FC s 195(1). In doing so, the PSC gives meaning to each of the enumerated principles. The 2006 State of the Public Service Report briefly explains how the Commission evaluates the Public Service in terms of FC s 195(1)'s utilising the nine constitutional principles and values of public

89 For a detailed discussion of Chapter Nine Institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24E, S Woolman & J Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

90 See PSC Act ss 3-7 for more detail on the appointment of Commissioners.

91 'Executive Summary' *2006 State of the Public Service Report* (2006).

administration in order to determine how each of the 'nine principles and values can reinforce a systematic and holistic approach to strategies to gird the capacity of the Public Service.'⁹²

As mentioned above, the Commission bases its evaluation of the public service on the 'fundamental imperatives' contained in FC s 195(1). The first principle, which imposes a duty to promote a high standard of ethics, is important for maintaining a reliable public service. The Commission notes that this duty is particularly crucial for ensuring that economic growth and service delivery are not jeopardised by tardy or dishonest officials. With regard to the requirement for efficiency, economy and effectiveness in the use of resources, it is the Commission's view that the public service should have the capacity for sound financial management and that the respective departments and agencies should have the ability to understand government's plans about service delivery. Departments should also have the capacity to determine success and failure in the course of implementing those plans. The principle of development orientation requires government departments to have the ability to design and to implement effective socio-economic interventions aimed at poverty reduction. The fourth principle, which deals with impartiality, fairness and equity in service delivery, requires the public service to have the ability to show an understanding of what kinds of actions and conduct would constitute bias, how bias should be prevented, and how to interface with the public on an equitable basis. Participatory responsiveness of the public service, which is the fifth of the nine principles, requires the public service to show that, in meeting the needs of the public, it has the capacity to promote and to sustain public participation in its activities.

The next principle has been the subject of a fair amount of litigation against the public service and other organs of state. This is the principle of accountability. From the Commission's perspective, this principle 'requires the public service to have the capacity to hold itself up to scrutiny and be answerable for its conduct and activities.' The PSC expects there to be credible mechanisms in place in order to assess a specific department's accountability. Good management and the ability

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to provide comprehensive reports are deemed to foster accountability. On fostering transparency, the PSC has stated that the activities of the public service must *empower the public to exercise its rights fully*.⁹³

The last two principles are those of good human resource management and representivity. These principles speak to both the capacity of and the management of the public service and its ability to implement government policies and become a legitimate service provider.

From a practical and statistical point of view, the PSC report purports to be a crucial gauge for use by both government and the public as to whether and to what extent the public service is complying with its constitutional mandate. It is, in fact, the sole gauge in respect of the performance of the public service. Unfortunately, the PSC lacks the resources to carry out its immense oversight responsibilities. As far as watchdogs go, its bark is worse than its bite. That said, it is alive and barking loudly.

92 Ibid at 12.

93 The report goes on to note that the absence of timely and accurate information can severely handicap the ability of the public to benefit from the services provided by the Public Service.

23A.8 FC 197: the public service

FC s 197 establishes a Public Service for the Republic. The Public Service operates within the Public Administration. The content of FC s 197 is therefore closely linked to the content of FC s 195. Indeed, the provisions of FC s 195(4)-(6) overlap with the provisions of FC s 197.

The Public Service, once established according to FC s 197(1), is to 'lawfully execute the policies of the government of the day.' FC s 197 requires national legislation to cater for the structure and functioning of the public service. FC s 197 also requires that those who make up the public service execute their duties loyally, regardless of their political affiliation, and should, in turn, not be favoured or prejudiced by such affiliation.

The long title of the Public Service Act states that it was enacted to 'provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the Public Service, and matters connected therewith.' FC s 195(4)-(6) also speaks to the 'organisation and administration' of the Public Service. Thus, it would seem that at least part of the FC s 195's 'enabling legislation' requirements have been satisfied by the Public Service Act.

