62

Access to Information

Jonathan Klaaren
Glenn Penfold

62.1 INTRODUCTION

Section 23 of the interim Constitution introduced a free-standing right of access to information.[1] The right of access to information is generally treated, in international instruments and foreign legislation dealing with such rights, as a corollary of the right to freedom of expression.[2] The separate and constitutional entrenchment of this right underscores its significance in the South African constitutional order.[3] In addition, this separate right makes it clear that the right is enforceable against the entity holding the information and is not simply a negative freedom to receive and impart information free of interference, which is a frequent interpretation of the right to freedom of expression.[4]

The final Constitution replaced and upgraded the interim Constitution's right of access to information with s 32, which reads as follows:

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

The right set out in s 32 did not, however, come into operation immediately. The transitional provision in item 23 of Schedule 6 to the final Constitution stipulated that Parliament must enact the legislation referred to in clause 32(2) within 3 years of the commencement of the final Constitution (that is, by 3 February 2000). Prior to such enactment, the right in s 32 was to be read as set out in item 23(2)*(a)* of Schedule 6, which was essentially the same as the text in s 23 of the interim Constitution.

The right contained in s 32 of the final Constitution significantly expands the right of access to information in two fundamental respects. First, in relation to information held by the state, it applies to all information and removes the proviso in the interim Constitution

[1] Section 23 of the interim Constitution provided that: 'Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.' The importance of this constitutional right was underlined by Constitutional Principle IX, which provided that: 'Provision shall be made [in the final Constitution] for freedom of information so that there can be open and accountable administration at all levels of government.'

[2] See, for example, art 19 of the International Covenant on Civil and Political Rights, 1966 and *International Fund for Animal Welfare Inc v R* [1989] 35 CRR 359 (Canadian freedom of expression includes access to information pertinent to intended expression). Such a right is specifically included in s 16(1)*(b)* of the Constitution. For a comparison of the South African rights of freedom of expression and information with those of the international instruments, see L Johannessen 'Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards' (1994) 10 *SAJHR* 216.

[3] Interestingly, a number of formerly communist states have included a separate access to information right in their constitutions. For example, art 24 of the Russian Constitution, 1993 states:

> '(1) It shall be forbidden to gather, store, use and disseminate information on the private life of any person without his/her consent.
> (2) The bodies of state authority and the bodies of local self-government and the officials thereof shall provide to each citizen access to any documents and materials directly affecting his/her rights and liberties unless otherwise stipulated under the law.'

[4] In *Leander v Sweden* 1987 (9) EHRR 433 at 456, the European Court of Human Rights held that the freedom to receive information in terms of art 10 of the European Convention on Human Rights 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' but does not confer a positive right to personal information held by the state.

that the relevant information must be required for the exercise or protection of rights.[1] Secondly, it expands the reach of the right of access to information to include information held by persons other than the state.

Following the trend towards legislation in a number of other democracies,[2] s 32(2) of the Constitution goes further and obliges Parliament to enact access to information legislation to 'give effect to' the constitutional right. The national legislation envisaged in s 32(2) is the Promotion of Access to Information Act,[3] which was enacted on the day of the deadline, 3 February 2000.[4] Broadly speaking, the AIA provides for access to records held by both public and private bodies, and sets out the grounds on which disclosure must or may be refused and the manner in which such grounds may be overridden in the public interest, as well as mechanisms for the resolution of disputes over access, notably judicial review.

What are the rationales for a right of access to information?[5] The most significant argues that there is a fundamental connection between access to information and South Africa's effort to create a constitutional democracy based fundamentally on the principle of openness and transparency.[6] Access to relevant information is fundamental to meaningful participation in the democratic process and to ensure that government is accountable to the governed.[7] This 'good government' or 'open democracy' rationale has also been identified by the

[1] As G E Devenish, K Govender & H Hulme state in *Administrative Law and Justice in South Africa* (2001) 189, in relation to access to information held by the state: 'Section 23 of the Interim Constitution provides for access to information on *a need to know* as opposed to *a right to know*, whereas the 1996 Constitution provides for the latter.'

[2] In addition to the American Freedom of Information Act see, for example, the Australian Freedom of Information Act, 1982; the Canadian Access to Information Act, 1980; the New Zealand Official Information Act, 1982; and the recently enacted United Kingdom Freedom of Information Act, 2000 (which will take full effect in 2005).

[3] Act 2 of 2000 ('the AIA'). For a discussion of the drafting history of the AIA, previously called the Open Democracy Bill, see J White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65; and Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) paras 1.3–1.12 ('*AIA Commentary*').

[4] The AIA did not immediately come into force. Section 93(1) provided that it would come into operation on a date determined by the President in the *Government Gazette*. The President brought the AIA, save for ss 10, 14, 16 and 51, into force on 9 March 2001 in terms of Government Notice 22125, R20 of 2001. Those sections were brought into force on 15 February 2002 in terms of Government Notice R9 of 2002 *GG* 23119. The Judicial Matters Amendment Act 42 of 2001 made a series of textual corrections to the Act.

In the period between 4 February 2000 and 9 March 2001 it appears that the wording set out in Schedule 6 continued in force (see *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (2) BCLR 652 (CC) at para 53 in relation to administrative action). See also *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, which held that, as the AIA had been assented to but was not yet in force, the applicable constitutional right of access to information was that set out in Schedule 6 to the Constitution.

[5] For a detailed discussion of the rationales for the protection of access to information, see L Johannessen, J Klaaren & J White 'A Motivation for Access to Information Legislation' (1995) 112 *SALJ* 45. See also *AIA Commentary* paras 2.2–2.5.

[6] See, for example, *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 642: 'Section 23 [of the interim Constitution] is . . . a necessary adjunct to an open democratic society committed to the principles of openness and accountability.' See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 225, 1994 (2) BCLR 89 (W): '[T]he purpose of s 23 is to enable a person to gain access to information held by the State in order to create, and thereafter to maintain, an open and democratic society.' This rationale of open and accountable administration is also emphasized in the wording of Constitutional Principle IX.

[7] E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 states that transparency serves the dual purpose of promoting public accountability as well as greater public participation in government.

Constitutional Court as underpinning the access to information right.[1] In other words, access to information is fundamental to a proper functioning participatory democracy. Another rationale, self-actualization, argues that access to information about oneself is necessary in order to gain self-knowledge and indeed to constitute oneself. A further rationale for freedom of information is that access to information is vital to protecting a person's other rights and interests (including, for example, the constitutional rights to privacy and equality).

The need for open and accountable government is particularly important given South Africa's recent past. This was characterized by extreme levels of government secrecy in which vital decisions were taken behind closed doors on the basis of documents to which the public (including persons whose rights or interests were detrimentally affected by the relevant decisions) could not have access. During the years of apartheid a number of legislative and other legal devices were used to withhold information or restrict access to information.[2] The complete set of these rationales does not serve in the same manner to explain the right of access to information in private hands. In the private sector the justification for the right of access may lie more with the self-actualization and rights-based rationales, essentially more with promoting and supplementing rights than with enhancing democracy.[3]

In this chapter we begin by analysing the relationship between the Constitution, other legislation and the AIA. After a brief examination of the general structure of the AIA we discuss the few blanket exclusions from most of its provisions. This is followed by a discussion of the distinction between public and private bodies for purposes of access to information and an analysis of the fundamental requirement for access to private information — 'required for the exercise or protection of any rights'. We then examine a few of the grounds of non-disclosure under the AIA and the Act's public interest override. While this chapter adopts a constitutional perspective, it does, to some extent, necessitate an analysis of some of the provisions of the AIA. The detailed provisions of this Act are fundamentally important as it is these provisions that will form the real battleground for the protection of the constitutional right of access to information.

From the point of view of Bill of Rights jurisprudence, the most dramatic effect of the Act is that it removes most access to information litigation from direct Bill of Rights control. In other words, from the time of implementation of the Act, most cases in this area will involve statutory causes of action and the application of statutory rights and remedies and will no longer involve the direct application of the Bill of Rights.

[1] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 83.

[2] For example, the Official Secrets Act 16 of 1956, the Protection of Information Act 84 of 1982, the Nuclear Energy Act 92 of 1982 and the Internal Security Act 44 of 1950. See generally, A S Matthews *The Darker Reaches of Government: Access to Information About Public Administration in Three Societies* (1978).

[3] See *AIA Commentary* paras 2.6–2.9.

62.2 THE RELATIONSHIPS BETWEEN THE CONSTITUTION, THE ACCESS TO INFORMATION ACT AND OTHER LEGISLATION

(a) The relationship between the Constitution and the AIA and between the Constitution and other legislation

In terms of s 32(2) of the Constitution the AIA was enacted 'to give effect to' the constitutional right to access to information. The AIA therefore provides a legislative basis for access to information and the starting point for access applications will be the Act itself. The question here is, what role does the constitutional right continue to play?

One approach would be that the AIA is now the sole basis of the constitutional right and that the right itself has no further application. This would be the case if 'give effect to' was read to mean 'created by'. This approach should, however, be rejected on the basis (among others) that it would be anomalous to include the right of access to information as a fundamental right in an entrenched Bill of Rights only to enable the substance of the right to be altered by simple legislative amendment. It may be consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to construct the very meaning of the right.[1]

The better argument is that the AIA gives effect to the right in the sense of making the right more effective through providing a detailed elaboration of both the scope and content of the informational rights, as well as providing an institutional framework for their implementation and enforcement.[2] The thrust of this argument is that the constitutional right continues to exist, notwithstanding the enactment of the AIA. In other words, there is a freestanding constitutional right of access to information.

There appear to be three ways in which the constitutional right will continue to play a role: to challenge the constitutionality of the AIA itself; to challenge other legislation passed after the AIA; and to assist in interpreting the provisions of the AIA.[3] Additionally, there may be rare instances of direct application. Each of these roles for the constitutional right of access is discussed in turn below.

First, the most dramatic use of the constitutional right would be to challenge the constitutionality of the AIA itself. Currie & Klaaren divide these potential challenges to the AIA into two categories: 'underinclusive' and 'overrestrictive' challenges.[4] Possible attacks on the AIA on the basis that it is underinclusive may include the blanket exclusion of Cabinet records and records held by members of Parliament in their capacity as such, as well as the fact that the Act only applies to recorded information. Overrestrictive challenges to the Act could be founded on the basis that the procedures that the Act imposes for the exercise of rights are overly burdensome. This may include the fees payable for access.

[1] *AIA Commentary* paras 2.12–2.13.

[2] This is the view favoured by Currie & Klaaren *AIA Commentary* para 2.12. In addition, it finds support in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). During the course of its judgment the court held (at para 83) that the reason for the suspension of the right of access in terms of item 23 of Schedule 6 was 'a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.'

[3] For a detailed discussion of these uses of the constitutional right, see *AIA Commentary* paras 2.13–2.15.

[4] *AIA Commentary* para 2.15.

It is unclear what approach our courts will adopt to assessing the constitutionality of the AIA. One argument is to treat the AIA in the same manner as other parliamentary legislation, that is, the AIA is unconstitutional if it infringes the rights in s 32(1), unless such infringement is reasonable and justifiable in accordance with the Constitution's general limitation clause. Another approach is to afford the legislature a greater degree of deference in relation to the AIA. There are essentially two reasons for this: the AIA, unlike most other legislation, is constitutionally mandated to give effect to a fundamental right; and s 32(2) expressly provides that this legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'.[1] Klaaren suggests a two-tiered approach to adjudication of the AIA's constitutionality.[2] In terms of this approach the provisions of the AIA can be divided into two categories: those which define and detail substantive rights, and those which set out procedures and structures to enforce the relevant rights. While some extra deference is due to the legislature in relation to the latter, no special deference is due for the former. As Klaaren states:[3]

> 'Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretative authority over the rights, Parliament receives no extra deference there.'

Regardless of the approach, in the event of a court finding that a provision of the AIA unconstitutionally fails to give effect to the constitutional right of access to information, the appropriate remedy would be for the court to allow Parliament a specified period within which to remedy the defect. A judicial approach in terms of which Parliament is required properly to give effect to the right within a set time would be consistent with the scheme provided for in the Constitution itself (that is, that Parliament was required to enact the relevant legislation within a period of three years). The issue of individual relief in the particular circumstances would, of course, need to be considered as well.

Secondly, the constitutional right could be used to challenge legislation enacted after the AIA which unjustifiably limits the right. Although the AIA prevails over previous legislation which is materially inconsistent with its objects or provisions,[4] the same cannot be said of subsequent inconsistent legislation. While every effort should be made to interpret the AIA and other subsequent legislation consistently, some such legislation may well be truly inconsistent. Such legislation can only be challenged by the constitutional right itself.

Finally, the constitutional right to access to information remains a valuable tool for the interpretation of the provisions of the AIA. In interpreting the Act, it should always be borne in mind that it is intended to give effect to the rights set out in s 32 of the Constitution. This is reiterated in the preamble to the Act and s 9, which states that the objects of the Act include

[1] It should be noted that the latter provision only indicates special deference in relation to burdens on the state, and not other non-state entities.

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

[3] J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 at 563.

[4] Section 5 of the AIA.

giving effect to the constitutional right and promoting transparency, accountability and good governance of both public and private bodies.[1]

It could also be argued that the constitutional right to just administrative action may be used as a residual right to obtain access to information which would not be available under the AIA. This could include, for example, obtaining access to information which is not in recorded form. It may also include direct adjudication of the application of the right of access to information to organs of state such as Cabinet, the records of which are exempt from the AIA. This would apply to all instances of overrestrictive challenges and may be attractive to courts as it obviates the need to strike down provisions of the AIA. In addition, the constitutional right may be relied on directly in circumstances where a particular piece of information is not being requested. This may include access to information through physical access such as where the media requests access to courts and tribunals for purposes of obtaining information and access to an event.[2]

Courts should, in our view, resist directly invoking a residual constitutional right in circumstances where the AIA itself fails to 'give effect to' the constitutional right apart from in exceptional circumstances. First, the residual right approach undermines the role of Parliament, which the Constitution specifically contemplates as the body which is required to 'give effect to' the constitutional right. Whatever individual relief may be granted, the focus of a proper remedy would rather be for a court to order that Parliament rectify the position and give effect to the right through a suitable amendment to the AIA. Secondly, if applied generally, the residual right approach could create anomalies where the substantive law under the Constitution could differ from that under the AIA. Moreover, reliance on the residual right would create the anomaly that the procedural requirements of the AIA would not apply where the constitutional right itself is invoked (for example, the internal appeal procedure of the AIA would not apply).

