

Chapter 63

Just Administrative Action

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63.1 Introduction: Administrative justice in a constitutional democracy*

While this chapter focuses primarily on constitutional issues that engage just administrative action (FC s 33), this limited exercise will inevitably require a detailed discussion of the provisions of the Promotion of Administrative Justice Act ('PAJA').¹ PAJA is, in practice, the primary tool for FC s 33's enforcement. We begin by analysing the relationship between the Final Constitution, PAJA, and the common law. We follow that foundational analysis with an interrogation of the meaning of the most important phrase for purposes of both the constitutional right and PAJA: 'administrative action'. We then proceed to discuss each of the four components of the right to just administrative action: the constitutional rights to lawful, procedurally fair, and reasonable administrative action, as well as the right to written reasons for administrative action. We conclude with an examination of standing and substantive remedies in administrative law.²

Prior to the advent of the Interim Constitution, South African administrative law was generally understood to be founded on the common law.³ The courts reviewed the exercise of public power based on their inherent jurisdiction.⁴ In so doing, the

1 Act 3 of 2000.

2 The right to just administrative action no longer needs to carry the legal burden — the work — in providing a front line against the depredations of an apartheid state — that administrative law generally, and natural justice particularly, were obliged to do prior to the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). Accordingly, we have previously noted: 'The work performed in comparable constitutional instruments by a single, all-embracing due process clause has been divided and allocated to several distinct sections of the South African Constitution: the limitations clause, the right of access to information, and the right of access to court as well as the right of freedom and security of the person.' See J Klaaren 'Administrative Justice' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) § 25.1). See also *Minister of Health & Another v New Clicks SA (Pty) Limited & Others* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 587 ('*New Clicks*') (Sachs J) ('[FC s 33] does not stand alone as a solitary bulwark against arbitrary or unfair exercise of public power. Administrative justice in itself has less work to do than it had in the pre-democratic era').

3 But see *Zantsi v Council of State, Ciskei & Others* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) (For an understanding of judicial review and the South African legal system prior to 1994 that emphasises its constitutional, as compared to its common law, nature.)

4 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*') at paras 23 and 28. See also *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111, 115 ('Whenever a public body has a duty imposed upon 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 set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court ...')

courts developed and applied judge-made rules of review with which exercises of public power were required to comply. Accordingly, the actions of decision-makers could be set aside if they abused their discretion, failed properly to apply their minds or failed to follow the rules of natural justice.⁵ In the

* The authors would like to thank Stu Woolman for editorial assistance and Theunis Roux for commenting on a portion of an earlier version of this chapter.

pre-constitutional era, administrative law and the courts' power of review were based on the constitutional principles of the rule of law and sovereignty of Parliament.⁶ Parliamentary sovereignty, in terms of which the will of Parliament was supreme, was the primary feature of South African constitutional law. Accordingly, the application of principles of judicial review was subject to the whim of Parliament. Parliament could limit the level of scrutiny of administrative action or even ultimately oust the courts' jurisdiction to enquire into the validity of administrative action.⁷

The legislative tools that flowed from Parliamentary sovereignty set the executive free to be as repressive as it wished in relation to laws governing racial segregation, national security statutes and a host of other apartheid legislation. They also affected areas of social and economic regulation less directly implicated in the apartheid legal apparatus. This dire set of legal circumstances was exacerbated by the executive-mindedness of certain judges who failed seriously to scrutinise the executive's actions. The result is that South Africa's history of administrative law and practice is littered with instances of abuses of power — particularly in the context of apartheid laws.⁸

The constitutionalisation of the right to administrative justice in the Interim Constitution amounted to a radical break in South African administrative law. Not only did the Interim Constitution replace the sovereignty of Parliament with the new governing principle of constitutional supremacy,⁹ but the constitutional rights to lawful and reasonable administrative action, procedural fairness and written reasons began the process of political disentanglement of legislative and executive abuse of

5 See *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A), 152 (Succinct formulation of the common-law grounds of review.)

6 *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers') at paras 33, 35 and 37.

7 On ouster, see *Staatspresident en Andere v United Democratic Front en 'n Ander* 1988 (4) SA 830 (A) and *Natal Indian Congress v State President & Others* 1989 (3) SA 588 (D). Devices to reduce the level of judicial scrutiny included the legislative use of subjective discretions. See generally J Gauntlet 'The Satisfaction of Ministers, Judicial Review of "Subjective" Discretions in South Africa' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael MacGregor Corbett* (1995) 208.

8 A large amount of literature has been written on this issue. See D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) and S Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

9 FC s 2 proclaims that '[t]he 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'.

power.¹⁰ The basis for judicial review of administrative action is now the protection of a fundamental right (FC s 33), an express commitment to

constitutional supremacy (FC s 2) and the constitutionally-inspired principle of legality (or the rule of law doctrine (FC s 1)). The principle of legality — or the rule of law doctrine — recognizes that all public power flows from the Final Constitution and must be consistent therewith.¹¹ As Chaskalson P stated on behalf of the Constitutional Court in *Pharmaceutical Manufacturers*:

The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the precepts of a written constitution which is the supreme law.¹²

The Final Constitution¹³ replaced the Interim Constitution's right to administrative justice with FC s 33, entitled 'Just Administrative Action', which reads as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must —
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

10 IC s 24, entitled 'Administrative justice', read as follows:

'Every person shall have the right to —

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such acts 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.'

11 *Pharmaceutical Manufacturers* (supra) at paras 19–45. For a discussion of the principle of legality, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' 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 11.

12 *Pharmaceutical Manufacturers* (supra) at para 45. See also *Fedsure* (supra) at paras 32 and 40; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) ('*Bato Star*') at para 22 ('The grundnorm of administrative law 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.')

13 The Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC')

- (c) promote an efficient administration.

Unlike most other fundamental rights in the Bill of Rights, the precise terms of the right set out in FC s 33 did not come into operation immediately on 3 February 1997. The transitional provision in item 23 of Schedule 6 to the Final Constitution provided that Parliament was required to enact the legislation referred to in FC s 33(3) within three years from the commencement of the Final Constitution (that is, by 3 February 2000). Prior to such enactment, the right in FC s 33 was to be read as set out in item 23(2)(b) of Schedule 6: that provision was essentially the same as the text of IC s 24.

The national legislation envisaged in FC s 33(3) is PAJA. PAJA was enacted on the day of the deadline, 3 February 2000.¹⁴ Broadly speaking, PAJA elaborates on

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the broad constitutional right to just administrative action, clarifies the scope and content of the right to procedural fairness, enacts a detailed regime for the provision of reasons, provides a legislative basis for judicial review of administrative action, and provides an institutional framework for the enforcement of such rights.

Prior to the introduction of constitutional democracy in South Africa, there was a perception that 'good' administrative lawyers favoured judicial activism and intervention in carefully scrutinising and setting aside administrative decisions. 'Bad' administrative lawyers favoured judicial deference, which was equated with executive-mindedness and acquiescence in injustice. The reasons for this are not difficult to understand. There was a need to control the exercise of public power as much as possible when that power had the effect of applying unjust laws. In the absence of participation of the majority in legislative decision-making and without a justiciable Bill of Rights, administrative law was often the only tool for avoiding injustice and preventing the erosion of or indeed the snuffing out of most South Africans' basic rights.¹⁵

It has been generally recognised that this pro-interventionist approach to judicial review needed to be re-assessed in our new constitutional democracy. A pro-interventionist approach tends to be less respectful of democracy, and the democratic institution of the executive, than may be appropriate. It may also run contrary to the principle of separation of powers. That principle requires that the

14 PAJA itself did not immediately come into force. Section 11 provided that it would come into operation on a date fixed by the President in the *Government Gazette*. The President brought PAJA, save for ss 4 and 10, into force on 30 November 2000 in terms of Government Notice R73 dated 29 November 2000. In respect of administrative action taking place between 4 February 2000 and 30 November 2000, the Constitutional Court stated, without discussion, that the form of the constitutional right provided for in Schedule 6 (ie the Interim Constitution's right to administrative justice) would apply. See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) ('*Kyalami Ridge*') at para 52. For a discussion of the interpretive applicability of PAJA with respect to administrative action taking place in this period, see I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) ('*Benchbook*') 84-85. Sections 4 and 10 of PAJA were brought into force on 31 July 2002 by Proclamation R63 of 31 July 2002. As of the time of writing (October 2008), there remains one significant element of the envisaged PAJA enforcement scheme that is not yet in operation — the PAJA jurisdiction of the magistrates' courts. For a discussion of the drafting history of PAJA, see Currie & Klaaren *Benchbook* (supra) at 4-13 and I Currie *The Promotion of Administrative Justice Act: A Commentary* (2008) ('*The PAJA*') 18-23.

15 See generally C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 ('*Future of Judicial Review*'). South African administrative lawyers therefore generally supported 'red-light' theories of administrative law. See also C Harlow & R Rawlings *Law and Administration* (1984); J Klaaren 'Redlight, Greenlight' (1999) 15 *SAJHR* 209 ('*Redlight, Greenlight*').

judiciary pay appropriate respect to the executive's sphere of operation.¹⁶ A choice for constitutional democracy is, to some extent, a choice to respect the constitutional drafters' decision to confer decision-making powers and discretions on the executive branch of government.¹⁷ In addition, it is no longer necessary for

administrative law to do all the work of rights protection. All public power must now comply with the requirements of the Final Constitution and, in particular, the Bill of Rights.¹⁸

At the same time, the Final Constitution should give the courts greater security to scrutinise administrative action closely, safe in the knowledge that their powers of review are constitutionally mandated and protected. They no longer have to push back the boundaries, using artificial devices like the intention of the legislature, to justify setting aside decisions. Their power is derived directly from the Final Constitution.¹⁹

These parallel developments could lead to the extension of administrative review in certain instances and its narrowing in others. It is thus appropriate to reassess administrative law in certain respects. In undertaking this reassessment, the courts should attempt to ensure that the actions of the administration are carefully scrutinised for compliance with the constitutional requirements of lawful, reasonable and procedurally fair administrative action. However they should not intervene in areas which are properly the executive's domain. In attempting to strike this difficult balance, the fundamental tension should be recognised, that is, between participation, accountability, transparency and fairness, on the one hand, and efficient, effective government on the other.

63.2 The relationship between the final constitution, PAJA, the principle of legality, and the common law

(a) The relationship between the Final Constitution and PAJA

16 For a discussion of this principle or doctrine, see S Seedorf and S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

17 See C Hoexter 'Future of Judicial Review' (supra) at 500 (Judicial activism creates problems of democracy and legitimacy); J Klaaren 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3. See also D Davis 'Administrative Justice in a Democratic South Africa' 1993 *Acta Juridica* 21.

18 Chapter 2 of the Final Constitution. The relevant constitutional requirements also include the principles of constitutional supremacy and legality. See *Pharmaceutical Manufacturers* (supra) at para 20: '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'. See also K O'Regan 'Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law' (2004) 121 *SALJ* 424.

19 See *Pharmaceutical Manufacturers* (supra) at para 45 ('But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.').

As stated above, Parliament enacted PAJA pursuant to the Final Constitution's mandate 'to give effect' to the constitutional right to just administrative action as required in FC s 33(3). PAJA therefore provides guidance and rules for administrators to follow as well as a legislative basis for administrative review. As we shall discuss in more detail below, applications for judicial review will usually be brought in terms of PAJA itself.

The questions that we shall consider in this section are an initial question regarding the procedure for bringing applications for judicial review, the degree of exclusivity of PAJA and then what could be termed three pure constitutional questions. Those three questions are: Did the enactment of PAJA satisfy the

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constitutional command of FC s 33(3)? Is PAJA the only statute of Parliament that gives effect to FC s 33? What roles should the constitutional right to just administrative action continue to play in the accountability scheme now that PAJA has been enacted and brought into force?

(i) The extent of PAJA's exclusivity

The initial question is the degree to which PAJA is the exclusive procedural gateway for judicial review of administrative action. It is clear that the primary mechanism for asserting administrative justice rights is not direct reliance on FC s 33, but through review under PAJA.²⁰ If the proposition was not apparent from the text of the basic law itself, the Constitutional Court indicated in *Bato Star* that an application for judicial review of administrative action must 'ordinarily' to be brought in terms of PAJA.²¹

Assuming acceptance of this primary role of PAJA, several questions nonetheless remain. The first is the degree of exclusivity.²² One practical way to pose this question is to ask: to what extent does PAJA cover the field of civil procedure for administrative review? *Bato Star* seemed to lean towards the position that s 6 of PAJA entirely replaces the substantive judicial review grounds found in the common law but added that it was not necessary in that case to consider 'causes of action for judicial review of administrative action that do not fall within the scope of PAJA'.²³ Chaskalson CJ in *New Clicks* seemed to go a step further, stating that PAJA 'was required to cover the field and purports to do so' and that '[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Final Constitution or the common law'.²⁴ In our view,

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20 See *Bato Star* (supra) at para 22; and *New Clicks* (supra) at paras 95-97 (Chaskalson CJ) and paras 433-438 (Ngcobo J).

21 Ibid at para 25 ('The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.') (O'Regan J).

22 See *Zuma v National Director of Public Prosecutions*, Unreported Decision of the Natal Provincial Divisions, Case no. 8652\08 (September 2008) at para 57 ('*Zuma v NDPP*').

23 *Bato Star* (supra) at para 25.

FC s 33 envisages PAJA as the centerpiece of judicial review of administrative action, with the common law retaining only a gap-filling function (as well as of course an interpretive role with regard to PAJA and at least to some extent with regard to FC s 33). As will become apparent below, the position in relation to other legislation is more complex, with some legislation performing a supplementary role and other specialist legislation applying to the exclusion of PAJA.

A second closely related and properly constitutional question is whether any assertion of unlawfulness of government conduct by way of administrative law review necessarily proceeds via PAJA. In our view, the answer to this question is dependent on the placement of the conduct complained of within the ambit of 'administrative action'. Outside of administrative action, and only outside of administrative action,²⁵ it remains open to assert administrative unlawfulness via the common law, as interpreted and developed in the light of the Final Constitution.²⁶ Where the action to be reviewed is administrative action, the procedure to be followed is that of PAJA.²⁷

The exception to this last point involves processes associated with internal, statutory review. Here, the relevant procedure and substantive grounds for the review of administrative action are those grounds contained in the statutory regime. Such procedures and grounds are separate and independent from the procedure governing, and the substantive grounds available in, PAJA causes of action.²⁸

Another instance in which this issue may arise is where conduct that amounts to administrative action under FC s 33 does not fall to be regulated by PAJA because it

24 *New Clicks* (supra) at paras 95–97. Chaskalson CJ continues: 'That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.' Ibid at para 96). See also *New Clicks* (supra) at paras 433–438 (Ncgobo J)('Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to s 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under s 33 and the common law.... Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies it provides'.) See also *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC)('Sidumo') at para 43.

25 We refer here to 'administrative action' as conduct that falls within this concept under both FC s 33 and PAJA.

26 See § 63.2(c) infra. One can, of course, review both administrative and non-administrative action on constitutional grounds other than those that flow from FC s 33, including a violation of the Bill of Rights or the principle of legality and rationality (§ 63.2(b) infra).

27 The Constitutional Court has distinguished the question of whether PAJA covers the field of judicial review procedure from the question of whether PAJA provides 'an exclusive statutory basis for the review of all administrative decisions' in *Sidumo* (supra) at para 80.

28 A majority of the Constitutional Court has assumed and used the availability of such a statutory ground of review as a factor in limiting its interpretation of PAJA. See *Walele v The City of Cape Town & Others*, Unreported Decision, Case no, CCT 64/07 (13 June 2008)('Walele') at para 32. The Court depended in part upon s 7 of the Building Standards Act 109 of 1977 to adopt a particular construction of s 3 of PAJA. This reasoning arguably demonstrates that PAJA and other review-granting statutory provisions should be treated as separate and independent.

is regulated by other specialist legislation. In *Sidumo*, the Constitutional Court held (per Navsa AJ) that arbitral decisions of the Commission for Conciliation Mediation and Arbitration ('the CCMA'), while amounting to 'administrative action' for purposes of FC s 33, are reviewable under the Labour Relations Act²⁹ and not PAJA, because the LRA is specialised labour legislation (and, indeed, special administrative law) that should apply in its sphere to the exclusion of the general administrative law contained in PAJA.³⁰ According to Navsa AJ:

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'[n]othing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA'.³¹

(ii) The constitutional command to enact legislation contemplated in FC s 33(3)

On the question as to whether the enactment of PAJA satisfied FC s 33(3), as distinct from whether the provisions of PAJA are in substance constitutional,³² the test that should be adopted here is procedural. If Parliament has attempted in good faith to satisfy the demands of FC s 33(3) and enacted legislation that it believes emanates from FC s 33(3), then the legislation should pass constitutional muster.³³

(iii) Can other legislation give effect to the right to just administrative action?

The satisfaction of the FC s 33(3) duty to pass legislation does not necessarily mean, however, that further legislation distinct from PAJA should not be considered as legislation enacted to 'give effect to' FC s 33.³⁴ To the extent that the limitations enquiry for statutes or provisions in statutes giving effect to FC s 33 differs from the general limitations enquiry (an open possibility that we cover below), the question whether legislation other than PAJA can give effect to FC s 33 has practical implications in assessing the constitutionality of such legislation.³⁵

We would suggest that the approach to this question should be grounded in the structure of FC s 33 itself. As noted above, FC s 33, which is limited in scope to administrative action, encompasses four principal sub-rights: administrative action

29 Act 66 of 1995 ('the LRA').

30 See *Sidumo* at paras 90–104. As Navsa AJ remarked at para 103: 'This is an appropriate case for the application of the principle that specialised provisions trump general provisions'.

31 *Ibid* at para 91 and para 92 ('It is apparent ... that [PAJA] is not to be regarded as the exclusive legislative basis of review'.)

32 For a discussion of the approach to the constitutionality of the substance of PAJA, see § 63.2(a)(iv) *infra*.

33 J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 ('Constitutional Authority').

34 We take it as given that good faith amendments to PAJA would qualify as national legislation in terms of FC s 33(3).

which is lawful, procedurally fair, reasonable, and for which reasons must be given. Sections 6, 7, and 8 of PAJA (apart from ss 6(2)(c) and 6(2)(h))

primarily implement the right to lawful administrative action. Sections 3, 4 and 6(2)(c) of PAJA implement the right to procedurally fair administrative action, s 6(2)(h) of PAJA implements the right to reasonable administrative action. PAJA s 5 implements the right to be given reasons for administrative action. Moreover, these sections implement these sub-rights generally. The intent to cover the field and the character of PAJA as general administrative law can and should serve to distinguish PAJA from other statutes and statutory provisions (which are specific administrative law). Apart from the Interpretation Act,³⁶ no other statutory enactments would appear to possess PAJA's broad, general sweep of application.³⁷

The simplest of solutions is the one we prefer. Where Parliament has indeed enacted a law with general application designed to cover the field, only such a law should be given the potential benefit of an easier-to-satisfy limitations enquiry. Thus, specific statutes or statutory provisions providing for judicial review or for regimes of reasons-giving, for example, should be judged against FC s 33 and the FC s 36 limitations enquiry without reference to FC s 33(3).³⁸

This use of Ockham's razor leaves us with one potential 'partner' to PAJA at the level of legislation with general application to administrative action: the Interpretation Act. We note that the draft Interpretation Bill proposed by the South African Law Reform Commission in fact contains several provisions that are not strictly speaking the province of interpretation and appear to belong more squarely within the coverage of general administrative law (indeed, of PAJA). For instance, the Interpretation Bill as currently proposed would, if enacted, require publication of legislation including subordinate legislation. It thus seems to us that the proposed

35 To the extent that one wishes to avoid dealing with this constitutional question and its implications, one might be tempted to adopt an interpretation of the FC s 33(3) limitations enquiry that parallels the FC s 36 enquiry. We note that the question as to the applicable limitations enquiry may also be directed at the two other primary pieces of national legislation mandated in the Bill of Rights and enacted at the same time as PAJA: the Promotion of Access to Information Act 2 of 2000 ('PAIA') and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act'). In relation to PAIA, FC s 32(2) provides that national legislation must be enacted to give effect to the right of access to information, which legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'. The scope for this argument in respect of the Equality Act is reduced by the fact that the wording of FC s 9(4) does not smack of an in-built limitations clause. It simply states that national legislation must be enacted 'to prevent or prohibit unfair discrimination'.

36 Act 33 of 1957 ('Interpretation Act'). Note that the PAJA definition of administrative action is itself intended to 'cover the field' and thus another other piece of general administrative law — such as the Interpretation Act — must be interpreted — at least subject to FC s 33 — consistent with that definition. See *Sidumo* (supra) at para 90.

37 Note that this is not necessarily the case with the other legislation mandated by the Bill of Rights. For instance, the Protection of Information Bill (B28-2008) ('Pol Bill') apparently purports to cover the same field as PAIA.

38 For an example of statutory review, see s 25 of the Refugees Act 130 of 1998. For an example of a regime of reasons-giving, see s 13(2) of the Electricity Regulation Act 4 of 2006. Note that in terms of the *Zondi's* interpretation command, such specific statutes and statutory provisions will also have to be interpreted in a manner consistent with FC s 33 and, insofar as possible, in a manner consistent with PAJA (§ 63.2(a)(iv) infra).

Interpretation Act will need to be read with PAJA as a coherent and consistent whole — the expression of the Parliamentary will regarding the content and coverage of general administrative law in South Africa.³⁹

In terms of the above analysis, the Constitutional Court's decision in *Sidumo* — to the effect that the LRA, and not PAJA, implements the FC s 33 guarantee of administrative justice in the labour context (or, put differently, it 'gives effect' to the FC s 33 right)⁴⁰— is then best explained, as the Court did, by emphasising the

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implicit choice of Parliament, in passing PAJA, to allow the LRA to dispose of such discrete domain-specific administrative action.⁴¹ In our view, Parliament is to be accorded some deference in its institutional choices regarding the enforcement of FC s 33.

(iv) The continuing role of FC s 33

Where does this then leave the role of FC s 33? One approach initially suggested was to the effect that PAJA would be the sole substantive basis of the constitutional right and that the right itself has no further application. This would be the case if 'give effect to' in FC s 33(3) was read to mean 'created by'.⁴² This approach should be rejected on the basis that it would be anomalous to include the right to just administrative action as a fundamental right in an entrenched Bill of Rights only to enable the substance of the right to be altered by simple legislative amendment. It may be consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to possess the sole say on the construction of the right.⁴³

The better argument is that PAJA gives effect to the right (including the sub-rights in FC s 33) in the sense of interpretation and enforcement: making the rights more effective through providing a detailed elaboration of both the scope and content of the rights, as well as providing an institutional framework for their implementation and enforcement.⁴⁴ The implication of this argument is that the constitutional right in

39 The revision and replacement of the Interpretation Act is currently the subject of a project of the South African Law Reform Commission (Project 25).

40 See *Sidumo* (supra) at para 91.

41 A counter-argument to this is that decisions of the CCMA are not included in the specific exclusions listed in PAJA's definition of 'administrative action'. See § 63.3(c)(iv) infra.

42 See Currie & Klaaren *Benchbook* (supra) at 27; I Currie & J Klaaren 'Just Administrative Action' in J de Waal, I Currie & G Erasmus (eds) *The Bill of Rights Handbook* 4 ed (2001) ('Just Administrative Action') 496.

43 See Currie & Klaaren *Benchbook* (supra) at 27.

44 See Currie & Klaaren *Benchbook* (supra) at 27. The view finds some support in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*. 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 83 (During the course of its judgment relating to the constitutional right of access to information which was suspended in a similar manner to the right to just administrative action, the Court held that the reason for the suspension was 'a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of

FC s 33 continues to possess a meaningful purpose. In other words, despite PAJA's enactment, a free-standing constitutional right to just administrative action still exists. Given the continued viability of a free-standing constitutional rights, we can identify three ways in which the constitutional right to just administrative action will continue to play a role: to assist in interpreting the provisions of PAJA; to challenge the constitutionality of PAJA itself; and to interpret and to challenge other legislation.⁴⁵

Firstly, the constitutional right to just administrative action remains a valuable tool for the interpretation of the provisions of PAJA. In interpreting the Act it

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should always be borne in mind that it is intended to give effect to the rights set out in FC s 33.⁴⁶ For example, as discussed below, the broad standing requirements of the Bill of Rights set out in FC s 38, rather than the more narrow grounds for standing in the common law, should be read into the Act.⁴⁷ The same goes for the interpretation of other statutes of general administrative law as well as for the other statute held to be giving effect to FC s 33, the LRA.⁴⁸

While PAJA should generally be interpreted in a manner which best complies with FC s 33,⁴⁹ we wish to emphasize that our courts should not attribute an 'unduly strained' meaning of the language of PAJA.⁵⁰ If PAJA limits FC s 33 in a manner that cannot be reconciled through reasonable interpretation, then courts should adopt the position that PAJA limits the constitutional right. The court should then engage in a limitations enquiry in order to assess whether the limitation of the right is justified.⁵¹ Of course, this limitations enquiry should acknowledge and even employ the factors laid out in FC s 33(3). If the PAJA provision is a justified limitation, then

information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.').

45 For a more detailed discussion of these uses of the constitutional right, see Currie & Klaaren *Benchbook* (supra) at 26-29.

46 See *Bato Star* (supra) at para 44, *Grey's Marine Hout Bay (Pty) Limited & Others v Minister of Public Works & Others* 2005 (6) SA 313 (SCA), 2005 (10) BCLR 931 (CC) ('*Grey's Marine*') at para 22, *New Clicks* (supra) at para 100 (Chaskalson CJ) and *Walele* (supra) at para 123 (O'Regan J).

47 See Currie & Klaaren 'Just Administrative Action' (supra) at 496 fn 29. See also § 63.8 infra.

48 For an example of this interpretation of s 145 of the LRA, see *Sidumo* (supra) at para 110 ('Section 145 [of the LRA] is now suffused by the constitutional standard of reasonableness.')

49 See, for example, *Wary Holdings (Pty) Limited v Stalwo (Pty) Limited & Another*, (July 2008) CCT 78/07 at paras 44-47 (It is necessary to take the best of the possible interpretations in giving effect to the spirit, purport and objects of the Bill of Rights.)

50 See *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 23-24; *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 24; *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) ('*Daniels v Campbell*'). For a discussion of these cases, see L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

PAJA should be left undisturbed. If the provision is not a reasonable or justifiable limitation of the right, the challenged provision of PAJA must be declared unconstitutional. In engaging in this limitations enquiry, courts are obliged to engage with the countervailing considerations appropriate to the limitations stage of the enquiry that may be raised in support of the more restrictive approach adopted in PAJA and then to decide whether or not to extend PAJA's scope (through their remedial powers of, for example, reading in and severance).⁵² This approach is superior to that of interpretation that results in an unduly strained reading of PAJA. The danger, from a constitutional perspective, in a court simply 'rewriting' the language of PAJA in the name of compliance with FC s 33 is that the court engages in 'legislating' and, in doing

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so, undermines the separation of powers.⁵³ In particular, FC s 33(3) identifies Parliament as the appropriate institution to give effect to the constitutional right to just administrative action. The principal separation of powers difficulty occasioned by such an approach (as opposed to, for example, the constitutional remedy of reading in) is that a court effectively re-writes legislation without first engaging in a limitations enquiry and making a finding of constitutional invalidity.⁵⁴

Secondly, the most dramatic use of the constitutional right would be to challenge the constitutionality of PAJA itself. Potential challenges to PAJA may be divided into two categories: 'underinclusive' and 'overrestrictive' challenges.⁵⁵ Possible attacks on PAJA on the basis that it is underinclusive may include: the narrowing of the definition of 'administrative action' and the apparent limitation of the right to procedural fairness to circumstances where a person's rights or legitimate expectations are adversely affected.⁵⁶ They may also encompass certain categorical

51 For a detailed discussion of the limitations enquiry, see S Woolman and H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

52 See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

53 See *Daniels v Campbell* (supra) at paras 68, 83, 84 and 104 (Moseneke J dissenting).

54 See M du Plessis and G Penfold 'Bill of Rights Jurisprudence' 2004 *Annual Survey of South African Law* 15 at 25-28 and M Du Plessis and G Penfold 'Bill of Rights Jurisprudence' 2005 *Annual Survey of South African Law* 27 ('Bill of Rights Jurisprudence') at 92-93.

55 See Currie & Klaaren *Benchbook* (supra) at 29-30 (Authors refer to a third category of challenges to the constitutionality of PAJA, namely, fundamentalist challenges. These challenges maintain that PAJA may not impose any limitations on the constitutional right to just administrative action as FC s 33(3) empowers Parliament to 'give effect to' and not to limit the constitutional right. This approach finds some textual support in the fact that, unlike FC s 32(2), which performs a similar role in relation to access to information, FC s 33(3) does not expressly state that the national legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'. It is, however, submitted that fundamentalist challenges should be rejected on the basis that to apply the wide wording of FC s 33(1) without limitation would impose an impossible burden on the administration of government. In addition, an absolute right to just administrative action is inconsistent with the general limitation clause applying to all rights in the Bill of Rights (FC s 36(1)).

56 See §§ 63.3(c) and 63.5(d)(ii) infra.

exclusions from the definition of administrative action.⁵⁷ Overrestrictive challenges to the Act would engage procedures that are overly burdensome. Such burdensome challenges may include the requirements that judicial review must be sought within a period of 180 days⁵⁸ and that an applicant must first exhaust internal remedies.⁵⁹

While we offered some hints, it still remains unclear as what approach our courts will adopt in assessing the constitutionality of a provision of PAJA. Very broadly speaking, there are two options, and, perhaps, a middle way. One option is to treat PAJA in the same manner as other parliamentary legislation, that is,

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PAJA is unconstitutional if it infringes the rights in FC s 33(1) or (2), unless such infringement is reasonable and justifiable in accordance with the Final Constitution's general limitation clause.⁶⁰ Another approach is to afford the legislature a greater degree of deference in relation to PAJA. Two arguments support the second approach. PAJA, unlike most other legislation, is constitutionally mandated to give effect to a fundamental right. FC s 33(3)(c) expressly provides that this legislation must 'promote an efficient administration', words that appear at least capable of a reading that would create a lower threshold for justification than that of the general limitations clause.⁶¹

One of the authors has suggested a middle way, a two-tiered approach to adjudication of PAJA's constitutionality based on its functions of interpretation and enforcement.⁶² In terms of this approach, the content of PAJA can be divided into two categories: those provisions which define and detail substantive rights, and those provisions which set out procedures and structures to enforce the relevant rights. While some extra deference is due to the legislature in relation to the latter, no special deference is due for the former.⁶³

The third function of the constitutional right would be to interpret and to challenge legislation other than PAJA. Although PAJA is mandated by the Final Constitution, it is not a constitutional document and is not specially entrenched. It

57 See § 63.3(c)(iv) *infra*.

58 Section 7(1) of PAJA.

59 Section 7(2)(a). Neither of these challenges is likely to succeed, particularly since PAJA allows for a relaxation of both these requirements (ss 7(2)(c) and 9(1) of PAJA).

60 This option finds support in that, unlike the terminology in FC s 32(2), the wording of FC s 33(3) does not constitute a special limitation. See Currie *The PAJA* (*supra*) at 40. It perhaps counts against this interpretation to note the specific references to FC s 36(1), in the context of the national legislation referred to in FC ss 23(5), 23 (6), and 25(8).

61 It should, however, be noted that the phrase 'promote an efficient administration' is capable of two meanings. See J Klaaren 'Constitutional Authority' (*supra*) at 561 (Klaaren points out that it could be read 'downwards' to authorise the reduction of legal burdens on the administration, promote cost-effectiveness and simplicity of procedures. On the other hand, it could be read 'upwards' to require an administration that is accountable, open, rational, effective and responsive). See also D Davis & G Marcus 'Administrative Justice' in *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 163.

62 Klaaren 'Constitutional Authority' (*supra*) 561.

could not, therefore, be used to challenge subsequent — and facially inconsistent — parliamentary legislation. The constitutional right would have to be relied on directly in such cases. As indicated above, the appropriate limitations vehicle would be the inquiry supplied by FC s 33 read with FC s 36. For instance, the constitutional right to lawful administrative action could be invoked directly to challenge attempts in future legislation to oust the court's review jurisdiction.

The interpretive role of FC s 33 extends beyond PAJA to other statutes, at

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least to the extent that they relate to administrative action.⁶⁴ This role should be viewed in concert with the role of FC s 33 in interpreting PAJA. Its effect is likely to be significant. According to the Constitutional Court: '[a]ll statutes which authorise the making of administrative action must now be read with PAJA unless their provisions are inconsistent with it. PAJA was intended to interface with all statutes (whether enacted before or during the current constitutional order) which authorise administrative action.'⁶⁵ We would make a distinction here between the strong 'suffusing' interpretative effect of FC s 33 — which has been used and is relevant to PAJA and other legislation giving effect to FC s 33 in the sense contemplated in FC s 33(3) — and the more ordinary 'reading with' interpretive effect of FC s 33 on ordinary legislation, which is sourced in both the principles of avoidance of unconstitutionality and, in line with FC s 39(2), of promoting the spirit, purport, and objects of the Bill of Rights. The effect of the more widespread interpretive role of FC s 33 in relation to legislation that does not give effect to the constitutional right is that, instead of raising the statutory provision to the level of PAJA, the particular administrative action taken in terms of that provision is subject to PAJA (unless of course the two statutes are inconsistent).⁶⁶

Finally, we note that we do not see a possible role for the constitutional right to just administrative action to be used as a residual right to challenge the validity of administrative action that falls outside the scope of PAJA. In our view, such a direct role for FC s 33 would undermine the role of Parliament. As we have already argued, the proper remedy for under-inclusiveness in PAJA is not direct reliance on FC s 33. It

63 See Klaaren 'Constitutional Authority' (supra) at 563 ('Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretative authority over the rights, Parliament receives no extra deference there.').

64 The relevance of FC s 33 is arguably heightened to the extent that a particular statute provides for statutory review of administrative action authorised by that statute.

65 See *Walele* (supra) at para 51 (citing *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 101).

66 The use of the constitutional right in the interpretation of PAJA will be of particular value in determining the consistency of PAJA with other statutes that are also to be interpreted consistently with FC s 33. The influence of the constitutional right in both statutory contexts will give added force to the argument that non-PAJA statutes should be interpreted, to the extent feasible, in a manner consistent with PAJA. See Currie & Klaaren *Benchbook* (supra) 20–21 (Argue that subsequent non-PAJA legislation should be interpreted if at all possible to be consistent with PAJA as the authoritative expression of Parliament's interpretation of the administrative justice right in the Final Constitution. This view is consistent with the dictum in *Walele* quoted above.).

is, rather, an order that PAJA is unconstitutional and does not properly give effect to the right.⁶⁷

(b) The principle of legality

In a series of cases crucial for the project of constitutionalism, the Constitutional Court has clearly identified a principle of legality that is distinct from, yet supportive of, the constitutional right of just administrative action.⁶⁸ In *Fedsure*, the Court first identified and applied this principle of legality. The principle requires that public power may only be exercised in accordance with law, a requirement that has purchase far beyond the ambit of administrative action. *Fedsure* held that the principle of legality is a constitutional principle founded on the rule of law.⁶⁹ As Chaskalson P, Goldstone J and O'Regan J stated:⁷⁰

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

The Constitutional Court went further in the *SARFU 1*.⁷¹ It held that, although the President's decision to appoint a commission of inquiry was not administrative action, it was constrained by the principle of legality. According to the Court, the

67 See *Hlophe v Constitutional Court of South Africa and Others*, Witwatersrand Local Division, Case no. 09/22932 (25 September 2008) ('*Hlophe v Constitutional Court*') (The action complained of in that case was not judicial action. The decision of the High Court in *Hlophe* could be read as interpreting the action of the Constitutional Court judges as an instance of action accountable in terms of the direct, judicial application of FC s 33. The case concerned the procedural fairness of judges (all the judges of the Constitutional Court) complaining about the alleged misconduct of another judge (the Judge President of the Cape Provincial Division) as well as the fairness of making the fact of such a complaint public.) See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC) ('*Independent Newspapers*') at para 161 fn 18 (Citing cases of on-the-spot exercises of judicial discretion. In this case a cluster of three rights comprising the concept of open justice is undertaken directly and judicially rather than by mediation of a statute.) Nonetheless, it is not clear whether the majority in *Hlophe v Constitutional Court* viewed the action of the Constitutional Court judges in laying a complaint as administrative action. Certain portions of the judgment indicate that the majority relied directly on the common law. *Ibid* at paras 20 and para 52. In any case, the result would perhaps better be understood as an application of the principle of legality and rationality. However, such a conclusion would be contrary to the finding of the Constitutional Court in *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) ('*Masetlha*'). See § 63.2(b) *infra*.

68 For a discussion of the principle of legality, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' 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 11.

69 FC s 1(c) proclaims that two of the foundational values of the Republic of South Africa are the supremacy of the Constitution and the rule of law.

70 *Fedsure* (*supra*) at para 58.

71 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) ('*SARFU 1*').

principle required that the President must act personally, in good faith, and without misconstruing the nature of his powers.⁷²

A third case reaffirmed the principle of legality and appeared to articulate an additional one of rationality — albeit a less clearly outlined principle. In *Pharmaceutical Manufacturers*, the Constitutional Court dealt with the President's decision to bring an Act into force despite the fact that the regulatory infrastructure for the operation of the Act had not yet been put in place. The Court held that the

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President's decision was not 'administrative action'.⁷³ Chaskalson P went on to state that it was a general requirement of the Final Constitution that public officials should not only exercise their powers in good faith but that such powers may not be exercised arbitrarily. Decisions must therefore 'be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement'.⁷⁴ The Court therefore struck down the President's decision to bring the Act into operation on the basis that it was objectively irrational. Chaskalson P summed up the position, in words reminiscent of the traditional administrative law concerns over review on the merits:⁷⁵

Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.

While this articulation initially appeared to indicate the existence of a second separate principle of rationality, later cases have made it clear that this requirement of objective rationality is best seen as a component of the principle of legality.⁷⁶

The principle of legality remained largely undeveloped for several years. And, while it has played a role in a significant pair of Constitutional Court cases, it has essentially not moved on.

72 Ibid at paras 148 and 149. *SARFU 1* thus represents a conception of legality that moves beyond *ultra vires* in the narrow sense. See *Pepcor Retirement Fund & Another v Financial Services Board & Another* 2003 (6) SA 38 (SCA) ('*Pepcor*'), as discussed at § 63.4 *infra*.

73 See § 63.3(b)(iii) *infra*.

74 *Pharmaceutical Manufacturers* (*supra*) at para 85. In adopting this approach Chaskalson P drew on the Court's previous equality jurisprudence relating to mere differentiation (see, for example, *Prinsloo v van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25).

75 *Pharmaceutical Manufacturers* (*supra*) at para 90.

76 See *Masetlha* (*supra*) at para 81 (The principle is termed 'the principle of legality and rationality'.)

In *New Clicks*, it was the minority (of one) judgment of Sachs J that introduced a set of creative possibilities for further development of the principle of legality. Holding part of the subordinate legislation at issue in that case not to be administrative action,⁷⁷ Sachs J nonetheless would have held such subordinate legislation accountable to not only legality (in the narrow sense) but also procedural fairness and substantive reasonableness, identifying the principle of legality — or, in his words, 'an expansive notion of legality' — as the basis for such a regime.⁷⁸ Sachs J would thus have sourced not only narrow and broad *ultra vires* (e.g. lawfulness) limits on subordinate legislation but also rules for rule-making (e.g. procedural

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fairness and reasonableness) in the principle of legality. Given the lack of a clear majority from the remaining members of the *New Clicks* Court, the use of the principle of legality to hold rule-making accountable was and remains a serious open question.⁷⁹

Nonetheless, the second case of the recent pair, *Masetlha*, has at the very least closed off one principal avenue of development for the principle of legality. The *Masetlha* Court was given the opportunity to include procedural fairness within the principle of legality but chose firmly not to do so. Contesting his dismissal, the former head of the National Intelligence Agency ('NIA'), Mr Billy Masetlha, was afforded the protection of the law (namely, the Final Constitution) but not the specific protection of procedural fairness. On behalf of the majority, having found in FC s 209(2) an implied power to dismiss the head of NIA, Moseneke DCJ noted that the dismissal was a FC s 85(2)(e) exercise of executive authority. As such, it was excluded from PAJA, although subject to the principle of legality and rationality. In Moseneke DCJ's view, the executive nature of the power trumped the usual need for procedural fairness in a dismissal.⁸⁰ In the view of the majority, this exercise of executive authority gave priority to effective government over procedural fairness.⁸¹

77 See § 63.3(b)(vi) *infra*.

78 See *New Clicks* (*supra*) at paras 611–640.

79 Note Moseneke DCJ's description of the views of Sachs J in *New Clicks* as 'immaculately reasoned'. See *New Clicks* (*supra*) at para 723. On rule-making, see § 63.3(b)(vi) *infra*. We express there the view that rule-making amounts to 'administrative action' and is thus subject to the rigours of FC s 33 and PAJA.

80 See *Masetlha* (*supra*) at para 77 (Moseneke DCJ) ('The power to dismiss — being a corollary of the power to appoint — is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action.')

81 *Ibid* at para 77 (Cites the Court's position from *Premier, Mpumalanga, & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) ('*Premier, Mpumalanga*') at para 41: 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.' The reasoning here may leave room for a finding that legality can include a certain measure of procedural fairness protection in other contexts (e.g. in the context of rule-making, if our courts ultimately hold, contrary to our view, that rule-making does not amount to administrative action.)