The Public Service Act should be viewed as the organisational backbone of Chapter 10. It creates, as per FC s 197's instructions, a *single* public service that

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functions as part of the public administration of the national, provincial and local governments. In *Premier, Western Cape*, the Court explained the rationale for this requirement:

The Constitution requires that one public service be established to implement national and provincial laws. It is presumably for this reason and in order to avoid any dispute thereon that the competence concerning the structure and functioning of the public service is dealt with specifically in the Constitution, and was not left to be dealt with under the general legislative power conferred on parliament by section 44(1)(a). If the Constitution had provided that the structure and control of all aspects of the public service would reside solely at national sphere, personnel would be employed by and answerable to national functionaries, and as was pointed out in the First Certification Judgment, that would have detracted materially from the legitimate autonomy of the provinces. On the other hand, if each province and the national government had the power to structure and control their respective segments of the public service, there would in substance be several public services and the concept of one public service would be a fiction. The compromise struck by the Constitution is that the framework for the public service must be set by national legislation, but employment, transfers etc. are the responsibility of the various administrations of which the public service is composed. That compromise was certified by this Court as being consistent with the [Constitutional Principles].⁹⁴

A single public service is consistent with the constitutional principles envisaged by the framers. Given the economic and social disparities which exist amongst the nine provinces, a uniform framework that serves the Republic is preferable to disparate services that offer uneven and unequal service delivery.⁹⁵ From a practical point of view, the same conditions of service should apply to all public servants. In addition, monitoring compliance with the requirements of the Act is made substantially easier

94 *Premier, Western Cape* (supra) at para 46. This judgment dealt with FC ss 196 and 197 in some detail because the Western Cape challenged the 1998 amendments to the Public Service Act.

if one is asked to engage a single entity. That said, each province manages its own employment and dismissals — and thus, the provinces create, to some degree, nine different systems of public service.

The PSA applies to persons within the public service and to persons who were previously employed in the public service. The PSA does not apply to certain persons in the employ of 'state educational institutions',⁹⁶ 'the services',⁹⁷ the 'Academy',⁹⁸ the 'Service'⁹⁹ or the 'Agency'.¹⁰⁰ The public service is described in

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section 8 of the PSA as consisting of persons who hold posts in the fixed establishment¹⁰¹ and those persons in state educational institutions, the services, the Agency, the Service or the Academy to whom the Act does apply. Public officials for the purposes of public administration constitute both a broader and a distinct category of employee.

The PSA also provides for the creation and the abolition of departments within the national and provincial spheres. The different departments are identified in column 1 of the two schedules to the PSA and the heads of each department are identified by their designation in column 2 of the two schedules.¹⁰² The creation or the abolition of a national department is a power granted to the Minister of Public Service and Administration. The Minister may advise the President on whether a department should be created or abolished. The President may then amend the relevant

95 *Mshavha v President of the RSA & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at paras 20 and 59.

96 The PSA defines 'state educational institution' in section 1 as 'an institution (including an office controlling such an institution), other than a university or technikon, which is wholly or partially funded by the State and in regard to which the remuneration and service conditions of educators are determined by law'.

97 The PSA defines 'the services' as 'the Permanent Force of the National Defence Force', 'the South African Police Service' and 'the Department of Correctional Services'.

98 The PSA defines 'the academy' as 'the South African National Academy of Intelligence as defined in section 1 of the Intelligence Services Act, 2002'.

99 The PSA defines 'service' as 'the Service as defined in section 1 of the Intelligence Services Act, 2002'.

100 The PSA defines 'Agency' as 'Agency defined in section 1 of the Intelligence Services Act, 2002'.

101 The PSA defines 'the public service' as 'the posts which have been created for the normal and regular requirements of a department'.

102 Schedule 1 is a list of the national departments and their respective heads while Schedule 2 is a list of the Provincial departments of all nine provinces and their respective heads. Schedule 3 refers to the Organisational Components and Heads thereof.

schedule accordingly.¹⁰³ The Premier of a province also has powers to create or to abolish provincial departments in terms of the PSA.¹⁰⁴

103 PSA s 3(3)(a). The Minister may also transfer and allocate of functions of the different departments in consultation with the executing authorities concerned.

104 PSA s 3A(a) read in conjunction with s 7(5). The Premier also has the power to transfer and allocate functions of the different departments.