Nonetheless, in some instances, direct application of the constitutional right may be appropriate to adjudicate an access to information matter. Our conclusion on this issue differs from our conclusion with respect to the constitutional right of just administrative action, where we do not see any such rare instances. The difference between our conclusions is really the result of a major textual difference between s 32 and the AIA, on the one hand, and s 33 and the AJA, on the other. The AIA is not like the AJA in that there is no equivalent in the AIA of the definition of 'administrative action' which sets the limits of enforceability of the rights to reasonable, fair and lawful administrative action. The AIA has been built around the concept of a 'record' not the concept of 'information held by the State'.[3] The lack of a precise statutory parallel in the AIA of the constitutional text in s 32 leaves room for rare instances of direct application.

A particular difficulty (and one instance where the right potentially directly applies) arises as a result of the fact that the AIA only applies to recorded information. An entity may have within its knowledge certain information that will not necessarily be recorded. A particular

[1] See also s 2(1) of the AIA, which directs that a court interpreting a provision of the Act 'must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects'.

[2] See *In re Application NBC* 635 F2d 945 (2d Cir 1980) (television networks entitled to copy and disseminate videotapes entered in evidence at a criminal trial subject to the orderly conduct of the trial).

[3] See *AIA Commentary* para 2.13.

decision, for example, may not have been reduced to writing (or recorded in any manner). Information may be capable of being recorded but may not yet be compiled. In certain circumstances the information may not yet be in existence. For example, the media may request access to a particular tribunal where the oral evidence will only be adduced in the future.[1] Alternatively, the media may wish to have access to an event in order to record the event itself in some form. In such instances the AIA as currently drafted will not assist them.

The question of the constitutional right's application then arises. As we see it, there are three possible approaches to this issue. First, one could argue that the constitutional right of access to information, properly construed, only applies to recorded information. This argument would probably emphasize the use of the term 'held' in s 32(1) together with the term 'information'. Unless a particular piece of 'information' has been reduced to a physical form, it cannot be 'held'. 'Information held' would thus mean information that already exists in physical form. A second approach would be to accept that s 32(1) contemplates access to all types of information, but to argue that Parliament's decision to limit the right to recorded information, through the mechanism of the AIA, amounts to a justifiable limitation on the constitutional right. If this is the case, the AIA is constitutional and adequately gives effect to the right of access to information. While the first of these approaches is unsatisfactory as it depends upon a rather strained purposive interpretation, the second is not entirely satisfactory either. In particular, access to information through physical access — a form of access to information that was at least partially catered for in the Open Democracy Bill in the sections on open meetings — may mean that the Act is significantly underinclusive. In addition to direct adjudication in these exceptional circumstances an appropriate remedy might direct Parliament to draft legislation giving effect to this dimension of the right of access to information.

In another particular difficulty (and a second potential instance of direct application of the right) the AIA exempts from its ambit records of the Cabinet and the judiciary, for instance. But this does not mean that the Cabinet and judiciary are not bound to give effect to the right. Their Act exemption (which is a limited one) just indicates that these bodies do not have to respond to AIA requests for records. In our view, the argument that in exceptional cases the right of access to information may be directly applied to the Cabinet is a plausible and persuasive one.[2] Likewise, one may rely on the constitutional right to challenge the laws and practices of the courts in relation to access to their records.

(b) The relationship between the AIA and other legislation

Two provisions of the AIA deal with the relationship between the AIA and other legislation. Section 5 provides that the AIA applies to the exclusion of other legislative provisions that

[1] In the latter case the constitutional right to freedom of expression would appear to be more appropriate as the information to be divulged cannot be said to be 'held' for purposes of s 32 of the Constitution (see, for example, *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO & others* 2000 (4) SA 973 (C), which held that the blanket exclusion of broadcasting of the King Commission of Inquiry was contrary to s 16(1)*(a)* of the Constitution; see also *South Africa Broadcasting Corporation & others v The Public Protector & others* (unreported, TPD case no 13992/2001, relating to broadcasting of the arms deal investigations)).

[2] See below, 62–10. See also *AIA Commentary* para 4.17.

prohibit or restrict disclosure and that are 'materially inconsistent' with the AIA. It therefore appears that if another piece of legislation is materially inconsistent with the AIA, the provisions of the AIA will apply to the exclusion of such other legislation. Section 6 of the AIA makes it clear that the provisions of the Act do not restrict the application of other legislation set out in the schedules which provide for access to information.[1]

62.3 General Structure of the AIA

The AIA provides for requests for access to all records held by public bodies and those records held by private bodies which are 'required for the exercise or protection of any rights'.[2] The Act therefore generally follows the distinction set out in s 32(1)*(a)* and *(b)* of the Constitution, although the distinction between the state and other persons is replaced by a distinction between public and private bodies.[3]

The AIA could perhaps have been more accurately titled the Promotion of Access to Records Act. A 'record' is defined in s 1 of the AIA as recorded information, regardless of form or medium, in the possession or under the control of the relevant body, whether or not it was created by that body. Section 4 of the Act goes on to provide that every record in the possession or under the control of an official of, or an independent contractor engaged by, a body is regarded as being a record of such body. Accordingly, although the AIA only applies to recorded information, it is clear that it extends to a wide range of recorded information.

Requests for access to records must be made to the information officer of the public body or the head of the private body. The relevant person must then consider the request within the stipulated time period and, in certain circumstances, must notify affected third parties of the request and allow such third parties to make representations as to whether the request should be granted.[4] If the requester is dissatisfied with a refusal of access by a department of state or administration in any sphere of government, he or she must follow the internal appeal procedure provided in the AIA.[5] In addition, a dissatisfied requester can, on application, appeal a decision to refuse access to a court.[6]

The AIA then sets out a number of mandatory and discretionary grounds for refusal of requests for access to records of both public and private bodies. If the request for a record falls within a ground of refusal, the body that holds the record must or may refuse to disclose it, unless the public interest override applies.[7]

[1] The only legislation currently listed in the schedule are the National Environmental Management Act 107 of 1998 and the Finance Intelligence Centre Act 38 of 2001. For a detailed discussion of the operation of this provision to other legislation not listed in the schedule, see *AIA Commentary* paras 3.5–3.7.

[2] Sections 11(1) and 50(1) in relation to public and private bodies respectively.

[3] See below, § 62.6.

[4] The third-party notification and intervention procedures are set out in Chapter 5 of Part 2 and Part 3 of the AIA (ss 47–49 and 71–73).

[5] Chapter 1 of Part 4 (ss 74–77).

[6] Chapter 2 of Part 4 (ss 78–82). Section 79 provides that the Rules Board for Courts of Law must, within 12 months from the date on which that section came into force (that is, 9 March 2001), make and implement rules of procedure for the hearing of access to information appeals by the High Court and designated magistrates' courts. Prior to the implementation of such rules, applications may be lodged with a High Court or a court of similar status.

[7] Sections 46 and 70. See below, § 62.9.

The AIA additionally places some positive duties on public and private bodies to produce manuals identifying the types of records held by the body in order to facilitate requests and to encourage the Act's goal of participation and accountability.[1]

62.4 WHAT THE AIA IS NOT: DATA PROTECTION LEGISLATION

Prior to embarking on a more detailed discussion of the provisions of the AIA, it is important to point out what the AIA is not. It is not a data protection or privacy statute, like those which apply in a number of other jurisdictions,[2] which protects the right to privacy and other interests in data. Typically, data protection legislation performs three functions: it prevents unauthorized disclosure and use of private information; it allows for the correction of personal information held by another body; and it allows for access to one's own information (that is, for personal requesters). The focus of such legislation is on the protection of privacy and not on access to information.

The AIA does contain certain elements of data protection legislation in that it allows for personal requesters (defined as a requester seeking personal information about him- or herself) to obtain access to information. In addition, s 88 provides that public and private bodies must take reasonable steps to establish 'adequate and appropriate internal measures' providing for the correction of personal information, 'until legislation providing for such correction takes effect'.

Nevertheless, the AIA does not contain a general prohibition on the disclosure of certain categories of information. Rather, it is a request-driven statute which merely provides for mandatory grounds of non-disclosure in relation to requests under the Act.[3] The role of privacy in the AIA is merely a restriction (albeit a mandatory one) on the right of access to information.[4] In circumstances where private information is disclosed beyond the parameters of the AIA, affected persons would rather need to rely on the common law relating to breaches of privacy as well as the constitutional right to privacy.[5] The South African Law Commission is currently compiling a report with a view to preparing separate data protection legislation.

[1] See, for example, s 14 and s 51.

[2] See, for example, the United Kingdom Data Protection Act, 1984 and the Canadian Privacy Act, 1985. See also the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Information, 1980 and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981.

[3] This creates the somewhat anomalous situation that a head of a private body or information officer is obliged, in certain circumstances, not to disclose information requested under the AIA. Nevertheless, the same person may disclose such information voluntarily where there has been no such request (for example, when data is transferred within a corporate group or to business partners). This, of course, also opens the way for abuse by bodies informally granting requests outside the Act, to the detriment of legitimate third-party interests.

[4] See below, § 62.8*(a)*.

[5] Privacy protection provisions were included in the initial version of the AIA, that is, Part IV the Open Democracy Bill, but were excluded at a later stage.

62.5 BLANKET EXCLUSION OF CERTAIN RECORDS

The AIA excludes certain categories of records from its application. Such exclusions have important consequences for the right of access to information as they have the effect that these categories of records may not be requested under the AIA even if the public interest override applies. We will briefly discuss each of these exclusions in turn.

(a) Records requested for criminal or civil proceedings

Section 7(1) of the AIA stipulates that the Act does not apply to a record that is requested for purposes of pending criminal or civil proceedings, where the production of or access to that record is provided for in any other law.[1] This provision relates to both public and private body requests. The provision indicates that the AIA was intended to have no impact on the current rules relating to discovery and compulsion of evidence at criminal and civil trials.[2] There are three elements that will have to be satisfied for s 7 to apply: the request must be for the purpose of proceedings, the request must be after the commencement of such proceedings, and the production of the records must be provided for in another law.[3]

In a case decided before the AIA, *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others*,[4] Davis J had 'serious doubts' as to whether the constitutional right of access to information could be used to justify a principle of discovery before the time provided in the Court Rules, which 'would mean that a defendant who falls within the scope of s 32 [of the interim Constitution] must lay bare its entire case before any action is in fact launched'. While discovery is not so extended, since the exemption applies only where litigation has commenced and since reasons for requests to public bodies do not need to be furnished, the use of the AIA in pre-discovery contexts cannot be ruled out.

(b) Records of Cabinet

Section 12*(a)* provides that the AIA does not apply to records of the Cabinet and its committees. The purpose of this exclusion appears to be to perpetuate the Westminster tradition of Cabinet secrecy, a part of which is that the Cabinet as a whole is indivisibly responsible for the body's actions. As discussed above, this complete exclusion of a certain category of records from the application of the Act may arguably be unconstitutional.[5] There

[1] Section 7(2) goes on to provide that any record obtained in a manner which contravenes s 7(1) is not admissible in the relevant criminal or civil proceedings, unless the exclusion of such record would, in the court's opinion, be detrimental to the interests of justice.

[2] The Judicial Matters Amendment Bill [B43-2001] intends to amend s 7 and the index of the AIA to make it clear that the section applies to records *requested* and not records *required*.

[3] Discovery is currently provided for in Rule 35 of the Uniform Rules of the High Court and Rule 23 of the Magistrates' Court Rules. Generally speaking, discovery can only be obtained after the close of pleadings.

[4] 2000 (3) SA 119 (C) at 135–6. It should, however, be noted that s 7(1) only applies to requests made after commencement of proceedings, whereas Davis J was dealing with pre-action discovery.

[5] See *AIA Commentary* para 4.17, where the authors express the view that this provision is not unconstitutional. A similar exclusion is contained in s 34 of the Australian Freedom of Information Act, 1982. See also J White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65 at 73, who argues that this exclusion is unconstitutional.

seems little justification for treating Cabinet records with such a degree of secrecy. In a legal system in which the right of access to all information held by the state is constitutionally protected, Cabinet should at least be required to disclose its records where the public interest in disclosure outweighs the instrumental value of Cabinet secrecy.[1] It is unacceptable for Cabinet secrecy, in effect, always to trump the right of access to information, particularly given the fact that such information goes to the heart of democratic decision-making.

(c) Records of judicial functions of courts

The AIA does not apply to a record of the 'judicial functions' of a court referred to in s 166 of the Constitution,[2] a special tribunal established in terms of s 2 of the Special Investigating Units and Special Tribunals Act[3] or a judicial officer of such court or tribunal.[4] The relevant judicial functions are not defined in the Act. It is submitted that they should be restricted to those functions of the judiciary that relate to the hearing or the determination of legal proceedings.[5]

(d) Records of members of Parliament

The AIA does not apply to a record held by an individual member of Parliament or of a provincial legislature 'in that capacity'.[6] For similar reasons to those discussed in relation to the Cabinet exclusion, this exclusion may be unconstitutional.

62.6 The Distinction between Public and Private Bodies

For purposes of deciding on requests for access to information the AIA adopts the distinction between a public and private body.[7] The definition of a 'public body' is substantially similar to the definition of an organ of state in s 239 of the Constitution, and reads as follows:

[1] In the English case of *Attorney-General v Jonathan Cape Ltd* [1996] QB 752 the Attorney-General sought to restrain a former Cabinet member from publishing an account of various Cabinet discussions, on the basis that such disclosure would amount to a breach of a duty of confidence. Lord Widgery CJ held that, although Cabinet discussions were confidential, the government's interest in maintaining confidence had to be balanced with the public interest in the freedom to impart information in a democratic society. In other words, the public interest in protecting Cabinet confidences was not indefinite.

