An evaluation of the transformation of public service delivery through the development of administrative justice in South Africa

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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Abstract

In order to test whether South African public service fulfills democratic aims and objectives, this study establishes the limits to and extent of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) in promoting the right to administrative justice as a human right (the RAJAH) and thereby transforming public service delivery. To achieve above aim the background to the entrenched right to administrative justice is analysed through a study of principles underlying administrative justice. Both South African common law and Constitutional systems are analysed against the principles underlying administrative justice. *Batho Pele* principles contained in the White Paper on the Transformation of the Public Service (WPTPS) are also analysed to find out how the South African Public Administration interprets its constitutional duties and to establish the relevance of these principles to administrative justice principles ensconced in the PAJA. The PAJA is then analysed in order to measure the extent to which it affirms the transformation principles ensconced in the Constitution and coinciding with *Batho Pele* principles. As the public service is a reflection of democracy in action, the public expects it to be professional, representative and proficient. If it does not fulfil these expectations, this may be interpreted as a fundamental failure of democracy. South African democracy in particular is development oriented because it is based on the Constitution that entrenches among others the right to administrative justice. The right to administrative justice as a development tool urges the public sector to recognise and apply constitutionally recognised procedures and processes in every delivery so that the social status of citizens may be enhanced. Such steps, if effectively followed, signify that the public sector has transformed from bad governance practices of the pre constitutional era where there was no requirement for the observance of individual rights in public service delivery. Failures to the adoption of good governance principles by the public sector show the opposite of the expected standards and signify that the public sector is not yet transformed. In the light of the problems caused by the lack of protection of human rights from abuse by the executive under the common law system of parliamentary supremacy, the constitutional era was expected to have changed the position of South African administrative law drastically through its adoption of the principles underlying administrative justice. To develop insight into the extent of the transformation towards administrative justice that is expected to have occurred in South Africa since the advent of constitutionalism the implementation of the PAJA is evaluated through an examination of a selection of cases that deals with public administration decisions in the area of social assistance as a context in which members of the public are most dependent on effective state administration. As the scope of the study limits the number of cases that can be examined, only the most informative cases on social assistance that relates to the KwaZulu-Natal and the Eastern Cape provinces are analysed. The research finds that public service is not yet transformed and identifies the causal factors. It recommends steps to be followed so that the expected culture from the public sector is attained.

Opsomming

Ten einde te bepaal of die Suid-Afrikaanse staatsdiens demokratiese doelstellings en doelwitte bereik, bepaal hierdie studie die beperkinge tot en omvang van die Wet op Bevordering van Administratiewe Geregtigheid No. 3 van 2000, in die bevordering van die reg tot administratiewe geregtigheid as 'n mensereg en waardeur openbare dienslewering getransformeer word. Om die bogenoemde doelwit te bereik, word die agtergrond tot die verskanste reg tot administratiewe geregtigheid ontleed teen die beginsels wat administratiewe geregtigheid onderlê. Die Suid-Afrikaanse gemenereg asook die Grondwet word ontleed teen die beginsels onderliggend aan administratiewe geregtigheid. *Batho Pele*-beginsels vervat in die Witskrif oor die Transformasie van die Staatsdiens (WTSD) word ook ontleed om vas te stel hoe die Suid-Afrikaanse Publieke Administrasie sy grondwetlike pligte interpreteer en om die geldigheid van hierdie beginsels vir administratiewe geregtigheidsbeginsels wat in Wet 3 van 2000 verskans is, te bepaal. Wet 3 van 2000 word dan ontleed ten einde die mate waarin dit die transformasiebeginsels wat in die Grondwet verskans is, bevestig en met *Batho Pele*-beginsels ooreenstem. Aangesien die staatsdiens 'n weerspieëling van demokrasie in aksie is, verwag die publiek van die staatsdiens om professioneel, verteenwoordigend en bekwaam te wees. Indien dit nie aan hierdie verwagtinge voldoen nie, kan dit as 'n fundamentele mislukking van demokrasie geïnterpreteer word. Die Suid-Afrikaanse demokrasie in besonder is ontwikkelingsgeoriënteerd omdat dit gebaseer is op die Grondwet wat onder andere die reg tot administratiewe geregtigheid verskans. Die reg tot administratiewe geregtigheid as 'n ontwikkelingshulpmiddel spoor die openbare sektor aan om grondwetlik erkende prosedures en prosesse in elke funksie te erken en toe te pas sodat die sosiale status van burgers bevorder kan word. Indien sulke stappe doeltreffend nagevolg word, beteken dit dat die openbare sektor die swak regeringspraktyke van die voor-grondwetlike tydperk, waar daar geen vereiste vir die eerbiediging van individuele regte in openbare dienslewering was nie, verander het. Versuim van die openbare sektor om die goeie bestuursbeginsels in gebruik te neem, toon die teenoorgestelde van die verwagte standaarde en dui aan dat die openbare sektor nog nie getransformeer is nie. In die lig van probleme veroorsaak deur die gebrek aan die beskerming van menseregte teen misbruik deur uitvoerende amptenare onder die gemeneregstelsel van parlementêre oppergesag, is van die grondwetlike era verwag om die posisie van die Suid-Afrikaanse administratiefreg drasties te verander deur die aanvaarding van die beginsels onderliggend aan administratiewe geregtigheid. Om insig te ontwikkel in die omvang van transformasie in administratiewe geregtigheid wat na verwagting in Suid-Afrika sedert die koms van konstitusionalisme moes plaasvind, word die implementering van Wet 3 van 2000 geëvalueer deur 'n analise van 'n seleksie van sake wat handel oor openbare administrasiebesluite op die terrein van sosiale bystand as 'n konteks waarin lede van die publiek die afhanklikste van doeltreffende staatsadministrasie is. Aangesien die omvang van die studie die

aantal sake wat ondersoek kan word, beperk, word slegs die insiggewendste sake van sosiale bystand in KwaZulu-Natal en die Oos-Kaap ontleed. Die navorsing bevind dat die staatsdiens nog nie getransformeer is nie en identifiseer die oorsake hiervan. Dit beveel stappe aan wat gevolg moet word sodat die verwagte kultuur in die openbare sektor geskep kan word.

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Introduction

1 1 Introduction

In pursuit of the protection of the democratic values of human dignity, equality, freedom, non-racialism and non-sexism,[1] South Africa adopted a system of constitutionalism just more than a decade ago.[2] The Constitution provides for separation of powers, and thus establishes the three branches of government, namely the executive, the legislature and the judiciary.[3] It also gives these organs their powers and monitors the operation of each organ.[4] The country therefore has an independent judiciary to enforce justice, a legislature with the power to enact legislation and an executive that carries policy-making and administrative duties.[5] In this way the Constitution creates a state system based on the rule of law. The rule of law ensures that the law should be supreme so that individuals are protected from arbitrary rule.

As the epitome of the rule of law, administrative justice is essential in a constitutional state to create a disciplined public administration, maintain peace and order and bring about good, transparent governance, all of which are the distinguishing features of a democratic state. The legal principles that underpin the Constitution represent positive steps toward good governance. Chapter 2 of the Constitution specifically provides both for the right of access to information[6] and the right to just administrative action,[7] which elevate administrative justice to a fundamental and enforceable human right. Section 24 of the Interim Constitution and subsequently section 33 of the Constitution have expressly

[1] Section 1 of the Constitution of the Republic of South Africa 1996 (the Constitution).
[2] As the Preamble to the Constitution states, the objective was to transform South Africa after the abolition of the apartheid era culture, systems and procedures.
[3] See Chapter 4, Chapter 5 and Chapter 8 of the Constitution.
[4] Section 2 read with Section 8 of the Constitution.
[5] Section 2 read with Section 8 of the Constitution.
[6] Section 32 of the Constitution.
[7] Section 33 of the Constitution.

entrenched this human right. The right to administrative justice demands lawful, fair and reasonable treatment of individuals by the administrative bodies; this offers flexible procedures for individuals to test administrative decisions before courts of law in terms of these principles. In order to give effect to the right to administrative justice as a human right, the Promotion of Administrative Justice Act[8] was enacted. In redefining administrative justice to transform public sector service delivery from a prejudicial system of governance – as it was under apartheid[9] parliamentary sovereignty – to one based on a culture of human rights, the Constitution can rightly be considered a major instrument for transformation.

The objective of the Constitution in including sections that deal with the rules of administrative law (including the traditional principles of natural justice) was to remedy the anomalies of the pre-democratic era that prevailed in public offices.[10] In urging justiciable discretion in government undertakings and an awareness of proper administrative procedures in public officials, the Constitution aims at reducing the rigidity of administrative law by providing a proactive measure to monitor administrative power in all respects as soon as it is put to use.[11] The Constitution further empowers individuals to participate in the enforcement of

[8] Act 3 of 2000 [the PAJA] This is in accordance with Section 33(3) of the Constitution, which requires that national legislation be enacted to give effect to the right to administrative justice as a human right by providing for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; by imposing a duty on the state to give effect to the rights in subsection (1) and (2); and by promoting an efficient administration.

[9] According to Schreiner *The Contribution of English Law to South African Law And the Rule of Law in South Africa* (1967) 87, "apartheid means separation or segregation-the keeping apart of the several races of South Africa. Sometimes the euphemism "separate development" is used instead, but the meaning is the same. Apartheid has a history going back to the earliest days of white settlement in South Africa. It has become more and more important in the life of the country during recent decades as all races have rapidly become more and more urban and industrialized, and as what used to be a natural and elastic practice for like to seek like has become a compulsory, hard and fast system laid down for all by the majority of politically dominant white minority."

[10] Section 33 read with Section 195 of the Constitution; Beukes "The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000" in Lange and Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 1 2.

[11] Sections 33 and 195 of the Constitution read with the Preamble and section 1. The Preamble sets the objectives of the Constitution while section 1 relates the constitutional values. The Preamble and section 1 are basic provisions to the interpretation of transformation provisions such as section 33 and section 195. Also see Lange and Wessels (eds) *The Right to Know* (2004) 1 2.

their rights without fear. Furthermore, the Constitution improves the position of the common law review of administrative decisions. Instead of being an inherent power of the Supreme Court, judicial review is now embedded in the Constitution. These improvements ensure individual protection and therefore liberty in civil governance.[12]

1 2 Background

In contrast with this encouraging scenario, a cursory review of South African history[13] shows that the enforcement of administrative justice has been a problem in the Republic of South Africa for a long time. In the pre-democratic era the control of administrative power, which is usually the lifeblood of administration, was characterised by a divided approach. Control of public administrators was seen as a regulatory mechanism mediating between the state's interests and the public interest, even though state interests had to be constrained within reasonable

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[12] Akokpari "Governance and the Study of Politics" in Hyden & Bratton (eds) *Governance and Politics in Africa* (1992) 5. In this regard, Akokpari points out that the presence of liberty in the governance of civil societies promotes good governance, which indicates potential economic and political development, instils efficiency so that scarce resources are used judiciously and marks the promotion of sustainable administrative justice. According to him, governance is a generic term referring to the task of running a government or an organisation, which may be either good or bad. Democratic governance is good governance, which is the result of a partnership between governance and civil society. The partnership between the two is such that a strong and knowledgeable society is capable of providing a windbreak against the growth of government arbitrariness, state autocracy and the subversion of human rights. The concept of "sustainable development" was introduced in the early 1980s (in particular through the publication of the World Conservation Strategy by IUCN, UNEP and WWF) to reconcile conservation and development objectives. http://www.jsdnp.org.jm/glossary.html, jdm glossary of terms [accessed 11-10-2005]. As this concept has since been evoked in discussions and has been used in different contexts it has a general meaning, namely that it means keeping into continuity by supplying with necessities and nourishments. My interpretation of sustainability in the context of South African perspective of administrative justice, is that it defines a characteristic of administrative law practice that can be maintained indefinitely, such as administrative actions that do not jeopardise public interests for state interests; public administration that is just and fair and improve the likelihood of such justice and fairness in the future. Sustainable administrative justice can therefore be determined in terms of its drivers, namely cost effective principles and strategies that control the system to induce a compliant public administration and consequently animate constitutional aspirations in the Preamble, sections 1, 33 and 195. Also see Chabal "Introduction" in Chabal (ed) *Political Domination in Africa: Reflections on the Limits of Power* (1986) 8.

[13] Taitz *Unreasonable Acts of Administrative Authorities Exercising Adjudicatory Functions as a Ground for Judicial Intervention* (1975) 1-10; Van Der Vyver *Seven Lectures on Human Rights* (1976) 1-20.

limits to avoid tyranny and disaster.[14] Had the approach, based on the strict application of the principles of natural justice,[15] been the only approach to underpin the administrative system, individuals would have had some degree of protection against the unreasonable exercise of state powers.

However, for the apartheid government to implement its policy of separate development, administrative power had to be as wide as possible.[16] The realisation of administrative justice was therefore based on the judicial review of administrative decisions rather than on making just administrative decisions from the start. Because the procedure could not yield a beneficial remedy to bad governance, this practice proved "costly and was tantamount to latching the stable door after the horse had bolted."[17]

During this time administrative justice was sanctioned by the principles of natural justice[18] as administered through the discretion of common law courts.[19] However, the common law courts entertained applications for review only upon "specific and limited grounds,"[20] something that allowed unreasonable behaviour by administrative authorities to go unchecked. As administrative officials were

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[14] Van Der Vyver *Seven Lectures* (1976) 1-20.

[15] These principles demanded that in decisions affecting individual rights there should be fairness. That is all parties should be heard and that no one should be a judge on his own cause. See para 1 4 1.

[16] Van Der Vyver *Seven Lectures* (1976) 1-20.

[17] Lange and Wessels (eds) *The Right to Know* (2004) 3. Also see, *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891 (CC) 895 para 6 which held that the period preceding 1994 was a period of inequality. O'Regan "Rules for Rule-making: Administrative Law and Subordinate Legislation" *Acta Juridica* (1993) 157 168, observed that the common law system was not effectively promoting administrative justice because there was over reliance on judicial review and not making correct administrative decisions from the beginning.

[18] The importance of these principles in administrative justice is explained in this Chapter paras 1 4 and 1 4 1.

[19] *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652*; Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

[20] Taitz *Unreasonable Acts of Administrative Authorities* (1975) 11.

presumed to have carried out their duties in good faith, parties that were adversely affected by decisions of the public administrators had to approach these courts by way of a notice of motion, which clearly stated the grounds for seeking review. Even though the public had no right to seek reasons for administrative decisions, aggrieved applicants had to state fully in their applications why they believed that the alleged administrative action had been based on malice or bad faith and was therefore unreasonable.

The case of *National Transport Commission v Chetty's Motor Transport Co, (Pty) Ltd*[21] confirms that administrative power was protected rather than controlled. The judgement limits the application of the "symptomatic unreasonableness rule" by insisting on a higher degree of unreasonableness and introducing the presumption that a responsible administrative authority carries out its duty properly and honestly. Together these two limits placed an exceedingly heavy onus on an aggrieved party, thereby reducing individual ability to seek review of administrative decisions. Since this approach was premised on the legal order of the day and it could be used to protect the positions of bureaucrats, it was preferred by the state, with the result that any attempt by the courts to move away from the interpretation was usually met with restraint and rejection.[22]

Because the apartheid system undermined administrative justice in this way, the new South African constitutional objectives were explicitly to transform public administration through the promotion of administrative justice. The apartheid system and processes seem to have been counter to the spirit of natural justice, which is central to administrative justice, and they therefore negated the rest of

[21] 1972 (3) SA 726 (A). Also see Taitz *Unreasonable Acts of Administrative Authorities* (1975) 11.

[22] This is marked by the different decisions, which lacked consistency regarding the extent of administrative discretion. See *Shidiak v Union Government* 1912 (AD) 651; *Union Government v Union Steel Corporation* 1928 (AD) 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A); *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

the foundational principles of administrative justice. It is therefore necessary to investigate the nature of the principles that underpin administrative justice. A study of the founding principles of administrative justice will form a background to the investigation of the extent to which public service delivery has improved since the adoption of a democratic system of governance, which honours and puts into effect the principles underlying administrative justice.

The focus, therefore, is on how these principles can be interpreted to lead to the promotion of administrative justice under the constitutional system, and thereby to account for the miscarriage of administrative justice under the common law system. The fact is that the promotion of administrative justice as entrenched in the new Constitution seeks to promote the principles of natural justice, which were neglected during the apartheid era, so as to transform public service delivery from the situation whereby a miscarriage of justice was experienced under common law. As a result, the Constitution has developed common law administrative law as well as constitutional law.

1 3 The jurisprudential development of the concept of administrative justice

As the nucleus of South African administrative law and constitutional law, the concept of administrative justice owes its development to the principles that form the basis of both of these disciplines. In order to investigate the South African interpretation of the concept of administrative justice, it is necessary to understand the historical relationship between the two disciplines.

In 1873 Austin[23] held that "[a]dministrative law and constitutional law are two separate departments, which regard respectively the status of the sovereign and the status of the subordinate political superiors. Though the rights and duties of

[23] Austin *Jurisprudence* (1873) 73.

the latter are comprised by administrative law and are not comprised by constitutional law, administrative law comprises the powers of the sovereign in so far as they are exercised directly by the Monarch or Sovereign number." This means that administrative law consisted of those portions of sovereign powers that had been "delegated or committed in trust" to subordinate political superiors to be "exercised directly".[24] Austin's interpretation could therefore be read to mean that administrative law does have a relationship to constitutional law. Since he concedes that administrative law is subject to constitutional law, the two disciplines inevitably overlap, even though they can be differentiated according to their functions.

More than two hundred years later Baxter,[25] writing from a South African common law perspective, describes administrative law as based on common law principles aimed at promoting the reasonable use of administrative power and protecting individuals from the possible misuse of such power in order to preserve a balance of fairness between public authorities and individuals, and to ensure the maintenance of public interest. Regarding the relationship between constitutional law and administrative law, he seems to agree that there is no "sharp break"[26] between the two disciplines, since the "infringement of one's rights by a public authority is a concern of administrative law as well as of 'constitutional' importance."[27] In highlighting the protective function of administrative law, however, Baxter recognises the naturalist[28] view of administrative law, which Austin did not do. It is this protective function of administrative law – now as part of constitutional law in South Africa – that is referred to as administrative justice.

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[24] Austin *Jurisprudence* (1873) 73.
[25] Baxter *Administrative Law* (1984) 2.
[26] Baxter Administrative Law (1984) 51.
[27] Baxter *Administrative Law* (1984) 51-52.
[28] The naturalists' view of law is different from positivists view. According to naturalists law should protect individual rights and not just confine authority to the sovereign. Positivists' legal perspective is that law ought to protect state interests against public interests. This leads to overemphasis on protection of state power as opposed to control of state power for the benefit of the individual. As positivists perceive, state has to have massive power to ward away from any forces from the subjects.

In a totally different dispensation,[29] Burns[30] agrees that it is not a simple task for one to separate constitutional law from administrative law, because both emanate from and deal with matters provided for by the Constitution. They "form part of public law, and both deal with the regulation of the divisions and exercise of state authority."[31] Administrative justice therefore concerns the rules that ensure the constitutional exercise of state authority.

While acknowledging that administrative law is a new branch of jurisprudence, and therefore not constitutional law *per se,* Devenish, Govender and Hulme[32] note that as far as South African law is concerned, it is difficult to oust administrative law totally from constitutional law principles, because "in substance and principle administrative law is inextricably part of constitutional law in a wide sense".[33] It is built on the constitutional principle of separation of powers to define the extent of and limits to administrative authority. Since such powers and actions encompass executive, legislative and judicial powers, they form an integral power in governance. As the Constitution provides the basic principles of governance for purposes of executing administrative power, administrative justice is placed at the centre of the enforcement of constitutional provisions. In a democratic South Africa administrative justice aims at the control of constitutionally mandated administrative powers to protect individual rights and therefore enforce constitutional values and realise constitutional transformative objectives.[34]

1 4 The notion of administrative justice

From the South African constitutional perspective, three functions of administrative law influence its nature:

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[29] The South African constitutional era.
[30] Burns *Administrative Law Under the 1996 Constitution* (2003) 1.
[31] Burns *Administrative Law* (2003) 1.
[32] Devenish, Govender & Hulme *Administrative Law and Justice in South Africa* (2001) 3-14.
[33] Devenish et al. *Administrative Law* (2001) 1.
[34] Sections 33, 39 and 172(a) read with the Preamble, section 1 and section 195 of the Constitution.

a) it deals with a body of legal rules conferring on administrators who have state authority competence to exercise public power or to perform public action;

b) it prescribes the procedures to be followed when such powers are exercised or such function performed, and ensures that the action is within the boundaries of the law; and

c) it provides for control over administrative action where the set powers or administrative functions have not been exercised or performed within the boundaries of the law.

Marked by its major objective, administrative justice is pivotal to administrative law. It is not *per se* administrative law, but an element of administrative law. "Administrative law encompassing administrative justice"[35] falls into the third category of the three functions of administrative law. It "is premised on seminal principles that have an ancient and esteemed lineage, like the celebrated rules of natural justice, the separation of powers and the principle of legality."[36] As far as administrative justice is concerned, these principles aim at ensuring stability in public governance by controlling state power. They are described below to establish their relevance to administrative justice as understood in South Africa today.

1 4 1 Principles of natural justice

The concept of natural justice is linked to the development of the theory of law pertaining to the protection of individual rights and therefore similar to the purpose of administrative justice in democratic South Africa. Born from the idea

[35] Devenish et al. *Administrative Law* (2001) 3.
[36] Devenish et al. *Administrative Law* (2001)3. The main theory in this regard is John Locke's legal philosophy, which is very similar to Hobbes's in this regard. It is based on positive legislation, which results from decisions of the will. See Locke *Two Treatises on Civil Government* (1690) 2 and Hobbes *The Elements of Law, Natural and Politic* (1640) Chapter xv.

of *jura naturale*,[37] natural justice encompasses the principles of *audi alteram partem* and *nemo judex in proprea sua causa*.[38] Marshall[39] neatly captures the role of these principles in the following:

> "Principles of natural justice are not only a part of natural law but are that part of natural law which relates to the *administration of justice.* That is to say, the two principles that no man shall be judged in his own cause and that both sides must be heard are so necessary for the fair administration of justice that they have been accepted as fundamental for that purpose."[40]

Locke's[41] theory of law also explains the purpose of these principles. His interpretation of natural justice, which protects individual rights, is based on the theory of natural law, which is in turn based on the concept of social contract. This concept describes the process of transformation of humans ("man") from the free state of nature, which lacked governance, to humanity. In order to be civilised, humans are said to have surrendered their fears and the dangers associated with their state of nature and reached a common agreement on the nature of natural rights. In this way Locke makes natural law the starting point of his theory. For him, the main purpose of natural law is to explain the foundation and maintenance of legal order. He argued that natural justice provides that the right of people to establish the legal order that protects individual rights is a primary right and, as such, original and inalienable.

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[37] Marshall *Natural Justice* (1959) 6, where he explains that *jus naturale* or natural law "was originally the Stoic philosophical conception of a universal idea of good conduct upon which all law should be founded and which, some asserted, ought not to be overridden by any other laws however made."

[38] Marshall *Natural Justice* (1959) 12.

[39] Marshall *Natural Justice* (1959) 12.

[40] Marshall *Natural Justice* (1959) 12 (my emphasis).

[41] Locke *Two Treatises on Civil Government* (1690) 2, where he writes: "since no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever anyone shall go about to bring them into such a slavish condition they will always have a right to preserve what they have not a power to part with and rid themselves of those who invade this fundamental, sacred and unalterable law of self- preservation for which they entered into society. And thus the community may be said in this respect to be always the supreme power."

His understanding is very close to the constitutional expression of administrative justice in South Africa, which states that in order to maintain good conduct in public administration, there ought to be a supreme law that cannot be easily altered, and which sets the extent of and limits to administrative discretion on public rights. In order to promote effective public administration, the aim of natural justice as well as South African constitutional administrative justice is to maintain accuracy, efficiency, effectiveness and accountability in decision-making and to impose a duty of fair hearing upon every decision-maker so that individual rights are protected.[42]

Today these twin principles of natural justice are still necessary. They are the basic elements of the right to administrative justice entrenched in section 33 of the Constitution to promote the fairness of state decisions. Fairness[43] has therefore become the basis of administrative duties entrenched in the Constitution, namely, the duty to act fairly by respecting, protecting, promoting and fulfilling individual rights and freedoms.

[42] See the decision in *R v Home Secretary, ex parte Hosenball* 1977 (1) W L R 766 772, which held that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done." Section 33 of the Constitution read with the Preamble, section 1 and 195 of the Constitution promote the protection of individual rights by urging the public administration to act accountably.

[43] The demand for fairness varies from case to case. Fairness prescribes the best way to achieve a certain objective and relates to the underlying values in the undertaking. Procedural fairness then relates to the best way to undertake a decision based on the prescriptions of the law and the circumstances that the decision-maker is facing. Procedural fairness can encompass both rationality and reasonability, although it may not mean that what is rational is fair or what is reasonable is fair. As Baxter explains, "what is rational can depend entirely upon one's personal values, aims and emotions and what is reasonable contains moral and social overtones; reasonableness is a social concept which relies on an appeal to reasons accepted or recognised by others." Baxter *Administrative Law* (1984) 482. Also see *MacLean v The Workers Union* 1929 (1) Ch. 602, 624 that explains that the duty to act fairly is therefore an integral principle in the promotion of administrative justice. It serves two purposes: firstly, it makes the public administrators answerable for their actions if they act unfairly and secondly, it provides room for questioning where unfairness is suspected: It therefore controls administrative decisions in that if found to be unfair they will affect administrative justice.

1 4 2 Separation of powers

Separation of powers is the second principle on which administrative justice is premised. As understood in South Africa today, its objective is to establish a system that protects individual rights through an appropriate distribution of state power. The main aim in this regard is to discourage concentration of power in a single person or institution as this may lead to tyrannical and autocratic, as opposed to constitutional and democratic, governance.[44] Accordingly, Hornberger writes,[45] the principle of the separation of powers envisages a system that "could be kept within a very narrow purpose: to protect, not regulate or destroy the natural, God-given rights of the people."[46]

The separation of powers is therefore central to the rationale of administrative justice or, in the words of Montesquieu, the main theory underlying administrative justice.[47] It entails the establishment of a three-bodied government, containing a Parliament that enacts law that reflects the public interest, an executive that recognises the law and is subjected to legal scrutiny when it fails to do what is required by the law, and an independent judiciary to control administrative power when all else has failed. "In this way each of the branches will be a check to the others."[48]

Historically the separation of powers bears two distinctive interpretations:[49] the narrow or traditional interpretation and the wide or progressive interpretation. The narrow approach insists on strict adherence to the division of power among the three bodies of government and maintains that no one of these bodies should be seen to encroach on the powers bestowed on any one of the other bodies.

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[44] Vile *Constitutionalism and the Separation of Powers* (1967) 13.
[45] Hornberger *The Constitution and the Rule of Law* (1992) 8.
[46] Hornberger *The Rule of Law* (1992) 8.
[47] Montesquieu *De l'Espirt de Lois* (1748) 151-152.
[48] Vile *Constitutionalism* (1967) 13.
[49] Vile *Constitutionalism* (1967) 13.

Foulkes[50] supports the traditional approach, and argues that failure to stick to the traditional interpretation of the separation of powers would lead to the detriment of the protected rights:

> "When the legislature and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive... There would be an end of everything, were the same man or body, whether the nobles or the people to exercise those three powers, that of enacting laws, which of the public resolutions, and of trying causes of individuals."[51]

The progressive interpretation of the separation of powers, on the other hand, supports the establishment of the three governmental bodies and agrees that, to check and balance power, each body should stick to its territory. However, in following the French approach to *droit administratif,*[52] which holds that, to involve expertise in public governance, an exception should be made with regard to the delegation of powers to specialized administrative bodies capable of maintaining law and order, and addressing social and economic conditions. Such delegation normally emanates from enabling statutes and may be direct or implied. As Port explains,

> "Administrative powers are delegated to the administrative bodies which occupy a position subordinate to the legislature because they are indeed creatures of legislation; this is because 'they derive their powers and functions from enabling legislation which lays down the parameters within which administrative action may be executed." [53]

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[50] Foulkes *Introduction to Administrative Law* 2 ed (1968) 193.
[51] Foulkes *Introduction to Administrative Law* 2 ed (1968) 193.
[52] Montesquieu *De l'Espirt de Lois* (1748) 151-152. This approach entails the appointment of a special body that has administrative powers and special courts that deal with administrative matters.
[53] Port *Administrative Law* (1929) 331.

Heavily criticized by Dicey on the basis of the concentration of power in the executive,[54] the delegation of duties empowers administrative officers to apply their discretion, which exists in the context of all three powers of the modern state. Executive discretion has therefore come to be considered the most dangerous of all forms of discretion[55] on account of the administrator's "immediate unfettered power over an individual who stands at his mercy."[56]

Despite these criticisms, a wider interpretation of the separation of powers, adopted in the newly democratic South Africa not only has the capacity to improve the facilitation of individual rights,[57] but is also likely to "ensure a reasonable standard of living"[58] through economic security, social welfare and education. Since a narrow interpretation cannot cater for the growing sophistication of governmental activities in the administration of public affairs in South Africa, a more progressive interpretation has become essential. However, as the Constitution provides, to realise administrative justice, it is essential to confine administrative bodies exercising delegated powers to the observance of principles of natural justice - fairness, reasonableness and lawfulness - which limit opportunities for the abuse of power. In addition, the due process of law must be maintained through reasonable opportunity to challenge administrative action.[59] The Constitution therefore entrenches the right to administrative justice,[60] which provides for these basic necessities in public governance.

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[54] Dicey *An Introduction to the Study of the Constitution* 3 ed (1889) 202.
[55] Corray "*The Rule of Law: Australian Achievement"*2005 http://www.aust.gov [accessed 2005-05-27] 8.
[56] Corray "*The Rule of Law: Australian Achievement"*2005 http://www.aust.gov [accessed 2005-05-27]9.
[57] ICJ Report on the Rule of Law in a Free Society, "The Rule of Law as a Supra-National Concept," in *Oxford Essays in Jurisprudence* (1959) 3.
[58] Foulkes *Administrative Law* (1968) 193.
[59] Gellhorn *Administrative Law and Process in a Nutshell* (1972) 22.
[60] Section 33 of the Constitution.

1 4 3 The principle of legality

The concept of the rule of law is derived from the French *La Principe de Legality* (the principle of legality), which is opposed to the use of arbitrary powers.[61] The rule of law was adopted in several states, which, despite maintaining the basic meaning of the principle of legality, interpreted the principle against different backgrounds.

The best-known interpretations, especially in relation to South African law, are by Montesquieu[62] and Dicey.[63] Hailing from French and British jurisdictions respectively, Montesquieu and Dicey interpreted the concept of rule of law differently. The French interpretation was based on their approach to *droit administratif*, which in essence placed emphasis on a separate hierarchy of courts in suits against public administration. These interpretations form the basis for the early development of administrative law as it is understood today,[64] also in South Africa.

On the other hand, the British Westminster system, which was adopted in South Africa before the Constitution, did not approve of a separate courts system for administrative purposes, which led to a persistent negation - and therefore a static development - of South African administrative law..[65] Dicey therefore interpreted the rule of law in the context of an unwritten British constitution of the eighteenth century, but under certain circumstances this approach gave an unreasonable interpretation of the concept as far as South Africa is concerned. According to this interpretation, the rule of law has mainly three principles: the supremacy of the law, equality before the law and effective remedies through judicial

[61] Schwartz *French Administrative Law and the Common Law* (1954) 314.
[62] Schwartz *French Administrative Law* (1954) 314.
[63] Wade & Phillips *Constitutional and Administrative Law* (1977) 85-89.
[64] Schwartz *French Administrative Law* (1954) 314.
[65] Baxter *Administrative Law* (1984) 22, where he explains that "the hostility to special administrative tribunals and courts led Dicey to place ordinary courts of law at the centre of his formulation of the rule of law."

declarations.[66] These three elements are also essential elements of the rule of law as it is understood in South Africa today, although their interpretation in some aspects differs from Dicey's interpretation.[67]

The first of these principles espouses the absolute supremacy and predominance of regular law as against the supremacy of the rules made by "man" and the influence of arbitrary power. Dicey's interpretation, therefore, excludes prerogative and even wide discretionary authority, an aspect also emphasised in the South African reading of constitutional and administrative law. Dicey[68] argues that the government should not punish a person for anything other than a breach of law.[69] Consequently, according to him, no person should be made to suffer penalties if he or she has not distinctly breached the law established before the ordinary courts.[70] In this sense Dicey contrasts a system that is governed by the rule of law with a system of government based on the exercise by those in authority of wide or arbitrary powers of constraint.[71] The South African Constitution, as the supreme law from which state power emanates and is controlled, expresses Dicey's notion of the rule of law.

For Dicey[72] the rule of law also means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts. This implies that no person was above the law and that officials, like private citizens, had a duty to obey the law. Claims by citizens against the state or its officials therefore had to be referred to ordinary courts and not to special administrative courts:

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[66] Dicey "The Development of Administrative Law in England" 31 *LQR* (1915) 148. The law that Dicey referred to was common law and not statutory law.
[67] Section 1 of the Constitution.
[68] Dicey *Study of the Constitution* (1889) 202.
[69] Those rules set by Parliament (the legislature) and interpreted by courts.
[70] This understanding still applies in South Africa, however with a qualification that courts may not necessarily mean only common law courts. Courts are in the present time constitutionally established in Chapter 8 of the Constitution.
[71] Wade & Phillips *Administrative Law* (1977) 88.
[72] Dicey *Study of the Constitution* (1889) 202.

> "[E]quality before the law as expressed by the rule of law excludes the idea of any exemption of officials or others from the duty to obedience to law which governs other citizens or from the jurisdiction of the ordinary tribunals."[73]

He therefore argues against the existence of separate administrative courts of the executive arm of government, such as the French administrative tribunals (*tribunaux administratifs*). Dicey's interpretation fits the South African perspective of the rule of law on the aspect of equality before the law, which element forms one of the basic constitutional values entrenched in section 1 of the Constitution.