In dissent, Ngcobo J, with Madala J concurring, argued that the rule of law rationale at the heart of the principle of legality could and did found a legal basis in this case for a right to procedural fairness for the dismissed NIA chief.⁸² In their view, '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 they make decisions that adversely affect an individual.'⁸³

It seems to us that the decision of the majority in *Masetlha* was appropriate — and not only because of its national security context. To turn procedural fairness into a component of the principle of legality would effectively mean that the

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performance of every public function, and not only administrative action, would attract challenges related to procedural fairness. The limiting of procedural fairness to contexts of administrative action is also sensitive to the relatively slender reed that is the rule of law claim at the heart of the constitutional principle of legality (and rationality). While most of the earlier principle of legality cases were incremental advances, the two-step of *New Clicks* and *Masetlha*, read in sequence, represents a significant (and, in our view, appropriate) retreat, in principle, from what might have been. As a result, the principle of legality has now attained a significant degree of clarity and certainty. Indeed, the view that the principle of legality could have grown to encompass or to even replace administrative law was an overstated and unlikely position.⁸⁴ That said, it cannot be denied that Ngcobo J's reasoning in dissent in *Masetlha* is cogent and powerful. There can be no watertight divide between the concepts of legality and of procedural fairness (as well as that of rationality). Thus, our courts would in an appropriate case be justified in incrementally expanding the existing jurisprudence to encompass within the principle of legality and rationality an element of procedural fairness. Even if the broad avenue is closed off, a few side streets could be mapped on to our current rule of law and legality jurisprudence. In any event, the development of the principle (and, to a certain extent, its cabining) is a significant constitutional development.

That said, one should note that the possibility explored by Sachs J in his minority opinion in *New Clicks* — that subordinate legislation should be governed by the principle of legality — is a route that may yet be taken by the legislature. It will, however, not be as wide a route, nor perhaps one as restrictive of other traffic, as the route Sachs J proposed. The initial recommendations made by Hugh Corder, proposing in part the adoption by Parliament of a legislative regime for the scrutiny of subordinate legislation, have not resulted in such a mechanism. A provincial legislature (Gauteng) has, however, taken some steps in this institutional direction, drawing both upon the principle of legality and the right of lawful administrative action to anchor its exercise of legislative oversight of subordinate legislation.⁸⁵

82 *Masetlha* (supra) at paras 178–189.

83 *Ibid* at para 180.

84 For a discussion of the open-ended possibilities presented by the principle of legality, see C Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165. It seems to us that the more ambitious use of, or aspirations for, the principle of legality as a peg for administrative law review was born less from constitutional principle than from concerns relating to the overly restrictive definition of 'administrative action' in PAJA. We submit that the preferable way forward is not to stretch unduly the principle of legality but rather to ensure that PAJA adequately gives effect to the constitutional right to just administrative action.

While complying with the basic thrust of Sachs J's proposal, this legislative scrutiny of subordinate legislation differs in two key respects: first it

enforces only norms of lawfulness rather than additionally those of procedural fairness and of proportionality or reasonableness; and second, it anchors itself in the right to lawful administrative action as well as in the principle of legality.

(c) The relationship between the Final Constitution and the common law

It is now part of constitutional history that the Supreme Court of Appeal and the Constitutional Court once expressly differed on the degree of separation between the Final Constitution and the common law in the context of judicial review as part of administrative law. The Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* held that '[j]udicial review under the Constitution and the common law are different concepts' and that the common-law system of judicial review was separate from the constitutional one.⁸⁶ Thus to the SCA, administrative law had not been constitutionalised in its entirety and one could still mount a challenge to administrative action based on the common law.⁸⁷

The SCA's decision, however, was overruled by the Constitutional Court in *Pharmaceutical Manufacturers*.⁸⁸

The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.⁸⁹

Where is the common law left in the constitutional scheme of administrative law? We would make four points relevant to what we see as a clearly diminished, albeit by no means negligible, role. First, as discussed below, it appears that administrative action as contemplated in the Final Constitution (and more clearly under PAJA) relates to the exercise of *public* power and does not encompass private action. FC s

85 The Final Report of the Task Team on Oversight and Accountability was presented to the Joint Rules Committee of Parliament on 19 March 2008, available at 20080319-final-report-task-team-oversight-and-accountability.htm. For the Gauteng structure, operative as of October 2008, see Standing Rules 220 and 224–227 of the Gauteng Provincial Legislature.

86 *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA) at para 20.

87 *Ibid.* ('[T]o the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact. There is no indication in the interim Constitution of an intention to bring about a situation in which, once a Court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds.')

88 *Pharmaceutical Manufacturers* (supra) at para 33. *Ibid.* at paras 44 and 50.

89 Note that perhaps the strongest interpretive use of the common law in the new constitutional scheme is that proposed by Ngcobo J. See *Masetlha* (supra) at paras 178–189 (Ngcobo J argued for a duty of fairness based on the rule of law.)

33 and its progeny, PAJA, are thus not available in this context for use in serving the purposes of accountability and transparency. Yet, under the common law the exercise of certain private powers was subject to judicial review for compliance with administrative law.⁹⁰ We maintain that it is possible that the

common law will continue to apply in this narrow sphere notwithstanding the constitutionalisation of administrative law generally.⁹¹

Secondly, the common law will play an indirect role in interpreting the provisions of both the Final Constitution and PAJA.⁹² For example, in *Premier, Mpumalanga* the Court used the common-law meaning of 'legitimate expectations' to interpret this phrase in IC s 24(b).⁹³ Several years later the majority in *Walele* did the same in the context of s 3(1) of PAJA.⁹⁴ Most importantly and pertinently, the common law will be of undoubted assistance in interpreting the content of the principle of legality.⁹⁵ But, in such a context, one must never forget that it is a constitutional principle that a court is interpreting and not a thread of the common law that one is articulating.

Third, the common law may still persist in its role as regulating the procedure for judicial review. This topic is of course covered by s 7 of PAJA. It remains in our view an open question as to whether PAJA covers the field of procedure for judicial review, thus completing ousting the common law. If s 7 does not oust the common law procedure for judicial review completely, then the common law will play a supplementary role. If s 7 does oust the common law procedure for judicial review, then the common law has no role here (apart from an interpretative one).

Fourth, it is of course the case that the common law often provides the regulatory backdrop against which administrative law operates. In this role, the common law provides the substantive and usually default rules for an operative legal background. We would argue that apart from these four specific and defined roles, the common law no longer has a direct part to play in administrative law in South Africa.

63.3 The meaning of administrative action

90 See, eg, *Marlin v Durban Turf Club & Others* 1942 AD 112; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) ('*Turner v Jockey Club*'); and *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A).

91 For a welcome use of administrative law in a private setting, see *Klein v Dainfern College & Another* 2006 (3) SA 73 (T) at para 24 (Describing the application of natural justice to private, disciplinary tribunals as a 'branch of private administrative law.')

92 *Pharmaceutical Manufacturers* (supra) at para 45 ('[T]hat is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development.') See also *SARFU 1* (supra) at paras 135-136.

93 *Premier, Mpumalanga* (supra) at para 36.

94 *Walele* (supra) at paras 28, 30 and 34 to 42.

95 See, for example, the aspects of legality identified in *SARFU 1*.

(a) Introduction

The notion of 'administrative action' as the threshold to administrative law review arose for the first time through the use of this phrase in the right to administrative justice contained in IC s 24. This phrase is repeated in the right to just administrative action entrenched in FC s 33 and delineates the scope of application of PAJA. The label 'administrative action' is thus the crucial threshold concept in post-democratic administrative law. Generally speaking, conduct that amounts to

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administrative action is reviewable on a broad range of administrative law grounds (which are now set out in PAJA). Conduct that falls short of this threshold is not.⁹⁶

The assessment of whether or not conduct amounts to 'administrative action' has proved often extremely difficult. Our courts (including the members of the Constitutional Court and the Supreme Court of Appeal) regularly disagree on whether or not conduct falls within its ambit. One reason for this difficulty is the complex definition of 'administrative action' in PAJA. While the elaboration of a constitutional concept by Parliament could in principle have assisted in providing clarity as to this concept, most agree that the statutory definition is at best unwieldy and at worst confusing and potentially internally inconsistent. Perhaps even more fundamental as a reason for the difficulty encountered is the fact that the assessment of 'administrative action' often raises difficult issues that go to the heart of public law, including the precise boundary between public and private power, the role of the doctrine of separation of powers, and the need to balance the principle of efficient administration with effective judicial oversight of administrative functioning. As a judge of the Constitutional Court has remarked, the classification of conduct as administrative action under the Final Constitution is 'a matter of considerable complexity'.⁹⁷

In the absence of a Constitution-level definition of 'administrative action', the Constitutional Court began to give meaning to this phrase in a line of judgments handed down in the years following the enactment of the Interim Constitution. While these judgments did not generally tell us what administrative action is, they gave some measure of definition to the phrase by telling us what it is not. Most significantly, the Constitutional Court held that administrative action does not include legislative,⁹⁸ executive⁹⁹ and judicial action.¹⁰⁰ By contrast with this strategy of definition by exclusion, the drafters of PAJA tackled the task of defining

96 'Absent [an administrative] act, the application for [administrative] review is stillborn.' *Gamevest (Pty) Limited v Regional Land Claims Commissioner, Northern Province and Mpumalanga, & Others* 2003 (1) SA 373 (SCA), 2002 (12) BCLR 1260 (SCA) at para 11. As discussed above, conduct that falls short of this threshold may, however, be subject to review on a number of other grounds, including legality and rationality, and a breach of the Bill of Rights.

97 See *New Clicks* (supra) at para 720 (Moseneke J). See also *SARFU 1* (supra) at para 143 ('Difficult boundaries may have to be drawn in deciding what should and should not be characterised as administrative action for purposes of s 33.')

98 *Fedsure* (supra).

99 *SARFU 1* (supra).

100 *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) ('Nel').

'administrative action' head-on: PAJA includes an extensive and extraordinarily complex definition of this term of art. In addition to the uncertainty that this statutory definition has created, it purports to cut down the ambit of administrative action and thus narrows the range of administrative conduct to which PAJA relates.

Given the high stakes at play as well as the complexities involved in deciding the issue, it is commonplace for a decision-maker, in the face of a challenge, to

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deny that its conduct amounts to administrative action.¹⁰¹ As a result, a large amount of judicial time has been taken up in assessing whether particular conduct amounts to administrative action. The meaning of 'administrative action' has thus become a (if not *the*) 'focal point of South African administrative law'.¹⁰²

A plethora of cases have been handed down on the meaning of administrative action under IC s 24, FC s 33 and PAJA. These cases are extensively discussed in other works,¹⁰³ and we do not aim to repeat the exercise here. For purposes of this chapter, we rather focus on the classification of administrative action from a constitutional angle. We assess: (1) the constitutional meaning of administrative action and the correct approach to defining the boundaries of this concept; and (2) the meaning of 'administrative action' under PAJA, viewed through the prism of the constitutional right to just administrative action, as well as the constitutionality of the PAJA definition.

As we aim to flesh out in further detail below, the correct approach to these threshold questions is to search first for a substantive understanding of 'administrative action' in FC s 33.¹⁰⁴ The priority of FC s 33 requires an assessment of whether it is consistent with constitutional purpose to hold the action accountable under FC s 33. In our view, this assessment must draw heavily on the doctrine of separation of powers.

The enquiry as to what is and what is not administrative action, however, does not end with FC s 33. In assessing whether conduct amounts to administrative action under PAJA, it is important to bear in mind that the drafters of the Final Constitution left it to Parliament to give effect to the constitutional right in FC s 33(1) and (2).¹⁰⁵

101 If conduct is administrative action, then the full range of administrative law grounds of review set out in s 6(2) of PAJA applies. If it is not administrative action, the other grounds of review based on legality (or the application of administrative law rules in the private sphere) may of course apply. But these grounds are 'lesser' than PAJA grounds.

102 Hoexter *Administrative Law* (supra) at 164. Hoexter laments that this focus on the meaning of 'administrative action' has taken our attention away from more important issues, such as the content of lawfulness, reasonableness and procedural fairness in particular contexts. See also C Hoexter "Administrative Action" in the Courts' 2006 *Acta Juridica* 303, 309 ('Administrative Action').

103 See, for example, Hoexter *Administrative Law* (supra) 162-222; J de Ville *Judicial Review of Administrative Action in South Africa* (2005) ('*Judicial Review*') 35-87; Currie *The PAJA* (supra) at 42-91; Currie & Klaaren *Benchbook* (supra) at 34-86; Y Burns & M Beukes *Administrative Law under the 1996 Constitution* (3rd Edition 2006) ('*Administrative Law*') 107-149.

104 The language here is taken from para 137 of the separate, concurring judgment of O'Regan J in *Sidumo* (supra), in which she refers to 'a substantive understanding of section 33'.

105 FC s 33(3). See § 63.2(a)(iv) supra.

PAJA, as the product of that process, should thus be treated with respect. This respect does not mean that one blindly accepts PAJA's apparent restrictions on the scope of administrative action. It rather sets a context for the application of the rules of statutory interpretation.¹⁰⁶ For the reasons discussed

above, PAJA's definition of 'administrative action' should be interpreted in a manner which best complies with FC s 33, provided that the resulting interpretation is a reasonable reading of the language of PAJA and is not 'unduly strained'.¹⁰⁷ If PAJA's definition of 'administrative action' limits FC s 33 in a manner that cannot be reconciled through reasonable interpretation, courts should find a prima facie violation of FC s 33 and then engage in a limitations enquiry. If the PAJA limitation is justified, then the more limited definition in PAJA should be applied. If it is not, then PAJA should be declared unconstitutional and the remedies of striking down, reading in and severance could then be used to expand PAJA's scope.¹⁰⁸

Another point that we wish to make at the outset is that the jurisprudence of our courts indicates that the classification of conduct as 'administrative action' is by no means a mechanical exercise in which the court simply applies established rules developed by the courts or the wording of the PAJA's detailed statutory definition. The approach of judges and academics to this question is coloured by a variety of theoretical concerns.

One such theoretical concern is the proper approach to the task of judicial review of administrative action in a constitutional democracy. Some (so-called red light) theorists see the primary function of judicial review as a means of holding the administration accountable and thereby hopefully improving effective decision-making. Other (so-called green light) theorists place greater emphasis on the need to ensure that administrative review does not become an unruly horse and thus undermine administrative efficiency. They would rather see administrators spending less time in court defending their decisions and more time getting on with the pressing task of running government.¹⁰⁹

A related issue that may affect one's stance on the definition of administrative action is one's willingness to embrace the concept of variability or, in what may not be quite the identical exercise,¹¹⁰ to apply different levels of review (or scrutiny) to different types of administrative action. If one accepts that the substance of the grounds of review are, at least to some extent, variable (as would be the case with different levels of review), one is likely to embrace a wide definition of 'administrative action' without the fear of opening the floodgates that may result if

106 For a detailed discussion of statutory (and constitutional) interpretation under the Constitution, see L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

107 See § 63.2(a)(iv) *supra*.

108 See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

109 See Klaaren 'Redlight, Greenlight' (*supra*); and Hoexter 'Future of Judicial Review' (*supra*).

110 For a brief discussion of the difference, and similarity, between variability and levels of scrutiny, see § 63.4 *infra*.

the full gamut of review grounds apply in the same way to all forms of administrative action. As the chief proponent of variability in administrative review, Cora Hoexter, says, this concept 'allows the courts to be more generous about the

application of administrative justice and to vary its precise content according to the circumstances'.¹¹¹ Likewise, different levels of scrutiny applied to different types of administrative action will provide similar leeway.

A third theoretical issue that comes into play is one's view of the scope for the application of other available public law review mechanisms (and the substantive 'teeth' of such mechanisms). The most important contender in this regard is the constitutional principle of legality (which applies to all exercises of public power, and which Hoexter has described as 'a constitutional safety net').¹¹² The more one regards these alternative mechanisms as encompassing principles of administrative law, the more one is likely to be comfortable with giving a more limited interpretation to 'administrative action'. Perhaps the best illustration of this approach is the separate judgment of Sachs J in *New Clicks*. Sachs J's finding that regulation-making does not generally amount to administrative action is very much linked to his view that procedural fairness and substantive reasonableness can be accommodated under the umbrella of 'an expanded notion of legality'.¹¹³ While we (and more importantly a Court plurality) disagree with Sachs J's position,¹¹⁴ it is

111 Hoexter *Administrative Law* (supra) at 201. See also Currie *The PAJA* (supra) at 83 fn 144. A similar approach to Hoexter's notion of variability is, in effect, adopted by the Constitutional Court in relation to arbitrary deprivations of property under FC s 25(1). The Court has adopted a wide approach to the meaning of 'deprivation of property' and deals with the relevant importance of the property right at stake, and the extent of the interference with that right, in adopting a variable test for arbitrariness (a test that, depending on the circumstances, ranges from mere rationality to proportionality). See *First National Bank of South Africa Limited t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at paras 57 and 100. As Theunis Roux points out in the property chapter in this treatise, '[t]he more likely scenario is that a court hearing a constitutional property clause challenge will construe almost any interference with the use or enjoyment of property as a deprivation, and will deal with the level of intrusiveness of the deprivation when considering whether the requirements of s 25(1) have been met'. See T Roux 'Property' 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 46, § 46.4.

112 Hoexter *Administrative Law* (supra) at 164. See § 63.2(b) supra.

113 *New Clicks* (supra) at para 583. See also *New Clicks* (supra) at para 612(Sachs J):

If the result of excluding such law-making from the purview of s 33 and PAJA would effectively be to immunise subordinate legislation from judicial review, save for limited grounds such as bad faith and outright irrationality, the outcome would be constitutionally unacceptable. A strained reading of PAJA would in these circumstances have much to commend it. I feel, however, that there is an alternative and better way of securing constitutional supervision of subordinate legislation. The approach I propose shares the philosophy underlying s 33, but is not founded on that section, nor is it constrained by the format of PAJA. In my view, the basis for judicial review of subordinate legislation lies in an expansive notion of legality derived from both express provisions and implied principles of the Constitution.

We note that, as stated at § 63.2(b), the majority of the Constitutional Court in *Masetlha* held that the principle of legality does *not* incorporate procedural fairness and, by describing legality as including review for rationality, suggests that reasonableness is also not included within the scope of legality review. *Masetlha* (supra) at paras 78 and 81.

114 See § 63.3(b)(vi) infra.

certainly both understandable and, with respect, wise to view the ambit of administrative action with due regard to other constitutional mechanisms of accountability.

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A final theoretical issue that arises from the case law is that the scope of administrative action is affected by one's approach to the proper interpretation of PAJA as constitutionally mandated legislation, and particularly the emphasis (or lack thereof) that one places on the text of PAJA. This approach, in turn, can depend on the level of respect that one accords to the legislature (as the drafters of PAJA) in light of the doctrine of separation of powers as well as, in another manifestation of the doctrine of separation of powers, on the competence and authority of the various institutions and structures set up by the Final Constitution.¹¹⁵ As we point out below, certain judgments have tended to disregard the wording of the PAJA definition of 'administrative action', in favour of a strained interpretation that, according to the courts, is consistent with the scope of the constitutional right in FC s 33.¹¹⁶

The Constitutional Court has held that the proper approach to interpreting the scope of administrative action is first to consider whether the conduct falls within the meaning of 'administrative action' for purposes of FC s 33 and, if it does, to then assess whether PAJA nevertheless excludes this conduct from the scope of 'administrative action'.¹¹⁷ The starting point is thus FC s 33. And that is where we begin.

(b) Administrative action under the Final Constitution

(i) The general scope of administrative action

Generally speaking, the constitutional reach of 'administrative action' extends to all action taken by persons and bodies exercising public power or performing public functions, save for specific exceptions that have been identified by the Constitutional Court. These exceptions are: legislative action by elected, deliberative legislatures; executive policy decisions (or matters of high political judgment); judicial action by judicial officers; and, it seems, the recently added category of labour relations.¹¹⁸

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We discuss each of these exceptions, in turn, before considering two specific types of action which starkly raise the distinctions between the various categories of public power, and the classification of which have divided the Constitutional Court:

115 One example of the latter aspect might concern the decisions of the Judicial Services Commission and the scope of administrative action. See § 63.3(c)(iv) *infra*.

116 The best illustrations of this tendency are the decisions of the Supreme Court of Appeal in *Grey's Marine* and the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) ('*Steenkamp*'). See § 63.3(c)(vi) *infra*.

117 See *New Clicks* (*supra*) at para 100 (Chaskalson CJ), para 446 (Ngcobo J) and para 586 (Sachs J). This is repeated by Ngcobo J in his minority judgment in *Sidumo* (*supra*) at para 202, and on behalf of the majority in *Chirwa v Transnet Limited & Others* 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC) ('*Chirwa*') at para 139 ('PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under section 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of section 33 of the Constitution.')

rule-making and compulsory, statutory arbitrations. The Court's treatment of these types of action provides fertile ground for assessing the approach that the Constitutional Court has thus far adopted to the ambit of administrative action. We then turn to an assessment of the other important prerequisite for the label 'administrative action': namely, the meaning of public (as opposed to private) power.

(ii) The distinction between legislative and administrative action

In *Fedsure*, the Constitutional Court was called on to review a municipal council's decision to pass resolutions adopting a budget, imposing rates and levies, and paying subsidies. In examining whether the resolutions amounted to administrative action, the Constitutional Court emphasised the changed constitutional landscape in which administrative review operated following the advent of the Interim Constitution. In relation to legislative action, the Court pointed out the need to distinguish between the processes by which laws are made. The process by which delegated legislation is made by a functionary vested with such power by a legislature is different from the process by which laws are made by 'deliberative legislative bodies'.¹¹⁹ The Court carefully examined the status of local government under the Interim Constitution and concluded that it recognised three levels of government: national, provincial, and local.¹²⁰ The municipal council was an elected, deliberative body which, like national and provincial legislatures, exercised original legislative power derived directly from the Constitution. The Court remarked that, although the detailed powers and functions of local government were to be determined by the laws of the competent authority, this did not mean that the powers exercised by them were delegated powers.¹²¹ During the course of its judgment, the Court emphasised the political nature of municipal councils, the deliberative process and their political accountability:

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The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which

118 The boundaries between these types of public power may often be difficult to draw. See *SARFU 1* (supra) at para 143. See also *Grey's Marine* (supra) at para 25 ('The exercise of public power generally occurs on a continuum with no bright line marking the transition from one form to another...') In addition to these exceptions, a good argument can be made that the constitutional right to just administrative action does not extend to the exercise of a public power or the performance of a public function that, while not falling within these exceptions, fails to meet an impact threshold requirement, e.g. it does not have a discernable effect on a person's rights or interests. See Currie & Klaaren *Benchbook* (supra) 117 citing H Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38. This question has not yet received the attention of our courts, other than through giving a wide meaning to PAJA's threshold requirements of 'adversely affecting rights' and 'direct, eternal legal effect.' See § 63.3(c)(vi) and (vii).

119 *Fedsure* at paras 27 and 28.

120 *Ibid* at paras 34-40.

121 See also *Fedsure* (supra) at para 38 (The Court noted: 'The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures.' The Court therefore acknowledged the departure from the pre-constitutional position where municipal by-laws constituted delegated legislation, which courts would review but construe 'benevolently' if they were enacted by elected councils. See L Baxter *Administrative Law* (1984) ('*Administrative Law*') 193. See also *Sehume v Attridgeville City Council & Another* 1992 (1) SA 41 (A), 57-58.

they are politically accountable to the electorate.... Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by 'every person' affected by them on the grounds contemplated by [IC] s 24(b) The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in such circumstances.¹²²

Accordingly, the Court held that the resolutions and by-laws passed by the municipal council were legislative and did not constitute administrative action.¹²³ In the course of its judgment, the Court also pointed out that the Interim Constitution reserved the power of taxation and the appropriation of government funds to legislatures. When a legislature exercises such powers it is therefore exercising a power 'peculiar to elected legislative bodies' after due deliberation.¹²⁴

In *Ed-U-College*, the Constitutional Court held that a specific allocation by the MEC for Education in the Eastern Cape of funds for independent schools out of the total budgetary allocation for education in the province, which was derived from the explanatory memorandum to the relevant Appropriation Act, did not constitute administrative action. The *Ed-U-College* Court emphasised the legislative nature of the explanatory memorandum. It stated that the estimate expenditures set out in the memorandum are debated in the legislature itself and are the basis on which votes on the Bill are decided. This memorandum therefore 'play[s] an important role in the legislative process which leads to the approval of an appropriation Bill'.¹²⁵

It is important to note that these cases do not simply exclude legislative action from the ambit of 'administrative action' because it is 'legislative' (or rule-generating), in the sense that it has a general effect or application. Legislative action is

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excluded because it is sourced in parliamentary, or other deliberative legislative, processes.¹²⁶ These cases do not therefore suggest that delegated legislation does not amount to administrative action. We return to this issue below.¹²⁷

122 *Fedsure* (supra) at para 41.

123 National legislation passed by Parliament and provincial legislation passed by a provincial legislature are obviously not instances of administrative action. In relation to provincial legislation, see *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC) ('*Ed-U-College*') at para 12.

124 *Fedsure* (supra) at paras 44 and 45.

125 *Ed-U-College* (supra) at para 14. It is submitted that the reasoning here is open to criticism since the allocation did not directly derive from the explanatory memorandum. The MEC for Education, in deciding on the allocation for independent schools out of the total education budget, is not bound by the estimates in the explanatory memorandum, or so-called 'White Book'. The decision by the MEC to divide funds between independent schools and other categories of schools appears to be an executive one. A better basis for holding that this allocation decision does not amount to administrative action may be that it was an executive policy decision. The fact that the White Book, which formed the basis on which the legislation was passed, included these estimated expenditures supports this argument.

By the same token, the fact that the action is taken by a legislative body (such as Parliament) does not mean that the (non-legislative) actions of that body do not amount to administrative action.¹²⁸ For example, in *De Lille*, the Cape High Court found that the decision of a parliamentary committee to suspend Patricia De Lille MP was reviewable as administrative action.¹²⁹

(iii) The distinction between executive policy decisions, political judgments and administrative action

During the course of its judgment in *Fedsure*, the Constitutional Court alluded to a further category of public action that does not amount to administrative action: certain types of executive action.¹³⁰

This distinction between administrative and executive action took centre stage in the Constitutional Court's decision in *SARFU 1*. This case involved a review of President Mandela's decision to institute a commission of inquiry into South African rugby in terms of FC s 84(2)(f) and to declare the Commissions Act¹³¹ applicable to the inquiry. During the course of its judgment, the *SARFU 1* Court pointed out that a determination as to whether conduct constitutes administrative action does not equate with the enquiry as to whether the action is performed by a member of the executive arm of government. In an oft-quoted passage, the court remarked that:

[W]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.

The difficulty which then emerges is how to distinguish between administrative action and other acts of the executive. The *SARFU 1* Court declared that the distinction between executive and administrative action essentially boils down to a

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distinction between the implementation of legislation, which is administrative action, and the formulation of policy, which is not. Acknowledging that this line may be difficult to draw, the Court said it will depend primarily upon the nature of the

126 See also *Colonial Development (Pty) Limited v Outer West Local Council* 2002 (2) SA 262 (N) at para 60 (Court held that, although the actions of a town planning commission in modifying a town planning scheme amounted to administrative action, the conduct of the local council in giving the commission's decision legal effect did not amount to administrative action as it was 'part of the law-making process').

127 See § 63.3(b)(vi) *infra*.

128 See *SARFU 1* (*supra*) at para 141.

129 *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) ('*De Lille*').

130 *Fedsure* (*supra*) at para 59 ('In relation to legislation and executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.' (Emphasis added).)

131 Act 8 of 1947. This Act empowers the President to confer upon a commission of inquiry the powers to summon and examine witnesses, to administer oaths and affirmations, and to call for the production of books, documents and objects (s 3(1)).

power.¹³² The factors relevant to this consideration in turn are: the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and whether it is related to policy matters or the implementation of legislation.¹³³

The President's power to appoint a commission of inquiry derived from FC s 84(2) (f).¹³⁴ The *SARFU 1* Court noted that the powers in FC s 84(2) are original constitutional powers that are conferred upon the President as head of state rather than as head of the national executive.¹³⁵ The Court described a commission of inquiry as 'an adjunct to the policy formulation responsibility of the President' as it merely performed a fact-finding function for the President, who was not bound by its findings.¹³⁶ In addition, when the President appoints a commission of inquiry he is not implementing legislation but rather exercising an original constitutional power.¹³⁷ The Court therefore concluded that the appointment of the commission did not amount to administrative action.¹³⁸

The President's decision to make the Commissions Act applicable to the rugby commission of inquiry was, according to the Court, a more difficult matter. The

132 *SARFU 1* (supra) at paras 142 and 143.

133 *Ibid* at para 143.

134 FC s 84(2) provides that the President is responsible for a number of listed functions. These include assenting to and signing Bills, referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality, summoning the National Assembly, calling a national referendum, receiving and recognizing foreign diplomatic and consular representatives, appointing ambassadors, pardoning or reprieving offenders, and conferring honours.

135 *SARFU 1* (supra) at para 144. The Court remarked that none of the powers in FC s 84(2) are concerned with the implementation of legislation in any sphere of government and are closely related to policy (at paras 145 and 146). The historical source of these powers is the prerogative. Nevertheless, they now find their source directly in the Constitution and may be reviewed for compliance with the supreme Constitution. (See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); A Breitenbach 'The Sources of Administrative Power: The Impact of the 1993 Constitution on the Issues raised by *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Department van Handel en Nywerheid* 1992 (4) SA 1 (A)' (1994) 5 *Stellenbosch Law Review* 197).

136 *SARFU 1* (supra) at paras 146 and 147.

137 *Ibid* at para 147.

138 *Ibid* at para 147. The *SARFU 1* Court, at para 146, appears to state *obiter* that all the powers set out in FC s 84(2) are not administrative action: 'It is readily apparent that these responsibilities could not suitably be subjected to s 33.' It should, however, be noted that the Court's decision is confined to the President's decision to appoint a commission of inquiry. The Court expressly stated that the conduct of the commission itself 'is a different matter' (at para 147). It is submitted that the conduct of a commission of inquiry should be classified as administrative action (see the analogous case of the Truth and Reconciliation Commission proceedings in *Du Preez & Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), 1997 (4) BCLR 531 (A) ('*Du Preez*').

source of this power was derived from legislation and not the Constitution itself. That fact suggested that its exercise constituted administrative action.¹³⁹ There were, however, indications to the contrary. As the Court stated, this power is closely related to the exercise by the head of state of the power to appoint a commission and to ensure it is able to perform its task effectively.¹⁴⁰ The Court, however, left this issue undecided and assumed for purposes of the judgment that the powers under the Commissions Act amounted to administrative action.¹⁴¹

The line-drawing exercise was even more difficult in *Pharmaceutical Manufacturers*. This case dealt with the President's decision to bring the South African Medicines and Medical Devices Regulatory Authority Act¹⁴² into force (despite the regulations and schedules required to make sense of the Act not yet being ready). The President's power to bring the legislation into operation was derived from the relevant section of the legislation itself.¹⁴³ Nevertheless, the exercise of that power did not clearly amount to the implementation of legislation, as the legislation had not yet come into force. The Constitutional Court acknowledged that the President's power lay somewhere between the law-making process and the administrative process. It was a power derived from the legislation itself but was incidental to the law-making process.¹⁴⁴ The Court concluded that, having regard to the nature and source of the power, and particularly the fact that it required a 'political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation', the decision to bring the law into operation did not constitute administrative action as it was 'closer to the legislative process than the administrative process'.¹⁴⁵

Unlike Presidential assent to Bills (which thus converts them into Acts of Parliament), the President who issues a proclamation is not, strictly speaking, engaging in a legislative act but is rather acting as the head of the national executive.¹⁴⁶ The decision in *Pharmaceutical Manufacturers* is thus best understood

139 *SARFU 1* (supra) at para 165.

140 *Ibid* at para 166.

141 *Ibid* at para 167.

142 Act 132 of 1998.

143 Section 55 of the Medical Devices Regulatory Authority Act reflected fairly standard wording, i.e. that the Act shall come 'into operation on a date determined by the President by proclamation in the *Gazette*'.

144 *Pharmaceutical Manufacturers* (supra) at para 79. It should, however, be noted that the President was not exercising a power circumscribed in legislation as the Medical Devices Regulatory Authority Act was not yet in force and therefore did not bind the President. Nevertheless, it was a power conferred by Parliament, without which the President could not simply bring legislation into force. *Ibid* at para 78.

145 *Ibid* at para 79.

146 *Kruger v President of the Republic of South Africa & Others*, [2008] ZACC 17 (2 October 2008) at para 6.

as an executive decision of the President which (because of its close link to the legislative process, the fact that it did not clearly involve the implementation of

legislation¹⁴⁷ and that it required the exercise of a 'political judgment') was of a high policy nature and thus fell outside the ambit of administrative action.¹⁴⁸

A more recent case in which the Constitutional Court has held that a decision amounts to executive action rather than administrative action is *Masetlha*.¹⁴⁹ As stated above, this case dealt with the President's decision effectively to dismiss the head of the NIA. Moseneke DCJ, writing on behalf of the majority of the Court, held that this type of dismissal fell into a special category because the implied power to dismiss the head of an intelligence service derived from both the Final Constitution and national legislation, and the power to dismiss was 'specially conferred upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security'.¹⁵⁰ The nature of the special relationship that Moseneke DCJ refers to appears most clearly in the dissenting judgment of Ngcobo J,¹⁵¹ who refers to the fact that the head of the NIA deals with extremely sensitive matters affecting national security, that the President must have absolute trust in the head of the NIA and '[t]he moment [the President] loses confidence in the ability, judgment or loyalty of the head of the NIA, he must have the power to remove him or her'.¹⁵²

147 See Hoexter *Administrative Law* (supra) at 172 (Takes a different view and contends that the case was 'obviously concerned with the implementation of legislation'.)

148 See Hoexter *Administrative Law* (supra) at 172-3 (Hoexter offers a critique of the Constitutional Court's reasoning in what she describes as a 'troubling case'. Hoexter points out that one difficulty with the Court's approach is that the making of delegated legislation will often require a 'political judgment' of some kind, both in relation to the timing of the legislation and its content. We submit that the 'political judgment' in *Pharmaceutical Manufacturers* should be limited to a judgment made by the head of the executive to bring legislation produced by an elected, deliberative, legislative body into force. Thus understood, the reasoning in this case does not apply to delegated legislation.)

149 See also *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) (Constitutional Court expressed the view that a decision of the President to consent to extradition was not administrative action. The President's decision 'is a policy decision which may be based on considerations of comity or reciprocity between the Republic and the requesting State. The decision is based not on the merits of the application for extradition but on the relationship between this country and the requesting State'. Ibid at para 26. The Constitutional Court expressed this view despite the fact that the President's power flowed from legislation — the Extradition Act, 1962.) Another instance of a court finding that an action amounted to executive rather than administrative action is found in *Nephawe v Premier, Limpopo Province* 2003 (5) SA 245 (T), 2003 (7) BCLR 784 (T) at pars 92 (Dealt with the decision of the Premier to refer a report of a commission of inquiry on traditional leaders to the relevant Minister 'as a contribution to the development of national policy'.)

150 *Masetlha* (supra) at para 77.

151 Although Ngcobo J dissented as to the outcome of the case, he appears to agree with the majority that the dismissal of the head of the NIA did not amount to administrative action.

152 *Masetlha* (supra) at paras 166-7.

It is important not to over-extend the category of executive policy decisions so as to exclude a large range of actions from the application of the right to just administrative action. A number of public decisions which are affected by policy considerations (for example, a decision whether to continue to grant subsidies to Model C schools which were previously white schools) should properly be

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categorised as administrative action.¹⁵³ Such decisions are generally made in the course of implementing legislation. It is therefore important to distinguish between policy in the narrow sense and policy in the broad sense. The former cluster of actions includes decisions that are political. They are political in the sense of being a matter of controversy or party political debate or being taken by a high political authority.¹⁵⁴ The latter set of decisions — executive policy decisions — are themselves political in the sense of being subject only to the political accountability of the representative institutions of the Final Constitution. These decisions include the development of policy and the initiation of legislation. It is only policy decisions in the broad sense which should be excluded from the ambit of administrative action.¹⁵⁵ On this distinction, which is sometimes quite difficult to draw, O'Regan J, in *Ed-U-College*, wrote:¹⁵⁶

Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.

In *Ed-U-College* the Court held that the determination of the formula for the grant of subsidies and the allocation of such subsidies (as opposed to the determination of the share of the budget for independent schools in the total education budget) contained an aspect of policy formulation, but it was policy in the narrow rather than the broad sense. The Court held that, having regard to the source of power (that is, the legislature), the constraints upon its exercise and its scope, it amounted to administrative action.

The approach of the *Ed-U-College* Court in distinguishing between policy in the narrow and broad sense has been employed in a number of subsequent decisions of our courts. These judgments hold that decisions do not fall beyond the reach of administrative justice simply because they have policy implications or 'overtones'.¹⁵⁷ As Nugent JA remarked in *Grey's Marine*: '[t]here will be few

153 See *Premier, Mpumalanga* (supra) at para 41 ('Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.' (Our emphasis).)

154 See *Ed-U-College* (supra) at para 17 ('[T]he fact that a decision has political implications does not necessarily mean that it is not an administrative decision within the meaning of s 33.')

155 Hoexter *Administrative Law* (supra) at 169 (Helpfully refers to these decisions as '(high) policy decisions'.)

156 *Ed-U-College* (supra) at para 18.

administrative acts that are devoid of underlying policy — indeed, administrative action is most often the implementation of policy that has been given legal effect — but the execution of policy is not equivalent to its formulation'.¹⁵⁸

As with *Pharmaceutical Manufacturers*, another case that is difficult to place in the categories of exceptions to administrative action is the decision of the Cape Provincial Division in *Steele v South Peninsula Municipal Council*.¹⁵⁹ In *Steele*, the High Court held that a resolution of a local council to remove speed bumps from two roads in its area of jurisdiction did not amount to administrative action. The *Steele* court also found that the decision was not legislative action but was rather 'a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted'.¹⁶⁰ The correctness of the decision in *Steele* is open to question. The mere fact that the local council is an elected, deliberative assembly is not necessarily sufficient to remove the decision from the realm of administrative action. The council was performing an executive act and did so in terms of a general statutory obligation in relation to traffic control and road safety. (However, as the court itself pointed out, it was not implementing any particular law).¹⁶¹ While a decision to remove speed bumps may have certain overtones of executive policy in the local government context (particularly where the Final Constitution envisages that a local council acts both as a legislature and executive body at the local government level), a decision to remove speed bumps from two specific roads in a suburban area does not, in our view, amount to a high policy decision. Although there is merit in the *Steele* court's observation that one cannot expect individual members of an elected, deliberative body to give reasons for why they voted to remove the speed bumps, a local authority should not be able to avoid the requirements of administrative law by making administrative decisions in a deliberative forum.¹⁶²

(iv) The distinction between judicial and administrative action

157 See *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C) at 611 (Decision on applications for departures from zoning regulations); *Grey's Marine* (supra) para 27 (Decision to grant lease of quayside property in Hout Bay); *Mkhatsywa v Mkhatsywa & Another* 2002 (3) SA 441 (T) (Premier's power to appoint a 'chief' in terms of the Black Administration Act 38 of 1927); *Sebenza Forwarding and Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Limited t/a Petro SA & Another* 2006 (2) SA 52 (C) ('Sebenza') (Decision of the Minister of Minerals and Energy not to conduct a formal enquiry into alleged irregularities in connection with a parastatal contract.)

158 *Grey's Marine* (supra) at para 27.

159 2001 (3) SA 640 (C).

160 *Ibid* at 644.

161 *Ibid* at 633–4.

162 For a preferable approach, see *King William's Town Transitional Local Council v Border Alliance Taxi Association* 2002 (4) SA 152 (E) (Holds that a decision of a local council to close a taxi rank amounts to administrative action.) See also *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C) (Holds that a municipal council's decision to approve a subdivision of property amounts to administrative action.)

The third category of public power that does not amount to administrative action for purposes of FC s 33 is judicial action. In *Nel*, Ackermann J stated *obiter* that the summary sentencing procedure in s 205 of the Criminal Procedure Act¹⁶³ was 'judicial and not administrative action'.¹⁶⁴ One reason for this conclusion is that

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the procedure was subject to appeal in the same manner as a sentence imposed in a criminal prosecution.¹⁶⁵

This category of action — as with the category of legislative action — should be characterised by its source in the judicial process (involving the act of sentencing) rather than by its adjudicative nature (eg, the application of law to facts). It is the location of the courts' powers in the Final Constitution, and the accountability that flows from the constitutional position of judicial authorities, that is important for this purpose, not the adjudicative function they perform.¹⁶⁶ In this regard, a major area of contention has been whether arbitrations amount to administrative or judicial action. This question is discussed at length below.¹⁶⁷

Again, as with the legislature, actions of judicial officers do not always fall on the judicial side of the administrative/judicial divide.¹⁶⁸ Judges and magistrates can act administratively. They exercise such powers under the Foreign Co-Operation in Criminal Matters Act¹⁶⁹ when issuing a letter of request to a foreign state for assistance¹⁷⁰ or, perhaps, when they issue a search warrant.¹⁷¹

(v) The distinction between administrative action and labour relations

163 Act 51 of 1977.

164 *Nel* (supra) at para 24.

165 *Nel* (supra) at para 24.

166 *Sidumo* employs a largely consistent approach. See § 63.3(b)(vii) infra. In *Independent Newspapers*, the Court noted but did not criticise the exclusion of judicial records from the scope of the PAIA in the arguably analogous context of the right of access to information.