[2] Section 166 of the Constitution lists the Constitutional Court, the Supreme Court of Appeal, the High Courts, the magistrates' courts and 'any other court established or recognized in terms of an Act of Parliament'.

[3] Act 74 of 1996.

[4] Section 12*(b)* of the AIA.

[5] See *AIA Commentary* para 4.18.

[6] Section 12*(c)* of the AIA.

[7] This distinction is different to the distinction between 'the state' and other bodies contained in s 32(1) of the Constitution. It is arguable that the state, properly construed, does not include all public bodies (see *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C) at 133, 2000 (5) BCLR 553 (C): '[T]he definition of organ of State in the 1996 Constitution expands the definition beyond [institutions which form part of the state] for it includes within the definition those institutions or functionaries who might otherwise be outside of the State but which exercise public power.' Davis J therefore concluded that the TRC was an organ of state even though it 'is not under the direct control of central government'). For example, an institution which performs a public regulatory function may be independent of the state. This development extends the effect of the right to access to information and is to be welcomed.

'*(a)* any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when —

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

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

Paragraph *(a)* of the definition would include, for example, the Department of Agriculture and a local municipality.[1] Paragraph *(b)*(i) would include the Judicial Service Commission and the Auditor-General.[2] Paragraph *(b)*(ii) expands the scope of public bodies much wider and would cover entities such as the Financial Services Board, the Independent Communications Authority of South Africa and other entities exercising public power or performing public functions in terms of legislation.[3] This could include, for example, financial exchanges, universities and parastatals such as Eskom, Telkom and Transnet.[4]

In relation to the latter category it is important to note that s 8(1) of the AIA provides that such a public body may in one instance be a private body and in another a public body, depending on whether the relevant record relates to the exercise of a function as a public body or as a private body.[5] For such bodies the distinction between a public and private body is therefore less important. The important enquiry is rather whether the function to which the record relates is a public or private one.[6]

The crucial question in establishing whether a body, other than a state department or constitutional body, is a public or private body is therefore whether it is 'exercising a public power of performing a public function in terms of legislation'.

In light of the similarity between the definition of public body and that of organ of state in the Constitution it may be useful to have regard to the number of cases relating to the meaning of 'organ of state' under the interim Constitution. Although there was some initial

[1] See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 27 (the Independent Electoral Commission is not an organ of state within the national sphere of government).

[2] The Truth and Reconciliation Commission would arguably fall within this category (see Davis J in *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C), holding that the TRC forms part of the state for purposes of the access to information clause). Davis J at 131–2 emphasized that, amongst other things, the commissioners are appointed by the President, s 41 of the Promotion of National Unity and Reconciliation Act 34 of 1995 provides that the State Liability Act 20 of 1957 applies to the Commission, and the TRC's function was mandated by the postscript to the interim Constitution.

[3] See *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, where the court held that the South African Telecommunications Regulatory Authority (the predecessor to ICASA in relation to the regulation of telecommunications) amounted to an organ of state.

[4] See *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[5] Section 8(1) provides for the same position in relation to private bodies. Section 8(1), however, does not apply to those public bodies falling within paras *(a)* and *(b)*(i) of the definition and applies only to para *(b)*(ii). This is important as it would arguably be unconstitutional for s 8(1) to apply to government departments as this would, in effect, mean that a requester would, in certain instances, be entitled to access to information held by the state only where it is necessary to exercise or protect rights. If this were the case, the AIA would not properly give effect to the right in s 32(1)*(a)* of the Constitution. To the extent that any body falling under para *(b)*(ii) of the definition constitutes part of 'the state', the operation of s 8(1) could be constitutionally problematic.

[6] This enquiry will often be a difficult one, particularly where a record may be prepared or kept for numerous purposes, some of which are public and others are private. Additionally, the requester may face an issue in choosing which forms (public body request or private body request) to use. Requests may of course be made in the alternative.

disagreement, our courts generally adopted the control test as to whether an institution amounted to an organ of state for purposes of the interim Constitution. In terms of this test an institution, which was not a state department, was an organ of state if it fell under the control of the state in one way or another.[1] It is, however, important to bear in mind that, whereas the interim Constitution defined an organ of state as 'any statutory body or functionary', both the final Constitution and the AIA shift the focus to the public nature of the function or power.[2] Accordingly, the cases decided under the interim Constitution are only of limited assistance in determining whether a body amounts to 'public body' under the AIA.[3] The focus should rather be on whether the function or power performed by the relevant entity is public in nature.[4]

An important consideration in assessing whether a body is exercising a public power or performing a public function in terms of legislation is whether the institution is obliged to act in the public interest. As Lawrence Baxter states,[5] discussing whether an institution is a 'public authority':

> 'Ultimately we are driven to an assessment of whether the institution concerned is under a duty to act in the public interest and not simply to its own private advantage.'

This emphasis on public interest is also consistent with the judgement of the Witwaterstrand Local Division in *Goodman Bros (Pty) Ltd v Transnet Ltd.*[6]

An additional issue will be whether the public function is exercised 'in terms of national legislation'. For instance, the function of providing universal service in terms of a cellphone licence granted to a private body in terms of telecommunications legislation may not be a function undertaken 'in terms of' that legislation but rather undertaken in terms of the licence.

[1] See, for example, *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & others* 1996 (3) SA 800 (T); *Oostelike Gauteng Dienste Raad v Transvaal Munisipale Pensione Fonds* 1997 (8) BCLR 1066 (T). See above, ch 10 'Application' for a detailed discussion of these cases.

[2] Section 233(1)(x) of the interim Constitution. See Y Burns *Administrative Law under the 1996 Constitution* (1998); and see I M Rautenbach & E F T Malherbe *Constitutional Law* 2 ed (1996) 299.

[3] See, however, *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, which applied the control test in finding that SATRA constituted an organ of State under the final Constitution. See also *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) and *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T) at 1177, in which Van Dijkhorst J held that the definition in the final Constitution was not intended to differ materially from that under the interim Constitution and the control test thus remained determinative.

[4] A useful analysis of the term 'public function' is set out in De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5 ed (1995) at 167–8: 'A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services . . . They also do so if they regulate commercial and professional activities to ensure compliance with proper standards.'

[5] *Administrative Law* 100.

[6] 1998 (4) SA 989 (W). In this case Blieden J, in concluding that Transnet amounted to an 'organ of state' in terms of s 239 of the Constitution, stated at 995–6: 'Of particular importance are the provisions of ss 15 and 17 of [the Legal Succession to the South African Transport Services Act 9 of 1989], that the respondent is required to provide a service "that is in the public interest" and can be directed by the Minister not to act contrary to the strategic or economic interests of the Republic. In my view, this brings it squarely within the definition of an organ of State as required by s 239 of the Constitution in that it performs a public function in terms of the relevant legislation.'

62.7 REQUIRED FOR THE EXERCISE OR PROTECTION OF ANY RIGHTS

Section 50(1) of the AIA, following the lead of the constitutional right, provides that one can only obtain access under the Act to the record of a private body if such record is 'required for the exercise or protection of any rights'. The existence of a right and a link between the request and the protection or promotion of that right is therefore necessary in order to obtain access to a record of a private body.

The term 'rights' should not be limited to constitutional rights but should rather be read widely as including all legal rights whether constitutional, statutory or arising in common law. This was the position taken by Cameron J in *Van Niekerk v City Council of Pretoria*,[1] which was subsequently endorsed by the Supreme Court of Appeal.[2]

In another respect the term 'rights' could be broadly interpreted, namely, it should include circumstances where the state has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the state.[3] In this case the term 'rights' moves closer to the meaning of legitimate expectations.

The other important term in relation to private bodies is 'required'. Several different interpretations of this term are possible.[4] Although often textually linked to the term 'required', the interpretations vary in their treatment of two analytically distinct ideas: the element of need and the element of relevance.[5] For present purposes, the element of need is most important. A strict interpretation of this element would demand that the information be necessary for the exercise or protection of a right. A more expansive interpretation would demand that the information be 'reasonably required', where all the circumstances promoting

[1] 1997 (3) SA 839 (T).

[2] *The Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at para 27. During the course of his judgment Cameron J described the previous decision in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & others* 1996 (3) SA 800 (T), which held that 'rights' was limited to constitutional rights, as 'clearly wrong'. For the protection of at least statutory rights, see *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 300B–E, 1995 (9) BCLR 1191 (C) and *Balmoral Investments (Edms) Bpk v Minister van Mineraal- en Energiesake en andere* 1995 (9) BCLR 1104 (NC) (treating a statutory right of appeal under s 57(1) of the Minerals Act 50 of 1991 as falling within the category of rights protected by IC s 23, but finding that no such right of appeal existed against the action of a Regional Director). See also *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 913E–F; *NISEC (Edms) Bpk v Western Cape Provincial Tender Board & others* 1998 (3) SA 228 (C), 1997 (3) BCLR 367 (C) at 374H; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W), 1997 (10) BCLR 1429 (W) (contractual and delictual rights).

[3] See the discussion of *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at 106n10. See below, ch 25 'Just Administrative Action'.

[4] *Shabala v Attorney-General, Transvaal & another; Gumede & others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 624C–D, 1994 (6) BCLR 85 (T): 'the word "required" is capable of a number of meanings ranging from "desired" through "necessary" to "indispensable" . . . To my mind, "required" in s 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than "useful" . . . or "relevant" . . . or simply "desired".'

[5] For a detailed discussion of both the elements of need and relevance, and support for a generous approach to both elements, see the previous edition of this chapter. A strict interpretation of the element of relevance might demand that the information be personally relevant to the person asserting the right of access rather than relevant to the exercise or protection of that person's rights. A generous interpretation of this element would demand only that the information be relevant to the exercise or protection of the relevant right. The generous interpretation is supported by the text of s 32(1)*(b)* of the final Constitution, which refers to 'any rights' and not merely those of the requester.

need and relevance may be examined.[1] It is the latter, generous approach which has found favour with our courts. Such a generous interpretation is consistent with the constitutional value of openness and is to be welcomed.[2]

There is a potential further weakening of the right of access to information held by private bodies within the term 'exercise or protection'. Courts may read narrowly the forum in which a right is to be exercised or protected. In particular, access may be granted only where such information is required to exercise or protect one's rights through litigation, that is, through formal action in the courts. However, a broader reading is possible and, it is submitted, desirable. As the decided cases have recognized, one can also exercise or protect rights through informal action before administrative bodies, in front of a political forum, and through the public media.[3]

At a minimum, applicants for access to information would need to comply with the following requirements of the Supreme Court of Appeal in *The Cape Metropolitan Council v Metro Inspection Services*:[4]

> 'Information can only be required for the exercise or protection of a right . . . It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.'

A number of cases which have turned on the issue of whether the relevant information is 'required' for the exercise or protection of rights, relate to requests for information which the requester believes will reveal whether the requester has a legal claim (to either claim damages or to take a particular administrative decision on review).[5] Our courts have generally adopted two different approaches to this issue.

[1] See *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 299D–300F, 1995 (9) BCLR 1191 (C); *Nortje & another v Attorney-General (Cape) & another* 1995 (2) SA 460 (C) at 474H; *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 913G–H; see, in particular, the discussion of Cameron J in *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) at 842J–846G; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W), 1997 (10) BCLR 1429 (W); *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C).

[2] See ss 1*(d)*, 36(1) and 39(1)*(a)* of the final Constitution.

[3] See *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 300E, 1995 (9) BCLR 1191 (C) ('It is to be noted that s 23 of the [interim] Constitution does not limit in any way the rights for the exercise or protection of which an applicant is entitled to seek access to officially held information, nor is there any limitation or restriction in respect of the manner or form in which such exercise or protection will take place'); *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 642; 1994 (1) BCLR 75 (E); *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) at 183F–G, 1997 (8) BCLR 1048 (T).

[4] *The Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at para 28.

[5] These cases arose under the right of access to information against the state in the interim Constitution or Schedule 6 of the final Constitution.

The one approach requires the applicant to make out some *prima facie* case that its rights have been infringed. For example, in *Goodman Bros (Pty) Ltd v Transnet Ltd*[1] Blieden J refused to order the disclosure of certain documents relating to a tender because no basis has been established by the applicant that its constitutional rights had been infringed.[2]

A similar approach was adopted in another Witwatersrand Local Division decision[3] by Heher J, who stated that persons were only entitled to information in terms of s 23 of the interim Constitution if they could

> 'show a reasonable basis for believing a disclosure of documents in the possession of the State or an organ of State will assist him to protect or exercise a right, however derived . . . Even allowing for a broad and generous purposive approach to constitutional interpretation . . . the section is not capable of meaning that access should be ordered if insight into the document is required in order to determine whether a right needs to be protected. Desirable as that may be in theory, it seems to me to be commercially impracticable and wide open to abuse.'

In two earlier cases our courts adopted a more liberal approach to this issue in holding that an applicant was entitled to access to information in order to establish whether he or she had a claim, without the need to show the existence of a *prima facie* case. In *Van Niekerk v Pretoria City Council*[4] Cameron J held that the applicant was entitled to access to a report for purposes of establishing whether the applicant had a delictual claim against the local council in relation to a power surge which caused the applicant damage. As the learned judge stated:

> 'In the present case, there can be no doubt that having sight of the electricity department's report would assist the applicant in either proceeding with or abandoning his claim against the respondent. The report will disclose why the respondent considers that the report exonerated it of negligence. It may also reveal information which would advance the applicant's claim. Either way, disclosure will promote an early settlement of the dispute and bring the envisaged litigation, by settlement or abandonment, to a short, sharp end. In this sense, the applicant can in my view be said reasonably to "require" the report.'[5]

Similarly, Schwartzman J, in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*,[6] held that an unsuccessful tenderer was entitled to access to the other tenders and other relevant documentation, in order to assess whether its rights to procedural fairness had been infringed. During the course of its judgement, the court expressly rejected the argument that the applicant must show the appearance of an irregularity in the tender process in order to be entitled to the documentation:

> 'The applicant clearly requires the documents . . . in order to determine whether the tender process complied with the requirements of s 33 of the Constitution. Until it has had sight thereof, it cannot decide whether it has any claim for relief against the respondent. Sight of the documents could well result in forestalling any further litigation which is in itself a good reason for ordering their

[1] 1998 (4) SA 989 (W).