He further argues that, as the common law expressed the rule of law, it had the capability to protect individual rights. Dicey[74] therefore maintains that violations of individual's rights can be effectively remedied by common law through judicial declarations and therefore the application of natural justice. His understanding in this regard does not fit the present South African perspective, which expresses the rule of law through a written constitution as opposed to reliance on common law. The Constitution improves the position of the common law review of administrative decisions. As shown above, judicial review is no longer an inherent power of the ordinary courts, but is now a constitutionally entrenched duty, which redefines the role of courts in public administration. Instead of courts being merely controllers of public administration – as was the case under common law – they are remedy providers to the public where administrators fail in their constitutional duties. Courts operate within constitutional limits to enforce constitutional objectives and values. Consequently, South Africa will have a responsive, efficient and accountable public administration.[75]

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[73] Dicey *Study of the Constitution* (1889) 202.
[74] Dicey *Study of the Constitution* (1889) 202.
[75] De Ville *Judicial Review of Administrative Action in South Africa* (2003) 6-9.

From these three explanations it is clear that Dicey acknowledges the existence of the discretionary powers of the authority. However, he seems to limit these powers to such an extent as to render them meaningless. His view that there is no need for wide discretionary powers nullifies the need for administrative powers, without which no state can function properly. Also, because he considers the delegation of powers to be contrary to the rule of law, he does not support the establishment of a system of public administration.[76] If there is no system of public administration, it would be difficult to identify administrative action. Consequently, the public would not have the right to administrative justice in terms of the entrenched right in section 33 of the Constitution, because the execution of this right is dependent on an existing system of public administration.[77] Through this right the public can challenge the lawfulness, reasonableness and procedural fairness of administrative action by public administrators. To make this right one that can be easily claimed, the Constitution establishes the office of the public administrator, which falls under the executive arm of government and which deals mainly with delegated duties from the three arms of government.[78] The Constitution also provides for a system of operation that this office must follow.[79] This is the kind of system that Dicey by implication does not approve of.

Dicey also denies the relevance of fair discrimination, such as where discrimination is based on categories of person with reference to economic or social considerations or legal status.[80] He emphasises that, if a written constitution allows delegated powers and confirms the branch of administrative law – an idea he sought to exclude from his theory of the rule of law – such a constitution is not as protective as the common law is. In this regard he overlooks the fact that "the Common law can be modified by Parliament, which may affect the most

[76] Dicey *Study of the Constitution* (1889) 202.
[77] Section 33 of the Constitution.
[78] Chapter 10 of the Constitution.
[79] Section 195 of the Constitution.
[80] Wade & Phillips *Administrative Law* (1977) 88.

fundamental liberties,"[81] as happened in South Africa during the apartheid era. Indeed, "[c]ommon law is also limited because it does not assure the citizen's economic or social well being."[82]

Even though the Diceyan interpretation of the rule of law can result in a wrong expression of administrative justice as understood in the South African Constitution, to some extent his emphasis on the supremacy of law is supportive of human rights protection. Like the South African Constitution, he supports a law that has sustainable legitimacy; such a law addresses the needs of the public and therefore protects the natural rights of individuals by specifically restricting the abuse of power by those that the public put in authority.[83] Such a law is the law of the people by the people and also affords equal protection to all. His interpretation of the concept of the rule of law also provides an excellent basis for the interpretation of the rule of law in constitutional governance, as in South Africa, with an acceptable delegation of powers, which can emanate from the separation of powers.

1 5 The constitutionalisation of administrative justice

The discussion above shows that the principles underlying the concept of administrative justice as entrenched in the South African Constitution have been around for some time. This discussion has also shows that there have been certain developments in this regard. The principles of natural justice, for example, developed from religious and philosophical debates into a working jurisprudence, while the separation of powers has been more widely interpreted to accommodate the growing sophistication of public governance; hence these principles enforce administrative justice. Similarly, the principle of legality has been developed to encompass the concepts of the supremacy of the law and equality before the law,

[81] Wade & Phillips *Administrative Law* (1977) 89.
[82] Wade & Phillips *Administrative Law* (1977) 89.
[83] Wade & Phillips *Administrative Law* (1977) 90.

and to influence the development of administrative law. Even before the constitutional era in South Africa, therefore, the concept of administrative justice had shown signs of development.

According to Burns, in South Africa, "[c]onstitutionalism is a doctrine that governs the legitimacy of government action, [and] conforms to the broad philosophical values within a state,"[84] as enshrined in the Constitution. It encompasses the principles discussed above, because it embraces a state governed by a constitution that sets its law in accordance with the principles of the rule of law as opposed to personalised governance. In South Africa's constitutional democracy people are therefore ruled by the law itself and not by a sovereign body.[85] To provide control, legal authority is bestowed on different bodies of government.[86] At the root of South African constitutionalism lies the protection of individual rights.

In discussing the relationship between human rights and constitutions, Hornberger explains,

> "[t]he constitution does not give the people rights. Instead, the Constitution is a higher law imposed on the officials of the national government to prevent them from interfering with pre-existing rights."[87]

The theory of rights as applied in South Africa means that human rights coexist with human life and, if there is no protection of human rights, the existence of humans is threatened. As understood in the constitutional dispensation in South Africa, in the process of preserving humanity and doing away with apartheid-era errors, the supreme law should not encroach upon human rights but instead it

[84] Burns *Administrative Law* (2003) 1.
[85] Burns *Administrative Law* (2003) 1; Currie & De Waal (eds) *Constitutional and Administrative Law* 2ed (2001) 318; Bennet *Constitutional and Administrative Law* 3ed (2001) 5.
[86] Raz "The Rule of Law and Its Virtue" 93 *LQR* (1977) 195.
[87] Hornberger *The Rule of Law* (1992) 8-9.

should protect them. The Constitution therefore entrenches a bill of rights in Chapter 2. In section 33 it specifically entrenches the attainment of administrative justice as a right; the right to administrative justice as a human right.

Constitutions can be written or unwritten. Since unwritten constitutions may not emanate from a *Grundnorm*[88] similar to that of written constitutions, they are characterised by a lack of clarity regarding the three fundamental principles discussed above. That is why South Africa adopted a Constitution to give effect to these principles that are accepted as applicable in democratic states. This Constitution identifies the set of values to be upheld in the governing process according to the *Grundnorm*[89] and enshrines them in a written document.[90]

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[88] As Dietl et al *Dictionary of Legal, Commercial and Political Terms* (1979) 344, explains, *Grundnorm* refers to the basic standard of behaviour in democracy. Similarly, Wikipedia explains, *Grundnorm* as a German term, which literally means basic norm and a philosophical concept created by Hans Kelsen, a jurist and a legal philosopher. According to this source Kelsen used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system. This theory is based on a need to find a point of origin for all law, on which basic law and the constitution can gain their legitimacy. http://en.wikipedia.org/wiki/Grundnorm [accessed 16-10-2006]. Fuller *The Morality of Law* (1964) 69 referring to *Grundnorm* maintains that "Parliament legislation should reflect '*the basic rule*' or *'Grundnorm'* which relates to the rationale of state existence and to a greatest extent is reflected in the relevant state's constitution." Also see Bennet *Administrative Law* (2001) 6. Based on these explanations, in the South African constitutional context, *Grundnorm* comprises the basis for a basic standard of behaviour in the South African democracy based on human rights. The Preamble of the Constitution directly entrenches the rationale for the adoption of the South African Constitution, namely that South Africans having learned from the past experiences of injustices and being aware that there are special contributions to the existence of South Africa such as sufferings in pursuit of justice and freedom, economic and social developments, believed that South Africa belongs to all South Africans. Consequently, South Africans adopted a Constitution as the supreme law of the Republic in pursuit of healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights. The Constitution therefore laid the foundation for a democratic and open society in which government is based on the will of the people and where every citizen is equally protected by law. It further urges governance that improves the quality of life of all citizens and frees the potential of each person. It intends constitutional governance that builds a united and democratic South Africa, which will be able to take its rightful place as a sovereign state in the family of nations.

[89] The following sources describe "Grundnorm," Dietl et al *Dictionary of Legal, Commercial and Political Terms* (1979) 344; Fuller *The Morality of Law* (1964) 69; Bennet *Administrative Law* (2001) 6; Wikipedia, http://en.wikipedia.org/wiki/Grundnorm [accessed 16-10-2006]. See footnote 88 above.

[90] Currie & De Waal (eds) *Administrative Law* 2ed (2001) 318.

Democratic constitutions such as the South African Constitution "include the idea that government should obtain its powers from the supreme law and that its powers should be limited to those set out in the law."[91] They also dictate how state power should be divided, exercised and become functional.[92] These constitutions are based on the will of the people and thus maintain that government action should be neither too narrow nor too expansive. Since they are based on the theory of rights, they recognise that individuals have rights that limit governmental action.[93]

The fact that written constitutions like the South African Constitution reflect the general will of the people provides the ruling power in democratic systems with legitimacy. This contrasts strongly with the authority under autocratic rule such as in South Africa during the apartheid era, where the actions of the supreme power were to some extent illegitimate, as a matter of fact, because only the wishes of a minority were accounted for as opposed to the wishes of the majority. As a result, decisions on the governing law were made regardless of what the majority of the public could have wished the law to be. In addition, the rules of an autocratic ruler are not subject to a separation of powers. Since the rule of law is also not part of an autocratic system, the principles of natural justice are negated.

Autocratic governance, like that under apartheid, operates on uncertain and unpredictable principles that can be changed at the whim of the legislature or

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[91] Bennet *Administrative Law* (2001) 5.

[92] The South African Constitution in particular establishes the separate legislative, executive and judicial arms of government and instructs their operation. See Chapters 3 to 8 of the Constitution.

[93] See Chapter 2 of the Constitution. Ramphal *Common Wealth Secretary-General Address New Delhi* (1989) 3 said, "[h]uman rights are as old as human society itself for they derive from every person's need to realise his essential humanity. They are not ephemeral, not alterable with time, place, and circumstance. They are not a product of philosophical whim or political fashion. They have their origin in the fact of human condition and because they are fundamental and inalienable. Most specifically, constitutions, conventions or governments do not confer them. These are the instruments, the testaments of their recognition, they are important, sometimes essential elements of the machinery for their protection and enforcement; but they do not give rights to them. They were born not of man but with man."

dictator. In such a system, for example, there is no clear explanation of the extent of and limits to state administrative powers, which made the control of administrative powers irregular. Even where the judiciary had declared administrative action unlawful, the legislature retrospectively legalised such action by enacting a new provision, which made it difficult for the judiciary to enforce administrative justice. Since the principles of constitutionalism are compromised in this way, autocratic governance fails to protect human rights. Under autocratic governance, therefore, there is no urgency to promote administrative justice.

A constitution like the South African Constitution, based on the *Grundnorm* that not only promotes human rights, but also recognises that individuals have rights that limit governmental action, cannot but promote administrative justice. In the South African constitutional context, administrative justice aims at realising government action that conforms to the broad philosophical values enshrined in the Constitution. As a right aimed at the protection of individual rights, the right to administrative justice in South Africa clearly redefines the role of each of the three powers in governance pertaining to the promotion of individual rights.[94] A central aspect of the right to administrative justice is to clothe individuals with the right to question the reasonableness, fairness and justification of powers exercised to the detriment of individual interest before the courts of law.

In South Africa's constitutional dispensation, administrative justice thus promotes individual protection. People should, for example, not have to subject themselves

[94] In relation to the redefined role of adjudication in democratic South Africa, Klare "Legal Culture and Transformative Constitutionalism" 14 *SAJHR* (1998) 146, mentions that the judiciary has increased duties in pursuit of transformation in South Africa. De Ville *Judicial Review* (2003) 10, explains that the Constitution awards a purposive approach to courts in that their role is not to just control the executive but to ensure that the aims and objectives of the Constitution are fulfilled. The public administration, which is an arm of the executive, has a duty to act efficiently so as to promote good governance. The purpose of the courts therefore, is not to usurp administrative functions nor to control and contain administration but to effect and ensure effectiveness of administrative action through interpreting it in the context of the constitution.

to the arbitrary decisions of government officials. Instead, in any action that affects the public, a clearly defined law embedded in the Constitution should guide government officials. This principle holds that, in order to attain equal treatment of citizens in public affairs, both those who are governed and those who administer such affairs should observe the ethical values of fairness, reasonableness and lawfulness.[95] Thus, administrative justice consists of a group of vital principles, which provide for what should be done and what should not be done to attain a system of governance, which has regard for human rights and is respectful of the liberties of its people.

In addition, administrative justice denotes a process that provides for the control of administrative power to ward off the possible dangers of abuse of power by those in authority. Because of its encompassing nature, administrative justice in South Africa is earmarked as the major principle for the protection of human rights under constitutionalism. This shows that, while the concept has developed over time, its development and role have never been as substantial as under a constitutional dispensation. In South Africa administrative justice has become a well-established principle, which promotes mechanisms to protect individual rights through the control of administrative power by limiting excessive power that could be exercised to the detriment of individual rights. In this way, administrative justice can be equated to the restoration of the basic principles of humanity associated with natural justice,[96] which marks the protection of individual rights as the central aspect in state governance. This in turn implies that the failure of a state to promote administrative justice affects not only the maintenance of law and order, but basic existence.

[95] These principles are basic to the principle of natural justice.
[96] Locke *Two Treatises on Civil Government* (1690) 10. Locke's theory of law, (i) stipulates that the purpose of natural law theory is to explain the foundations and maintenance of legal order. (ii) emphasises the inalienable right of the people to establish the legal order to suit the protection of their general rights.

1 6 Statement of the problem, hypothesis and aim of the study

South African society's expectations of the performance of public administration converge in the concepts of transformation and administrative justice. In this respect, transformation refers to the move away from the undemocratic public service practices prevalent under the system of parliamentary sovereignty in South Africa before 1994 to a system based on the principles of good governance. A transformed public service therefore enforces efficient public management and maintains peace and order to satisfy the rights of the public. Members of the public participate and contribute ideas for the realisation of good governance, because they feel honoured and respected as dignified citizens. They will therefore support the governor who protects and gives effect to their rights. As Khoza and Adam[97] explain, good governance cannot be totally divorced from law, because it is the nature of the law that determines good governance.

There can be no question that the Constitution as it stands is an improvement on the common law approach. Specifically with regard to the realisation of administrative justice, a plethora of cases in which members of the public have asserted that they were victims of unjust administrative action has clogged the courts around the country since the advent of constitutional judicial review.[98] If these complaints prove to be true, a significant degree of maladministration would have been committed during the past 12 years, which would mean that the objectives of section 33 and the PAJA have not been met with a great deal of success, in other words, that the public is still denied administrative justice.[99]

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[97] Khoza & Adam *The Power of Good Governance: Enhancing the Performance of State-Owned Enterprises* (2005) 28.
[98] See Chapter Five.
[99] See De Villiers "Social Grants and the Promotion of Administrative Justice Act" *18 SAJHR* (2002) 320 and see Plasket "Administrative Justice and Social Assistance." 120 *SALJ* (2003)503.

According to reported cases[100] and the recent Black Sash report,[101] a significant degree of maladministration has occurred during the constitutional era, which means that the objectives of section 33 and the PAJA are not yet realised. For example, in *Vumazonke*,[102] several applicants alleged that the office of the MEC had either failed or refused to deliver reasons within a reasonable time to explain why their applications for social grants had not been granted. In observing the rising weekly statistics (about forty cases per motion court for cases of this nature), Plasket J summarised the problem as follows:

> "(N)otwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years,[103] it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem. In the absence of a class action or similar representative litigation (which may have its own difficulties-and limitations-when it comes to forging appropriate remedies to compel administrative reform), the courts are left with a problem that they cannot resolve: while they grant relief to individuals who approach them for relief, they are forced to watch impotently while dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people 'who are most lacking in protective and

[100] See Chapter Five.

[101] Black Sash Report *Making Human Rights Real, Conference on Promotion of Administrative Justice Act 3 of 2000 – a Tool For Transforming Delivery In South Africa.* October 2004.

[102] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE).

[103] Plasket J in the same case writes, "The point must be made that the respondent's department hardly ever opposes the applications brought against it and, when it opposes, hardly ever does so successfully. As Erasmus J noted in *Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Another SECLD* case 597/02 unreported judgement undated 1-2, the notices of opposition that are filed as a matter of course appear to be part of the stratagem to buy time. This stratagem also drives up the costs that must, at the end of the day, be paid to the applicant when he or she eventually succeeds in being granted the inevitable order. Officials in the respondent' s department often appear to blame large-scale fraudulent conspiracies within the system for the large volume of cases but it is noteworthy that this never seems to be raised as a defence in the application that are brought. It is difficult to see how this would impact on the problem of failing to take decisions timeously, which, after all, is the cause of complaint in most of the cases."

> assertive amour' and whose needs 'must animate our understanding of the Constitution's provisions'.[104] What escalates what I have termed a problem into a crisis is that the cases that are brought to court represent only a tip of the iceberg."[105]

In the light of this decision, the question arises whether South African public administration has overcome its problems as expected by the public in line with constitutional objectives and adopted the standards of performance envisaged in the right to administrative justice as a human right. Not only can the right to administrative justice not be guaranteed if cases such as the above are brought to court regularly, but the prospect of sustaining the implementation of the right would also appear bleak. This scenario will be contrary to the expectation that public administrators in the constitutional era, as opposed to public administrators during the apartheid era, would base the achievement of administrative justice on the implementation of principles of good governance. There ought to be transformation of public service delivery. Instead of the public having to rely excessively on judicial review in order to attain administrative justice, as used to happen under the apartheid system, administrators in the constitutional era should enforce acceptable standards of governance from the beginning.

If public administration should fail to abide by the constitutional provisions, the perception would be created that the Constitution has not fulfilled its purpose of transforming the public service sector; this in turn would imply that the right to administrative justice remains a right only on paper. If the public is still directly or indirectly deprived of this right, it would be tantamount to maintaining the status quo of the apartheid era, during which individual rights were commonly subordinated to state interest as the result of lack of good governance.

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[104] *Mashavha v President of the Republic of South Africa and others* 2004 (12) BCLR 1243 (CC) 1260 para 51, in this case Van Der Westhuizen J commented that social assistance was "an area of governmental responsibility very closely related to human dignity."

[105] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE) 236 para 10, added footnotes.

The assumption underlying this study is that, if the expected transformation has indeed occurred, it would be evident in the behaviour of public officials, who would adhere to the legal principles outlined in the new South African laws and policies.[106] This assumption therefore influences the investigation into the extent of and limits to the implementation of the human right to administrative justice as entrenched in section 33 of the Constitution and effected by the PAJA, with specific relevance to transforming public sector service delivery in South Africa. The results are likely to indicate the degree of success or failure of the public sector to implement this right in the new dispensation.

In more practical terms, the law and policies urge public officials to act accountably by refraining from actions that might jeopardise individual rights and to adopt the principles of lawfulness, fairness and reasonableness.[107] To aim for transformation, public administrators must observe and maintain a set of values and processes based on the principles of good governance and enunciated in the law and in policies that are intended to eradicate any negative impact that might result from the acts and omissions of such administrators with regard to justiciable rights.[108] Acts of maladministration that resemble those of the public administration of the pre-democratic era in form or otherwise could mark the extent of the success or failure of law to acculturate and transform the public sector into accepting that administrative justice is a human right. A study of the violations committed by public officials since the inception of the new Constitution could therefore reveal to what extent public service delivery has been transformed.

[106] Section 33 of the Constitution read with the PAJA and the *Batho Pele* Policy.
[107] Section 33 of the Constitution.
[108] Section 33 read with the PAJA.

The aim of this study is thus to establish through an analysis of cases the extent to which public service delivery has improved since the adoption of a democratic system of governance. As this study has a limited scope,[109] only two of the most recent[110] and informative cases that extensively reveal the impact of public administration on social assistance applications will be analysed. It is hoped that the results of the study will assist the government in finding a solution to the problems encountered in the implementation of PAJA provisions, which aim at transforming the public service, but do not seem to have fulfilled expectations.[111]

1 7 Sequence of chapters

To provide a background to the entrenchment of the right to administrative justice as a human right in the South African Constitution and to gauge whether the democratic post-apartheid system upholds the rule of law to protect individual rights as the Constitution envisages, Chapter Two analyses the South African legal position, first under common law and then under the Constitution. In both cases this analysis will be undertaken with reference to the principles of administrative justice outlined above. In Chapter Three the *Batho Pele* principles contained in the White Paper on the Transformation of the Public Service (WPTPS)[112] are analysed. Chapter Four evaluates the extent to which the PAJA affirms the principles of transformation entrenched in the Constitution. It also shows the relationship between PAJA and *Batho Pele* principles.

In the light of the problems caused by the lack of protection of human rights under the common law system of parliamentary supremacy, the constitutional era was expected to change the position of South African administrative law

[109] The required length of this study.
[110] These cases were decided in 2004 and therefore cover a history of public administration activities in the democratic era.
[111] A plethora of cases brought before the courts of law, especially those concerning protection of the rights of the poor, show the extent of the efforts of the PAJA and section 33. Examples of these cases are analysed in Chapter Five.
[112] Government Gazette no 18340 of 1997-10-01.

drastically. Since some doubts exist as to whether this has happened, a close examination of a selection of cases that deal with public administration decisions in the area of social assistance follows in Chapter Five. As explained above, this is expected to provide some insight into the extent of the transformation towards administrative justice in South Africa since the advent of constitutionalism. Chapter Six concludes the study with a summary and recommends reform against the background of administrative justice as a human right, where a need for such reform is identified.

Chapter Two

The Evolution of Administrative Justice in South Africa

2 1 Introduction

The evolution of administrative justice in South Africa is divided into two eras, the common law and the constitutional era. Since the approach to administrative justice in these two periods is completely different as a result of different interpretations of state power, the extent of and limits to the exercise of administrative power also differ significantly. Parliamentary supremacy in the pre-democratic era shielded state power and promoted state interests over public interests. Under the Constitution, the supreme law protects individual rights through controlled state power, which also requires the transformation of public service delivery from the apartheid-era practices. Without this change, true democracy could not be achieved.

Because of the system of parliamentary supremacy, which allowed procedures and laws that limited judicial review of administrative decisions, access to courts that facilitated court intervention in cases where public administrators adversely affected individual rights was also limited. Consequently, under the common law system administrative justice was not only rare, but also difficult to achieve. With reference to the principles that underpin the concept of administrative justice, namely, those of legality, natural justice, separation of powers and constitutionalism, this chapter analyses specific aspects of the common law that created the undemocratic public service of the apartheid era, and notes the changes towards greater acknowledgement of individual rights that came with the Constitution.

2 2 The common law approach

When Great Britain colonised South Africa, the British system of governance as well as the British approach to law was adopted in South Africa.[113] This period was characterised by the principle of parliamentary supremacy, which led to a positivistic approach in law. Based on the Aristotelian description of justice as what is in accordance with the *nomos* or positive law, positivism is underpinned by the belief that law is what the authorities pass as law.[114] As a result, there is no need to regard any extraneous premise, moral, metaphysical or otherwise. Although this approach negates natural law, which encompasses natural justice, and it is "inherently and invariably inimical to the protection of human rights,"[115] it was followed in South Africa for a long time.[116]

During this time, administrative law principles were derived from the common law, which was a mixture of English and Roman Dutch law. Roman Dutch common law encompassed the notion of natural justice[117] and was based upon a philosophy of government that entailed the delegation of powers and also recognized judicial review, which entailed principles of fair procedure and compensation for negative interference with individual interest. Devenish *et al.* confirm that the principles related to Roman Dutch law "addressed issues of the delegation of powers, the status of acts done contrary to statutory provisions, and the rule *res iudicata* in respect of the legal force of judicial acts of the administration."[118] However, even though Roman Dutch law could promote administrative justice, its application did not extend to sources of authority for

[113] Baxter *Administrative Law* (1984) 272; Schreiner *The Contribution of English Law* (1967) 27.
[114] Van Der Vyver *Seven Lectures* (1976) 1; Hart "Positivism and the Separation of Law and Morals" 71 *HARV LR* (1958) 596.
[115] Devenish et al. *Administrative Law* (2001) 20.
[116] From the Union of South Africa in 1910 up until the adoption of the interim Constitution in 1993.
[117] See para 2 2 1 below.
[118] Devenish et al. *Administrative Law* (2001) 20.

administrative action and the manner by which discretionary powers were to be exercised.[119]

While the two systems contributed differently to the formation of the basic South African common law principles, the British system – which introduced the English notion of constitutional law, parliamentary government, the system of courts and public administration – influenced the principles that dealt with administrative law much more significantly. The main British influences that would eventually affect the exercise of administrative justice in South Africa were the doctrines of parliamentary supremacy, ministerial responsibility for administrative action and the separation of powers. The Diceyan perception of the rule of law in English law, which preferred common law courts to specialised administrative courts, further influenced the South African common law approach to judicial review of administrative action.[120]

2 2 1 Parliamentary supremacy

As natural law was considered unascertainable and not as authoritative as the enacted law of Parliament, the British system of parliamentary sovereignty had reformed the common law to make it possible for the courts to ignore natural law by the time South Africa adopted the system of British parliamentary supremacy in 1910. Through this adoption the South African Parliament had absolute sovereignty over all other government institutions, including the executive and the judiciary, which affected all the powers that these bodies possessed. It could even change or repeal any legislative acts, thereby controlling the power of previous Parliaments. In terms of this power, the Parliament mandated the executive to do any act and shielded it from judicial scrutiny. In this manner Parliament's sovereign power also lead to extensive power in the hands of the executive. For

[119] Devenish et al. *Administrative Law* (2001) 20.
[120] Baxter *Administrative Law* (1984) 34.

example, extensive executive powers were exempted from judicial scrutiny and as a result the executive powers were wide and uncontrolled.[121]

This approach was in direct contrast to the Roman Dutch concept of governance. It was also not compatible with the underlying principles of administrative justice, namely, those of legality, natural justice, separation of powers and constitutionalism. Under these circumstances, the South African courts were forced to find a way to manipulate the system of parliamentary supremacy if they wanted to promote administrative justice, which led to glaring inconsistencies in the protection of individual rights.

2 2 2 Separation of powers

It has been shown that three bodies governed the apartheid state. However, under parliamentary supremacy, their powers were irrationally distributed as Parliament had absolute sovereignty over all the other government bodies. Under those circumstances, there was little scope for individuals or groups to challenge government action flowing from a legislative mandate.[122] Neither could the courts test the substance of laws in this system against standards such as fairness and equality. Most major individual complaints regarding administrative action were referred to administrative tribunals, which were not courts of law, but part of the executive. According to Rose Innes, these tribunals "were created by statute and exercised discretionary powers, being guided to their decisions by policy rather than by law. They were (also) not in their proceedings obliged to observe the procedures of law courts,"[123] which indicates that they were instruments of public control to enforce state interests rather than public interests. [124]

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[121] Schreiner *The Contribution of English Law* (1967) 29. Also see *Fellner v Minister of the Interior* 1954 (4) S A 523(A.D) and *Sachs v Donges N.O.*1950 (2) S A 265 (A.D).
[122] Burns "A Rights-Based Philosophy of Administrative Law and a Culture of Justification" 17 *SAPR/PL* (2002) 280; Mureinik 31 *SAJHR* (1994) 32.
[123] Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 1-9.
[124] Rose Innes *Judicial Review* (1963) 1-9.

2 2 3 The rule of law

In the context of apartheid, parliamentary supremacy led to the perpetuation of the implementation of principles of inequality, which were rooted in the administrative legislation of the time.[125] As Van der Vyver explains, "[p]arliament and the provincial councils were free to establish, or to authorise the establishment of, separate facilities for the various races without such facilities having to be equal."[126] In addition, as a result of the racial theory[127] that backed the apartheid system of governance, some laws were enacted that were applicable only to particular races, and not to others. Thus there was no equality before the law. Schreiner's view of this mode of governance confirms this interpretation:

> "Parliament… made the laws to bring about an efficient pro-apartheid administration, the maintenance of law and order in accordance with apartheid policies and legislation and the safety of a well-established apartheid state…the rule of law (at that time) embodied a most important principle of apartheid and, when realised, provided a bulwark against all forms of totalitarianism, including the communism associated with the banned opposition parties."[128]

The alterations that Parliament made to the common law on these grounds rendered the law ineffective as far as remedying administrative injustices committed against individuals were concerned. The outlined characteristics of the system of governance based on parliamentary supremacy[129] fit the description of

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[125] The Reservation of Separate Amenities Act 49 of 1953, the Consolidation Act 25 of 1945 and several others. Van Der Vyver *Seven Lectures* (1976) 1-20.
[126] Van Der Vyver *Seven Lectures* (1976) 1-20.
[127] This theory underlies the concept of discrimination, xenophobia and elements of self-determination on the basis of the concept of survival of the fittest as it happened in the state of nature before humans could think of the social contract and adopt natural justice.
[128] Schreiner *The Contribution of English Law* (1967) 86.
[129] Schreiner *The Contribution of English Law* (1967) 29. Also see *Fellner v Minister of the Interior* 1954 (4) S.A. 523(A.D) and *Sachs v Donges* N.O. 1950 (2) S.A 265 (A.D).

the arbitrary ruler,[130] as explained by Dicey.[131] Even though Schreiner interpreted the parliamentary system laws as legitimate, the fact is the apartheid Parliament was elected by a few people belonging to the free race,[132] while the majority of the population was barred from elections, which marked such Parliament as *de facto* illegitimate and as a result its laws could not be considered legitimate. Consequently, parliamentary laws were not reflective of the will of the people and therefore not based on the *Grundnorm.*[133]

The common law rules of natural justice could not supersede the rules of the Parliament. This means that Dicey's argument that under common law everyone would be equal before the law (rather than responsible to "man") was invalid in the South African parliamentary system. In addition, even though everyone except Parliament was subjected to the law, the law itself did not reflect the will of the majority of South Africans. There was no recognition of majority rights in South Africa; for example, there was no bill of rights as part of the constitution of that time. Individual rights were therefore easily trampled upon.

According to Burns, the legal circumstances in that era were "aggravated by the entrenchment of white privilege in the exclusion of black people from any meaningful participation in the affairs or running of the country. The human rights of the majority of the population were infringed by draconian laws, which denied people their freedom, equality and human dignity."[134] The nature of the

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[130] Schwartz *French Administrative Law and the Common Law* (1954) 314.
[131] Dicey *An Introduction to the Study of the Constitution* 3 ed (1889) 202.
[132] Schreiner *The Contribution of English Law* (1967) 86 wrote that the apartheid government was " freely elected by secret ballot and that ….The existence of a sovereign Parliament provided no guarantee against infringement of the rule of law, especially when the Government has an overwhelming Parliamentary majority, elected by a minority racial group."
[133] The following sources provide a definition of "Grundnorm," Dietl et al *Dictionary of Legal, Commercial and Political Terms* (1979) 344; Fuller *The Morality of Law* (1964) 69; Bennet *Administrative Law* (2001) 6 and Wikipedia. http://en.wikipedia.org/wiki/Grundnorm [accessed 16-10-2006]. See footnote 89 above.
[134] As Mureinik 31 *SAJHR* (1994) 32&40 and Burns 17 *SAPR/PL* (2002) 283 expostulate, the apartheid era had a culture of authority wanting of justification.

law of that time could not be said to have had a moral basis and therefore could not acculturate administrative bodies with human rights principles encapsulated in natural justice.

The fact here is that, as opposed to Dicey's theory that the common law could promote equality, the apartheid system succeeded in corrupting the law for its own purposes. Not only was the law not supreme, as shown earlier, but even though everyone was subjected to the law (as Dicey proposed), it discriminated against certain races and, in doing so, obliterated all efforts to achieve equality. Thus there could be no question of the rule of law under apartheid.

2 2 4 The extent of judicial review of administrative action under common law

It was argued above that as a result of the system of parliamentary supremacy individual rights were protected inconsistently during the apartheid era. In line with the positivist approach to law described above, common law courts in their decisions[135] assessed delegated legislation simply against the perceived intention of the legislature, rather than scrutinise the reasonableness or fairness of such delegated legislation. Because of parliamentary supremacy, the courts did not apply any other law than the law of the Parliament,[136] and they avoided interfering with a public officer's *bona fide* judgement, even if it was based on legislation that was abhorrent to the principles of reasonableness and fairness.[137]

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[135] See *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 903, 913; *Bloem v State President of the RSA* 1986(4) SA 1064 (O); *State President v Tsenoli* 1986 (4) SA 1150 (A); *Kabinet Van die Tussentydse Regering Vir SWA v Katofa* 1987 (1) SA 695 (A); *Omar v Minister of Law and Order* 1987 (3) SA 859 (A); *Castell NO v Metal and Allied Workers Union* 1987 (4) SA 795 (A) and *Staatspresident v UDF* 1988 (4) SA 830 (A).

[136] See the decisions in *Logan v Burslem* 1842 4; *Moore* P.C. 284, 296 and *Gibbs v Guild* 1882 (9) QBD 74. In these cases respectively, it was held that "even if the Act of Parliament is contrary to reason it is not within the courts' capacity to countenance because a court of justice cannot set itself above the legislature" and that, since "Acts of Parliament are omnipotent, they cannot to be got rid of by declarations of courts of law or equity."

[137] *Shidiack v Union Government* 1912 AD 642, 651-652.

Like their British counterparts, who had to abide by parliamentary enactments, common law courts were also limited in their operation.[138] Their decisions[139] show that in those circumstances they had difficulty in making meaningful declarations in order to control unfair and unreasonable administrative actions. The common law courts were also forced to abide by legislative swings,[140] which deprived them of independence to use their discretion in deciding matters concerning administrative action. Based on unclear interpretations of administrative action, courts often negated their duty in fear of jeopardizing the limited powers that the law of the day offered them.

Only if the authority concerned was under a duty to act judicially or *quasi*-judicially and had failed in this duty – that is, when the public administrator acted beyond statutorily provided powers – could the courts evoke principles of natural justice to control administrative action. Since judicial acts referred only to administrative actions that were appealable, reviewable and that could be delegated,[141] and *quasi*-judicial administrative action referred to delegated judicial action,[142] this did not provide the courts with much leeway to use their discretion to protect individual rights.