167 See § 63.3(b)(vii) infra.

168 *SARFU I* (supra) at para 141('[J]udicial officers may, from time to time, carry out administrative tasks.')

169 Act 75 of 1996.

170 See *Kolbatschenko v King NO & Another* 2001 (4) SA 336 (C), 2003 (3) BCLR 288 (C) at paras 355–356 (It appears that this issue was common cause between the parties in this case.)

171 See *Terry v Botes and Another* [2002] 3 All SA 798 (C). But see *Pretoria Portland Cement Co Limited & Another v Competition Commission & Others* 2003 (2) SA 385 (SCA).

A few years prior to the Interim Constitution, the Appellate Division in *Administrator, Transvaal & Others v Zenzile & Others*¹⁷² held that the dismissal of a public sector employee was an exercise of public power and was subject to administrative law review. Nevertheless, since the advent of: (a) the Final Constitution, which not only entrenches the right to just administrative action but also guarantees to 'everyone' the right to fair labour practices¹⁷³ and (b) the post-constitutional LRA, which extends the protections of labour law to public sector employees, courts have grappled afresh with the question as to whether the relationship between public sector employers and employees is governed by administrative law.

Until the recent decision of the Constitutional Court in *Chirwa*, the focus of the dispute, which has been described as one of 'mystifying complexity',¹⁷⁴ was

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whether the decision of the public sector employer to dismiss its employee was public or private *vis-à-vis* the employee. A line of cases held that such decisions were public and therefore amounted to administrative action,¹⁷⁵ while another line held that employment relationships should be governed exclusively by labour law, were private and thus did not amount to administrative action.¹⁷⁶ It was hoped that the Supreme Court of Appeal would provide greater clarity when the issue came before it in *Chirwa (SCA)* (a case arising from the dismissal of the Human Resources Executive Manager of the Transnet Pension Fund). But the SCA proved divided. Two judges (per Mthiyane JA) held that, in dismissing the applicant, Transnet 'did not act as a public authority but simply in its capacity as an employer' and did not engage in administrative action.¹⁷⁷ Two other judges (per Cameron JA) held that the dismissal involved the exercise of public power and thus amounted to administrative action.¹⁷⁸

Given the long line of divergent cases that preceded it, it came as somewhat of a surprise that when *Chirwa* was decided by the Constitutional Court, it was virtually unanimous in finding that the dismissal of the employee concerned did not amount to administrative action.¹⁷⁹ A further surprise was that, despite the previous focus of the case law on the public / private divide, the majority of the Constitutional Court decided the matter on a different basis. Ngcobo J, who wrote the majority judgment on this issue, adopted the view that the dismissal of an employee by Transnet *did*

172 1991 (1) SA 21 (A) ('Zenzile') at 34.

173 FC s 23.

174 See *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) ('Chirwa (SCA)') at para 33, quoted by Ngcobo J in *Chirwa* (supra) at para 81.

175 See, for example, *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others* (2006) 27 ILJ 555 (E). See also *Chirwa* (supra) at para 128 fn 63 (For other citations).

176 See, eg, *SA Police Union & Another v National Commissioner of the SA Police Services & Another* (2005) 26 ILJ 2403 (LC). For other cases, see *Chirwa* (supra) at para 128 fn 62.

177 *Chirwa (SCA)* (supra) at para 15.

178 The fifth judge (Conradie JA) decided the matter on a different basis and thus did not address whether the dismissal amounted to administrative action.

involve the exercise of public power,¹⁸⁰ but that it nevertheless did *not* amount to administrative action because it fell into a newly identified constitutional-level category of employment and labour relations.

Ngcobo J adopts a functional approach to the meaning of administrative action, stressing, in the language of *SARFU 1*, that what matters in the identification of administrative action is the function and not the functionary, and that the most important consideration is the nature of the power involved.¹⁸¹ Ngcobo J observes that the source and nature of the power in this case was contractual, that it did not involve the implementation of legislation and that the termination of the

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contract of employment did not amount to 'administration' but was 'more concerned with labour and employment relations'.¹⁸² Ngcobo J thus concludes that the dismissal did not amount to administrative action.¹⁸³ Ngcobo J then points to the structure of the Final Constitution in supporting his view. He remarks that '[t]he Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other' and contemplates that these two areas of law 'will be subject to different forms of regulation, review and enforcement'.¹⁸⁴ He goes on to emphasise the separate protection of the constitutional right to fair labour practices in FC s 23 and states that there is no indication that public sector labour disputes should be treated any differently to those in the private sector.¹⁸⁵ Ngcobo J then refers to the range of legal protections now available to public sector employees in labour law, and notes that is no longer necessary to extend the protection of administrative law to this category of employees.¹⁸⁶ He concludes as follows:

179 Ten judges held that the dismissal was not administrative action. The eleventh, Skweyiya J, did not consider it necessary to decide this issue but added, in language suggesting that he had decided it anyway, that: 'If, however, I had been called upon to answer that question, I would have come to the same conclusion as Ngcobo J: namely, that the conduct of Transnet did not constitute administrative action under section 33 of the Constitution for the reasons that he advances in his judgment.' Chirwa (supra) at para 73.

180 For a discussion of this aspect of the judgment in *Chirwa*, see § 63.3(b)(vii) infra.

181 See *Chirwa* (supra) at paras 139-142.

182 *Chirwa* (supra) at para 142.

183 Ibid.

184 Ibid at paras 143-4.

185 Ibid at para 145 ('On the contrary, section 23 contemplates that employees regardless of the sector in which they are employed will be governed by it. The principle underlying section 23 is that the resolution of employment disputes in the public sector will be resolved through the same mechanisms and in accordance with the same values as the private sector, namely, through collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action'.)

186 Ibid at para 148. In this sense, the *Chirwa* majority interprets *Zenzile* as a pre-Bill of Rights decision necessary for its time.

In my judgement labour and employment relations are dealt with comprehensively in section 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between public and private sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviations from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes of action, one flowing from the LRA and another flowing from the Constitution.

This approach of the majority of the Constitutional Court in *Chirwa* is novel. It identifies a category of public power to which the label 'administrative action' does not apply; an exception that is not based on the doctrine of separation of powers (unlike the traditional categories of legislative action, broad executive policy decisions and judicial decisions) but rather in a distribution of constitutional competence rooted in the Bill of Rights itself.¹⁸⁷ There are two important

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threads in this portion of Ngcobo J's judgment. The one is that the decision to dismiss is contractual in nature, is concerned with labour and employment relations and is thus not 'administration'. The second thread is that the Final Constitution envisages that labour relations are dealt with separately to administrative action and that public sector employees have the same protections as their private sector counterparts. While the first thread suggests that the position would be different if the power to terminate the employment contract arose from legislation rather than contract, the second thread suggests that this is not the case.

Ngcobo J's judgment can thus be read as adopting the position that public sector employees enjoy protection under the fundamental right to fair labour practices (and the legislation that implements and enforces that right) and therefore do not need additional protection under the right to just administrative action. This approach to determining the ambit of FC s 33 would be an unusual way to interpret a constitutional right. There are many instances in which particular conduct infringes more than one right. In fact, it is seldom that a litigant in fundamental rights litigation goes to court asserting the breach of only one fundamental right.¹⁸⁸ It is, in our view, inadvisable for courts to limit the ambit of a particular fundamental right based on the ambit of other overlapping fundamental rights.¹⁸⁹ If a right is truly fundamental, its substance should not vary depending on other complementary rights that are placed alongside it (i.e. rights that operate in the same direction, as opposed to rights that are in opposition).¹⁹⁰ As Langa CJ

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187 An analogous exclusion from the PAJA definition of administrative action is arguably s 1(*hh*), the exclusion of a decision taken in terms of the PAIA. FC s 33 arguably does not provide a separate and additional source of accountability for the action taken in implementing FC s 32. Of course, at the level of legislation giving effect to FC s 32, PAIA does at least provide an alternative source of accountability by including provisions for review of PAIA decisions.

188 There is, for example, often an overlap between freedom of expression and freedom of religion, between the right to property and equality, and between dignity and a number of other fundamental rights.

stated in his minority judgment in *Chirwa*: '[a] litigant is entitled to the full protection of both rights, even when they seem to cover the same ground'.¹⁹¹

On the other hand, Ngcobo J's judgment can be read as adopting the position that 'administrative action' requires an act of 'administration', in the sense of an other-regarding act through which the administrator engages with the subject of administration *qua* administrator.¹⁹² In other words, the action must have an external effect.¹⁹³ This approach is also, in our view, not entirely convincing. As we stated in the original version of this chapter, the disciplining of a public servant can be seen to have a direct, external legal effect on the relevant person.¹⁹⁴

Having examined the main categories of public power that are excluded from the ambit of administrative action, we now turn to consider two other contentious issues relating to the scope of administrative action: rule-making and compulsory, statutory arbitrations.

(vi) Rule-making as administrative action

189 Such an approach is also, we submit, contrary to that of the majority of the Constitutional Court in *Sidumo* (supra), discussed at § 63.3(b)(vii) infra. In *Sidumo* the majority rejected an argument that a decision of the CCMA did not amount to administrative action because it was governed by FC s 33 (labour relations) and FC s 34 (access to court). Navsa AJ held as follows: 'This submission is based on the misconception that the rights in ss 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected.' Ibid at para 112. This apparent inconsistency in approach is even more surprising when one considers that the judgment in *Chirwa* was handed down less than two months after the judgment in *Sidumo* and that a number of judges signed on to both majority judgments. See also C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' in 1 *Constitutional Court Review* (2008) — (forthcoming) ('Clearing the Intersection?'). We acknowledge, however, that the practical outcomes of the decisions in *Chirwa* and *Sidumo* are not contradictory. The result of these decisions is that the dismissal of an employee (whether a public or private sector employee) will not amount to 'administrative action' but will rather enjoy the protection of labour law (i.e., FC s 23, the LRA and other applicable legislation). And while a decision of the CCMA in respect of such dismissal will amount to 'administrative action' for purposes of FC s 33, it will fall to be dealt with under the LRA rather than PAJA.

190 We accept that the reach of one fundamental right may be limited by other fundamental rights that pull in a different direction in a particular case. Fundamental rights may be limited by countervailing considerations, including other rights. For example, in the context of defamation, the plaintiff's right to dignity may limit the defendant's right to freedom of expression. Fundamental rights should, however, not be limited by complementary or overlapping rights that pull in the same direction.

191 *Chirwa* (supra) at para 175.

192 We reiterate in this regard that Ngcobo J states that the dismissal is not administrative action, on the basis that the nature of the power is contractual, is not the implementation of legislation and does not constitute 'administration'. Ibid at para 142. It is only after this conclusion that Ngcobo J goes on to state that this view is supported by the provisions of the Constitution that, according to him, draw a distinction between administrative action and labour relations. Ibid at paras 143-149.

193 The requirement of this 'external' effect is reflected in the corresponding requirement in PAJA's definition of 'administrative action'. See § 63.3(c)(vii).

Does rule-making qualify as administrative action? The question has attracted much attention since the advent of the Interim Constitution and the Final Constitution's protection of the fundamental right to administrative justice.

South African academic opinion is fairly unanimous: yes, delegated or subordinate legislation and other forms of rule-making should be treated as administrative action and should be subject to administrative review.¹⁹⁵ To restrict

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'administrative action' to purely administrative decisions and adjudications would be unacceptable given the vast bulk of governmental administration undertaken by regulation. Nevertheless, the Constitutional Court has still not provided a clear answer to this question.

The first occasion on which the issue arose, albeit tangentially, was in *Fedsure*. In *Fedsure*, the Court clearly supported coverage of the administrative justice clause beyond purely administrative decisions and adjudications.¹⁹⁶ The Court was thus willing to go beyond the bounds of *South African Roads Board v Johannesburg City Council*.¹⁹⁷ In *South African Roads Board v Johannesburg City Council*, Milne JA articulated a distinction between those government decisions applying generally (termed 'legislative') and those applying in a particular situation. According to the Court, the cases referred to by Milne JA in exempting the impact of natural justice from legislative decisions were of 'little assistance' in determining the content of administrative action in terms of the Interim Constitution.¹⁹⁸ The majority judgment, delivered by the triumvirate of Chaskalson P, Goldstone J and O'Regan J, noted:

194 The other important aspect of *Chirwa* (of course not directly relevant to the scope of the right to just administrative action) relates to the question as to the overlapping jurisdiction between the Labour Court (under the LRA) and the High Court (under PAJA). The *Chirwa* Court held that a public sector dismissal falls within the exclusive jurisdiction of the Labour Court. For a criticism of this aspect of the judgment, amongst others, see Hoexter 'Clearing the Intersection?' (supra). See also Nugent JA in *Makambi v The Member of the Executive Council, the Department of Education, Eastern Cape Province*, Unreported judgment of the SCA, Case no. 638/06 (29 May 2008)(Nugent JA writes: 'Regrettably I can find no clear legal — as opposed to policy — reason for the outcome in *Chirwa*' (at para 21). Nugent JA points out that it is impossible to reconcile *Chirwa* with the previous decision of the Constitutional Court in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC).)

195 See Burns & Beukes *Administrative Law* (supra) at 131 ('Since the exercise of this authoritative power (the promulgation of subordinate legislation) potentially has far-reaching consequences for the individual and may often impact harshly on individual rights, it must be included in the definition of administrative action'); Currie *The PAJA* (supra) at 88; Currie & Klaaren *Benchbook* (supra) at 84; De Ville *Judicial Review* (supra) at 39–40; Hoexter *Administrative Law* (supra) at 191; I Currie & J de Waal *The Bill of Rights Handbook* (2005) 656 ('It seems extremely unlikely that [PAJA] does not apply to the making of delegated legislation'); and M Beukes 'The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000' in C Langa and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 1, 12.

196 Hoexter *Administrative Law* (supra) at 173 describes the judgment in this case as giving a 'strong hint' that delegated legislation amounts to administrative action under the Constitution.

197 1991 (4) SA 1 (A).

198 *Fedsure* (supra) at para 26.

Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation', the process by which the legislation is made is in substance 'administrative'.¹⁹⁹

The issue came before the Constitutional Court more squarely in the post-PAJA case of *Minister of Home Affairs v Eisenberg*.²⁰⁰ *Eisenberg* involved a challenge to immigration regulations. Here the Court avoided the issue of classifying the delegated legislation. It assumed that the regulations amounted to administrative action for purposes of PAJA and then found that the regulations did not fall foul of PAJA's provisions. Passing statements of Chaskalson CJ, who delivered judgment on behalf of the Court in *Eisenberg*, are ambivalent. One dictum suggests that rule-making might not be administrative action for purposes of PAJA.²⁰¹ Yet another raises potential doubts about the constitutionality of such an outcome.²⁰²

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The decision of the Constitutional Court in *New Clicks* was therefore read with keen interest to see how the Court would deal with the respondents' assertion that the delegated legislation (in that case, the ministerial regulations dealing with medicine pricing that had been promulgated under the Medicines and Related Substances Control Act)²⁰³ amounted to administrative action and should be reviewed under PAJA. The decisions that preceded the appeal to the Constitutional Court were a mixed bag. The majority of the Full Bench of the Cape High Court²⁰⁴ held that the Pricing Regulations, and the Pricing Committee's recommendations that preceded them, did not amount to administrative action under PAJA, but that they were, in any event, reviewable under FC s 33.²⁰⁵ Traverso DJP wrote a dissenting

199 *Fedsure* (supra) at para 27.

200 *Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC) ('*Eisenberg*').

201 *Ibid* at para 52.

202 *Ibid* at para 53 fn 30 (Chaskalson CJ states that the question as to the application of PAJA to this case 'raises complex issues including the question whether a construction of PAJA that excludes the making of regulations from the ambit of administrative action would be consistent with the Constitution'.) For another case which supports the view that the making of delegated legislation amounts to administrative action, see *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W).

203 Act 101 of 1965 ('the Medicines Act'). The regulations at issue were the Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances in Government Notice R553 in *Government Gazette* 26304 of 30 April 2004 ('the Pricing Regulations').

204 The decision of the Cape High Court is reported as *New Clicks South Africa (Pty) Limited v Tshabalala-Msimang & Another NNO; Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Another NNO* 2005 (2) SA 530 (C) ('*New Clicks (HC)*').

205 *New Clicks (HC)* (supra) at paras 45, 49 and 50. Presumably this means that the majority found that the Pricing Committee's recommendation and the regulations amounted to 'administrative action' for purposes of FC s 33. As pointed out at § 63.2(a)(iv) supra, this approach to the relationship between FC s 33 and PAJA is incorrect. One cannot simply circumvent the requirements of PAJA by relying directly on FC s 33, unless one is challenging the constitutionality of PAJA.

judgment. She found that the Pricing Regulations were administrative action for purposes of both FC s 33 and PAJA.²⁰⁶ The Supreme Court of Appeal unanimously struck down the Pricing Regulations on grounds of legality and therefore did not find it necessary to consider the administrative action question.²⁰⁷ There is, however, a strong suggestion towards the end of the judgment that regulations should be treated as administrative action because it would otherwise result in the 'unlikely' situation of the scope of administrative justice being reduced under the Final Constitution and PAJA.²⁰⁸

Those who hoped that the Constitutional Court would clarify the issue once and for all in *New Clicks* came away disappointed. The Court was very much divided in the way that it dealt (or did not deal) with this issue. Of the five substantive judgments delivered by the Court in this case, only the opinion of Chaskalson CJ (in whose judgment O'Regan J concurs) came down in favour of the general principle that regulations amount to administrative action under both FC s 33 and PAJA. Chaskalson CJ starts by pointing out that rule-making was reviewable on administrative law grounds prior to the Interim Constitution,²⁰⁹ and that neither the Interim Constitution nor Final Constitution showed any intention

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to exclude rule-making from the reach of administrative justice.²¹⁰ In fact, according to the Chief Justice, the Final Constitution does the opposite. Chaskalson CJ points to a number of constitutional provisions which reflect the importance of accountability, transparency and public participation in the law-making process,²¹¹ and concludes that:

The making of delegated legislation by members of the Executive is an essential part of public administration. It gives effect to the policies set by the Legislature and provides the detailed infrastructure according to which this is to be done. The Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies. To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government.²¹²

206 *New Clicks (HC)* (supra) at paras 41 and 58 (Traverso DJP).

207 See *Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Another NNO; New Clicks South Africa (Pty) Limited v Minister of Health & Another* 2005 (3) SA 238 (SCA), 2005 (6) BCLR 576 (SCA) ('*New Clicks (SCA)*').

208 *New Clicks (SCA)* (supra) at para 94. Under our common law, regulations were subject to review on administrative law grounds. See Baxter *Administrative Law* (supra) at 490-494.

209 *New Clicks* (supra) at paras 101-106.

210 *Ibid* at paras 107-113.

211 See FC s 59 (Obliges the National Assembly to facilitate public involvement in the legislative process.) *New Clicks* (supra) at paras 110-113.

212 *New Clicks* (supra) at para 113.

Ngcobo J (with whom Langa DCJ and Van der Westhuizen J concur) agrees that the Pricing Regulations at issue in *New Clicks* amount to administrative action under both FC s 33 and PAJA, but leaves open the question as to whether delegated legislation *generally* amounts to administrative action.²¹³ As with other (more recent) judgments that Ngcobo J has penned on the meaning of administrative action,²¹⁴ his reasoning in *New Clicks* focuses on the nature of the powers and functions conferred by the relevant empowering provision (s 22G of the Medicines Act). He emphasises that s 22G provides for a 'unique process', in that the Minister must make regulations 'on the recommendation of the Pricing Committee'.²¹⁵ In other words, neither the Minister nor the Pricing Committee may act alone. They must act together.²¹⁶ The Pricing Committee's investigation, recommendation and the ministerial regulations are thus 'interlinked' and 'inseparable', and 'the recommendation of the Pricing Committee represents part of the process of regulation-making'.²¹⁷ Ngcobo J concludes that the nature of the power and its subject-matter in this particular case amounts to the implementation of legislation and can 'readily be subjected to s 33'.²¹⁸ We note that, although Ngcobo J left open

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the question as to whether general rule-making amounts to administrative action, much of his reasoning would seem to support of an argument that this question should be answered in the affirmative.²¹⁹

Moseneke J (in whose judgment Madala, Mokgoro, Skweyiya and Yacoob JJ concurred) adopts the position that it was 'neither prudent nor necessary' to decide whether the Pricing Regulations amount to administrative action.²²⁰ He confines

213 Ibid at para 422.

214 See § 63.3(b)(v) supra, and § 63.3(b)(vii) infra.

215 *New Clicks* (supra) at para 441.

216 Ibid.

217 Ibid at para 442.

218 Ibid at para 450. The nature of the power that, for Ngcobo J, seems to be determinative is the fact that the Pricing Regulations are specific, providing for a specific pricing system with particular prices and fees, and that the Pricing Committee operated in a similar way to an administrative decision-maker — ie it investigated the matter and made a recommendation. Ibid at paras 440–442 and 450. It is difficult to pin down Ngcobo J's reasoning on this score, particularly as he also states that PAJA applies to the specific regulations at issue in this case for the reasons set out in Chaskalson CJ's judgment but that 'there are additional reasons why PAJA is applicable'. Ibid at para 422.

219 See *New Clicks* (supra) at para 849 (O'Regan J) and para 851 (Van der Westhuizen J). See also W Wakwa-Mandlana and C Plasket 'Administrative Law' in 2005 *Annual Survey of South African Law* 104, 108. See also *New Clicks* (supra) at para 476 (Ngcobo J) ('Nor am I persuaded that categorisation of the exercise of public power as adjudicative or legislative provides the criterion as to whether the exercise of the power in question amounts to administrative action. The trend in modern administrative law has been to move away from formal classification as a criterion'.)

220 Ibid at para 722.

himself to noting briefly that there are, on the one hand, compelling reasons for holding that ministerial regulation-making is reviewable under PAJA and, on the other, there are 'at the very least equally compelling considerations that ministerial legislation is not administrative action...'.²²¹

The final judgment in *New Clicks* to deal with this question is that of Sachs J. Sachs J adopts a creative and thought-provoking approach to the question of the review of rule-making. His position is that the right to just administrative action is confined to 'adjudication' (in the sense of administrative decision-making) and does not extend to rule-making. As he states:

Section 33 is directed towards administrative acts of an adjudicative kind, and not to legislative functions carried out by the administration. The notions of procedural fairness and the right to be given written reasons fit in closely with adjudicative justice for individuals. They are not, without undue interpretive strain consonant with subordinate legislation.²²²

Sachs J is therefore the only judge in the *New Clicks* saga (and, in fact, the only judge that we are aware of in any decision of our courts) who has held that regulation-making does not amount to administrative action for purposes of FC s 33. This is, however, not because he adopts a narrow view on the ambit of administrative law review. On the contrary, his judgment in *New Clicks* calls for 'an expansive notion of legality', which he regards as 'an alternative and better way of securing constitutional supervision of subordinate legislation'.²²³ This expanded notion of legality would embody both procedural fairness (members of the public should be given a reasonable opportunity to comment during the rule-making process)²²⁴ and substantive reasonableness.²²⁵

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With regard to the specific regulations at issue in *New Clicks*, Sachs J holds that the Pricing Regulations are generally not administrative action because they are rule-making in form.²²⁶ The regulation dealing with the more specific issue of the determination of a dispensing fee for pharmacists,²²⁷ on the other hand, is, according

221 Ibid at para 723.

222 Ibid at para 596.

223 Ibid at para 612.

224 Ibid at para 630.

225 Ibid at paras 635–637. Sachs J regards legality as, at least in part, a branch of administrative law: 'Thus to say that the making of subordinate legislation involves the implementation of primary legislation and is therefore part of administrative law, is to state the question, not to resolve it. The question that remains is: is it a form of implementation which falls under the concept of administrative action as envisaged in s 33 of the Bill of Rights, or is it in essence an extension of the legislative process that happens to be undertaken by the administration, thereby falling to be considered under a different constitutional rubric?' Ibid at para 582.

226 *New Clicks* (supra) at para 642 (Sachs J states that the scheme created by the regulations 'affects the public at large and applies indefinitely into the future' and is thus '[l]aw-making in the fullest sense'.)

to Sachs J, sufficiently specific to be 'adjudicative' in form and therefore falls within the scope of administrative action as contemplated in FC s 33 and PAJA.²²⁸

The approach of Sachs J is a salutary reminder of the importance of fairness and substantive reasonableness in all areas of administrative decision-making. Nonetheless, constitutional law is made from majority judgments. And the interesting pathway indicated by Sachs was not taken by the Court in *Masetlha*.²²⁹ Thus, the substantive underpinning for the one judgment against rule-making as administrative action has been cut away, leaving five judges broadly in favour of treating rule-making as administrative action and five yet to decide. We contend that the preferable approach is that advanced by Chaskalson CJ in *New Clicks*. All administrative rule-making shall be accommodated under the rubric of 'administrative action'. This approach avoids attempting to draw difficult lines between different types of regulations (which Ngcobo J's approach intimates). More importantly, it is in our view consistent with a principled approach to the ambit of administrative action based on the separation of powers. A rule-making act performed by a member of the executive should not be characterised as a legislative (rather than an administrative) act simply because it has rule-making qualities. As stated above, legislative action should only fall beyond the label 'administrative action' when it is performed by a deliberative, legislative body in respect of which the Final Constitution provides an alternative form of accountability. As discussed below, this approach is, on our view, consistent with that of the majority of the Constitutional Court in *Sidumo* in the context of statutory arbitrations.²³⁰

We accept that there may well be a need for greater flexibility with respect to administrative law rules that apply to rule-making and the manner in which those rules are scrutinised on review. This conclusion does not, however, mean that rule-making should be excluded from the ambit 'of administrative action'. This

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conclusion suggests that courts should develop an appropriate approach to scrutiny of administrative rule-making through the concepts of variability or levels of scrutiny.²³¹

(vii) Statutory arbitrations as administrative action

227 Regulation 10.

228 Sachs J explains that the objective in relation to the dispensing fee is 'not so much to establish a general normative structure as to determine a precise figure for a particular activity of a directly identified group of persons. The price tag put on the activity of the pharmacists affects their interests materially, adversely and in an immediately operative way.' Ibid at para 646. It is surprising that Sachs J did not find that the same applies to another key regulation in *New Clicks*, regulation 5(2)(c) which, read with Annexure A to the Pricing Regulations, sets out a detailed (though unclear) method for determining the initial single exit price of medicines. It would seem that this regulation would equally have a material and immediate effect on, at least, pharmaceutical manufacturers.

229 See § 63.2(b) supra.

230 See § 63.3(b)(vii) infra.

231 See § 63.4 infra.

Another contentious issue regarding the application of FC s 33 is whether or not it applies to decisions of arbitrators pursuant to compulsory, statutory arbitrations. The context in which this issue has arisen is compulsory arbitration before the CCMA under the LRA. It is an issue that divided the Constitutional Court in the *Sidumo*.²³²

The majority of judges (five to four)²³³ held that a compulsory, statutory arbitration amounts to administrative action.²³⁴ After noting the standard caution in *SARFU 1* that what matters is 'not so much the functionary as the function',²³⁵ the majority notes that administrative tribunals 'straddle a wide spectrum', from those that implement and give effect to policy or legislation to those that resemble courts of law.²³⁶ Navsa AJ goes on to point out some similarities between the CCMA process and courts (e.g. the manner of adducing evidence, the power of subpoena, the contempt power and the fact that an award is final and binding).²³⁷ He, however, points out that there are important differences between the two fora (the CCMA must conduct matters with a minimum of legal formalities in order to determine the dispute fairly and quickly, there is no blanket right to legal representation, no system of binding precedents and CCMA commissioners do not have security of tenure).²³⁸ As Navsa AJ says: '[t]he CCMA is not a court of law'.²³⁹ Relying on this institutional characterisation of the CCMA, the majority concluded that, as the commissioners exercised public power, their decisions amounted to administrative action under FC s 33.²⁴⁰

Consistent with his other decisions, Ngcobo J commences his minority judgment by stressing that the test for determining whether conduct amounts to

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administrative action is whether the *function* is administrative in nature.²⁴¹ He even goes so far as to say that '[t]he identity of the functionary performing the function is *not relevant* for purposes of determining whether a particular conduct constitutes

232 Supra.

233 Navsa AJ delivered the majority judgment in *Sidumo*, in which four other judges concurred, including O'Regan J who wrote a separate concurring judgment. Ngcobo J penned the minority judgment, in which three judges concurred. Sachs J wrote a separate judgment concurring with both the majority and the minority judgments.

234 A unanimous Supreme Court of Appeal had found that CCMA arbitrations amounted to administrative action for purposes of PAJA. See *Rustenburg Platinum Mines Limited (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA).

235 *SARFU 1* (supra) at para 141.

236 *Sidumo* (supra) at paras 81-82.

237 *Ibid* at para 84.

238 *Ibid* at para 85.

239 *Ibid*.

240 *Ibid* at para 88.

administrative action.¹²⁴² True to his word, Ngcobo J focuses on the arbitral function of the CCMA. He notes that it 'involves a determination of facts and the application of legal principles in order to decide whether or not a dismissal is fair' and that CCMA arbitrations 'bear all the hallmarks of a judicial function'.²⁴³ He points out that the CCMA thus constitutes an independent and impartial tribunal for purposes of FC s 34 and must therefore decide matters in a fair, public hearing.²⁴⁴ The minority thus distinguishes between actions of the CCMA that are administrative in nature (which are governed by FC s 33) and those that are adjudicative in nature (to which FC s 34 applies). Ngcobo J concludes that the conduct of CCMA arbitrations is very different from the functions of other statutory tribunals. The CCMA's functions 'are closer to, if not identical to the judicial function'.²⁴⁵ As a result, the decisions of the CCMA do not amount to administrative action.²⁴⁶

A comparison of the majority and the minority judgments in *Sidumo* reveals a significant difference of approach to the distinction between judicial and administrative action. The majority adopt a primarily *institutional* test in drawing the line between judicial and administrative action. By this, we mean that the majority considered whether the action was judicial (as opposed to administrative) by focusing on whether the CCMA was institutionally a court of law, rather than by adopting a functional approach which would emphasise the nature of the function that the CCMA performs (which, in this case, is adjudicative).²⁴⁷ Accordingly, the actions of the CCMA are not taken out of the administrative realm simply because they are adjudicative (or judicial) in nature. By contrast, the

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minority adopt a thorough-going *functional* approach to the distinction. They repeatedly refer to the adjudicative nature of the CCMA's arbitrations and adopt the

241 *Sidumo* (supra) at para 203.

242 With apparent reliance on *SARFU 1*, Ngcobo J adds: '[t]he fact that the CCMA is not a court of law and does not have judicial authority, is irrelevant'. Ibid at paras 203 and 220

243 *Sidumo* (supra) at paras 207–208.

244 Ibid at para 215.

245 Ibid at para 238.

246 Ibid at para 240. The Supreme Court of Appeal reached the same conclusion in *Total Support Management (Pty) Limited & Another v Diversified Health Systems (SA) (Pty) Limited & Another*. 2002 (4) SA 661 (SCA), 2007 (5) BCLR 503 (SCA) ('*Total Support Management*'). (This case, dealing with a private, consensual arbitration, held that it amounts to judicial action and is thus not administrative action. Ibid at para 25). This aspect of the SCA's decision is in effect overruled by the judgment of the majority of the Constitutional Court in *Sidumo*. Nevertheless, it is still possible to argue that private arbitrations amount to the exercise of private rather than public power and, for that reason, are not administrative action. See *Total Support Management* at para 24. See, further, the discussion on the distinction between public and private power at § 63.3(b)(viii). See also *Telecordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 (SCA) at para 45.

247 Navsa AJ accepts that the decision of the CCMA would, in pre-constitutional language, have been described as a 'quasi-judicial function' and bears many similarities to the judicial process. *Sidumo* (supra) at para 88.

attitude that the functionary is irrelevant.²⁴⁸ Ngcobo J's focus on a functional approach is evident in his regular reiteration of the *SARFU 1* test on numerous occasions in his judgment.²⁴⁹

The majority's approach in *Sidumo* is correct. And it can be reconciled with the dictum in *SARFU 1*. The ability to reconcile the two judgments does not, however, most clearly appear from Navsa J's majority judgment. It is rather to be found in the separate concurring judgment written by O'Regan J.²⁵⁰

O'Regan J calls for a 'substantive understanding of section 33'.²⁵¹ She stresses that 'the question of whether the CCMA falls within the scope of section 33 should be answered by determining the constitutional purpose of section 33 and then considering whether it is constitutionally suitable to impose the requirements of section 33 on the conduct of the CCMA.'²⁵² She refers to the passage in *SARFU 1* that focuses on the function rather than the functionary, but points out that this phrase was used by the Constitutional Court in that case in seeking to draw the line between two forms of executive action (policy decisions and administrative action), and was not used to distinguish between judicial and administrative action.²⁵³ O'Regan J points to the decisions of the Constitutional Court in *Nel and De Lange v Smuts NO & Others*,²⁵⁴ which, according to her, held that powers are judicial 'not only because they involved adjudication, but because they were powers which under our constitutional order, are to be exercised only by the judiciary'.²⁵⁵ Although she accepts that arbitral decisions of the CCMA are adjudicative in nature and that the CCMA is an independent and impartial tribunal as contemplated in FC s 34, she rejects Ngcobo J's view that this description means that the decisions are judicial rather than administrative.²⁵⁶ O'Regan J adopts the position that the distinctions between different forms of public power (legislative, executive, judicial, on the one hand, and administrative, on the other) should be based on the doctrine of separation of powers. It is for

248 See, for example, *Sidumo* (supra) at paras 207-208, 215-220 and 233-238.

249 Ibid at paras 203, 217, 225, 230 and 234.

250 O'Regan J's judgment is, in our view, one of the most meaningful decisions on the proper approach to assessing the scope of 'administrative action' under FC s 33. It is unfortunate that no other judges signed on to it.

251 *Sidumo* (supra) at para 137.

252 Ibid at para 135. O'Regan J makes a similar point elsewhere. Ibid at para 132 ('In my view, the question needs to be answered by understanding the proper constitutional purpose of section 33 and then considering that purpose against the context of the adjudicative functions of the CCMA'.)

253 Ibid at para 130.

254 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) ('*De Lange v Smuts*').

255 *Sidumo* (supra) at paras 127-129.

256 Ibid at paras 124 and 126.

this reason, she says, that the Constitutional Court has held that the legislative action of democratically elected legislative bodies, certain executive policy decisions and judicial actions of judicial officers do not amount to administrative action. Why? Again, because it is not constitutionally appropriate to review these actions on administrative law grounds.²⁵⁷ In this regard, it seems that the most important question is whether the principles of responsiveness, transparency and, most importantly, accountability indicate that the conduct should be subject to administrative review.²⁵⁸ In O'Regan J's words:

The content of section 33 is straightforward. It requires administrative action to be 'lawful, reasonable and procedurally fair'. It also requires that written reasons be given for administrative action that adversely affects the rights of individuals. Section 33 should be understood as one of the key constitutional provisions giving life to the constitutional values of accountability, responsiveness and openness to be found in section 1 of our Constitution. It recognises that requiring administrative action to be lawful, procedurally fair and reasonable is one of the ways of ensuring the exercise of public power that is accountable. The question of purposive constitutional interpretation that thus arises is whether it is constitutionally appropriate to hold the CCMA to these standards.²⁵⁹

Turning to the classification of CCMA arbitrations, O'Regan J rightly concludes that the separation of powers doctrine has 'no application' to such decisions, and that there are 'powerful reasons' why adjudicative tribunals should be held to the standards of FC s 33.²⁶⁰ These reasons flow from the fact that the CCMA is an organ of state exercising public power under legislation, that it determines disputes as to the fairness of labour practices, that the LRA contemplates that it should do so in a speedy and cheap fashion and that an appeal does not lie against its decisions.²⁶¹ To this we would only add that, whereas an entire constitutional chapter (as well as the doctrine of separation of powers more generally) structures the accountability of the judiciary,²⁶² FC s 33 imposes constitutional accountability on non-s 166 tribunals.

The approach of the *Sidumo* majority judgments reflects two principles that are, in our view, equally applicable to the classification of administrative rule-making.²⁶³

257 *Sidumo* (supra) at para 136.

258 O'Regan J points out that a similar approach was adopted by the Constitutional Court in *Fedsure*. *Fedsure* (supra) at para 41. It is noteworthy that the judgments of Ngcobo J in *Sidumo* and *Chirwa* are, in some respects, consistent with this general approach in that they emphasise the alternative form of constitutional accountability in relation to the decisions at issue in those cases, which accountability arises from FC s 34 and FC s 23, respectively.

259 *Sidumo* (supra) at para 138.

260 *Ibid* at para 137.

261 *Ibid* at para 139–140.

262 See Chapter 8 of the Final Constitution: Courts and the Administration of Justice.

263 See § 63.3(b)(vi) supra.

The first is that an act of the administration is not removed from the ambit of administrative action merely because it has the characteristics of power

that is traditionally exercised by one of the other branches. In other words, it does not fall beyond 'administrative action' simply because its nature is judicial (i.e. adjudicatory).²⁶⁴ The related second principle is that the exercise of public power that is judicial in nature falls outside the ambit of administrative action when it is exercised by an institution that forms part of one of the other branches of government: namely, when a judicial function is exercised by a judicial authority, or, drawing on *Fedsure*, when a legislative power is exercised by an elected, deliberative legislature.²⁶⁵ In both these instances, we note that the legislative or judicial power is a power that derives directly from the Final Constitution and that the exclusion of these acts is justified in light of the fact that these categories of action are subject to alternative forms of both political and constitutional participation and accountability. These actions are therefore subject to institutional accountability under the Final Constitution rather than the safeguards of administrative justice.²⁶⁶

These principles have important implications for the classification of rule-making. In *Sidumo*, the majority of the Constitutional Court held that the exercise of judicial (i.e. adjudicatory) powers by the executive does not mean that the power crosses over from the administrative to the judicial sphere. This suggests that the performance of legislative functions by the executive does not, in itself, go from being executive to legislative for purposes of determining the scope of administrative action. If action of the executive is only judicial (as opposed to administrative) when it is performed by a court of law (or other judicial authority), it seems to us that action is not legislative (for purposes of this characterisation) unless it is performed by a legislative body contemplated under the Final Constitution.

(viii) The distinction between public and private power

Administrative action is confined to the exercise of *public* power.²⁶⁷ The difficulty is that the line between public and private power is a very difficult one to draw. As Langa CJ remarked in his minority judgment in *Chirwa* '[d]etermining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied'.²⁶⁸

264 See *Sidumo* (supra) at paras 88, 126 and 135.

265 *Fedsure* (supra).

266 See Currie & Klaaren *Benchbook* (supra) at 57.

267 *Pharmaceutical Manufacturers* (supra) at para 45.

268 *Chirwa* (supra) at para 186. See also *AAA Investments (Pty) Limited v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) ('*AAA Investments*') at para 119 ('It is true that no bright line can be drawn between "public" functions and private ordering').

The case law has dealt with a number of contentious areas in which the public/private divide is most difficult to identify. For purposes of this chapter, we do not aim to cover all these areas, but rather identify two broad areas which have

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attracted the attention of our highest courts and which starkly raise the difficult question of the public/private divide, namely, the case of public entities exercising contractual rights (including in an employment context); and private bodies exercising regulatory powers. This is followed by an attempt to extract some of the factors that courts have identified as assisting in the classification of powers into either public or private.

The question as to the classification of contractual powers (or rights) exercised by public entities has recently become particularly significant in light of the increased practice of public entities engaging in outsourcing, corporatisation, privatisation and generally entering into contracts with third parties.²⁶⁹ The question as to whether the exercise of contractual rights in such a setting amounts to administrative action is significant as its answer is not only important for the public entity to consider and implement but also dramatically affects the judicial scrutiny that can be brought to bear in relation to the exercise of those rights. Most importantly, the classification of 'administrative action' may mean that the public entity must engage in a fair process and in some circumstances may only exercise its contractual rights after giving the other party (and perhaps third parties) a hearing.

This issue has come before the Supreme Court of Appeal in two significant cases. The first is *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others*.²⁷⁰ *Cape Metro* involved a decision by a municipal council to cancel an outsourcing contract with a private firm (for the collection of municipal levies and the identification of non-payers) on grounds of fraud. The contract had been concluded pursuant to a public tender process and, in canceling the contract, the municipal council relied on the contract's breach clause (rather than the alternative statutory power that the council enjoyed to cancel the contract in the event of fraud). The private party challenged the decision to cancel the contract on the basis that it had not been given a hearing prior to the cancellation. The Supreme Court of Appeal unanimously held that the cancellation of the contract did not amount to administrative action. According to the SCA, the municipal council was exercising a contractual power derived from the agreement between the parties. The Supreme Court of Appeal's reasoning is captured in the following passage:

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The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the

269 See *Transnet Limited v Goodman Bros (Pty) Limited* 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA) ('*Goodman Brothers*') at para 31 ('The identification of an administrative action, in contrast to an act regulated by private law, has become more difficult with the increasing use by the State of private law institutions, notably contract, to perform its duties. This takes place by privatisation, delegation, outsourcing, etc'.) For useful discussions of these developments, see A Cockrell 'Can You Paradigm? — A New Perspective on the Public Law/Private Law Divide' 1993 *Acta Juridica* 227; Y Burns 'Government, Contracts and the Public/Private Law Divide' (1998) 13 *SAPL* 234; and Hoexter *Administrative Law* (supra) at 147-159. On the meaning of organs of state, and the public/private divide, 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.