[2] During the course of his judgment the learned judge remarked as follows at 1000–1: 'It seems that the whole basis for the present portion of the application is for the applicant to gather information which it might or might not use in further legal proceedings which it might or might not embark upon . . . [I]t is my view that the applicant needs to have more than just an unsubstantiated apprehension of harm to it before it is to be entitled to [claim access to the relevant information].'

[3] *SA Metal Machinery Co Ltd v Transnet Ltd* (unreported, WLD, 22 March 1998) at page 11.

[4] 1997 (3) SA 839 (T).

[5] At 848.

[6] 1998 (2) SA 109 (W).

> production at this stage . . . To hold that a tenderer such as the applicant is required to lay a jurisdictional basis before being able to assert his constitutional right to information would serve to undermine the basis on which I am required to interpret the Bill of Rights.'[1]

A particularly interesting case in this context is the decision of the Cape Provincial Division in *IFP v TRC*.[2] In this case the IFP requested access to relevant documentation of the TRC in order to establish whether it had a claim for defamation against the TRC. Of particular relevance here was that the relevant legislation[3] provides that persons who perform tasks on behalf of the Commission may only be liable if they act in bad faith. As a result of this statutory exclusion of liability the applicants contended that they could only assess whether they had an action in law if they had sight of the relevant documents on which the TRC based its actions. Davis J, in principle, appeared to endorse this approach, stating that the applicants were entitled to information which would enable them 'to launch proceedings in an informed fashion' and held that:

> 'In the present case the question is thus whether information is reasonably required for the enforcement of applicants' rights in that, based on such information, applicants can obtain advice as to whether they have a claim and can then frame their pleadings in a manner which discloses a cause of action'.[4]

This liberal approach was, in our view, particularly appropriate in determining whether an applicant was entitled to access to information against the state in terms of interim Constitution. This is because such an approach better facilitates the underlying rationales of access to information against the state, that is, open and accountable, democratic governance. Nevertheless, this liberal approach may be less appropriate in deciding disputes relating to access to information held by private bodies under the final Constitution, where the focus is more on the protection of rights and less on the promotion of democracy, than in the public sector.

One case effectively avoids substantive limitations analysis by determining that there is no right at issue to be protected or exercised, exploiting the particular language (and the use of the past tense) of the internal limitation of the interim Constitution's formulation of the right. The danger of this 'no right to be protected' approach is demonstrated pointedly by *Tobacco Institute of Southern Africa & others v Minister of Health*.[5] This case essentially disregards any role for the right of access to information to play in a deliberative democracy

[1] At 119. This approach was subsequently endorsed by the Supreme Court of Appeal in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2000 (1) SA 853 (SCA) at 867, 2001 BCLR 176 (SCA). This liberal approach is also consistent with the approach of the SCA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at paras 28–9.

[2] *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C).

[3] Section 41(2) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[4] At 135. Davis J, however, expressed grave doubts as to whether the right of access to information gave rise to a general right to pre-action discovery. Interestingly, the learned judge rejected the argument that an ordinary defamation plaintiff is entitled to relevant information held by the defendant in order to establish whether the defendant had acted reasonably, in light of the new defence to defamation of reasonableness (see above, ch 20 'Expression'): '[T]o suggest that s 32 of the Constitution can now be interpreted so as to impose upon defendants in such cases an obligation to provide information to plaintiff and therefore to disclose the basis for their defence is indeed to extend the right of information far beyond that which is reasonably required for the enforcement of applicants' rights, that is to be able to launch proceedings in an informed fashion.'

[5] 1998 (4) SA 745 (C), 1999 (1) BCLR 83 (C).

by completely denying a multi-pronged request for information with regard to proposed legislation on the rationale that proposed legislation can affect rights only after it becomes enacted into law. With respect, this case eviscerated one aspect of the core rationale for the right of access to information — participation in democratic decision-making.[1] The preferable approach would have been instead to examine which of the requests for information were validly refused and which not. For instance, with the use of the exemptions in the AIA much, if not most, and perhaps all, of the information sought could have been validly withheld.[2]

62.8 GROUNDS OF REFUSAL

Like all other constitutional rights, the right of access to information is not absolute and may be limited, provided such limitation complies with the limitation clause of the Constitution, in that it is provided for by a law of general application and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[3] The AIA, which is intended to give effect to that constitutional right, provides such a law of general application in at least most instances and allows for certain mandatory and discretionary grounds of non-disclosure. Such grounds will only withstand constitutional scrutiny if they constitute reasonable and justifiable limitations on the right.

In interpreting the grounds of refusal, as with interpreting the Act as a whole, it should be borne in mind that the primary object of the AIA is to promote openness and transparency through giving effect to the right of access to information. This should result in courts adopting a restrictive approach to the grounds of non-disclosure. As Currie & Klaaren state:[4]

> 'Access to information is the normal course. The Act is intended to give effect to the constitutional right of access to information. Access should only be denied where the denial is clearly justified. Any doubts as to whether the withholding of particular information is justified should be resolved in favour of disclosure.'[5]

A detailed discussion of all the grounds of non-disclosure is beyond the scope of this chapter.[6] We will, however, briefly discuss three of the grounds set out in the Act which raise particularly constitutional legal issues: privacy, national security and defence, and the operations of public bodies.

[1] This rationale, however, does not hold in the private sector.

[2] The Constitutional Court case of *Mphahlele v First National Bank of South Africa* 1999 (3) BCLR 253 (CC) also entertained an access to information claim, but denied it on the basis of the internal limitation. This case upheld the Supreme Court of Appeal's practice of not giving reasons for the dismissal of a petition to the Chief Justice for leave to appeal. The expressed rationale of the court was that since the petition was final, there was no right to be exercised or protected.

[3] Section 36 of the 1996 Constitution. See above, ch 12 'Limitations'.

[4] See *AIA Commentary* para 2.10.

[5] It should, however, be borne in mind that one specific object of the Act is to give effect to the constitutional right, subject to justifiable limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance (s 9*(b)*(ii)). Section 3(2) of the Australian Freedom of Information Act, 1982 specifically adopts a restrictive approach to exclusions, in providing that 'any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest possible cost, the disclosure of information'.

[6] For such a discussion, see *AIA Commentary* ch 8.

(a) Privacy

The protection of the privacy of third parties is an internationally recognized restriction on freedom of information.[1] In the context of the South African Constitution, this ground of non-disclosure is particularly important as it gives effect to the constitutionally protected right to privacy.[2] In principle, this ground of non-disclosure (which amounts to a limitation on the right of access to information) is therefore reasonable and justifiable. Nevertheless, interpreting this ground of non-disclosure in a constitutionally acceptable way will involve a careful balancing of the values of these two constitutional rights, the right of access to information and the right to privacy.

The text of the relevant ground of refusal in the AIA provides that a body must refuse a request for access if disclosure 'would involve the unreasonable disclosure of personal information about a third party, including a deceased individual'.[3] 'Personal information' is broadly defined as 'information about an identifiable individual'. The definition goes on to list a number of examples of personal information, including information relating to race, gender, pregnancy, medical, criminal or employment history, address, fingerprints or blood type, personal opinions, views or preferences, and private or confidential correspondence.[4] The relevant sections provide that this ground of refusal does not apply to certain information, including where the relevant individual has consented in writing to its disclosure, he or she was informed at the time that it was given to the relevant body that it belongs to a class of information that would or might be made available to the public; it is already publicly available; and, importantly, information 'about an individual who is or was an official of a public body and which relates to the position or functions of the individual'.[5]

[1] See, for example, the Australian Freedom of Information Act and the jurisprudence of the European Court of Human Rights interpreting art 10(2) of the European Convention on Human Rights.

[2] Section 14 of the Constitution. See generally above, ch 18 'Privacy'.

[3] Sections 34 and 63 for public and private bodies respectively.

[4] Section 1 of the AIA provides that 'personal information', includes, but is not limited to:

'*(a)* information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;

(f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the individual;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but excludes information about an individual who has been dead for more than 20 years. . . .'

[5] Sections 34(2) and 63(2). The latter exception is particularly important as it gives effect to the related principles of open and accountable government and the diminished expectation of privacy of public officials. The privacy of such officials may not be used to frustrate access to information about that individual, which relates to that person's official functions. This type of information is obviously important in promoting an informed electorate and enhancing participatory democracy.

It is important to note that the AIA only prohibits the 'unreasonable' disclosure of personal information. The crucial question in applying these provisions will therefore be whether, in the relevant circumstances, disclosure will be unreasonable. The first stage of this enquiry will be whether the disclosure amounts to an infringement of privacy in that it is a disclosure of private facts.[1] This will only be the case where the third party can be said to have a legitimate or reasonable expectation of privacy in relation to the particular information.[2]

The next stage is to determine whether the disclosure is 'unreasonable'. This requires an examination of all the surrounding circumstances, including the strength of the third party's privacy interest, the nature of the particular record and the importance of the purpose for which it is requested.[3] It is submitted that our common law, as interpreted in the light of the Constitution, could play an important role in this enquiry as the common-law test for a breach of privacy is essentially the same. Under the common law a disclosure of private facts would only be wrongful if it is unreasonable in the circumstances and if one of the established defences is not met, including consent, qualified privilege, and truth in the public interest.[4] It is difficult to contemplate a situation in which disclosure would not be wrongful under the common law but would be prohibited under the AIA. For example, if the public interest in disclosure outweighs the individual's privacy interest, disclosure would not be 'unreasonable'.[5]

[1] An alternative approach would be that ss 34 and 63 of the AIA contemplate that any disclosure of 'personal information' (other than the categories of information set out in subsecs (2)) amounts to the disclosure of private facts. The only relevant question in each case is therefore whether such disclosure of private facts is reasonable in the circumstances. We, however, believe that the suggested preliminary enquiry is preferable in that the aim of the relevant sections, as their headings indicate, is to protect the privacy interests of third parties. If the privacy rights of a third party are not undermined by disclosure, this mandatory ground of non-disclosure would not be justified under the Constitution. In any event, the strength of the third party's privacy interest plays an important role in determining whether disclosure will be unreasonable.

[2] See above, ch 18 'Privacy' and especially the Constitutional Court in *Bernstein v Von Wielligh Bester NO* 1996 (2) SA 751 (CC) para 75: '[T]he party seeking suppression of the evidence must establish both that he or she has a *subjective expectation* of privacy and that the society has recognized that expectation as *objectively reasonable* . . . It seems to be a sensible approach to say that the scope of person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.' One way of understanding the exceptions in ss 34(2) and 63(2) is that no legitimate expectation of privacy arises in relation to such information. See also G E Devenish, K Govender and H Hulme *Administrative Law and Justice in South Africa* (2001) at 203–4.

[3] A similar balancing approach is applied by the United States Courts in interpreting the Federal Freedom of Information Act. In *US Department of Justice v Reporters Committee for Freedom of Expression et al* 489 US 749 (1989) the United States Supreme Court stated that 'whether disclosure of a private document . . . is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny" . . . rather than on the particular purpose for which the document is being requested'. See also *Department of Airforce v Rose* 425 US 352 (1977).

[4] See, generally J Neethling, J M Potgieter & P J Visser *Neethling's Law of Personality* (1996) at 239–77.

[5] It should be noted that the public interest contemplated here is broader than the public interest override contained in the AIA (see below, § 62.9). For example, while the disclosure of malfeasance has long been recognized as being in the public interest, this would not necessarily amount to a substantial contravention of law contemplated in the statutory public interest override. This is also consistent with the position in the United Kingdom that a defence to an action for breach of confidence exists if the public interest in disclosure outweighs the public interest in preserving the confidence (see, generally, G Robertson and A Nicol *Media Law* 3 ed (1992) 183–7 and D Feldman *Civil Liberties and Human Rights in England and Wales* (1993) 438–41).

(b) Defence, security and international relations

This discretionary ground of non-disclosure, contained in s 41 of the AIA, applies only to public bodies. This provision provides, in s 41(1), that the information officer of a public body may refuse a request if disclosure 'could reasonably be expected to cause prejudice to' the defence, security or international relations of the Republic.[1] Subsection (2) goes on to include a number of examples of specific records.[2] Section 41(4) goes further in providing that the information officer may refuse to confirm or deny the existence or non-existence of the record if such a disclosure would harm South Africa's defence, security or international relations.

National security is an important concern for any state. Instances where a genuine threat to national security or defence outweighs the constitutional right of access to information would accordingly constitute a justifiable limitation on that constitutional right.[3] Such an approach is consistent with the approach in foreign jurisdictions[4] and international conventions.[5] For example, in the Canadian decision of *Zanganeh v Canadian Security Intelligence Service*[6] the court held that the refusal to disclose information relating to national security was a justifiable limitation under the Canadian Charter's limitations clause, notwithstanding the fact that the Canadian government had made a false denial that it did not have the relevant information in its possession.

In the context of national security the important terms which require interpretation in s 41 of the AIA are 'reasonably be expected to cause', 'prejudice', 'defence' and 'security'. In interpreting these terms our courts should be careful to strike a proper balance between this

[1] Information which could prejudice the international relations of the Republic is subject to a sunset provision that this ground cannot be relied upon if the record came into existence more than 20 years before the request. Information which could prejudice defence or security is not, however, subject to such a provision.