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[138] Dicey "The Development of Administrative Law in England" 31*LQR* (1915) 148.
[139] See footnote 23 above.
[140] In the past Parliament could undo any administrative action by retrospective legislation and pass discriminatory or unreasonable statutes, provided they were procedurally correct which left the courts no room to declare administrative action based on such legislation invalid.
[141] Baxter *Administrative Law* (1984) 307-308. A true judicial decision presupposes an existing dispute between two or more parties, and then involves four prerequisites; firstly, the presentation of their case by the parties to the dispute; secondly, if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence; thirdly, if the dispute between them is a question of law, the submission of legal argument by parties; and lastly, a decision which disposes of the whole matter by finding upon the facts in dispute and an application of the law to the facts so found, including, where required, a ruling upon any disputed question of law.
[142] A *quasi* judicial decision equally presupposes an existing dispute between two or more parties and involves the same procedure as that for a judicial decision. Unlike the judicial act, however, it does not involve a decision, which disposes of the whole matter by finding upon the facts in dispute and an application of the law to the facts so found, including where required a ruling upon any disputed question of law.

The concerned ministers had free choices to classify administrative actions that were not judicial or *quasi*-judicial as purely administrative or ministerial acts, which included those actions that need not conform to natural justice, to powers that could be exercised with absolute, little or no discretion and to acts that could only be performed by ministers of state, their agents or delegates. Purely administrative acts therefore consisted basically of administrative action affecting public interests.

As the courts could not review any administrative acts outside the scope of judicial or quasi-judicial acts on natural justice or reasonableness grounds, by classifying contested administrative acts as purely administrative or ministerial acts, the legal obligation that rested upon the courts to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue was removed. The grounds upon which the administration acted and the means it took to inform its action were left entirely to the discretion of the ministers concerned.[143]

Together, therefore, the insistence on the literal interpretation of legislation and the search for legislative intent and manipulation of administrative laws by the legislature under the common law prevented the courts from protecting individuals effectively from the abuse of power by the public administration through judicial review. In this way the development of administrative law was crippled.

[143] Yardley *Principles of Administrative Law* 2 ed (1986) 92; Baxter *Administrative Law* (1984) 34.

2 2 5 The extent of administrative justice under common law

The analysis above shows that the system of parliamentary supremacy in South Africa was incompatible with the underlying principles of administrative justice discussed in Chapter One of the study. This led to glaring inconsistencies in the protection of individual rights.[144] Here there was little scope for individuals or groups to challenge government decisions,[145] which were guided by a policy of public control rather than public protection.

The decision in *Johannesburg Consolidated Investment Co v Johannesburg Town Council,*[146] according to which the Supreme Court of South Africa was inherently vested with the power to review administrative decisions, sets out the common law principle of review of administrative bodies. Innes CJ describes this power as follows:

> "It is an inherent right in the court, which has jurisdiction to entertain all civil causes and proceedings within its area of jurisdiction. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a case as falls within the ordinary jurisdiction of the court. And it will, when necessary, summarily correct or set aside proceedings, which come under the above category… The body whose proceedings are reviewed is not a judicial one; the application is by way of motion and not by way of summons; and the grounds upon which a review may be claimed are somewhat wider than those which alone would justify a review of judicial proceedings. There may be irregularities committed by a licensing or valuation courts (*sic*) which are not included in the list set out under [section 24 of the Supreme Court Act, 1959] and yet may

[144] Baxter *Administrative Law* (1984) 34. Also see *Logan v Burslem* 1842 (4) *Moore* P.C. 284, 296 and *Gibbs v Guild* 1882 (9) QBD 74.
[145] Burns 17 *SAPR/PL* (2002) 280 and Mureinik 31 *SAJHR* (1994) 32.
[146] 1903 TS 111,115.

> form good ground for a motion to review the proceedings in the sense in which I am now considering the term."[147]

Since this system did not restrict the sovereign powers of Parliament, Parliament had unlimited power and could delegate any of its powers to the executive. It could even delegate on matters of "general principle." The fact that the Cabinet and Prime Minister were responsible to an elected House of Assembly meant that to some extent executive power and legislative power were vested in one body.[148] In addition, *Fellner*[149] held that, as a non-statutorily empowered person or group of persons could exercise the prerogative, such a person or persons could have discretionary powers.[150] As these circumstances made it very difficult to ascertain which body had administrative discretion and, as prerogative powers were shielded from judicial scrutiny, it was difficult to control administrative discretion. The difficulty in controlling administrative discretion greatly affected the realisation of administrative justice.[151]

Indeed, Rose Innes explains that "review power could be excluded by the legislature or restricted in extent by statute" or, "[i]n certain cases, 'particular' grounds for review could be of limited application or not applicable at all."[152] As mentioned the different standards of review of administrative action in South African common law emanated from the classification of such administrative action according to its functions. "Legislative administrative action was subject to a reasonableness *simpliciter* standard, whereas non-legislative administrative

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[147] 1903 TS 111,115.
[148] Van Der Vyver *Seven Lectures* (1976) 27-28.
[149] *Fellner v Minister of the interior* 1954 (4) SA 523 (AD).
[150] Also see *Sachs v Donges N.O.*, 1950(2) SA 265 (AD).
[151] There was no recognition of individual rights in South Africa; for example, there was no bill of rights as part of the constitution at that time and this made individual rights amenable to abuse of power by the public administration. As Burns 17 *SAPR/PL* (2002) 280 states," the uncomfortable position of that era was aggravated by the entrenchment of white privilege in exclusion of black people from any meaningful participation in the affairs or running of the country. The human rights of the majority of the population were infringed upon by draconian laws, which denied people their freedom, equality and human dignity."
[152] Rose Innes *Judicial Review* (1963) 7.

action was subject to a standard of gross unreasonableness review."[153] As seen above, most administrative actions were classified as non-legislative duties and therefore to some extent immune from review and therefore of any questioning of their reasonableness.[154] Because the grounds on which subordinate legislation could be held invalid were limited, administrative power was not subjected to scrutiny, and without checks the administrators to some extent had very wide discretion in the performance of their duties. In addition, the heavy burden of proof described above made the achievement of administrative justice almost impossible. Since the public had neither access to general information nor the right to know the basis for administrative decisions, they could not provide proof of malice in cases of alleged maladministration. [155]

As Beukes explains,

> "The unequal society of the years preceding 1994 manifested itself in yet another reality as well, the reality of people being left in the dark and uninformed about matters of public interest. People (as a collective and not as individuals) had little, if any, say before administrative decisions which were of general application –decisions which affect the public in general and not only one person –were taken. Neither did they have any say or input prior to the promulgation of subordinate legislation (such as regulations), that is, when rule making was involved. In short, people were confronted with an absence of accountability, responsiveness and openness in their

[153] De Ville *Review of Administrative Action* (2005) 8.
[154] Baxter *Administrative Law* (1984) 490-494. Also see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg TMC and Others* 1999 (1) SA 374 (CC) paras 28-31.
[155] The following cases are examples of that situation, *Administrator, Transvaal and the Firs Investments (Pty.) Ltd. v Johannesburg City Council* 1971 (1) SA 56 (A); *Johannesburg City Council v Administrator, Transvaal and Myofis* 1971(1) SA 56 (A). Also see *Ralikhoto v East Rand Administration* 1983 (3) SA 595(A); *Hurley v Minister of Law and Order* 1985 (4) SA 709(D); *Hira v Booysen* 1992 (4) SA 69(A).

> dealings and involvement with organs of state exercising any form of public power."[156]

Because these loopholes offered an opportunity for temptation and for arbitrary, insolent, discriminatory, intrusive and corrupt government, administrative justice was undermined. One such an anomaly occurred in cases where there was no proof that a decision was tainted with malice and bad faith, in which case it would be considered just, even though it was unfair and unreasonable.[157] Not only was the judicial review of administrative actions rendered ineffective in this way, but administrative justice was subjected to abusive interpretations. Govender[158] confirms that the fact that the common law principles of administrative law could be manipulated rendered administrative justice ineffective. He states that

> "[t]he gains made by administrative law were tenuous and often short-lived, as they were reversed by (an) administration that acted correctly in form, but in contempt of norms of legality and decency. The same flexibility that gave lawyers the space to conjure up legal arguments also afforded conservative judges the opportunity to recast the administrative law in an executive friendly mode."[159]

As a result of these problems in the system and the law itself, the promotion of administrative justice under the common law system was not only rare, but also difficult to achieve, with a result that citizens became increasingly dissatisfied with public service delivery. The reluctance of courts coupled with the rigid nature of administrative law yielded only limited opportunity to the public to challenge administrative action. The public therefore became disillusioned; "they considered the state of public administration with suspicion and distrust, since as

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[156] Lange & Wessels (eds) *The Right to Know* (2004) 2.

[157] For example the cases of *Administrator, Transvaal and the First Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) 79 and *Jooma v Lydenburgh Rural Licensing Board* 1933 TPD 477 485-486.

[158] Govender "Administrative Law as a Surrogate for Human Rights" in Corder & Van Der Vijver (eds). *Realising Administrative Justice* (2002) 45 54-56. Also see *Administrator, Transvaal and the Firs Investments (Pty.) Ltd. v Johannesburg City Council* 1971(1) SA 56 (A); *Johannesburg City Council v Administrator, Transvaal and Myofis* 1971 (1) SA 56 (A).

[159] Corder & Van Der Vijver (eds) *Realising Administrative Justice* (2002) 46.

part of the executive, it was the branch of government responsible for implementing racial and discriminatory legislation and (was) consequently protected from scrutiny, either judicial or public."[160] This was one of the compelling causes of the eventual change in mode of governance.

While the common law had the potential to promote equality, the apartheid system succeeded in corrupting the law for its own purposes, a situation that was exacerbated by the positivist approach to the interpretation of law. This meant that the common law could not uphold administrative justice in South Africa under the pre-democratic system, which explains the dissatisfaction among the people of South Africa described in Chapter One. In order to achieve greater certainty, impartiality, consistency and equality before the law, a new system and law were necessary to control administrative discretion. However, the old system continued until the adoption of the Interim Constitution in 1993.

2 3 The constitutional approach

The Interim Constitution formulates the purpose of the constitutional system as "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."[161] The Constitution[162] expresses this sentiment in the form of the following aims:

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[160] Wiechers "Administrative Law and the Benefactor State" *Acta Juridica* (1993) 248.

[161]The concept of a bridge between past and present occurs at the inclusion of the bill of rights in the Interim Constitution.

[162] Constitution section 7(2), read together with section 7(1) and the Preamble; see also section 1 where the Constitution reads, South Africa is a Democratic state founded on the values of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" and, s 39(1)(a) which demands that, courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

> "Heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay a foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."[163]

These aims are entirely different from the aims of the apartheid system, in that they are not only compatible with the principles of good governance underpinning the South African common law described above,[164] but develop them to a constitutional level. Central to their understanding is the concept of democracy. "Democracy itself is variously used to mean a system of government, a form of society, a principle, and a set of values and at one point is also referred to as a culture that can be deepened by adoption of charters of rights."[165] The *New Collins Concise Dictionary Plus* describes democracy to essentially entail: 1) government by the people or their elected representatives; 2) the practice or spirit of social equality; and 3) a social condition of classlessness and equality.[166] Roux views the interpretation of the concept of democracy as elusive of a definite meaning. He states that, to define democracy there is a need to search for a qualifying adjective. In the case of the South African Constitution, the interpretation of democracy is qualified by four adjectives: representative, participatory, constitutional and multiparty.[167]The South African Constitution

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[163] The Preamble of the Constitution; also see *Shabalala v Attorney-General, Transvaal* 1995 (12) BCLR 1593(CC); Du Plessis *Re-Interpretation of Statutes* (2002) 32; Lange and Wessels (eds) *The Right to Know* (2004)1.
[164] See 2 2 above.
[165] Roux, "Democracy" in Chaskalson et al *Constitutional Law of South Africa* Vol I.(2005) 10-1− 10-2.
[166] Hanks et al (eds) *New Collins Concise Dictionary Plus* (1989) 334. Chaskalson et al *Constitutional Law of South Africa* Vol I. (2005) 10-1− 10-2.
[167] Chaskalson et al *Constitutional Law of South Africa* Vol I. (2005) 10-1− 10-2.

enshrines human rights in a written document,[168] entrenches the values of human dignity, equality and freedom,[169] and expressly provides for constitutional supremacy.[170] It constitutionalises the underlying principles of administrative justice, namely, those of natural justice, especially the *audi alteram parterm* principle, the rule of law,[171] and the separation of powers.[172] It redefines the state authority to that of justification in that the officers of the three state organs are required to justify their actions,[173] which contrasts strongly with the authority of the autocratic apartheid system. Under this system of justification it is not possible for the legislature to exclude the principles of natural justice in the way that this could be done in the common law system under apartheid.

To sustain its legitimacy the Constitution emanates from the *Grundnorm*.[174] This is the law of the people by the people and it affords equal protection to all.[175] The Constitution addresses the needs of the public and consequently protects the natural rights of individuals by specifically restricting the abuse of power by those that the public put in authority to facilitate individual emancipation.[176] With regard to the aim of the current study, it specifically commands the judiciary to monitor administrative action so that individual rights are effected.[177] Chapter 2 of the Constitution entrenches the bill of rights; central to the bill of rights is the

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[168] Currie & De Waal (eds) *Administrative Law* 2ed (2001) 318.
[169] In section 1(a) of the Constitution. Sections 9, 10 and 12, tabulate the essentials of these values. This is a very important development in the South African administrative law. Section 33 entrenches the right to administrative justice.
[170] Sections 1(c) and 2.
[171] Section 1(c).
[172] Section 1(c) and Chapters 3-8.
[173] Mureinik 31 *SAJHR* (1994) 32 and Burns 17 *SAPR/PL* (2002) 283.
[174] For a description of this term, see footnote 89 above.
[175] Section 1 explains the foundation of the document to be human dignity, the achievement of equality and the advancement of human rights and freedoms. It further explains that the Constitution negates racialism and sexism and that it sets up universal adult suffrage, a national common voters' roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness.
[176] Chapter 2 on the Bill of Rights, more specifically sections 33 and 38 of the Constitution.
[177] Section 2 read with Section 8 of the Constitution.

right to administrative justice, which is the main provision for the achievement of good governance.[178]

To effect the right to administrative justice as a human right, the Interim Constitution entrenched section 24 and the Constitution section 33.

Section 24[179] reads 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 action has 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."

Section 33 is a substitute to section 24. In drafting it, the objective of the Constitutional Assembly was unchanged.[180] Item 23 of schedule 6 to the Constitution provides that, until the prescribed legislation had been enacted, section 33 would read like the corresponding section 24 of the Interim Constitution, and be applied as such, but if no legislation was enacted within three years after the commencement of the Constitution, section 33(3) of the Constitution would lapse.[181] As Hopkins[182] explains:

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[178] As *Fedsure Life Ass Ltd v Greater Johannesburg TMC* 1998 (12) BCLR 1458 (CC) 32 underscores, the right to administrative justice, is now rooted in the Constitution itself. This right builds in this regard on the Constitution, which "has radically changed the setting within which administrative law operates in South Africa."

[179] See De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution," 11 *SAJHR* (1995) 264 -281.

[180] Carpenter (ed) *South Africa in Transition the Focus on the Bill of Rights* (1996) 67.

[181] See in general on s 33 and its application, Klaaren "Administrative Justice," in Chaskalson et al *Constitutional Law of South Africa* 1 (1999) 25; Malherbe, "Administrative justice and access to information: Implications for schools," *Perspectives in Education* 19 (2001) 65.

> "[S]ection 33(3) FC requires the enactment of national legislation within three years from the date on which the Constitution took effect on the 4 February 2000. The legislation must give effect to the right to "just administrative action" and provide for review of administrative action by a court or where appropriate an independent and impartial tribunal. Further, the legislation must impose a duty on the state to give effect to the rights in section 33(1) and (2) FC and promote an efficient administration. In terms of item 23(3) schedule 6, section 33(3) FC would have lapsed if the envisaged legislation had not been enacted within three years from the date on which the new Constitution took effect. If the deadline had not been met, Parliament would still have been entitled to enact national legislation to limit the right to "just administrative action," although the special circumstances in section 33(3) would have fallen away. This would have left only the provisions of section 36 (FC) ("limitation of rights") and the rest of the Constitution as a test for the Constitutionality of the restrictions in the Act on section 33(1) and (2)."

Item 23(2)(b) of schedule 6 stipulates that section 33(1) and (2) must be read as if it has been phrased like section 24 until the national legislation is enacted. The idea behind this was to afford government time to draft legislation in accordance with section 33(3), read together with item 23 schedule 6. However, as the envisaged legislation was passed on 3 February 2000, section 33(1) and (2) seems to have entered into force then, while section 24 had been in operation from the inception of the Interim Constitution on 27 April 1994 until 3 February 2000. Like section 24, section 33 introduces just administrative action.

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[182] Hopkins Grounds For Review of Administrative Action: The Interaction Between the Constitution, the Act and the Common law (2000) 8. Also see Corder "Administrative Justice in the Final Constitution" 13 *SAJHR* (1997) 28, 32.

In order to promote efficient public administration,[183] the purpose behind the South African formulation of the "right to administrative justice as a human right" is therefore two-fold. Firstly, it promotes public participation in public governance by giving everyone a right to lawful, reasonable and procedurally fair administrative action, which entitlement places a duty on administrators to involve the public in decision making and, upon their failure to do so, the public can approach the courts for judicial review. Secondly, it affords courts a new approach to judicial review of administrative action, constitutional review of administrative action.[184] The current notion of administrative justice therefore aims at transforming the administrative culture[185] so that it regulates and controls the exercise of administrative power, and therefore promotes government accountability, responsiveness and openness, which are foundational requirements of the Constitution as laid down in section 1(d).[186] By requiring a series of checks and balances before final executive decisions are taken, section 33 provides for the limitation of administrative power and mitigates against possible negative effects, such as decisions that may have been taken too quickly or too slowly, or may have been ill conceived or based on corruption, favouritism, personal beliefs or eccentricity and therefore contrary to constitutional demands.

As the custodian of constitutionally protected individual rights and freedoms, the administrator is specifically expected to act in accordance with the constitutional provisions that set the extent of and limits to administrative powers. Of specific relevance is section 195 of the Constitution, in which it is provided that public administration be governed not only by democratic values,[187] but also by the following principles enshrined in the Constitution: a high standard of professional

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[183] S A L R C *Report on Administrative Justice Project 115* (1999) reported that the committee takes efficiency to be analogous to justice.
[184] Section 33 of the Bill of Rights declares administrative justice a specific right to every one.
[185] Mureinik 31 *SAJHR* (1994) 32 and Burns 17 *SAPR/PL* (2002) 283.
[186] Chapter 1 of the Constitution; see also Burns 17 *SAPR/PL* (2002) 286; *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) 687 para F-G.
[187] The Preamble, section 1 and section 33.

ethics; the efficient use of resources; a development and needs-oriented approach; impartial, fair, equitable and unbiased provision of services; encouragement of broadly representative public participation in policy-making; accountability; transparency by providing the public with timely, accessible and accurate information; the maximization of human potential; and redress of the past inequities. Section 195 therefore contemplates a transformed public service within the broader context of transformation as envisaged in the Constitution. In this way, the new constitutional dispensation reverses the behaviour of public administrators before the advent of constitutionalism, where service delivery was a privilege for the favoured few. [188]

Besides ensuring that public administration complies with the constitutional demands to curb possible maladministration, the right to administrative justice as a human right allows every person to challenge administrative action before the courts of law.[189] It mainly affords affected persons *loci standi in judicio.* It therefore remedies the restrictive common law procedures. By reducing these obstacles, the Constitution unleashes individual potential to achieve self-determination.

As the enforcement of this right also effects the right of access to court,[190] which is a necessary and implicit right in the protection of other more substantive rights,[191] the right to administrative justice as a human right can be termed a "collateral right",[192] and therefore a right that guarantees that individuals may

[188] In Chapters One and Three paras 1 3 and 3 1-3 2 5 respectively.
[189] *Pharmaceutical Manufacture Association of South Africa in re: the Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 696 C-D; Devenish et al. *Administrative Law* (2001) 4; Suskin "The Problematical State of Access to Judicial Review" in Brigid *Judicial Review a Thematic Approach* (1995) 3.
[190] Entrenched in section 34 of the Constitution.
[191] This concerns the subjective claims of individuals vis-'a-vis state authority as opposed to procedural rights which denote a set of legal rules which lay down basic standards of conduct to be observed by state officials in the course of the administration of justice.
[192] In describing the conceptual nature of rights of access in public law, Suskin writes, "access rights may take one of two forms, or be a combination of the two forms. They may be either

challenge administrative action before the courts of law.[193] "This means that if the law or conduct of the state violates the bill of rights, an affected person can approach the courts"[194] to examine whether subordinate legislation or administrative conduct conforms to the Constitution and gives appropriate relief to the affected. This usually takes the form of an order declaring the law or conduct in question to be invalid.

In essence, therefore, section 33 of the bill of rights in the Constitution guarantees different elements of the right to administrative justice. In particular, it sets out specific rights to safeguard justifiable administrative action, namely, that administrative action should be fair, lawful and reasonable.[195] It therefore establishes a "general duty to act fairly," where individual rights are affected in accordance with the rule of law as spelled out in the Constitution.[196]

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collateral rights or autonomous rights. The term collateral refers to the right of access as a necessary and implicit element in the protection of other more substantive rights. An autonomous right of access is a free standing right existing irrespective of the specific nature of the substantive claims being made." Brigid *Judicial Review a Thematic Approach* (1995) 3.

[193] *Pharmaceutical Manufacture Association of South Africa in re: the Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 45; Devenish et al. *Administrative Law* (2001) 4; Currie & De Waal (eds) *Administrative Law* 2ed (2001) 318-319.

[194] Currie & De Waal (eds) *Administrative Law* 2ed (2001) 318-319.

[195] Fairness relates to procedural fairness, which implies that at the minimum there should be compliance with the rules of natural justice especially the *audi alteram partem* rule. Lawfulness encompasses all grounds of review under common law, the *ultra vires* doctrine and more. It gives constitutional expression to the "narrow" common law view of the *ultra vires* doctrine, instead of requiring that administrative action fall within the four corners of the statute even if it has a negative - and therefore unreasonable and irrational - impact on individual rights, which excluded such action from judicial review under common law. Under the Constitution, administrative action is *ultra vires* if it does not abide by constitutional demands, which means that the courts are entitled to review the rationality of administrative reasons. Administrative action that complies with statutory provisions can therefore be declared illegal if these provisions are unconstitutional. Constitutional lawfulness also does away with the "ouster clauses" used in the apartheid era, which aimed at rooting the rule by executive discretion. The term reasonableness means that the decisions of administrators should be rational and constitutionally justiciable in that they follow coherent constitutional decision-making processes. As Mureinik 31 *SAJHR* (1994) 40, explains it denotes a process, "where the decision maker has considered all the serious objections to the decision taken and has answers which plausibly meet them; … where the decision maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and … where there is a rational connection between premises and conclusion - between the information (evidence and argument) before the decision maker and the decision taken."

[196] Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169.

Failure to comply with these safeguards will prompt individuals to subject administrative action to judicial review, except where administrative action is legally excluded from judicial review.[197] The constitutional entrenchment of the principles of natural justice guides their legal enforcement, as courts are empowered to enforce these principles by entertaining constitutional review of administrative decisions that affect individual rights.

The Constitution therefore provides for a drastic change in the position of administrative law.

2 3 1 The rule of law under constitutional supremacy

The rule of law under the Constitution differs from the common law conception of the rule of law, where legislative enactment and every government action authorised by Parliament were considered supreme, even though they might have been unreasonable. The rule of law under the Constitution entails supremacy of the law, equality before the law, and the possibility of equality being implemented through the courts of law.[198] In the democratic context of the South African Constitution, the Constitution is the supreme law and all actions of the state must therefore be in accordance with constitutional provisions.[199]

To promote equality before the law and protect individual rights, the Constitution requires that official conduct be congruent with constitutional objectives,[200]

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[197] The limitation clause in section 36 of the Constitution may justify the legislative exclusion or limitation of judicial review of specific administrative acts in terms of section 33.. According to *Fedsure Life Ass Ltd v Greater Johannesburg TMC* 1998 (12) BCLR 1458(CC) 25, the application of section 24 does not extent to executive functions; legislative actions of Parliament, the provincial legislatures and municipal councils. However, such actions can be tested on the basis of their constitutional validity.

[198] Chapter One 1 4 3.

[199] Section 1(c) of the Constitution; Section 2 of the Constitution; also see a full discussion of the concept of the rule of law in paras 1 4 3 and 2 2 3.

[200] Enshrined in the Preamble.

values[201] and administrative principles.[202] It therefore demands government action to be neither too reserved nor too extensive.[203] To promote appropriate public administration behaviour, it therefore enshrines the right to administrative justice and demands that the courts should comply with constitutional guarantees to enforce the right to administrative justice. To enforce its mandate, the Constitution also influences the substance of legislation and government action. As it expressly intends to "safeguard and protect individuals (as well as particularly vulnerable 'categories' of people) against any abuse of power by organs of state,"[204] it emphasises the "fundamental importance of accountable public power."[205]

As a result, therefore, in pursuing equality and freedom, both among those who are governed and those who administer public affairs, the Constitution has implemented a three-fold strategy consisting of the empowerment of the public for effective participation, protection of the public from arbitrary decisions of governmental officials, and subjection of public administrators to clearly defined ethical values of procedural fairness, reasonableness and lawfulness.[206] In this way the Constitution seeks to instil a new culture of human rights in public service delivery as opposed to the human rights negation in the apartheid era.[207] In contrast with the pre-democratic era, in which the supreme law was the law as stipulated by Parliament,[208] the Constitution is now the supreme law of the country.[209] While in the former case state power was protected, the Constitution requires that all governing powers be justified by the provisions of the supreme law; this requirement in turn effects accountability. While it was possible under

[201] Entrenched in section 1.
[202] Entrenched in section 195.
[203] Section 33.
[204] Lange and Wessels (eds) *The Right to Know* (2004) 4.
[205] Lange and Wessels (eds) *The Right to Know* (2004) 4.
[206] These principles are the core of the principle of natural justice discussed in Chapter One.
[207] Mureinik 31 *SAJHR* (1994) 32; Klare 14 *SAJHR* (1998) 146; Burns 17 *SAPR/PL* (2002) 283; *Shabalala v Attorney General, Transvaal* 1995 (12) BCLR 1593 (CC).
[208] See 2 1 above.
[209] Sections 1(c) and 2.

apartheid for the actions of the supreme power not to be legitimised by the will of the people and for decisions on the governing law to be made regardless of the wishes of large sections of the public,[210] the Constitution requires government powers to be exercised in accordance with the public will or *Grundnorm*.[211] As it aims at the transformation of all governmental institutions, it demands that the decisions taken by the executive, legislature and judiciary must be rationally related to their purposes and objectives.[212]

In establishing who has to do what and to what extent, the law is stable, ascertainable and predictable. If the exercise of public power is arbitrary, it falls short of the standards demanded by the Constitution for such action.[213] When dealing with the public rights entrenched in the bill of rights, public administration is required to promote good governance and fair administration.[214] Any administrative decision that is contrary to the three constitutional rules discussed above is justiciable and can therefore be found to be unconstitutional.

As opposed to the system of parliamentary supremacy, constitutional supremacy not only makes public administrators answerable for their actions, but provides remedies to the affected individuals. In this way the Constitution prevents the maladies of the past era, where the undefined and irregular control of administrative action could lead to a disregard of individual rights by the state, which could declare unfair, unreasonable and unlawful administrative action valid.[215] In accordance with the principles of natural justice, legality, the

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[210] See 2 2 1 above.
[211] Refer to footnote 89 above.
[212] Mureinik 31 *SAJHR* (1994) 32; Klare "Legal Culture and Transformative Constitutionalism" 14 *SAJHR* (1998) 146; Burns 17 *SAPR/PL* (2002) 283; *Shabalala v Attorney-General, Transvaal* 1995 (12) BCLR 1593 (CC).
[213] *Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 675.
[214] Burns 17 *SAPR/PL* (2002) 18.
[215] *Administrator, Transvaal and the Firs Investments (Pty.) Ltd. v Johannesburg City Council* 1971 (1) SA 56 (A); *Johannesburg City Council v Administrator, Transvaal and Myofis* 1971(1) SA 56 (A); Rose Innes *Judicial Review* (1963) 7.

separation of powers and constitutionalism discussed in Chapter One, this system greatly improves the situation under the South African common law.

2 3 2 Separation of powers

Because the concentration of power in a single body can lead to autocratic governance as used to happen during the apartheid era, the Constitution provides for the separation of powers with the objective of establishing a system that protects individual rights through the appropriate distribution of state power.[216] It establishes three governmental bodies, the legislature, the executive and the judiciary and directly monitors their operation.[217] To involve expertise and effectiveness in public governance, a wide interpretation of separation of powers as opposed to a narrow interpretation is adopted in the constitutional era. Thus the three bodies are allowed to delegate duties to the public service through constitutionally compliant statutes, which aim at the effecting of individual rights.

Within a very narrow purpose, the Constitution requires state powers to be exercised in accordance with the *Grundnorm*[218] to protect individual rights. While the Constitution clothes Parliament with the power to deal with legislative drafting in accordance with constitutional provisions, it awards policy-making and administrative duties to the executive.[219] Through delegated legislation, these duties include public administration, which has to interpret governmental policies in accordance with the Constitution and especially comply with section 33 of the Constitution.

The Constitution therefore dictates how state power should be divided, exercised and become functional. For example, public administration, which is part of the

[216] In Chapters 4-8.
[217] Section 8(1) of the Constitution; Rauntenbach & Malherbe *Constitutional Law* (2004) 308.
[218] For a description of "Grundnorm" see footnote 89 above.
[219] Rauntenbach & Malherbe *Constitutional Law* (2004) 305-310.

executive arm, cannot behave as it wishes, because the supreme law provides a network of institutions to ensure a system of checks and balances.[220] The Constitution thus recognises the desirability of the establishment of independent tribunals and other bodies[221] for hearing and addressing complaints. These bodies include the SA Human Rights Commission,[222] the Public Protector,[223] who deals with investigations into maladministration, and the Public Service Commission,[224] which promotes the values of public administration. All three governing bodies are therefore subject to the rule of law,[225] which is in direct contrast to the concentration of powers under the common law. To control the powers of all these bodies through judicial review, the Constitution provides for an independent judiciary.[226]

2 3 3 Judicial review and the use of natural justice

The Constitution provides that the judiciary should be free and independent.[227] It demands that the courts should "promote and fulfil"[228] through their professional work the "democratic values of human dignity, equality and freedom,"[229] and they should work to "establish a society based on democratic values, social justice and fundamental human rights."[230] In particular, section 39(2) of the Constitution provides that, when interpreting legislation and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and

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[220] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE) at 237para B, refers to constitutional provisions in sections 38,118,165,172,195,184, 196, Chapter 9 and 10.

[221] In interpreting this provision, section 167 of the Constitution should be borne in mind; specifically the provision that:"[t]he Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution…"

[222] Section 181(1)(b) of the Constitution.

[223] Section 181(1)(a) of the Constitution.

[224] Section 196(1) of the Constitution.

[225] Sections 2 and 8 of the Constitution.

[226] Section 165(2 of the Constitution).

[227] Section 165(2) of the Constitution.

[228] Klare 14 *SAJHR* (1998) 146 158.

[229] Klare 14 *SAJHR* (1998) 146 158.

[230] Klare 14 *SAJHR* (1998) 146 158.

objects of the bill of rights.[231] Chaskalson P mentions specifically "the need for control of government action through courts is vital for the welfare of individuals in that it preserves their constitutionally entrenched rights."[232]

The Constitution also sets the extent of and limits to judicial review, as it demands that the judiciary must "be conscious of the values underlying the Constitution and interpret the Constitution bearing in mind the involved technique of making constitutional choices by balancing competing fundamental rights and freedoms."[233] To effect this requirement, the judiciary must refer to a system of values extraneous to the constitutional text, but "embraced by, contemplated in or underlying the text, or immanent within the legal order, that is, they must be *legal*, not personal or political, values."[234]

Judicial review within the ambit of section 33 must comply with these requirements. When specifically enforcing the right to administrative justice as a human right, the court has to determine whether the act to be reviewed falls within administrative action as referred to in section 33. This test was enunciated in *President of the RSA v SARFU and Others,*[235] where the court held that

> "[i]n s33 the adjective 'administrative' not 'executive' is used to qualify 'action.' This suggests that the test used for determining whether conduct constitutes 'administrative action' is not the question whether a member of the executive arm of government performs the action concerned. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or

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[231] *Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 49.
[232] *Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 45; also see *Mahambehlela v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).
[233] *State v Zuma* 1995 (4) BCLR 401 (CC) 17.
[234] Per Mogkoro J, in *State v Makwanyane*, 1995 (6) BCLR 665 (CC) 302-304.
[235] 1999 (10) BCLR 1059 (CC) 1117 paras A-J.

not. It may well be, as contemplated in *Fedsure*,[236] that some acts of a legislature may constitute 'administrative action.' Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs but on the nature of the power he or she is exercising."

In *Fedsure*[237] it was held that the resolutions adopted by a deliberative legislative body such as a municipal council constituted legislative action [238] and therefore did not fit the description of administrative action within section 33. Such resolutions could not be reviewed subject to section 33. By entrenching judicial review and providing that judicial review of administrative action should be limited only by constitutional demands, the Constitution removes the disadvantages of common law judicial review, where the legislature could amend or choose to legalize and therefore execute administrative decisions, even when the courts had declared an administrative act unlawful. In so doing, the Constitution unties the apartheid-era bounds on the judiciary. In Corder's words,

"This breaks the pre-democratic era restrictive mould of judicial review of administrative action, without moving completely into the field of appeals on the merits. The approach is not only consistent with the general model of constitutional review, but also avoids the pitfalls attendant on the attempted inclusive definition of grounds of review and the operation of the *expressio uris* rule of interpretation.

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[236] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg TMC and Others* 1999 (1) SA (CC) 374.

[237] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg TMC and Others* 1999 (1) SA (CC) 374.

[238] A similar test was successfully applied in several cases, for example, *De Lange v Smuts NO and others* 1998 (3) SA 785; *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province & Another v Edu-U-College (PE) Section 21 inc* 2001(2) SA 1 (CC); *Janse Van Rensburg NO v Minister of Trade and Industry* 2000 (11) BCLR 1235 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674(CC); *Minister of Health and Another v New Clicks South African (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC); *Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others* 2004 (12) BCLR 1298 (CC).