270 2001 (3) SA 1013 (SCA) ('*Cape Metro*').

contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority *by virtue of its being a public authority* and, in respect of the cancellation, did not, *by virtue of its being a public authority*, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.²⁷¹

The SCA placed considerable emphasis on the contractual source of the right of cancellation. Streicher JA even went so far as to say that 'there can be no question' that if the council had chosen to exercise its statutory power of cancellation, it would have been exercising a public power that amounted to administrative action.²⁷²

This decision, read on its own, suggests that a large amount of public contracting will fall outside the realm of administrative action.²⁷³ It should, however, now be read subject to the subsequent decision of the SCA in *Logbro Properties CC v Bedderson NO & Others*.²⁷⁴ *Logbro* turns on a decision by a province to withdraw a property from tender in terms of the tender conditions: the SCA assumed (without deciding) that the tender constituted a contract between the province and the tenderers. The appellant relied on, amongst others, *Cape Metro* in arguing that the right to withdraw the tender flowed from the contract and therefore did not

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amount to administrative action. Cameron JA (with whom the remaining judges agreed) held that the decision, notwithstanding its contractual source, amounted to administrative action and was therefore subject to the constraints of procedural

271 *Cape Metro* (supra) at para 18.

272 Ibid at para 20. Streicher JA distinguishes the pre-constitutional cases in *Zenzile* (supra) and *Administrator, Natal & Another v Sibiyi & Another* 1992 (4) SA 532 (A). Ibid at paras 11 and 12 (On the basis that they involved the exercise of statutory powers.) But see *The Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd*, Unreported Decision, Case no. 148/2007 (25 September 2008) ('*Thabiso Chemicals*'). The obiter statement in this judgment is most surprising, and concerning: 'I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law The fact that the Tender Board relied on authority derived from a statutory provision (i.e. s4(1)(eA) of the State Tender Board Act) to cancel the contract on behalf of the Government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the Tender Board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the Regulations — like the provisions of ST36 — became part of the contract through incorporation by reference'. Ibid at para 18.

273 For a sustained criticism of the judgment in *Cape Metro*, see C Hoexter 'Contracts in Administrative Law: Life After Formalism?' (2004) 121 *SALJ* 595; Hoexter *Administrative Law* (supra) at 176-7.

274 2003 (2) SA 460 (SCA) ('*Logbro*').

fairness.²⁷⁵ He was careful to emphasise that *Cape Metro* turned on its own facts and certainly is not authority for the principle that the exercise of contractual rights by a public entity is never subject to the duty to act fairly. Instead, he noted, 'the answer depends on all the circumstances'.²⁷⁶ According to Cameron JA, the impact of *Cape Metro* is limited to the following proposition:

[A] public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority *deriving from its public position*, does not amount to an exercise of public power.²⁷⁷

The crucial advance from *Cape Metro* by the *Logbro* Court was making explicit and more significant the recognition of the relative bargaining power of the parties, a relationship that does not always favour the public party to the contract. According to the SCA in *Logbro*, the province had itself dictated the tender conditions, and was thus undoubtedly acting 'from a position of superiority or authority by virtue of its being a public authority'.²⁷⁸

Logbro is a welcome caveat to the judgment in *Cape Metro*. It takes account of the variability and reality of public power in dealings with tenderers, promotes public accountability and cuts down the argument that the source of the power — be it contractual or legislative — automatically determines the classification of the power as public or private.²⁷⁹ *Logbro* is also consistent with a long line of cases that hold that the rules of administrative law apply in the context of public tenders, even when the public body would otherwise be acting in an ordinary commercial capacity.²⁸⁰ It is not so simple to draw the line between *Cape Metro* and *Logbro*. Despite the recognition that some public entities may not be in a position to 'dictate terms', it seems to us that in most instances in which government and other public entities contract, the public entity is in an advantageous position by virtue of its public authority. That said, many private entities obviously wield significant power in a contractual setting.

The public sector employment context is a particular contractual setting that has spawned a large number of cases on the distinction between public and

275 *Logbro* (supra) at paras 7 and 8.

276 *Ibid* at para 9.

277 *Ibid* at para 10 (Our emphasis). See Currie & Klaaren *Benchbook* (supra) at 72 (Point out that the decision in *Cape Metro* 'turned on the equality of bargaining of the parties.')

278 *Logbro* (supra) at para 11.

279 The argument that the contractual source of a power automatically means that it is private has now been removed by the decision of the Constitutional Court in *Chirwa* (supra).

280 In *Goodman Brothers*, the Supreme Court of Appeal held that a tender for long service gold watches amounted to administrative action for purposes of FC s 33. As Schutz JA stated, the actions of Transnet in calling for and adjudicating tenders amounted to administrative action 'whatever contractual arrangements may have been attendant upon it'. *Ibid* at para 9. See also G Penfold and P Reyburn 'Public Procurement' 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 25, § 25.8 (Further case citations).

private power. Prior to the recent decision of the Constitutional Court in *Chirwa*, the case law was, as discussed above, heavily divided.²⁸¹ The SCA in *Chirwa* was similarly divided, with two judges saying the dismissal of the public sector employee was public, while two held it was private.

The applicant in *Chirwa* was dismissed from her position as the Human Resources Executive Manager of the Transnet Pension Fund, a business unit of Transnet Limited (a wholly state-owned enterprise). Ngcobo J delivered the majority judgment on the issue as to whether the dismissal amounted to the exercise of a public power. Ngcobo J held that it did.²⁸² The thrust of his reasons for this finding is that Transnet is obliged to act in the public interest, is established by statute and draws its authority from statute. As Ngcobo J states:

In my view, what makes the power in question 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. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, '[t]hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution'²⁸³

The minority judgment of Langa CJ (with whom Mokgoro and O'Regan JJ concurred) adopts the opposite view. The minority found that the applicant's dismissal was a private act. The minority based its conclusion on a consideration of four factors. First, 'the relationship of coercion or power that the actor has in its capacity as a public institution'.²⁸⁴ In this regard, Langa CJ noted that Transnet has no specific authority over its employees by virtue of its status as a public body and the power it has over its employees is identical to that of other private entities.²⁸⁵ The second factor is 'the impact of the decision on the public'. Langa CJ pointed out that the dismissal of the HR Executive Manager of the parastatal's pension fund would not have much impact on the public.²⁸⁶ In particular, the applicant 'does not take decisions regarding transport policy or practice'.²⁸⁷ The third factor is the source of the power, i.e. a contractual source. Langa CJ commented that, while this factor was

281 See § 63.3(b)(v) supra.

282 *Chirwa* (supra) at para 138. Ngcobo J found, for different reasons, that the dismissal did not amount to administrative action. See § 63.3(b)(v) supra.

283 Ibid. Ngcobo J then quotes the following dictum from *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) ('*Hoffmann v SAA*') ('Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest.').

284 This factor, as Langa CJ pointed out, was particularly relevant in *Cape Metro*.

285 *Chirwa* (supra) at para 187.

286 Ibid at para 188.

287 Ibid.

not decisive, the contractual source 'points[s] strongly in the direction that the power is not a public one.'²⁸⁸ The final factor,

according to the minority, is 'whether there is a need for the decision to be exercised in the public interest'. Langa CJ's view is that the public interest in the running of the Transnet Pension Fund is not as great as it is in relation to other public entities.²⁸⁹

At the conclusion of his judgment, Langa CJ notes that the minority's decision is very much based on the facts of the case, and should not be taken to mean that the dismissal of public sector employees will never amount to the exercise of public power. He offers three examples of a public dismissal: (a) where the person is dismissed in terms of a legislative provision; and (b) where the dismissal 'is likely to impact seriously and directly on the public' as a result of (i) 'the manner in which it is carried out' or (ii) 'the class of public employee dismissed'.²⁹⁰

While the approach of the minority in *Chirwa* is, to some extent, consistent with that of the SCA in *Cape Metro*, the same cannot necessarily be said of decision of the majority. One would think that the reasoning applied by the majority in *Chirwa* would result in a finding that a municipal council canceling a public, or outsourcing contract for fraud, would be obliged to act in the public interest and operates, directly or indirectly, under statutory authority. It seems to us that, in light of the majority's decision in *Chirwa*, a court will seldom find that an indisputably public body is not performing a public power or performing a public function. This is as it should be.²⁹¹

Whereas the cases discussed above under this heading approach the public/private divide from one direction (ie public entities performing what would otherwise be classified as private functions), a number of other cases deal with the situation where this divide is approached from the other direction, namely, where a private entity performs a public function.²⁹² The most common type of case that arises in the latter context relates to the performance of regulatory powers. The most often cited example of this in the common law was the decision of Goldstone J in *Dawnlaan Belleggings (Edms) Beperk v Johannesburg Stock Exchange*.²⁹³ The Court held that the decisions of the stock exchange were

288 Ibid at para 189.

289 *Chirwa* (supra) at paras 190-193.

290 Ibid at para 194.

291 This conclusion is also consistent with the decisions of the SCA finding that, where the state exercises its rights of ownership in property in order to grant rights in respect of that property to private parties, the state engages in administrative action (at least insofar as rights are granted in relation to a valuable resource). See *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) ('*Bullock*') (Granting of a servitude over property on the banks of the Hartbeespoort Dam); *Grey's Marine* (supra) (Conclusion of a lease for quayside property in Hout Bay harbour). We point out, however, that the latter case involved the exercise of a statutory power. See also 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 (On the nature of organs of state as public bodies.)

292 Hoexter *Administrative Law* (supra) at 176 - 183 (Helpfully groups the cases into '[p]owers exercised by public bodies in a private-law setting' and '[p]rivate bodies exercising public powers'.)

reviewable on administrative law grounds because, although it was not a statutory body, it was under a statutory duty to act in the public interest.²⁹⁴

A number of cases that attempt to draw the difficult line between when a non-statutory body exercises a public power and when it does not, have been decided since the advent of the Interim and Final Constitutions. The most significant one is the recent decision of the Constitutional Court in *AAA Investments*. *AAA Investments* involved a challenge to the rules of the Micro Finance Regulatory Council ('the MFRC') that regulate small lenders. The MFRC is a section 21 company that regulates members who agree to comply with its rules. The primary significance of the MFRC, in legal terms, is that the Usury Act²⁹⁵ stipulates that the Minister of Trade and Industry may exempt categories of moneylending transactions from the application of the Usury Act 'on such conditions and to such extent as he may deem fit'.²⁹⁶ The main effect of this stipulation is that an exempted moneylender may charge in excess of the rate of interest prescribed in the Usury Act. The exemption notice published by the Minister under this provision states that small moneylenders must, amongst other things, register with a regulatory institution approved by the Minister in order to qualify for exemption. The MFRC was established by representatives of government, money-lending institutions and community bodies, and was approved as the regulatory institution for purposes of the exemption notice.²⁹⁷ Accordingly, as Yacoob J stated in *AAA Investments*, 'all micro-lenders who wished to qualify in terms of the exemption notice had to be registered with the [MFRC]' and, therefore, the MFRC 'has become responsible for the regulation of the micro-lending sector'.²⁹⁸

Whereas the High Court found that the MFRC exercised public power in making the rules,²⁹⁹ the Supreme Court of Appeal held that the MFRC is not a 'public regulator' but is rather a 'private regulator' of moneylenders whose

293 1983 (3) SA 344 (W) ('*Dawnlaan Beleggings*').

294 *Dawnlaan Beleggings* (supra) at 364. Goldstone J stated that: 'the decisions of the committee of the stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy. It is for that reason that the Act makes the public interest paramount. To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.' Ibid at 364–365. The correctness of this approach was confirmed by the Appellate Division in *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A) at 152. See also *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] 1 All ER 564 (CA) ('*Datafin*') (Held that the take-overs panel exercises public power despite not being a statutory body and not exercising statutory powers on the grounds that the panel exercised considerable powers, performed an important public duty which affected the public and the government in effect made use of the panel because its existence meant that the government did not itself need to establish a similar body. Ibid at 577 and 585. For a brief discussion of these cases, see Hoexter *Administrative Law* (supra) at 179–180.

295 Act 73 of 1968.

296 Section 15A of the Usury Act.

297 *AAA Investments* (supra) at para 13.

298 Ibid at paras 2 and 14.

authority derives from the agreement of the lenders.³⁰⁰ This approach, which we submit does not give sufficient weight to the statutory context in which the MFRC operates and overstates the element of voluntary consent (in that, the reality is that one cannot operate effectively as a micro-lender without being registered with the MFRC), was overruled by the Constitutional Court on appeal. Yacoob J held that the MFRC exercised a public function.³⁰¹ The Minister passed on his regulatory power by creating a regime that enabled the MFRC to regulate the micro-lending sector³⁰² and the Minister exercised control over the functioning of the MFRC (eg approving the registration criteria for the MFRC's members).³⁰³ As Yacoob J concluded:

The fundamental difference between a private company registered in terms of the Companies Act and the Council [the MFRC] is that the private company, while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfills them. The Council's composition and mandate show that, although its legal form is that of a private company, its functions are, essentially, regulatory of an industry. These functions are closely circumscribed by the ministerial notice. I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates, in the public interest and in the performance of a public duty.³⁰⁴

The approach of the Constitutional Court in *AAA Investments* is to be welcomed. It provides for a context-sensitive test in which one assesses the public or private nature of a body exercising regulatory control by examining all relevant factors, including the legislative context, whether agreement to the rules is truly voluntary, the level of state control over the functioning of the body and whether the body regulates in the public interest.³⁰⁵

(ix) Some relevant factors in assessing whether a power is private or public

As the Chief Justice pointed out in his dissenting judgment in *Chirwa*, there is no precise test for determining whether a power is public or private. This enquiry depends on a consideration of all relevant factors.³⁰⁶ Having examined some of the important decisions in this area, we now attempt to extract from the case law some of the factors that should be taken into account when making this assessment.

299 *AAA Investments (Pty) Limited v Micro Finance Regulatory Council & Another* 2004 (6) SA 557 (T).

300 *Micro Finance Regulatory Council v AAA Investments (Pty) Limited & Another* 2006 (1) SA 27 (SCA) at para 24.

301 *AAA investments* (supra) at paras 43–45. O'Regan J, who wrote a separate concurring judgment, agreed with this conclusion, adding that the MFRC's rules are 'coercive and general in their effect'. Ibid at paras 119–121.

302 See *AAA Investments* (supra) at para 43 (Yacoob J): 'The fact that the Minister passed on the regulatory duty means that the function performed must, at least, be a public function'.

303 Ibid at para 44.

304 Ibid at para 45.

Perhaps the most important factor is whether the actor has a duty to act in the public interest rather than for its own private advantage. The Constitutional Court in *SARFU 1* remarked that one of the factors in assessing whether conduct amounts to administrative action is 'whether it involves the exercise of a public duty'.³⁰⁷ Likewise, the majority of the Constitutional Court in *Chirwa* stated that 'what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest'.³⁰⁸ In the context of English law, the point is well captured by De Smith, Woolf and Jowell.³⁰⁹

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- 305 A series of cases have dealt with the question as to whether non-statutory sports regulators exercise public power. See *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) (Court held that because the United Cricket Board ('the UCB') was a voluntary body unconnected to the State and was not recognised in legislation, it did not exercise public power in banning the South African cricket captain Hansie Cronje for life. In our view, this decision does not give sufficient weight to the significant power that the UCB wields for those who pursue cricket as their chosen career, the extent of the regulatory function it performs, the public interest in the regulation of a national sporting code and the fact that the government would probably intervene to regulate cricket if the UCB did not exist.) For a critique of this case, see S Driver & C Plasket 'Administrative Law' 2001 *The Annual Survey of South African Law* 81, 116 (Point out, amongst other things, that this decision ignores the reality of the monopoly power at the disposal of the UCB and that it performs the equivalent of government function.) See also Y Burns 'Do Principles of Administrative Justice Apply to the Actions of Domestic Bodies and Voluntary Associations such as the South African Rugby Union and the United Cricket Board?' 2002 *SAPL* 372; Burns & Beukes *Administrative Law* (supra) at 140-144. We rather favour the approach adopted in decisions of the Cape High Court in the following two cases. *Coetzee v Comitis Others* 2001 (1) SA 1254 (C) (Court held that the National Soccer League ('the NSL') performed public functions in the public interest and that any person who wants to play professional football is subject to the NSL's rules); *Tirfu Raiders Rugby Club v South African Rugby Union & Others* [2006] 2 All SA 549 (C) at para 28 (Court held that a decision of the Rugby Union which affected log positions of rugby teams was a matter of 'significant public interest'.) In light of the latter two decisions, it may be that the decisions of the Jockey Club would now amount to the exercise of public power (despite the decision of the Appellate Division in *Turner v Jockey Club* (supra), holding that the Jockey Club exercises private power but is subject to the rules of administrative law in so doing, pursuant to an implied term of the contract between the Club and its members). See Hoexter *Administrative Law* (supra) at 193. See also L Thornton 'The Constitutional Right to Just Administrative Action — Are Political Parties Bound' (1999) 15 *SAJHR* 351 (Argues that 'administrative action' should include certain private actions.)
- 306 *Chirwa* (supra) at para 186.
- 307 *SARFU 1* (supra) at para 143.
- 308 *Chirwa* (supra) at para 138. This important factor is also recognised in Langa CJ's judgment. *Chirwa* (supra) at para 186 ('Whether there is a need for the decision to be taken in the public interest.') See also *AAA Investments* (supra) at para 45 ('The Council regulates in the public interest and in the performance of a public duty'); *Hoffman v SAA* (supra) at para 23. See further, *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others No. 1* 2008 (3) SA 91 (E), [2006] 2 All SA 175 (E) ('*POPCRU*') at para 53 (Public power not confined to power that impacts on the general public, but rather depends on whether it 'has been vested in a public functionary who is required to exercise it in the public interest, and not to his or her own private interest or at his or her own whim'); *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* [2006] 10 BLLR 960 (LC) at para 59; Olivier JA in *Goodman Brothers* (supra) at para 37; *Dawnlaan Belleggings* (supra) at 364; *Institute for Democracy in South Africa & Others v African National Congress & Others* 2005 (5) SA 39 (C) at para 27 (Relying on J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62, § 62-13, court remarked that a service or activity required to be undertaken in the public interest is an 'essential characteristic of a public power or function.')

A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

The next factor is the source of the power.³¹⁰ A legislative source is a very strong indication that the power is public.³¹¹ After all, as our courts have remarked, the implementation of legislation is the quintessential example of administrative action.³¹²

Another important factor is the extent of state control over the actor, either through an ownership interest (in the case of state-owned entities) or control over its functioning.³¹³ While this factor is taken into account, it is important to stress that it is by no means determinative. Although certain cases decided under the Interim Constitution held that the 'control test' was applicable in deciding whether or not an entity amounted to an 'organ of state',³¹⁴ this is not the case under the Final Constitution. In a recent decision, the Supreme Court of Appeal has helpfully pointed out that the fact of state control remains useful 'when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead'.³¹⁵

A factor that, as we have seen, has played a significant role in classifying power as public or private in circumstances in which a public entity exercises contractual rights, is the power relationship between the public entity and the other party to the contract.³¹⁶

309 *Judicial Review of Administrative Action* (5th Edition 1995) ('De Smith, Woolf and Jowell') at 167, quoted with approval by the Supreme Court of Appeal in *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) ('*Mittalsteel*') at para 20.

310 *SARFU 1* (supra) at para 143; *Chirwa* (supra) at para 186.

311 See P Craig 'What is Public Power?' in H Corder and T Maluwa *Administrative Justice in Southern Africa* (1997) 25 ('Public Power') at 27.

312 *SARFU 1* (supra) at para 142; and Chaskalson CJ and Ngcobo J in *New Clicks* (supra) at paras 126 and 461, respectively. Nevertheless, as we have seen, a power is not private simply because it flows from a non-statutory source, such as a contract or a common law right of ownership. See § 63.3(b)(viii) supra.

313 *Mittalsteel* (supra) at para 19; *AAA Investments* (supra) at paras 44–45. See also *Hoffmann v SAA* (supra) at para 23.

314 See, for example, *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T), [1996] 2 All SA 83 (T). For a discussion of the 'control test' and the authorities in support of — and against — that test, 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, § 31.4(f).

315 *Mittalsteel* (supra) at para 19. See Hoexter *Administrative Law* (supra) at 154–155. See also *Goodman Brothers* (supra) at paras 37–38 (Olivier JA) and para 8 (Schutz JA).

316 *Cape Metro* (supra) and *Logbro* (supra). See § 63.3(b)(viii) supra.

Another factor is the impact of the decision on the public.³¹⁷ This consideration has played a role in assessing the nature of the state's exercise of its ownership rights in relation to valuable resources (such as waterfront property at

Hartbeespoort Dam)³¹⁸ and has proved helpful in assessing whether rules made by an entity amount to the exercise of public power.³¹⁹ Although a public interest in a decision does not mean that the entity exercises a public function, significant public interest in a decision can operate as an indicator that the function is public.³²⁰

Another factor that has played a role in certain decisions is whether the conduct is 'governmental' in nature or, in other words, whether it corresponds to a power traditionally exercised by government.³²¹ This factor is particularly relevant when assessing whether a private actor is engaging in the exercise of public power, and it results in the characterisation of most regulatory power as public.³²² Moreover, certain cases suggest that the fact that an entity exercises monopoly power or near-monopoly power over its sphere of activity plays a role in coming to this conclusion.³²³

The final factor that we wish to mention is whether the existence of the function is recognised (expressly or impliedly) in a government's regulatory scheme.³²⁴ Closely related to this consideration is whether the function is such that the government would intervene and itself regulate the activity if the actor did not exist.

317 See *Chirwa* (supra) at para 186 (Langa CJ).

318 *Bullock* (supra) at para 14.

319 In *AAA Investments*, O'Regan J stated that one of the criteria to be taken into account in assessing whether rules are public in character is whether they 'apply generally to the public or a section of the public.' Ibid at para 119. The fact that a decision does not affect the public at large obviously does not mean that it is not the exercise of a public power. A great deal of administrative action only affects an individual or a small group of individuals. See Currie *The PAJA* (supra) at 76-77.

320 See *Tirfu Raiders* (supra) at para 28; *POPCRU* (supra) at para 54 ('The pre-eminence of the public interest' in the proper administration of prisons indicated that the dismissal of a number of correctional officers amounted to the exercise of public power.)

321 See *Mittalsteel* (supra) at para 22 ('In an era in which privatisation of public services and utilities has become commonplace, bodies may perform *what is traditionally a government function* without being subject to control by any of the spheres of government and may therefore ... properly be classified as public bodies' (emphasis added)). See also *Goodman Brothers* (supra) at para 30 ('The essential characteristics of the concept of *administrative action* are seen as the exercise of a public (ie governmental) function by a public authority or official...') See further *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853, 867 ('*Aga Khan*') (Jockey Club's powers not subject to public law review as its functions are not 'governmental.')

322 See Currie *PAJA* (supra) at 76. As the Supreme Court of Appeal apparently noted in *Mittalsteel*: one sense of the term public power is 'being able to regulate or control the conduct of others'. *Mittalsteel* (supra) at para 12.

323 See *Goodman Brothers* (supra) at para 8; and De Smith, Woolf and Jowell (supra) at 170 referred to in *Mittalsteel* (supra) at para 21. But see *Aga Khan* (supra) at 867.

(c) The meaning of administrative action under PAJA

(i) Background and the general approach to 'administrative action' under PAJA

The definition of 'administrative action' in PAJA went through a tortuous drafting process. Although the broad definition initially proposed in the South African Law Commission's draft Administrative Justice Bill was largely accepted by Cabinet, the Parliamentary Portfolio Committee on Justice and Constitutional Development ('the Portfolio Committee') made a significant number of changes.³²⁵ It appears that the changes made by the Portfolio Committee, particularly in the period shortly before the finalisation of PAJA, were intended to narrow the scope for judicial scrutiny of the administration.³²⁶ The Committee, in particular, added a series of limitations to the definition (such as the requirements of a 'decision', 'adversely affects the rights of any person' and 'direct, external legal effect'). The result is a very complex and, on its face, narrow definition. As the Supreme Court of Appeal has remarked: '[t]he cumbersome definition [of administrative action] in PAJA serves not so much as to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications'.³²⁷

Despite these problematic aspects of PAJA, it is worthwhile reiterating that an approach to interpreting PAJA properly mindful of the doctrine of separation of powers requires a court to respect the drafting choices of the legislature, while always ensuring that its provisions (including the definition of administrative action) are interpreted insofar as possible in a manner that is consistent with FC s 33. As noted above, the Constitutional Court has indicated that the correct approach to determining whether conduct amounts to administrative action is to assess whether it is 'administrative action' for purposes of FC s 33 and, if so, whether PAJA nevertheless excludes it.³²⁸ The FC s 33 jurisprudence discussed

above thus continues to play a significant role in interpreting the meaning of 'administrative action' under PAJA. In addition, to the extent that PAJA adopts a more restrictive definition of 'administrative action', the constitutional right could be used to challenge PAJA as failing to give effect to the constitutional right.

324 See *AAA Investments* (supra) at para 119 (One factor in assessing whether the power is public is whether it is 'related to a clear legislative framework and purpose'); *Datafin* (supra) at 577 and 585. See also De Smith, Woolf and Jowell (supra) at 170 referred to in *Mittalsteel* (supra) at para 21; Craig 'Public Power' (supra) at 29 (Describes this process as the 'Privatisation of the Business of Government', using a term coined by Hoffman LJ in *Aga Khan* (supra) at 874).

325 For a useful discussion of the process of drafting PAJA, including a table comparing the wording of the definition of 'administrative action' in the various drafts, see Currie *PAJA* (supra) at 18-22.

326 Ibid at 21 fn 80.

327 *Grey's Marine* (supra) at para 21. See also Hoexter *Administrative Law* (supra) at 185 (Hoexter agrees: 'The definition of administrative action in the Act is both extremely narrow and highly convoluted. Indeed, one feels that the legislature could hardly have made it more so'.) See also Hoexter 'Administrative Action' (supra) at 303 ('The statutory definition seems parsimonious, unnecessarily complicated and probably as unfriendly to users as it is possible to be'.) See also *Sebenza* (supra) at para 21.

Section 1 of PAJA sets out the definition of administrative action for purposes of the Act.³²⁹ This definition, when read with the definition of a 'decision',³³⁰ essentially comprises six elements: (1) a decision of an administrative nature; (2) made in terms of an empowering provision (or the Final Constitution, a provincial constitution or legislation); (3) not specifically excluded from the definition; (4) made by an organ of state or by a private person exercising a public power or performing a public function; (5) that adversely affects rights; and (6) that has a direct external legal effect.³³¹ The first four elements relate to the nature of

328 See § 63.3(a) supra. Certain statements of the Constitutional Court indicate that the meaning of 'administrative action' in PAJA cannot extend beyond that contemplated in FC s 33, and that a finding that conduct does not amount to 'administrative action' under FC s 33 is thus the end of the PAJA enquiry. See Ngcobo J, on behalf of a minority of judges in *Sidumo* (supra) at para 240 and, on behalf of a majority of judges, in *Chirwa* (supra) at para 150. See also Sachs J in *New Clicks* (supra) at para 607. The correctness of this approach is open to question. Although PAJA is intended to give effect to the constitutional right to just administrative action, there would seem to be no legal barrier to Parliament deciding to extend the scope of administrative review so as to cover a wider range of conduct than that contemplated in FC s 33 (eg to extend the reach of administrative justice to private decision-makers). At least absent another conflicting scheme of constitutional accountability (see, eg, *Independent Newspapers*), why should Parliament not be allowed to be expansive in its definition of administrative action? Perhaps the better interpretation of these dicta is that they only serve to reflect that a decision that is not of an administrative nature in terms of the constitutional jurisprudence will not amount to administrative action under PAJA (by virtue of the fact that the requirement of a decision 'of an administrative nature' is included in PAJA's definition). See § 63.3(c)(ii) infra.

329 Administrative action is defined as 'any decision taken, or any failure to take a decision, by —

(a) an organ of state, when —

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include —

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

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

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

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

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

action, while the fifth and sixth relate to the effect of the action (i.e. the so-called 'impact threshold').³³²

The purpose of this portion of the chapter is not to replicate the texts that provide a detailed commentary on the meaning of 'administrative action' under PAJA and the growing body of cases interpreting PAJA.³³³ It is, rather, to focus on those issues that raise fundamental questions about PAJA's scope and its constitutionality.

(ii) A decision of an administrative nature

The first element of the PAJA definition of administrative action is that it must be a decision 'of an administrative nature'. In our view, this is no more than an incorporation of the jurisprudence of the Constitutional Court discussed above.³³⁴ The first element embraces all exercises of public power other than legislative action, judicial action, broad policy-making decisions and certain decisions in the context of public sector employment relations.

As we have seen above in the discussion of FC s 33, a crucial question is whether PAJA applies to administrative rule-making such as delegated or subordinate legislation (usually taking the form of regulations).³³⁵ If one accepts, as we argue, that rule-making amounts to administrative action for purposes of FC s 33, then the

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1).'

330 A 'decision' is defined in s 1 of PAJA as 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly.'

331 This division of the PAJA definition into six elements draws down on Currie & Klaaren's *Benchbook*. See *Benchbook* (supra) at 40-82.

332 See De Ville *Judicial Review* (supra) at 37.

333 For detailed commentaries on the scope of 'administrative action' under PAJA, see Currie *The PAJA* (supra) 42-91; Currie & Klaaren *Benchbook* (supra) 34-86; Hoexter *Administrative Law* (supra) 184-222; De Ville *Judicial Review* (supra) 35-87; Burns & Beukes *Administrative Law* (supra) 107-149.

334 See § 63.3(b)(ii) to (v) supra.

correct question is therefore whether PAJA nevertheless excludes it. While this question was left open by the Constitutional Court in *Eisenberg*, several judges confronted the issue in *New Clicks*. Chaskalson CJ held that all regulation-making amounts to administrative action under PAJA and Ngcobo J found that the particular regulations at issue in that case amounted to administrative action (ie regulations that are inextricably linked to the recommendation from which they emanated).³³⁶

In coming to this conclusion, Chaskalson CJ made four important points that have a bearing upon the interpretation of PAJA's definition of 'administrative action'. First, the executive power of implementing legislation as contemplated in FC s 85(2)(a) is omitted from the list of executive powers expressly excluded from PAJA's definition of administrative action.³³⁷ Second, although the making of

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regulations is not referred to in the definition of 'decision', the references in this definition to 'any decision of an administrative nature' and 'doing or refusing to do any other act or thing of an administrative nature'³³⁸ bring the making of regulations within the meaning of this definition.³³⁹ Third, the definitions in PAJA must, in the case of doubt, be construed in a manner that is consistent with FC s 33: FC s 33, according to Chaskalson CJ, speaks to rule-making.³⁴⁰ Finally, the inclusion of s 4 in PAJA, which provides for procedural fairness for administrative action affecting the public, suggests that regulations, 'the most common form of administrative action affecting the rights of the public', are subject to review under PAJA.³⁴¹

(iii) Made in terms of an empowering provision (or the Constitution, a provincial constitution or legislation)

335 See § 63.3(b)(vi) supra. The Law Commission's draft Bill contained a definition of a 'rule' and specifically included this within the definition of administrative action. Nevertheless, the Portfolio Committee deleted this definition and many of the provisions relating to rule-making. The decision to delete these provisions from PAJA was apparently based in part on the Australian jurisprudence that a 'decision' does not include rule-making. See Currie & Klaaren *Benchbook* (supra) at 83–84.

336 See § 63.3(b)(vi) supra.

337 *New Clicks* (supra) at paras 123–126. See *New Clicks* at para 461 (As Ngcobo J (whose reasoning is slightly different, though complementary, to that of Chaskalson CJ on this score) states: 'The conclusion that the deliberate exclusion of implementation of legislation from the list of executive powers or functions that do not fall within the ambit of PAJA was intended to bring those powers or functions within the ambit of PAJA is irresistible.')

338 See para (g) of PAJA's definition of 'decision'.

339 *New Clicks* (supra) at para 128. See also *New Clicks* at para 467 (Ngcobo J).

340 At para 128.

341 At para 133. See, however, Sachs J in *New Clicks* (supra) at paras 599–606 (Points to various provisions of PAJA in support of his conclusion that PAJA does not apply to rule-making, but does nonetheless apply to the making of one of the regulations at issue in this case (the specific determination of a dispensing fee). As discussed above, Sachs J is of the view that rule-making should rather fall to be scrutinised under an expanded notion of legality, while five judges in *New Clicks* did not consider the question of whether the Pricing Regulations amount to administrative action.) See § 63.3(b)(vi) supra.

The second element of PAJA's definition of administrative action is that it must be made 'in terms of an empowering provision' or, as we explain below, 'in terms of the Constitution, a provincial constitution or legislation'. The definition of 'empowering provision' is extremely broad and includes 'a law, a rule of common law, customary law' or 'an agreement, instrument or other document in terms of which an administrative action was purportedly taken'.

The use of the phrase 'an empowering provision' in PAJA's definition of 'administrative action' and 'decision' is odd.³⁴² The phrase is used in the definition of 'decision' in a manner that suggests that it applies to all types of administrative action, i.e. the opening words of this definition read 'any decision of an administrative nature made, proposed to be made, or required to be made ... under an empowering provision'. The definition of 'administrative action', on the other hand, only uses the phrase to qualify the definition insofar as it applies to the exercise of a public power or public function by a natural or juristic person *other than an organ of state*.³⁴³ The phrases that are used to qualify the exercise of public powers and functions of an organ of state are rather 'in terms of the Constitution or a provincial constitution'³⁴⁴ or 'in terms of any legislation'.³⁴⁵

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In light of the very broad definition of 'empowering provision', this drafting discrepancy suggests that the scope of administrative action is, in some respects, narrower in respect of organs of state than it is in respect of non-organs of state. Such an inversion of public power and private power does not make sense. It cannot be that the reach of administrative justice is narrower in relation to government and organs of state than it is in relation to private entities.

It has been suggested that the phrases 'in terms of the Constitution or a provincial constitution' and 'in terms of legislation' are superfluous. These legal sources of power are, in any event, covered by the phrase 'empowering provision', and most commentators seem to express the view that the requirement of an 'empowering provision' should apply equally to organs of state and non-organs of state.³⁴⁶ While this reading is artificial, it has the attraction of avoiding the anomaly of the scope of administrative action being broader in relation to non-organs of state than organs of state.³⁴⁷

342 This phrase was included for the first time in the drafting process by the Parliamentary Portfolio Committee.

343 See para (b) of the definition of 'administrative action'.

344 See para (a)(i) of the definition of 'administrative action'.

345 See para (a)(ii) of the definition of 'administrative action'.

346 See Currie & Klaaren *Benchbook* (supra) at 40-1; De Ville *Judicial Review* (supra) at 46; Hoexter *Administrative Law* (supra) at 191-2; Currie *The PAJA* (supra) at 60.

347 This position accords with the principle of statutory interpretation that the legislature did not intend that legislation would result in an absurdity. See *Walele* (supra) para 37. See also L du Plessis *Re-Interpretation of Statutes* (2002) at 162-164. Since the conflict here is between two definitions at the equivalent level of generality, the approach adopted by O'Regan ADCJ in *Walele* (at para 126) would appear not to apply.

The dilemma comes into sharp focus in the minority judgment of Langa CJ in *Chirwa*. The Chief Justice concludes that one of the bases for finding that the decision to dismiss the employee of the Transnet Pension Fund does not amount to administrative action under PAJA is that decision was not taken 'in terms of legislation', but rather in terms of the contract of employment.³⁴⁸ To the extent that the minority in *Chirwa* is suggesting that, even though the power of dismissal may be public,³⁴⁹ the fact that the decision was not taken in terms of legislation takes it out of the realm of administrative action, this suggestion is surprising. It is anomalous to find that a decision of an organ of state falters at the 'administrative action' threshold if it is not taken in terms of legislation, whereas the contract of employment would undoubtedly amount to an 'empowering provision' under PAJA should the entity in question be a private entity.³⁵⁰ Such a result should be avoided.

It seems to us that another potential route of avoiding the absurdity described above, but that is more consistent with the text of PAJA than simply stating that the 'empowering provision' requirement applies to organs of state and non-organs of state alike, is to adopt the following two-step approach. Our analysis incorporates constitutional organ of state jurisprudence.³⁵¹ First, it could argued

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that, in relation to bodies that qualify as 'organs of state' in terms of paragraph (b) of the definition in FC s 239,³⁵² such bodies amount to 'organs of state' only insofar as they exercise powers or perform functions in terms of the Constitution, a provincial constitution or legislation.³⁵³ If they do not exercise powers in terms of such instruments, then they should then be judged according to paragraph (b) of the PAJA definition of 'administrative action' (i.e. do they exercise a public power or function in terms of an 'empowering provision?'). Such an approach effectively negates the 'Constitution or provincial constitution' or 'legislation' requirement in relation to this category of organ of state. This conclusion then leaves entities that are classified as organs of state by virtue of paragraph (a) of the definition in FC s 239, namely, a 'department of state or administration in the national, provincial or local sphere of government'.³⁵⁴ The second leg of the argument is that, in relation to these bodies, any exercise of public power or performance of a public function by these entities necessarily takes place, directly or indirectly, in terms of the Final Constitution, a provincial constitution or legislation. We note that, although the decision of the

348 *Chirwa* (supra) at paras 182–185.

349 Langa CJ goes on to find that the dismissal in this particular case was the exercise of private rather than public power. *Ibid* at para 194.

350 The definition of 'empowering provision' expressly includes 'an agreement'.

351 For more on the meaning of organ of state under FC s 239, 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.

352 That is, any functionary or institution 'exercising a power or performing a function in terms of the Constitution or a provincial constitution' or 'exercising a public power or performing a public function in terms of any legislation'.

353 This interpretation of the definition of organ of state in FC s 239 is supported by the use of the words 'exercising' and 'performing' in paragraph (b) of the definition.

majority of the Constitutional Court in *Chirwa* does not deal with the application of PAJA, it is explicitly consistent with the broad approach we suggest here. In this regard, Ngcobo J stated: '[a]s a public authority, [Transnet's] decision to dismiss necessarily involves the exercise of public power and, "that power is always sourced in statutory provision, whether general or specific, and, behind it, the Constitution."' ³⁵⁵

Lastly, it may be important to note that the definition of 'empowering provision' includes the phrase 'was purportedly taken'. Administrative action therefore includes acts that go beyond the power of the administrator. Exercises of public power are often challenged on the grounds that they were not made in terms of an empowering provision and are thus *ultra vires*. It would be nonsensical to argue that, due to its *ultra vires* nature, such action was not taken 'in terms of an empowering provision' and therefore does not amount to administrative action. ³⁵⁶

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(iv) Specific exclusions from the definition of administrative action

The definition of administrative action in PAJA contains a number of specific exclusions. These exclusions are, broadly speaking, as follows: executive powers or functions of the national executive, a provincial executive and a municipal council; legislative functions of Parliament, a provincial legislature or a municipal council; judicial functions of a judicial officer (including a judge or magistrate); judicial functions of a Special Tribunal and a traditional leader under customary law or any other law; decisions to institute or continue prosecutions; decisions relating to any aspect regarding the appointment of a judicial officer by the Judicial Service Commission; decisions in terms of PAIA; and a decision in terms of s 4(1) of PAJA. ³⁵⁷

A number of these exclusions are based on, and consistent with, the categories of public power excluded from the meaning of administrative action in the Constitutional Court's jurisprudence. ³⁵⁸ For example, the exclusion of legislative acts of a municipal council in paragraph (*dd*) flows from the decision in *Fedsure*, ³⁵⁹ while

354 The difficulty is that entities and functionaries falling within this category of organs of state are organs of state *per se*. Their status cannot vary depending on the function that they perform. The dilemma that litigants have in challenging decisions of these entities or functionaries is reflected in the following statement in *Sebenza*. *Sebenza* (supra) at para 20 ('The applicant contended that the Minister's decision constituted administrative action as defined in either s 1(a)(ii) or 1(b) of the PAJA. Since the first subsection relates to a decision taken by "an organ of State" and the second to a natural or juristic person other than an organ of State, the applicant cannot have it both ways. The Minister must either be an organ of State or not. Since she is sued in her representative capacity and having regard to the wide definition of an "organ of State" in s 239 of the Constitution, it would seem that s 1(a)(ii) is applicable.')

355 See *Chirwa* (supra) at para 138, quoting Cameron JA in *Chirwa* (SCA) (supra) at para 52. Langa CJ disagrees with this approach. *Chirwa* (supra) at para 183. The difficulty with the argument we advance here is that it appears that organs of state do occasionally exercise public power without doing so in terms of either legislation or a constitution. See *Kyalami Ridge* (supra) at paras 33-48.

356 See *Tirfu Raiders* (supra) at para 30. But see *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) at para 55.

357 For a detailed discussion of these specific exclusions, see Currie & Klaaren *Benchbook* (supra) at 53-69; Currie *PAJA* (supra) at 60-75; Hoexter *Administrative Law* (supra) at 210-216; Burns & Beukes *Administrative Law* (supra) at 113-128.

the exclusion of the judicial functions of a judicial officer in paragraph (ee) is consistent with *Nel*.³⁶⁰

The first two exclusions in paragraphs (aa) and (bb) engage the executive powers or functions of the national executive and provincial executive and include a list of constitutional powers and functions that are specifically excluded.³⁶¹ It is important to ensure that these powers and functions are interpreted in a manner that ensures that only executive policy decisions (or matters involving high political judgment) are excluded.³⁶²

A similar issue arises in relation to the exclusion in paragraph (cc) of the executive powers or functions of a municipal council. This exclusion should be

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interpreted narrowly, and in accordance with the jurisprudence of the Constitutional Court,³⁶³ to include only the deliberative exercise by municipal councils of decision-making power in the realm of broad policy-making or legislating and not the actions of municipal councils in implementing provincial legislation and national legislation.³⁶⁴ If this exclusion is not given such a meaning, it may well be unconstitutional.