[2] These records are records including information relating to: military tactics, strategy, exercises or operations 'undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities'; the quantity, characteristics, capabilities, vulnerabilities or deployment of weapons; the characteristics of any military force and information held for the purposes of defence intelligence. The crucial issue is whether the list is of information that can be presumptively assumed to reasonably be expected to cause prejudice or whether the list is just a set of examples of the type of information that *could* have that effect, that is, if a record contains information about military tactics can it be refused for this reason, or is it additionally necessary for the public body to show that its disclosure can reasonably be expected to cause harm to defence? See *AIA Commentary* paras 8.89–8.95 for a more detailed discussion of this ground of non-disclosure, concluding that s 41(2) is presumptive.

[3] As Cameron J stated in the *Commission of Inquiry into Armscor Transactions, Ruling on in camera proceedings, (7 November 1994)* the concept of national security 'may be invoked to inhibit the public debate on the problem and the State's response to it. Thus, in South Africa, massive legislation was introduced under apartheid to preclude comment on the armaments and nuclear industries and other issues. In our view, the Commission needs to find a balance between too broad and too narrow a determination of national security and the national interest. In finding that balance, as we have indicated, we consider that commercial interests related to the country's future well-being and prosperity may play a legitimate role.'

[4] For example, in the context of freedom of expression, the United States Supreme Court adopted the 'clear and present danger' test in *New York Times v United States* 403 US 713 (1971), in holding that the United States administration had not justified its attempt to prevent publication of the so-called 'Pentagon papers'.

[5] See, for example, art 19 of the International Covenant on Civil and Political Rights, 1966 and art 10 of the European Convention on Human Rights, 1950.

[6] (1988) 50 DLR (4th) 747.

compelling interest and the constitutional right of access to information.[1] In striking the correct balance it is important to stress that access to information is a fundamental right. As Cameron J stated in the *Armscor* inquiry, assessing whether there was 'reason to believe' that the national security of South Africa may be threatened if the hearing is not conducted *in camera*:

> 'Reasonableness as a standard of public conduct in South Africa now requires that decision-makers should have due regard to appropriate constitutional standards and principles. These include in the present case the value of openness and visibility in the government and official processes. In other words, an assessment whether the reasonable justification test has been fulfilled may include, in the weighing process, giving consideration to the public's constitutional right to know, and the constitutional value of an open society. To put the matter differently, the public's right to know should not be omitted from the assessment whether the "reasonable justification" standard has been fulfilled.'[2]

Courts should, in particular, closely scrutinize an assertion of national security in view of the long history of the abuse of this ground in South Africa and elsewhere and in view of the conflict between the notion of national security and the constitutional value of openness.[3] It is all too easy for the government simply to assert national security as a ground for non-disclosure, particularly where the very existence of the record need not be confirmed under this ground. As David Feldman states:

> 'The security of the state and its institutions is an important public interest. Yet the law which buttresses those institutions is inevitably viewed with suspicion by democrats and libertarians, as a threat to state security can too easily be asserted by those in power, as a justification for restricting a wide range of freedoms in ways which protect the interests of the governing party rather than the public.'[4]

(c) Operations of public bodies

Section 44 of the AIA provides that the information officer of a public body may refuse access to a record if that record relates to the operations of the public body in a particular manner. Section 44(1)*(a)* applies if the record contains an opinion, advice, report or recommendation or an account of a consultation, discussion or deliberation 'for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law'. Paragraph *(b)* applies if 'the disclosure of the record could

[1] This balancing is implicit in the approach of Cameron J in the final Armscor inquiry judgment, in which he 'accept[ed] that no decision as to disclosure in this area can be without risk or harm, or without anxiety as to its consequences . . . [T]hat risk, in the present case, however, is not sufficient to entitle us to bar from the press and the public an important right to examine our past, including our past armaments dealings, whether or not that examination causes embarrassment, and even complexity, for other governments, and indeed for the present Government of National Unity.' (*Commission of Inquiry into Armscor Transactions, Ruling on in camera application — country classification for armaments trade: log 17 Pam 19.*)

[2] It should be noted that Cameron J specifically stated that this consideration may 'have a marginal influence' in that case. Nevertheless, it is submitted that its emphasis is useful in interpreting s 41 of the AIA.

[3] As G E Devenish, K Govender & H Hulme state in *Administrative Law and Justice in South Africa* (2001) at 192: '[I]n South Africa, there is no doubt that the courts will meticulously scrutinize any claim that information is privileged by virtue of considerations of national security as a result of the manifest abuse of national security as a cloak for covering up human rights violations and abuses that were committed on an inordinate scale during the era of white minority rule.'

[4] D Feldman *Civil Liberties in Human Rights in England and Wales* (1993) at 682.

reasonably be expected to frustrate the deliberative process in a public body or between public bodies' by inhibiting candid communication or deliberation; or the disclosure, by prematurely disclosing a policy or contemplated policy, could 'reasonably be expected to frustrate the success of that policy'.

This ground of non-disclosure protects the disclosure of public decision-making and therefore draws on the purposes behind the state communications privilege.[1]

The most striking feature of this ground of non-disclosure is the breadth of para *(a)*. On the face of it, this provision will permit public bodies to refuse to disclose almost all information which is formulated for the purposes of formulating a policy or taking a decision, including decisions which would constitute administrative action for purposes of the just administrative action clause.[2]

While the breadth of this provision may be constitutionally suspect, it is important that it is restrictively interpreted. In this regard, there are three respects in which it should be restrictively interpreted. First, this provision only protects pre-decision, and not post-decision, documents. A post-decision document cannot be 'for the purpose of assisting' in formulating policy or taking a decision. Thus, a pre-decision document which is adopted or incorporated in an administrative decision should also lose its protection.[3] Secondly, this ground should not ordinarily protect internal secret law, working law or administrative guidelines as such documents would constitute a policy or decision in themselves.[4] Thirdly, this provision should ordinarily be limited to documents containing opinion and not those which set out facts. These restrictive interpretations of the ground of non-disclosure are justified by the fact that the records contemplated in this ground go to the heart of open government and democratic functioning.

Section 44(2) further provides that the information officer may refuse a request if disclosure could 'reasonably be expected to jeopardize the effectiveness of a testing, examining or auditing procedure or method used by a public body'; or if the record contains evaluative material and disclosure would breach a promise to hold the information in confidence. Subsection (2)*(c)* provides that the information officer may refuse access if the

[1] Cases interpreting the executive privilege in the content of the US FOIA have distinguished three purposes behind the state communications or executive privilege. First, the privilege is designed to encourage open, frank discussions on policy matters between subordinates and superiors. Secondly, the privilege is designed to protect against premature disclosure of proposed policies before they are finally adopted. Thirdly, the privilege protects against public confusion by disclosure of reasons and rationales that were not the actual reasons for state actions. *Coastal States Gas Corp v Department of Energy* 617 F2d 854 (DC Cir 1980).

[2] Although s 44(4) provides that this provision may not be used to refuse a record 'insofar as it consists of an account of, or a statement of reasons required to be given in accordance with s 5 of the Promotion of Administrative Justice Act, 2000', this would not prevent a body from refusing to disclose information leading up to the decision. Applicants in judicial review applications would be entitled to such information as part of the record under Rule 53 of the Uniform Rules of the High Court of South Africa. G E Devenish, K Govender & H Hulme (eds) *Administrative Law and Justice in South Africa* (2001) at 206 argue that the 'or' between paras *(a)* and *(b)* of s 44(1) is an error and that the conjunctive 'and' should have been used instead, 'because otherwise a completely untenable and absurd situation would arise in terms of which the exception to the right of access to information would completely negate the operation of the right itself'. But see *AIA Commentary* para 8.99.

[3] *AIA Commentary* paras 8.100 and 8.101.

[4] See Justine White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65 at 71–2 for a criticism of secret guidelines.

record 'contains a preliminary, working or other draft of an official of a public body'. The latter provision is unclear but appears to envisage draft documents held by a public official.[1]

62.9 PUBLIC INTEREST OVERRIDE

Sections 46 and 70 of the AIA, in relation to public and private bodies respectively, contain public interest overrides which provide for mandatory disclosure in the public interest. These provisions override all the grounds of non-disclosure included in the Act, save for one.[2] In terms of this provision, a request for access to a record must be granted, notwithstanding the other provisions of the Act, if:

'*(a)* the disclosure of the record would reveal evidence of —
(i) a substantial contravention of, or failure to comply with, the law; or
(ii) an imminent and serious public safety or environmental risk; and
(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

The public interest overrides therefore contemplate a particularly serious type of public interest, namely, a substantial contravention of law or an imminent and serious public safety or environmental risk. This provision does not require the mandatory disclosure of information which is in the public interest, in the general sense.[3]

It is unfortunate that the wider provision in clause 44(2) of the Open Democracy Bill was abandoned in the drafting process of the AIA. This clause would have required mandatory disclosure if the public interest in disclosure of the relevant information outweighed any right or interest which would be protected by the relevant ground of refusal.

Of particular concern is that the emphatic language of these provisions ('substantial contravention', 'imminent and serious' and 'clearly outweighs') could have the effect that the public interest override will seldom apply. If this is the case, the constitutional right of access to information could be undermined, which could call into question the constitutionality of the entire structure of the AIA.[4] Even with the liberal interpretation in favour of openness of information which is in the public interest which these terms should therefore be given, the clause seems unavoidably restrictive.

[1] This is consistent with the previous draft of the Open Democracy Bill, which contained the term 'working draft or note of an official of a government body'.

[2] Namely, s 35(1), which provides for the mandatory protection of certain records of the South African Revenue Service.

[3] The public interest, as a defence to a delictual claim for defamation or invasion of privacy, is significantly wider. The public interest, in this sense, is simply something which is of serious concern or benefit to the public. In *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212, Hefer JA stated that the 'public interest' is 'material in which the public has an interest' as opposed to 'material which is interesting to the public'. For example, it would include a disclosure of simple malfeasance.

[4] It is, however, acknowledged that the broad public interest could have the effect that a particular ground of non-disclosure will not apply, in which case the public interest override is irrelevant. See above, 62–20 for a discussion of the manner in which a public interest may result in a disclosure of personal information not being unreasonable.

63 Just Administrative Action

Jonathan Klaaren
Glenn Penfold

63.1 INTRODUCTION: ADMINISTRATIVE JUSTICE IN A CONSTITUTIONAL DEMOCRACY

This chapter considers the main constitutional issues relating to the right to just administrative action. While our focus will be on constitutional issues, this exercise inevitably results in significant discussion of the provisions of the Promotion of Administrative Justice Act,[1] which will, in practice, be the major tool for the enforcement of this right. We begin by analysing the relationship between the Constitution, the common law and the AJA. This is followed by a discussion of the meaning of the most important phrase for purposes of both the constitutional right and the AJA, 'administrative action'. We then proceed to discuss each of the four components of the right to just administrative action: the constitutional rights to lawful, procedurally fair, and reasonable administrative action, and the right to written reasons for administrative action. We conclude with an examination of the important issues of standing and substantive remedies in administrative law as well as a discussion of the self-standing constitutional principles of legality and rationality.[2]

Prior to the advent of the interim Constitution, South African administrative law was founded on the common law. The courts reviewed the exercise of public power based on their inherent jurisdiction.[3] In so doing, the courts developed and applied judge-made rules of review with which the exercise of public power was required to comply. Accordingly, the actions of a decision-maker could be set aside if he or she abused the discretion, failed properly to apply his or her mind or failed to follow the rules of natural justice.[4] In the pre-constitutional era, administrative law and the courts' power of review were based on the constitutional principles of the rule of law and sovereignty of Parliament.[5] Parliamentary sovereignty, in terms of which the will of Parliament was supreme, was the primary feature of South African constitutional law. Accordingly, the application of principles of judicial review was subject to the whim of Parliament, which could limit the level of scrutiny of administrative action or even oust the courts' jurisdiction to enquire into the validity of administrative action.[6]

[1] Promotion of Administrative Justice Act 3 of 2000, hereafter referred to as the 'AJA'.

[2] As the previous edition noted: 'The work performed in comparable constitutional instruments by a single, all-embracing due process clause has been divided and allocated to several distinct sections of the South African Constitution: the limitations clause, the right of access to information, and the right of access to court as well as the right of freedom and security of the person.'

[3] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 23 and 28. See also *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111 at 115: 'Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court. . . .'

[4] See Corbett CJ in *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another* 1988 (3) SA 132 (A) at 152 for a succinct formulation of the common-law grounds of review.

[5] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 33, 35 and 37.

[6] As to ouster, see *Staatspresident en andere v United Democratic Front en 'n ander* 1988 (4) SA 830 (A) and *Natal Indian Congress v State President & others* 1989 (3) SA 588 (D). Devices to reduce the level of judicial scrutiny included the legislative use of subjective discretions. In this regard, see generally Jeremy Gauntlet 'The Satisfaction of Ministers, Judicial Review of "Subjective" Discretions in South Africa' in Ellison Kahn (ed) *The Quest for Justice: Essays in Honour of Michael MacGregor Corbett* (1995) 208.

These legislative tools to give the executive free reign were particularly popular in relation to laws governing racial segregation, national security and a host of other apartheid legislation. The position was exacerbated by the executive-mindedness of certain judges who failed seriously to scrutinize the executive's actions. The result is that South Africa's history of administrative law and practice is littered with instances of abuses of power, particularly in the context of apartheid laws.[1]

The constitutionalization of the right to administrative justice in the interim Constitution amounted to a radical sea-change in administrative law. Not only did the Constitution replace sovereignty of Parliament with the governing principle of constitutional supremacy[2] but the rights to lawful and reasonable administrative action, procedural fairness and written reasons were now entrenched against legislative interference by specifically including the right to administrative action in the Bill of Rights.[3] Jurisprudentially, the bases for judicial review of administrative action are now the constitutional principles of constitutional supremacy and legality, which require that all public power flows from the Constitution and must be consistent therewith.[4]

As Chaskalson P stated on behalf of the Constitutional Court in the *Pharmaceutical Manufacturers* case:[5]

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

The final Constitution replaced the interim Constitution's right to administrative justice with s 33, entitled 'Just Administrative Action', which reads as follows:

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

[1] A large amount of literature has been written on this issue, including David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) and Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

[2] Section 2 of the final Constitution proclaims that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[3] Section 24 of the interim Constitution, entitled 'Administrative justice', read as follows:

'Every person shall have the right to —

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such acts have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

[4] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 19–45.