> The notion of 'unreasonableness' covers a wide range of 'possible grounds of review.'"[239]

Constitutional review is therefore wider than common law review and remedy based. It extends to procedural propriety and substantive reasonableness of the administrative action - the rationale of administrative decisions - as opposed to merely interpreting legislation to find the intention of the legislature. Judicial review of administrative action is now constitutionally provided as opposed to the time when it was merely a discretionary power under common law courts.

2 3 4 The extent of administrative justice as provided for under the Constitution of South Africa

As discussed above, administrative justice under constitutional supremacy is a branch of administrative law that governs the administrative process and is based on specific principles that address administrative procedures with the aim to protect individual rights. It concerns legal rules for public administration competence and performance within prescribed procedures and therefore provides for control and remedies to administrative action. To show the importance of public protection under Constitutional supremacy, the right to administrative justice is entrenched in section 33, which empowers individuals, through their entitlement to lawful, reasonable and procedurally fair administrative action,[240] to choose how they should be governed and to control administrative action.

The concept of "the right to administrative justice as a human right" can also be interpreted as a concept expressing a *sui generis* right which, since it is based on rights theory, demands that state powers should be controlled for the maintenance of human dignity. As they are subject to the bill of rights, "executive organs may only perform actions when they have been authorised by some other legal rule to

[239] Corder et al (eds) *A Charter for Social Justice A Contribution to the South African Bill of Rights* (1992) 13.
[240] Section 33(1).

do so, and no legislature may exempt executive organs from complying with the bill of rights."[241] Read with section 36, the constitutional requirements in section 33 subject administrative action to the principles of natural justice, mainly the principle of *audi alteram partem* encompassing fairness. This section further demands that administrative action should be lawful, fair and reasonable.[242] Accordingly, administrative bodies are required to observe the contents of the justiciable bill of rights. If administrators fail to act fairly, lawfully and reasonably, individuals may approach the courts of law to claim redress[243] on the basis of written reasons availed by the relevant administrative officer.[244] The right therefore protects individuals against unlawful and arbitrary action on the part of the administration and its administrators and officials.

Thus it can be held that the right to administrative justice encompasses the principles of natural justice and develops them to a recognised right to administrative justice as a human right. This is the right to seek redress for grievances caused by administrative action, the grounds of which clearly encompass both procedural and substantive matters. It recognises the desirability of the establishment of independent tribunals and other bodies, besides the common law courts, for the hearing and redress of complaints about administrative action. In addition, a wider group of people is afforded the right to challenge administrative action and seek redress of grievances caused by administrative action, "the grounds for such relief clearly encompassing both procedural and substantive matters."[245] In this way, it relaxes the tensions of the pre-democratic approach to standing to sue in administrative law, which required an applicant to show a direct and substantial interest.

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[241] Rauntenbach & Malherbe *Constitutional Law* (2004) 308.
[242] See Chapter One. As Khoza &Adam *The Power of Good Governance: Enhancing the Performance of State-Owned Enterprises* (2005) 28 explain, good governance is embedded in the nature of law and cannot be totally divorced from law.
[243] Section 33(2).
[244] Section 33(3).
[245] Corder et al (eds) *A Charter for Social Justice* (1992) 53-54.

In the constitutional era the protection of individual rights is considered urgent; hence the Constitution promotes administrative justice through a special right. The principles of natural justice are inscribed in the right to administrative justice. The determination of their applicability is not subject to the discretion of the courts as happened in the past, but they are part of the constitutional provisions and therefore superior to parliamentary legislation. The strong position of these principles today makes it impossible for Parliament to legislate against them in order to deprive individuals of their protection against state actions. This marks the development in South African administrative law from a law that negated individual rights and therefore promoted lack of accountability and efficiency in service delivery, all of which affected good governance.

2 4 Conclusion

The question addressed in this chapter was to what extent the interpretation of administrative justice under the common law in South Africa in the pre-democratic era is compatible with the principles underlying that concept, and how this has changed under the Constitution. The analysis above shows that the different interpretations of state power in these two systems influenced their approaches to administrative justice significantly. As a result of this difference, the extent of and limits to the exercise of state power on the public are also widely divergent. In the pre-democratic era the supreme law was the law as stipulated by Parliament, while in the democratic era supremacy refers to constitutional supremacy. In the first instance, state power was protected, while in the second individual rights are promoted through controlled state power. In this way the Constitution removes the disadvantages of the common law approach to the protection of individual rights.

To interpret and give meaning to the basic requirements of section 33, the Promotion of Administrative Justice Act 3 of 2000 [the PAJA] was enacted. The extent to which this Act complies with its mandate is discussed in Chapter

Four.[246] However, before examining the PAJA, Chapter Three analyses the transformation principles, based on the provision for the transformation of public administration in the Preamble, section 1, section 33 and section 195 of the Constitution, as contained in the White Paper on the Transformation of the Public Service (WPTPS).[247]

[246] Section 33(3) reads, "National legislation must be enacted to give effect to the three rights, namely, right to lawful, reasonable, procedurally fair administrative action and the right to reasons." The Act ought to also provide for "review of administrative action by a court or where appropriate, an independent and impartial tribunal; impose a duty on the state to give effect to the rights in subsections (1) and (2) and promote an efficient administration."
[247] Government Gazette no 18340 of 1997-10-01.

Chapter Three

The *Batho Pele* Transformation Principles

3 1 Introduction

Chapter Two of this study traced the development of administrative justice in South Africa through the common law era into the beginning of the post-1994 constitutional system. It noted the changes towards acknowledging individual rights entrenched in Chapter 2 of the Constitution and argued that these rights would not be promoted without also transforming public service delivery. In the effort to achieve constitutional transformation in terms of the objectives and values entrenched in the Preamble and section 1 respectively,[248] the Public Service Department adopted a policy ensconcing the *Batho Pele* (people first) transformation principles and strategies.[249]

As section 1(c) of the Constitution specifically provides, the Constitution is the foundation for a democratic and open society in which governance is based on the will of the people and the law protects every citizen equally.[250] This foundational principle of good governance is well expounded in the major public service policy in South Africa – the *Batho Pele* policy. Chapter 11 of the policy, read with the eight *Batho Pele* principles, encourage public administration to strive for the maintenance of a high standard of professionalism; cost effectiveness; development orientation; impartiality; fairness; equitable and unbiased decision making; responsiveness to public needs and assurance of public participation in policy making; accountability and transparency; cultivation of good human

[248] Chapter 1 of the Constitution entrenches the founding provisions that include supremacy of the Constitution.
[249] The Public Service Delivery Principles of *Batho Pele* Policy by the Department of Public Service and Administration 18 September 1997, enclosed in the White Paper on the Transformation of the Public Service (WPTPS) (GG 18340 of 1997-10-01).
[250] The Preamble, sections 1 and 195 of the Constitution.

resource management and portrayal of broad representation of South African people.

Read together with section 195(1) of the Constitution, the *Batho Pele* policy requires that public administration should serve the best interests of the public by enabling the achievement of individual rights encompassed in the provisions of the Constitution. This policy may also be read as prescribing that good governance must centre on the best interests of the public as defined by Chapter 2 of the Constitution and explained in the form of basic principles of public administration. Stemming from these underlying principles, the purpose of the WPTPS is "... to establish a framework to guide the introduction and implementation of new policies and legislation aimed at transforming the South African public service."[251] In accordance with the constitutional objectives outlined in the Preamble, the main focus of the WPTPS is on the facilitation of public participation, especially the participation of those previously excluded by the public administration of the apartheid era.[252]

The WPTPS therefore impresses a constitutional duty on public administrators to adhere strictly to the constitutionally entrenched principles of good governance for the way that government should conduct its business in the constitutional era. It highlights the importance of the founding values of accountability, responsiveness and openness to maintain the rule of law. If the WPTPS is adhered to, the expected transformation of public service delivery will be realised. To give effect to the major transformation principles that underlie the development of administrative justice,[253] the WPTPS[254] imports principles of corporate governance to transform public service delivery. The relevance of these principles to the current study is also emphasised by the international status afforded them in

[251] Paras 1.1.3, 1.1.12,1.1.3,3,4.3.
[252] Paras 1.1.12, 1.1.5, 4.1.3,4.2, and 4.4.4.
[253] Enshrined in the Preamble, sections 1, 33 and 195 of the Constitution.
[254] Para 2 3 5. of the WPTPS.

the sense that they embody the principles of good governance laid down by the New Partnership for Africa's Development (NEPAD).[255] As South Africa is committed to the enforcement of these principles, it has undertaken a process-targeted capacity-building initiative to effect institutional reform, which focuses on:

- providing efficient administrative and civil services;
- strengthening parliamentary oversight;
- promoting participatory decision making;
- adopting effective measures to combat corruption and embezzlement; and
- undertaking judicial reform.

Because the *Batho Pele* policy seeks to align South African domestic legal initiatives with international commitments, the *Batho Pele* principles deserve a closer analysis. The aim of the current chapter is therefore to provide, through an analysis of these principles, a more comprehensive framework for the evaluation of the PAJA as a means for transforming public administration in the promotion of administrative justice.

3 2 The *Batho Pele* principles

The *Batho Pele* principles explain the rationale of the right to administrative justice as a human right entrenched in section 33 of the Constitution. This right in turn serves as a coercive measure in terms of section 195 to animate the Constitutional objectives declared in the Preamble and section 1. If the exercise of public power is arbitrary, it falls short of these constitutional administrative standards.[256] To root out maladministration, the intent of the White Paper[257] was therefore to set out a practical agenda for transforming the delivery of public

[255] The NEPAD Policy initiatives in article 83 read with article 84.
[256] *Pharmaceutical Manufacture Association of South Africa In Re: Exparte Application of the Republic of South Africa* 2000 2 SA 687(CC) para G-H.
[257] Para 2 read with para 1.2.4.

services in general.[258] Its scope includes those parts of the public sector, both national and provincial, as well as local government, which are regulated by the Public Service Act of 1994.[259] This means that the WPTPS is relevant to all areas and employees of the public sector regulated by other legislation, such as local government and parastatal employees, teachers in education departments, the South African Police Service, the South African National Defence Force and the Intelligence Services.[260] Published in 1997, the policy itself states that "[t]he Public Service still operates largely within immensely centralised, hierarchical and rule-bound systems and has systems which make it difficult to hold individuals to account because -

- decision-making is diffused;
- they are focused on inputs rather than on outcomes;
- they do not encourage value for money;
- they do not reward innovation and creativity;
- they reward uniformity above effectiveness and responsiveness; and
- they encourage inward-looking, inflexible attitudes which are utterly at odds with the vision of a public service whose highest aim is 'service to the people'."[261]

This approach should not be judged too harshly, since Lange notes that "[p]rior to 1994, the public service of the Republic of South Africa was perceived as an unaccountable machinery (*sic*) dominated by white officialdom which neglected the needs of the vast majority of the population."[262] It does, however, explain why, after 1994, a policy was initiated to promote service excellence in the public sector and to encourage the public to expect excellent service from government.

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[258] Para 1.2.4. "In line with the constitutional principle of co-operative government, particularly as regards promoting a coherent government, WPTPS expects all sectors of public administration to agree to follow its principles."
[259] No 103 of 1994.
[260] Para 2.
[261] Para 1.1.9.
[262] Lange "The PAJA: Creating an Accountable Public Service Delivery," *Issues Service Delivery Review* 2(1) 2003 1.

According to Chapter 11 of the WPTPS, national and provincial departments must have, among other things, identifiable mission statements; service guarantees for designated groups; and a specific budget for the cost of such services, all of which should be in line with the priorities and principles of affordability of the Reconstruction and Development Programme (RDP) and with the principle of redirecting resources to areas and groups previously under-resourced.[263] They must also have:

- service standards with defined outputs, targets and performance indicators, which must be benchmarked against comparable international standards;
- monitoring and evaluation mechanisms and structures designed to measure progress and introduce corrective action, where appropriate;
- plans for staffing, human resource development and organisational capacity building, tailored to service delivery needs, and for the redirection of human and other resources from administrative tasks to service provision, particularly for disadvantaged groups and areas;
- financial plans that link budgets directly to service needs; and
- plans for the development, particularly through training, of a culture of customer care and of approaches to service delivery that are sensitive to issues of race, gender and disability.[264]

Aimed at transforming the South African public service, the WTPTS therefore introduced a new approach, which puts pressure on systems, procedures, attitudes and behaviour within the public service and reorients public service delivery towards becoming a customer-based service.[265] It therefore promotes administrative accountability, which implies that in accordance with the WPTPS

[263] As para 1.3.8 of Policy Framework on Reconstruction and Development Programme (RDP) summarises, RDP is set to achieve, "[a]n integrated programme, based on the people, that provides peace and security for all and builds the nation, links reconstruction and development and deepens democracy."
[264] Para 1.1.3.
[265] Para 1.1.12.

demand for the satisfaction of public interest, public administrators must justify their actions by explaining that they acted lawfully, reasonably and fairly. The white paper gives the assurance that "[t]his does not mean introducing more rules and centralised processes or micro-managing service delivery activities,"[266] but requires that the best interest of the customer take a central place in public service.[267]

The aim of the final policy was therefore to "kick-start" the transformation of the public service into a vehicle of service delivery that is people-oriented.[268] The name, *Batho Pele*, by which the principles that underpin this policy have become known, was derived from this aim and now appears as a motto on the homepage of the official government website, according to which "[t]he *Batho Pele* initiative aims to enhance the quality and accessibility of government services by improving efficiency and accountability to the recipients of public goods and services."[269] Eight service delivery principles for successful implementation of the policy are listed as follows:

- regularly consult with customers;
- set service standards;
- increase access to services;
- ensure higher levels of courtesy;
- provide more and better information about services;
- increase openness and transparency about services;
- remedy failures and mistakes;
- give the best possible value for money.

[266] Para 1.1.12.
[267] Para 1.2.
[268] As envisaged in Chapter 11 of the WPTPS.
[269] http://www.gov.za.[accessed 22-August-2006].

The WPTPS puts "[s]ervice delivery to the people central to realising government's commitment to a better life for all".[270] Public administration is therefore mandated to strive for the maintenance of a high standard of professionalism, impartiality, fairness, equitable and unbiased decision making, transparency and accountability, and cost effectiveness. It also strives to cultivate a development orientation and good human resource management, evince a broad representation of South African people, ensure public participation in policy making and respond to public needs.

These factors, the government believes, have the potential to bring about a major change in the way that public services are delivered.[271]

3 3 Strategies for transforming the public service through the *Batho Pele* principles

To provide more certainty about what the government wants to achieve in transforming the public administration through the *Batho Pele* principles, the strategies below were formulated for their implementation.[272]

3 3 1 Consultation

The public must be consulted regularly and systematically[273] and must, where the need arises, be engaged in review of past, present and potential essential services.[274] The public service must also use methods that are suitable to "the characteristics of the users, consumers concerned and purpose of consultation."[275] To ensure comprehensiveness and representativeness, which includes coverage of

[270] Government Communications Hand Book 26. http://www.gcis.gov.za/docs/publications [accessed on 14th March 2006].
[271] Paras 1.1.5; 1.2.6; 12.2; 4.7.
[272] Para 4.
[273] Para 4.1.
[274] Para 4.1.1.
[275] Para 4.1.1.

the views of the entire range of existing and potential customers, including those who have previously been denied access to public services, those who have been previously disadvantaged, and those who have previously found it hard to make their voices heard because of geography, language barriers, fear of authority or any other reason, more than one method will be needed.[276] Such methods could include interviews with individual citizens; customer surveys; meetings with consumer representative bodies, NGOs and CBOs,[277] and possibly also potential partnerships with the private sector about providing more effective forms of service delivery.[278]

To observe citizens' right to privacy,[279] the consultation process should be undertaken sensitively. People should, for example, not be asked to reveal unnecessary personal information, and they should be able to give their views anonymously if they wish.[280] Consultations must aim at an outcome that balances what citizens want with what provincial departments can realistically afford and have the resources and capacity to deliver.[281] They should therefore not result in a list of demands that raise "unrealistic expectations", but should "reveal where resources and effort should be focused in future so as to meet the most urgent public needs."[282] After a consultation that was arranged in accordance with the required steps, a report must be submitted to the relevant Minister or MEC, who must publicise it for every official's attention so that all staff members will be aware of how their services are perceived by customers. The results must be taken into account when future administrative decisions are taken.[283] This means that the interests of the state should not be served at the expense of the interests of the public.

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[276] Para 4.1.1.
[277] Para 4.1.2.
[278] Chapter 11 of the WPTPS.
[279] Section 14(d).
[280] Section 14(d).
[281] Para 4.1.3.
[282] Para 4.1.3.
[283] Para 4.1.3.

While the principle of consultation is meant to improve public service as it had been exercised under the authoritarian system of apartheid, it can also facilitate the contribution of the public towards attaining the right to reasonable administrative action. In this regard, Burns writes that administrators should "guard against the approach of viewing administrative action purely from the viewpoint of the individual but should view the individual's from the perspective of the general interest of the state and the public order."[284] This, however, means that public servants need to be well aware of general service standards. This approach removes secrecy and therefore promotes the right of access to public information. It will therefore satisfy the need for fairness in that the public will be enabled to contribute their version to the final administrative decisions.

3 3 2 Service standards

The WTPTS requires that departments publish relevant and meaningful standards[285] for the level and quality of services they provide, which includes new services introduced for those who have previously been denied access. These standards must cover those aspects of service that matter most to users and are expressed in understandable, relevant and easy terms. They must also be precise and measurable to enable users to judge whether they are receiving the promised standards.[286]

Service standards must be set at a demanding but realistic level and should reflect a level of service higher than the current level, which it is believed can be achieved with dedicated effort and by adopting more efficient and customer-focused working practices. To make South Africa globally competitive, standards

[284] Burns 17 *SAPR/PL* (2002) 286.
[285] Para 4.2.
[286] Para 4.2.1.

should be benchmarked against international standards, although South Africa's current level of development must be taken into account.[287]

As the responsibility for decisions pertaining to what and how services are rendered at different levels rests with elected representatives - Ministers and MECs - who are accountable to the legislature for implementing government policies and for the proper use of public money, these representatives must approve decisions before they are adopted.[288] Once approved, service standards must be published and displayed at the point of delivery and communicated as widely as possible. To enable the public to hold national and provincial departments to account for their performance, formal mechanisms must be developed to measure performance against standards regularly. Such mechanisms are the tools to track improvements from year to year, and to inform subsequent decisions on the levels to which standards should be raised in future.[289] Performance must be reviewed against standards annually and, as standards are met, they should be raised progressively. Once set standards are published, they may not be reduced. If a standard is not met, the reasons must be explained publicly and a new target date set for when they will be achieved.[290]

In line with section 32 of the Constitution, which demands that the public has the right of access to information so that secrecy in issues of public governance is minimised, where individuals are directly affected, they have the right to know the operating standards so that they can make an input in the development of the working standards. While the strategy to publish service standards promotes communication between the public and public officials, the publication of working standards would indicate ministerial commitment to a just administration, which implies that if constitutionally accepted service standards

[287] Para 4.2.2.
[288] Para 4.2.3.
[289] Para 4.2.4.
[290] Para 4.2.5.

are adopted they would promote lawfulness, reasonableness and fairness in administrative decisions. In essence publication of service standards will urge decision makers to act reasonably in accordance with the set standards so that public expectations are met without compromise, as the opposite will trigger public intervention. As the public will quickly notice sub-standard administrative action, it will exercise its right to approach the court for a review of contrary administrative action. Although South Africa should not simply transplant international aspirations without interpreting them in the context and circumstances of the local sphere, this strategy reflects the country's intention to honour its international commitments on good governance.[291]

3 3 3 Access to services

To curb the inequality in service delivery, close the gap between the first- and third-class worlds in South Africa and redress the disadvantages of existing barriers to access, *Batho Pele* suggests that access to services be increased through specific programmes. It is therefore mandatory that all national and provincial departments consult institutions such as the Gender Commission and groups representing the disabled that promote the interests of previously disadvantaged groups to set targets for increasing access to their services progressively within the parameters of the government's Growth, Employment and Redistribution (GEAR)[292] strategy.[293]

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[291] In accordance with the NEPAD commitments and the South African Participation in the African Peer Review Mechanism (APRM). The APRM is the mutually agreed instrument for self-monitoring by the participating member governments consisting of AU members. The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building. Through the signing of this document South Africa was mandated to ensure that its policies and practices conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

[292] Of 14th June 1996.

[293] Para 4.3.1 of GEAR.

In this undertaking, attention should be paid to significant factors affecting access, such as geographical factors and the lack of infrastructure, which exacerbates the difficulties of communication with, and travel to, remote areas. In drawing up their service delivery programmes, national and provincial departments must therefore develop strategies to eliminate the disadvantages caused by these factors, for example, by setting up mobile units and redeploying facilities and resources closer to those in greatest need. Other barriers to access that need to be taken into account are social, cultural, physical, communication and attitudinal.[294]

As mentioned in Chapters One and Two, the majority of South Africans were deprived of service delivery during apartheid as a result of lack of access. The expansion of access will promote administrative justice, as every one will be afforded services. This strategy therefore promotes fairness in administrative decision-making. Promotion of access to services bridges the gaps created by apartheid systems and therefore satisfies the constitutionally mandated transformation objectives. Although the improvement of infrastructure and decentralisation schemes will make public services available to the previously disadvantaged, these two mechanisms are not the only strategies for expanding access. As a lack of education can be an obstacle in service delivery, measures such as educating the public are equally important.

However, *Batho Pele* recommends only in-service training and specifically states that it is unnecessary to spend money on training public servants. In so doing, it pays little regard to the transition of public servants from the prior apartheid system to a democratic system, which can remain an obstacle in the attempts to realise constitutional aspirations. It is futile to demand that untrained public servants implement improved standards, since the quality of their education is likely to limit their attempts to transform, even if they aspired to do the best they could.

[294] Para 4.3.2.

3 3 4 Courtesy

To ensure courtesy, the behaviour of all public servants is required to be professional.[295] In accordance with this demand, public servants must not only treat the public politely, but must "put themselves in the shoes of the customer and treat them with as much consideration and respect as they would like to receive themselves."[296] To improve the behaviour of public servants, managers are required to set an example by behaving according to the departmental Code of Conduct and to monitor the behaviour of their staff regularly.[297] They must also encourage customer-focused behaviour by providing staff members who come into regular contact with the public with opportunities to improve their service.[298]

Among other things, this requirement covers patterns of greeting and addressing customers; the identification of staff by name when dealing with customers, whether in person, on the telephone or in writing; the style and tone of written communications; simplification and "customer-friendliness" of forms; the maximum length of time within which responses must be made to enquiries; the conduct of interviews; how complaints should be dealt with; dealing with people who have special needs, such as the elderly or infirm; gender; and language.[299]

Because a culture of courtesy facilitates all other processes, it is vital in public service delivery. It encourages interaction between the public and public offices so that consultation may occur, communication may improve and access to services and information may be facilitated. Consequently, these improvements promote fairness and reasonableness in that public administrators will also consider the public interest in every decision they take, as the public will be

[295] Para 4.4.
[296] Para 4.4.1.
[297] Para 4.4.3.
[298] Para 4.4.4.
[299] Para 4.4.2.

encouraged to make inputs into decision making. However, because training is the key to improvement in any institution,[300] it is not progressive for government not to spend money on training. Rather than rely on existing managers who may not have been trained themselves, professionals should train both the staff and managers. Because exercising courtesy is a complex matter in a diverse society such as South Africa, it should not be taken lightly. This means that state money will have to be spent to restore the *ubuntu*[301] culture, which was undermined by apartheid tensions and sacrifices.

3 3 5 Information

According to the *Batho Pele* principles, it is mandatory that national and provincial departments provide full, accurate and up-to-date information about the services they provide to those to whom such services ensue.[302] In order to ensure that all those who need information will receive it, especially those who had previously been excluded from the provision of public services, this must be done actively. Public officers must therefore consult the public to find out what they need to know, and then to work out how, where and when the information can best be provided.[303]

In general, this is required to be done in a variety of media and languages to meet the differing needs of different customers. If written, the information must be plain and free of jargon and supported by graphical material where necessary. All written information must be tested on the target audience for readability and

[300] Public Service Commission, State of the Public Service Report February 2005 23-25 [http:// www.gov.sa.za accessed 26-December-2005].
[301] Mokgoro J's judgement in *S v Makwanyane* 1995 (6) BCLR 665 (CC) para D-E, explains that, "'*ubuntu*' translates as humaneness. In its most fundamental sense, it translates as personhood and morality…while it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation."
[302] Para 4.5.
[303] Para 4.5.1.

comprehensiveness. As it cannot be assumed that written information alone suffices, information must also be given verbally. Basic information must be made available at schools, libraries, clinics, shops and local NGOs and CBOs, where these are used as points for service delivery. However, for users far from points of delivery, arrangements must be made for information notices to be posted on trees, toll-free help-lines to be available in different languages, and so forth. Service providers must also make regular visits to remote communities to disseminate information.[304]

In line with the constitutional right to information entrenched in section 32, these strategies also promote individual participation in public governance in that they enable claimants of services to know and therefore advise public administrators on the standard of services they wish to receive and thus facilitate constitutional transformation in that administrative decisions will then be characterised by lawfulness, reasonableness and fairness. Public administrators will be forced to adhere to the known standards and principles.[305] They will also consider the individual concerns and reasonably execute their duties in the best interest of the public.

3 3 6 Openness and transparency

As hallmarks of a democratic government, openness and transparency are important to build confidence and trust between the public sector and the public it serves.[306] The public must know more about the way national and provincial departments are run, how well they perform, which resources they consume and who is in charge of them.[307] Annual reports to citizens providing financial and administrative information are therefore important.[308] Additionally, national and

[304] Para 4.5.3.
[305] Para 1 1,1 3, 1 4, 1 4 1, 1 4 2, 1 4 3, 1 5 and 2 3, 2 3 3, 2 3 5.
[306] Para 4.6.
[307] Para 4.6.1.
[308] Para 4.6.2.

provincial departments may utilise events such as open days to invite citizens to visit the department or institution to meet with all levels of officials to discuss service delivery issues, standards and problems. According to *Batho Pele*, these events can also provide the department or institution with an opportunity to advertise their services to citizens.[309]

The strategy to improve transparency complies with the transformative constitutional demands for the achievement of human dignity, equality, non-racialism and non-sexism, which are constitutional objectives basic to the promotion of administrative justice. Where transparency prevails, there is an assurance of legality of all administrative action; there is also a guarantee that administrative decisions can be scrutinised and that the public will be given reasons for decisions. This is a move away from the pre-democratic era of bad governance practices and towards making individuals feel protected from a closed and secretive public administration.

3 3 7 Redress

The key to the *Batho Pele* redress principle lies in the ability to identify quickly and accurately when services are falling below the promised standard and having procedures in place to remedy the situation. This needs to be done at the individual level in transactions with the public, as well as at the organisational level, in relation to the entire service delivery programme.[310] Complaints procedures should eliminate lengthy bureaucratic requirements aimed at defending the department's actions rather than solving the user's problem. Where these procedures are not available, departments must create them in order to identify systemic problems. They must also collect statistics about the number and type of complaints they receive.

[309] Para 4.6.4.
[310] Para 4.7.1.

Since all dissatisfaction, whether expressed in writing or verbally, is an indication that a citizen does not consider that the promised standard of service is being delivered, ways of measuring dissatisfaction must be established.[311] Staff must also be encouraged to welcome complaints as an opportunity to improve service, and to report complaints so that weaknesses can be identified and remedied. Not only must they be dealt with regularly and personally,[312] but national and provincial departments must review and improve their complaints systems in line with the principles[313] of accessibility, speed, fairness, confidentiality, responsiveness, confidentiality, review and training, which imply that these departments should publicise complaints systems that are easy to use and accommodating of all manner of presentation by the public.

Public servants must respond swiftly to public complaints. Where delays and mistakes or sub-standard services are experienced, public servants must immediately give a full explanation and an apology, and inform the complainant of the progress made in rectifying the matter; they must also assure the complainant that such an occurrence will not be repeated and provide a remedy. Public servants should provide a full and impartial investigation on a report by a complaint. Wherever possible the complainant must be availed of an independent avenue of redress, where he or she is dissatisfied with the initial response received. Confidentiality should be protected, so that complainants are not deterred from making complaints in future, and the response to a complaint, however trivial, should take full account of the individual's concerns and feelings. Wherever possible, staff who deal with the public directly must be empowered to take action themselves to put things right. Complaints systems must incorporate mechanisms for review and for feeding back suggestions for change to those who are responsible for providing the service, so that mistakes and failures do not recur. Procedures for handling complaints must also be publicised throughout the

[311] Para 4.7.2.
[312] Para 4.7.3.
[313] Para 4.7.4.

organisation and training must be given to all staff, so that they know what action to take when a complaint is received.

As remedy-based procedures in public administration reflect the characteristics of the constitutionally envisaged culture of justification – as opposed to the culture of authority that existed during the apartheid era[314] – a system with remedies prepares public administrators to respect public rights and aim at remedying discomforts caused by public administration. Such a system provides a deterrent to potential maladministration, while encouraging public participation by giving the public hope that there can be an opportunity to remedy the negative effects of administrative action. If these procedures were instituted proactively and followed closely, they could remedy the common law judicial review approach to administrative justice and become central to the promotion of administrative justice. As seen in the previous chapters, courts were viewed as merely controllers of public administration and their role as remedy providers to the public when administrators fail was obscure and mired in statutory limitations.[315]

3 3 8 Value for money

To get the best possible value for money, improving service delivery and extending access to public services to all South Africans must be achieved alongside the government's GEAR strategy for reducing public expenditure and creating a more cost-effective public service.[316] According to *Batho Pele*,[317] the rate at which services are improved will be affected significantly by the speed at which national departments achieve efficiency savings that can be ploughed back into improved services. Some improvements that the public would like to see require no additional resources and can sometimes even reduce costs, while the failure to give a member of the public a simple, satisfactory explanation may

[314] Mureinik 31 *SAJHR* (1994) 32; Burns 17 *SAPR/PL* (2002) 283.
[315] De Ville *Judicial Review of Administrative Action in South Africa* (2005) 6-9.
[316] Para 4.8.
[317] Para 4.8.

result in an incorrectly completed application form, which costs time to set right (and may even result in costly judicial review litigation). In order to save hundreds of rands in consultants' fees, senior managers are therefore encouraged to spend a few hours each month talking to customers and the staff who serve them.[318] In addition, all national and provincial departments are required to improve programmes and to identify areas where efficiency savings can be made and to implement the service delivery improvements resulting from these savings.[319] National and provincial departments must also ensure that an environment is created that is conducive to the delivery of services, so that the staff's capacity to deliver good services is enhanced. As mentioned above, this means that staff dealing with the public directly should be given the necessary support and tools to carry out their functions effectively and efficiently.[320]

As proposed in Chapter One, the reduction of public expenditure and the creation of a more cost-effective public service are good strategies for sustainable public service delivery.[321] However, the ability of public administrators to administer in a cost-effective manner is likely to depend on the quality of the training they are offered in this regard.

3 3 9 The relationship between *Batho Pele* strategies and the principles underpinning constitutional administrative justice

As they give content to the proposals of the Preamble, section 1 and section 195 of the Constitution, the *Batho Pele* strategies and principles are mechanisms for the implementation of constitutional aims and objectives. For the purposes of transformation, the central aim of public service delivery envisaged in the South African Constitution is to protect individuals from state oppression, which emphasises the need for public administrators to honour their constitutional duties

[318] Para 4.8.1.
[319] Para 4.8.2.
[320] Para 5.3.
[321] Para 1 1.

and therefore promote the constitutional perspective of administrative justice. The *Batho Pele* strategies therefore rectify the weaknesses of the administrative processes of the authoritarian system under apartheid, which were the result of the fact that the public was never listened to because of a distorted interpretation of administrative justice. These strategies therefore facilitate the public's contribution to the administrative decisions that affect it, which promotes a rights-based approach to administrative justice as understood in the democratic era.

The application of *Batho Pele* strategies satisfies the right of individuals to lawful, reasonable and fair administrative action. If the public is consulted and treated with courtesy, they will be encouraged to communicate their views. Similarly, if the public is afforded information on available services and possible service standards, they will insist on efficient, transparent and accountable public service, because they can take decision makers to task in terms of a rights-based interpretation of administrative justice. While a good relationship between the public and its administration results in cost-effective service delivery, it also enhances the disposition of administrators to make rational and constitutionally justifiable decisions. In such a relationship administrators are disposed to follow the coherent constitutional decision-making processes mentioned in section 195. Public administrators are also forced to satisfy the constitutional objectives entrenched in the Preamble by honouring the constitutional values indicated in section 1.

As Burns[322] observed, it is important that administrators should be open minded and knowledgeable to avoid making decisions based exclusively on the evidence and arguments presented from the viewpoint of the individual complainant. Administrators must weigh individual apprehensions against general public concern as well as state interests regarding public order. To be able to achieve this, public servants need to be well aware of general service standards, both local

[322] Burns 17 *SAPR/PL* (2002) 286.

and international, to the extent that they are able to consider all possible serious objections to the decisions that they are taking. As decision makers they have to consider all the serious alternatives to the decision taken, and have to carefully discard the less appropriate ones for rational reasons. The administrators have to connect premises and conclusions rationally on the basis of information derived from the evidence and arguments before they take final decisions. Adopting a strategic approach will therefore enable them to give reasonable answers to the public as demanded by the Constitution.

This approach replaces the secrecy of the past with transparency and promotes access to public information, so that the need for fairness to the public is satisfied. It also promotes public participation. Adherence to the new procedural standards, namely those requiring accountability, responsiveness and reasonableness by the administration, will also minimise the need for judicial review of administrative decisions and eliminate forever the authoritarian approach to administration by the adoption of an approach in public service delivery based on rational justification of decisions taken.[323]

This approach is therefore a move away from the culture of secrecy to one of openness and accountability. Openness and transparency demand the provision of reasons to the public as their right, which also permits an individual to contest the validity of administrative action. This approach demands that public administrators justify their decisions by explaining the rationale for their decisions, which promotes reasonable and procedurally fair administrative action.