Paragraphs (dd) and (ee) exclude the legislative functions of Parliament, provincial legislatures and municipal councils as well as the judicial functions of a judicial officer of a court³⁶⁵ and a Special Tribunal³⁶⁶ and a traditional leader under customary law or any other law. The exclusion of the legislative functions of legislatures and judicial functions of judicial officers is based on the separation of

358 These express exclusions are not strictly speaking necessary as these decisions would in any event not amount to decisions 'of an administrative nature' for purposes of PAJA. See § 63.3(c)(ii) *supra*. These exclusions also do not limit the FC s 33 right and thus need not be scrutinised under the FC s 36(1) limitations enquiry.

359 See § 63.3(b)(ii) *supra*.

360 See § 63.3(b)(iv) *supra*.

361 In *New Clicks*, Ngcobo J (with whom Langa DCJ and Van der Westhuizen J concurs) holds that the listed exclusions in paragraph (aa) are exhaustive. *New Clicks* (*supra*) at paras 453-460. In other words, the only executive powers and functions excluded under paragraphs (aa) and (bb) are those contemplated in the enumerated sections. See Burns & Beukes *Administrative Law* (*supra*) at 114 (Take the view that if a power or function is not specifically listed, it is not excluded from the meaning of administrative action.) But see Hoexter *Administrative Law* (*supra*) at 210 (States that the powers and functions listed in these paragraphs are not exhaustive.) In our view, since the exclusion of some non-enumerated categories also flows from the constitutional jurisprudence, it is the non-exhaustive interpretation that is to be preferred.

362 Such an approach appears to be consistent with *Masetlha*. In assessing whether the President's power to dismiss the head of the NIA fell within the ambit of the exclusion of the President's performance of 'any other executive function provided for in the Constitution or national legislation' (paragraph (aa) of PAJA's definition of 'administrative action', read with s 85(2)(e) of the Constitution), Moseneke J emphasised that the President's special power to appoint is expressly conferred in the Constitution, that the power to dismiss is a corollary of that constitutional power and that it would not be appropriate to constrain the exercise of this executive power to the requirements of procedural fairness.

363 See § 63.3(b)(ii) and (iii).

powers doctrine and is consistent with the jurisprudence of the Constitutional Court on the distinction between administrative action, on the one hand, and legislative and judicial action, on the other. As the majority judgment in *Sidumo* makes clear, what matters is not only the nature of the function (administrative, legislative or adjudicative) but also the institution that is performing the function.³⁶⁷

As a number of authors have pointed out, the exclusion of the judicial functions of traditional leaders is, however, controversial. The legal safeguards of independence, impartiality and accountability are less extensive in relation to these functionaries.³⁶⁸

The remaining exclusions from the ambit of PAJA are pragmatic, legislative choices and, as such, should be narrowly interpreted in order to survive constitutional scrutiny.³⁶⁹ We briefly discuss each of these exclusions in turn.

Paragraph (*ff*) stipulates that administrative action does not include 'a decision to institute or continue a prosecution'. This pragmatic exception is justified on the grounds that the criminal justice system would be delayed by administrative reviews before criminal proceedings have even commenced. The accused is, in any event, given an opportunity during the course of the criminal trial to address

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the case against him or her.³⁷⁰ The extension of this exclusion to a decision not to prosecute or a decision to discontinue a prosecution is hotly contested.³⁷¹ Indeed, it has been discussed in the high-profile (and high-impact) judgment by Nicholson J in *Zuma v NDPP*.³⁷² It seems somewhat anomalous to have full-blown administrative accountability for a decision not to prosecute but not for a decision to prosecute, especially in the light of the protection offered in this area by the more specific legal

364 This interpretation is consistent with the use of the same phrase 'executive powers or functions' in paragraphs (*aa*) and (*bb*) followed by a list of powers and functions under the Final Constitution that are related to broad policy making or political judgment. This view is shared by a number of authors. See R Pfaff & H Schneider 'The Promotion of Administrative Justice Act from a German Perspective' (2001) 17 *SAJHR* 59 ('German Perspective') at 77; Currie & Klaaren *Benchbook* (*supra*) at 64-65; Hoexter *Administrative Law* (*supra*) at 212; and Burns & Beukes *Administrative Law* (*supra*) at 118-119.

365 In terms of FC s 166, 'court' would encompass the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts and 'any other court established or recognised in terms of an Act of Parliament' (the latter would include, for example, the Labour Appeal Court and the Competition Appeal Court).

366 Tribunals may be established under s 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

367 But see the minority judgment in *Sidumo* (Ngcobo J).

368 See Currie & Klaaren *Benchbook* (*supra*) at 66-67. For an updated discussion of the exclusion of judicial functions of traditional leaders, see Currie *The PAJA* (*supra*) at 71-72. For a discussion of the judicial powers of traditional leaders, see T Bennett & C Murray 'Traditional Leaders' 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 26, § 26.6(c)(i).

369 To the extent that the excluded actions amount to 'administrative action' under FC s 33, the exclusion of these decisions in PAJA would, if challenged, be subjected to the limitations test under FC s 36(1).

regime relating to prosecution.³⁷³ Nevertheless, it seems to us that the language of paragraph (ff) of PAJA, coupled with the need to interpret PAJA's exclusions in a restrictive manner, means that this exclusion does not extend to decisions not to prosecute or to discontinue prosecutions.³⁷⁴ Such decisions are therefore reviewable under PAJA, where they meet the other requirements for 'administrative action'.

The next exclusion from the ambit of administrative action concerns decisions of the Judicial Services Commission ('the JSC') 'relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person'.³⁷⁵ The JSC is a public entity that exercises powers granted by legislation and, although certain of its members are judges, it does not exercise judicial functions.

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Some authors express doubts as to the justifiability of this exclusion.³⁷⁶ Jacques De Ville is of the view that it is a justifiable exception on the basis that decisions on the appointment of judges are unsuitable for review on administrative law grounds.³⁷⁷ Although the constitutionality of this exclusion is not free from doubt, the facts are that: (a) the JSC's powers to nominate judges, and to consult with and advise the

370 A decision to institute a prosecution is thus similar to a decision to institute civil proceedings or, for example, a decision by the Competition Commission to refer a complaint to the Competition Tribunal, which decisions have been held to lack the requisite finality for a classification as administrative action. See *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Limited* 2001 (4) SA 661 (W), 2001 (4) BCLR 344 (W) ('Peter Klein'); *Norvartis SA (Pty) Limited and Others v Competition Commission and Others* (CT 22/CR/B/Jun 01, 2.7.2001) at paras 40–61; *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Limited and Another* 2003 (3) SA 64 (SCA), [2003] 1 All SA 82 (SCA) at paras 16 and 17; and *Telkom SA Limited v The Competition Commission of South Africa & Another*, unreported judgment of the Transvaal Provincial Division under case no. 44239/04 (20 June 2008). See also *Podlas v Cohen No & Others* 1994 (4) SA 662 (T), 1994 (3) BCLR 137 (T) at 675 and *Park-Ross v Director, Office for Serious Economic Offences* 1998 (1) SA 108 (C) at para 18.

371 A number of authors are of the view that this exclusion from PAJA does not apply to a decision not to prosecute: Currie *The PAJA* (supra) at 73; Hoexter *Administrative Law* (supra) at 213–214 (noting the South African Law Reform Commission rationale that whereas a positive decision to prosecute would lead to judicial accountability for that decision in a trial, a negative decision would not); De Ville *Judicial Review* (supra) at 65; Burns & Beukes *Administrative Law* (supra) at 126. Schneider & Pfaff (supra) express the opposite view (at 22). One should also note that unlike an accused who is prosecuted, a decision not to prosecute has a final effect in respect of the victim of a crime. The question of the extension of the exclusion was left open by Constitutional Court in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) ('Kaunda') at para 84.

372 The alternative to the inclusion of a decision not to prosecute is its review on 'mere' grounds of legality. Such a review regime may well accord with the Constitutional Court's seeming approval of the cautious approach to this issue in the United Kingdom in *Kaunda*. *Kaunda* (supra) at para 84 n64.

373 See FC s 179(5). For more on the statutory framework and case law, see Currie *The PAJA* (supra) at 73 and Hoexter *Administrative Law* (supra) at 214 fn 340.

374 A potential argument excluding the specialised area of prosecutions from administrative action in a parallel to the LRA, as understood by the Constitutional Court in *Sidumo*, could be constructed but would rely upon parallel grounding in the constitutional scheme of accountability (ie the FC s 33 regime).

375 Paragraph (gg) of the definition of 'administrative action'. Note that the action of the JSC relating to misconduct of judges would not fall within this PAJA exclusion.

President on the appointment of judges, are derived directly from the Final Constitution;³⁷⁸ and (b) the appointment of judges is an inherently political decision, with considerable policy attributes, that is ultimately taken by the President in terms of a constitutional power. From these two facts it follows that this exclusion would survive constitutional scrutiny.

Paragraph (ii) of the definition excludes a decision taken, or a failure to take a decision, in terms of PAIA. This exception is justified in light of the specific internal appeal and statutory review mechanisms, as well as the reason-giving requirements, provided for in PAIA.³⁷⁹

The final express exclusion from the definition of 'administrative action' is any decision, or failure to take a decision, in terms of s 4(1) of PAJA. As discussed below, s 4(1) states that, in the case of administrative action affecting the rights of the public, an administrator *must* decide to follow one of a number of procedures for giving effect to procedural fairness under s 4(1) (e.g. to follow a notice and comment procedure or to hold a public inquiry). The full extent of this exclusion is that the administrator's choice of procedure under s 4(1) does not amount to administrative action, ie that the administrator's choice of procedure is final.³⁸⁰ The administrator is still obliged to make a decision and to follow one of the processes set out in s 4(1).³⁸¹ The subsequent conduct of the chosen process will be subject to administrative law review.³⁸²

(v) A decision of an organ of state or person exercising public power or performing a public function

In order to qualify as administrative action in terms of PAJA, the decision must be made by an organ of state or by another person exercising a public power or performing a public function. The crucial question that this element of the

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376 See Currie & Klaaren *Benchbook* (supra) at 68; Currie *The PAJA* (supra) at 73; Pfaff & Schneider (supra) at 77 (Describe the exclusion as 'unfortunate'); Hoexter *Administrative Law* (supra) at 214 (Describes paragraph (gg) as an 'enigmatic exclusion' and remarks that it may seem 'somewhat whimsical.')

377 See De Ville *Judicial Review* (supra) at 66.

378 FC ss 174(3), (4) and (6).

379 It has been argued, however, that this should only be the case if the review of decisions by statutory bodies under PAIA is at least as extensive as that under PAJA (see I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* 2002 at 202-209). In any case, this exclusion may have constitutional grounding in the competence asserted by FC s 32.

380 *New Clicks* (supra) at para 132 (Chaskalson CJ) and *New Clicks* at para 468 (Ngcobo J).

381 This follows from the principle of legality, coupled with the use of the mandatory word 'must' in s 4(1).

382 Chaskalson CJ in *New Clicks* (supra) at para 132.

definition raises is whether the relevant actor is exercising a *public* power or performing a *public* function. Since the placement of this requirement in PAJA raises no issues apart from the understanding of this requirement in terms of FC s 33, the detailed discussion above on the distinction between public and private powers or functions for purposes of FC s 33 applies equally to this element of PAJA's definition of administrative action.³⁸³

(vi) The requirement of adversely affecting rights

As we have already noted, the most controversial element of the definition of administrative action in PAJA has been the requirement that the decision must 'adversely affect the rights of any person'. This requirement, together with the requirement of a 'direct, external legal affect', imposes an impact threshold³⁸⁴ on the meaning of administrative action. This impact threshold, on the face of it, greatly restricts the scope of PAJA.³⁸⁵

It may be argued that the 'adversely affecting rights' requirement is unconstitutional. It fails to give effect to the constitutional right to just administrative action by restricting the meaning of administrative action to a class of action which is narrower than that contemplated in FC s 33. Depending on the meaning given to this phrase in PAJA, this argument may well succeed. In our view, this argument is strengthened by the fact that, while the right to written reasons in FC s 33(2) applies only to persons 'whose rights have been adversely affected' by administrative action, no similar limitation is placed on the application of FC s 33(1). If FC s 33(1) contemplates that administrative action arises only in circumstances where rights have been adversely affected, this qualification in FC s 33(2) would be unnecessary.³⁸⁶

We now turn to consider the meaning of the PAJA requirement that the decision 'adversely affects the rights of any person'. We then return to the question of its constitutionality below.

The word 'affects' is capable of two meanings — 'deprived' and 'determined'. If the former definition is to be preferred, PAJA will cover a narrow class of administrative action. If the latter is given precedence, then it will cover a relatively broad class of administrative action. For example, if 'affects' means 'deprived', a person whose licence is prematurely terminated will be protected by the rules of administrative justice but a first-time applicant for a licence will

383 See § 63.3(b)(viii) and (ix) *supra*.

384 The term 'impact threshold' to describe these two elements of the definition of 'administrative action' is used in *De Ville Judicial Review* (*supra*) at 37.

385 As stated above, the 'adversely affecting rights' and 'direct, external legal effect' requirements were inserted during the drafting process by the Portfolio Committee and were not contained in the Law Commission's draft Bill. In fact, the draft Bill did not contain any impact threshold requirement; it defined administrative action with reference to its administrative character rather than its effect.

386 Hoexter 'Future of Judicial Review' (*supra*) at 514 criticises this restriction on the definition of administrative action, stating as follows: 'This is a startling departure both from the definition proposed by the South African Law Commission and from the common law, and in my view its effect is to narrow the ambit of administrative action beyond what is acceptable.... On this score alone one must harbour the gravest doubts about the constitutionality of s 1 of the Act.'

not. This dispute between the determination theory and the deprivation theory of administrative justice is not new to our law and had already generated a considerable amount of debate in relation to the scope of natural justice prior to the finalisation of the Interim Constitution.³⁸⁷

While it is possible that the inclusion of the word 'adversely' indicates the deprivation theory, this interpretation would give administrative action such a limited meaning as to render PAJA unconstitutional. To hold that administrative justice only applies to decisions which deprive a person of his or her rights cannot be said to give effect to the constitutional right to just administrative action.³⁸⁸ Such an interpretation should thus be avoided. Our courts should rather adopt the determination theory in interpreting this requirement of PAJA.³⁸⁹ Although our courts have not, to date, expressly grappled with the deprivation versus determination theories in this context, the decision by the majority of the Constitutional Court in *Union of Refugee Women* clearly endorses the determination theory in the context of PAJA's definition of administrative action.³⁹⁰

Even if one accepts that the word 'affects' in the phrase 'adversely affects the rights of any person' means 'determines', the difficulty still remains as to how to

387 See, for example, E Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. See also E Mureinik, 'Admin justice in the BoR' (6 July 1994, Unpublished memorandum on file with authors); E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35, 36–40 ('Reconsidering Review'). It is decidedly odd that this debate now takes place in the context of defining 'administrative action' as the threshold requirement for the application of PAJA (ie as a threshold requirement for the application of administrative review). It has, historically, been a debate attaching to the scope of natural justice (which is generally considered to have a more limited scope than the reach of administrative review), in which a compromise was found in the form of the legitimate expectation doctrine. See § 63.5(d)(ii) *infra*; *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A), 549 (Indicates that natural justice attaches to deprivations of rights); *Hack v Venterspost Municipality & others* 1950 (1) SA 172 (W), 189–90 (Indicates that natural justice attaches to determinations of rights.) But see Currie & Klaaren *Benchbook* (supra) at 78–79 (Interpret the debate as having been appropriately and entirely displaced by a regime of constitutional supremacy, particularly in view of the two-stage theory of fundamental rights and limitations analysis.)

388 See Hoexter 'Future of Judicial Review' (supra) at 516 (states that the deprivation theory 'clearly creates an unacceptably high threshold for admission to the category of "administrative action"'.)

389 Such an approach, when combined with the other limitations contained in PAJA, will, in effect, result in the adoption of Mureinik's provisional determination theory (see Mureinik 'Reconsidering Review' (supra) at 37; and Currie & Klaaren *Benchbook* (supra) at 78–9). Courts will, in practice, work in from the determination theory by accepting that all public power which determines rights will constitute administrative action, unless the other elements of PAJA's definition are not met.

390 *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC) at para 70 (Kondile AJ) ('The refusal to register an applicant as a private security service provider is an adverse determination of the applicants' rights. The determination has an immediate, final and binding impact on the applicants, who have no connection with the Authority. The decisions therefore do have a direct, external legal effect and constitute administrative action in terms of PAJA.') Some support for the determination theory may also be found in the following *dictum* of Boruchowitz J in the pre-PAJA case of *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) at 997, in holding that the relevant decision amounted to administrative action: '[T]he Board's decision has plainly affected the rights and interests of the applicant. It has *determined* its rights' (our emphasis). See also the decision of the SCA in *Grey's Marine* (supra) at para 23, stating that the administrative action must have 'capacity to affect rights'; and *Minister of Defence and Others v Dunn* 2007 (6) SA 52 (SCA) ('Dunn') at para 4. The determination theory also enjoys extensive academic support. See, for example, Hoexter *Administrative Law* (supra) at 200; Currie & Klaaren *Benchbook* (supra) at 77; Currie *The PAJA* (supra) at 82.

interpret the other two key words, 'adversely' and 'rights'. The most significant decision on the meaning of this requirement in PAJA is that of the Supreme Court of Appeal in *Grey's Marine*. In dealing with the question whether a decision by the Minister of Public Works to grant a lease over the quayside in Hout Bay amounted to administrative action, Nugent JA remarked as follows on behalf of a unanimous SCA:

While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that a literal meaning could have been intended. For administrative action to be characterized by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1) [of PAJA], which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct, external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications operating in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.³⁹¹

Although this passage can be read to indicate that the test for the 'adversely affecting rights' requirement is whether the decision has the capacity to affect legal rights (which we take as a synonym for 'determines rights'), other statements in the judgment suggest that the *Grey's Marine* test is whether the decision has a direct and immediate impact on individuals or groups.³⁹² Most dramatically, the SCA appears completely to disregard the word 'adversely' in the phrase 'adversely affects the rights of any person' (apparently in keeping with its view that classifying administrative action based on its effect is paradoxical). The SCA does so by basing its decision that the grant of the lease amounts to administrative action on the fact that it had direct and immediate consequences for *the lessee*.³⁹³ As the lessee was the recipient of rights flowing from the lease, it cannot be said that the decision had an 'adverse' effect on the lessee's rights.³⁹⁴

The Court in *Grey's Marine* is not alone in disregarding the language of the PAJA phrase 'adversely affects the rights of any person'. The Constitutional Court has itself done so in a passage in *Steenkamp*. Moseneke DCJ remarks (on

behalf of the majority of the Court) that a decision to award or refuse a tender constitutes administrative action because the decision 'materially and directly

391 *Grey's Marine* (supra) at para 23.

392 See *Grey's Marine* (supra) at paras 23, 24 and 28. Other decisions of our courts have followed this approach in *Grey's Marine* and focused on the direct and immediate impact of the decision. See *Chirwa (SCA)* (supra) at para 53; *Kiva v Minister of Correctional Services*, Unreported, Eastern Cape Local Division (27 July 2006) Case no 1453/04, [2006] JOL 188512 ('*Kiva*') at para 28; *Dunn* (supra) at para 4 (SCA remarked that the appointment of a person to a post in the South African National Defence Force amounted to administrative action 'even though it cannot be said to adversely affect the "right" of a person who is non-suited'). See also *Walele* (supra) at paras 27 and 31 ('There can be no doubt' that the decision to approve the building plans constitutes administrative action, despite later remarking that 'the approval could not, by itself, affect the applicant's rights.')

393 *Grey's Marine* (supra) at para 28.

394 See Du Plessis and Penfold 'Bill of Rights Jurisprudence' (supra) at 92-93.

affects the *legal interests or rights* of tenderers concerned'.³⁹⁵ Moseneke J thus seems to ignore the legislative choice of the word 'rights' in the definition of administrative action, and adopts the position that an impact on legal *interests* is sufficient.³⁹⁶ As with *Grey's Marine*, the Constitutional Court thus effectively disregards the language of PAJA and redraws the ambit of the Act.³⁹⁷

Another judicial route around the 'adversely affecting rights' requirement is to say that the term 'rights' includes the constitutional right to just administrative action. This approach was adopted by Schutz JA on behalf of the majority of the Supreme Court of Appeal in *Goodman Brothers* in the slightly different context of the constitutional right to written reasons under the Interim Constitution.³⁹⁸ The problem is that, as Cora Hoexter has pointed out, this amounts to 'bootstrap' reasoning. In the PAJA context, it negates the requirement that the decision must adversely affect rights.³⁹⁹ To say that the decision adversely affects the administrative rights of persons affected by it is to put the question, not to answer it.

These cases, in our view, adopt an overly artificial interpretation of PAJA's 'adversely affecting rights' requirement. If one looks back to the beginning of the process of drafting PAJA, what appears to have taken place is as follows: the Law Commission prepared a sensible, wide definition of 'administrative action'; in an effort to reduce judicial scrutiny of the administration, this definition was cut down by the Portfolio Committee, through various amendments including the introduction of the impact threshold; and the courts have subsequently clawed-back its extension by 'redrafting' the definition so as to restore administrative

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395 *Steenkamp* (supra) at para 21 (Our emphasis)(Although it may be suggested that Moseneke DCJ is referring to 'administrative action' under FC s 33 rather than PAJA, the language of this passage and the reference in fn 15 to both s 1 of PAJA and *Grey's Marine* suggests that this is not the case.)

396 Other courts, though not going as far as the *Steenkamp* Court, either equate rights and legitimate expectations or apparently read in that the action may affect legitimate expectations. See *Dunn v Minister of Defence* 2006 (2) SA 107 (T) para 5 (Decision is administrative action if it adversely affects 'rights and/or legitimate expectations'); and *Tirfu Raiders* (supra) at para 36 (Decision is administrative action if it affects 'rights, in the form of legitimate expectations'). For a comment on the latter case, see R Stacey 'Substantive protection of Legitimate Expectations in the Promotion of Administrative Justice Act — *Tirfu Raiders Rugby Club v South African Rugby Union*' (2006) 22 *SAJHR* 664.

397 It may be argued that the word 'rights' has no natural limit and can bear a sufficiently broad meaning so as to encompass 'interests'. See, for example, *De Ville Judicial Review* (supra) at 53-54 (Argues that the 'adversely affecting rights' requirement simply means that the decision must have a discernable effect on an individual or group of individuals). We disagree. In our view, the terms rights, interests and legitimate expectations have meanings that are sufficiently established in our administrative law that the word 'rights' cannot simply be equated with the far broader concept of 'interests'. See Currie *The PAJA* (supra) at 82-83).

398 *Goodman Brothers* (supra) at paras 11-12.

399 C Hoexter 'The Current State of South African Administrative Law' in *Realising Administrative Justice* H Corder and L van der Vijver (eds) (2002) 20, 30-32 ('The Current State'). See also Hoexter *Administrative Law* (supra) at 202; Currie & Klaaren *Benchbook* (supra) at 80-81.

review to its more appropriate scope. The courts have, however, done so through an interpretation of the impact threshold which pays little attention to the language used in the statute.⁴⁰⁰

Although one is tempted to conclude that these judgments more appropriately delineate the scope of administrative justice than the drafters of PAJA have done and to accept these judgments as correctly proclaiming the law,⁴⁰¹ it is important not to lose sight of the fact that these judgments are, as a matter of constitutional principle, flawed. It is a trite principle of constitutional law, emphasised by the Constitutional Court on a number of occasions, that one can only interpret legislation in a manner which is consistent with the Final Constitution if the meaning arrived at is one that the language of the legislation is reasonably capable of bearing and is not 'unduly strained'.⁴⁰² In our view, the meanings attributed to the phrase 'adversely affects the rights of any person' in *Grey's Marine* and in *Steenkamp* are unduly strained. The courts are, in our view, effectively engaged in legislative redrafting. If PAJA's definition of 'administrative action' limits the scope of FC s 33, which we submit it does, the proper approach is to assess whether that limitation complies with the limitations clause. In this case, one must thus assess whether the 'adversely affecting rights' requirement amounts to a reasonable and justifiable limitation of FC s 33, taking into account any justification that the state advances for the narrowing of the scope of administrative action in this manner. If a court then finds that the phrase is unconstitutional, the court could apply ordinary constitutional remedies: such as striking down the definition of administrative action or engaging in severance (e.g. striking out the word 'adversely') or reading-in (e.g. reading in the word 'interests').

We can now return to the question as to whether the phrase 'adversely affects the rights of any person' amounts to a reasonable and justifiable limitation on the constitutional right. It should be borne in mind that if the determination theory applies in interpreting PAJA (as the case law, including that of the Constitutional Court, thus far indeed suggests), the restrictive impact of this phrase is significantly reduced. This restrictive impact is further reduced by interpreting 'rights' broadly in at least two respects. First, it should not be restricted to constitutional rights but should include all forms of legal rights, including statutory and common-law rights.⁴⁰³ Second, O'Regan J, in examining the application of administrative justice in the Interim Constitution on behalf of the Constitutional Court,

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400 See Currie *The PAJA* (supra) at 46 fn 9 ('One of the most problematic aspects of s 1 is that it does not mention "legal interests" but confines itself to "rights". But it is a great deal less troublesome if, as the approach in *Steenkamp* suggests, one ignores that small problem.')

401 See, for example, Currie *The PAJA* (supra) at 79 (States that the SCA's interpretation of the 'adversely affecting rights' requirement in *Grey's Marine* 'cuts the Gordian knot created by this ill-advised insertion into the Act', and adds at 81 that the approach in *Grey's Marine* 'has considerable attraction'.)

402 See § 63.2(a)(iv) supra.

403 This approach finds support in the case law dealing with the analogous right of access to information in the Interim Constitution, which could only be invoked where it was required to exercise or protect a right. See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62, § 62.7.

stated *obiter* that it 'may well be appropriate' to adopt a broader notion of 'right' than that used in private law, to include circumstances where the State has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the State.⁴⁰⁴

If this broad meaning is given to 'rights' and the determination theory is adopted, then much of the potential unconstitutionality is alleviated. Nonetheless, we are of the view that the PAJA definition is still too narrow to comply with, and give effect to, the constitutional right to just administrative action in at least one limited respect. It would still exclude decisions that do not deprive or determine rights in an adverse manner despite the fact that such decisions may be administrative in nature, confer rights on some and impact adversely on the material interests of others (eg, the neighbouring landowners in *Bullock* or *Grey's Marine*). Cases of significant impact on the interests of third parties should constitute a category of administrative action excluded by PAJA but within constitutional purview, and which exclusion is not justifiable. Accordingly, the phrase 'adversely affects the rights of any person' is, in our view, unconstitutional as underinclusive. It seems to us that consideration should be given to removing this unconstitutionality in one of three ways: (a) deleting the phrase 'adversely affects the rights of any person'; (b) deleting the word 'adversely'; or (c) adding the words 'or interests' after the word 'rights'.

(vii) A direct, external legal effect

The final element of PAJA's definition of administrative action is that it must have 'a direct, external legal effect'. This requirement, which was yet another late addition to the Act by the Portfolio Committee, is derived from the German Federal Law of Administrative Procedure of 1976.⁴⁰⁵ Pfaff & Schneider explain the phrase as follows:⁴⁰⁶

As a general principle, ... the decision must not only have an effect internally, ie within the sphere of public administration The purpose is to avoid legal disputes with regard to measures and actions of public authorities that may well influence the final decision, but do not determine individual rights in a binding way.

The most important implication of this definitional element is that, together with the phrase 'adversely affects the rights of any person', it introduces the concept of finality. A decision will have a direct legal effect only if it has an actual and final impact on a person's rights or interests. It therefore appears that preparatory steps and recommendations that do not have such an impact will not amount

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to administrative action.⁴⁰⁷ Nevertheless, it is important to note that a preliminary or intermediate decision can still meet this requirement where it, in itself, has a material impact on individuals or groups.⁴⁰⁸ In addition, an intermediate decision (e.g. a recommendation) can, together with the final decision that results from that

404 *Premier, Mpumalanga* (supra) at para 32 fn 10.

405 The relevant provision reads as follows: 'Administrative act is every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences.'

406 Pfaff & Schneider (supra) at 71.

intermediate decision, amount to administrative action which is reviewable as a composite whole.⁴⁰⁹

The phrase 'external effect' implies that the decision must have a direct impact on a person or entity other than the administrative actor. It would therefore exclude a decision of a subcommittee which makes a recommendation to the final decision-making body. The phrase should not be taken literally. If it were, then it would exclude actions which affect the members of (or the persons within) the public body itself.⁴¹⁰ For example, the internal transfer of a prisoner to a higher level of security has a direct, external legal effect on the relevant person and should constitute administrative action.

63.4 The right to lawful administrative action

The right to lawful administrative action was entrenched in IC s 24(a) and is now entrenched in FC s 32(1). While its content overlaps with the principle of legality, the right to lawful administrative action differs from that principle because it applies only to administrative action.

The content of the right to lawful administrative could be broken down and analysed in terms of two components: a prospective component and retrospective judicial review component. With respect to the first prospective component, the

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right — just like the principle of legality — is of immediate application.⁴¹¹ Where administrative action is taken it is prospectively subject to the right of lawful administrative action. At a minimum, this component of the constitutional right serves the purpose of guarding against parliamentary ouster clauses covering administrative action. Such clauses would be invalid. Under our system of

407 See, for example, *Registrar of Banks v Regal Treasury Private Bank (under curatorship) & Another (Regal Treasury Bank Holdings Ltd intervening)* 2004 (3) SA 560 (W), 567; *Sasol Oil (Pty) Ltd & Another v Metcalfe NO* 2004 (5) SA 161 (W) at para 13. This outcome may be at odds with the decision in *Nextcom Cellular (Pty) Ltd v Funde NO & Others* 2000 (4) SA 491 (T)(Coetzee AJ held that a recommendation of the South African Telecommunications Regulatory Authority to the Minister of Communications as to the award of the third cellular licence constituted a reviewable decision.) See also *Oosthuizen Transport (Pty) Limited & Others v MEC, Road Traffic Matters, Mpumalanga, & Others* 2008 (2) SA 570 (T) at paras 28–32 (Holds that a recommendation to suspend operating permits had a direct, external legal effect under PAJA, because it was a jurisdictional requirement for the suspension, the recommending body was responsible for the investigation of the matter and the recommendation was 'aimed at' affecting, and had the capacity to affect, rights.)

408 See, eg, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA), 1999 (8) BCLR 845 (SCA) and *South African Heritage Recourses Agency v Arniston Hotel Property (Pty) Ltd* 2007 (2) SA 461 (C) at para 24 (a provisional protection order had a 'direct, external legal effect' as it temporarily 'froze' certain property rights.)

409 See, eg, *New Clicks* (supra) at paras 136–141.

410 As discussed at § 63.3(b)(v) supra, the majority in *Chirwa* held that a decision to dismiss a public sector employee does not amount to administrative action. It is unclear whether the majority regarded these acts as internal to the administration, and therefore as lacking an external effect (this is partly explained by the fact that the majority found that the dismissal did not amount to administrative action for purposes of FC s 33 of the Constitution and thus did not consider the application of PAJA). The minority (per Langa CJ) expressly did not address whether the dismissal had an 'external' effect for purposes of PAJA. *Ibid* at para 181.

constitutional supremacy (and unlike the previous system of parliamentary sovereignty), an Act of Parliament can no longer unjustifiably oust a court's constitutional jurisdiction and deprive the courts of their review function to ensure the lawfulness of administrative action.⁴¹² With respect to the retrospective component, the right of lawful administrative action is identified and enforced primarily through the mechanism of judicial review.⁴¹³ We focus on this second component in the pages that follow.

Both components of the right to lawful administrative action overlap with the principle of legality in relation to administrative action.⁴¹⁴ As noted above, this principle has been described as ensuring that the executive 'may exercise no power and perform no function beyond that conferred upon them by law'.⁴¹⁵ The right to lawful administrative action therefore constitutionalises the fundamental rule of administrative law that a decision-maker must act within his or her powers and must not act *ultra vires*.⁴¹⁶ It is clear that this right requires that an

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administrator must act in terms of, and in accordance with, the terms of an empowering statute or other law. This right therefore prohibits a decision-maker acting beyond the terms of the relevant empowering legislation and thus outlaws action which is *ultra vires* in the narrow sense.⁴¹⁷

411 Indeed, it is presumably subject to the principle of objective constitutional invalidity. On this doctrine, 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; M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

412 Parliamentary ouster clauses were, in the past, upheld in a number of cases, including *Staatspresident en Andere v United Democratic Front en 'n Ander* 1988 (4) SA 830 (A) and *Natal Indian Congress v State President & Others* 1989 (3) SA 588 (D). One could argue that the courts' general supervisory function with respect to administrative action is additionally or alternatively provided for by the right of access to court in FC s 34. See J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59, § 59.4(a)(i).

413 This is not, however, exclusive. For instance, the administrative procedures of internal review and appeal are non-judicial mechanisms that would also seek to give effect to the right to lawful administrative action. See for instance the Refugees Appeal Board in the Refugees Act 130 of 1998 and s 38 of the National Health Act 61 of 2003. This body of administrative law is not currently fully-fledged or articulated but is likely to develop significantly under the Final Constitution. Note that this review is separate from the constitutionally authorised review in terms of the PAJA that a tribunal may engage in — although no such tribunals have been established or designated. See Currie *The PAJA* (supra) 154–155.

414 See *Fedsure* (supra) at para 59. See also § 63.2(b) supra (Discussion of the application of this constitutional principle beyond administrative action.) Given the explicit entrenchment of the right to lawful administrative action in the specific context of administrative action, the general principle would seem to be that its protection would be at least equivalent to the protection offered by the implicit principle of legality outside of those bounds.

415 See *Fedsure* (supra) at para 56.

416 See *Pharmaceutical Manufacturers* (supra) at para 50 ('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.')

We believe, however, that the right to lawful administrative action goes further and applies to acts that are *ultra vires* in a broader sense of that term. As Lawrence Baxter and other writers have pointed out, the traditional grounds of common-law judicial review are founded on this broad *ultra vires* principle. Where a decision-maker acts, for example, for an ulterior purpose, in bad faith, takes into account irrelevant considerations or fails to take into account relevant considerations, or makes an error of law, he or she acts beyond his or her powers.⁴¹⁸

PAJA gives effect to this constitutional right to lawful administrative action principally by providing for judicial review of all administrative action in s 6 of the Act. Section 6(2) sets out a comprehensive list of grounds on which administrative action can be judicially reviewed, including: that the administrator was not authorised to take the action by the empowering provision; that the administrator acted under a delegation of power which was not authorised by the empowering provision; that a mandatory and material procedure or condition was not complied with; that the action was taken for a reason not authorised by the empowering provision; and that the action itself is not authorised by the empowering provision.⁴¹⁹

While it is beyond the scope of this chapter to cover the materials interpreting each of the PAJA grounds of review, the remainder of this section is devoted to offering a constitutional perspective on these grounds. Other texts provide a view of the grounds of judicial review informed by canons of statutory interpretation.⁴²⁰

The most significant shift is the constitutional basis for the institution of judicial review.⁴²¹ Consistent with our general approach in this chapter, we would argue that this change in the legal landscape has two particular implications: that the common law review jurisprudence may not be taken for granted, and that it

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must be critiqued and reformulated; and, secondly, the intensity of judicial review must be evaluated in terms of the separation of powers doctrine.⁴²²

417 See *Farjas (Pty) Ltd & Another v Regional Land Claims Commissioner; KwaZulu-Natal* 1998 (2) SA 900 (CC), 1998 (5) BCLR 579 (LCC) at para 18 (IC s 24(a) 'cast[s] a duty on reviewing courts to be all the more astute to ensure that public officials confine themselves strictly to the law which confers powers on them.')

418 See Baxter *Administrative Law* (supra) 30–31. See *Estate Geekie v Union Government & Another* 1948 (2) SA 494 (N), 502 ('In considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted *ultra vires* or not.')

419 Section 6(2)(a)(i) and (ii), (b), (e)(i) and (f)(i). These provisions appear to provide for review for *ultra vires* in the narrow sense. In our view, the remainder of the grounds of review in s 6(2) also give effect to the right to lawful administrative action by providing that administrative action may be reviewed, for amongst other things, bias, errors of law, ulterior purpose or motive, or bad faith. All such defects in decision-making contravene the right to lawful administrative action in the broad sense.

420 See, eg, Currie & Klaaren *Benchbook* (supra) at 150–74; and Currie *The PAJA* (supra) at 152–174.

421 See Currie *The PAJA* (supra) at 155–156.

In respect of this latter contention, it may be appropriate to outline our view on the concept of standards of review.⁴²³ In our view, the effect of the Final Constitution (and the entrenchment of the right to just administrative action, in particular) is not a rising tide that lifts all boats of judicial review. Its effect is not to achieve a general heightening of judicial review. Instead, the standard of intensity of judicial review of administrative action will differ according to the context. In this respect, we agree with Cora Hoexter's suggestion that there is a pressing need to develop an appropriate approach to variability. Nonetheless, this differentiation is by no means case specific and potentially casuistic — it ought not to vary according to each and every set of circumstances.⁴²⁴ In order to satisfy constitutional dictates of rationality and, insofar as possible, to provide predictability and accountability, the standard of judicial review should, we argue, differ according to general categories. For instance, decisions will need to take into account the statutory context in which they are taken and therefore vary in their degree of deference (or respect) offered to the administrators having taken the decision. While theoretically appealing, it remains to be seen whether this degree of discipline on the variability impulse will be accepted and, more significantly, usefully used by the judiciary.

Second, the constitutional right to lawful administrative action would also appear to prohibit vague and uncertain delegations of law-making power as well as the conferral of over-broad discretionary powers on a decision-maker. This view finds support in *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO*.⁴²⁵ In *Janse van Rensburg*, the Constitutional Court struck down a provision of the Consumer Affairs (Unfair Business Practices) Act⁴²⁶ that enabled the Minister of Trade and Industry to take steps to prevent the continuation of business practices which were the subject of an investigation and in addition to attach and freeze assets. Interpreting the right of just administrative action directly, the Court held that these far-reaching powers could not be used in the absence of procedural fairness and without guidance as to how

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they are to be exercised. Goldstone J, in striking down the relevant provision, concluded as follows:

Every conferment by the Legislature of an administrative discretion need not mirror the provisions of the Constitution or the common law regarding the proper exercise of such

422 The debate over whether subjective jurisdictional facts ought to be given less weight in the constitutional era ought to be considered against the backdrop of the doctrine of the separation of powers. See Currie *The PAJA* (supra) at 163; Hoexter *Administrative Law* (supra) at 270–271.

423 See Currie *The PAJA* (supra) at 157, Hoexter *Administrative Law* (supra) at 143, 200–201, and 328–330, De Ville *Judicial Review* (supra) at 23–34 (Identifying an approach of institutional comity) and 213–216 (Identifying a deferential rationality, an unreasonableness, and a rational connection standard of review within reasonableness); H Corder 'Reviewing "Executive Action"' (supra) at 73–78; J Klaaren 'Five Models of Intensity of Review' in J Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 79 – 82. De Ville's entire work can be seen as a working out of a model of judicial review that attempts to specify different degrees of scrutiny.

424 Cf Hoexter *Administrative Law* (supra) at 200–201 (Conceiving variability as case-specific.)

425 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) ('*Janse van Rensburg*').

426 Act 71 of 1988.

powers. However, as this court has already held (in the context of a limitations analysis), the constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.⁴²⁷

The Constitutional Court found that uncircumscribed administrative discretion, together with the other circumstances of the case, was contrary to the right to procedural fairness.⁴²⁸

Subsequent cases, albeit in a non-administrative action context, have emphasised the point of principle.⁴²⁹ *Janse van Rensburg* thus represents authority for the fact that, in certain circumstances, a broad decision-making power, which does not give adequate guidance as to the manner in which it is to be exercised, may be unconstitutional.⁴³⁰ Still, *Janse van Rensburg* does not stand for the proposition that such breadth on its own (at least in primary legislation) will constitute an infringement of the right of just administrative action. Any discretion will therefore need to be assessed on its own terms to determine whether it is constitutionally defective in the manner contemplated in *Janse van Rensburg*.

Third, the common law relating to mistake of law and that relating to subjective jurisdictional facts is inconsistent with the right to lawful administrative action and requires reconceptualisation in the constitutional era. In the pre-constitutional case of *Hira & Another v Booysen & Another*,⁴³¹ the Appellate Division held that an

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agency's interpretation of its empowering provisions is reviewable unless the legislature intended to commit the question of interpretation solely to the agency's discretion. Among others, Michael Asimow has convincingly argued that, under the Final Constitution, Parliament can no longer completely commit a question of legal

427 *Janse van Rensburg* (supra) at para 25. See also *Dawood & Another v Minister of Home Affairs & Others*; *Shalabi & Another v Minister of Home Affairs & Others*; *Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 42–48, which held that an uncircumscribed discretion would not comply with the limitations clause where a fundamental right is infringed. The latter decision applies only where the exercise of a discretion has the effect of infringing a fundamental right.

428 This case illustrates the close connection between the requirement of lawful administrative action and procedural fairness as the Court could just as easily have found that the relevant provisions contravened the right to lawful administrative action. This appears to have been accepted by the Constitutional Court. See *Janse van Rensburg* (supra) at para 19.