[5] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 45. See also *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 32 and 40.

(3) National legislation must be enacted to give effect to these rights, and must —
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.'

The right set out in s 33 did not come into operation immediately, however. The transitional provision in item 23 of Schedule 6 to the final Constitution provided that Parliament was required to enact the legislation referred to in clause 33(3) within three years from the commencement of the final Constitution (that is, by 3 February 2000). Prior to such enactment, the right in s 33 was to read as set out in item 23(2)*(b)* of Schedule 6, which was essentially the same as the text of s 24 of the interim Constitution.

The national legislation envisaged in s 33(3) of the Constitution is the Promotion of Administrative Justice Act,[1] which was enacted on the day of the deadline, 3 February 2000.[2] Broadly speaking, the AJA elaborates on the broad constitutional right to just administrative action, clarifies the scope and content of the right to procedural fairness, provides a legislative basis for judicial review of administrative action, and provides an institutional framework for the enforcement of such rights.[3]

Prior to the introduction of constitutional democracy in South Africa there was a perception that 'good' administrative lawyers favoured judicial activism and intervention in carefully scrutinizing and setting aside administrative decisions, while 'bad' administrative lawyers favoured judicial deference, which was equated with executive-mindedness and acquiescence in injustice. The reasons for this are not difficult to understand. There was a need to control the exercise of public power as much as possible when that power had the effect of applying unjust laws. In the absence of participation of the majority in legislative decision-making and without a justiciable Bill of Rights, administrative law was often the only tool for avoiding injustice and the undermining of persons' basic rights.[4]

There is a need to reassess this pro-interventionist approach to judicial review in our new constitutional democracy. An over-interventionist approach may be undemocratic and contrary to the principle of separation of powers, which requires that the judiciary respect the executive's sphere of operation. A choice for constitutional democracy, to some extent, means a choice to respect the legislature's or constitutional drafters' decision to confer

[1] Act 3 of 2000.

[2] The AJA did not immediately come into force. Section 11 provided that it would come into operation on a date fixed by the President in the *Government Gazette*. The President brought the AJA, save for ss 4 and 10, into force on 30 November 2000 in terms of Government Notice R73 dated 29 November 2000. In respect of administrative action taking place between 4 February 2000 and 30 November 2000, the Constitutional Court stated without discussion that the form of the constitutional right provided for in Schedule 6 (i e the interim Constitution right) would apply: *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 52. For a discussion of the interpretive applicability of the AJA with respect to administrative action taking place in this period, see Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) (*Benchbook*) 84–5.

[3] For a discussion of the drafting history and the general effect of the AJA, see Currie & Klaaren *Benchbook* 4–13.

[4] See generally Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484. South African administrative lawyers therefore generally supported 'red-light' theories of administrative law (see Carol Harlow & Richard Rawlings *Law and Administration* (1984); Jonathan Klaaren 'Redlight, Greenlight' (1999) 15 *SAJHR* 209).

decision-making powers and discretions on the executive branch of government.[1] In addition, it is no longer necessary for administrative law to do all the work of rights protection. All public power must now comply with the requirements of the Constitution, including the Bill of Rights.[2]

At the same time, the Constitution should give the courts greater security to closely scrutinize administrative action, safe in the knowledge that their powers of review are constitutionally mandated and protected. They no longer have to push back the boundaries, using artificial devices like the intention of the legislature, to justify setting aside decisions. Their power is derived directly from the Constitution.[3]

These parallel developments could lead to the extension of administrative review in certain instances and its narrowing in others. The area of administrative law may thus, to some extent, be reassessed. In undertaking this reassessment, it is submitted, the courts should attempt to ensure that the actions of the administration are carefully scrutinized for compliance with the constitutional requirements of lawful, reasonable and procedurally fair administrative action, while not intervening in areas which are properly the executive's domain. In attempting to strike this balance the fundamental tension should be recognized, that is, between participation, accountability, transparency and fairness, on the one hand, and efficient, effective government on the other.

63.2 THE RELATIONSHIP BETWEEN THE CONSTITUTION, THE COMMON LAW AND THE AJA

(a) The relationship between the Constitution and the common law

The Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*[4] held that '[j]udicial review under the Constitution and the common law are different concepts' and that the common-law system of judicial review was separate from the constitutional one. Accordingly, administrative law had not been constitutionalized in its entirety and one could still mount a challenge to administrative action based on the common law. As Hefer JA stated:[5]

[1] See Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 and Jonathan Klaaren 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3. As Hoexter states at 500, judicial activism creates problems of democracy and legitimacy. See also Dennis Davis 'Administrative Justice in a Democratic South Africa' (1993) *Acta Juridica* 21 and Alfred Cockrell 'Can You Paradigm? Another Perspective on the Public Law/Private Law Divide' (1993) *Acta Juridica* 227 at 246–7.

[2] Chapter 2 of the Constitution. The relevant constitutional requirements also include the principles of legality and rationality (see below, § 63.10). As Chaskalson P stated in *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 20, '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law'.

[3] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 45: 'But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.'

[4] *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) at para 20.

[5] Ibid.

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

This decision, however, was overruled by the Constitutional Court in the *Pharmaceutical Manufacturers* case, in which the court expressly took a different view:[1]

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

Nevertheless, the common law continues to serve two principal purposes in relation to administrative review. First, as discussed below, it appears that administrative action as contemplated in the Constitution relates to the exercise of public power and does not include private action. Under the common law the exercise of certain private powers was subject to judicial review for compliance with administrative law.[2] It is arguable that the common law will continue to apply in this narrow sphere notwithstanding the constitutionalization of administrative law generally. Secondly, the common law will play an indirect role in interpreting the provisions of both the Constitution and the AJA.[3] For example, in the *Premier, Mpumalanga* case the court used the common-law meaning of 'legitimate expectations' to interpret this phrase in s 24*(b)* of the interim Constitution.[4]

(b) The relationship between the Constitution and the AJA

As stated above, the AJA was enacted 'to give effect' to the constitutional right to just administrative action as required in s 33(3) of the Constitution. The AJA therefore provides a legislative basis for administrative review and applications for judicial review will usually be brought in terms of the Act itself. The question which thus falls to be considered is what role the constitutional right continues to play.

One approach would be that the AJA is now the sole basis of the constitutional right and that the right itself has no further application. This would be the case if 'give effect to' was read to mean 'created by'.[5] This approach should, however, be rejected on the basis that it

[1] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33. See also paras 44 and 50.

[2] See, for example, *Marlin v Durban Turf Club & others* 1942 AD 112; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); and *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* 1976 (2) SA 1 (A).

[3] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 45: '[T]hat is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development.' See also *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) ('the *SARFU* case') at paras 135 and 136.

[4] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 36.

[5] Currie & Klaaren *Benchbook* 27; Iain Currie & Jonathan Klaaren 'Just Administrative Action' in Johan de Waal, Iain Currie & Gerhard Erasmus (eds) *The Bill of Rights Handbook* 4 ed (2001) 496.

would be anomalous to include the right to just administrative action as a fundamental right in an entrenched Bill of Rights only to enable the substance of the right to be altered by simple legislative amendment. It may be consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to construct the very meaning of the right.[1]

The better argument is that the AJA gives effect to the rights in the sense of making the rights more effective through providing a detailed elaboration of both the scope and content of the rights, as well as providing an institutional framework for their implementation and enforcement.[2] The implication of this argument is that the constitutional rights continue to exist, notwithstanding the enactment of the AJA. In other words, there is a free-standing constitutional right to just administrative action.

There appear to be three ways in which the constitutional right to just administrative action will continue to apply: to challenge the constitutionality of the AJA itself, to challenge other legislation passed after the AJA, and to assist in interpreting the provisions of the AJA.[3] Each of these is discussed in turn below.

The most dramatic use of the constitutional right would be to challenge the constitutionality of the AJA itself. Currie & Klaaren divide these potential challenges to the AJA into two categories: 'underinclusive' and 'overrestrictive' challenges.[4] Possible attacks on the AJA on the basis that it is underinclusive may include: the narrowing of the definition of 'administrative action' and the limitation of the right to procedural fairness to circumstances where a person's rights or legitimate expectations are adversely affected.[5] Overrestrictive challenges to the Act would be on the basis that the procedures that it imposes for the exercise of rights are overly burdensome. This may conceivably include the requirements that judicial review must be sought within a period of 180 days[6] and that an applicant must first exhaust internal remedies.[7]

[1] Currie & Klaaren *Benchbook* 27.

[2] This is the view favoured in Currie & Klaaren *Benchbook* 27. In addition, it finds some support in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). During the course of its judgment relating to the constitutional right of access to information which was suspended in a similar manner to the right to just administrative action, the court held, at para 83, that the reason for the suspension was 'a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.'

[3] For a more detailed discussion of these uses of the constitutional right, see Currie & Klaaren *Benchbook* 26–9.

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

[5] See below, § 63.3*(b)*.

[6] Section 7(1).

[7] Section 7(2).

It is unclear what approach our courts will adopt to assessing the constitutionality of the AJA. One argument is to treat the AJA in the same manner as other parliamentary legislation, that is, the AJA is unconstitutional if it infringes the rights in s 33(1) or (2), unless such infringement is reasonable and justifiable in accordance with the Constitution's general limitation clause. Another approach is to afford the legislature a greater degree of deference in relation to the AJA. There are essentially two reasons for this: the AJA, unlike most other legislation, is constitutionally mandated to give effect to a fundamental right; and s 33(3)*(c)* of the Constitution expressly provides that this legislation must 'promote an efficient administration'.[1] Klaaren suggests a two-tiered approach to adjudication of the AJA's constitutionality.[2] In terms of this approach the provisions of the AJA can be divided into two categories: those which define and detail substantive rights, and those which set out procedures and structures to enforce the relevant rights. While some extra deference is due to the legislature in relation to the latter, no special deference is due for the former. As Klaaren states:[3]

> 'Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretative authority over the rights, Parliament receives no extra deference there.'

In the event of a court finding that a provision of the AJA is unconstitutional in that it fails properly to give effect to the constitutional right, the appropriate remedy would, in our view, be for the court to allow Parliament a certain period to remedy the defect. A judicial approach in terms of which Parliament is placed on terms to properly give effect to the right would be consistent with the scheme provided for giving effect to the right in the Constitution itself (that is, that Parliament was given a limited period of three years to enact the relevant legislation).

The second function of the constitutional right would be to challenge legislation enacted after the AJA.[4] Although the AJA is mandated by the Constitution, it is not a constitutional document and is not specially entrenched. It could not, therefore, be used to challenge subsequent parliamentary legislation which is inconsistent therewith. The constitutional right would have to be relied on directly in such cases. Further, the constitutional right to lawful administrative action could be invoked directly to challenge attempts in future legislation to oust the court's review jurisdiction.

Finally, the constitutional right to just administrative action remains as a valuable tool for the interpretation of the provisions of the AJA. In interpreting the Act it should always be

[1] It should, however, be noted that the phrase 'promote an efficient administration' is capable of two meanings. Jonathan Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 at 561 points out that it could be read 'downwards' to authorize the reduction of legal burdens on the administration, promote cost-effectiveness and simplicity of procedures. On the other hand, it could be read 'upwards' to require an administration that is accountable, open, rational, effective and responsive. See also Dennis Davis & Gilbert Marcus 'Administrative Justice' in *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 163.

[2] Jonathan Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549.

[3] Jonathan Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 at 563.

[4] It is assumed here that the AJA prevails over previous legislation to the extent that it is inconsistent therewith. This is in terms of ordinary rules of statutory interpretation.

borne in mind that it is intended to give effect to the rights set out in s 33 of the Constitution. For example, the broad standing requirements of the Bill of Rights set out in s 38 of the Constitution, rather than the more narrow grounds for standing in the common law, should be read into the Act.[1] The use of the constitutional right in the interpretation of the AJA will be of particular value in determining the consistency of the AJA with other statutes. The constitutional right will give added force to the argument that non-AJA statutes should be interpreted to the extent feasible to be consistent with the AJA.[2]

Beyond these three functions for the constitutional right, it may also be argued that the constitutional right to just administrative action could be used as a residual right to challenge the validity of administrative action which falls outside the scope of the AJA. This would apply to all instances of overrestrictive challenges and may be attractive to courts as it obviates the need to strike down provisions of the AJA. Nevertheless, courts should, in our view, resist directly invoking a residual constitutional right in circumstances where the AJA itself fails to 'give effect to' the constitutional right. There are essentially three grounds for this view. First, it undermines the role of Parliament, which the Constitution specifically contemplates as the body which is required to 'give effect to' the constitutional right. The proper remedy would rather be for a court to order that Parliament rectify the position and properly give effect to the right. Secondly, such an approval could create anomalies where the substantive law under the Constitution could differ from that under the AJA. For example, if the definition of 'administrative action' in the AJA is found to be overrestrictive, this provision of the AJA should, as a matter of principle, be declared unconstitutional. If a particular action amounts to 'administrative action' on a proper construction of the Constitution, but falls outside the definition in the AJA, a court should hold that the AJA fails to give effect to the right to just administrative action. A situation where administrative action has one meaning under the Constitution and another under the AJA should be avoided. Thirdly, reliance on the residual right would create the anomaly that the procedural requirements of the AJA would not apply where the constitutional right itself is invoked (for example, an applicant would not need to comply with the 180-day prescription period).

63.3 THE MEANING OF ADMINISTRATIVE ACTION

The categorization of action as administrative action is a fundamental prerequisite to the application of both the constitutional right to just administrative action and the AJA. It is the starting point for the judicial review of public power and is the question on which a number of cases have turned. The meaning of administrative action in the Constitution has been fleshed out in a number of decisions of the Constitutional Court and other courts. In addition, the AJA includes a detailed definition of administrative action.