The *Batho Pele* strategies for services are specifically aimed at including the previously disadvantaged in public governance. If the service is conducted in a courteous, transparent and open way, then the constitutionally guaranteed right to

[323]Mureinik 31 *SAJHR* (1994) 40 and Burns 17 *SAPR/PL* (2002) 283.

lawful, procedurally fair and reasonable administrative action would be promoted and the governmental commitment to honouring its international undertakings would be evident.

It must, however, be emphasised that the ability of public administrators to provide services in a cost-effective manner is likely to depend on the quality of the training they are offered. A lack of education can be a significant obstacle to people-oriented service delivery, a factor that is not mentioned by *Batho Pele*. The government should therefore be held accountable for training both public administrators and the public.

If public servants receive the relevant training in service standards, the public is made aware of these standards, given access to relevant information, and requested to make a contribution to improving such services, it would be an indication that the present government is committed to transforming the bad governance practices which were promoted by the culture of secrecy in public governance in the apartheid era. If these strategies could therefore be followed closely, the government's remedy-based approach to public service delivery does indeed have the potential to revolutionise the common law implementation of administrative justice which basically dependant on judicial review.

3 4 Conclusion

This chapter has shown that, as constitutional implementation mechanisms, the principles and strategies of *Batho Pele* in general reflect the provisions of the Constitution for transformation and therefore have the potential to transform the inward-looking, bureaucratic public service system of the past into a transparent people-oriented system. Based on the premise that individuals need to be protected from the abusive administrative processes of the past, these principles can be considered an invitation to self-governance based on the democratic

attributes of the South African Constitution. The main hurdle that has been pointed out to the achievement of these aims appears to be the explicit omission of formal training from the policy. It was necessary to examine these principles because they unfold the compound concept of administrative justice, which is the theme of this study. In a nutshell, *Batho Pele* principles and strategies establish in detail the right to lawful, fair and reasonable administrative action. If these principles and strategies are followed, administrative justice is attained.

Chapter Four

The South African Promotion of Administrative Justice Act 3 of 2000 in the Context of Transformation

4 1 Introduction

As argued in Chapter Two, the development of administrative justice in South Africa was stilted during the apartheid system mainly because of the lack of a suitable infrastructure and the negation and irregular enforcement of the principles of natural justice. To protect and emancipate individuals from inactive vessels of misery and oppression to humane and participatory agents of their own governance, the South African Constitution brought about legal development by transforming these factors. The main feature that has been added to common law principles of natural justice by the Constitution is that the principles underpinning administrative justice are not merely facilitative, but are independent and substantive human rights.

Because the current system places administrative justice at the centre of good governance, it aims at transforming public service delivery and instilling a culture of human rights in public administrators. In line with the principles underlying administrative justice; namely, principles of natural justice, the rule of law and separation of powers,[324] the constitutional provisions encompassing transformative principles entrenched in the Preamble, sections 1, 33 and 195[325] and government's ideals ensconced in the *Batho Pele* transformation principles,[326] this chapter examines the extent of and limit to the Promotion of Administrative Justice Act 3 of 2000 [the PAJA] in giving effect to the principles

[324] Discussed in Chapter One.
[325] Discussed in Chapter Two.
[326] As discussed in Chapter Three para 3 2, they aim to transform public service delivery to service that is efficient, accountable, maintain a high standard of professionalism; cost effective; development orientated; impartial; fair; equitable, unbiased; responsive and ensures public participation in policy making; transparency; cultivates good human resource management and portrays broad representation of South African people.

entrenched in the constitutional right to administrative justice. But first the scope and functions of the PAJA will be explained.

4 2 The scope of the PAJA

As the main aim of the PAJA is to protect individuals from unconstitutional administrative action through the promotion of administrative justice,[327] the Preamble reiterates the provisions of section 33 of the Constitution and the demands of item 23 of schedule 6 and affirms that the Act seeks to give effect to the right to administrative justice. It further notes that the Act applies to any administrative action, except constitutionally excluded administrative action.[328]

The eleven interrelated sections of the Act expand on the three main rights of the constitutional right to administrative justice and impose a duty on all administrators to give effect to these rights.[329] The Act also provides for the review of administrative action by courts or independent and impartial tribunals[330] so that categories of persons defined as beneficiaries to the right to judicial review of administrative action are given appropriate remedies.[331]

The PAJA applies to and binds the entire administration at all levels of government[332] except where expressly excluded.[333] Like the transformative

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[327] The Preamble of the Act.

[328] Section 1(aa)-(hh) of the PAJA. According to *Fedsure Life Ass Ltd v Greater Johannesburg TMC* 1998 (12) BCLR 1458(CC) 25, the key exclusions are executive functions; legislative actions of Parliament, the provincial legislatures and municipal councils.

[329] The Preamble; sections 3, 4 and 5 of the PAJA. As explained in Chapter Three para 3 2, this duty entails giving effect to the right to lawful, fair and reasonable decisions provided for in section 33(1) and (2) of the Constitution and thus calls for efficiency and accountability in the performance of administrative functions.

[330] The Preamble and section 6 of the PAJA. Also see section 167 of the Constitution.

[331] Section 33(3) of the Constitution read with sections 6,7&8 of the PAJA.

[332] Section 33 of the Constitution, read with sections 8 and 36 of the Constitution. Also see section 1 of the PAJA read with section 2 of the Act.

[333] Section 36 of the Constitution read with sections 3(4)(a), 4(4)(a) and 5(4)(a) of PAJA limits the application of administrative justice.

principles mentioned above it directly prescribes how the powers that are given to administrators by other administrative statutes, such as the Social Assistance Act,[334] must be exercised. By so doing, it redefines the nature of public administration in the constitutional dispensation. As De Villiers explains,[335] "the implementation of PAJA goes beyond its four corners in that it goes to the deepest end where subsidiary regulations form part of administrative actions and therefore creates a general administrative law framework against which particular administrative law provisions such as the provisions of Social Assistance Act 59 of 1992 stand to be tested."

The interconnectivity of the right to administrative justice and other rights such as the right of access to social security is fundamental in the realisation of constitutional transformative objectives which aim at rights based public service delivery. The right to administrative justice facilitates beneficiaries of rights to access these rights.[336] Without a doubt the PAJA therefore serves as the umbrella statute for all legislation dealing with administrative issues because it is the expression of the constitutional right to administrative justice, which outlines how every public administrator should do their duties in the constitutional dispensation.

The PAJA aims at transforming public service delivery and instilling a culture of human rights in South Africa's administrative system.[337] The Act accordingly defines administrative action as action by organs of state, natural or juristic persons who exercise statutory public power or perform non-statutory public functions.[338] These include decisions and omissions made by those organs of state

[334] Act 59 of 1992.
[335] De Villiers 18 *SAJHR* (2002) 321.
[336] Martin "Just Administrative Action-the Key to Accessing Socio-Economic Rights" http://www.community lawcentre.org.za/ser/esr1999 [accessed 10 November 2006].
[337] Section 33(3).
[338] In accordance with section 195 of the Constitution. See section 8(2) of the Constitution and Section 1(b) (iv) of the PAJA.

that exercise their powers in terms of the national or provincial Constitutions, exercise a public power or perform a public function in terms of any legislation and that both affect the rights of a person adversely and have a direct, external legal effect. Administrative action also refers to decisions taken by private natural or juristic persons that exercise public powers or perform public functions in terms of any empowering provision.[339]

However, in its attempt to circumscribe administrative action, the PAJA gives a "cumbersome definition."[340] Section 1 of PAJA restricts administrative action to decisions that "adversely affect the rights of any person." Section 3(1) on the other hand broadens the requirement by recognising as administrative action conduct that impacts adversely on legitimate expectations because it does not strictly require an adverse impact on rights. It envisages that administrative action might or might not affect rights.[341] If administrative action is exclusively seen in conjunction with the requirement in section 1 that it must have a "direct and external legal effect,"[342] "it is …probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."[343]

This literal interpretation of the Act therefore suggests that the PAJA fails in its mandate to effect the right to administrative justice envisaged in section 33 of the

[339] Empowering provision means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken. For example, as an empowering legislation, the Social Assistance Act 59 of 1992 provides "…for the delegation of powers and the authorization to perform duties…. ". See the Preamble of the Act.
[340] *Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others* 2004 (12) BCLR 1298 (C) para 21.
[341] Section 3(1) provides that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."
[342] Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* para 2.33.
[343] *Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others* 2004 (12) BCLR 1298 (C) para 23.

Constitution. As suggested by Currie & Klaaren,[344] when interpreting administrative action, a broad definition envisaged by section 33 of the Constitution and provided for in reading section 1 together with section 3 of PAJA, must be the starting point. Consequently, having established the general definition, a narrow definition based on constitutional distinctions can be adopted, "[instead of beginning] with a limited essentialist and overly formalistic definition."[345]

To avoid this paradoxical impression of the literal interpretation which "characterised administrative action by its effect in particular cases (either beneficial or adverse)",[346] and to come up with a constitutionally acceptable interpretation, in accordance with section 33,[347] courts have used various qualifications to the literal definition.[348] Accordingly, whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so.[349] This interpretation of administrative action based on conduct of "an administrative nature" emerged from the construction that has been placed on section 33 of the Constitution.[350] According to this creation administrative action is characterised by four exclusions, namely, i) it does not extend to the exercise of legislative powers by deliberative elected legislative bodies,[351] ii) nor to the ordinary

[344] Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* para 2.12.
[345] Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* para 2.12.
[346] *Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others* 2004 (12) BCLR 1298 (C) para 23.
[347] *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 35; *Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others* 2004 (12) BCLR 1298 (C) para 22.
[348] *Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others* 2004 (12) BCLR 1298 (C) para 25; *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 145-147.
[349] *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 141.
[350] *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 141.
[351] *Fedsure Life Ass Ltd v Greater Johannesburg TMC* 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374(CC) para 45; *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 140.

exercise of judicial powers,[352] iii) nor to the formulation of policy or the initiation of legislation by the executive,[353] iv) nor to the exercise of original powers conferred upon the President as head of state.[354]

Administrative action is therefore rather, "in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."[355]

By its aim to effect open, accountable governance and a system of administration that is lawful, reasonable and fair,[356] the Act seeks to attain its constitutional mandate and therefore sets out procedures and methods aimed at encouraging lawful, fair and reasonable decisions by administrators,[357] thereby aiming at reducing the need for judicial review that was almost exclusively relied upon under the common law during apartheid.[358]

The PAJA therefore has three main functions, namely, to promote public participation in decisions that affect the public,[359] to guide public administrators

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[352] *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 24; *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 140.
[353] *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 142.
[354] *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) paras 145.- 147.
[355] *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) paras 136 and 146.
[356] Devenish et al *Administrative Law* (2001) 142.
[357] Sections 3, 4 and 5 of PAJA. These procedures have the same theme as the strategies set out in *Batho Pele* policy discussed in Chapter Three para 3 3.
[358] Section 3 of the PAJA and see Chapter Two paras 2 2 and 2 2 4.
[359] Sections 3-5 of the PAJA.

in their efforts to sustain efficiency and accountability[360] and to promote review of administrative action for aggrieved individuals.[361]

4 2 1 The promotion of public participation

Regarding the need for individual participation in public administration, the PAJA affords individuals the procedural right to be heard and to make representations before an administrator takes a decision that might adversely affect their rights.[362] They are also entitled to obtain a clear statement of the decision within a reasonable time so that they can exercise their right to judicial review or internal appeal.[363]

The Act provides every person with the right to approach courts for review of administrative action that they consider to have violated their rights or legitimate expectations.[364] The adversely affected party may petition the court on the basis that his or her right or legitimate expectation has been affected adversely by the action or omission of an administrator. Section 38 of the Constitution gives a general foundation for the right to approach a court in order to enforce a constitutional right. As PAJA gives effect to section 33 of the Constitution, these standing provisions in section 38 of the Constitution also apply to applications in terms of PAJA. Accordingly, anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The 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;

[360] Sections 2-4 and 1(i)(b)(aa)-(hh) of the PAJA.
[361] Sections 6-8 of the PAJA.
[362] Sections 3(1) and (2)(a)-(d) of the PAJA.
[363] Sections 5-8 of the PAJA.
[364] The aggrieved person should satisfy provisions of section 6(1) of the Act.

- anyone acting as a member of, or in the interest of , a group or a class of persons;
- anyone acting in the public interest; and
- an association acting in the interest of its members.

In addition to the provisions above that regulate the behaviour of administrators, section 7 of the PAJA also provides for the procedure that affected individuals must follow in order to seek judicial review. Except where they are exempted by court, they must exhaust internal remedies before they can approach the court.[365] They must also act within a reasonable time, which is a period limited to 180 days after they have become aware of or might reasonably have been expected to have become aware of the unsatisfactory administrative action and reasons for it.[366]

The limits to the right to just administrative action are contained in section 6 read with section 1 of the PAJA. According to this, the right to administrative justice is limited in application because it excludes categories of administrative action.[367] Due to its narrow definition, section 1 excludes a range of public administration actions from scrutiny under the Act.[368]

[365] Section 7(2).
[366] Section 7(1).
[367] These include the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution; the executive powers or functions of a municipal council; the legislative functions of Parliament, a provincial legislature or a municipal council; 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 74 of 1996, and the judicial functions of a traditional leader under customary law or any other law; a decision to institute or continue a prosecution; a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission; any decision taken, or failure to take (i)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).
[368] It is in this respect that the Act may be considered unconstitutional as it limits section 33 provision for administrative justice.

4 2 2 Guidance for public administration

Another function of the PAJA is to give proactive guidance to administrators[369] in accordance with constitutional transformation principles.[370] It provides that administrative decisions must be procedurally fair.[371] Principles of natural justice, especially the *audi alteram partem* principle,[372] must also be honoured. This means that administrators must give persons who are negatively affected by administrative decisions an opportunity to put their case before a final decision is taken.[373] For this purpose, they must provide the individuals with:

- "adequate notice of the nature and purpose of the proposed administrative action;
- a reasonable opportunity to make representation;
- a clear statement of administrative action;
- adequate notice of any right to review or internal appeal where applicable;
- adequate notice of the right to request reasons in terms of section 5."[374]

At their discretion, administrators may also give individuals an opportunity to obtain legal assistance if they are involved in serious or complex cases. In addition, individuals may appear in person to present their arguments and dispute evidence or information before the administrator.[375]

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[369] Sections 3 – 5 of PAJA. In addition, sections 2-4 and 1(i)(b)(aa)-(hh) of the PAJA set exclusions to guide administrators in getting to grips with the definition of administrative action.
[370] As required in Section 33 of the Constitution read with the Preamble, section 1 and 195 of the Constitution.
[371] Sections 3 and 4 of the PAJA..
[372] Sections 3, 4 and 5 of the PAJA.
[373] Sections 3(2)and 4 of the PAJA.
[374] Section 3(2) of the PAJA. In this regard administrators must comply with the guiding principles in Chapter 3 of the regulations on fair administrative procedure. Promotion of Administrative Justice Act 3 of 2000 Regulations. GNR 1022 of 31 July 2002.
[375] Section 3(3) of the PAJA.

To attain fairness for affected members of the public in accordance with section 4, administrators must decide whether to hold a public inquiry or involve a suitably qualified person or panel of persons to do so.[376] They may also choose to or cause a panel to follow a notice and comment procedure or execute both of the procedures. Where reasonable and justifiable they may depart from subsections 1(a) to (e), (2) and (3).

A reasonable and justifiable action takes into account the objects of the empowering provision; the nature and purpose of and the need to take the administrative action; the likely effect of the administrative action; the urgency of taking the administrative action or the urgency of the matter, and the need to promote efficient administrative and good governance.[377] Procedures for a public enquiry must have the nature of a public hearing and administrators must keep a record of the proceeding and produce a written report, a summary of which will be published in a government gazette in English and at least in one other official language. Administrators must also communicate the contents of the report to the public concerned.

Where a notice and comment procedure is selected instead of a public inquiry, the administrator must take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them. These comments must be considered to decide whether or not the administrative action should be taken with or without changes.[378] Within

[376] Section 4(1) and (2)of the PAJA. In this performance the administrator is accordingly guided by Chapter 1 of the Promotion of Administrative Justice Act 3 of 2000 Regulations. GNR 1022 of 31 July 2002: Regulations on fair administrative procedures.
[377] Sect ion 4 (a)(b) of the PAJA.
[378] Section 4 (3) of the PAJA. In this action the administrator is accordingly guided by Chapter 2 of the Promotion of Administrative Justice Act 3 of 2000 Regulations. GNR 1022 of 31 July 2002: Regulations on fair administrative procedures.

a period of 90 days after they have been requested to do so, administrators must furnish adversely affected parties with written reasons for their decisions.[379]

Despite these specific mandatory provisions, it is not impossible for administrators to take decisions that are contrary to the spirit of the law. Although exemptions are allowed only under exceptional circumstances and only if necessary, and while the essence of this perspective is that constitutional rights are "indispensable to the realisation of the greater good of the state,"[380] administrators' interpretation of the provisions could lead to decisions that would have the same effect as the abuse of concessions of this nature had under the common law apartheid system because these provisions are open-ended in nature and thus put great discretion in the hands of administrators to decide how to act under the PAJA. An example of such open-ended requirements is section 3(2)(b)(i) where the Act requires "adequate" notice, but does not specify when a notice will be adequate. Similarly, the requirement in section 3(2)(b)(ii) in respect of a "reasonable" opportunity bears similar characteristics.

This is therefore, a factor that needs to be addressed not only by the courts, but also through training so that administrative justice is not dependant on judicial review. In the present time the main focus should be to make public administrators to deliver in an effective and efficient manner by transforming from the pre-democratic era culture rather than to make judicial review the main aspect in the achievement of administrative justice.[381]

[379] Section 5(1) and (2).
[380] Burns 17 *SAPR* (2002) 286.
[381] Hoexter "The Future of Judicial Review in South African Administrative Law" 117 *SALJ* (2000) 484.

The Act is also not user-friendly, as it demands extensive interpretation involving expensive technical expertise and professional assistance.[382] This means that those guaranteed the right to just administrative action must resort to legal assistance, which loses sight of the fact that the majority of claimants of the right to administrative justice are the poorest of the poor - the first victims of maladministration.[383] Since these multitudes of South Africans are illiterate and cannot differentiate legal from illegal administrative action,[384] even in the current democratic system, their lack of education and training could constitute a serious weakness in the application of the Act and, in so doing, contribute to administrative injustice. However, also here the remedy seems to lie in effective implementation of the Act.

Adding to these problems is the fact that the provisions of the PAJA - even the positive ones – have to date been implemented through undeveloped systems, contrary to what *Batho Pele* strategies propose,[385] it is not conducive to the enforcement of the right to administrative justice that most government departments in South Africa have not aligned their systems to the Act yet. The fact that its provisions have not been implemented effectively can, however, not be totally ascribed to the PAJA. In contrast with the spirit of *Batho Pele* and the

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[382] A simple indicator is that the act is only available in English and has not been translated in to other languages to communicate it to all levels of the public. Similarly the prescribed procedure in seeking judicial review has technicalities that an individual cannot comprehend with ease without seeking legal assistance.

[383] Devenish et al *Administrative Law* (2001) 143; De Villiers 18 *SAJHR* (2002) 320.

[384] De Villiers 18 *SAJHR* (2002) 320. The author observes that, "the social welfare system is a gruelling test of the state's ability to maintain an efficient administration, while adhering to its constitutional promise of administrative justice."

[385] The South African Year Book 2005/2006 423 proposes that to facilitate transformation of service delivery in the public sector, at least in the ministry of justice, there should be transformation of partnerships, mainly with regard to the department's key strategic partners and stakeholders. To capacitate courts to be effective, the department adopted a turnaround strategy through the "Re Aga Boswa" We are Rebuilding Project. See Chapter Three 3 3 3 and *Thozamile Magidimisi NO v The Premier of the Eastern Cape &Others* Case No 2180/04 Bisho, where the court held that "the constitutional duty of the respondents was to give effect to the fundamental right of the applicant and others to social security and assistance under section 27 of the Constitution, by properly administering the provisions of the Social Assistance Act 59 of 1992. These include *reasonable measures to make the system effective*." See further *Member of the Executive Council Welfare v Kate* All SA (2) 2005 745 (SCA) para 3.

constitutional transformative objectives the factors mentioned above could indirectly disempower the public from seeking judicial review of administrative action affecting them.

Although actions in implementation of the PAJA provisions could carry most of the blame for problems affecting effective implementation of the Act it can however be noted that there are many aspects of the Act itself which seem to be problematic and that may detract from successful implementation. To the extent that the PAJA provisions provide guidance for effective public administration, the Act seems to be more of a punitive measure to ineffective and inefficient public administration than being a directive standard. What makes matters worse is the condensed nature of administrative principles that the Act provides.

For example, it cannot be easily determined that when the Act requires the administrator to act with fairness it would mean that the administrator must actually inform the customer of his or her rights before even engaging in any service that an individual would need. This is contrary to what happens in criminal justice where officers are specifically directed by law to inform the suspect of suspect's rights upon arrest. With this problem it is possible that administrators who are in most cases not legally trained would misinterpret the provisions of the Act. Be that as it may, public administrators are supposed to be aware of the *Batho Pele* policy provisions, which are described in Chapter three as a wider expression of constitutional transformative principles that include section 33 from which the PAJA emanates. This confirms the need for formal training of public servants.

4 2 3 The review of administrative action by courts

The last function of the PAJA that is relevant to this study is that it develops judicial review of administrative action, the purpose of which is to protect,

promote and fulfill the rights contained in the Bill of Rights. Since judicial review powers are entrenched in the Constitution,[386] courts are now protected from the legislative whims, which limited common law judicial discretion, hampered judicial review on administrative action, and therefore crippled the promotion of administrative justice.

The Act provides every person with the right to approach courts for review of administrative action that they consider to have violated their rights.[387] The adversely affected party may petition the court on the basis that his or her right has been negatively affected by the action or omission of an administrator.

If the courts find that constitutional transformation objectives are not promoted by administrative action, they must redress the situation. For example, where administrative action is contrary to transformative principles in the Preamble, section 1, section 33 and section 195 due to the fact that the administrator is not acting lawfully, fairly and reasonably, there will be a need for courts to review administrative action and consequently enforce these constitutional demands.[388] The courts' ability to remedy administrative behaviour arises when the affected person petitions the court. [389]

The Act also provides for grounds of review and for the procedure for obtaining review; it gives courts the power to scrutinise the lawfulness, reasonableness, and procedural fairness of administrative action and provides remedies to be available in proceedings for judicial review.[390]

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[386] Section 33 (3) read with section 165(3). Also see Devenish et al. *Administrative Law* 6.
[387] The aggrieved person should satisfy provisions of section 6(1) of the Act.
[388] De Villiers 18 *SAJHR* (2002) 321 observes that, "the social welfare system is a gruelling test of the state's ability to maintain an efficient administration, while adhering to its constitutional promise of administrative justice."
[389] In accordance with section 6 of PAJA.
[390] Section 8 of the PAJA.

Read with section 8 of the PAJA, section 172(1)(b) of the Constitution empowers courts to formulate appropriate remedies creatively when deciding on matters of constitutional violation, such as administrative injustice. In the South African context an appropriate remedy means an effective remedy depending on the circumstances of each case.[391] The recent remedies that courts awarded have three elements, namely they deter administrators from violating individual rights, they address the problem that the affected individual have with the aim to provide a remedy suited to the individual's unique case and they vindicate the constitutional transformative demands.

The basis for this approach is that the human rights violators do not only affect particular persons, but also impede fuller realisation of constitutional transformation. As Kriegler J confirms in *Fose,* "the harm caused by violating the Constitution is harm to the society as a whole, even where the direct implications of the violation are highly parochial."[392] De Ville also agrees, " in devising its remedies the court [has to adopt] the approach that the remedy devised must be to the benefit not only of the successful litigant, but also of similarly suited people."[393]

On the basis of this principle the courts must create multifarious remedies to suit the circumstances of individual cases. For this purpose they have to use available remedies in both common law and other statutory provisions, especially those contained in section 8 of PAJA. As De Ville mentions, where the subject matter of the case concerns the lawfulness of administrative action, common law remedies have in most cases proven adequate.[394] However, where the subject

[391] *Fose v Minister of safety and Security* 1997 (7) BCLR 851(CC) &1997 (3) SA 786 (CC) para 34.
[392] *Fose v Minister of safety and Security* 1997 (7) BCLR 851(CC) &1997 (3) SA 786 (CC) para 95.
[393] De Ville *Judicial Review* (2005) 357.
[394] De Ville *Judicial Review* (2005) 357.

matter concerns reasonableness of administrative decisions, common law remedies are inadequate and therefore courts must formulate an appropriate remedy.[395]

The courts also have to use other constitutionally provided transformative supervisory mechanisms,[396] and make use of their constitutional discretion to apply international law and foreign law where these can be of help.[397]

Section 8(1) of the PAJA, in particular, suggests remedies that the courts can use where appropriate. These include mandatory and prohibitory interdicts, declaratory orders, orders to give reasons, and review orders in the classic sense. Courts can also set aside the administrative action in question and either remit it or, in exceptional cases, substitute it or vary the administrative action and direct the payment of compensation. Similarly section 8(2) of the PAJA allows courts to grant remedies that are "just and equitable" where the provided remedies fall short of effective constitutional protection, namely that they vindicate constitutional objectives, compensate the aggrieved and punish the wrongful administrative

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[395] De Ville *Judicial Review* (2005) 357.

[396] Such as institutional supervisory mechanisms, for example, those mentioned in the constitutional provisions of sections 38, 118, 165, 172, 195, 184, 196, and chapters 9 and 10. In particular see the decisions of Plasket J and Froneman J in *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 & *Kate v MEC for Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) respectively, where the courts gave judgements in favour of the aggrieved by ordering that aggrieved be compensated. In addition Plasket J ordered that institutional remedies be enforced and to facilitate that ordered that the judgement be served upon the concerned constitutional institutions including the Human Rights Commission.

[397] Section 39(1) of the Constitution. In the case of *Steenkamp* the court obiter referred to foreign law practice while deciding the issue "whether tender boards should be held liable in delict for loss suffered by a successful tenderer as a result of reliance on a tender, and steps to fulfil obligations in terms of that tender, when the tender was subsequently set aside on review due to the tender board's negligence in performing its administrative duties." The court observed that unlike South Africa in many other jurisdictions the rights and obligations of parties to government procurement processes are regulated by statute. In the European Union for example, two directives regulate the procurement of public works and supply contracts. These directives impose an obligation upon member states of the European Union to provide contracts with remedies for the review of the award of public contractors. The directives also specify the remedies that reviewing bodies should have at their disposal. *Jurgens Johannes Steenkamp n.o v The Provincial Tender Board of the Eastern Cape* CCT 71/05 Heard on: 11 May 2006 and decided on 28 September 2006.

action. In general, section 8 therefore introduces remedies *sui generis*.[398] As De Ville[399] confirms,

> "although the common law administrative remedies will remain relevant and will often be suitable, one should be careful not to simply equate remedies in Section 8 with those that existed under common law. The common law remedies to be found in Section 8 may firstly be developed in terms of the powers of the courts set out in section 39(2) of the Constitution. Secondly, the broad language in section 8(1) clearly indicates that new remedies may be fashioned by the courts. It should be remembered that PAJA (including the remedies provided for in section 8) aims at giving effect to constitutional rights."

Section 8 of the PAJA therefore gives expression to sections 38 and 39 read with section 172(1)(b) of the Constitution, which provides for the extent of and limits to judicial innovation of remedies for administrative actions that violate the rights in the Bill of Rights. According to these provisions remedies are appropriate[400] if they are just and equitable[401] and aim at promoting the values that underlie an open and democratic society based on human dignity, equality and freedom.[402] Judicial review is thus a positive duty of the courts, as De Ville confirms:

> "Section 33(3) of the Constitution, read with the purposive approach the courts have adopted to the interpretation of the Constitution and statutes (especially those that give effect to rights in the Bill of Rights) endorses an approach by the courts, which departs from Diceyan approach to the rule of law... The Courts, in interpreting the AJA, have an important role to play in ensuring administrative

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[398] See also *Fose v Minister of safety and Security* 1997 (7) BCLR 851(CC) &1997 (3) SA 786 (CC) para 98 and 99.
[399] De Ville *Judicial Review* (2003) 325.
[400] Section 38 of the Constitution.
[401] Section 172(1)(b) of the Constitution, which empowers courts to create orders that are just and equitable. Also see section 8 of PAJA.
[402] Section 39(1)(a) of the Constitution.

effectiveness, rather than seeing their role primarily as that of controlling and containing the administration."[403]

The constitutional right to administrative justice as a human right[404] and the willingness of courts to develop innovative remedies[405] in administrative matters play a critical role in protecting individual rights. This shows that judicial review is no longer viewed merely as a procedure, but has become a remedy through which the courts can make sure that methods and procedures adopted by the administration in the discharge of its statutory functions shall be lawful, fair and reasonable. Regarding judicial review under the PAJA, therefore, four aspects have been significantly improved from the situation under the common law during apartheid: the public now have access to courts, the courts must use the remedies provided by the Act when appropriate, they must create suitable remedies where necessary and they must consider it a constitutional duty to enforce individual rights.

Plasket J[406] interpreted "appropriate" remedies as relief that upholds the rights of all and ensures compliance with constitutional values that were not recognised under the common law. This implies that such remedies animate the transformative purpose of the Constitution. Kriegler J's interpretation of an appropriate remedy as "a remedy specifically fitted or suitable to vindicate the Constitution and act as a deterrent for future constitutional rights violations and precisely suited to facts surrounding a specific violation of rights"[407] confirms the

[403] De Ville *Judicial Review* (2005) 10.
[404] Section 33 of the Constitution.
[405] Administrative justice remedies are granted cumulatively in most cases in order to achieve appropriate remedies. This creativity achieves a number of results. It keeps the administrators on their toes to see to it that their decisions are taken in the best interests of the public they serve. This transforms administrative culture from one of discriminations to a rights-based culture, as the South African Constitution envisages.
[406] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE) para 11. Also see *Kate v MEC for Department of Welfare, Eastern Cape* All SA 2005 (2) 745(SE) para 16.
[407] *Fose v Minister of safety and Security* 1997 (7) BCLR 851(CC) &1997 (3) SA 786 (CC) paras 18 &19.

view that, at least with regard to judicial review, the PAJA promotes administrative justice.[408]

Concisely *Kate,*[409] held " all courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting 'appropriate relief', 'just and equitable orders', and by developing the common law 'taking into account the interests of justice.'"[410] Unlike under common law, constitutional review allows courts independence "to devise means of protecting and enforcing fundamental rights that were not recognized under the common law."[411] Through constitutional review, violations of individual rights will therefore be remedied and in turn administrative justice will be promoted.

4 3 The transformative ability of the PAJA

To gauge whether the PAJA has the potential to transform service delivery in South Africa through promotion of administrative justice, it has to be tested against the principles underlying administrative justice, the constitutional provisions encompassing transformative principles[412] and the *Batho Pele* transformation principles.[413]

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[408] *Fose v Minister of safety and Security* 1997 (7) BCLR 851(CC) &1997 (3) SA 786 (CC) paras 18 &19.
[409] *Kate v MEC for Department of Welfare, Eastern Cape* All SA 2005 (2) 745 (SE) para 16.
[410] *Kate v MEC for Department of Welfare, Eastern Cape* All SA 2005 (2) 745 (SE) para 16.
[411] *Kate v MEC for Department of Welfare, Eastern Cape* All SA 2005 (2) 745(SE) para 16.
[412] Discussed in Chapter Two, these are provided for in the Preamble, section 1, section 33 and section 195 of the Constitution
[413] As shown in Chapter Three they aim to transform public service delivery to service that is efficient, accountable, maintain a high standard of professionalism; cost effective; development orientated; impartial; fair; equitable, unbiased; responsive and ensures public participation in policy making; transparent; cultivates good human resource management and portrays broad representation of South African people.

Since the Act emanates directly from the Constitution, it complies with the principles underlying administrative justice discussed in Chapter One and is therefore subject to the rule of law and separation of powers. It gives content to the scope of the constitutional right to administrative justice as a human right,[414] and enforces administrative procedure that abides by principles of natural justice, especially the *audi alteram partem* principle that underpins its main provisions in sections 3, 4 and 5. This means that the PAJA is the executory tool for ensuring that administrative action is maintained in accordance with the democratic standards of good governance.

In accordance with section 33 of the Constitution, the PAJA puts into effect public governance that is lawful, fair and reasonable to redress the imbalances of the past while maintaining continuity of service to all levels of society, with the main focus on meeting the needs of the disadvantaged South Africans.[415] This accord with the principles of constitutional transformation[416] and gives force to the *Batho Pele* initiative that demands transformed service standards for the maintenance of an open and transparent public administration.

As the Act puts public participation in the centre of administrative justice, when read with *Batho Pele*, it impliedly encourages public administration to adopt international standards and interpret these standards in terms of South African Constitution.[417] It therefore facilitates public participation through consultation before finalising administrative decisions and requires that the public be treated with courtesy and provided with access to services by making adequate information available. As the Act demands, public services must also reflect value for public money. The public services should also be remedy based. For example,

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[414] The Preamble of the PAJA.
[415] The Preamble of the PAJA.
[416] Provided for in the Preamble, section 1, section 33 and section 195 of the Constitution. Also see Devenish et al *Administrative Law* (2001) 143.
[417] The NEPAD initiatives in terms of the GEAR strategy discussed Chapter Three paras 3 1 and 3 3 3 show that best practices in public administration are those that address customer needs.

where administrators err, their action must be redressed through internal appeals and judicial review of administrative action to provide remedies to the affected individuals.

To create a suitable environment for the promotion of administrative justice, the Act attempts to instil a new culture amongst role players, by providing for what administrative justice have to be and imposing duties for the public administrators, the courts and right to review of administrative action to the public. However, this aim could be eroded by provisions such as those governing the interpretation of the exceptions in sections 3(4), 4(4) and 5(4) of the Act [418] which provide for discretion in the application of the provisions of sections 3, 4 and 5, and section 36 of the Constitution, which provides for exclusions from the application of the Act. To prevent this from happening, role players in the execution of the Act must be very well trained and appropriate institutional structures and frameworks must be devised and implemented.