429 See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) ('*Affordable Medicines Trust*') at paras 27–28. Nevertheless, *Affordable Medicines Trust* can, in some respects, be seen as a retreat from *Dawood* and *Janse van Rensburg*. The Court in *Affordable Medicines Trust* held that sufficient guidance was given to the decision-maker, despite the wide wording of the relevant discretion (the power to issue licences 'on the prescribed conditions'), because the factors constraining that discretion could be established by having regard to the provisions and objects of the empowering legislation read as a whole. *Ibid* paras at 30–39.

430 Nevertheless it is important to note that the breadth of the power was only one of the factors which led the Court to conclude that the right to procedural fairness was infringed in this particular instance. *Janse van Rensburg* (supra) at para 25. The Court also emphasised the cumulative effect of the other features set out in para 23 of the judgment.

431 1992 (4) SA 69 (A) at 93.

interpretation to an agency's discretion as all interpretive issues must now be reviewable.⁴³² Asimow suggests, appropriately in our view, that courts retain interpretive authority but give deference to carefully reasoned interpretations of ambiguous statutory language where an agency's expertise gives it some interpretive advantage over the courts. While *Hira* is essentially on the right track, a recalibration (either general or in particular areas of statutory interpretation) is necessary: legislation should not be permitted effectively to oust the courts' power to review a mistake of law.⁴³³ While we are somewhat more hesitant with respect to the doctrine of subjective jurisdictional facts⁴³⁴— due to its potential for judicial overreach — a similar argument can in principle be made for a version of that doctrine.⁴³⁵ We should, however, not be read as suggesting that a subjectively-phrased discretion renders the administrative decision immune from administrative review. It may simply suggest that a lower level of judicial scrutiny is appropriate.⁴³⁶

Fourth, we note that the right of lawful administrative action has engendered a new ground of review: that of a material mistake of fact. In *Pepcor*, certificates issued on the basis of incorrect actuarial information were the basis for deciding to transfer money to a retirement fund. This decision was set aside on the basis of a material mistake of fact. In reaching this conclusion, the Supreme Court of Appeal drew more support from the principle of legality than from FC s 33(1). While PAJA does not list this ground of review explicitly, the Act's silence has not prevented its use.⁴³⁷

63.5 The right to procedurally fair administrative action

(a) Introduction

The right to procedurally fair administrative action, entrenched in FC s 33(1), is a right of participation. This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them. It, at a

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minimum, entrenches the common law rules of natural justice. These rules are embodied in two fundamental principles — the right to be heard (*audi alteram partem*) and the rule against bias (*nemo iudex in sua causa*).

432 M Asimow 'Administrative Law under South Africa's Final Constitution: The Need for an Administrative Justice Act' (1996) 113 *SALJ* 613, 623.

433 Cf Hoexter *Administrative Law* (supra) at 258–259 (Seeming to endorse the *Hira* approach without change in the constitutional era).

434 Subjective jurisdictional facts include subjectively phrased discretions such as 'is satisfied that', 'in his discretion' and 'has reason to believe'.

435 See J Klaaren 'Teaching Procedural Jurisdictional Facts' (1998) 14 *SAJHR* 60.

436 For a similar approach, based on deference, see Hoexter *Administrative Law* (supra) at 270–271. Hoexter also points out that wide, subjective discretions may, at times, fall foul of the requirement that the conferral of decision-making power must not be unguided.

437 Section 6(2)(i) of PAJA provides for a catch-all ground of review where 'the action is otherwise unconstitutional or unlawful'.

It is important, at the outset, to note that the right is to *procedural* fairness. It goes to the procedure by which administrative decisions are made and does not safeguard a right to *substantive* fairness. The majority of the Constitutional Court made this clear in *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another*.⁴³⁸ It concluded that a standard of substantive fairness 'would drag Courts into matters which, according to the separation of powers, should be dealt with at a political and administrative level and not at a judicial level'.⁴³⁹

(b) The rationales for procedural fairness

The primary rationale for the right to procedural fairness is that it improves the quality of administrative decision-making by ensuring that all relevant information, interests and points of view are placed at the administrator's disposal.⁴⁴⁰ As Ngcobo J remarked on behalf of the Constitutional Court:

It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations. A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained.⁴⁴¹

Procedural fairness thus promotes informed, rational and legitimate decision-making and reduces the risk of arbitrary decisions.⁴⁴² In so doing, it enhances the constitutional principles of openness, accountability and participation.⁴⁴³

This first rationale is related to a second: Procedural fairness gives a person potentially affected by a decision a chance to influence that decision.⁴⁴⁴ The

438 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) ('*Bel Porto*') at para 88.

439 We note, however, that the requirement of reasonable administrative action approaches that of substantive fairness and requires courts, to some extent, to engage with the merits of administrative decision-making. See § 63.6 *infra*.

440 See *Janse van Rensburg* (*supra*) at para 24 ('[O]bservance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken.') See also Mokgoro J in *De Lange v Smuts* (*supra*) at para 131 ('Everyone has the right to state his or her case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance'.)

441 *Zondi* (*supra*) at para 112. See also Ngcobo J in *Masetlha* (*supra*) at para 187; and Megarry J in *John v Rees & Others; Martin & Another v Davis & Others; Rees & Another v John* [1970] Ch 345 ('*John v Rees*') at 402, quoted with approval in *POPCRU* (*supra*) at para 76.

442 *POPCRU* (*supra*) at 76. See also *De Lange v Smuts* (*supra*) at para 131; *De Ville Judicial Review* (*supra*) at 217. See *Masetlha* (*supra*) at para 187 (Ngcobo J, dissenting) (Decision-maker having all the relevant facts at his or her disposal 'is essential to rationality, the sworn enemy of arbitrariness'.)

443 See, eg, FC s 1(d) and FC s 195 (Setting out the values and principles of public administration).

444 See *Masetlha* (*supra*) at para 75.

exercise of procedural fairness leaves those concerned 'with the feeling that their views have been taken into consideration in the process'.⁴⁴⁵ At least two benefits flow directly from such participation. First, persons who have had a real chance to influence a decision are more likely to accept the decision even if it goes against them. As Megarry J remarked, one should not underestimate 'the feelings of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events'.⁴⁴⁶ Second, allowing affected persons an opportunity to influence decisions that affect them affirms their equal worth and human dignity.⁴⁴⁷ These rationales are well captured in the following passage:

It is of first importance in a democracy that, when public bodies make decisions affecting the rights, liberties, interests, or legitimate expectations of individuals, they are obliged to treat such individuals with respect, and as participants in, rather than as mere objects of, the administrative process. In a relationship between citizen and state thus conceived lie the seeds of a healthy polity, in which public bodies earn the trust of individuals; in which individuals are paid the respect due to them by state bodies; and in which the chances of good decisions are enhanced.⁴⁴⁸

As discussed below, the right to procedurally fair administrative action is not confined to those decisions that have an effect on individuals. It extends to administrative decisions that have a general effect on the public. This post-constitutional development in our law enhances the constitutional principle of participatory democracy. Our Constitutional Court has described participatory democracy as 'one of [our democracy's] basic and fundamental principles': it 'provides vitality to the functioning of representative democracy'.⁴⁴⁹ The Court's endorsement of the principle of participatory democracy, in the context of the right to participate in the parliamentary legislative process, is expressed in terms that apply equally to general administrative decisions (like rule-making):

The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar

445 See *Bel Porto* (supra) at para 245.

446 See *John v Rees* (supra) at 402, quoted in *POPCRU* (supra) at para 76, fn 89.

447 See *De Ville Judicial Review* (supra) at 217; Hoexter *Administrative Law* (supra) at 326-327; TRS Allan 'Procedural Fairness and the Duty of Respect' 1998 *Oxford Journal of Legal Studies* 497.

448 *Beatson, Matthews and Elliott's Administrative law: Text and Materials* (3rd Edition, 2005) 391.

449 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) ('*Doctors for Life*') at para 145 (Ngcobo J) and *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC). See K Govender 'An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa' (2003) 18 *SAPL* 404. For a discussion of the fundamental importance of democracy, including participatory democracy, under the Final Constitution, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. In *Doctors for Life*, the Constitutional Court used the principle of participatory democracy as a basis for holding that legislatures are often obliged to allow interested parties an opportunity to comment during the legislative drafting process.

with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation 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. 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.... Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy.⁴⁵⁰

In fact, it may be said that public participation is of greater importance in the context of administrative decision-making in that subordinate legislation lacks to some extent the democratic legitimacy of original legislation that emanates from democratically elected legislatures. Participation in such a decision-making process thus acts as a 'surrogate political process'⁴⁵¹ and enhances the legitimacy of administrative action 'by emphasising openness, consultation and reasoned decision-making'.⁴⁵² As with the right to a hearing in individual cases, public participation in relation to administrative action that has a general impact thus advances a number of important objects. As Cora Hoexter puts it:

Public participation encourages people to exercise their rights and perform their duties as citizens; it educates citizens and counters their sense of 'powerlessness'; it leads to better and more informed decisions; and it helps ensure that administrators remain or become politically accountable to those affected by their decisions.⁴⁵³

(c) The flexible nature of procedural fairness

The content of procedural fairness varies widely depending on the contexts in which it is applied. This was true under the common law and continues to be the case under the Final Constitution.⁴⁵⁴ As Ngcobo J has noted, '[t]he very essence of the requirement to act fairly is its flexibility and practicability'.⁴⁵⁵

This flexibility is reflected in s 3(2)(a) of PAJA. Section 3(2) provides that 'a fair administrative procedure depends on the circumstances of each case'. This

450 See *Doctors for Life* (supra) at paras 115–116. See also *New Clicks* (supra) at paras 156–157 (Chaskalson CJ).

451 L Baxter 'Rulemaking and Policy Formulation in South African Administrative Law Reform' in H Corder (ed) *Administrative Law Reform* (1993) 176, 179.

452 Currie *The PAJA* (supra) at 118.

453 Hoexter *Administrative Law* (supra) at 78. See also Hoexter's discussion of public participation at 75–84; C Mass 'Section 4 of the AJA and procedural fairness in administrative action affecting the public: A comparative perspective' in C Lange and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 63 at 63–64; Currie & Klaaren *Benchmark* (supra) at 108–9; and Currie *The PAJA* (supra) at 118.

454 See, eg, *Premier, Mpumalanga* (supra) at para 39; *SARFU* (supra) at para 216; *Ed-U-College* (supra) at para 19; *Zondi* (supra) at paras 113–114; *Janse van Rensburg* (supra) at para 24; *Kyalami Ridge* (supra) at para 101; *New Clicks* (supra) at paras 145 and 152.

455 *Masetlha* (supra) at para 190.

section has been described as '[codifying] the idea, at the heart of the right at common law, that procedural fairness is situation-specific and what is fair depends on the circumstances'.⁴⁵⁶

Flexibility is perhaps more important in the context of procedural fairness than in any other area of administrative law. There is a need to balance the interests of the individual or group affected by the administrative action against the public interest in efficient administration. In the Constitutional Court's first decision regarding procedural fairness, *Premier, Mpumalanga*, O'Regan J put the matter as follows:

In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness.⁴⁵⁷

In another important decision reiterating the circumstances-based basis of the right to procedural fairness, the Constitutional Court in *Kyalami Ridge* wrote:

Where, as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it.⁴⁵⁸

We now turn to examine the scope and the content of the right to procedural fairness. These concerns are primarily governed by PAJA and engage the right to procedural fairness in two contexts: that of administrative action affecting any person (ie individual administrative action) and that of administrative action affecting the public (ie general administrative action).

(d) The scope of procedurally fair administrative action affecting any person

The right to procedural fairness was constitutionally entrenched in IC s 24(b). IC s 24(b) provided that 'every person shall have the right to procedurally fair administrative action where any of his or her rights or legitimate expectations is affected

456 See *POPCRU* (supra) at para 70.

457 *Premier, Mpumalanga* (supra) at para 41. See also *Walele* (supra) at para 123 (O'Regan J, dissenting) ('That administrative action be procedurally fair is therefore an important constitutional right which we should seek to protect. Yet, the Constitution does not require a knee-jerk response of affording a right to a hearing in every case regardless of the context or the circumstances of those affected. These are countervailing considerations of equal importance to the interpretation of both section 33 of the Constitution and section 3(1) of PAJA.')

458 *Kyalami Ridge* (supra) at para 101.

or threatened'. FC s 33(1) removed the in-built qualification (as it did with the other elements of the right) and simply provided that 'everyone' is entitled to administrative action that is procedurally fair.

Whereas FC s 33(1) suggests that *all* administrative action must be procedurally fair, s 3(1) of PAJA seems to reintroduce a similar threshold to that contained in IC s 24(b). Section 3(1) of PAJA provides that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'.

(i) The difficulty in reconciling s 3(1) with the definition of 'administrative action' in s 1 of PAJA

A significant interpretive difficulty that arises in relation to the scope of procedural fairness under PAJA is that s 3(1) applies to 'administrative action' which 'materially and adversely affects the *rights or legitimate expectations* of any person',⁴⁵⁹ while 'administrative action' is defined in s 1 as a decision which adversely affects any person's *rights*. On the face of it, procedural fairness therefore appears, in some respects, to apply to a narrower category of action than 'administrative action' (the inclusion of the word 'materially') and, in other respects, to a wider category of action (that which affects legitimate expectations and not only rights).⁴⁶⁰ The latter conclusion would, however, be logically inconsistent (at least under usual principles of statutory interpretation). Action must first constitute 'administrative action' under PAJA before one can consider whether it is subject to the requirement of procedural fairness. The ambit of s 3(1) cannot be wider than the ambit of 'administrative action' in s 1.⁴⁶¹

The relationship between the definition of 'administrative action' in s 1 and the wording of s 3(1) comes into sharp focus when one considers the outcome in *Grey's Marine*. In *Grey's Marine*, the Supreme Court of Appeal held that the decision to lease quayside property in Hout Bay harbour amounted to administrative action because it had direct and immediate consequences for the lessee. As discussed above, the SCA thus effectively disregarded the word 'adversely' in the definition of 'administrative action'.⁴⁶² One of the reasons that the SCA offered for giving this non-literal meaning to the phrase 'adversely affect the rights of any person' in s 1 was because a literal construction would be inconsistent with s 3(1), 'which envisages that administrative action might or might not affect rights adversely'.⁴⁶³ Despite holding that the decision amounted to 'administrative action'

459 Emphasis added.

460 Some commentators have used the differing directions in which these two conclusions pull to attempt to construct an interpretation of the PAJA consistent with their interpretation of FC s 33. We have referred to such interpretations above as strained and prefer here to work directly and closely with the doctrine of separation of powers.

461 But see *Walele* (supra) at paras 37 and 126.

462 See § 63.3(c)(vi) supra.

463 *Grey's Marine* (supra) at para 23.

for purposes of PAJA, the SCA, however, held that s 3(1) was not triggered and the adjacent landowners were thus not entitled to a hearing prior to the decision. Nugent JA remarked that, while 'rights' may have a wide connotation in this context, and may include 'prospective rights that have yet to accrue', 'it is difficult to see how the term could encompass interests that fall short of that'.⁴⁶⁴ Nugent JA then appeared to emphasise the word 'adversely' in s 3(1) — the same word that the court effectively disregarded in the definition of 'administrative action'. He wrote: 'It has not been shown that any rights — or even prospective rights — of any of the appellants (or of any other person) have been *adversely* affected by the Minister's decision.'⁴⁶⁵

A number of academics have attempted to reconcile the 'logical puzzle'⁴⁶⁶ presented by the inclusion of 'legitimate expectations' (a wider concept than rights) in s 3(1), with the fact that PAJA only applies to action that adversely affects 'rights'.⁴⁶⁷ One such approach to solving this puzzle is to emphasise the word 'materially' in s 3(1). The inclusion of this word indicates that a certain class of administrative action (as defined) will not require the application of procedural fairness. That is, those actions which affect rights but do not affect one's rights or legitimate expectations in a *material* manner do not trigger procedural fairness. In such a situation the rules of procedural fairness will apply if the action materially affects the relevant person's legitimate expectations.⁴⁶⁸ According to this approach, legitimate expectations only matter when rights are adversely affected in a non-material manner. While logically consistent, this view appears to unduly strain the words of PAJA and would give legitimate expectations very little scope in which to operate.

A second approach is to regard a 'legitimate expectation' that is both materially and adversely affected, as contemplated in s 3(1), as a species of 'right' for purposes of the definition of 'administrative action'.⁴⁶⁹ This approach is unattractive. It collapses the distinction between rights and legitimate expectations and is inconsistent with the fact that PAJA itself uses these two distinct terms. PAJA's use of these two terms of art suggests that they have different meanings. Indeed, they are placed alongside one another in s 3(1).

464 In this regard, as is apparent from the footnotes in *Grey's Marine*, Nugent JA essentially followed the approach indicated by the Constitutional Court in *Kyalami Ridge*. *Kyalami Ridge* (supra) at para 100.

465 *Grey's Marine* (supra) at para 30 ((Emphasis added). In the same paragraph, Nugent JA continued: 'None of the appellants has any right to use the property that has been let, or to restrict its use by others, nor has any case been made out that their rights of occupation of their premises have been unlawfully compromised'.)

466 Currie & Klaaren *Benchbook* (supra) at 93.

467 See Hoexter *Administrative Law* (supra) at 358 (The use of the phrase 'legitimate expectations' in s 3(1) 'seems entirely illogical'.)

468 See Currie & Klaaren *Benchbook* (supra) at 93-94. The authors accept that this will only apply to a narrow class of action.

469 See Hoexter *Administrative Law* (supra) at 359. Hoexter, however, notes that this approach 'fails to appeal to logic since ... the whole point of legitimate expectations is that they are not rights'.

Jacques De Ville offers another interpretation. He contends that the phrase 'materially and adversely affects rights and legitimate expectations' does not qualify the scope of *application* of procedural fairness but rather identifies factors that affect the *content* of procedural fairness.⁴⁷⁰ While this gloss on the text is creative, it seems to us to strain the language of s 3(1) of PAJA, which appears to use the phrase 'materially and adversely affects the rights or legitimate expectations' as a threshold requirement.⁴⁷¹ Moreover, to argue that s 3(1) merely sets out factors for the content of a duty to act fairly would potentially collapse the distinction between scope and content. This distinction — although never absolute — has been a useful and accepted concept in procedural fairness jurisprudence.

The approach to which we find ourselves most attracted requires that the phrase 'materially and adversely affects rights' in s 3(1) refers only to decisions which *deprive* one of rights and not those which determine one's rights. We point out that this approach differs from our preferred position under the definition of 'administrative action'. There, one will recall, we argued that the determination theory should apply.⁴⁷² If this approach is adopted, 'administrative action' could include a broad category of action which *determines* one's rights and procedural fairness could apply to a narrower class of action which *deprives* one of one's rights or legitimate expectations. Although this approach may also seem somewhat artificial, it does satisfy constitutional purpose and attaches real meaning to the term 'legitimate expectations'. In addition, this approach is supported by the fact that, unlike the definition of administrative action, s 3(1) couples the term 'rights' with 'legitimate expectations'. If rights meant the determination of one's rights in s 3(1), there would seem little need to include the phrase 'legitimate expectations'.⁴⁷³

In the recent decision of *Walele*, the Constitutional Court avoided the difficulty of attempting to reconcile PAJA's definition of 'administrative action' and s 3(1) by, in effect, holding that the definition of 'administrative action' in s 1 does not apply to the use of that term in s 3(1) (or the defined term is 'supplemented' for the purposes of s 3(1)). Jafta AJ, writing on behalf of a bare majority of the Court (which was divided six judges to five), pointed out that applying the definition of 'administrative action' to s 3 would lead to 'incongruity or absurdity' and, as a

470 See De Ville *Judicial Review* (supra) at 222–223. See § 63.5(e) *infra*.

471 See *Walele* (supra) at para 28 ('*The express precondition* for the requirement to act fairly, in terms of [s 3], is that the administrative action must materially and adversely affect the rights or legitimate expectations of the aggrieved person' (emphasis added).)

472 See § 63.3(c)(vi) *supra*.

473 See Mureinik 'Reconsidering Review' (supra) at 44–45 (Expresses the view that similar wording in drafts of the Bill of Rights proposed by the African National Congress and the government amounted to the adoption of the liberal version of the deprivation theory, ie, the deprivation theory expanded by the doctrine of legitimate expectations.) The down-side of this approach is that the scope of procedural fairness is limited in a manner which may not fully give effect to the constitutional right to procedural fairness, unless the broad approach to legitimate expectations discussed below is applied (ie, a legitimate expectation arises whenever the duty to act fairly requires a hearing.)

result, 'administrative action' in s 3 'cannot mean what was intended in the definition section'.⁴⁷⁴ For purposes of s 3, s 1 was essentially read out of the statute. The majority, therefore, accepted that s 3 confers procedural fairness on persons whose legitimate expectations are materially and adversely affected.

O'Regan ADCJ, writing on behalf of the five-judge minority in *Walele*, dealt with what she described as 'the enigma' of the relationship between the definition of 'administrative action' and s 3(1), by adopting the position that, in determining the scope of procedural fairness, the specific provision of s 3(1) should take precedence over the general definition of 'administrative action' (particularly in light of the fact that s 3(1) is aimed at giving effect to the constitutional right to procedurally fair administrative action).⁴⁷⁵ In this approach, s 1 is not read out of the statute but is essentially altered with respect to s 3 to fit the ends of the latter section. She reasoned that:

The apparent contradiction between the two provisions should be resolved by giving effect to the clear language of section 3(1) which expressly states that administrative action which affects legitimate expectations must be procedurally fair. Thus, the narrow definition in section 1 must be read to be impliedly supplemented for the purposes of section 3(1) by the express language of section 3(1). If this were not to be done, the clear legislative intent to afford a remedy to those whose legitimate expectations are materially and adversely affected would be thwarted.⁴⁷⁶

While we are taking on a full set of eleven judges here (!), it seems to us that the approaches of both (!) the majority and the minority in *Walele* do not satisfactorily explain the relationship between the definition of 'administrative action' and s 3(1). The interpretation of s 3 of PAJA cannot be cabined within the specific constitutional sub-right of procedural fairness, but should rather be understood within the context of FC s 33 as a whole. It cannot, we submit, be the case that the right to procedural fairness applies to a wider category of administrative action than other aspects of the right to just administrative action reflected in PAJA. While it is sometimes argued that procedural fairness applies to all conduct that is susceptible to administrative law and to administrative law review, it is generally understood that it applies to a narrower range. It has never been suggested that the right to procedural fairness extends to a wider range of conduct than, for example, the right to lawful administrative action. In our view, the approach of the Constitutional Court in *Walele* is thus best understood as a decision in which the Court pragmatically engages with the proper scope of the application of s 3(1), while leaving the question of the constitutionality of the definition of 'administrative action' for another day.⁴⁷⁷ Against this necessarily

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less-than-clear backdrop, we now consider the meaning of the crucial phrase in s 3(1): 'materially and adversely affects the rights or legitimate expectations of any person'.

474 *Walele* (supra) at para 37.

475 *Ibid* at para 126.

476 *Ibid*.

477 *Walele* also expressly leaves open the question as to the constitutionality of s 3(1). *Walele* (supra) at paras 30 and 123.

(ii) The meaning of 'materially and adversely affects the rights or legitimate expectations of any person'

For the reasons discussed above, it may well be that the phrase 'adversely affects' in s 3(1) should be read as referring only to decisions that *deprive* one of rights or legitimate expectations and not also those that *determine* rights. We note, however, that the position is by no means clear. Some support for the determination theory can be found in the fact that a number of decisions of our courts have assumed, though not decided, that the phrases 'where any of his or her rights ... is affected or threatened' in IC s 24(b) (and FC item 23(2)(b) of Schedule 6) and 'adversely affects the rights ... of any person' in s 3(1) of PAJA (both of which delineate the scope of procedural fairness) cover not only existing rights but also prospective rights.⁴⁷⁸

In addition, and again for the reasons discussed above, we submit that the term 'rights' should be interpreted broadly as including all forms of legal rights as well as situations where the State has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the State.⁴⁷⁹

Nevertheless, 'rights' cannot be equated with interests.⁴⁸⁰ Such an interpretation would be inconsistent with the fact that the concepts of rights and interests are distinct in administrative law and the fact that, during the process of drafting PAJA, the Parliamentary Portfolio Committee specifically amended the version of PAJA prepared by the Law Commission which provided that administrative action must be procedurally fair where it 'adversely affects rights, interests or legitimate expectations'.

The next important question that arises is: what is meant by the phrase 'legitimate expectations' in s 3(1) of PAJA? The doctrine of legitimate expectations was accepted by the Appellate Division in *Administrator, Transvaal & Others v Traub & Others*.⁴⁸¹ This doctrine extended the scope of the right to a hearing

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beyond circumstances in which a person's property, liberty or existing rights were adversely affected, to those where he or she has a legitimate expectation which entitles him or her to a hearing. The traditional approach to legitimate expectations is that they arise 'either from an express promise given on behalf of the public authority or from the existence of a regular practice which the claimant can

478 See *Kyalami Ridge* (supra) at para 100 ('It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to protection ...'); *Grey's Marine* (supra) at para 30: ('Rights' in s 3(1) of PAJA 'may include prospective rights that have yet to accrue'). The determination theory also enjoys academic support. See, eg, De Ville *Judicial Review* (supra) at 224-227). But see *Walele* (supra) at 32 (The reference to a 'pre-existing right' appears in Jafta AJ's judgment for the majority of the Constitutional Court — it thereby intimates a preference for the deprivation theory.)

479 See § 63.3(c)(vi) supra.

480 See *Kyalami Ridge* (supra) at para 100; *Grey's Marine* (supra) paras 30-31. These judgments indicate skepticism in this regard. The majority judgment of Jafta AJ in *Walele* fairly emphatically indicates that interests falling short of rights or legitimate expectations do not trigger the right to a hearing in s 3 of PAJA. *Walele* (supra) at para 44. See also *Walele* (supra) at para 127 (O'Regan J).

481 1989 (4) SA 731 (A).

reasonably expect to continue'.⁴⁸² On this approach, a legitimate expectation flows from an express promise or undertaking or from a regular and long-standing past practice.⁴⁸³ This traditional approach to the ambit of legitimate expectations has been applied by the Supreme Court of Appeal in a number of decisions. For example, in *South African Veterinary Council & Another v Syzmanski*, Cameron JA stated that the requirements for a legitimate expectation included that it was based on a clear, unambiguous representation that was induced by the decision-maker.⁴⁸⁴

It is important to note that a legitimate expectation can be either substantive or procedural. That is, as O'Regan J states in *Premier, Mpumalanga*, '[e]xpectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind'.⁴⁸⁵ For example, a legitimate expectation will arise not only where an official promises that a particular procedure will be followed but also where an official promises that a particular substantive benefit will be given.

The problem with the traditional approach to the ambit of legitimate expectations in the context of s 3(1) of PAJA is that it fails to afford a right to a hearing where a person's rights are not materially affected by the decision and where there

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is no expectation based on prior conduct of the administrator — and yet the facts cry out for a hearing.⁴⁸⁶ As Wandisile Wakwa-Mandlana and Clive Plasket observe in relation to the approach of the SCA in *Grey's Marine*:

482 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, 944 (HL).

483 It will not always be reasonable to expect that a past practice will continue (in which case, that practice will not give rise to a legitimate expectation). See *Ed-U-College*, in which the Court examined all circumstances of the case, in holding that procedural fairness does not require the right to a hearing for all affected persons simply because a decision is taken which has the effect of reducing annual subsidies to schools. During the course of her judgment, O' Regan J wrote: 'Subsidies are paid annually and, given the precarious financial circumstances of education departments at present, schools and parents cannot assume, in the absence of any undertaking or promise by an education department, that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the legislature has reduced the amount allocated for distribution.' *Ed-U-College* (supra) at para 22. A single previous occurrence obviously does not give rise to a regular practice. See *Walele* (supra) at paras 41 and 135.

484 2003 (4) SA 42 (SCA), 2003 (4) BCLR 378 (SCA) para 19, quoting Heher J in *National Director of Public Prosecutions v Phillips & Others* 2002 (4) SA 60 (W), 2002 (1) BCLR 41 (W) at para 28, with approval. The requirements for a legitimate expectation set out in these cases are: (a) a representation that is 'clear, unambiguous and devoid of relevant qualification'; (b) the expectation is reasonable; (c) the representation was induced by the decision-maker; and (d) the representation was one which it was competent and lawful for the decision-maker to make. See also *Grey's Marine* (supra) at para 33 ('Counsel for the appellants could point us to *no conduct on the part of the State or any of its officials* to suggest that the appellants were brought under the impression that that state of affairs would continue indefinitely or even that they would be invited to comment before its use was changed.' (Emphasis added)).

485 See *Premier, Mpumalanga* (supra) at para 36. See, generally, Hoexter *Administrative Law* (supra) at 381-382.

486 See *Traub* (supra) at 761. See also CF Forsyth 'Audi alteram partem since *Administrator, Transvaal v Traub*' in *The Quest for Justice: Essays in Honour of Michael McGregor Corbett* E Kahn (ed) (1995) 196('Audi'). Forsyth does not regard this as a failing of the legitimate expectation doctrine, but rather as an issue to be accommodated under the general 'duty to act fairly'.

[It] highlights the problem created by the narrow and formalistic approach to procedural fairness that was taken by the drafters of the PAJA: the rights and legitimate expectations approach leaves a big hole in the net of procedural fairness in the form of cases that may not involve rights but interests of sufficient importance to warrant procedural protection. This rigidity may well undo the important developments that have taken place prior to the enactment of the PAJA in entrenching the fairness doctrine in South African administrative law.⁴⁸⁷

Despite the apparent endorsement of the traditional approach in these decisions of the SCA, and the views of certain authors that legitimate expectations are confined to these situations,⁴⁸⁸ some recent authority suggests that current understandings of 'legitimate expectations' are somewhat broader.

In the decision of the Constitutional Court in *Premier, Mpumalanga* O'Regan J restated Corbett CJ's decision in *Traub* in the following terms:⁴⁸⁹

Corbett CJ also recognized that a legitimate expectation might arise in *at least* two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and, secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made.

This statement suggests that the concept of legitimate expectations may be usefully thought of in three categories: express promise, past practice, and fairness. The first two fit into the category of the previous conduct of an official. The third category is a residual one, fairness, and is in fact the first category mentioned by O'Regan J in *Premier, Mpumalanga*. This approach may, depending on one's reading of the judgment, also be reflected in the following *dictum* of the Constitutional Court in *SARFU 1*:

The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before

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taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances.⁴⁹⁰

In light of this jurisprudence from the Constitutional Court, Jacques De Ville argues persuasively that a legitimate expectation 'need not be coupled with previous

487 W Wakwa-Mandlana and C Plasket 'Administrative Law' 2005 *Annual Survey of South African Law* 74, 119.

488 See, eg, Forsyth 'Audi' (supra) at 196, 204–205 (This is not because Forsyth is of the view that a right to a hearing should not arise in other circumstances, but because such a right should rather flow from the broad 'duty to act fairly' — 'to those situations where no existing rights were affected, where there was no legitimate expectation of anything at all, yet the facts cried out for a legal remedy'). See also CF Forsyth 'A Harbinger of a Renaissance in Administrative Law' (1990) 107 *SALJ* 387, 398–399.

489 *Premier, Mpumalanga* (supra) at para 35 (Emphasis added).

governmental conduct' and 'is completely context-dependent'.⁴⁹¹ In fact, in *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere*⁴⁹² the Supreme Court of Appeal held that the right to a hearing can arise where a decision is significantly prejudicial to a person (in that case, a decision to transfer a prisoner to a maximum security prison).⁴⁹³ A broad approach to the scope of legitimate expectations is also evidenced in the decision of the SCA in *Bullock*, which held that a legitimate expectation arose from the fact that the yacht club had been the lessee of the foreshore (over which the servitude was granted) for 30 years in terms of successive leases, it had made substantial improvements on the property during that period and, 'perhaps most importantly', negotiations with the yacht club for a new lease on the property were far advanced.⁴⁹⁴

The recent decision of the Constitutional Court in *Walele* is, to date, the most comprehensive judicial consideration of the meaning of 'legitimate expectations' for purposes of s 3 of PAJA. *Walele* involved a challenge to the City of Cape

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Town's approval of the building plans of a four-storey block of flats on a neighbouring property. The construction of the flats was consistent with the zoning scheme in respect of the relevant area. One of the bases for challenging the approval was that the applicant had not been afforded an opportunity to make representations in respect of the building plans application. The applicant asserted that he enjoyed the right to procedural fairness under s 3 of PAJA because, as the owner of the neighbouring property, his property would be devalued and his right to use and enjoyment of his property would be undermined because the flats would cast a shadow over his property. Although the Constitutional Court was split (six to five) on the outcome on other grounds, the Court unanimously agreed that the applicant did

490 *SARFU 1* (supra) at para 216. Nevertheless, it is conceivable that *SARFU 1* is consistent with the traditional approach to legitimate expectations (requiring a promise or past practice), with the quoted paragraph only relating to the additional requirement that the expectation must be 'legitimate'. See *SARFU 1* (supra) at paras 212, 215 and 216. See also *Walele* (supra) at para 38 (Majority appears to adopt this reading of the quoted paragraph in *SARFU 1*.)

491 *De Ville Judicial Review* (supra) at 230–232. Other authors also support a broader approach to legitimate expectations. See, eg, J Hlophe 'Legitimate expectations and Natural Justice: English, Australian and South African law' (1987) 104 *SALJ* 165, 177–179; J Hlophe 'The Doctrine of Legitimate Expectations and the Appellate Division' (1990) 107 *SALJ* 197 at 200–201; J Grogan 'Audi after Traub' (1994) 111 *SALJ* 80, 89–90; PP Craig 'Legitimate expectations: a conceptual analysis' (1992) 108 *LQR* 79, 82–84. As De Ville points out, some support for a broad approach to legitimate expectations can be found in the case law. See *Foulds v Minister of Home Affairs & Others* 1996 (4) SA 137 (W), 149 ('*Foulds*'); *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 (Tka).

492 2001 (3) SA 472 (SCA).

493 *Nortje* (supra) at para 14 ('The *audi* rule is applicable where an administrative decision can prejudice a person to such an extent that, in accordance with that person's legitimate expectation, the decision ought not to be taken unless he is heard' (translation from the headnote, quoted in Hoexter *Administrative Law* (supra) at 379). For a criticism of this judgment, see DM Pretorius 'Die Leerstuk van Regverdigbare Verwagtinge en die Reg op n Billike Aanhoring: *Nortje v Minister van Korrektiewe Dienste* 2001 3 SA 472 (HHA)' (2002) 64 *THRHR* 436.

494 *Bullock* (supra) at para 22. The SCA judgment in *Grey's Marine* could, however, be read as clawing back from *Bullock*, in stating that the *Bullock* Court might have had in mind a legitimate expectation 'grounded in past practice'. *Grey's Marine* (supra) at para 31.

not enjoy a right to a hearing in this case. Both the majority and the minority held that the granting of approval did not affect the applicant's rights, that the applicant had not proved that his property would be devalued as a result of the erection of the flats and that the applicant could not rely on a legitimate expectation.⁴⁹⁵ While we will not quibble with the outcome of the case, the attitude of the majority and the minority in *Walele* to the possible scope of legitimate expectations is of particular interest for present purposes.

The attitude of the majority appears to be that legitimate expectations are confined to the established categories of promises and past practices. For example, at one point in his judgment Jafta AJ states that '[a] legitimate expectation may arise either from a promise made by a decision-maker or from a regular practice which is reasonably expected to continue.'⁴⁹⁶ At another point, he rejects the idea that an impact on interests that falls short of rights or legitimate expectations can found a right to a hearing.⁴⁹⁷

In her minority judgment, O'Regan ADCJ, while leaving open the question as to whether legitimate expectations extend beyond their traditional scope, suggests that there may well be room for such expansion under PAJA:⁴⁹⁸

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From time to time, our courts have taken the view that a legitimate expectation may also arise simply because the administrative action in question constitutes a dramatic impairment of interests less than rights. It may well be that the concept of legitimate expectation in PAJA is not limited to the narrow requirement of a promise or a practice as set out in Lord Fraser's reasoning. Indeed, a broader understanding of 'legitimate expectation' may be appropriate given the language of section 33 of the Constitution that '[e]veryone has the right to administrative action that is ... procedurally fair.'

It may be argued that an expansive approach to legitimate expectations, as outlined above, deviates from the concept of legitimate expectations understood in its pure form, and that an expansive approach to the ambit of procedural fairness should more appropriately be accommodated under a broad duty to act fairly (assuming that such duty is accepted in our law).⁴⁹⁹ Nevertheless, it seems to us that the extension of legitimate expectations beyond the traditional categories of promises and past practices is useful in the context of s 3(1) of PAJA. It introduces sufficient

495 *Walele* (supra) at paras 31, 33, 42, 132. It is interesting to note that O'Regan ADCJ found that the applicant's rights had not been materially and adversely affected despite the fact that his use and enjoyment of his property may have been affected by the approval. In explaining this finding, she stated that '[o]ur use and enjoyment of property is affected by many things' and to hold that s 3(1) of PAJA applies in respect of every administrative action that impacts on use and enjoyment of property 'may well cause great disruption to the administration of urban spaces.' Ibid at para 132. O'Regan ADCJ thus appears to take policy considerations into account in assessing whether rights are materially and adversely affected for purposes of s 3(1), and may well advocate an understanding of 'material' in s 3(1) that goes beyond non-trivial.

496 Ibid at paras 35, 37, 38 and 42 ('Since the concept of legitimate expectation referred to in section 3 of PAJA is not defined, it must be given its ordinary meaning as understood over a period of time by the courts in this country'. Jafta AJ goes on to assess whether a past practice gave rise to a legitimate expectation in this case and states that '[a] legitimate expectation may arise from an express promise or a regular practice. It cannot arise from ownership of a neighbouring property.').

497 *Walele* (supra) at paras 44 and 45.

498 *Walele* (supra) at para 133.

flexibility so as to remove the constitutional difficulties with this section.⁵⁰⁰ In addition, it does so without unduly straining the language of the provision. Where one, having regard to all the circumstances, has a reasonable expectation of a hearing, it can be said that one has a 'legitimate expectation' of that hearing.⁵⁰¹ In other words, an extended concept of legitimate expectations can be used to interpret s 3(1) in a manner that gives effect to the constitutional right to procedurally fair administrative action (particularly in circumstances in which s 3(1) adopts the deprivation theory, which we suggest it does).

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Before leaving the topic of the scope of the right of procedural fairness, we must note that there may well be (at least!) one other way of interpreting PAJA in order to come to the same conclusion. One could argue, with some conviction, that s 3(1) should be limited to decisions that affect rights and legitimate expectations in the traditional sense (ie based on past practice or promise); that s 3(1) is not exhaustive of the scope of administrative action but rather requires administrative action that 'materially and adversely affects the rights or legitimate expectations of any person' to be procedurally fair *in the sense contemplated in the remainder of s 3*; that all administrative action must be procedurally fair;⁵⁰² and that a failure to comply with procedural fairness in respect of any administrative action is reviewable under s 6(2)(c) of PAJA.⁵⁰³ According to this approach, the duty to act fairly flows from s 6(2)(c)

499 See W Wakwa-Mandlana and C Plasket 'Administrative Law' 2004 *Annual Survey of South African Law* 74 at 92-93. See also Forsyth 'Audi' (supra) at 196 and 205; DM Pretorius 'Ten years after Traub: The doctrine of legitimate expectation in South African administrative law' (2000) 117 *SALJ* 520, 523-525 ('Ten years after Traub'). See *Board of Education v Rice* [1911] AC 179, 182 (The duty to act fairly is 'a duty lying upon everyone who decides anything'.) A case that is often cited as supporting the application of the duty to act fairly in our law is *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C), 1995 (9) BCLR 1191 (C). The decision held that procedural fairness entitles affected persons to 'the principles and procedures' which in the circumstances are 'right and just and fair' (quoting Lord Morris of Borth-Y-Gest with approval). See also *Mpande Foodliner CC v Commissioner for the South African Revenue Service & Others* 2000 (4) SA 1048 (T), 1067.)

500 See Hoexter *Administrative Law* (supra) at 380 ('The trend towards a wider understanding of legitimate expectations is attractive because it would allow the doctrine to cover mere interests as well as expectations in the usual sense, thus offering a way around the wording of s 3 of PAJA.')

501 We note that the expectation in this expanded context would appear to be limited to a procedural expectation (ie a reasonable expectation of a hearing). A reasonable expectation of a substantive benefit arising other than from a promise or past practice would not suffice for purposes of triggering the right to a hearing (unless the substantive expectation gave rise to an accompanying reasonable expectation of a hearing). See *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) (Lord Diplock stated that the term 'legitimate' should be preferred to 'reasonable': 'in order thereby to indicate that it has consequences to which effect will be given in public law, whereas as expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences.')

We discuss the difference between procedural and substantive expectations above.

502 This approach has the attraction of being consistent with the formulation of the right to procedurally fair administrative action in FC s 33(1).

503 For more on this approach, see De Ville *Judicial Review* (supra) at 222-223 and 234. See also Wakwa-Mandlana and Plasket (supra) at 93 (Raise the alternative possibility of reviewing procedural unfairness in respect of decisions with an adverse impact on interests under the catch-all in s 6(2)(i) of PAJA.)

rather than from an expanded concept of legitimate expectations. While initially attractive, we would be wary of adopting such a position. A free-floating duty to act fairly sourced in s 6(2)(c) runs contrary to the concept that the content of ss 3 and 4 provides the material basis for the courts' review powers. Moreover, the language of s 3(1) suggests that it determines the scope for procedural fairness. Nonetheless, even if this approach is untidy, and in our view overly complex, it is at least conceptually possible that administrative enforcement of procedural fairness in FC s 33 (the business of ss 3 and 4 of PAJA) is based on the doctrine of legitimate expectations and judicial enforcement of procedural fairness in FC s 33 (the business of s 6 of PAJA) is based on the duty to act fairly.