[1] See Currie & Klaaren 'Just Administrative Action' in De Waal et al (eds) *Bill of Rights Handbook* 488 at 496n29 and below, § 63.8.

[2] See Currie & Klaaren *Benchbook* 20–1 (arguing that subsequent non-AJA legislation should be interpreted if at all possible to be consistent with the AJA as the authoritative expression of Parliament on its interpretation of the administrative justice right in the Constitution).

(a) Administrative action under the Constitution

(i) *The general scope of administrative action*

It is submitted that, subject to the three broad exceptions discussed below, 'administrative action' extends to all action taken by persons and bodies exercising public power.[1] This point is illustrated by the fact that our courts have held that administrative action includes the following broad range of public conduct: the withdrawal of education bursaries by organs of the provincial executive;[2] a decision of the Minister of Trade and Industry to compel a business to cease an activity which is under investigation as a harmful business practice and to freeze assets;[3] the determination of a subsidy formula and the allocation of school subsidies by a MEC for education;[4] the calling for, adjudication and awarding of tenders for government bodies or organs of state;[5] arbitration proceedings conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration;[6] a commission of inquiry authorized by the Master of the Supreme Court and held under the machinery of the Companies Act;[7] the award of a licence by an organ of state to exploit mineral resources to one of several competing applicants;[8] and the decision of a local authority to close a taxi rank and compel the relocation of members of a taxi association to another rank.[9]

The Constitutional Court has, in recent years, identified three categories of public power that do not amount to administrative action: legislative action, executive policy decisions and judicial action. We discuss each of these, in turn, below. First, however, we look at the position of rule-making powers as administrative action.

[1] See *Cape Metropolitan Council & another v Metro Inspection Services Western Cape CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA), in which the court held that the cancellation of an agency agreement by a local authority did not constitute administrative action. The court's rationale for this was that the power to terminate the contract was derived from the terms of the contract and the common law. As Streicher JA stated at para 18: 'Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers not with the public administration acting as a contracting party from a position no different from what it would have been in, had it been a private individual or institution.' See also Olivier JA in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA) at paras 28–30. But see Lisa Thornton 'The Constitutional Right to Just Administrative Action — Are Political Parties Bound' (1999) 15 *SAJHR* 351, who argues that 'administrative action' should include certain private actions.

[2] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC).

[3] *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

[4] *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC).

[5] *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en andere* [1997] 2 All SA 548 (SCA); *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C); *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1997 (1) BCLR 1429 (W); *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA).

[6] *Kynoch Feeds (Pty) Ltd v CCMA & others* [1998] 4 BLLR 384 (LC).

[7] *Jeeva & others v Receiver of Revenue, Port Elizabeth & others* 1995 (2) SA 433 (SE).

[8] *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust & another* 1999 (8) BCLR 908 (T).

[9] *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2000 (3) BCLR 295 (E).

(ii) *Rule-making as administrative action*

Administrative action should be interpreted to cover not only adjudicative administrative decisions but also delegated and subordinate legislation. To restrict it to adjudications only would be unacceptable given the vast bulk of governmental administration undertaken by regulation. This view finds support in the decision of the Constitutional Court in *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others*,[1] in which the court clearly supported coverage of the administrative justice clause beyond administrative adjudications. The court was thus willing to go beyond the bounds of *South African Roads Board v Johannesburg City Council*,[2] where Milne JA elaborated upon a distinction between those government decisions applying generally (termed 'legislative') and those applying in a particular situation. According to the court, the cases referred to by Milne JA in exempting the impact of natural justice from legislative decisions were of 'little assistance' in determining the content of administrative action in terms of the Constitution.[3] The majority judgment, delivered by the triumverate of Chaskalson P, Goldstone J and O'Regan J, noted:[4]

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

The action of making delegated and subordinate legislation is thus administrative action.

(iii) *The distinction between legislative and administrative action*

In *Fedsure Life Assurance*[5] the Constitutional Court was called on to review a municipal council's decision to pass resolutions adopting a budget, imposing rates and levies, and paying subsidies. In examining whether the resolutions amounted to administrative action, the Constitutional Court emphasized the new constitutional landscape in which administrative review now operated. In relation to rule-making action, the court pointed out the need to distinguish between the processes by which laws are made. The process by which delegated legislation is made by a functionary in whom the power to do so has been vested by a legislature is different to the process by which laws are made by 'deliberative legislative bodies'.[6] The court carefully examined the status of local government under the interim Constitution and concluded that the Constitution recognizes three levels of government — national, provincial, and local.[7] The municipal council was an elected, deliberative body which, like the national and provincial legislature, exercised original legislative power derived directly from the Constitution. The court remarked that, although the detailed powers

[1] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC).

[2] 1991 (4) SA 1 (A).

[3] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 26.

[4] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 27.

[5] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC).

[6] At paras 27 and 28.

[7] At paras 34–40.

and functions of local government were to be determined by the laws of the competent authority, this did not mean that the powers exercised by them were delegated powers.[1] During the course of this judgment the court emphasized the political nature of municipal councils, the deliberative process and their political accountability:[2]

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

Accordingly, the court held that the resolutions and by-laws passed by the municipal council were legislative and did not constitute administrative action.[3] In the course of its judgment the court also pointed out that the interim Constitution reserves the power of taxation and the appropriation of government funds to legislatures. When a legislature exercises such powers it is therefore exercising a power 'peculiar to elected legislative bodies' after due deliberation.[4]

The *Pharmaceutical Manufacturers* case[5] dealt with the President's decision to bring the South African Medicines and Medical Devices Regulatory Authority Act[6] into force. The President's power to bring the legislation into operation was derived from the relevant section of the legislation itself.[7] In this case the Constitutional Court acknowledged that the President's power lay somewhere between the law-making process and the administrative process. It was a power derived from the legislation itself but was incidental to the

[1] See also *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 38, where the court noted: 'The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures.' The court therefore departed from the pre-constitutional position that municipal by-laws constituted delegated legislation, which courts would review but construe 'benevolently' if they were enacted by elected councils (see Lawrence Baxter *Administrative Law* (1984) at 193). See, for example, *Sehume v Attridgeville City Council & another* 1992 (1) SA 41 (A) at 57–8.

[2] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 41.

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

[4] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 44 and 45.

[5] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)

[6] Act 132 of 1998.

[7] Section 55 of the Act provided that the Act shall come 'into operation on a date determined by the President by proclamation in the *Gazette*'.

law-making process.[1] The court, per Chaskalson P, concluded that, having regard to the nature and source of the power, and particularly the fact that it required a 'political judgment', the decision to bring the law into operation did not constitute administrative action as it was 'closer to the legislative process than the administrative process'.[2]

In the *Ed-U-College*[3] case the Constitutional Court held that a specific allocation by the MEC for Education in the Eastern Cape of funds for independent schools out of the total budgetary allocation for education in the province, which was derived from the explanatory memorandum to the relevant Appropriation Act, did not constitute administrative action. The court emphasized the legislative nature of the explanatory memorandum, stating that the estimate expenditures set out in the memorandum are debated in the legislature itself and are the basis on which votes on the Bill are decided. This memorandum therefore 'play[s] an important role in the legislative process which leads to the approval of an appropriation Bill'.[4]

It is important to note that the defining character of the category of legislative action is not its general effect or application but rather its source in the parliamentary, or other legislative, process. Delegated legislation thus remains within the constitutional term 'administrative action'.

(iv) *The distinction between executive policy decisions and administrative action*

During the course of its judgment in the *Fedsure* case the Constitutional Court alluded to a further category of public action which does not amount to administrative action, that is, certain types of executive action.[5]

This distinction between administrative and executive action took centre stage in the Constitutional Court's decision in *President of the Republic of South Africa & others v South African Rugby Football Union & others*.[6] This case involved a review of President Mandela's

[1] See *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 79. It should, however, be noted that the President was not, strictly speaking, exercising a power circumscribed in legislation as the Act was not yet in force and therefore did not bind the President. Nevertheless, it was a power conferred by Parliament, without which the President could not simply bring legislation into force (see para 78).

[2] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 79.

[3] *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC).

[4] *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC) at para 14. It is submitted that the reasoning here is open to criticism. The MEC for Education, in deciding on the allocation for independent schools out of the total education budget, is not bound by the estimates in the explanatory memorandum, or so-called 'White Book'. The decision by the MEC to divide funds between independent schools and other categories of schools appears to be an executive one. A better basis for holding that this allocation decision does not amount to administrative action may be that it was a policy decision (see below, § 63.3*(a)*(iv)). The fact that the White Book, which formed the basis on which the legislation was passed, included these estimated expenditures supports this argument.

[5] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59: 'In relation to legislation and executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.'

[6] 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC).

decision to institute a commission of inquiry into South African rugby in terms of s 84(2)*(f)* of the interim Constitution and to declare the Commissions Act[1] applicable to the inquiry. During the course of its judgment the court pointed out that a determination as to whether conduct constitutes administrative action does not equate with the enquiry as to whether the action is performed by a member of the executive arm of government: '[W]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.'[2] The difficulty which then emerges is how to distinguish between administrative action and other acts of the executive. The court declared that the distinction between executive and administrative action essentially boils down to a distinction between the implementation of legislation, which is administrative action, and the formulation of policy, which is not. Acknowledging that this line may be difficult to draw, the court said it will depend primarily upon the nature of the power.[3] In addition, the court set out further relevant factors: the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and whether it is related to policy matters or the implementation of legislation.[4]

The power to appoint a commission of inquiry derived from s 84(2)*(f)* of the interim Constitution.[5] The court noted that the powers in s 84(2) are original constitutional powers that are conferred upon the President as head of state rather than as head of the national executive.[6] The court described a commission of inquiry as 'an adjunct to the policy formulation responsibility of the President' as it merely performed a fact-finding function for the President, who was not bound by its findings.[7] In addition, when the President appoints a commission of inquiry he is not implementing legislation but rather exercising an original constitutional power.[8] The court therefore concluded that the appointment of the

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

[2] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 141.

[3] See *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 142 and 143.

[4] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 143.

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

[6] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 144. The court remarked that none of the powers in s 84(2) are concerned with the implementation of legislation in any sphere of government and are closely related to policy (at paras 145 and 146). The historical source of these powers is the prerogative. Nevertheless, they now find their source directly in the Constitution and may be reviewed for compliance with the supreme Constitution. (See *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); Andrew Breitenbach 'The Sources of Administrative Power: The Impact of the 1993 Constitution on the Issues raised by *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Department van Handel en Nywerheid* 1992 (4) SA 1 (A)' (1994) 5 *Stellenbosch Law Review* 197.

[7] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 146 and 147.

[8] At para 147.

commission did not amount to administrative action.[1] The President's decision to make the Commissions Act applicable to the rugby commission of inquiry was, according to the court, a more difficult matter. The source of this power was derived from legislation and not the Constitution itself, which suggested that its exercise constituted administrative action.[2] There were, however, indications to the contrary. As the court stated, the power is closely related to the exercise by the head of state of the power to appoint a commission and to ensure it is able to perform its task effectively.[3] The court, however, left this issue undecided and assumed for purposes of the judgment that the powers under the Commissions Act amounted to administrative action.[4]

It is important not to over-extend the category of policy decisions to exclude a large range of actions from the application of the right to administrative action. A number of public decisions which are affected by policy considerations (for example, a decision whether to continue to grant subsidies to Model C schools which were previously white schools), should properly be categorized as administrative action.[5] Such decisions are generally made in the course of implementing legislation. It is therefore important to distinguish between policy in the narrow sense and policy in the broad sense. The former includes decisions which are political in the sense of being a matter of controversy or party political debate or being taken by a high political authority.[6] The latter are decisions which are themselves political in the sense of being subject only to the political accountability of the representative institutions of the Constitution. These include the development of policy and the initiation of legislation. It is only the latter which should be excluded from the ambit of administrative action. On this distinction, which is sometimes difficult to draw, O'Regan J stated as follows in the *Ed-U-College* case:[7]

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

[1] At para 147. The Constitutional Court, at para 146, appears to state *obiter* that all the powers set out in s 84(2) of the Constitution are not administrative action: 'It is readily apparent that these responsibilities could not suitably be subjected to s 33.' It should be noted that the court's decision is confined to the President's decision to appoint a commission of inquiry. The court expressly stated that the conduct of the commission itself 'is a different matter' (at para 147). It is submitted that the conduct of a commission of inquiry should be classified as administrative action.

[2] At para 165.

[3] At para 166.

[4] At para 167.

[5] This was the case in *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC), in which O'Regan J stated at para 41: 'Citizens are entitled to expect that government *policy* will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker' (our emphasis).

[6] O'Regan J in *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC) stated at para 17: '[T]he fact that a decision has political implications does not necessarily mean that it is not an administrative decision within the meaning of s 33. . . .'

[7] *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC) at para 18.

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

(v) *The distinction between judicial and administrative action*

Finally, there may also be governmental action which is judicial in character and therefore not administrative action and not subject to s 33. In *Nel v Le Roux NO & others*[1] Ackermann J stated *obiter* that the summary sentencing procedure in s 205 of the Criminal Procedure Act[2] was 'judicial and not administrative action'. This category of action — as with the category of legislative action — should be characterized by its source in the judicial process (e g the act of sentencing) rather than by its adjudicative nature (e g the application of law to facts).[3] Such judicial action would be taken by original constitutional judicial authorities. It is the location of the courts' power in the Constitution that is important, not the adjudicative function they perform. This is consistent with the decision in *Carephone (Pty) Ltd v Marcus NO & others*,[4] which rejected the submission that compulsory arbitration in terms of the Labour Relations Act[5] was judicial and not administrative action. The basis for this rejection was that judicial action was action by courts of law which was already subject to the values of accountability, responsiveness and openness.[6]

[1] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) at para 24.

[2] Act 51 of 1977.