Despite these concerns, the Act provides for better and faster strategies of responding to citizens' needs so as to change the irrational way in which services were delivered in the pre-democratic era. In so doing, the PAJA has drastically changed the pre-democratic administrative law into a development-oriented law.

4 4 Conclusion

This chapter sought to examine the extent of and limit to the PAJA in giving effect to the principles ensconced in the constitutional right to administrative justice namely, the right to lawful, reasonable and fair administrative action and therefore encouraging a culture of human rights in public administration officials as opposed to human rights negation of the pre-democratic era. The transformative ability of this Act was also measured against the government's

[418] Para 4 3 1 above.

ideals to transform public service delivery. It promotes a shift away from inward-looking, bureaucratic systems, processes and attitudes and initiates a search for new ways of working that put the needs of the public first. If those who implement the Act would do so within the spirit of South Africa's Constitution, it would be hard to fault the Act against its aims. In Chapter Five, the success of the implementation of the Act is examined through an analysis of a number of social assistance cases.

Chapter Five

Measuring the success of the implementation of administrative justice principles through an analysis of social assistance cases

5 1 Introduction

This chapter analyses a selection of cases[419] to gauge whether administrative justice principles, as envisioned by the Constitution and the PAJA, [420] are being effectively translated into reality for those most dependent on public administration, in particular in the social assistance context. The analysis firstly focuses on the performance of administrators in this regard. That is followed by a discussion of the role of courts in fashioning remedies that may enhance administrative justice. The question of whether members of the public effectively utilize the procedural guidelines in the PAJA when seeking enforcement of their rights, while equally important, is not discussed in detail here due to the limited scope of the study. Although some remarks are made in this regard, further research is warranted, especially with regard to the recently published Black Sash Report.[421]

[419] It mainly refers to KwaZulu-Natal and Eastern Cape social assistance cases.

[420] On the duty of courts in this regard see the decision of Ackerman J in *Fose v Minister of safety and Security* 1997 (3) SA 786 (CC) para 69 and see section 8 (1) and (2) of the PAJA which explain essentials of a just and equitable order. Also see section 38 of the Constitution and Sections 33, 39 and 172(1)(a)(b) read with the Preamble, section 1 and section 195. In addition, see the *Batho Pele* policy, which explains the nitty gritties of a justifiable administrative action. This policy probably provides principles that courts can use to measure the fairness, reasonableness and lawfulness of administrative action.

[421] Black Sash Report *Making Human Rights Real, Conference on Promotion of Administrative Justice Act 3 of 2000 – a Tool For Transforming Delivery In South Africa.* October 2004. In page 4 this report stated that " the majority of South Africans do not know about PAJA, nor are they enabled to challenge abuses of their rights…"

5 2 The role of public administrators

QT Machi[422] and *Vumazonke*[423] are the two most informative cases concerning execution of administrative powers and they give an indication of the effective execution of the PAJA.

5 2 1 *Q T Machi*

In *Q T Machi,*[424] the Member of the Executive Council (MEC) had failed to deal with applications for sick pay and pension grants properly. Referring to thousands of pending matters, the court obiter said that the high statistics indicated the incompetence of the department for which the MEC is answerable. The court chose two cases among the pending cases, which reflected the seriousness of the failed administrative action in cases of social need.

In the first case the applicant who was a "deaf and dumb" woman was entitled to a disability grant, because she fell within a category provided for under section 2 of the Social Assistance Act 59 of 1992. The court observed that the applicant had employed sections 3 and 4 of the Social Assistance Act,[425] which prescribe the way in which an application should be brought to the attention of the Department of Social Welfare and Population Development. Together with another 200 cases lodged in 1999, her application had involved a great deal of correspondence with the respondent's department. Since she received no response, her application

[422] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD unreported judgement delivered on 8 March 2005 by Combrink J.
[423] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE).
[424] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD.
[425] Act 59 of 1992.

culminated in this application, in which she sought judicial review of the respondent's administrative action.[426]

The second case involved an elderly woman who sought court intervention because the pension that she had been receiving for a number of years "was suddenly, out of the blue, stopped."[427] She also engaged in comprehensive correspondence, writing "letter after letter to the department."[428] In addition, she "spoke to any number of officials,"[429] but could not obtain an answer as to why her pension had been stopped. Neither could she get the matter resolved.

The court noted the tremendous hardships that applicants face in cases of this nature, as they "exhaust every possible remedy" before resorting to the court and filing an application before court.[430] On this basis, the court held that the rest of the applications before it, 18 000 in total, deserved the court's attention.[431] The current applications were seen as "a fair cross-section" of the myriad of applications still awaiting enrolment in the High Court, both in the Provincial Division, and in the Local Division.[432]

Combrink J also sketched what often happens to applicants after the courts have decided in their favour. They experience further unlawful treatment when the offices of the respondents do not abide by court orders. As a result, a number of

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[426] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD pages 11-12 paras 20 and 5.
[427] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD pages 11-12 para 10-15.
[428] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD pages 11-12 para 10-15.
[429] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD pages 11-12 para 10-15.
[430] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD pages 11-12 para 15-20.
[431] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD pages 11-12 para 15-20.
[432] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 11 para 15.

judges who were dissatisfied with the performance of the department "had granted cost orders which stung."[433]

The judge mentioned that he had personally been involved with the respondent's department two years before to try to curb the "maladministration current in the department,"[434] which had resulted in the present applications before court. The department had promised that to deal with the backlog and expedite the handling of the growing number of applications, they were improving their systems by installing new programmed computers and making available machinery. It was therefore agreed that the respondent's office would discontinue its abuse of the court process by filing "disingenuous"[435] notices of opposition against applications as a delay tactic, a habit that gave a false impression of a valid legal decision to support the respondent's case.[436] In one incident before Hurt J, in which the respondent had agreed with applicants' attorneys that the 26 000 applicants since the beginning of 2000[437] could seek default judgement, all but one of the applications were successful. Combrink J remarked that the only inference that could be drawn was that "there simply was not and is no defence to the *causa* raised by each application in these applications." [438]

In the light of these arguments, the court did not accept the excuses of the department and considered the delaying tactics to be the result of grave

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[433] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 8 para 5.
[434] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 8 para 5.
[435] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 8 para 15.
[436] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 8 para 15. It is also observed that the same disguise by the administration may paint a false picture to the public that the department is acting in accordance with the law and may tame efforts by the public to try to approach courts of law on similar matters.
[437] Figures furnished by the State Attorney.
[438] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 9 para 5-10.

mismanagement, which lead to an expensive undertaking as the proceedings entailed massive costs. It was noted that over R26,7 million had been paid in legal costs in the four years from 2000 to 2005, while the costs for cases pending before court as recorded by 2004 was projected to be R42,9 million. The estimated total for overall cases, including those awaiting enrolment, was R133,6 million. In addition to these matters, there were other matters that were registered, although not enrolled yet, which would potentially cost R66,6 million. The estimated total cost was therefore R200,2 million, an amount with which "a great number of the poorest of the poor could be helped." [439] However, "until the Department of Social Welfare and Population Development discharged its obligations under the Social Assistance Act, which they administered,"[440] these people "would sadly not be helped."[441]

The judge added that a supporting affidavit filed by *amici curiae* showed that several contacts had been made with the Ministry of Social Welfare to encourage it to facilitate the issuance of grants to the applicants. Not only did the ministry ignore these requests, but, as pointed out by the *amici curiae*, ministerial procedures were not lawful, fair and reasonable, and were therefore unjust. Where claims were finally accepted, some claimants' files were misplaced and eventually lost. In other instances, appeals had to be lodged because no reasons for refusals were obtained. When a date of appeal was set, but the administrative office failed to enrol it, the matter was postponed and the claimant told to come back another day. When the claimant arrived, he or she would find that the matter

[439] And therefore possibly satisfy the constitutional right to administrative justice as a human right and act in accordance with the transformative principles in the Preamble, section 1, 33 and 195 of the Constitution, discussed in Chapters One, Two, Three and Four. *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 14 para 15.
[440] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 14 para 15.
[441] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 14 para 15.

had again not been enrolled; another day would be set and the claimant would return, only to find that the matter had been dealt with in the claimant's absence.

Emphasising that these experiences were habitual in the respondent's department and that it had been so for a long time,[442] the court remarked that the outlined examples were similar to a number of cases that followed exactly the same pattern and all of them stemmed from 1999, 2000 and 2001. Although these cases involved people who were indigent and classified in society as the poorest of the poor, the ministry ignored them.[443]

5 2 2 *Vumazonke*

In *Vumazonke*[444] the applicants argued that administrative action taken in relation to their social grant applications were unjustifiable. They alleged that the MEC's office had either failed or refused to deliver reasons within a reasonable time to explain why they had not been granted the social grants for which they had applied. In each case "the applicant had applied for a disability grant in accordance with the requirements of the Social Assistance Act and its regulations,"[445] but had received no convincing reply within a period of three months, despite regular enquiries.

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[442] Regardless of the new culture proposed by section 33 of the Constitution as given effect to by the PAJA.
[443] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD page 15 para 10-15.
[444] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE).
[445] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE) paras 9&10.

In this regard, Plasket J drawing on a list of cases that support his decision[446] remarked that the work of the Department of Social Development had consequences that brought "its performance within the heartland of the judicial function."[447] Its failings therefore "infringe or threaten the fundamental rights of large numbers of people to have access to social assistance, to just administrative action and to human dignity."[448] In relating the history of the administration of social grants in the Eastern Cape Province, the judge mentioned that he had dealt with 102 matters in different categories of social assistance from 8 to 12 November 2004. Of these 95 concerned child support grants and 7 disability grants. As "administrative torpor"[449] was part of the Eastern Cape Province culture, he was not surprised that these applicants had either received no response or received responses when they were about to go to court.

5 2 3 The Black Sash Report

The recent Black Sash Report on the PAJA as a tool for transforming delivery in South Africa[450] reiterates the findings of the courts on the degree of maladministration in KwaZulu-Natal and the Eastern Cape discussed above. In a wide-ranging account of the encounters of individuals with public administration officials on social assistance, the Black Sash's advice office workers have reported that their daily interactions with clients and social welfare public functionaries during the four to five years before publication of the report taught

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[446] *Somayi v Member of the Executive Council for Welfare, Eastern Cape and Another* 1144/01 (SE); *Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Another* 597/02 (SE); *Mbanga v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 359 (SE); *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Ngxuza and others v Permanent Secretary, Department of welfare, Eastern Cape Provincial Government and Another* 2001(2) SA 609 (E).

[447] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE) para 9.

[448] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE) para 9.

[449] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE) para 1.

[450] Black Sash *Conference on Promotion of Administrative Justice Act 3 of 2000 – a Tool for Transforming Delivery In South Africa* October 2004.

them that "public functionaries or bureaucrats responsible for the administration of the Social Assistance Act and the subsequent departmental regulations are not responding to legitimate social assistance benefit claims."[451] As a result applicants supported by the Legal Resources Centre in Grahamstown flooded courts in Grahamstown, Port Elizabeth and Bisho with applications arguing that,

> "the right to fair administrative justice is not adhered to as per section 3 of PAJA: applicants receive no feedback on the status of their grant applications and have to return to the DOSD on a number of occasions to lodge successful application. The right to a reason is not adhered to as per section 5 of PAJA: applicants are not provided with valid reasons and are told that the files are missing etc. The lack of administrative justice has cost implications for people who are poor as each trip to the DOSD costs them money they can ill afford."[452]

The report specifically mentions the agreement of the researchers with the numerous judgments handed down by the courts, in which judges rightfully criticised the administrative methods used by welfare officials on grant applicants.[453]

In line with Combrink J's and Plasket J's judgments[454] on the nature of violations that the public administration performs, the report confirms that many of the cases concerning socio-economic rights around the country "are rooted in the denial of the right of clients to procedurally fair administrative action."[455] These actions include circumstances where an official "fails to decide on the eligibility of the grant application within the 90 days prescribed by the Department's Norms and Standards", where "grants are cancelled without notice or reasons given"; and

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[451] Black Sash *Conference on Promotion of Administrative Justice Act* 38.
[452] Black Sash *Conference on Promotion of Administrative Justice Act* 37.
[453] Black Sash *Conference on Promotion of Administrative Justice Act page* 40.
[454] Respectively, in *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD and *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE).
[455] Black Sash *Conference on Promotion of Administrative Justice Act page* 4.

where "reasons are not given to an unsuccessful applicant and the right to an appeal is not granted."[456]

5 3 The role of the courts

In Chapter Four I noted the role of courts, in terms of the PAJA read with the Constitution, to formulate appropriate remedies to promote a human rights-based culture in public administration and accordingly effect the expected service delivery. The courts do not tolerate maladministration and work towards its eradication.[457] To do this, when effecting social security rights through implementing the PAJA, they introduced new remedies. These include damages, declarations of contempt of court and the enforcement of available administrative procedures.

5 3 1 Damages

In *Mahambehlala*[458] the court awarded constitutional damages as the common law remedies were not adequate to remedy the infringement of the applicant's right. Leach J held that it was necessary to fashion an appropriate remedy as the applicant was entitled to relief in accordance with section 38 of the Constitution.[459] He held that,

> "…it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position in which she would have been had her fundamental right to lawful and

[456] Black Sash *Conference on Promotion of Administrative Justice Act page* 4.
[457] For example see *Ngxuza and others v Permanent Secretary, Department of welfare, Eastern Cape Provincial Government and Another* 2001(2) SA 609 (E) at 617 I to J; *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Other* 2001 (4) SA 1184 (SCA) para 8; *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE), 350 para B; *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA) para 17 and *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) paras 3&4.
[458] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1) SA 342 (SE).
[459] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1) SA 342(SE) 356 353D-F.

> reasonable administrative action not been unreasonably delayed, and that relief placing her in such a position would be 'appropriate' as envisaged by the Constitution."[460]

In *Mbanga*[461] the applicant had applied for an old age pension when the 1996 Social Assistance Regulations were still in force. When he received no response to his application despite regular enquiries and was "driven by despair," he approached the court for orders to direct the respondents to consider his application and, in the event of success in this regard, to direct them to pay him his old age pension from the date on which he applied for it and to pay interest on the arrears. After the proceedings had been instituted, the respondents took a decision to the effect that the applicant was entitled to an old age pension. In this light, the applicant was entitled to arrears from the date on which he applied for his grant. The only outstanding issue was whether he was entitled to interest on the arrears. The court had put into question whether back pay and interest can be claimed as constitutional damages in terms of the PAJA in cases of unreasonable delays in approving and paying social grants.[462] As in *Mahambehlala,*[463] Leach J arrived at the conclusion that at common law no claim for interest had been established by the applicant, but that interest on the arrears due to him was appropriate relief for the infringement of the applicant's fundamental right to just administrative action.

However, *Jayiya*[464] swept aside the reasoning in *Mahambehlala*[465] and *Mbanga*[466] and held against the award of damages. It also overruled prior decisions,[467] which were the basis of the reasoning in *Mahambehlala.*[468]

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[460] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1) SA 342(SE) 356 C - D.
[461] *Mbanga v MEC for Welfare, Eastern Cape and Another* 2002(1) SA 359(SE).
[462] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA) paras 1-3.
[463] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1) SA 342(SE).
[464] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA).
[465] *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).
[466] *Mbanga v MEC for Welfare, Eastern Cape and another* 2002(1)SA 359 (SE).

In this matter the appellant had sought an order compelling the second respondent to explain in court why she had not complied with an order of court that was in the appellant's favour. Distinguishing the facts in *Jayiya*[469] from the case of *Mahambehlala,*[470] Conradie JA held that, although the appellant had made her plea along the same lines as *Mahambehlala,*[471] *Jayiya*[472] differed significantly from *Mahambehlala.*[473] He added that, while common law was applicable in the former case, the PAJA was applicable in *Jayiya*.[474] Since the Act gives effect to the constitutional guarantee of just administrative action, the appellant should have sought her remedy in this Act. The judge noted that constitutional damages, as discussed in the case of *Fose,*[475] "might be awarded as appropriate relief where no statutory remedies have been given or no adequate common law remedies exist".[476] He added that the PAJA "does not provide for the kind of relief afforded to the appellant, instead it provides in sec 8(1)(c)(ii)(bb) that a court may in proceedings for judicial review, exceptionally, direct an administrator to pay compensation."[477]

The High Court in *Kate* contrary to *Jayiya* resorted to *Mahambehlala*[478] and *Mbanga*[479] and awarded damages as an appropriate remedy.[480] It held against the

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[467] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) *East London Transitional Local Council v MEC Eastern Cape for Health and Others* 2000 (4) All SA 443 (CK).
[468] *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).
[469] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA).
[470] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1)SA 342(SE).
[471] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1)SA 342(SE).
[472] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA) para 8.
[473] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2002 (1) SA 342(SE).
[474] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[475] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) 826 para 69.
[476] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA) para 8.
[477] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA) para 15.
[478] *Mbanga v MEC for Welfare, Eastern Cape and Another* 2002(1) SA 359(SE).
[479] *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).
[480] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE).

respondents' reliance on *Jayiya,*[481] as that would create anomalies, Froneman J[482] held that the claim on arrears was in fact premised on a "constitutionally entrenched fundamental right to lawful administrative action"[483] and therefore well within the ambit of the PAJA. He further held,

> "[O]n the face of it, PAJA does not preclude judicial review under the general rule of the principle of legality, nor does it preclude appropriate constitutional relief under such a claim. The remedies available under PAJA too are couched in wide, open-ended and permissive terms."[484]

Nugent JA[485] also adopted the reasoning in *Mahambehlala*[486] and *Mbanga,*[487]to decide the *Kate*[488] appeal matter and held the remarks in *Jayiya*[489] concerning damages as an inappropriate remedy to be non-binding as *Jayiya* held tentative views regarding a matter that was not at issue before that court. [490]

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[481] *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611(SCA).
[482] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 31.
[483] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745 (SE) para 31.
[484] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 20.
[485] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 20.
[486] *Mahambehlala v MEC for Welfare, Eastern Cape &another* 2002 (1) SA 342(SE).
[487] *Mbanga v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 359(SE).
[488] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) paras 19, 33 and 34.
[489] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[490] "Paragraphs 1.1(i) and (ii) of the order sought in *Jayiya* … sought relief only to the extent that the respondents were called upon to account why they did not comply with the order and how they intended complying with the order. The *ratio* for rejecting *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) and *East London Transitional Local Council* was the constitutional rule forbidding the conviction of any person for a retrospectively created offence. This rationale would not apply to an adapted common law rule of civil contempt, shorn of its criminal elements of punishment, in the form of a declaratory order that a state functionary is in contempt of a court order. Nor would it prohibit orders by the courts calling upon state functionaries to explain why they have not complied with court orders and requiring them to explain how they intend complying with those orders." *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE).

While dismissing the appeal with costs, Nugent JA awarded constitutional damages as appropriate relief and designed more appropriate measures to quantify the monetary loss in social assistance cases. Holding that there was no empirical monetary standard against which to measure a loss that the appellant had suffered,[491] Nugent JA adopted the submission that "in the absence of such a measure [the appellant] should be awarded an amount equivalent to the interest that is recognised in law to be payable when money is unlawfully withheld"[492] and that "the damages ought not to accumulate such as to exceed the capital amount."[493] The judge altered the order that was granted by the court below, so that the damages ran only from the date on which the unlawful delay commenced.

From these judgments it appears that out of the common law remedy of damages, a unique "constitutional damages" remedy has been successfully developed to promote administrative justice, which is now grounded in section 8(1)(c)(ii)(bb) of the PAJA. The possibility for courts to grant this remedy is brought about by the availability of the right to administrative justice, which among others affords the public the right to sue the administrator where during the execution of administrative powers the administrator negatively affects public rights. In turn access to socio-economic rights is improved.

5 3 2 Declaratory order of contempt

In *Vumazonke*[494] Plasket J remarked,

> "when it comes to forging appropriate remedies to compel administrative reform[for the sake of protection of human rights] the courts are left with a problem that they cannot resolve: while they grant relief to the individuals who approach them for relief, they are

[491] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 33.
[492] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 33.
[493] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478(SCA) para 33.
[494] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE) para 10.

> forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people 'who are most lacking in protective and assertive armour' and whose needs 'must animate our understanding of the Constitution's provisions.' What escalates what I have termed a problem into a crisis is that the cases that are brought to court represent only a tip of an ice-berg."[495]

In *Magidimisi*[496] the court referred to the source of this problem as "the fundamental misconception" that public administrators appear to have "about their obligation to comply with court orders."[497] This was also implied in the court's decision which can be read to indicate two levels of maladministration: "a systemic failure to comply with court orders, and an individualised [failure to attend] to … cases of each of the judgment creditors," [498] with a result that, where judgments are given against the province, there is a general reluctance to give effect to those judgments.

According to Jafta J in *Mjeni*[499] the committal for contempt of court against state officials as a common law rule is inappropriate in these circumstances for judgments sounding in money. Consequently upon the failure of the public administrator to comply with a court order that the applicant for a grant be assisted retrospectively, the court cannot order that the public official be committed for contempt of court, the reason being that the accused would be the representative of state.[500] In the same manner, Jafta J had held that the use of the

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[495] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE) para 10.
[496] *Magidimisi N.O. v MEC for Social Development and Others* case 2180/04 (SE).
[497] *Magidimisi N.O. v MEC for Social Development and Others* case 2180/04 (SE) para 10.
[498] *Magidimisi N.O. v MEC for Social Development and Others* 2180/04 (SE) para 10.
[499] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH)at 456 B-E Jafta J, relying on the House of Lords decision in *M v Home Office and another*, [1993]3 All ER 537 (HL) at 567 *e-g* found nothing wrong in upholding the relief sought, in the form of a declaratory order of contempt, 'to uphold the rule of law, rather than to punish the transgressor.'
[500] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH)at pages 454 paras A-H.

word "attachment" in section 3 of the State Liability Act did not include the arrest of a state official for contempt of court. The judge, however, held that, in order to protect the constitutional objective of restoring the rule of law, the court has to see to it that administrative authorities comply with the courts' decisions. This, according to the court, is not a punishment of an individual, but performance of the court's constitutional duty, while in turn deterring the insubordinate officials from incidents of maladministration. Based on this premise, the courts have used the declaratory order of contempt as a remedy to enforce their court orders.

In *QT Machi,*[501] a case in which Combrink J gave a *de bonis propriis* cost order against the respondent (the MEC), the court held that a declaration to bind the administrative authorities for contempt of court was an appropriate remedy.[502] In awarding a suspended sentence for vicarious liability for administrative injustices, despite the respondent's denial of culpability,[503] the judge developed a new remedy. Combrink J held that it was the duty of the court to stand up and do something where constitutional rights were being trampled on. He held that when all else had failed, judicial review became the last resort in pursuit of administrative justice and the aggrieved expected protection from the court.[504]

Before the decision in *QT Machi*[505] the remedy for contempt of court was the subject matter in *Jayiya,*[506] where the applicant sought that the second respondent be held for contempt of court, and therefore liable to incarceration. Conradie JA

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[501] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development.* 4392/04 NB/CD pages 16&17. Also see *East London Transitional Local Council v MEC for Health, Eastern Cape, and others* 2000(4) ALL SA 443(Ck).
[502] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD pages 16&17. Also see *East London Transitional Local Council v MEC for Health, Eastern Cape, and others* 2000(4) ALL SA 443(Ck).
[503] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD.
[504] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development.* 4392/04 NB/CD page 11 paras 5-10 and page 16 paras 5-10.
[505] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development.* 4392/04 NB/CD.
[506] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).

held that the granting of the order before court was based on both procedural and factual errors. Firstly, there was no allegation that the second respondent was the one responsible for the non-payment. Furthermore, there was no notice to her that any order in this regard would be sought against her and for that matter she ought not to have been cited. The judge observed that the second respondent could have been mistaken for the "administrator" envisaged by section 1 of the PAJA and explained that the reading of the section for purposes of the concerned department defines the Department of Social Welfare and Population Development as an "administrator", as the phrase "an organ of state taking administrative action" indicates.[507] According to the judge, the administrator referred to in section 6 of the Social Assistance Act[508] does not necessarily mean an individual; the political head of the relevant organ of state was supposed to be the person before court as the nominal respondent.

He held that the order sought for contempt and therefore incarceration by the appellant must fail, because the appellant sued a wrong person and apart from that "save for one exception …a money judgment is not enforced by contempt of court proceedings but by execution."[509] According to the court, and also as decided in *Mjeni*,[510] "section 3 of the State Liability Act 20 of 1957 forbids execution, attachment or like process,"[511] of the nominal respondent's or state assets in proceedings against a government department.

Unlike Jafta J in *Mjeni,*[512] Conradie JA did not fashion a remedy that deterred administrative officials from maladministration, which goes against the

[507] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA) para 4.
[508] Act 59 of 1992.
[509] In *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA) para 15. It was decided otherwise by the full court (per Jafta J) in *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH)and followed by Ebrahim J in *East London Transitional Local Council v MEC for Health, Eastern Cape, and others* 2000(4) All SA 443 (Ck).
[510] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH).
[511] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) page 454 para C.
[512]*Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH).

transformative principles that the PAJA seeks to promote. Conradie JA was "not persuaded that the laziness and incompetence which is at the root of the malaise in the Eastern Cape Department of Welfare has created a 'need' that the common law must evolve to meet."[513] He held that, even if there was such a need, the common law could not evolve in conflict with statute law or basic principles of law. As one of the fundamental tenets of the common law is that of legality, the judge noted that common law cannot evolve in such a way as to (retrospectively) create a new crime or extend the limits of an existing one.

He explained that, regarding the way South African common law has to develop, an accused person could be committed only where the act is deliberate or where the act is *mala fide*. The accused cannot by judicial extension be made to embrace orders *ad pecuniam solvendam*. The judge held that not even the legislature could make conduct retrospectively punishable, because the Constitution forbids it. In section 35(3)(i), the accused has the right "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted."[514] On that note, therefore, Conradie JA dismissed the appeal.

In the subsequent *Kate*[515] case, Froneman J narrowly construed the *Jayiya*[516] decision to reinterpret the application of the remedy of contempt of court in social assistance matters. While Froneman J in *Kate*[517] observed,

> "… in matters of this kind (where innovative relief may be called for) Judges of the High Court may legitimately expect some guidance from higher Courts. Conradie JA's comments are, however, only

[513] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA) para 18.
[514] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[515] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE).
[516] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[517] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE).

> critical of the developments following upon Leach J's judgment in *Mahambehlala.* They offer no guidance other than to imply that these developments are ill-founded. Unfortunately it is, with respect, on my reading of the judgment, not altogether clear why this should be the case."[518]

In *Kate*[519] the judge criticised *Jayiya*[520] for overturning prior cases without suggesting alternatives. For example, the *Jayiya* judgment[521] did not give a clear explanation as to why it cast aside the reasoning in *Mjeni*.[522] "Even an objective interpretation of the *Jayiya*[523] judgment leads to absurdities. In terms of such interpretation section 3 of the State Liability Act[524] allows public administrators leeway to behave as they please by forbidding contempt of court orders ." [525] The court's reasoning in that regard was based on the possibility that *Jayiya*[526] could be capable of pronouncing the law to be that:

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[518] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 20.
[519] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) Para 27.
[520] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[521] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[522] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) *and East London Transitional Local Council* 2000(4) SA 446 (Ck) at 456 B-E Jafta J, relying on the House of Lords decision in *M v Home Office and another*, 1993 (3) All ER 537 (HL) at 567 *e-g* found nothing wrong in upholding the relief sought, in the form of a declaratory order of contempt, 'to uphold the rule of law, rather than to punish the transgressor'
[523] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[524] 20 of 1957.
[525] The court then held, "Often the formality of the law serves to hide underlying practical inequalities. To illustrate this one may take the present case as an example. If the interpretation of the effect of the decision in *Jayiya,* referred to in para [15] above, is applied it would mean that until the issue is again raised before the Supreme Court of Appeal persons such as the applicant will have to be told that the courts cannot help them in the form of ordering financial compensation if public state officials do not do their work properly and that, even if the courts do order compensation, there is nothing legally that the courts can do to help them if state functionaries neglect, for whatever reason, to give effect to such an order. It would be of little comfort to persons such as the applicant who rely on a disability grants for a living to know that they have a right of appeal. Out of their own pocket they would not be able to fund the appeal. The rule of law would have failed them and its failure would have given succour to public functionaries who flouted their public responsibilities. The stance adopted by the respondent in the present case proves the point." *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) Para 27.
[526] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).

> "individual state officials cannot be sued in the courts in review proceedings for wrongful administrative acts; that appropriate relief under s. 38 of the Constitution is excluded by the provisions of PAJA; that back pay and interest cannot be ordered as compensation under PAJA; that there is no binding obligation on the State to comply with money judgments; and that the courts may not take any steps to enforce court orders sounding in money…"[527]

Froneman J viewed such a reading of *Jayiya*[528] as wrong, and contrary to the role of the High Court in developing new remedies under the Constitution.[529] He held that

> "All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting 'appropriate relief' 'just and equitable orders', and by developing the common law 'taking into account the interests of justice."[530]

That means that courts have to devise means of protecting and enforcing fundamental rights that were not recognized under the common law.[531] It would therefore be indirectly aiding and abetting "unconstitutional government, the very antithesis of the court's duty in terms of the Constitution,"[532] if the court "realises the possibility *as a matter of fact* that the government might refuse to comply with

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[527] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) Para 15.
[528] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[529] Section 165(1) Constitution obliges courts to apply the law impartially and without fear, favour or prejudice. In addition, see the decision of Ackerman J in *Fose v Minister of safety and Security* 1997 (3) SA 786 (CC) para 69 and see section 8 (1) and (2) of the PAJA which explain essentials of a just and equitable order. Also see section 38 of the Constitution and Sections 33, 39 and 172(1)(a)(b) read with the Preamble, section 1.
[530] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 16.
[531] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para16.
[532] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 25.

court orders [but] hold *as a matter of law* that courts are powerless to devise ways to ensure compliance with court orders in a constitutional state …"[533]

The judge further held that the courts, in fashioning new remedies and in the enforcement of those remedies, must thus take account of the practical difficulties experienced by the new administration, and must also be extremely wary not to move into areas that, by virtue of the constitutional separation of powers, fall outside their domain. But these difficulties may not serve as an excuse for failing to fashion and enforce new remedies simply because they did not exist under the common law.[534]

Froneman J stated

> "[T]he judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law."[535]

Given the inequalities of the past era, more often than not such a supine approach will effectively result in a choice for the retention of an unequal and unjust *status quo.*[536] On this note the court held that all that was bindingly decided in *Jayiya*[537] was that, in that case, the wrong orders were sought against the wrong respondents, and that state functionaries could not be found guilty of the *crime* of contempt of court for non-compliance with a money judgment.[538] In the Supreme

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[533] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 24.
[534] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745(SE) para 16.
[535] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745 (SE) para 16.
[536] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA (2) 2005 745 (SE) para 16.
[537] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA).
[538] *Jayiya v MEC for Welfare, Eastern Cape and another* 2004(2) SA 611 (SCA) para 22.

Court of Appeal's judgment in *Kate*[539] Nugent JA confirms this narrow interpretation of *Jayiya,* where he held,

> "Much of what was said in *Jayiya* was indeed *obiter* and the *ratio* in that case was decidedly narrow. *Jayiya* decided only that a money judgment given against a provincial government (which is the construction that was placed upon the relevant order) is not enforceable by incarcerating for contempt a defendant."[540]

This therefore suggests that the courts could still summon responsible welfare functionaries to court to explain their non-compliance with court orders, and could make declarations that they were in contempt of court without attaching criminal sanctions.[541] This recent judgment of the Supreme Court of Appeal in *Kate*[542] adopted the High Court trend and Nugent JA held,[543]

> "Section 6 of the [Social Assistance] Act properly construed, read together with the procedural guarantees in ss 33 (1) and 237 of the Constitution, obliges the Director General to consider and decide upon an application for a social grant, and to do so lawfully, procedurally fairly, and with due diligence and promptitude. It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a mandamus compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the provincial government…Moreover, there ought to be no doubt that a public official who is ordered by a court to do or refrain from doing a particular act and fails to do so is liable to be committed for contempt in accordance with ordinary principles and there is nothing in Jayiya[544]that suggests the contrary."

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[539]*MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA)
[540]*MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) paras 18 and 19.
[541]*MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 21.
[542]*MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).
[543]*MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 30.
[544] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA).

If this remedy is used more often, the declaration of contempt of court may help to ensure that administrators immediately abide by court decisions. This remedy, however, bears limited transformative ability. If an administrator were punished for contempt of court in a particular case, it is possible that administrators could only act accordingly to enforce an immediate judicial decision but would not take the judicial decision, as a lesson to deal with the root causes of maladministration in public service. The fact that contempt of court deals with a particular case at a time makes it possible that the administrator would be involved in maladministration in future. This leaves out of account the long-term transformative intention of the Constitution that the PAJA seeks to promote. As the intention of section 33 read with PAJA is that the administrator must change and adopt new ways of public administration, this remedy has a limited ability to promote sustainable[545] administrative justice.[546]

5 3 3 Administrative procedural remedies or structural remedies

Administrative procedural remedies focus on long-term mechanisms in the enforcement of the constitutional objective and aim to transform public service delivery in order to promote administrative justice. They also serve as coercive mechanisms to force responsible constitutional institutions to do their duty so that service delivery is transformed and administrative justice is promoted. Through the right to judicial review provided in the PAJA this remedy promotes administrative justice in that it forces administrators to act according to the requirements of the constitutional transformative objectives[547] as well as the PAJA read with *Batho Pele.*

[545] See footnotes 13 and 292.
[546] Courts must make the administrators enforce constitutional aims and objectives, in the Preamble, section s 1,33, 195 as harnessed by *Batho Pele* policy.
[547] Courts must make the administrators enforce constitutional aims and objectives, in the Preamble, section s 1,33, 195 as harnessed by *Batho Pele* policy.