(e) The content of procedurally fair administrative action affecting any person

As discussed above, the content of procedural fairness varies from case to case. Indeed, the most significant characteristic of procedural fairness is its flexibility. In the words of Lord Mustill, '[t]he principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects'.⁵⁰⁴ This flexibility is particularly important if one accepts (as we do) that the ambit of administrative action to which procedural fairness applies is quite broad. Nevertheless, flexibility cannot alone determine the content of procedural fairness: were flexibility to determine the extension of procedural fairness it would

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inevitably lead to uncertainty. Administrative decision-makers and those affected by administrative decisions would not know what procedural fairness demands. There is thus a need for our courts to develop different standards of procedural fairness that apply to various different types of administrative action. This exercise, to some extent, requires a shift in focus from the scope of administrative action to the content of administrative justice in the particular circumstances of the case.

The content of procedural fairness in relation to administrative action affecting a person (ie individual administrative action) is governed by s 3 of PAJA. This section divides the content of procedural fairness into mandatory and directory elements.

Section 3(2)(b) lists those elements that fall into the former category: 'the core, minimum content of the right [to procedural fairness] when fairness requires a hearing to be given'.⁵⁰⁵ As was the case under the common law, the focus of the mandatory elements is that affected persons must be given adequate notice and a reasonable opportunity to make representations prior to a decision being taken.⁵⁰⁶ Mirroring the language of the Constitutional Court in *Premier, Mpumalanga*, paragraphs (i) and (ii) of s 3(2)(b) stipulate that an administrator 'must' give a person whose rights or legitimate expectations are materially and adversely

504 See *Doody v Secretary of State for the Home Department and Other Appeals* [1994] 1 AC 531 (HL) at 560, quoted with approval by Chaskalson CJ in *New Clicks* (supra) at para 152; *Chairman, Board on Tariffs and Trade & Others v Brenco Inc & Others* 2001 (4) SA 511 (SCA) ('Brenco') at para 13.

505 *POPCRU* (supra) at para 70.

506 As to the position under the common law, see *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture & Another* 1980 (3) SA 476 (T), 486 ('Heatherdale Farms'). See also *Russel v Duke of Norfolk* [1949] 1 All ER 109, 117.

affected: adequate notice of the nature and the purpose of the proposed administrative action; and a reasonable opportunity to make representations.⁵⁰⁷ The use of the words 'adequate' and 'reasonable' in these provisions leave much room for flexibility as to the precise content of the notice and the opportunity given to make representations.

It is important to note that the notice provided to persons affected by the decision must include the reasons (or purpose) for the proposed administrative action, and must be 'adequate' both as to the time provided to make representations⁵⁰⁸ and the information that is provided to affected persons.⁵⁰⁹ The rule of thumb is that these persons must be provided with sufficient information in order for them to know the case they have to meet and so that their opportunity to make representations is a meaningful one.⁵¹⁰ Although the content of procedural fairness varies from case to case, this rule of thumb generally means that an affected person must be notified of the gist or substance of the case against

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him or her,⁵¹¹ any particular information that is adverse to him or her⁵¹² and any significant policy considerations that apply to the proposed decision.⁵¹³ The remainder of the mandatory elements of procedural fairness set out in s 3(2)(b) are: a clear statement of the administrative action;⁵¹⁴ adequate notice of any right of review or internal appeal and the right to request reasons.⁵¹⁵

Section 3(3) of PAJA sets out directory elements of procedural fairness. This subsection provides that the administrator 'may, in his or her or its discretion'⁵¹⁶ give a person whose rights or legitimate expectations are materially and adversely

507 *Premier, Mpumalanga* (supra) at para 41 (O'Regan J)('Citizens are entitled to expect that government policy will not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker'.)

508 See *Du Preez* (supra); *POPCRU* (supra) at para 73.

509 See Hoexter *Administrative Law* (supra) at 332-337.

510 See *Heatherdale Farms* (supra) at 486; *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism & Another* 2005 (3) SA 156 (C)('Earthlife') at para 52.

511 *Du Preez* (supra) at 232; *Brenco* (supra) at para 42; and *Earthlife* (supra) at para 53. See also *New Clicks* (supra) at para 153 (Chaskalson CJ)(In the case of individual administrative action '[a]n individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns.')

512 *Du Bois v Stompdrift Kamanassie Besproeiingsraad* 2002 (5) SA 186, 188-189 (C).

513 See *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T), 1995 (2) BCLR 138, 178-179 (T); *Foulds* (supra) at 148-149. See also *Yuen v Minister of Home Affairs & Another* 1998 (1) SA 958 (C).

514 This requirement appears to demand a clear statement of the administrative action once it has been taken. See Hoexter *Administrative Law* (supra) at 337.

affected, the opportunity to: (1) obtain assistance and, in serious or complex cases, legal representation; (2) present and dispute information and arguments; and (3) appear in person. The placement of this provision is curious in that it suggests that elements such as legal representation and an oral hearing are purely discretionary and that a failure to allow for these elements cannot be challenged on the basis of procedural fairness.⁵¹⁷ Such an outcome should be avoided. It would, in our view, result in PAJA failing to give effect to the constitutional right to procedural fairness. One way to avoid this outcome is to adopt the approach that an administrator is obliged to consider granting these elements in a particular case,⁵¹⁸ and that the administrator's decision to refuse to provide for one or more of these elements is itself 'administrative action' and is thus

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susceptible to review under PAJA.⁵¹⁹ Iain Currie points out, for example, that if legal representation is essential in a particular case in order to ensure fairness, a decision by the administrator not to provide an opportunity for legal representation would be unreasonable (and thus susceptible to challenge).⁵²⁰ A second approach would emphasise that the specific elements listed (as discretionary elements) in s 3(3) cannot diminish the mandatory obligation in s 3(2)(b)(ii) to provide affected persons with 'a reasonable opportunity to make representations', and that a failure to, for example, allow for legal representation where procedural fairness demands it would fall foul of this requirement.

The difficulty with the second approach is that, while it is most consistent with the underlying constitutional right to procedurally fair administrative action, it does strain the ordinary meaning of s 3(3). Although it is not necessarily an *unduly*

515 On the consequences of non-compliance with these requirements, see I Currie & J Klaaren 'Remedies for Non-Compliance with Section 3 of the Promotion of Administrative Justice Act' in C Lange & J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 31.

516 The use of this subjectively-phrased discretion is unfortunate in an Act aimed at promoting administrative justice.

517 The reason for this odd drafting is that the Parliamentary Portfolio Committee altered the Law Commission's draft Bill which listed these elements after the phrase '[a] fair procedure may also entail'. This wording would have made it clear that these elements may, depending on the circumstances, be required in order to give effect to procedural fairness. See Currie *The PAJA* (supra) at 103, fn 49. But see *POPCRU* (supra) at para 70 (Describes s 3(3) as '[providing] for discretionary additions to the core, minimum requirements when fairness makes them necessary'.)

518 With respect to this obligation in respect of s 3(3), see *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* [2003] 9 BLLR 963 (T) para 26 and 23 (Although the High Court seems to regard s 3(3)(a) as *requiring* legal representation in serious and complex cases, an earlier statement in the judgment partially undercuts this claim.) See also *Dladla v Administrator, Natal* 1995 (3) SA 769 (N) (Held that a disciplinary committee must properly exercise its discretion as to whether or not to afford the right to legal representation, and cannot fetter that discretion on the basis that the usual practice is not to allow such representation.)

519 Currie & Klaaren *Benchbook* (supra) at 100 and Currie *The PAJA* (supra) at 103–104 and 110.

520 Currie *The PAJA* (supra) at 110. See Baxter (supra) at 555 ('In unusually complex cases involving complex evidence or legal issues, legal representation might be regarded as a sine qua non of a fair hearing ...') See also *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) at paras 12–13.

strained reading, it would be preferable for s 3(3) to be amended to reflect that the discretionary elements are only directory in the sense that they do not generally apply but that they must be afforded where procedural fairness so requires.

Despite the use of the label 'mandatory' elements, PAJA retains the flexible nature of procedural fairness. It allows an administrator to depart from any of the mandatory elements in subsection (2) if to do so is 'reasonable and justifiable in the circumstances'.⁵²¹ PAJA goes on to provide that, in determining whether a departure is reasonable and justifiable, an administrator must take all relevant factors into account, including the urgency of the matter and the need to promote an efficient administration and good governance.⁵²² This provision is consistent with the post-constitutional case law on procedural fairness. These cases have allowed a relaxation of the right to make representations in cases of pressing urgency⁵²³ and have held that an opportunity to make representations after the administrative action is taken can suffice in certain circumstances.⁵²⁴

Finally, s 3(5) provides that an administrator may act in accordance with a different procedure if he or she is granted the power to follow a different, but still fair, procedure. In assessing the fairness of a different procedure, the courts should carefully scrutinize the relevant procedure to ensure that it gives affected

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persons an adequate opportunity to be heard. After all, the constitutionally mandated aim of PAJA is to give effect to the constitutional right to procedural fairness.

(f) The scope and content of procedurally fair administrative action affecting the public

Whereas a large amount of PAJA codifies the common law position, s 4 constitutes a significant development. In what has been described as 'a great innovation in South African administrative law',⁵²⁵ s 4 applies procedural fairness to administrative action that 'materially and adversely affects the rights of the public'. PAJA therefore introduces general procedures that must be followed in relation to administrative action affecting the public generally. This development represents a change from the common-law position where administrative decisions which had a general, rather than a particular, effect were not subject to the requirements of natural justice.⁵²⁶ This development is to be welcomed. One positive effect of s 4 is that it requires public participation in the administrative rule-making process. Given that the administrative rule-making process is frequently employed by modern legislatures

521 Section 3(4)(a) of PAJA. The Minister may also, with the approval of Parliament, exempt administrative actions or classes of administrative actions from s 3 where it is reasonable and justifiable to do so (s 2(1) of PAJA). For a criticism of this approach in PAJA, see Hoexter *Administrative Law* (supra) at 343-344.

522 Section 3(4)(b).

523 *Kyalami Ridge* (supra) at paras 104-109.

524 See, eg, *Hindry v Nedcor Bank Ltd & Another* 1999 (2) SA 757 (W) at 781-782; and *Buffalo City Municipality v Gauss & Another* 2005 (4) SA 498 (SCA), 2006 (11) BCLR 1314 (SCA) at para 14.

525 Hoexter *Administrative Law* (supra) at 364.

that devolve their law-making powers to administrative functionaries, a legal regime that enhances access to this process is a necessary complement to the constitutional commitment to participatory democracy.

Section 4(1) stipulates that where an administrative action 'materially and adversely affects the rights of the public' an administrator must decide between five courses of action. He or she must: either hold a public inquiry (which includes a public hearing on the proposed administrative action, and public notification of the inquiry);⁵²⁷ follow a notice and comment procedure (which involves publishing the proposed action for public comment and written representations on the proposal);⁵²⁸ follow both the public inquiry and notice and comment procedures; follow a fair but different procedure in terms of an empowering provision; or follow another appropriate procedure which gives effect to the right to procedural fairness in s 3 of PAJA (eg, granting hearings to the entire group affected by the proposed action).⁵²⁹

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The important threshold test for s 4 is whether the relevant administrative action 'materially and adversely affects the rights of the public'. In interpreting this phrase, it is important to bear in mind that 'public' is defined in s 1 of PAJA as '[including] any group or class of the public'.

Currie and Klaaren propose that s 4 is triggered where administrative action: has a general impact; has a significant public effect; and if the rights of the public are in issue.⁵³⁰ In order to have a general impact the administrative action must apply to members of the public 'equally' and 'impersonally', although it may impact on certain members of the public more than others (for example, a regulation prohibiting the consumption of alcohol on a particular day of the week).⁵³¹ The requirements of an adverse effect on the rights 'of the public' must be taken to mean that the action impacts on the rights of *members* of the public (rather than the rights of the group).⁵³² Whether the materiality requirement is met will depend on

526 *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A). For a general discussion of administrative rule-making, see L Baxter 'Rule-making and Policy Formulation in South African Administrative-law Reform' (1993) *Acta Juridica* 176 and C O'Regan 'Rules for Rule-making: Administrative Law and Subordinate Legislation' (1993) *Acta Juridica* 157.

527 The procedure for a public inquiry is set out in s 4(2), read with Chapter 1 of the Regulations on Fair Administrative Procedures published under GN R 1022 in *Government Gazette* 23674 of 31 July 2002 ('the Regulations').

528 The notice and comment procedure is set out in s 4(3), read with Chapter 2 of the Regulations.

529 For a discussion of the effect of this latter provision, and the thorny question as to the relationship between s 3 and s 4 of PAJA, see Hoexter *Administrative Law* (supra) at 374; Currie & Klaaren *Benchbook* (supra) at 130-131; Currie *The PAJA* (supra) at 119-122; and Mass (supra) at 67.

530 Currie & Klaaren *Benchbook* (supra) at 114.

531 Currie & Klaaren *Benchbook* (supra) at 114-116.

532 Currie *The PAJA* (supra) at 125. We prefer this interpretation to the approach advocated by De Ville. De Ville argues that, as there are no rights in the traditional sense inhering in the public, the term 'rights' as used in s 4(1) must be understood as including 'interests'. De Ville *Judicial Review* (supra) at 227.

the circumstances of each case and should be judged cumulatively in relation to the public as a group.⁵³³ As with individual administrative action under s 3, an administrator may depart from the requirements in s 4 if it is 'reasonable and justifiable in the circumstances', taking into account all relevant factors.⁵³⁴

(g) The rule against bias

The second component of procedural fairness⁵³⁵ is the rule against bias. This rule is captured by the maxim *nemo iudex in sua causa* ('no one shall be a judge in their own cause'). This common law ground of review is now codified in s 6(2)(a)(iii) of PAJA. This provision stipulates that administrative action may be judicially reviewed if the administrator who took it 'was biased or reasonably suspected of bias'. This rule aims to ensure that a decision-maker is, and is seen to be, impartial. In the context of quasi-judicial bodies, the administrative law rule (which forms part of the constitutional right to procedurally fair administrative action) is supplemented by FC s 34. FC s 34 entrenches the right to have any

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dispute that can be resolved by application of law decided by a court or 'an independent and impartial tribunal'.⁵³⁶

The primary rationales for the rule against bias are: (a) to enhance good administrative decision-making, as a person who is free from bias (or impermissible partiality) is more likely to come to a decision in the public interest; (b) promoting fairness — it is fundamentally unfair to expose an affected person to decision-making by an administrator that is biased (or perceived to be biased) against him or her; and (c) enhancing confidence in administrative decision-making processes.⁵³⁷ As Lord Hewitt famously remarked, in the context of judicial decision-making: 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'⁵³⁸

Traditionally, the rule against bias was applied in the context of judicial and quasi-judicial decisions.⁵³⁹ The rule now applies more broadly to all administrative decision-making. There are at least two reasons why this should be the case. First, the rule

533 An example of an administrative action affecting the public in a manner which does not meet the requirement of materiality would be Hugh Corder's example of a regulation requiring that the background of motor vehicle licence plates should be red rather than yellow. See H Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38, 46.

534 Section 4(4) of PAJA. The Minister may also, with the approval of Parliament, exempt actions or classes of administrative actions from s 4 where it is reasonable and justifiable to do so (s 2(1) of PAJA).

535 Bias is subsumed under procedural fairness at least in the sense in which the term is used in FC s 33. Under PAJA s 6, bias and procedural fairness are treated as separate grounds of review.

536 That a quasi-judicial tribunal is governed by both FC s 33 and FC s 34 is apparent from the decision of the majority of the Constitutional Court, and the separate concurring judgment of O'Regan J, in *Sidumo*. *Sidumo* (supra) at paras 112, 124 and 135. On FC s 34, see J Brickhill and A Friedman 'Access to courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59, especially § 59.4(c).

537 See De Ville *Judicial Review* (supra) at 269; Hoexter *Administrative Law* (supra) at 405.

against bias is a component of the right to procedurally fair administrative action (which attaches to all administrative action under FC s 33(1)). Second, bias is specifically listed as one of the grounds of review of administrative action in s 6(2)(a)(iii) of PAJA. As the Constitutional Court stated in *SARFU 2*, the rule against bias is applicable to judicial cases 'as well as quasi-judicial and administrative proceedings'.⁵⁴⁰

Broadly speaking, there are two types of impermissible bias. The first is actual bias: the decision-maker was in fact biased or partial. This form of bias arises where the decision-maker approached the issues 'with a mind that was in fact prejudiced or not open to conviction'.⁵⁴¹ Actual bias has rarely been found to have arisen in our case law.⁵⁴²

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The second form of bias, which more often arises in practice, is where there is a reasonable suspicion (or apprehension)⁵⁴³ of bias. The reasonable suspicion test is objective. One considers whether the hypothetical reasonable person with ordinary intelligence, knowledge and common sense, placed in the circumstances of the person alleging bias, would be of the view that there was a reasonable suspicion that the decision-maker would be biased.⁵⁴⁴ In *SARFU 2*, the Constitutional Court rejected such a biased-based application for the recusal of a number of judges of that Court:

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has 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 the submissions of counsel.⁵⁴⁵

538 *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256 at 259. See also the Constitutional Court in *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC) at para 31 ('The principle that justice must not only be done but also be seen to be done is well known'); *S v Roberts* 1999 (4) SA 915 (SCA) ('*Roberts*') at para 22.

539 See, eg, *Hack v Venterspost Municipality & Others* 1950 (1) SA 172 (W) at 189.

540 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('*SARFU 2*') at para 35. See also *Umfolozzi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548, 552, 553 (A).

541 *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A) ('*BTR Industries*') at 690. See *De Ville Judicial Review* (supra) at 271-273.

542 For a fairly recent instance of actual bias, see *De Lille* (supra), in which the High Court found that a decision of an *ad hoc* parliamentary committee to recommend the suspension of Patricia De Lille MP was vitiated by actual bias. Ms De Lille was suspended for alleging that a number of African National Congress MPs had acted as spies for the apartheid government. This decision was taken on the recommendation of a committee, where the majority of the committee members were ANC MPs and where certain members of the committee appeared to have pre-judged the matter.

543 The term 'apprehension' was preferred by the Constitutional Court in *SARFU 2*, on the basis that the word 'suspicion' may possess 'inappropriate connotations'. *SARFU 2* (supra) at para 38.

544 See *BTR Industries* (supra) at 693.

545 *SARFU 2* (supra) at para 48.

The reasonable person postulated in this test is, as Lord Bingham recently remarked on behalf of the House of Lords, characterised by the following: 'he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious'.⁵⁴⁶ Our courts have, post-*SARFU 2*, emphasised that the test for bias in respect of judicial officers involves four requirements: (a) a reasonable suspicion that the judicial officer *might*, not would, be biased; (b) the suspicion must be that of a reasonable person in the position of the accused or litigant; (c) the suspicion must be based on reasonable grounds; and (d) the suspicion is one which a reasonable person *would*, not might, have.⁵⁴⁷

Our courts are likely to apply a similar test for a reasonable suspicion of bias in the context of administrative decision-makers — at least insofar as they exercise quasi-judicial or disciplinary power. In such a context, the test for disqualifying bias may be easier to meet than in the judicial realm. This is because there is a presumption that, in light of the oath of office, institutional independence, and legal training and experience of judicial officers, such officers act impartially and free from bias.⁵⁴⁸ The stricter nature of the test for bias in the context of quasi-judicial decision-makers is reflected in the following statement in *Mönnig & Others v Council of Review & Others*:

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[I]n the case of non-judicial officers performing functions indistinguishable from the judicial process, the test operates more strictly even than in the case of judicial officers. Reasonable litigants are less likely to regard judicially trained officers as inclined to succumb to outside pressures or to be influenced by anything other than the evidence given before them. The quality of impartiality is not so readily conceded to non-judicial adjudicators. Since the appearance of impartiality has to do with the public perception of the administration of justice, it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others. The most vulnerable, I venture to suggest, are tribunals — other than courts of law — which have all the attributes of a court of law and are expected by the public to behave exactly as a court of law does.⁵⁴⁹

It is important to note that the test of a reasonable suspicion of bias should vary. The variability of the test should turn on the nature of the administrative body concerned and the nature of the administrative action. As L'Hereux Dubé J noted on behalf of the Canadian Supreme Court: 'the standards for reasonable apprehension of bias may vary ... depending on the context and the type of function performed by the administrative decision-maker involved'.⁵⁵⁰ There is a significant difference as to the circumstances in which a reasonable suspicion of bias would arise in respect of, for

546 *R v Abdroikov; R v Green; R v Williamson* [2008] 1 All ER 315 at para 15.

547 *Roberts* (supra) at paras 32–34. See also *South African Commercial Catering and Allied Workers Union & Others v Irvin & Johnson Limited* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) and *S v Shackell* 2001 (4) SA 1 (SCA) ('*Shackell*').

548 See, for example, *SARFU 2* (supra) at para 48. The Supreme Court of Appeal in *Shackell* (supra) describes this as 'the weighty presumption of judicial impartiality' (at para 21). See also the Canadian Supreme Court in *R v S (RD)* (1997) 118 CCC (3d) 353 at para 113.

549 1989 (4) SA 866 (C) at 880.

550 *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193 (SCC) at para 47.

example, a disciplinary tribunal as opposed to a committee that makes decisions based on broad policy considerations.⁵⁵¹

(h) Institutional bias

Prior to the advent of the constitutional protection of procedural fairness, our courts applied the concept of 'institutional bias'. A finding of 'institutional bias' could preclude the conduct from review on the ground of bias. By 'institutional bias', we mean the term used to describe a lack of impartiality that is explicit or implicit in the empowering legislation. For example, legislation that specifically provides for a hearing before a person that has some or other interest in the matter, clearly contemplates and thus arguably authorises a degree of partiality in the conduct of that hearing. In the pre-constitutional era, the approach of our courts was that if a level of partiality was a necessary consequence of the legislative scheme, such partiality did not result in impermissible bias. In other words, institutional bias (sometimes referred to 'structural bias') operated as an exception to the rule against bias. Jacques De Ville explains the position as follows:

Before the coming into effect of the 1993 Constitution, there was no possibility of challenging the validity of legislation setting up an administrative body with institutional bias. Such bias had to be tolerated 'because it had its origin in the nature of the hearing for which the Legislature has specifically provided'. Such a body would be acting improperly 'only if it

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could be shown that it had approached the matter which it had to consider with a closed mind, that it had, for example, irrevocably decided on a certain cause of action and only went through the motions in considering objections', ie in the event of a real likelihood of bias.⁵⁵²

This approach was consistent with the doctrine of parliamentary sovereignty that applied prior to the Interim Constitution. As a result, the administrative law rule against bias could not be used to challenge the legality of a structure that was specifically envisaged in the legislation. As Etienne Mureinik stated:

The point of calling bias institutional is that statutory approval means that it must be tolerated.... [I]f it is the institutional character of the bias which generates the statutory exclusion or curtailment, that must be because the legislature must be taken not to want to disqualify for bias arising from the decisionmaking procedure itself.⁵⁵³

The doctrine of parliamentary sovereignty has been eclipsed by doctrine of constitutional supremacy found in the Interim Constitution and the Final Constitution. In light of the constitutionally protected right to procedural fairness (which includes the rule against bias), there is a need to reassess the concept of 'institutional bias'. For if one has a constitutional right to an unbiased hearing, then even a law of Parliament cannot simply override such a right without justification. The difference between the approach to institutional bias before and after the Final Constitution is aptly described by Ross Kriel:

551 See De Ville *Judicial Review* (supra) at 270–271, fn 462 (Authorities cited there.)

552 De Ville *Judicial Review* (supra) at 281. See, eg, *Ciki v Commissioner of Correctional Services & Another*; *Jansen v Commissioner of Correctional Services & Another* 1992 (2) SA 269 (E) at 272; and *Loggenberg & Others v Robberts & Others* 1992 (1) SA 393 (C) at 405–406.

553 'Administrative Law' 1992 *Annual Survey of South African Law* 732–733.

[A]t common law one determines whether the legislature has authorised an 'institutional bias', and if so, it must be tolerated Under the Constitution, particularly given that section 34 separately grounds rights to independent and impartial tribunals, the question is not whether the legislature has authorized institutional bias, but whether it can justify institutional bias. These are two entirely different enquiries.⁵⁵⁴

63.6 The right to reasonable administrative action

(a) Reasonableness: a (somewhat) controversial ground of review

FC s 33 proclaims that everyone has the right to reasonable administrative action. It is therefore indisputable that the Final Constitution subjects administrative action to a standard of reasonableness. Despite this clear starting point, it is important to bear in mind the somewhat controversial nature of this ground of review.

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The traditional concern with review for unreasonableness is that it invites judicial scrutiny of the merits of the administrative decision or, more formalistically, that it narrows the distinction between a review and an appeal. Unreasonableness review therefore opens the way for courts to interfere with, and second guess, executive decisions and the policy prerogatives flowing from those decisions. It is, in particular, said that courts are ill-equipped to decide polycentric questions and are not institutionally competent to do so. The concern is therefore expressed that reasonableness review undermines the separation of powers.⁵⁵⁵

While it is correct that review for unreasonableness requires a court to assess the substance or merits of administrative decisions,⁵⁵⁶ reasonableness review, properly construed, is both appropriate and consistent with the principle of separation of powers as entrenched in the Final Constitution. It is important, in this regard, that administrative decision-makers are required to act reasonably. It cannot, in principle, be correct that administrators should be at liberty to act unreasonably.⁵⁵⁷ That a

554 'Administrative Law' 1999 *Annual Survey of South African Law* 73.

555 On the principle of separation of powers generally, see S Seedorf and S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

556 See, for example, *Bato Star* (supra) at para 45; *Sidumo* (supra) at para 108. This is not, in itself, problematic. For one thing, a number of traditional grounds of administrative review involve, at least to some extent, an assessment of the substantive merits of the decision, including the old common law grounds of symptomatic or gross unreasonableness. See Hoexter 'Future of Judicial Review' (supra) at 512; C Hoexter 'Unreasonableness in the Administrative Justice Act' in C Lange and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 148, 157-158 ('Unreasonableness'); J Chan 'A Sliding Scale of Reasonableness in Judicial Review' in H Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) at 234-235.

557 See E Mureinik 'Reconsidering Review: Participation and Accountability' 1993 *Acta Juridica* 35 ('Reconsidering Review') at 41 ('It is difficult to see why the fact that a decision is strikingly grossly unreasonable does not, on its own, prove abuse of discretion. Or, for that matter, why unreasonableness does not, on its own, prove abuse of discretion. After all, if we characterize a decision as unreasonable, we mean much more than that we disagree with it, or that we consider it wrong. We mean that we judge it to lack plausible justification. If so, how can we believe it to have been reached without an abuse of discretion?')

reasonableness standard strikes an appropriate balance is well expressed by Cora Hoexter:

Standard dictionaries reveal that reasonable means 'in accordance with reason' or 'within the limits of reason'; and surely this is precisely what we are entitled to demand of discretionary administrative action. *Within the limits of reason* suggests an area of 'legitimate diversity', and a space within which various reasonable choices may be made. It does not suggest that a decision is reasonable only when it is correct or perfect. On the ordinary dictionary meaning of 'reasonable', in fact, s 33 captures exactly the right standard.⁵⁵⁸

It is important that, whatever form reasonableness review takes, the courts' role is confined to assessing the *reasonableness* of administrative action, and not its *correctness*. In this way, separation of powers is respected and the distinction between

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review and appeal is maintained.⁵⁵⁹ Perhaps most significantly, the legitimacy of judicial review of the administration is maintained. As Froneman DJP stated, commenting on the test of 'justifiable' administrative action in IC s 24(d):⁵⁶⁰

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.⁵⁶¹

Reasonableness review only played a small role in pre-constitutional administrative law. In relation to the largest category of administrative conduct (so-called 'purely administrative decisions') the role played by reasonableness was limited to the application of two doctrines. First, symptomatic unreasonableness, which meant unreasonableness that established the existence of another ground of review.⁵⁶² The second related doctrine was that of gross unreasonableness. Gross unreasonableness stood for the proposition that a decision will be set aside only if the degree of unreasonableness is particularly egregious. In *National Transport*

558 'Future of Judicial Review' (supra) at 510.

559 See *Bato Star* (supra) at para 45; and *Sidumo* (supra) at para 109 (Navsa AJ). As Ngcobo J stated in his minority judgment in *Sidumo* discussing the standard of review under s 145(2)(a) of the LRA: 'there may well be a fine line between a review and an appeal, in particular, where ... the reviewing court considers the reasons given by a tribunal, not to determine whether the result is correct, but to determine whether a gross irregularity occurred in the proceedings. At times it may be difficult to draw the line. There is, however, a clear line. And this line must be maintained'. *Sidumo* (supra) at para 244.

560 *Carephone (Pty) Ltd v Marcus NO & Others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) ('*Carephone*') at para 36.

561 See also Mureinik 'Reconsidering Review' (supra) at 40-43 ('"Reasonableness" marks off decisions as tolerable even where they may be wrong.') See also *Kotze v Minister of Health & Another* 1996 (3) BCLR 417 (T) at 425-426.

562 See, for example, *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220, 236-237. The term 'symptomatic unreasonableness' was coined by J Taitz 'But 'Twas a Famous Victory' 1978 *Acta Juridica* 109, 111.

Commission & Another v Chetty's Motor Transport (Pty) Ltd,⁵⁶³ the court wrote that a decision will be set aside if it is 'grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply ... [the] mind'.

Reasonableness review was not, however, entirely foreign to our common law during this period. Most significantly, unreasonableness was a ground for challenging delegated legislation, where the rule in *Kruse v Johnson*⁵⁶⁴ was applied in a 'long train of cases'.⁵⁶⁵ In addition, certain cases applied a variant of reasonableness review to 'purely judicial' administrative decisions.⁵⁶⁶

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(b) The constitutional right to reasonable administrative action

IC s 24(d) dramatically altered the existing common-law position of the time. It provided that 'every person shall have the right to administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'. The key substantive component of the administrative justice clause amounted to a constitutional command for rational decision-making.⁵⁶⁷ Although the term 'justifiable' was used in the Interim Constitution, most authors expressed the view that 'justifiable' was synonymous with 'reasonableness'.⁵⁶⁸ While certain courts agreed with this approach,⁵⁶⁹ the majority of the Constitutional Court in *Bel Porto* suggested that 'justifiability', at least in the context of that case, meant no more than mere rationality.⁵⁷⁰

FC s 33(1) appears to have eliminated any uncertainty by simply and forthrightly stating that everyone has the right to administrative action which is 'reasonable'. If

563 1972 (3) SA 726 (A) at 735.

564 [1898] 2 QB 91 at 99-100.

565 *R v Jopp* 1944 (4) SA 11, 13 (N). See Baxter *Administrative Law* (supra) at 478-479, fn 13. For a discussion of the application of reasonableness review to legislative administrative acts under the common law, see Hoexter *Administrative Law* (supra) at 296-301.

566 *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A)(Jansen JA). See Baxter *Administrative Law* (supra) at 499 (Explains what Jansen JA appeared to mean by 'purely judicial' decisions are 'decisions that have to be reached by reference to clear rules, principles or standards, not decisions involving a high degree of policy', ie decisions with which the courts are closely familiar.) See also Hoexter *Administrative Law* (supra) at 301.

567 J Klaaren 'Administrative Justice' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* 1st ed. (5th revision, 1999) § 25.8.

568 See, for example, E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31; Klaaren 'Administrative Justice' (supra) at § 25.8; Hoexter 'Future of Judicial Review' (supra) at 511; L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 169. But see D Davis & G Marcus 'Administrative Justice' in D Davis, H Cheadle & N Haysom (eds) *Fundamental Rights in the Constitution: Commentary and cases* (1997) 161, who suggest that reasonableness might be a wider concept than justifiability since a decision may be justifiable, although the reasons for the decisions do not have an objectively reasonable basis.

569 See *Standard Bank of Bophuthatswana Ltd v Reynolds NO & Others* 1995 (3) BCLR 305 (B); and *Roman v Williams NO* 1998 (1) SA 270 (C), 1997 (9) BCLR 1267 (C) ('Roman').

one adopted a more restrictive approach to the ambit of justifiability under the Interim Constitution, there is no doubt that FC s 33(1) went further in providing for reasonableness review. As Chaskalson CJ (who had penned the judgment of the majority in *Bel Porto*) remarked in his judgment in *New Clicks*, FC s 33 means that administrative action can be reviewed for reasonableness and that reasonableness is a 'higher standard' than rationality. This higher standard 'in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the interim Constitution'.⁵⁷¹

The question that inevitably arises is what is meant by 'reasonableness'? Part of the answer is that it, at a minimum, encompasses rationality. This overlaps with the constitutional principle of rationality discussed above,⁵⁷² and requires a rational

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connection between the decision, the information before the decision-maker and the purpose that the decision seeks to achieve.⁵⁷³ As Hoexter argues:

Rationality means, first, that administrative action must be supported by the evidence before the administrator and the reasons given for it. This requirement may be summed up as follows: 'Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?' [quoting from *Carephone*]⁵⁷⁴ Secondly, administrative action must be objectively capable of furthering the purpose for which the power was given and for which the action was purportedly performed.⁵⁷⁵

The next question that is commonly asked is whether 'reasonableness' includes proportionality. Broadly speaking, proportionality requires a proportionate balance

570 *Bel Porto* (supra) at paras 89 and 127-128 (per Chaskalson CJ). This portion of Chaskalson CJ's judgment suggests that certain administrative decisions may require a stricter standard of justifiability than rationality. Chaskalson CJ stated in his later judgment in *New Clicks* (supra) that IC s 24(d) 'in substance set rationality as the review standard' (at para 108). See, however, the minority judgment of Mokgoro and Sachs JJ in *Bel Porto*, stating that the rationality requirement in IC s 24(d) extended beyond rationality review and encompassed a proportionality standard (paras 162-166). For a criticism of the majority decision in *Bel Porto*, see A Pillay 'Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?' (2005) 122 *SALJ* 419 at 427-428.

571 *New Clicks* (supra) at para 108.

572 See § 63.2(b) supra.

573 The requirement of a rational connection between the decision and its purpose covers the same ground as the constitutional principle of rationality, which the Constitutional Court has held flows from the rule of law (see § 63.2(b) supra). As the Court stated in *Pharmaceutical Manufacturers* (supra) at para 85: '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.' The requirement of a rational connection between the decision and the information before the decision-maker, however, goes further. In this latter sense rationality seems to mean illogical or arbitrary. It is thus akin to unreasonableness in the sense referred to by Mureinik 'Reconsidering Review' (supra) at 41 (ie lacking plausible justification) or, at the very least, gross unreasonableness.

574 Supra, at para 37.

575 'Unreasonableness' (supra) at 153. See also Hoexter 'Future of Judicial Review' (supra) at 511.

between the objective sought to be achieved by the administrative action and the impact of that decision on persons' rights and interests.⁵⁷⁶

There is some judicial support for the idea that proportionality forms part of the test for reasonable administrative action.⁵⁷⁷ In his minority judgment in *New Clicks*, Sachs J even goes so far as saying that '[p]roportionality will always be a significant element of reasonableness'.⁵⁷⁸ Some support for the application of the proportionality principle as part of a reasonableness enquiry is also found in the arguably analogous decisions of the Constitutional Court which consider proportionality in assessing whether or not the State is complying with its obligation to

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take 'reasonable measures' to achieve the progressive realisation of socio-economic rights.⁵⁷⁹ This is significant, given the fact that the judicial enforcement of socio-economic rights raises similar separation of powers concerns as does reasonableness review in administrative law, namely, polycentric decision-making and involving courts in an assessment of policy matters, with which courts are generally considered ill-equipped to deal.⁵⁸⁰

In deciding on the appropriate test to adopt, one should not lose sight of the fact that the text of the Constitution specifically uses the term 'reasonable'. It is this term, rather than a substitute, that must be given meaning. As Froneman DJP, discussing the test of justifiability in the Interim Constitution, remarked:

Without denying that the application of these formulations [of 'reasonableness, rationality' and 'proportionately'] in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters easier.⁵⁸¹

576 The principle of proportionality is well-known in South African constitutional law as it is integral to the general limitations analysis under FC s 36. Nonetheless, it is a contested concept. For a discussion and a critique of proportionality in this context, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, § 34.8(b) and (d).

577 *Roman* (supra) at 284–285 (in the context of review of administrative action for justifiability under IC item 23(2)(b) of Schedule 6); *Peter Klein* (supra) at para 36; *Schoonbee & Others v MEC for Education, Mpumalanga & Another* 2002 (4) SA 877 (T) at 885. See also the post-PAJA decision of the Constitutional Court in *Bato Star* (supra), at § 63.6(d) infra. A number of academics also favour the requirement of proportionality in relation to administrative action. See, eg, Hoexter *Administrative Law* (supra) at 309; and Pillay (supra) at 420 and 429; *De Ville Judicial Review* (supra) at 215–216 (Argues that proportionality review should apply to certain types of administrative action, ie where a fundamental right has been infringed, where a penalty is imposed or fees are determined.)

578 *New Clicks* (supra) at para 637.

579 See Pillay (supra) at 421 and 429–432; C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *SALJ* 264, 279–280.

580 Pillay (supra) 420–421.

581 *Carephone* (supra) at para 37.

That being the case, a legitimate approach to reasonableness in FC s 33(1) is to regard it as importing the standard of a reasonable decision-maker (similar to the reasonable person test for negligence in delict). This standard does not, however, mean that the decision taken by the real-world administrator must be the same decision as that at which the Herculean reasonable person would arrive.⁵⁸² Such an approach would negate the administrator's legitimate area of administrative discretion. Moreover, such a standard would be virtually impossible to apply in the administrative law context, where one is dealing with a variety of polycentric decisions which are often driven by policy considerations and which courts are at times ill-equipped to assess. Accordingly, the reasonableness standard should mean that a court is required to establish whether the decision taken falls within the range of decisions that a reasonable administrator *could* have taken.⁵⁸³ Although this test is not identical to the test for negligence, it is similar in that it postulates a reasonable decision-maker. As we will see below, the Constitutional Court in *Bato Star* has interpreted reasonableness in PAJA in this very manner.

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(d) Reasonableness review under PAJA

The concept of reasonableness review is included in two ways in PAJA. First, s 6(1)(f) provides that administrative action may be judicially reviewed if it is not 'rationally connected' to: (a) the purpose for which it was taken; (b) the purpose of the empowering provision; (c) the information before the administrator; or (d) the reasons given by the administrator. This provision clearly requires that administrative action must be rational in the sense discussed above: that there is a connection between, on the one hand, the action and, on the other hand, the purpose, information and reasons, and that the connection flows in the 'correct' direction. (It may *not* be counterproductive).

The first two aspects of rationality review (ie (a) and (b)) ask whether the action objectively operates in the direction of fulfilling its purpose. This understanding accords with the concept of rationality in the general constitutional sense. It is, perhaps unnecessary now, as the exercise of all public power must, courtesy of the principle of legality, be rationally related to a legitimate objective.⁵⁸⁴ (It does retain the virtue of having been codified in PAJA.) The last two aspects ((c) and (d)), however, add another dimension to rationality. They look not to the likelihood of a particular outcome, but rather assess whether the action is supported by the evidence and the reasons. While s 6(1)(f) helpfully identifies the matters to which

582 See R Dworkin *Law's Empire* (1986).

583 The rationality aspect of reasonableness review can be accommodated within this approach. A reasonable decision-maker could not make an irrational decision. Similarly, it would generally follow that a reasonable decision-maker could not have taken a decision which is disproportionate in its effect. It should, however, be noted that proportionality goes further than this conception of reasonableness, in that proportionality does not simply focus on the perspective of the administrator; it looks at the impact of the action. It is conceivable that a decision may have a disproportionate effect although the administrator could not reasonably have been aware of this effect at the time of taking the decision (particularly in urgent circumstances). Accordingly, it may well be that reasonableness, in the sense contemplated in FC s 33, goes beyond the reasonable administrator test contemplated in the text above and extends to objective proportionality (although we acknowledge that this will, in the case of limitations of fundamental rights, overlap with the proportionality requirement flowing from FC s 36(1)).

584 See § 63.2(b) *supra*.

there must be a rational connection, the extent of the connection remains unclear. What level of support is required for the decision or what likelihood of furthering the purpose is required? As we will see below, the judgment of the Constitutional Court in *Bato Star* suggests that there must be a *reasonable* link between the decision, the evidence on which it is based and the objective it seeks to achieve.⁵⁸⁵ Section 6(2)(h) of PAJA goes further, in providing that administrative action may be set aside if it is 'so unreasonable that no reasonable person could have so exercised the power or performed the function'.⁵⁸⁶

While one might argue that this provision means that only particularly egregious instances of unreasonableness will be reviewable,⁵⁸⁷ such an approach should be avoided because it would fail to give effect to the constitutional right to reasonable administrative action. Section 6(2)(h) should rather be read as simply

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providing for review for unreasonableness.⁵⁸⁸ This standard requires a decision-maker to act reasonably, in the sense that the decision taken would have been one of the decision-making options open to the reasonable administrator in all the circumstances. It is therefore not the decision which a reasonable decision-maker *would* have made but rather one he or she *could* have made. In other words, reasonableness is assessed by examining whether the action of the administrator was one of the courses of action open to a reasonable administrator. This enquiry involves a limited proportionality enquiry as a wholly disproportionate action would not be one open to a reasonable decision-maker.