The principle in *Vumazonke*[548] introduces effective administrative initiatives as a remedy to promote administrative justice. In this case the court held that responsible constitutional bodies should be informed of any maladministration that affects constitutional objectives and ordered that a copy of its judgment be served on the Human Rights Commission. This decision was taken because it had come to the court's attention that in the previous crisis, when the problem in the administration of social assistance was brought before the Commission, the Commission did not make any investigations into the conduct of the respondent's department with a view to proposing concrete steps to ensure that it began to comply with its constitutional and legal obligations and ceased to infringe fundamental rights on the present grand scale. The Public Service Commission was also served with a copy of the judgment, because a large part of the problem in the respondent's department appeared to be maladministration and inefficiency in the administration of social assistance. The judge further held that swift action by the respondent's department was essential for remedying the systematic infringement of the Constitution and the law and the principles of good administration. In accordance with the present constitutional culture, the Premier was responsible for enhancing public administration.

5 4 The extent of compliance with administrative justice principles

The extent of compliance with administrative justice principles is analysed in terms of the three role players articulated by the PAJA, namely, administrators, the courts and the public.

5 4 1 Administrators

The above discussion exposes the inadequate extent of administrators' compliance with the administrative justice principles of lawfulness, fairness and

[548] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE) at page 13.

reasonableness[549] provided for in the PAJA. In terms of *Batho Pele* strategies read with the PAJA, this means that the public administration fails to facilitate public participation, which demands that there should be consultation before final decisions are taken.[550] This discourteous treatment of the public has similar effects as the failure to provide the public with access to services and to adequate information, which affects the effective implementation of the PAJA. The public administration's extravagant spending on legal defences instead of affording the public social assistance emphasises that public servants have no sense of value for money. They also fail to afford redress to the public.[551] These lead the public to solely depend on judicial review for redress. If public administrators fail to transform in this way, they do not improve on the weak administrative processes of the authoritarian system under apartheid, which were the result of the fact that the public was never listened to.

5 4 2 Courts

With regard to the courts, the cases show that to effect their constitutional and legislative duty to control administrative action, the courts intervene where administrative action affects public rights negatively by providing remedies for the identified violations.[552] However, courts seem to limit their intervention to the protection of the aggrieved before court because the remedies they provide serve a limited purpose, as they do not go to the root causes of maladministration. Although it is not wrong to call to account administrators who fail to perform their duties[553] and to compensate affected individuals by putting them back into the position in which they would have been if the administrators had complied with their duties,[554] and to vindicate constitutional demands by applying available

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[549] Interpreted in the context of the Preamble, section 1 and 195 of the Constitution as given content to by *Batho Pele* policy as per discussions in Chapters One, Two, Three and Four.
[550] in sections 3(2) and 4 of the PAJA.
[551] in sections 3 to 5 of the PAJA
[552] Paras 5 2, 5 2 1 and 5 2 3 above.
[553] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* 4392/04 NB/CD.
[554] *Kate v the MEC for the Department of Welfare, Eastern Cape* All SA 2005 (2) 745(SE).

remedies cumulatively to give effect to an order,[555] courts ought not to disregard the need for a comprehensive and integrated approach to "remedy formulation", as suggested in the *Grootboom* case.[556] From the above cases it is noted that courts concentrate predominantly on redeeming the aggrieved before the court without adopting a holistic approach. They have to look at the interconnectivity of rights at stake and address all relevant issues.

They also have to provide remedies that can effectively enforce the requirements of the PAJA and redeem constitutional objectives and aims. For example, as the failure of administrators to effect individual rights of access to social assistance is the result of failure to effect the right to administrative justice, the courts must aim at the enforcement of administrative justice principles where the fault has occurred because of a failure to consult, which then led to the unreasonable decision that the remedy must address, including the cause of such unreasonableness. If, for example, the fault happened because of lack of knowledge, the administrator concerned must be ordered to go for training. If it is the result of dereliction of duty, then the concerned employee must be suspended or discharged.

Where the cause of maladministration is improper administrative structures, there ought to be an order that a new structure that will enhance the enforcement of administrative duties in accordance with the PAJA be adopted. Courts must go to the root cause of the maladministration and re-enforce the appropriate steps to be followed. If there was a need for consultation, the courts can decide that such consultation be held. Such remedies would be progressive in the sense that they would address the core of maladministration, which affects public rights to administrative justice so that the same actions are not repeated. It is similarly important that courts must move from the use of solely traditional remedies under

[555] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229(SE).
[556] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

common law. In accordance with section 39 of the Constitution they must find remedies that are effective in other relevant fields as well – for example, remedies for misbehaviour in labour law, management and public administration. Courts should also look at the existing legal provisions, both local and international, together with available policies such as *Batho Pele* and section 8 of the PAJA, which provides for remedies envisages. [557]

If courts would apply the principle in *Grootboom*[558] with due diligence, they would be taking the initiative to implement the constitutional transformative demands, so that the public is protected from the abuse of power by public administrators. They would also be aiming at remedying and protecting the aggrieved from the effects of unjust, unfair and unreasonable administrative action by providing the most effective remedy. This will effectively transform public service delivery and promote administrative justice.

5 4 3 Public

In relation to public participation, the cases seem to show that members of the public follow the procedural steps provided for by the PAJA. In Combrink J's words,[559] they "exhaust domestic remedies before approaching the court,"[560] a fact that is supported by the Black Sash Report, which acknowledges "that [the Black Sash] represent the public and interpret the law to their clients", who subsequently follow legal procedures.[561] However, this does not necessarily mean that all members of the public are able to bring matters to the courts. Those who

[557] This kind of creativity in "remedy formulation" may be called a "transformational remedying" approach to remedies if not constitutional approach to the formulation of remedies.
[558] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
[559] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development.* 4392/04 NB/CD.
[560] *Q T Machi and others v MEC for Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* . 4392/04 NB/CD, pages 11&12 para 15-20.
[561] Black Sash *Conference on Promotion of Administrative Justice Act* pages 21, 40 and 41.

file unreasonable applications may not be reflected in the analysis of the Black Sash.

Rather, it appears as if there may be many more whose rights to administrative justice are still infringed because of a lack of funds and knowledge, since the report admits that the "majority of South Africans do not know about the PAJA,[562] nor are they enabled to challenge abuses of their rights through the PAJA."[563] It also notes "for an ordinary person to seek judicial review from courts is an expensive exercise."[564] Van der Westhuizen J also specifically commented in *Mashavha*[565] that those parties that appear before courts of law are just "a tip of the iceberg,"[566] while large numbers of poor people who are not able to present their grievances before court are left in the hands of "a dysfunctional and apparently unrepentant administration which continues to abuse its power at their expense."[567] Such a situation cannot but affect the ability of the PAJA to effect administrative justice.

It is apparent that the PAJA provisions aim at the promotion of administrative justice, but its implementation remains a problem. Under these circumstances the problem may not lie with the Act itself, although, it may be possible that the interpretation of the Act may cause problems for those who have to enforce it. Because of the unique nature of the Act, which has to be interpreted in the light of the related constitutional provisions, applying it can be a very complex issue. It is therefore important that rules for its interpretation are formulated.

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[562] An alternative abbreviation for the Promotion of Administrative Justice Act 3 of 2000.
[563] Black Sash *Conference on Promotion of Administrative Justice Act* page 4
[564] Black Sash *Conference on Promotion of Administrative Justice Act* page 40.
[565] *Mashavha v President of the Republic of South Africa and others* 2004(12) BCLR 1243 (CC) para 51.
[566] *Mashavha v President of the Republic of South Africa and others* 2004(12) BCLR 1243 (CC) para 51.
[567] *Mashavha v President of the Republic of South Africa and others* 2004(12) BCLR 1243 (CC) para 51, Van Der Westhuizen J commented that social assistance is "an area of governmental responsibility very closely related to human dignity."

5 5 Conclusion

As indicated, the PAJA encompasses the notion of administrative justice comprehensively, but as a result of the performance of public administrators and the limited nature of remedies provided by courts, the implementation of the Act seriously undermines its potential effectiveness in the particular context of social assistance. In this post-apartheid era, in which the Constitution clearly provides for individual rights, it remains difficult for individuals to claim these rights in the field of social assistance, which reflects a failure of the government to abide by the Constitution as well as by their own *Batho Pele* principles. In the midst of a new system of governance, development-oriented laws and transformational principles, the implementation of administrative justice has not been fully achieved.

Chapter Six

Summary and Recommendations

6 1 Introduction

This study set out to investigate the question whether the South African public administration has overcome the problems of its apartheid past. As both the Constitution and the PAJA have been instituted, South African society's expectations of public administration converged around the concepts of transformation and administrative justice. With regard to public administration, transformation referred to a move away from the undemocratic public service practices that were prevalent under the system of parliamentary sovereignty in apartheid South Africa to a system based on the principles of good governance entrenched in the Constitution. If this does not happen, the Constitution could be seen to have failed in its attempt to transform public service delivery from a culture of authority to that of justification.

On the basis of Khoza and Adam's[568] argument that the nature of law determines the quality of governance, the study included an examination of both the law and newly formulated policies that urge public officials to act accountably. After an investigation into the difference between the deficiencies of the common law approach and the positive demands of constitutionalism with regard to accountability in public services,[569] special attention was paid to the way in which the government interprets the constitutional transformative principles. This was done by considering how the *Batho Pele* policy transformation principles and strategies define effective and efficient public administration. Against this background, the provisions of the PAJA were analysed to ascertain whether the

[568] Khoza & Adam *The Power of Good Governance: Enhancing the Performance of State-Owned Enterprises* (2005) 28.

[569] These positive constitutional demands are entrenched in the Preamble, sections 1, 33 and 195 of the Constitution.

PAJA fulfils the requirements of the Constitution that it should promote the right to administrative justice and therefore protect individuals from state abuse.[570] Furthermore, the PAJA was assessed on whether it aligns with *Batho Pele* transformative principles to effect transformation of public service delivery.

The reasoning was that if public officials adhered to the Constitution, the PAJA and the *Batho Pele* policy, the public should be satisfied. However, in the light of a series of reported violations – particularly, in the area of social assistance – doubts emerged that the PAJA might not altogether achieve its purpose, which could mean that the provisions of the Act do not effectively follow the instructions of section 33. The study therefore investigated to what extent the PAJA had the ability to promote administrative justice and what limitations existed that could hamper the Act from achieving its purpose.

6 2 Principles underlying administrative justice

In Chapter One the concept of administrative justice addressed in the PAJA was found to be the nucleus of both constitutional and administrative law. As it is underpinned by principles of natural justice, it is essential in a democratic state such as South Africa, where the need to protect individual rights against uncontrolled public administration has been shown to be paramount. Today, the aims of natural justice, which are to achieve accuracy, efficiency, effectiveness and accountability in decision-making and to impose a duty of fair hearing upon every decision-maker so that individual rights are protected,[571] are still necessary to promote fairness of state decisions. The separation of powers, for example, is necessary to establish a system of checks and balances to limit opportunities for the abuse of power, while the principle of legality, which expresses the authority of law against the authority of Parliament, is essential to avoid authoritarian rulings in which individual rights are disregarded.

[570] Section 33 of the Constitution.
[571] *R v Home Secretary, ex parte Hosenball* 1977 (1) W L R 766,772. Also see 1 4 1 above.

While it appeared that constitutionalism encompassed all the principles that were necessary for the protection of human rights, the question arose as to how compatible the interpretation of administrative justice in pre-democratic South Africa under the common law was with the principles underlying the concept of administrative justice, and how this had changed under the Constitution. Chapter Two was therefore concerned with the evolution of administrative justice in South Africa.

6 3 The common law and the Constitution

The common law was found to have ignored the principles underlying administrative justice and as a result to have jeopardised effective administrative justice. The law could not uphold individual rights, with a result that executive decisions were protected against public scrutiny and individuals did not have an established right to administrative justice, which could entitle them to question administrative action. The law was applied irregularly because the Constitution of that time did not have a bill of rights. Since the legislature could legislate against courts findings, courts of law lacked independence as far as decisions against executive action were concerned.

The legislature protected the executive from scrutiny in two respects: firstly, by retrospectively legalising administrative action that the courts had declared unlawful; and secondly, empowering provisions regularly excluded or limited judicial review of the exercise of public power. In addition to legislative limitations, there was a presumption that the executive acted in good faith and its decisions were not to be reviewed on the merits unless gross unreasonableness is inferred. Because administrative action was not controlled through judicial review, but instead protected through legislative enactments, it gave way to ineffective service delivery and a lack of accountability in public administration.

In contrast, as the supreme law to which every citizen and organ of state is answerable, the South African Constitution entrenches the principles underlying administrative justice. It entrenches the separation of powers, which allows South Africa to have an independent judiciary to guard and enforce constitutional objectives, a legislature that abides by its terms and a constitutionally controlled executive. It also entrenches individual rights and specifically declares administrative justice to be a fundamental right. It further demands that there should be an Act that gives effect to this right, which led to the enactment of the PAJA, discussed in Chapter Four.

Before analysing the provisions of the Act against the demands of administrative justice, Chapter Three examined the question of how the government interpreted constitutional transformation objectives to effect transformation in the public administration to promote administrative justice.

6 4 *Batho Pele*

The government's White Paper on the Transformation of the Public Service (WPTPS) espouses eight principles, which were defined to be within the parameters of the government's Growth, Employment and Redistribution (GEAR) plan and in line with the priorities and principles of affordability of the Reconstruction and Development Programme (RDP). This policy encompasses a people-oriented strategy developed to align it with South Africa's international commitments under the New Partnership for Africa's Development (NEPAD).

To create an efficient and effective public service, this strategy highlights essential characteristics in public service delivery, which are that public administrators should regularly consult with customers, set service standards, increase access to services, ensure higher levels of courtesy, provide more and

better information about services, increase openness and transparency about services, remedy failures and mistakes, and give the best possible value for money. In an attempt to control public administrators from violating public rights, public participation is also an important principle in administrative decisions.

The *Batho Pele* principles were therefore found to be appropriate for the promotion of administrative justice. They also express the constitutional transformation principles entrenched in the Preamble and section 1, section 33 and section 195 of the Constitution. If followed, these strategies appear to have the ability to transform public administration to an efficient and effective undertaking.

6 5 The PAJA

In Chapter Four the PAJA was examined to establish whether it gives effect to the principles ensconced in the Constitution, which ensures the right to administrative justice, and to what extent it relates to the South African government's ideals for transforming public service delivery. It was found that the Act awards roles to three participants in the promotion of administrative justice: public administrators, the public and the courts.

While the Act makes it the duty of public administrators to act lawfully, fairly and reasonably, it puts courts on guard to control administrative action that fails to comply with its provisions and those of the Constitution. It instructs courts to create suitable and fitting remedies where a person is negatively affected by administrative action so that the main objectives of the Constitution are achieved. Thus individual rights are prioritised, which marks the human rights-based approach of the South African Constitution as opposed to the apartheid-era approach in which state interests were protected at the expense of those of the public.

Like the *Batho Pele* principles and strategies, the PAJA is a people's act, which means that it facilitates public participation so that administrative justice is promoted. It further binds the public administration to facilitate this exercise and provides that individuals may approach courts for relief if administrators fail them. The Act also substantiates what section 33 demands. As such, it has the ability to promote administrative justice. It was therefore reasoned that if the problem described in Chapter One did indeed exist, its source had to be sought in the *implementation* of the Act.

6 6 Implementation of the PAJA

In Chapter Five a selection of social assistance cases from the KwaZulu-Natal and the Eastern Cape courts, which were thought to reflect the implementation of the PAJA, were examined. The question was to what extent the three role players performed their tasks in accordance with the PAJA.

Public administrators were found to act contrary to their legislative duty to act lawfully, fairly and reasonably. They also acted against *Batho Pele* principles and strategies, which affects the achievement of constitutional transformative objectives. This marks a failure in the attempt to acculturate the public administrators towards adopting a human rights-based culture. They still deprive individuals of their right to administrative justice and consequently negatively affect the public rights entrenched in chapter 2 of the Constitution. As Boyle[572] has remarked, South African society is described as a society with "largely world-class constitutional, legal and regulatory frameworks, but ineffective implementation…"

[572] Boyle "Good Laws, But Bad Enforcement: SA Assesses Effectiveness of its Democracy Ahead of Peer Review," *Sunday Times* (2006-04-09) 4.

Ironically, the ineffective implementation of the principles and strategies to protect human rights seems to have triggered individuals into taking up their role of reporting defective administrative action to the courts. The courts were also shown to effect administrative justice by providing appropriate remedies that animated and protected constitutional objectives, compensated affected individuals and attempted to deter administrators from further violations of human rights.

This finding seems to indicate that the promotion of administrative justice is as dependent on the courts as it was under the common law. Although the fact that the courts do not have the same legal obstructions as in the past is a sign of legal development, the gross overburdening of the courts shown in Chapter Five means that the objectives of the Constitution with regard to administrative justice are not being met. The hoped for "constitutionally-mandated legislation on administrative justice [that] would help to fulfil the need for an integrated system of administrative law in which judicial review could play a more suitable and more limited role"[573] has not come to fruition in our fledgling democracy.

6 7 Recommendations

To do away with the root causes of maladministration so that the right to administrative justice as stipulated in the PAJA becomes more than just a right on paper, both structural and behavioural remedies must be engaged to facilitate the implementation of the Act. The Human Rights Commission (HRC), the office of the Public Protector and the Public Service Commission (PSC) must perform their constitutional duties by enforcing constitutionally recommended monitoring and evaluation mechanisms. There must be training of civil servants and the public. Where misconduct persists, dismissal must be used as a behavioural remedy. The public's awareness of the right to administrative justice as a human right must be

[573] Hoexter 117 *SALJ* (2000) 484.

increased. The department of justice must put measures in place for administrative courts to enable facilitation of remedies by these courts. Furthermore, this department must finalise the drafting of the code of Good Conduct for Administrative Justice.[574] The regulations pertaining to the establishment and empowerment of the Advisory Council for the monitoring of the application of the PAJA must be finalised.[575] Government must grant financial support to paralegal movements and other civil society bodies, so that their participation in monitoring and reporting on the delivery of public services is increased. There must be improvements to the PAJA so that it becomes a user-friendly transformative tool for both the public and public administrators.

6 7 1 There must be training of civil servants

In line with the findings in Chapters Three and Four of the study, the State of the Public Service Report 2005 observed that there have been gaps in the proper communication of the transformation principles to the public and its servants. It also observed that few of these officials have training on matters of administrative justice as required by the PAJA and therefore they provide limited assistance in advising service users of their rights. As a result, the report recommends "increased training should be provided to all officials on the PAJA and that there should be financial support to the civil society organisations working in this area."[576] In agreement with this suggestion, the Black Sash Report[577] too

[574] As provided for by Section 10(5A) of the PAJA.
[575] Provided in section 10(2) of the PAJA.
[576] Public Service Commission, State of the Public Service Report February 2005 http:// www.gov.sa.za [accessed 26-December-2005]. It is worth pointing out that as recently as the 26th February 2006 the Department of Public Service and Administration has initiated the "Know Your Service Rights Campaign." As the notice for tenders outlined, "the objective of this campaign is to revitalise the practice and implementation of the *Batho Pele* ethos as well as enhance the manner in which services are delivered to people of South Africa. The campaign will (a) educate and promote the public's awareness about their rights with regard to the level and quality of service they receive and are entitled to from various government departments and institutions, (b) determine the means, medium and institutions for exercising such rights including redress mechanisms (c) Promote good professional ethics amongst Public Service officials." Sunday Times "Invitation for Tenders No DPSA 02/2006" 2006-04 –26.
[577] Black Sash *Conference on Promotion of Administrative Justice Act* (2004) 41.

suggested that "each public servant responsible for administrative decisions be issued with an administrative justice tool kit."

These suggestions are important to avert the danger of improper communication identified by Kumar,[578] who stated that "a law cannot induce changed behaviour unless it is properly communicated to role occupants, because communication gaps lead to misinterpretations which may distort the actual objectives of the statutes." The importance of communicating policies and laws is indeed a prime factor to implement change especially to a role occupant acculturated otherwise, as in the South African case, where the civil servants were used to apartheid systems and procedures. Training enhances the opportunity and capacity to obey new rules and policies.[579] The State of Public Service Report of 2005[580] identified education as a major capacity-building tool in public administration, because it will help the public servants to appreciate the processes and procedures in place to enable their obedience. Through education, public administrators will also know the repercussions of disobeying the law and they will take reasonable, justifiable and fair decisions. Education will also improve administrative skills needed for the enforcement of the law and consequently lead to a new culture of effectiveness and efficiency.[581]

As Seidman realised,[582] for the identified problem of inefficient communication of transformation principles,[583] the suitable measure will be to provide for

[578] Kumar *Law and Economic Development* (1998) 1:14.
[579] Seidman *The State, Law and Development* (1978) 105.
[580] Public Service Commission State of the Public Service Report February 2005.
[581] Mafunisa "Measuring Efficiency and Effectiveness in Local Government in South Africa" 39 *SAIPA* (2004) 291 writes that, "efficiency and effectiveness represent two distinct but complementary ideas. The ethical standard of efficiency refers to the achievement of predetermined goals (without regard to whether those are the right objectives to be attained) within minimum resources. As an ethical standard, effectiveness requires performance of duties in a way that maximises the benefits generated while at the same time minimizing the costs of generating or providing these benefits."
[582] Seidman *The State, Law and Development* (1978) 105.

education that interprets the provided guidelines and explanations for the necessity of transforming the public service. That kind of education, however, will not produce a solution to the problem of skills shortage, technical know-how and communication skills.

Along the same lines the recommendations on implementing principle four[584] of the *Batho Pele* policy in the State of the Public Service Report 2005 require that there should be training that raises awareness and a detailed understanding of the Act and there should be communication of the need for administrative decisions to be fair, just and reasonable. In addition, the need to provide reasons to the affected public should also be emphasised, so that the participants understand the repercussions of their actions. The report further suggests that there should be training that raises awareness of the need to integrate the PAJA objectives into other public service programmes.[585]

The proposed approach is similar to what the Premier of the Northern Cape anticipated,[586] where she observed the importance of a public rights protective system, and the need to uphold it by devising government support systems which motivate performance in the public sector. This could include making available departmental budgets annually to meet the basic needs of the public sector development. She added that managers should be prepared to deliver according to their performance agreements and juniors should also be equipped to expedite the process of good governance and accountable government. She suggested that the public service systems should be modified to meet constitutional requirements to make government comply with its own laws.

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[583] The *Batho Pele* Principles as outlined in the Public Service Transformation White Paper. In Chapter Three and Four of this work these principles were analysed in connection to administrative justice

[584] Principle four requires that services be provided impartially, fairly, equitably and without bias.

[585] Public Service Commission State of the Public Service Report (2005) 23-25.

[586] In her speech on the 25 November 2001 http://www.gov.sa.za [accessed 26-December 2005].

As Van der Merwe[587] suggested, training should focus mainly on the leadership of the institutions, because what makes the employees perform is the exercise of leadership from the top down, and the ability of departmental leaders at all levels to instil fundamental philosophical principles of responsible and ethical behaviour; efforts to communicate objectives; and to promote an understanding of the department's role and purpose among all employees.

This is a valid observation, because well-informed managers enhance institutional competence.[588] In line with Mafunisa's argument, in building competence, managers have to "ensure that juniors have the skills, knowledge and experience to perform assigned tasks by coaching and mentoring them."[589] In this respect, Swanepoel[590] observed that trained managers can "create a transformational climate and culture for their juniors where each individual in a group can achieve their full potential and have ability to meet the demands of a multicultural South Africa." Trained managers will be innovative and adopt appropriate models, which enhance competencies such as interpersonal skills. Such skills would include, among other things, the ability to work as a team, collaboration, negotiation, and networking; people-oriented characteristics with a keen sensitivity to diversity. They would aim at a value system that elevates the interest of the organization above the individual interests; being attuned to cultural sensitivities and behavioural norms; integrity, honesty and trustworthiness; personal learning skills, especially the ability to learn from, and help others learn from experience.[591]

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[587] Van der Merwe, "Performance Management in the Public Sector: in Search of an Answer." 27 *SAIPA* (1992) 2.
[588] As Lincoln & Kallenberg indicate, "competence is partly defined as capacity for hard work (diligence) and perseverance, and partly as talent, skill or ability." Lincoln & Kallenberg *Culture, Control and Commitment. A Study of Work Organisation and Attitudes in the United States and Japan.* (1992) 125 to 126.
[589] Mafunisa "Public Service Ethics" 35 *SAIPA* (2000) 83.
[590] Swanepoel ed *South African Human Resource Management: Theory and Practice III* (2003) 363.
[591] Penceliah "Emotional Intelligence for Organisational Effectiveness" 39 *SAIPA* (2004) 634.

To improve organizational productivity well-trained managers will promote qualities of efficiency and effectiveness by adopting "performance management systems which are specifically geared towards excellence in service delivery."[592] These include, among others, performance targeting, the setting of performance standards, and a performance evaluation system. This will enable public administrators to be able to participate in the evaluation of their performance and reflect whether they are abiding by the principles embedded in the right to administrative justice as a human right.

In line with Layman's[593] argument, for purposes of implementing proper productivity improvement programmes, managers should implement performance management systems that include setting of performance targets so that the junior administrators can effectively and efficiently make the expected input. Such a system would include the identification and specification of the objectives of a particular process; an outline of the methodology to be involved in the operations; an outline to determine and specify the timeframe within which the envisaged level of performance should be pursued and realised; the outline of expected costs of performance or non-performance in view of budgetary constraints; and finally, the description of the outcome in terms of benefits, if proper procedures are followed, and losses, if unconstitutional means are utilised.

6 7 2 Use dismissal as a behavioural remedy

When all else has been tried and failed, dismissal can be used to remedy ineffective public service delivery. As a last resort for improving public service

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[592] Masango "Towards efficiency and Effectiveness in the Public Service" 35 *SAIPA* (2000) 61. Also see section A of Part III of Public Service Regulations (No R679 of 1999) which states that, "to enhance result oriented organizational efficiency and effectiveness, as well as accountability for the use of resources, performance management should be established in public service. Performance management programmes should be directed towards ensuring that more and better services are delivered at the lowest possible cost."

[593] Layman "Efficiency and Effectiveness" in Cloete & Mokgoro (eds) *Policies for Public Service Transformation* (1995) 121.

delivery, dismissal is almost too obvious to mention, but needs to be considered under the circumstances described in Chapter Five of this study. As employees, public administrators who shirk their duties must be disciplined accordingly. As ineffective and inefficient employees they deserve the application of disciplinary measures that employers apply to errant employees. Where the severity of their misconduct fits a category for dismissal, they must be dismissed.[594]

6 7 3 Public awareness must be increased

As public participation in decision-making was found to be uneven and inconsistent, providing access to justice through legal literacy is of the utmost importance. Access to the law and to justice by the greatest possible number of members of our society will depend on widespread general legal literacy. Therefore, the broadest and most inclusive education agent, that is the primary and secondary school system, should be employed in this regard. There should be a development of high-quality teaching resources in the education system to ensure that education on the administrative justice system is entrenched as a fundamental and effective part of the curriculum of schools and other learning institutions. Secondary methods include holding of workshops; providing pamphlets about administrative justice; and using the media and all the available educational tools to assist in achieving legal literacy.

The use of these methods can assist in achieving a more complete understanding of the administrative justice system. Community legal education can play a central role in the effort to demystify the law. It can be an important mechanism

[594] Crossett M *Discipline and Dismissal a Practical Guide for South African Managers* 2ed (1999) 21, explain that dismissal is used as a last resort when all else has failed. A category of steps taken before a dismissal is carried out include, warning-verbal, written and final written warnings; suspension-with or without pay; transfers and demotions. Further dismissal is fair and accordingly acceptable by the courts if the severity of the perpetrator's action subject to punishment is commensurate. Dismissal cannot therefore be resorted to when the alleged administrative action constitute a minor offence. Obviously human rights violations are not minor offences; they are very serious administrative offences.

for improving access to justice. Community legal education can also help to bring down the costs of legal representation. With an understanding of their legal rights and obligations, people can make informed and cost-effective choices regarding particular problems in administrative justice affecting access to justice. In line with the Black Sash recommendations, there should also be a strategy for raising awareness of the requirements of the Act and individual rights among non-governmental organisations (NGOs), community-based organisations (CBOs) and citizens.[595]

As representatives of the public such organisations can promote public participation, which is a vital support mechanism to constitutional administrative systems. Without public participation it would be impossible for public administrators to reflect on their actions and measure their successes and failures to effect the right to administrative justice. For this purpose educating the public and the relevant representative organisations is critical to alleviate the potential external threats to a new administrative culture. As Sindane[596] observed, even the service recipients can affect the effectiveness and efficiency of public administration if they have a culture of violence, entitlement and unreasonable demand, which elements are at times characteristic of a public which is not clear with the extent and limits of its rights.[597]

To enable the public to analyse public administration performance effectively, it must be made aware of the nature of the relevant laws and policies so that it can give a true reflection of civil service performance by exercising this right effectively. There is also a need for educating the public so that it understands when to bring a legal action before court. This will enable the public to

[595] Black Sash *Conference on Promotion of Administrative Justice Act* (2004) 41.
[596] Sindane A M "Establishing Administrative Culture in South Africa: A Case of Legitimacy, Ethics and Trust in the Face of Globalisation" 38 *SAIPA* (2003) 2.
[597] For example, this was indicated a present Public culture in South Africa by Saturday Star "the Launch of Moral Regeneration" (2002) 4

understand the appropriate procedures and processes when they seek services, so that they act as a positive influence on the public officials, instead of exerting unnecessary pressure on the civil servants to enhance efficiency and effectiveness of civil service.

On the other hand, educating the public will capacitate citizens to understand their rights clearly, so that they know what to do when they face difficulties. Education will help the public to understand the extent and limits of its rights. Most importantly, public education will enhance public participation in decision making in the sense that members of the public can detect faults as early as possible where irrelevant measures are implemented by the public administration, because the public will have been informed of the procedures and processes in effecting proper service delivery.

6 7 4 Constitutional monitoring and evaluation mechanisms

The HRC,[598] the Public Protector[599] and the Public Service Commission (PSC) [600] should play a greater role in ensuring that public functionaries adhere to constitutional rights and stop violating individual rights.

6 7 4 1 The HRC must abide by its constitutional duties

The HRC can promote administrative justice, as its purpose is to guard constitutional rights.[601] It has a special responsibility in respect of socio-economic rights, which include the right to social assistance and many other areas of public service delivery. In this regard the Constitution[602] mandates the HRC to monitor, assess and observe human rights. The Commission also has the power to

[598] Established in section 181(b) of the Constitution.
[599] Established in section 181(a) of the Constitution.
[600] Entrenched in section 196 of the Constitution.
[601] Section 184(3) of the Constitution.
[602] Section 184 of the Constitution.

investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, and most importantly, to evaluate annual reports from organs of state so that it can establish the extent to which these organs have taken measures to realise the socio-economic rights as the Constitution demands.[603] As a result, the HRC can play an important role in remedying maladministration and therefore transform public administration in accordance with the constitutional demands.

As seen in the *Vumazonke*[604] case, the court ordered that the HRC be alerted to the incidents that led to the applicants and other persons in the same category as the applicants seeking relief in courts. It was insisted that the HRC ought to have taken steps to put a halt to incidents of maladministration, but as the court observed, the Commission did not take steps in some cases. As it is its constitutional task, the Commission has to directly supervise executive action so as to bring about reforms and implement these reforms in terms of its constitutional objectives. For example, in *Grootboom*[605] the Commission was specifically ordered to enforce its constitutional powers and monitor compliance with the order of the Constitutional Court and, if necessary, report in terms of its powers on the efforts made by the state to comply with the state's constitutional duties.

To enforce this task the Commission can add responsibilities involving the advancement of administrative justice in the mandates of existing offices. For example, in its training and education tasks the Advocacy Department should also add education of public and public servants on the right to administrative justice.

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[603] Section 184(1)(a)(c) of the Constitution.
[604] *Vumazonke and others v M E C for Social Development, Eastern Cape Province* 2005 (6) SA 229.
[605] *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC).

The Legal Department should also investigate violations of human rights perpetrated by non-observance of the PAJA.

The new Cross-Sectoral Information Officers Forum[606] should also be mandated to share information on the implementation issues and difficulties on the PAJA; to help raise awareness of the Act under public bodies; to advise the Commission on areas that require its "intervention"; to advise independent organisations and other sectors on the latest developments on the implementation of the PAJA; and to help with capacity-building issues in public bodies on how to achieve transformative objectives; call all departments, independent organisations to a yearly meeting/*kopanong*[607] to share experiences on implementing the PAJA; create a virtual forum (on the Commission's website) that can be used for continuous discussion of difficulties associated with the implementation of the PAJA; distribute questionnaires on the difficulties they experience and how they can be resolved; and consult with public bodies on best practice and implementation processes under the PAJA.[608]

6 7 4 2 The Public Protector must effectively carry out constitutional duties

The Public Protector, who deals with the investigations into maladministration, reports on such conduct and takes appropriate remedial action, must be open to all persons who are affected by administrative action. As this office is centralised at the present moment, there is need for decentralisation of the office. It must have a customer care office with branches in all nine provinces.[609] To carry out its duty to investigate any conduct in the public administration that is alleged or suspected to be improper or to result in any impropriety or prejudice, it must have a legal department that helps with the investigations and such office must also be

[606] Established on 20 September 2006.
[607] A Sesotho word meaning meeting or meeting place.
[608] These tasks are suggested in line with what the Forum has set to undertake in the implementation of PAIA.
[609] Section 182(4) of the Constitution.

decentralised for maximum public access.[610] To facilitate public reporting on maladministration and to take appropriate remedial action, there must be a communications office, which is also accessible to the public. [611] Any report issued by the Public Protector concerning administrative action must be open to the public, who have to be allowed to make an input.

6 7 4 3 PSC must carry out its duty

The PSC has to promote the values of public administration by performing its constitutional task of investigating, monitoring and evaluating the organisation and administration of the public service. As well as having the chief directorate for public administration and investigations, it should also have a chief directorate for public administration and monitoring, so that public service department performance is accordingly monitored and, where there are capacity needs, this office addresses these needs at an early stage.

For an accountable execution of public duties and improved public participation aligned to *Batho Pele* principles, the PSC adopted Public Service Complaints Rules and a National Anti-Corruption Hotline. Through these channels the public can lodge complaints about substandard services and can report suspected acts of corruption, as well as related activities. These include complaints with regard to maladministration; the standard of service provided; dishonesty or improper dealings with regard to public money; the behaviour, competency, diligence or attitude of staff; and any form of discrimination such as racism, nepotism and many more.