The Constitutional Court adopted this approach in *Bato Star*. Relying on the need to interpret s 6(2)(h) in light of the constitutional right in FC s 33(1), O'Regan J states as follows:⁵⁸⁹

Even if it may be thought that the language of section 6(2)(h), if taken literally, might set the standard such that a decision would rarely if ever be found to be unreasonable, it is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h)

585 *Bato Star* (supra) at para 48 (Suggests that a court may review a decision 'which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts').

586 The draft of PAJA prepared by the Law Commission provided that a court could review administrative action if 'the effect of the action is unreasonable, including any: (i) disproportionality between the adverse and beneficial consequences of the action; and (ii) less restrictive means to achieve the purpose for which the action was taken'. See Hoexter 'Future of Judicial Review' (supra) at 518-519 for a criticism of s 6(2)(h).

587 One reason for this is that s 6(2)(h) employs very similar language to the test for unreasonableness in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*. [1947] 2 All ER 680 (CA) at 683 and 685 (Lord Greene referred to a decision 'so unreasonable that no reasonable authority could ever have come to it.'). The *Wednesbury* test is similar to that of gross unreasonableness in our common law, and has been much-criticised in the United Kingdom. See, eg, HWR Wade and CF Forsyth *Administrative Law* 9th ed. (2004) 371-372. See also *Bato Star* (supra) at para 44.

588 See Currie & Klaaren *Benchbook* (supra) at 171-173.

589 *Bato Star* (supra) at para 44.

should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words,⁵⁹⁰ it is one that a reasonable decision-maker could not reach.⁵⁹¹

In other words, the administrative decision must be one that would be open to a reasonable decision-maker. Only if it goes beyond those parameters, is it open to challenge as unreasonable. The administrative decision at issue in *Bato Star* required a reasonable equilibrium to be struck between various factors. O'Regan J thus remarked that the precise 'equilibrium is best left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances'.⁵⁹² O'Regan J added that this test is a flexible, context-sensitive one:⁵⁹³

What will constitute a reasonable decision will depend on the circumstances of each case.... Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

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The decision in *Bato Star* is to be welcomed. It provides a flexible test for determining reasonableness, taking into account not only the impact of the decision and its benefits, but also factors that are policy-based (and which are sensitive to the institutional competence of courts and administrators). It allows for courts to vary the level of scrutiny depending on factors such as the nature of the decision and the 'identity and expertise of the decision-maker'. It also makes clear that reasonableness goes beyond rationality and includes at least some elements of proportionality.⁵⁹⁴ The core focus of the test, however, remains the standard of the reasonable decision-maker and whether the decision is one that such decision-maker could have made. As O'Regan J reiterated in a slightly different context, and with reliance on her judgment in *Bato Star*, the standard of reasonableness requires the

590 In *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 120, 157 (HL).

591 The SCA in *Foodcorp (Pty) Ltd v Deputy Director General Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management & Others* 2006 (2) SA 191 (SCA) ('*Foodcorp*') at para 12 described the test in the following way: 'whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached'. Although the courts in *Bato Star* (supra) and *Foodcorp* have not adopted a strictly literal interpretation of s 6(2)(h), it seems to us that this interpretation is not unduly strained and is thus, we submit, appropriate as a matter of constitutional principle.

592 *Bato Star* (supra) at para 49.

593 At para 45.

594 See Hoexter *Administrative Law* (supra) at 316 (Points out that the references to 'the impact of the decision', 'the nature of the competing interests involved' and 'the range of factors relevant to the decision' in this dictum in *Bato Star* suggest a proportionality enquiry.) As we discuss above, there may be a need to go further, in light of FC s 33, and to accommodate proportionality within the grounds of review in s 6(2) of PAJA. One possibility in this regard is to bring disproportionality under the catch-all in s 6(2)(i) of PAJA: 'otherwise unconstitutional or unlawful'.

public authority's conduct 'to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted.'⁵⁹⁵

Conscious of the potential of reasonableness review to blur the distinction between review and appeal, and to undermine the separation of powers, O'Regan J in *Bato Star* emphasised the need for appropriate 'respect' (the term that she prefers to 'deference') towards the administrative decision-maker. She did so in a manner that locates the idea of respect or deference not as an extra-legal trump card but as an incidence of the separation of powers:⁵⁹⁶

[T]he need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the constitutional principle of the separation of powers itself... . In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend on the character of the decision itself, as well as the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. ... This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported by the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.⁵⁹⁷

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63.7 The right to written reasons

(a) The constitutional right to written reasons

In an oft-noted and oft-lamented gap, there was no right to reasons in general administrative law under the common law.⁵⁹⁸ This position was radically altered by IC s 24(c). It proclaimed that every person has the right to be furnished with written reasons for administrative action which 'affects his or her rights or interests unless the reasons for such action have been made public'. The surprisingly broad ambit of this right to reasons (referring to both 'rights' and 'interests') was reduced under the Final Constitution. FC s 33(2) abandons the reference to 'interests' and states that everyone whose '*rights* have been adversely affected by administrative action has the right to be given written reasons'.⁵⁹⁹ The right to written reasons in FC s 33(2) is thus subject to a threshold test of 'rights' (to which the right to lawful, reasonable

595 *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 86 and 87. See also *Sidumo* (supra) at para 119.

596 See Hoexter *Administrative Law* (supra) at 138–147 and 318–321.

597 *Bato Star* (supra) at paras 46–8.

598 Baxter *Administrative Law* (supra) at 226. Some statutes, however, required reasons for particular decisions. *Ibid.* See also Hoexter *Administrative Law* (supra) at 419–420.

and procedurally fair administrative action in FC s 33(1) is not subject). We return to the significance of this below.

(b) The rationales for the right to written reasons

The right to reasons has been described as 'the bulwark of the right to just administrative action'.⁶⁰⁰ It promotes administrative justice and good decision-making in a constructive manner without the need to rely on judicial review. If a decision-maker knows that he or she is required to provide written reasons to justify his or her decision, then he or she will be more inclined to consider all alternatives and to act in conformity with principles of good administration.⁶⁰¹ The requirement of written reasons also promotes accountability, with decision-makers needing to justify their conduct. In so doing, it increases public confidence in the administration and advances the foundational constitutional values of accountability, responsiveness and openness.⁶⁰²

The furnishing of reasons simultaneously promotes the values of lawful and efficient administrative decision-making in the following manner. If the decision has been properly taken and adequate reasons are furnished in respect of that decision, then a person affected by it may well accept it and take the matter no

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further (thus reducing the prospect of disgruntled persons bringing review applications for purposes of finding out whether a decision was properly taken, which undermines efficient administration). If, on the other hand, the reasons reveal that the decision was not properly taken (eg relevant considerations were not taken into account or irrelevant considerations were), the affected person would be able to make an informed decision as to whether and how to challenge the decision.⁶⁰³ In other words, written reasons enable persons to assess whether or not their rights have been infringed and to review or, where appropriate, appeal a particular decision.

In addition, the right to written reasons can perform an educational function; informing, for example, an applicant for a licence how he or she can improve his or her chances of being awarded a licence the next time around.⁶⁰⁴

Some of these rationales are well-captured in the minority judgment of Mokgoro and Sachs JJ in *Bel Porto*:

599 Emphasis added.

600 See *Goodman Brothers* (supra) at para 42 (Olivier JA, concurring.)

601 See *Bel Porto* (supra) at para 159. See also Baxter *Administrative Law* (supra) at 228 ('A duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account.')

602 FC s 1(d). See also FC s 195(1)(Sets out the principles of public administration); De Ville *Judicial Review* (supra) at 287; and *Kiva* (supra) at paras 22 and 37.

603 See *Bel Porto* (supra) at para 159. See also Hoexter *Administrative Law* (supra) at 416.

The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallize the issues should litigation arise.⁶⁰⁵

(c) The scope of the right to written reasons

As stated above, FC s 33(2) confers the right to written reasons on a person whose 'rights are adversely affected' by administrative action. Section 5(1) of PAJA gives this constitutional right statutory form. It provides that any person 'whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action' may request the administrator to furnish written reasons for the action.⁶⁰⁶ The administrator is obliged to provide such reasons within 90 days after receiving the request.⁶⁰⁷ Subsection (3) goes

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on to provide that if an administrator fails to furnish adequate reasons, it will be rebuttably presumed in any judicial review proceedings that the administrative action was taken without good reason. An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances⁶⁰⁸ and may follow a fair but different procedure in terms of an empowering provision.⁶⁰⁹

The right to written reasons therefore only arises under PAJA if a person's 'rights' have been 'materially and adversely affected'. Here, PAJA adds the qualification 'materially' as a threshold requirement that must be satisfied in order to invoke the right to written reasons as expressed in FC s 33(2). In order to ensure that PAJA

604 Baxter *Administrative Law* (supra) at 138 (Quoted with approval in a number of decisions of our courts, including the SCA in *Goodman Brothers* (supra) at para 6 (per Schutz JA)). For more detailed discussions of the rationales for the right to written reasons, and the disadvantages of the requirement to furnish reasons, see Hoexter *Administrative Law* (supra) at 416-419; De Ville *Judicial Review* (supra) at 287-288; Currie *The PAJA* (supra) 137-139; Burns & Beukes *Administrative law* (supra) at 253-255.

605 *Bel Porto* (supra) at para 159.

606 The request for reasons must be made within 90 days from the date on which the affected person 'became aware of the action or might reasonably have been expected to have become aware of the action'. PAJA s 5(1).

607 PAJA s 5(2).

608 PAJA s 5(4)

609 PAJA s 5(4). Section 2 also provides for an exemption from the requirement to furnish written reasons.

properly gives effect to the constitutional right, only fairly insignificant, trivial effects should fall short of the 'materially' requirement.⁶¹⁰

The more significant question (and one fundamentally parallel to our discussion above regarding s 3 of PAJA) is what is meant by an adverse effect on 'rights' in the context of s 5(1) of PAJA? One answer is to apply the approach of the Supreme Court of Appeal in *Goodman Brothers*. *Goodman Brothers* concerned a request for reasons by an unsuccessful tenderer. Although the case was decided in terms of the transitional FC s 33(2), which repeated the wording of IC s 24(c),⁶¹¹ the SCA did not consider whether the decision to award the contract to another tenderer adversely affected the unsuccessful tenderer's 'interests'. It focused on whether its 'rights' were adversely affected. Schutz JA, writing on behalf of the majority of the SCA, held that the affected right was that of lawful and procedurally fair administrative action. Schutz JA arrived at this conclusion because, without reasons, the affected person could not assess whether his or her right to lawful and fair administrative action had been violated.⁶¹² Without reasons, the unsuccessful tenderer 'is deprived of the opportunity ... to consider further action'.⁶¹³

Some have suggested that the approach of the majority of the SCA in *Goodman Brothers* can usefully be employed in relation to s 5 of PAJA.⁶¹⁴ And at least one decision of our courts has indeed applied it to s 5.⁶¹⁵ However, if this approach

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is correct, then all administrative action which adversely impacts on a person will trigger the right to written reasons.⁶¹⁶ In adopting this approach, the differences between FC s 33(1) (which applies to all administrative action) and FC s 33(2) (which only applies to administrative action adversely affecting rights) would 'seem to be obliterated'.⁶¹⁷

While we have some sympathy for the furtherance of the aims of the right to written reasons through this approach, it is, in our view, flawed. It amounts to

610 *Kiva* (supra) at para 23.

611 FC item 23(2)(b) of Schedule 6.

612 *Goodman Brothers* (supra) at paras 10–11.

613 *Ibid* at para 12.

614 De Ville *Judicial Review* (supra) at 290–291. Hoexter *Administrative Law* (supra) at 424–426 also seems to support the application of *Goodman Brothers* to s 5(1) of PAJA, though in more tentative terms, acknowledging the difficulties with the 'bootstraps' reasoning in *Goodman Brothers*, but stating that 'it is reasoning that will appeal to anyone who cares about the values of participation and accountability'.

615 *Kiva* (supra) at paras 29–32 (Plasket J). The Court in *Kiva* also held that the rights to equality, access to court and fair labour practices were affected by the decision not to promote the applicant (at para 32).

616 See De Ville *Judicial Review* (supra) at 291.

617 Hoexter *Administrative law* (supra) at 424.

'bootstraps' reasoning that reads out the adversely affecting rights requirement in s 5 of PAJA (and FC s 33(2)).⁶¹⁸ It thus fails to give effect to the language used in both FC s 33(2) and PAJA. Perhaps most problematically, it undermines the clear choice of the drafters of the Final Constitution to list the right to written reasons (in FC s 33(2)) separately from the right to lawful, reasonable and procedurally fair administrative action (in FC s 33(1)) and to make the former right expressly subject to the additional threshold of adversely affected rights.⁶¹⁹ It also fails to pay due respect to the drafters of PAJA, who expressly limited the right to written reasons to situations where administrative action adversely affects 'rights', while providing that procedural fairness applies to a wider range of decisions (adversely affecting 'rights or legitimate expectations').⁶²⁰ This 'lack of respect' for an important distinction made by another branch of government is inappropriate both as a means to interpret correctly a constitutional right (FC s 33(2)) as well as a provision of constitutionally mandated legislation (s 5(1) of PAJA).⁶²¹

It seems to us that the purpose of the 'adversely affecting rights' requirement in FC s 33(2) is not to entitle persons to written reasons in order to assess whether or not their rights (including their rights to just administrative action) have been infringed (as laudable as such an approach would be), but rather to adopt the approach that has been used for some time in administrative law in the context of the right to a hearing; namely, to narrow the categories of persons who are entitled to that right based on the impact of the administrative decision on those persons.⁶²² In this regard, it is instructive to compare the language in FC s 33(2) with the right to access to information in private hands in FC s 32(1)(b). FC s 32(1)(b) entitles persons to access information 'that is required for the exercise or protection of any rights'. While FC s 32(1)(b) contemplates the need to

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have sight of information in order to exercise or protect one's rights,⁶²³ FC s 33(2) applies where the administrative action actually has an adverse effect on rights.

We submit that a more appropriate approach is to read the 'adversely affecting rights' requirement in s 5(1) of PAJA as denoting administrative action that *determines* one's rights. 'Rights' in this context includes *all* rights and may well

618 See Hoexter *Administrative law* (ibid) and Hoexter 'The Current State' (supra) at 31.

619 This purpose is particularly apparent when one has regard to the extensive use of this type of threshold in qualifying each of the rights to just administrative action under IC s 24.

620 Compare s 5(1) and s 3(1) of PAJA.

621 The problem is captured by Hoexter 'The Current State' (supra) at 32 in the following terms: '[*Goodman Brothers*] is a fairly clear illustration of what judicial enthusiasm can do to obliterate the limits deliberately drawn by any legislature. To put it rather crudely, the decision shows just how easy it is to make administrative justice fully applicable to everyone all the time'.

622 This approach was also adopted in relation to the various aspects of administrative justice in IC s 24.

623 See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62, § 62.7.

extend to unilateral obligations undertaken by the State.⁶²⁴ Differing significantly from our interpretation of the scope of ss 3 and 4 of PAJA but nonetheless not going so broad as *Goodman Brothers*, this 'determining' interpretation of s 5 would entitle a broad range of persons who are affected by administrative action to written reasons in respect of that action (including an unsuccessful tenderer such as in *Goodman Brothers*) but, in our view, gives effect to the wording of FC s 33(2) and s 5(1) of PAJA.

(d) The content of PAJA s 5: the meaning of 'adequate' reasons

Another important question for purposes of s 5 of PAJA is what constitutes 'adequate reasons'? Although PAJA does not provide guidance on this issue, a number of cases shed light on it.

In the pre-PAJA case of *Moletsane v Premier of the Free State & Another*, the Court laid down the general approach that 'the more drastic the action taken, the more detailed the reasons which are advanced should be'.⁶²⁵ The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished. This approach links the level of detail to the impact on the person affected by the action.

Shying away from such a unidimensional approach, Currie and Klaaren point out that there are other possible alternatives to assessing what is adequate in the

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circumstances and too much store should not be set by the seriousness of the administrative action. One should have regard to all relevant considerations, including the level of complexity relating to the matter and the cost of providing detailed reasons in the circumstances, in assessing the adequacy of reasons.⁶²⁶ The guiding principle in this regard is that the reasons should be sufficient in order to serve the objects of the right to written reasons. Accordingly, 'a statement of reasons is adequate ... when it is intelligible to the persons seeking the reasons and

624 See § 63.3(c)(vi) supra. An interesting issue that would arise if this approach is adopted is the impact of the right to equality. See *Goodman Brothers* (supra) at para 42 (Olivier JA, in a separate concurring judgment, held that, in the context of a tender, the right to equality in FC s 9 gave rise to an effect on rights: 'The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such a right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally'.) At the risk of being accused of cynicism, we submit, for the reasons set out above, that the right to written reasons (under FC s 33(2)) does not arise simply because one needs to have sight of reasons in order to assess whether one has been subject to unequal treatment. Nevertheless, the nature of the right to equality (and particularly 'mere differentiation' contemplated in FC s 9(1)) may mean that a wide range of administrative action adversely affects the right to equality, in the sense that it results in different treatment (even though that different treatment is not unconstitutional). In addition, the context of tenders may have specific implications on the rights at issue and their interpretation and application. See G Penfold and P Reyburn 'Public Procurement' 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 25.

625 1996 (2) SA 95 (O) at 98G-H, 1995 (9) BCLR 1285, 1228B (O).

626 See Currie & Klaaren *Benchbook* (supra) at 143-146.

is of sufficient precision to give them a clear understanding of why the decision was made'.⁶²⁷

A helpful and authoritative statement as to the meaning of 'adequate reasons' and one that references the purposes of the right to written reasons is provided in the judgment of the Supreme Court of Appeal in *Phambili Fisheries*:

[Section] 13(1) of the [Australian] Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'

This requires that the decision-maker should set out his understanding of the relevant law, any finding of fact on which his conclusions depend (especially if those have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.⁶²⁸

(e) The request-driven nature of the right to written reasons under PAJA

The starting-point of PAJA's treatment of reasons is that the process is request-driven. While this would probably not affect the constitutionality of PAJA, it equally should not be taken as a signal for the legislature to depart from the recent legislative trend to require that reasons be automatically given in relation to certain decisions. The automatic grant of written reasons serves the

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interests of good administration. In addition to adhering to this trend in legislative drafting, the provisions of s 5(6) should be employed for this purpose.⁶²⁹

63.8 Standing to enforce the right to just administrative action

627 Currie & Klaaren *Benchbook* (supra) at 144. See also in J Wessels "'Adequate reasons" in terms of the Promotion of Administrative Justice Act' in C Lange and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 116, 125-131.

628 *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at para 40 (Schutz JA), quoting Woodward J in the Australian case of *Ansett Transport Industries (Operations) Pty Ltd & Another v Wraith & Others* (1983) ALR 500, 507. On the adequacy of reasons, see *Nomala v Permanent Secretary, Department of Welfare, & Another* 2001 (8) BCLR 844 (E); *Commissioner, South African Police Service, & Others v Maimela & Another* 2003 (5) SA 480 (T).

629 Section 5(6)(a) provides that '[i]n order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section'.

In administrative law, standing primarily refers to the right of an applicant to approach the court for relief by way of judicial review.⁶³⁰ In enforcing the Bill of Rights, FC s 38 expands the common-law grounds of standing in cases in which it is alleged that a constitutional right has been infringed or threatened. In such cases the following persons may approach a court: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members.⁶³¹

This constitutional position has a relatively clear implication for general administrative law and the enforcement of the right to just administrative action: that the approach to standing must be broader than has previously been the norm. The standing clause of the Bill of Rights should be read into the PAJA.⁶³² In our view, a broad approach to standing, such as has by and large been adopted by our courts thus far, would not only follow the constitutional direction in this area of public law⁶³³ but would also be consistent with the fact that s 6(1) of the PAJA provides that 'any person' may institute judicial review proceedings. One specific implication is that final administrative action with a general effect should be justiciable regardless of its implementation or enforcement in individual cases.⁶³⁴ Such a position would reverse the existing, narrow common-law understanding.

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In one treatment of standing within administrative law, the Constitutional Court has supported a relatively expansive view of standing. In *AAA Investments*, the Court granted leave to appeal even where the case had become moot due to its important implications for regulation.⁶³⁵

An important class action case in the lower courts supports the general argument that the broad constitutional provision relating to standing should be applied in the context of review under the PAJA. In relation to administrative justice, Froneman J in *Ngxuzwa Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another*⁶³⁶ adopted a broad approach to standing:

630 As noted above, standing may also be relevant in non-judicial administrative proceedings such as those of internal review and appeal.

631 See C Loots 'Standing, Ripeness and Mootness' 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 7.

632 Currie *The PAJA* (supra) at 179. For a general discussion of standing in administrative law, see Hoexter *Administrative Law* (supra) chapter 9 'Standing' 434-460. While Hoexter considers standing to be a separate topic from that of ripeness and mootness, we consider these issues together.

633 See *Ferreira v Levin NO & Others; Vryenhoek & others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 229 (O'Regan J emphasised that litigation of a public character is suited to such an expansion.)

634 See Currie *The PAJA* (supra) at 181-182.

635 *AAA Investments* (supra) at para 27.

Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach [to standing]. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality. All this speaks against a narrow interpretation of the rules of standing.

In this case a number of applicants, whose disability grants under social legislation had been cancelled or suspended, sought a declaration that the suspension or cancellation was unlawful. The same relief was claimed by the applicants on behalf of any other persons in the same position as themselves. Froneman J emphasised the conditions of poverty in the Eastern Cape in holding that there was evidence that many people in similar circumstances as the applicants were unable individually to pursue their claims through poverty, did not have access to legal representation, and would have difficulty in obtaining legal aid. They were thus effectively unable to act in their own name.⁶³⁷

The Court therefore held that the applicants had standing under s 38(b) on the ground that they were acting on behalf of others who could not act in their own names. The Court also held that the applicants had standing on the basis that they were members of a class of persons (s 38(c)) and were acting in the public interest (s 38(d)).

The finding that the applicants had standing on the basis that they were members of a class was upheld on appeal by the Supreme Court of Appeal.⁶³⁸ In the course of his judgment Cameron JA emphasised that the class of applicants were

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drawn from a poor community, their claims were small and they were widely spread. Cameron JA therefore remarked that the situation 'seemed pattern-made for class proceedings'.⁶³⁹

63.9 Substantive relief

A detailed discussion of the remedies available in administrative law falls beyond the scope of this chapter.⁶⁴⁰ Nevertheless, a significant issue, which raises fundamental questions in relation to the separation of powers, is the circumstances in which a court has the competence to grant substantive relief in an administrative review. In other words, when will a court substitute the decision of the administrator, rather

636 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E) ('Ngxuza') at 619 and 1327, respectively.

637 *Ngxuza* (supra) at 622-623.

638 *Permanent Secretary, Department of Welfare, Eastern Cape & Others v Ngxuza & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA) ('Ngxuza SCA') (It was unnecessary for the SCA to decide on the other grounds of standing as the applicants had subsequently chosen to proceed with a class action.)

639 *Ngxuza* (SCA) (supra) at para 11.

than granting the normal remedy of setting aside the decision and referring it back to the relevant decision-maker? Under our common law, the courts were generally reluctant to substitute the decision of the original decision-maker but did so in what were determined to be exceptional circumstances.⁶⁴¹ This common law position is now reflected in s 8(1)(c)(ii)(aa) of PAJA. Section 8(1)(c)(ii)(aa) provides that 'in exceptional cases' the court may substitute or vary the administrative action or correct a defect resulting from the administrative action.

The emphasis on exceptional circumstances is not surprising, given the fact that the granting of such relief (eg ordering a licensing authority to award a licence to a particular applicant) amounts to a dramatic encroachment by the court into the executive sphere, and also blurs the distinction between review and appeal. In order to preserve the separation of powers, this intervention should only take place where it is warranted by strong countervailing considerations. As Heher JA stated in an important decision of the Supreme Court of Appeal on substantive administrative law relief, 'remittal is almost always the prudent and proper course', because:⁶⁴²

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An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.

The question that then arises is what circumstances are sufficiently exceptional to trigger a substantive remedy? It is likely that our courts will continue to turn to extant common law jurisprudence in seeking to answer this question. In our view, such reliance is generally appropriate. Nevertheless, in line with our adoption of the doctrine of the separation of powers as a lodestar, we would underline the call in *Premier, Mpumalanga* for reviewing courts to consider and respect fully the separation of powers in this as in other areas of administrative law.

Hiemstra J in *Johannesburg City Council v Administrator, Transvaal & Another*⁶⁴³ identified two circumstances in which substantive relief may be appropriate: (a) where the end result is 'a foregone conclusion'; and (b) where the reviewed decision-maker 'has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again'. To these two

640 Section 8 of PAJA provides that a court of tribunal in proceedings for judicial review of administrative action may grant 'any order that is just and equitable' including, for example, directing the administrator to give reasons, prohibiting the administrator from acting in a particular manner, setting aside the administrative action and remitting it for reconsideration, declaring the rights of the parties, granting a temporary interdict or other temporary relief. In relation to constitutional remedies generally, see M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

641 South Africa is traditionally somewhat divergent in this respect from its usual comparators in the Commonwealth, such as the United Kingdom, where a judicially reviewing court's power to substitute its decision for that of the reviewed administrator is more limited.

642 *Gauteng Gambling Board v Silverstar Development Ltd & Others* 2005 (4) SA 67 (SCA) ('*Silverstar*') at para 29. *Silverstar* was an exception perhaps proving the rule, as the case saw substantive relief ordered.

643 1969 (2) SA 72 (T) at 76.

circumstances can be added a third and fourth: (c) where further delay would unjustifiably prejudice the subject of the decision;⁶⁴⁴ and (d) where a court is as qualified as the administrator to make the decision.⁶⁴⁵

Two points should be made in relation to this list of circumstances. First, they are only considerations to be taken into account (along with all other relevant considerations) in assessing whether substantive relief should be granted. Simply because one or more of (a) to (d) arises does not mean that substantive relief will automatically be granted.⁶⁴⁶ The courts have, for example, emphasised that simply because the court may be as well placed as the administrator to make the decision, does not mean that the court *should* take the decision.⁶⁴⁷ Second, whatever other circumstances may exist, a court should not grant substantive relief unless it has

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adequate information, and the requisite institutional competence, to make the substantive decision. The need for adequate information is reflected in the recent decision in *Intertrade Two (Pty) Limited v MEC for Roads and Public Works, Eastern Cape, & Another*.⁶⁴⁸ In *Intertrade*, the High Court refused to order that two tenders be awarded to the applicant, despite the fact that the tender process was 'shot through with irregularities',⁶⁴⁹ that there had been numerous delays in the tendering process, that the applicant was the only tenderer in respect of the two tenders and that the tenders related to the vital function of maintaining hospital equipment. As Plasket J explained:

The availability of proper and adequate information and the institutional competence of the Court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from 'exceptional circumstances', before a court can legitimately assume an administrative decision-making function. This, it

644 *Ruyobeza & Another v Minister of Home Affairs & Others* 2003 (5) SA 51 (C), 65; *Reynolds Brothers Limited v Chairman, Local Road Transportation Board, Johannesburg & Another* 1985 (2) SA 790 (A), 805.

645 See Hoexter *Administrative Law* (supra) at 490–492. For a comprehensive list of the considerations that may play a role in determining whether exceptional circumstances arise, see De Ville *Judicial Review* (supra) 336–337. In *Silverstar* (supra) the SCA took the dramatic step, following a successful review, of awarding a casino licence to the applicant. The SCA's decision was based on the apparent inevitability of the award of the licence to the applicant if the matter had been remitted (paras 38–39), the delay had 'reached substantial proportions' (para 40) and the well-founded belief of the applicant that the administrative decision-maker (the Gauteng Gambling Board) had 'lost its objectivity' (ibid). The Court adopted this approach despite acknowledging that the Board held manifest advantages over a court as a decision-maker on this issue (para 38).

646 The one possible exception is (a). If a court can say with absolute certainty that a particular decision is a 'foregone conclusion', there would seem to be no difficulty with granting the substantive remedy.

647 *University of the Western Cape & Others v Member of the Executive Committee for Health and Social Services & Others* 1998 (3) SA 124 (C) at 131; *Commissioner, Competition Commission v General Council of the Bar of South Africa & Others* 2002 (6) SA 606 (SCA) ('*Commissioner, Competition Commission v GCB*'); and Baxter *Administrative Law* (supra) at 684.

648 2007 (6) SA 442 (CKHC) ('*Intertrade*').

649 Ibid at para 36.

seems to me, is a minimum requirement of rational decision-making, a fundamental requirement of the rule of law.⁶⁵⁰

In addition to factors (a) to (d) above — and the significant considerations of institutional competence and the separation of powers — fairness also plays an important role in considering whether or not to grant a substantive remedy.⁶⁵¹ As Hefer JA stated in *Commissioner, Competition Commission v GCB*, 'considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so'.⁶⁵²

63.10 The substantive protection of legitimate expectations⁶⁵³

An issue that has attracted a great deal of academic debate and judicial attention in recent years is the extent to which substantive legitimate expectations enjoy substantive protection.⁶⁵⁴ As discussed above in the context of procedural fairness,

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the founding basis of a legitimate expectation can either be procedural (where an affected person has a reasonable expectation of a hearing prior to a decision being taken) or substantive (where one has a reasonable expectation of a benefit or favourable decision).⁶⁵⁵ Whichever form the legitimate expectation takes, the traditional approach is that it only entitles one to procedural protection. In other words, a legitimate expectation entitles one to a hearing prior to a decision which might frustrate that expectation.

650 Ibid at para 43.

651 Hoexter *Administrative Law* (supra) at 489 and 492. De Ville *Judicial Review* (supra) at 337 describes fairness to all concerned as the 'primary consideration' in assessing substantive relief. De Ville quotes Holmes AJA in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A), 349: 'although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides'. See also *Commissioner, Competition Commission v GCB* (supra) at para 14.

652 *Commissioner, Competition Commission v GCB* (supra) at para 15.

653 Although the substantive protection of legitimate expectations is often included in discussions of procedural fairness, it is not in fact an issue of procedural fairness. While the concept of legitimate expectations owes its origin to the application of the right to a hearing, the substantive protection of these expectations falls more appropriately under the headings of legality, reasonableness and administrative remedies. It is for this reason that this complex issue is briefly discussed under this separate heading.

654 The recent literature on substantive protection of legitimate expectations is voluminous. See, eg, J Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *SALJ* 292 ('The Potential and Limits of Substantive Protection'); J Campbell 'Legitimate Expectations: Developments at Home and Abroad' (2004) 121 *SALJ* 328; G Quinot 'The developing doctrine of substantive legitimate expectations in South Africa administrative law' (2004) 12 *SAPL* 543; C Forsyth 'The provenance and protection of legitimate expectations' 1988 *Cambridge LJ* 238; C Forsyth 'Wednesbury Protection of Substantive Legitimate Expectations' (1997) *Public Law* 375; P Craig 'Legitimate expectations: a conceptual analysis' 1992 *LQR* 79; Hoexter *Administrative Law* (supra) at 382–392; and De Ville *Judicial Review* (supra) at 123–135.

655 See § 63.5(d)(ii) supra.

In recent years, courts in various jurisdictions have gone further and in a few cases have provided *substantive* protection to substantive legitimate expectations. In other words, courts have protected the substance of the expectation. The effect of this so-called doctrine of substantive legitimate expectations is, by way of example, that where an administrator has promised a particular benefit (such as the grant of a permit or the application of a particular policy), the administrator must comply with that promise (i.e. the permit must be granted or the policy must be applied).

In recent years the doctrine of substantive legitimate expectations has been increasingly considered and to some extent accepted in the United Kingdom and in other, though not all, commonwealth countries.⁶⁵⁶ The doctrine has been specifically rejected in Australia.⁶⁵⁷ Even where accepted, however, courts and academics have not agreed on the manner in which these expectations are to be protected.⁶⁵⁸ One recent judicial authority on substantive legitimate expectations in the UK is the decision of the Court of Appeal in *R (Abdi and Nadarajah) v Secretary of State for the Home Department*.⁶⁵⁹ In *R (Abdi and Nadarajah) v Secretary of State for the Home Department*, Laws J held, *obiter*, that a public authority may only

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frustrate a legitimate expectation where it is proportionate to do so, taking into account the competing interests in the matter. He emphasised that holding a public authority to its promises or past practices accords with the principle of good administration.⁶⁶⁰ According to the court, the substantive protection of legitimate should only be denied:

in circumstances where to do so is the public body's duty, or is otherwise ... a proportionate response ... having regard to the legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.⁶⁶¹

656 See Campbell 'The Potential and Limits of Substantive Protection' (supra) at 292 and Quinot (supra) at 556-563 (See cases cited). The one court of final appeal that has accepted the notion is in Hong Kong: *Ng Sui Tung v Director of Immigration* [2002] 1 HKLRD 561.

657 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1; 195 ALR 502.

658 For useful discussions of the different approaches, see Campbell 'The Potential and Limits of Substantive Protection' (supra) and Quinot (supra) at 556-63. One approach (promoted by Professor Craig) adopted in the UK is to protect substantive legitimate expectations directly through balancing the person's interest in the expectation against the public or state interest in frustrating the expectation. This approach has been applied in different ways. See *R v Ministry of Agriculture, Fisheries and Food; ex parte Hamble (Offshore) Fisheries Limited* [1995] 2 All ER 714 (QB); *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health intervening)* [2000] 3 All ER 850 (CA). The second approach in the UK is to protect legitimate expectations where a frustration of the expectation would fall short of the standard of *Wednesbury* unreasonableness. See, eg, *R v Secretary of State for Transport, Ex Parte Richmond-upon-Thames London* [1994] 1 WLR 74.

659 [2005] EWCA Civ 1363.

660 *R (Abdi and Nadarajah) v Secretary of State for the Home Department* (supra) at para 68.

The doctrine of substantive legitimate expectations has, to date, had a mixed reception in South African courts. While substantive protection has been granted in some cases,⁶⁶² the doctrine has been rejected in a more recent decision of the High Court.⁶⁶³ Although the issue has been raised in our highest courts on a number of occasions and has again recently been argued in the Constitutional Court,⁶⁶⁴ both that Constitutional Court and the Supreme Court of Appeal have left open the question as to whether substantive protection may be granted in respect of legitimate expectations.⁶⁶⁵

The reticence to embrace this controversial doctrine arises from what is often seen as a tension at the heart of the substantive protection of legitimate expectations. On the one hand, a failure to fulfill a legitimate expectation is seen as unfair (in the general sense) and as undermining certainty and confidence in the administration.⁶⁶⁶ On the other hand, the traditional objections to the substantive protection of substantive legitimate expectations are that to do so: (a) involves courts descending into the merits of administrative decision-making and thus undermines the separation of powers between the executive and judiciary; (b) results in the fettering of administrative decision-making, by holding administrators to their undertakings and current practices or policies; (c) undermines the rule of law, by enabling administrative decision-makers to exceed their powers (ie it creates

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the risk of an administrator, in effect, arrogating to herself a power she does not have, through a promise or other form of conduct); and (d) it discourages changes to administrative decision-making and policy-making, thus undermining the ease with which the administration responds to evolving public interests.⁶⁶⁷

Although it is possible that the direct application of the doctrine of substantive legitimate expectations will find acceptance in our law,⁶⁶⁸ we agree with John Campbell that substantive protection should be granted in appropriate cases using

661 Ibid.

662 See Campbell 'The Potential and Limits of Substantive Protection' (supra) at 314–315 (Points to the decisions in *Traub v Administrator, Transvaal* 1989 (1) SA 397 (T) and *Minister of Local Government & Land Tenure v Inkosinathi Property Developers (Pty) Ltd* 1992 (2) SA 234 (TCA) as examples of the substantive protection of legitimate expectations.)

663 See *Durban Add-Ventures v Premier Kwazulu-Natal (No 2)* 2001 (1) SA 389 (N).

664 See *Various Occupants v Thubelisha Homes and Others* CCT22/08.

665 See *Premier, Mpumalanga* (supra) at para 36; *Bel Porto* (supra) at para 96; *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at para 27; and *Szymanski* (supra) at para 15. The question was also left open by the High Court in *Putco Ltd v The Minister of Transport for the Republic of South Africa* 2003 JDR 0408 (W), referred to in *Quinot* (supra) at 549–550. But see *Bel Porto* (supra) at para 212–213 (Madala J)(Appears to accept that substantive protection of legitimate expectations is possible.)

666 See Hoexter *Administrative Law* (supra) at 382.

667 See, generally, Pretorius 'Ten years after Traub' (supra) at 531; Hoexter *Administrative Law* (supra) at 382; De Ville *Judicial Review* (supra) at 123–124; Campbell 'The Potential and Limits of Substantive Protection' (supra) at 294–295.

the established grounds of review under PAJA. The effect of s 3 of PAJA is that a person whose legitimate expectations are materially and adversely affected by administrative action must be given an opportunity to make representations on the proposed action. As Campbell points out, it would follow from this proposition that the person's expectation (and the past practice, promise or other facts underlying it) would be a relevant consideration in coming to the administrative decision.⁶⁶⁹ A failure by the administrator to give due regard to the expectation would thus be reviewable on the ground of a failure to consider a relevant consideration.⁶⁷⁰ In addition, and perhaps most significantly, the legitimate expectation would place a thumb on the scales in considering whether the administrative action is reasonable. If the action is unreasonable, then it would fall foul of s 6(2)(h) of PAJA.⁶⁷¹ The effect is that a substantive legitimate expectation cannot be denied where it would be unreasonable to do so. This approach allows the court to take into account all relevant circumstances, including, on the one hand, the impact of a negative decision on the holder of the legitimate expectation and, on the other, the public interest that is served by frustrating that expectation (including the interest in ensuring that public administration is not unduly hampered and that changes in policy can be effected in the public interest). The question is thus: 'could the reasonable administrator have made the decision even though it adversely affected X's legitimate expectation of a substantive benefit?'⁶⁷²

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This leaves the issue of remedy. Again, the remedial approach inherent within the substantive protection of substantive legitimate expectations can be accommodated within our existing administrative law. Where the expectation is that a current state of affairs will continue (eg an old age home will not be closed or subsidies will continue to be paid), a court upholding that expectation can simply interdict the administrator from changing the status quo. Where, on the other hand, the expectation is that a new benefit will be granted (eg, the issuing of a permit), a court could, in exceptional circumstances, grant a substantive remedy under PAJA (eg, to compel the issuing of a permit).⁶⁷³

If the substantive protection of legitimate expectations is construed in the manner we have just suggested, then the main concerns relating to this protection

668 A court could, eg, hold that administrative action may only adversely affect a substantive legitimate expectation where it is proportionate or there is a pressing public interest. On the latter, see *Bel Porto* (supra) at para 213 (Madala J). If accepted, this test could possibly be accommodated under the ground of review in s 6(2)(i) of PAJA ('The action is otherwise unconstitutional or unlawful'). See Hoexter *Administrative Law* (supra) at 391.

669 'Legitimate expectations are, quintessentially, relevant factors for consideration in [the decision-making] process and can never be ignored. There is no escape from this requirement' (Campbell 'The Potential and Limits of Substantive Protection' (supra) at 311).

670 Section 6(2)(e)(iii) of PAJA.

671 If the administrative action is irrational, it would also contravene s 6(2)(f)(ii) of PAJA.

672 A consideration of legitimate expectations would seem to fall within the broad notion of reasonableness review contemplated in *Bato Star*. O'Regan J noted that the factors to be taken into account in assessing the reasonableness of administrative action include 'the range of factors relevant to the decision, ... the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'. *Bato Star* (supra) at para 45. See § 63.6 supra.

(set out above) are considerably reduced (or removed). Part of this doctrinal security flows from the constitutional context of South African administrative law: it requires that everyone is entitled to lawful and reasonable administrative action. First, substantive protection would take place through the established grounds of review under PAJA, including a failure to have regard to relevant considerations and unreasonableness. Although the latter, to some extent, involves an assessment of the merits of administrative action, the assessment is confined to whether or not the action is reasonable. In this way, respect for the separation of powers is maintained.⁶⁷⁴ Second, substantive protection does not mean that an administrator cannot deviate from his or her undertakings or existing policies. It only means that he or she cannot do so unless it is reasonable having regard to all the circumstances, including the impact of frustrating the expectation. We note in this regard that in treating the legitimate expectation as a factor in assessing the reasonableness of the decision, and not as a trump, the distinction between rights and legitimate expectations is maintained.⁶⁷⁵ A person's legitimate expectation is protected not because he or she has an entitlement to it, but because the administrative decision-making is 'disciplined by the ordinary rules of administrative law'.⁶⁷⁶ Third, as Hoexter points out, substantive protection advances the principles of good administration, and therefore the values of the Final Constitution, through promoting accountability, responsiveness, candour and transparency in public administration.⁶⁷⁷

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We thus support the protection of substantive legitimate expectations, in appropriate cases, to the extent that this relatively new doctrine can be accommodated within the application of the normal rules of administrative law. The bottom line for us is that these expectations cannot be overridden where it is unreasonable to do so and where it is appropriate to grant substantive relief.

673 Section 8(1)(c)(ii)(aa) of PAJA. As to the circumstances in which substitution may be appropriate in this context, see Campbell 'The Potential and Limits of Substantive Protection' (supra) at 314. See also § 63.9 supra.

674 See § 63.6 supra. Even if our courts were to apply the substantive legitimate expectation doctrine directly, it is unlikely to involve scrutiny of the merits to a greater degree than reasonableness review already contemplates. See De Ville (supra) at 124.

675 See Campbell 'The Potential and Limits of Substantive Protection' (supra) at 294-6 and 316.

676 Ibid at 311.

677 See Hoexter *Administrative Law* (supra) at 391. See also FC s 195 (Principles of public administration). See, generally, A Bodasing 'Public Administration' 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 23A.