The PSC, however, recommends that it is important, where possible; when a complaint is raised a solution should be sought with the relevant organ of state

[610] Section 182(1) of the Constitution.
[611] Section 182 (5) of the Constitution.

before being referred to the PSC. In addition, the rules[612] require that a complaint should be lodged within a period of no longer than twelve months from the date of the incident. Such a complaint should preferably be submitted in writing, and copies of all documentation relevant to the complaint should also be submitted to the PSC. According to these rules, a valid complaint must provide the following information:

- Nature of the complaint;
- Background of the complaint;
- Steps that have been taken to resolve the problem; and
- The names and particulars of employees of the relevant institution that have been dealing with the complaint.

Upon receipt of a complaint in accordance with the stipulated rules, the PSC will investigate; make recommendations for improvement to the Executive on a yearly basis; and report to Parliament. Although this move by the PSC is highly applauded, it may not be effective because the PSC does not put in place measures for the protection of whistle-blowers. As the recommended compliant form demands biographical information about the complainant there exists the possibility of stigma and rejection of individuals who may lodge a complaint against public officials, and this will ultimately deter the public from doing so.

The details required to complete the form may make individual attempts to report maladministration futile, as it may be difficult to obtain all the information. It is better that the individual be allowed to provide any available information. What the individual is not able to write down should trigger a reaction from the PSC. The fact that the PSC might not provide immediate remedies to the affected parties may discourage the public from reporting. It is therefore important at this stage that the PSC should consider using behavioural remedies such as dismissal of public servants who fail to meet the requirements of the PAJA.

[612] Government gazette no 23635 Vol 445 19th July 2002.

6 7 4 4 Governmental departments must afford measures to protect the right to administrative justice

National and provincial state departments should properly implement the requirements of the PAJA in accordance with the demands set by the Constitution and the procedural standards set by the PSC.[613] They must raise their standards of performance and do away with the low level of compliance reflected in this study.[614] The public service should utilise the basic infrastructure for promoting a high standard of professional ethics created within government. The public service should devote more attention to ensuring that its operation is efficient and economically effective to reflect value for public money. They should avoid under-spending and adopt best development management practices.

The intervention mechanisms entrenched in section 100 of the Constitution for the national supervision of the provincial administration must be enforced to implement constitutional transformative objectives. Since maladministration of social assistance grants is a provincial problem, the central government must intervene in provincial administration where a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution.[615] It must take appropriate steps to ensure fulfilment of constitutional obligations. In this regard, appropriate intervention steps include: the issuing of a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; assuming responsibility for the relevant obligation in that province to the extent necessary to maintaining essential national standards or meeting established minimum standards for the rendering of

[613] Constitutional transformative principles in the Preamble, section 1, section 33, section 195 and the *Batho Pele* transformative strategies and principles.
[614] Also see the concern raised by the Commission before Parliament on Friday the 4th September 2006 where the Commission predicted "a risk that services would not be delivered justly," due to the failures of the public administration. Ensor "South Africa: Low Level of Compliance With Citizens' Rights Law" *Business Day* 2006-09-04.
[615] Section 100(1)of the Constitution.

services; maintaining economic unity; maintaining national security or preventing the province concerned from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.[616]

6 7 5 Department of justice must put measures in place for the administration of courts

It is recommended that, as a means of preventing the overburdening of courts with administrative and transactional procedures, which "was experienced until 1994 when South Africa had had 11 departments of justice and to avoid duplication of duties at the national and regional levels which led to case backlogs, the ministry's engagement in comprehensive effort to transform the courts has to be hurried."[617] The new Court Support Services Model with a single national office for policy, planning and budgeting and a separate centre for procurement, financial administration, human resources and other services has to operate effectively so that courts, prosecutors, judges and court clerks can dedicate their efforts entirely to case quality, jurisdiction and service. This will enable delivery of justice for aggrieved social assistance claimants in a speedy way, because it will promote access to courts, which are focused and aim at speedy delivery of justice.

6 7 6 The department of justice must finalise the drafting of a code of good conduct for administrative justice

As section 10(5A) of the PAJA has to be enforced, it is urgent that the Minister of Justice and Constitutional Development must publish a code of good

[616] Section 100(1)(a)(b) of the Constitution.

[617] The South African Year Book 2005/2006 423, proposes that to facilitate transformation of service delivery in the public sector, at least in the ministry of justice, there should be transformation of partnerships, mainly with regard to the department's key strategic partners and stakeholders. To capacitate courts to be effective, the department adopted a turnaround strategy through the "Re Aga Boswa" We are Rebuilding Project ."*Re aga Boswa*" is a Sesotho phrase meaning "we are reconstructing". The rationale for the reconstruction of the justice system is to adopt a new phase that abides with the entrenched constitutional systems and procedures for the administration of justice so as to enhance the independence of the judiciary.

administrative conduct.[618] As the Act demands, the code must provide administrators with practical guidelines and information to promote an efficient administration and the achievement of the objects of the Act. This code is supposed to provide guidance to administrators to ensure that the decisions they take are lawful, reasonable and procedurally fair. It will also assist administrators to comply with the requirement that reasons must, when requested, be given for decisions.

Although that code will not impose legal obligations on administrators in addition to those imposed by the Constitution and the PAJA read with *Batho Pele,* it explains the PAJA and the relevant law in the Constitution in order to assist administrators to comply with their legal duties. The code will assist administrators to identify the basic rules of administrative justice that are applicable to their work. Administrators will be bound to follow the code's guidelines as closely as possible, as a departure from the guidelines contained in this code could be an indication that the Constitution and the requirements of the PAJA have not been complied with. At the present moment there is just a basic draft code, which has not yet been finalised. It would be beneficial if this code will be tabled in Parliament for approval as soon as possible. A single code for all instances of public administration may be the best option, as each department may interpret it in the context of the specific departmental objectives and aims.

6 7 7 The Administrative Justice Advisory Council must be established

As the Black Sash Report[619] states, there is a pressing need for the establishment of the statutorily suggested Council.[620] At present there is only draft regulations on the establishment of such a Council, which provide that the Council's Chairperson must convene meetings at least twice a year, or when necessary, or if

[618] Black Sash *Conference on Promotion of Administrative Justice Act* (2004) 41.
[619] See Black Sash *Conference on Promotion of Administrative Justice Act* (2004) 41.
[620] Section 10(2)(a) of the PAJA.

the Minister so requests. It may determine its own procedures at meetings, and may appoint committees from its members to assist it in the performance of its functions or the exercise of its powers.[621] As the PAJA demands, the Council must monitor the application of the Act and advise the Minister on the appropriateness of publishing uniform rules and standards, which must be complied with in the taking of administrative action.

Such rules must include:

- the compilation and maintenance of registers containing the text of rules and standards used by organs of state;
- improvements that might be made in respect of internal complaints procedures, internal administrative appeals and judicial review by courts or tribunals of administrative action;
- the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action, and of establishing specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action;
- the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards;

[621] It consists of a senior representative of each of the following: the Department of Justice; the Public Service Commission; the Public Protector; any other organ of state designated by the Minister; the judiciary; each professional legal association requested by the Minister to nominate a representative; and the faculties of law at South African universities collectively; the chairperson of the Justice Portfolio Committee of the National Assembly; the chairperson of the Justice Select Committee of the National Council of Provinces; and any other person appointed by the Minister. Chairperson and Deputy Chairperson designated by the Minister. The Chairperson must preside at meetings of the Council and perform the other functions assigned to the chairperson. The Deputy Chairperson shall act as chairperson if the Chairperson is absent or unable to perform the functions of chairperson; or the office of chairperson is vacant. Section 4 of the draft Regulations on the Administrative Justice Advisory Council, 2000. Draft Regulations made by the Minister in terms of section 10 of the Promotion of Administrative Justice Act, 3 of 2000.

- programmes for educating the public and administrators regarding the contents of the Act and the provisions of the Constitution relating to administrative action;
- any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice;
- any steps which may lead to the achievement of the objects of the Act;
- and any other matter in respect of which the Minister requests advice;
- a forum in which the Department of Justice, other organs of state, the judiciary, the legal profession, legal training institutions and other interested bodies can share information and co-ordinate policy issues regarding the application of administrative justice; and request other institutions to perform research for the Council.[622]

The Director-General of Justice must provide administrative support for the Council to function effectively.

With these characteristics, the Council will enhance the effective implementation of the PAJA, because it will facilitate the proactive steps that could be taken in the public administration and avoid the reactive approach that the Act seems to have largely adopted. Through the rules that the Council may recommend, public administrators should receive guidance on every step of their administrative

[622] The Ministry of Justice and Constitutional Development is taking steps under a newly formed PAJA-project, which has just started in November 2006 to a formation of a national forum. According to the PAJA e-newsletter, the goal of the project is that " at the end of the PAJA-Project , all administrators should have capacity to comply with the requirements of the PAJA in their daily work. It also envisaged that everyone would be empowered to challenge an administrative decision that adversely affects them, in an inexpensive and efficient manner." Through this project, the Ministry will monitor and evaluate the implementation of PAJA by government ministries. It will "adjust the strategies and activities needed for a specific public entity," and therefore turn activism into action and assumptions into knowledge." To kick-start this promising attempt in the promotion of administrative justice as demanded by the Constitution as well as PAJA, the Ministry has held two workshops in Pretoria and KwaZulu Natal in November and December respectively for legal officers in the public service who will be involved in the implementation of PAJA. PAJA e-newsletter 1st Edition 2006 http:/ www.gov.doj.za/2004dojsite/paja/new.htm. [accessed 7-01-2007]

duties. The rules should also make the understanding of the Act easy for public administrators who do not understand the legal concepts. The creation of a forum will lead to effective implementation of PAJA, because it will enhance professional participation in matters of administrative justice, as all stakeholders will have a say on how the PAJA can be implemented. The Council can work effectively and should be supported by the public, because it will be more focused on the improvement of the performance of public servants from whom the public expect a high standard of services.

6 7 8 Participation of the paralegal movement, including monitoring and reporting on the delivery of public services, must be increased

The area of social assistance that concerns the poor, who cannot easily afford legal fees, has to be addressed through the provision of available primary legal services to a larger extent. As in some cases it is difficult for the public interest legal organisations to have access to the communities in order to deliver their services, it is important that the state budget for the purposes of dealing with the cases falling into this category. As in criminal cases, there should be *pro deo* fees for paralegals that may assist in these matters.

In addition, the paralegal movement must effectively monitor and report on state delivery and lobby jointly with the community for improvement or changes where necessary. They should also provide a link between the community and the state, by informing people of state services available to them and encouraging those hesitant but in need of assistance to apply appropriately. They must be involved in continuous community empowerment and development programmes and projects, simplifying the PAJA provisions and helping communities with procedures to access the rights provided by the PAJA. The service provided by paralegals is the first tier of legal services, the first point of call. It is community based, versatile, adaptable and flexible. This raises the need to promote these bodies legally. Firstly, there should be a formal and legal recognition of this primary legal service

currently provided by paralegals. There should be standardized and accredited training supported by all stakeholders within the legal fraternity. The state should take full responsibility for providing funding for this primary legal service.

6 7 9 Other civil society bodies must be involved

Community legal centres must be establishment as they are a responsive and flexible method of providing legal advice and assistance to the poor. They are also cost-effective service providers that draw upon volunteer attorneys, advocates and community representatives. In rural and regional centres they will improve access to justice. In addition to these centres, it is important to expand universities and other legal aid institutions because they are more accessible and affordable. As the Black Sash Report notes, the services provided by these clinics are already beneficial to a great number of people, although they can hardly handle the increasing workload.[623] Such clinics can therefore possibly form the basis of the establishment of community legal centres.

At present these clinics are largely funded by non-governmental organisations. It is therefore of the essence that the importance of these clinics in matters pertaining to violations of the rights of the poor is recognised. The role that university legal institutions can play in improving access to justice has to be taken into consideration. As their role in society is vital, this appeals to governmental funding for expansion of their services. In addition, there is a need for the establishment of an umbrella body representing all interested parties to structure and regulate funding, services rendered and work done by clinics, centres, advice offices and other agencies rendering legal aid and involved with access to justice

[623] Black Sash *Conference on Promotion of Administrative Justice Act* (2004) 41.

6 7 10 Other possible measures must be employed

A twenty-four hour toll-free telephone legal advice service can facilitate reporting of public administration injustices. It can also provide immediate access to information, immediate delivery of advice and, where appropriate, immediate referral to responsible personnel, which would lead to quicker solutions. For the purposes of the enforcement of administrative justice it is therefore necessary that the costs of legal services are reviewed to improve access to justice. They should be minimised so that all South Africans have access to quality legal services and effective dispute-resolution mechanisms to protect their rights.

6 7 11 Amendments to the PAJA

The interpretation of the PAJA is essential for public administrators. It is therefore important that interpretative regulations are provided to unravel the complex legal terminology used in this Act. Furthermore, there is a need to unpack the basic principles in this Act. For purposes of public understanding, there is need for the Act to be translated into the eleven South African languages.

Bibliography

Books

Allan T R S *Constitutional Justice, a Liberal Theory of the Rule of Law* New York 2000

Allars M *Introduction to Australian Administrative Law* Sydney 1990

Andrews P and Ellmann S(eds) *The Post –Apartheid Constitutions Perspectives on South Africa's Basic Law* Johannesburg 2001

Austin P *Jurisprudence* London 1873

Basson D *South Africa's Interim Constitution: Text and Notes* Kenwyn 1994

Baxter L B *Administrative Law* Cape Town 1984

Bennet T *Constitutional and Administrative Law* (3rd ed) Cape Town 2001

Botha C J *Statutory Interpretation: an Introduction for Students* Kenwyn 1996

Brigid H (ed) *Judicial Review a Thematic Approach* Dublin 1995

Burns Y *Administrative Law Under the 1996 Constitution* Durban 2003

Carpenter G (ed) *South Africa in Transition, Focus on the Bill of Rights* Pretoria 1996

Chabal P (ed) *Political Domination in Africa: Reflections on the Limits of Power* Cambridge 1986

Chaskalson A, Kentridge J, Klaaren J, Marcus G, Spitz D and Woolman S (eds) *Constitutional Law of South Africa* Johannesburg 1999

Cloete J J N and Mokgoro J (eds) *Policies for Public Service Transformation* Cape Town 1995

Cloete J J N *Public Administration and Management* (6th ed) Cape Town 1991

Cockram G *Administrative Law* Cape Town1976

Convery J *Law Basics Constitutional Law: Students Study Guide* (2nd ed) Edinburgh 2001

Corder H (ed) *A Charter for Social Justice: A Contribution to the South African Bill of Rights* Cape Town 1992

Corder H and Maluwa T (eds) *Administrative Justice in Southern Africa* Cape Town 1996

Corder H and Van der Vijver L (eds) *Realising Administrative Justice* Cape Town 2002

Crossett M *Discipline and Dismissal a Practical Guide for South African Managers* (2nd ed) Cape Town1999

Currie I and De Waal J (eds) *The New Constitutional and Administrative Law Vol 1* Cape Town 2001

Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook* Cape Town 2001

Davis D M *Democracy and Deliberation: Transformation and the South African Legal Order* Kenwyn 1999

Davis D M *Fundamental Rights in the Constitution: Commentary and Cases* Kenwyn 1997

Davis K C *Administrative Law Text* Minnesota 1972

De Smith S A *Constitutional and Administrative Law* (3rd ed) Middlesex 1978

De Ville J R *Constitutional and Statutory Interpretation* Cape Town 2000

De Ville J R *Judicial Review of Administrative Action in South Africa* (2nd ed) Durban 2005

De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* (4th ed) Cape Town 2001

Devenish G E, Govender K and Hulme D *Administrative Law and Justice in South Africa* Durban 2001

Dicey A V *Introduction to the Study of the Law Constitution* New York 1889

Dietl C, Moss A and Lorenz E *Dictionary of Legal, Commercial and Political Terms* New York 1979

Du Plessis L and Corder H *Understanding South Africa's Transitional Bill of Rights* Cape Town 1994

Du Plessis L *Re-Interpretation of Statutes* Durban 2002

Emery C *Administrative Law: Legal Challenges to Official Action* London 1999

Flick G A *Natural Justice Principles and Practical Application* Brisbane 1979

Forsyth C *Judicial Review and the Constitution* Oxford-Portland Oregon 2000

Foulkes D *Introduction to Administrative Law* (2nd ed) London 1968

Fuller L *The Morality of Law* London1964

Gellhorn E *Administrative Law and Process in a Nutshell* London 1972

Grant B *Administrative Law Through the Cases* Kenwyn 1998

Griffith J A G *The Politics of the Judiciary* (2nd ed) Glasgow 1981

Hamson C J *Executive Discretions and Judicial Control, an Aspect of the French Conseil d'Etat* London 1954

Hoexter C with Lyster R, and Currie I (ed) *The New Constitutional and Administrative Law Vol II* Cape Town 2002

Hornberger J G *The Constitution and the Rule of Law* 1992 http://www.fff.org/ [date accessed 20th June 2005]

Hyden G and Bratton M (eds) *Governance and Politics in Africa* Colorado 1992

Jackson P *Natural Justice* (2nd ed) London 1979

Jowell J and McAuslan J P W B (eds) *Lord Denning: the Judge and the Law* London1984

Jowell J and Oliver D (eds) *The Changing Constitution* Oxford 1995

Khoza R J and Adam M *The Power of Governance Enhancing the Performance of State-Owned Enterprises* Johannesburg 2005

Kruger J and Brian C (eds) *Interpreting the Bill of Rights* Kenwyn 1994

Kumar U *Law and Economic Development* Roma Lesotho 1998

Lange C and Wessels J (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Act* Cape Town 2004

Lincoln J and Kallenberg A *Culture, Control and Commitment: A Study of Work Organisation and Attitudes in the United States and Japan* Cambridge 1990

Lewis C *Judicial Remedies in Public Law* London 2000

Lloyd D *Introduction to Jurisprudence With Selected Texts* London 1959

Locke J *Two Treatises on Civil Government* London 1690

Marshall T *Natural Justice* London 1959

McLeod I *Judiciary Review* London 1993

Montesquieu C *De l'Espirt de Lois* Paris 1748

Naudé A V and Smit E J P *Law, Government and People* Durban 1997

Nedjati Z M, Trice M A and Dashwood M A *English and Continental Systems of Administrative Law* Netherlands 1978

Neill P (ed) *Administrative Justice Some Necessary Reforms* Oxford 1988

Okpaluba C (eds) *Law and Contemporary South African Society* Pretoria 2004

Port F J *Administrative Law* London 1929

Rautenbach C, Van Rensburg L J and Venter F (eds) *Politics, Socio-Economic Issues and Culture in Constitutional Adjudication: A Resource Manual* Potchefstroom 2004

Rautenbach I M and Malherbe E F J *Constitutional Law* Durban 2004

Rose Innes L A *Judicial Review of Administrative Law in South Africa* Cape Town 1963

Schreiner M C *The Contribution of English Law to South African Law; And the Rule of Law in South Africa* Cape Town 1967

Schwartz B *French Administrative Law and the Common- Law World* Washington 1954

Seidman R B *The State, Law and Development* London 1978

Street H and Griffith J A G *Principles of Administrative Law* (5th ed) London 1999

Van Der Vyver J D *Seven Lectures on Human Rights* Cape Town 1976

Vile M J C *Constitutionalism and the Separation of Powers* Cape Town 1967

Wade E C S and Phillips G G *Constitutional and Administrative Law* London 1977

Yardley D C M *Principles of Administrative Law* (2nd ed) London 1986

Articles

Ababio E P "Enhancing Community Participation in Developmental Local Government for Improved Service Delivery" 2004 *SAIPA* 272

Amoa P K A"Independence of the Judiciary in Lesotho: A Tribute to Judge Mofokeng" 1999 *LLJ* 21

Boyle B "Good Laws, But Bad Enforcement: SA Assesses Effectiveness of its Democracy Ahead of Peer Review" *Sunday Times* (2006-04-09) 4

Burns Y "A Rights-Based Philosophy of Administrative Law and a Culture of Justification" 2002 *SAPL* 17

Chapman R "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights" 1996 *HRQ* 38

Cloete F "Impact of the Presidential Review Commission, Report on Sustainable Service Delivery in South Africa." 1999 *SAIPA* 313

Cloete F "Measuring Sustainable Governmental Performance" 2004 *SAIPA* 620

Corder H "Administrative Justice in the Final Constitution" 1997 *SAJHR* 28

Corray C "The Rule of Law: Australian Achievement" 2005 Unpublished [http://www.aust.gov date accessed 2005-05-27]

De Ville J R "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution,"1994 *SAJHR* 264

De Villiers N "Social Grants and the Promotion of Administrative Justice Act" 2002 *SAJHR* 320

Dicey A C "The Development of Administrative Law in England" 1915 *LQR* 31

Ensor L "South Africa: Low Level of Compliance With Citizens' Rights Law" *Business Day* (2006-09-04) 3

Goldblatt B and Liebenberg S "Giving Money to Children: The State's Constitutional Obligations to Provide Child Support Grants to Child-Headed Households" 2004 *SAJHR* 151

Harris D "The Right to Fair Trial in Criminal Proceedings as a Human Right" 16 *ICLQR* 354

Hart H L A "Positivism and the Separation of Law and Morals" 1958 *Harv LR* 596

Hoexter C "The Future of Judicial Review in South African Administrative Law" 2000 *SALJ* 484

Hurd G L "Address to an International Conference on Debt United Kingdom Secretary for Foreign Affairs" 1990 *Africa Research Bulletin* 9963

Klaaren J "Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights" 1997 *SAJHR* 3

Klare K "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146

Kuye J O and Mafunisa M J "Responsibility, Accountability and Ethics: The Case for Public Service Leadership" 2003 *SAIPA* 421

Langa P "The Vision of the Constitution" 2003 *SALJ* 670

Lange C "The AJA: Creating an Accountable Public Service Delivery," 2003 *Issues Service Delivery Review* 2(1) 1

Liebenberg S "Basic Rights Claims; How Responsive is 'Reasonableness Review'?" 2004 *ESR* 10

Liebenberg S "Enhancing Accountability for the Basic Needs of the Poor: The Judicial Enforcement of Social Security Rights in South Africa" 2005 Unpublished (Paper Presented at the International Expert Workshop on Rights to Social Security Berlin Germany 2005-04-6-7)

Mabuza E "Judicial Reform a Matter of Urgency, Says the Minister" *Business Day* (2005-06-01) 2

Mafunisa M J "Measuring Efficiency and Effectiveness in Local Government in South Africa" 2004 *SAIPA* 290

Makhubedu-Mametja T C "Training Municipal Councillors to Promote Effective Service Delivery" 2003 *SAIPA* 370

Malherbe E F J "Administrative Justice and Access to Information: Implications for Schools" 2001 *Perspectives in Education* 65.

Maphunye K J "The South African Senior Public Service: Roles and the Structure in Post-1994 Departments" 2001 *SAIPA* 36

Marius O "Constitutional Perspectives on the Enforcement of Socio-Economic Rights; Recent South African Experiences" 2002 *VUWRL* 33 117

Martin P "Just Administrative Action-the Key to Accessing Socio-Economic Rights" http://www.community lawcentre.org.za/ser/esr1999 [accessed 2006-11-10]

Masango R "Towards Efficiency and Effectiveness in the Public Service" 2000 *SAIPA* 60

Mkhuna Z "the Launch of Moral Regeneration" *Saturday Star* (2002-04-20) 4

Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 32

O'Regan C K "Rules for Rule-making: Administrative Law and Subordinate Legislation" 1993 *Acta Juridica* 157

O'Regan C K "The Vision of the Constitution: a Response to the Address by Professor Kader Asmal, MP Minister of Education" http://education.pwv.gov.za/conf_wshops_Events/Values/Kate_O_Regan.htm[date accessed 26 June 2005]

Odendaal M "Sustainable Local Communities: What is the Role of South African Metropolitan Governments?" 2003 *SAIPA* 43

Okpaluba C "Constitutionality of Legislation Relating to the Exercise of Judicial Power: the Namibian Experience Comparative Perspective" 2002 *TSAR* 2

Penceliah Y "Emotional Intelligence for Organisational Effectiveness" 2004 *SAIPA* 634

Plasket C "Administrative Justice and Social Assistance" 2003 *SALJ* 494

Pretorius D M "Ten Years After Traub: The Doctrine of Legitimate Expectation in South African Administrative Law" 2000 *SALJ* 520

Raz J "The Rule of Law and Its Virtue" 1977 *LQR* 195

Seekings J "The Broader Importance of Welfare Reform in South Africa" 2002 *Social Dynamics* 26

Sindane A M "Establishing Administrative Culture in South Africa: A Case of Legitimacy, Ethics and Trust in the Face of Globalisation" 2003 *SAIPA* 2

The Department of Public Service and Administration " Know Your Service Rights Campaign Invitation for Tenders No DPSA 02/2006" *Sunday Times (*2006-02-26) 14

Tshikwatamba N E "Contextualizing the Guidelines of Public Administration Within the Selected African Community Values" 2004 *SAIPA* 255

Van der Merwe S "Performance Management in the Public Sector: in Search of an Answer" 1992 *SAIPA* 2

Xlundu X "Provincial System Under the Microscope; Government Discusses Changes to Improve Delivery of State's Programmes: Examining People who Implement Policies" *Sunday Times* (2006-08-27) 4

Reports

Blacksash *Making Human Rights Real, Conference on Promotion of Administrative Justice Act 3 of 2000 – a Tool For Transforming Delivery in South Africa* 2004.

De Lange J and Corder H "The Separation of Powers and Strategies for Transformation in the South African Judiciary" *Public Discussion Report by the Institute for Justice and Reconciliation* 2005

Greg M "Promotion of Administrative Justice Act" *Report for Administrators Justice College* 2001

Haasbroek PJ *Media Release by the Department of Justice on Behalf of Justice College on Training Needs and Judicial Independence* 1998 [http://www.southafrica.gov date accessed 2005-06-5]

Ian C *The Promotion of Administrative Justice Act: Administrator's Guide* 2001

ICJ Report on The Rule of Law in a Free Society, "The Rule of Law as a Supra-National Concept," 1959 *Oxford Essays in Jurisprudence* 3

Ramphal P *Commonwealth Secretary-General Address* New Delhi 1989

South African Law Reform Commission *Report on Administrative Justice* (Project 115) 1999

The Government of South Africa *Public Service Annual Report* (2003/2004)

The Law Reform Commission of Western Australia *Judicial Review of Administrative Decisions* (Project no 95) 2002

The Public Service Commission *State of the Public Service Report* 2005

Statutes and policies

Judicial Conduct Tribunals Bills of 2005

Promotion of Administrative Justice Act 3 of 2000

Social Assistance Act 59 of 1992

South African National Training College Draft Bill of 2005

State Liability Act 20 of 1957

Superior Courts Bill of 2005

The South African National Justice College Draft Bill of 2005

The Basic Principles on the Independence of the Judiciary, Human Rights-Compilation of International Instruments Universal Instruments 1(Part1) ST/HR /1 Rev.5 (1994) 386-389

The Public Service Transformation White Paper Government Gazette no 18340 of 1997-10-01

The Public Service Delivery Principles of *Batho Pele* Policy by the Department of Public Service and Administration 18 September 1997 [http://www.gcis.gov.za/docs/publications, accessed on the 14th March 2006]

World Conservation Strategy by IUCN, UNEP and WWF, 1980 [http://www.jsdnp.org.jm/glossary.html, jdm glossary of terms, accessed 11-10-2005]

Theses

Hopkins E *Grounds of Review of Administrative Action: The Interaction Between the Constitution, the Act and Common Law* Unpublished LLM Thesis, University of Stellenbosch, 2002

Taitz JT Unreasonable Acts of Administrative Authorities Exercising Adjudicatory Functions as a Ground for Judicial Intervention Unpublished LLM Thesis, University of South Africa, 1975

Cases

Administrator, Transvaal and the Firs Investments (Pty.) Ltd.v Johannesburg City Council 1971 (1) SA 56 (A)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687(CC)

Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another 2002 (9) BCLR 891(CC)

Bernstein and others v Bester and others NNO 1996 (2) SA 751 (CC)

Birch v Klein Karoo Agricultural Co-op Ltd 1993 (3) SA 403 (A)

Bloem v State President of the RSA 1986 (4) SA 1064(O)

Casseim v Oos-Kaapse Komittee Vandie Groupsgebied 1959 (3) SA 651(A)

Castell NO v Metal and Allied Workers Union 1987 (4) SA 795(A)

De Lange v Smuts NO and others 1998 (3) SA 785 (CC)

Du plessis v De Klerk 1996(5) BCLR 658 (CC)

East London Transitional Local Council v MEC for Health, Eastern Cape, and others 2000 (4) ALL SA 443(Ck)

Fedsure Life Ass Ltd v Greater Johannesburg TMC 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC)

*Fellner v Minister of the Interior*1954 (4) SA 523(AD)

Fose v Minister of safety and Security 1997(7) BCLR 851(CC); 1997(3) SA 786 (CC)

Gibbs v Guild (1882) 9 QBD 74

Greys Marine Hout Bay (pty) Ltd and Others v Minister of Public Works and others 2004 (12) BCLR 1298 (C)

Government of the Republic of South Africa and others v Grootboom and others 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC)

Hira v Booysen 1992 (4) SA 69(A)

House of Lords in M v Home Office 1993 (3) All ER 537 (HL)

Hurley v Minister of Law and Order 1985 (4) SA 709 (D)

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (1) BCLR 78 (CC)

Janse Van Rensburg NO v Minister of Trade and Industry 2000 (11) BCLR 1235 (CC)

Jayiya v MEC for Welfare, Eastern Cape & another 2004 (2) SA 611 (SCA)

Johannesburg City Council v Administrator, Transvaal and Myofis 1971 (1) SA 56 (A)

Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111

In re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC)

Jooma v Lydenburgh Rural Licensing Board 1933 TPD 477

Kabinet Van die Tussentydse Regering Vir Swa v Katofa 1987 (1) SA 695(A)

Kate v the MEC for the Department of Welfare, Eastern Cape 2005 (2) All SA 745(SE)

Kauda and Others v President of the Republic of South Africa 2004(10) BCLR 1009 (CC)

Khosa v Minister of Social Development; *Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC)

Kolbatschenko v King 2001 (4) SA 336 (C)

Local Council v MEC for Health, Eastern Cape and Others 2000 (4) ALL SA 443(Ck)

Logan v Burslem (1842) 4 Moore P.C. 284

Maclean v The Workers Union (1929) 1 Ch. 602

Mahambahlela v MEC for Welfare, Eastern Cape & another 2002 (1) SA 342(SE)

Mashavha v President of the Republic of South Africa and others 2004 (12) BCLR 1243 (CC)

Mbanga v MEC for Welfare, Eastern Cape and another 2002(1) SA 359 (SE)

MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA)

Minister of Finance and Other v FJ Van Heerden 2004 (11) BCLR 1125(CC)

Minister of Health and others v Treatment Action Campaign and others (‘*TAC*’) 1997 (12) BCLR 1696 (CC)

Minister of Health and Another v New Clicks South African (Pty) Ltd and others 2006 (1) BCLR 1(CC)

Minister of Health and others v Treatment Action Campaign & others (‘TAC’) 1997 (12) BCLR 1696 (CC)

Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446(Tk)

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (2) BCLR 150(CC)

Modder East Squatters and another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and others v Modderklip Boerdary(Pty) Ltd 2004 (8)BCLR 821(SCA)

Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)

National Transport Commission v Chetty" s Motor Transport (Pty) Ltd 1972 (3) SA 726 (A)

Ndevu v MEC for Welfare,Eastern Cape Provincial Government and Another SECLD case 597/02 (unreported judgement, undated)

Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another 2000 (12) BCLR 1322 (E)

Omar v Minister of Law and Order 1987 (3) SA 859 (A)

Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province & Another v Edu-U-College (PE) 2001 (2) SA 1 (CC)

Permanent Secretary, Department of Welfare, Eastern Cape and Others v Ngxuza and Others 2000(1) BCLR 39 (SCA), 2001 (4) SA 1184 (SCA)

Pharmaceutical Manufacture Association of South Africa in re: the Exparte Application of the Republic of South Africa 2000 (2) SA 674 (CC)

Pharmaceutical Society of South Africa and others v The Minister of Health & another 2005 (3) SA 238 (SCA)

President of the Republic of South Africa and others v Modderklip Boerdary(Pty) Ltd 2005 (8) BCLR 786 (SCA)

Q T Machi and Others v MEC for Province of Kwazulu Natal Responsible for Social Welfare and Population Development Case no 4392/04-NB/CD (unreported judgment of 8 March 2005)

R v Home Secretary, ex parte Hosenbal 1977 (1) W L R 772

Ralikhoto v East Rand Administration 1983 (3) SA 595 (A)

Sachs v Donges N.O. 1950 (2) SA 265 (AD)

Shabalala v Attorney General, Transvaal 1995 (12) BCLR 1593 (CC)

Shidiack v Union Government 1912 AD 642

Soobramoney v Minister of Health Kwazulu-Natal 1998 (1) SA 765 (CC)

South African Defense and Aid Fund v Minister of Justice 1967 (1) SA 263 (A)

Staatspresident v UDF 1988 (4) SA 830 (A)

State President v Tsenoli 1986 (4) SA 1150 (A)

State v Makwanyane 1995 (6) BCLR 665 (CC)

State v Zuma and others 1995 (4) BCLR 401 (CC)

Thozamile Eric Magidimisi NO v The Premier of the Eastern Cape; The MEC for Finance, Eastern Cape; The MEC for Social Development Eastern Cape; The Head of the Department of Social Development, Eastern Cape and the Minister of Justice Case no 2180/04 (unreported judgement, undated)

Union Government v Union Steel Corporation 1928 AD 222

Van Duyker v District Martial 1948 (4) SA 691 (AD)

Van Rooyen and Others v The State and Others 2002 (5) SA 246 (CC)

Van Rooyen v Stoltz and Others 2005 (1) BCLR 78 (CC)

Vumazonke and others v M E C for Social Development, Eastern Cape Province 2005 (6) SA 229 (SE)