[3] While Ackermann J expressed 'grave doubts' on the applicability of s 24 of the interim Constitution beyond sentencing to the information-gathering procedures of s 205, he also stated that, if s 24 did apply, there was no infringement of the right because 'the examinee's rights are adequately protected' (*Nel v Le Roux NO & others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) at para 24). Thus his statement is *obiter*. Moreover, elsewhere in his judgment Ackermann J seemed to treat those procedures as administrative rather than judicial, noting the application and importance of procedural fairness, due process and natural justice in the administration of s 205 proceedings (see paras 11, 17 and 21). Likewise in *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 93–110 Ackermann J expressed doubts about whether the enquiry conducted under ss 417 and 418 of the Companies Act 61 of 1973 was administrative action in terms of s 24 of the interim Constitution, but assumed that it was and found its procedures to be facially consistent with s 24*(b)* and *(c)* of the interim Constitution. Perhaps most significantly, Kriegler J (Didcott J concurring) and O'Regan J specifically declined to endorse Ackermann's doubts on the scope of administrative action (see paras 131 and 155). For criticisms of these decisions, see David van Wyk 'Administrative Justice in *Bernstein v Bester* and *Nel v Le Roux*' (1997) 13 *SAJHR* 249 and Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 507–8.

[4] 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) at paras 15–19.

[5] Act 66 of 1995.

[6] Using this exception, the court in *Patcor Quarries CC v Issroff & others* 1998 (4) SA 1069 (SE) held that the decisions of arbitrators in terms of the Arbitration Act 42 of 1965 are judicial rather than administrative in nature.

(vi) *The rationale for excluding acts from the ambit of administrative action*

The primary rationale for the exclusion of legislative action, policy acts of the executive and judicial action from the sphere of administrative action is that these categories of action are subject to alternative forms of both political and constitutional participation and accountability. This participation and accountability plays itself out in the political process and it would be inappropriate for administrative law to apply thereto. These actions are therefore subject to institutional accountability under the Constitution rather than the safeguards of administrative justice.[1]

(b) The meaning of administrative action under the AJA

(i) *The general approach*

The Constitutional Court, in the cases discussed above, has largely defined administrative action in the negative, delineating what administrative action is not rather than what it is. There has not been much attempt to confront the difficult issue of defining the scope of administrative action. By contrast, the drafters of the AJA faced the definitional challenge head-on and addressed it by including a detailed definition of administrative action. Notwithstanding this difference in form, it is important to note that the definition in the AJA must be based on the Constitutional Court jurisprudence discussed above and that this jurisprudence will continue to play a significant role in interpreting the meaning of 'administrative action' under the AJA. In addition, to the extent that the AJA adopts a more restrictive definition of 'administrative action', the constitutional right could be used to challenge the AJA as failing to give effect to the constitutional right, with the proper remedy being an invitation to Parliament to rectify the drafting of the AJA.

[1] See Currie & Klaaren *Benchbook* 57.

Section 1 of the AJA sets out the definition of administrative action for purposes of the Act.[1] This definition, when read with the definition of a 'decision',[2] essentially comprises six elements: (1) a decision of an administrative nature; (2) made in terms of an empowering provision; (3) not specifically excluded from the definition; (4) made by an organ of state or by a private person exercising a public power or performing a public function; (5) that adversely affects rights; and (6) that has a direct external legal effect.[3] The first three elements relate to the subject-matter of administrative action, the fourth to the identity of the actor, and the fifth and sixth to the effect of the action.

At the outset it should be noted that a 'decision' specifically includes 'a failure to decide'. In addition, the definition of administrative action as a decision should not be taken to mean that only adjudicative actions are covered. The definition includes the catch-all in para *(g)*, 'doing or refusing to do any other act or thing of an administrative nature'. This indicates that the use of the term 'decision' is no more than a convenient way of describing administrative conduct at its broadest.

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

(a) an organ of state, when —

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

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

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

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

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

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

[3] This division of the AJA definition into six elements draws from Currie & Klaaren *Benchbook*, which discusses these elements in detail at 40–82, further discussing separately the terms 'decision' and 'of an administrative nature'. The discussion in the section draws on that contained in the *Benchbook*.

A crucial question is whether the AJA applies to administrative rule-making such as delegated or subordinate legislation (usually taking the form of regulations in terms of legislation).[1] It is submitted that the AJA should apply to rule-making. A number of factors support this conclusion. First, were this not the case, it would be anomalous to provide for notice and comment procedures for administrative action affecting the interests of the general public in terms of s 4 of the AJA. Secondly, the AJA is intended to give effect to the constitutional right to just administrative action which has been held to apply to delegated legislation.[2] Thirdly, to exclude rule-making would lead to a separate legal regime under the Constitution for such action.[3]

(ii) *A decision of an administrative nature*

The first element of the AJA definition is that it must be a decision 'of an administrative nature'. The above discussion of administrative action in the context of the Constitution indicates the type of action that is administrative in nature. Essentially, it includes all exercises of public power other than legislative action, judicial action and broad policy-making decisions. This may include the implementation of legislation, the making of subsidiary rules, the formulation of detailed policy within the framework of larger policy contained in the legislation, the exercising of discretions, the settlement of disputes and the granting of benefits.[4] Currie & Klaaren conclude that 'decisions of an administrative nature are decisions connected with the daily business of government: the implementing (administering) of legislative policy and the making of policy within the framework allowed by primary legislation'.[5]

(iii) *Made in terms of an empowering provision*

The second element of the definition of administrative action is that it must be made 'in terms of an empowering provision'. The definition of 'empowering provision' is extremely broad and includes 'a law, a rule of common law, customary law, or an agreement, instrument or

[1] See the discussion of the similar issue in the context of the constitutional right above, § 63.3*(a)*(ii). With respect to the AJA, the Law Commission's Draft Bill contained a definition of a rule and specifically included this within the definition of administrative action. Nevertheless, the Parliamentary Portfolio Committee deleted this definition and many of the provisions relating to rule-making. The decision to delete these provisions was apparently based in part on the Australian jurisprudence that a 'decision' does not include rule-making.

[2] See *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) and *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), where the Constitutional Court indicated *obiter* that delegated legislation is administrative action.

[3] See Currie & Klaaren *Benchbook* 83–4. The types of decisions listed in paras *(a)–(f)* of the definition of a 'decision' are confined to traditional administrative decisions and do not specifically include rule-making actions. A court may therefore, applying the *euisdem generis* principle, hold that the AJA does not apply to rule-making, particularly where the term 'decision' is used. This approach should, however, be avoided as it would result in the AJA failing 'to give effect to' the constitutional right to just administrative action. See the discussion above, § 63.3*(a)*(ii).

[4] Currie & Klaaren 'Just Administrative Action' in De Waal, Currie & Erasmus (eds) *Bill of Rights Handbook* 488 at 503.

[5] Currie & Klaaren 'Just Administrative Action' in De Waal, Currie & Erasmus (eds) *Bill of Rights Handbook* 488 at 503.

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

(iv) *Specific exclusions from the definition of administrative action*

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

A number of the exclusions are based on, and are consistent with, the categories of public power excluded from the meaning of administrative action in the Constitutional Court's jurisprudence discussed above.[2] Nevertheless, a number of the exclusions may be challenged as unduly limiting the constitutional right. For example, some of the exclusions relating to the executive powers and functions of the national executive, provincial executives and municipal councils will need to be carefully considered to ensure that they are read in a manner consistent with the constitutional right to administrative action. Should the scope of the exclusions go too wide, they may well be unconstitutional.[3]

In addition, a number of the specific exclusions from the ambit of the AJA are pragmatic, legislative choices and as such, may be controversial. These exemptions should also be narrowly interpreted in order to survive constitutional scrutiny. For example, the exemption relating to decisions of the Judicial Service Commission should be confined to the actual deliberations on whether to appoint a particular judicial officer. This exclusion would appear to be justifiable on principle, given the fact that the JSC's power to appoint judicial officers is derived directly from the Constitution and that the appointment of judges is an inherently political decision. Nevertheless, other decisions of the JSC should fall within the meaning

[1] For a detailed discussion of these specific exclusions, see Currie & Klaaren *Benchbook* 53–69.

[2] For example, the exclusion of legislative acts of a municipal council in *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (discussed above, § 63.3*(a)*(iii)) is reflected in para *(dd)*.

[3] For example, the exclusion of the executive powers or functions of a municipal council should be interpreted narrowly to include only the deliberative exercise by municipal councils of their direct constitutional executive powers and not the more common actions of municipal councils in implementing provincial and national legislation. The exclusion should apply only to executive functions within the realm of policy-making or legislating and should not include the implementation of legislation and other forms of administrative action (see Currie & Klaaren *Benchbook* 64–5).

of administrative action, including, for example, a decision as to whether interviews of judicial candidates should be open to the public.[1]

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

In order to qualify as administrative action in terms of the AJA the decision must be made by an organ of state or by a private person exercising public power or performing a public function. The crucial question which this element asks is whether the relevant actor is exercising a public power or performing a public function. The focus is on the public nature of the power, rather than the person or entity exercising it.[2]

(vi) *The requirement of adversely affecting rights*

The most controversial element of the definition of administrative action in the AJA is that the decision must 'adversely affect rights'. This requirement, together with the requirement of a direct external legal affect, greatly restricts the scope of the AJA.[3] It may be argued that this restriction is unconstitutional as it fails to give effect to the constitutional right to administrative action by restricting the meaning of administrative action to a class of action which is narrower than that contemplated in s 33 of the Constitution. Depending on the meaning given to this phrase, this argument could succeed, particularly in light of the fact that, while the right to written reasons in s 33(2) of the Constitution applies only to persons 'whose rights have been adversely affected' by administrative action, no limitation is placed on the application of s 33(1). If s 33(1) contemplates that administrative action arises only in circumstances where rights have been adversely affected, this qualification in s 33(2) would be unnecessary.[4]

In addition to the question of constitutionality, this element of the definition gives rise to two questions of interpretation, namely, the meaning of 'affect' and 'rights'.

The word 'affect' is capable of two meanings — 'deprived' and 'determined'. If the former is to be preferred, the AJA will cover a narrow class of administrative action, while if the latter is preferred, it will cover a relatively broad class of administrative action. For example, if it means 'deprived', a person who applies for the renewal of an existing licence will be protected by the rules of administrative justice but a first-time applicant will not. This dispute between the determination theory and the deprivation theory of administrative justice

[1] Another controversial question is the exclusion of the judicial functions of traditional leaders.

[2] See Olivier JA in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA) at para 36, who emphasizes that the threshold requirement is not whether the relevant entity is an organ of state, but whether it exercises a public power or performs a public function. The exercising of private power is therefore excluded (see above, § 63.3*(a)*(i)). See above, Chapter 62 Access to Information § 62.6 for a discussion of the meaning of public powers or public functions, and Currie & Klaaren *Benchbook* 69–74.

[3] This requirement was a new restriction inserted by the Parliamentary Portfolio Committee and was not contained in the original Law Commission Draft Bill.

[4] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 514 criticizes this restriction on the definition of 'administrative action', stating as follows: 'This is a startling departure both from the definition proposed by the South African Law Commission and from the common law, and in my view its effect is to narrow the ambit of administrative action beyond what is acceptable . . . On this score alone one must harbour the gravest doubts about the constitutionality of s 1 of the Act.'

is not new to our law and has already generated a considerable amount of debate in relation to the scope of natural justice.[1]

It is possible that the inclusion of the word 'adversely' indicates the deprivation theory. It would, however, be preferable in interpreting this term in the AJA to adopt the determination theory.[2] This approach is supported by the fact that the AJA must be interpreted so as to give effect to the constitutional right, which is free of express restrictions. It is also supported by the Constitutional Court's trend in decisions such as *Minister of Public Works & others v Kyalami Ridge Environmental Association & others*[3] to adopt a wide-ranging and ultimately substantive, rather than formal, approach to procedural fairness. Applying the deprivation theory would, in our view, render the AJA unconstitutional, as to hold that administrative justice only applies to decisions which deprive a person of his or her rights cannot be said to give effect to the constitutional right to just administrative action.[4] In addition, had the Act intended to be more restrictive, it could have inserted the words 'existing rights' instead of 'rights'.[5]

The decision must have an adverse affect on 'rights'. Nevertheless, the rights need not be the rights of the applicant but can be those of a third party. This follows from the phrase 'rights of any person' and the absence of any standing provision in the AJA.

The usual meaning of 'a right' is an enforceable claim against a duty-holder. In light of the need to interpret the AJA so as to give effect to the constitutional right to administrative action, we submit that 'rights' should be interpreted broadly in at least two respects. First, it should not be restricted to constitutional rights but should include all forms of legal rights, including statutory and common-law rights.[6] Secondly, O'Regan J, examining the application of administrative justice in the interim Constitution on behalf of the Constitutional Court, stated *obiter* that it 'may well be appropriate' to adopt a broader notion of 'right' than that used in private law, to include circumstances where the state has unilaterally incurred liability

[1] See, for example, Etienne Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. See also Mureinik, unpublished memorandum 'Admin justice in the BoR' (6 July 1994), and 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 at 36–40. It is somewhat bizarre that this debate must now take place in the context of defining 'administrative action' as the threshold requirement for the application of the AJA. It has historically been a debate attaching to the scope of natural justice in which a compromise has been found in the form of the legitimate expectation doctrine. (See below, § 63.5*(b)*(i) and cf *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549, indicating that natural justice attaches to deprivations of rights, with *Hack v Venterspost Municipality & others* 1950 (1) SA 172 (W) at 189–90, indicating that natural justice attaches to determination of rights.)

[2] Such an approach, when combined with the other limitations contained in the AJA, will in effect result in the adoption of Mureinik's provisional determination theory (see Etienne Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 at 37; and Currie & Klaaren *Benchbook* 78–9). Courts will, in practice, work in from the determination theory by accepting that all public power which determines rights will constitute administrative action, unless the other elements of the definition are not met.

[3] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at paras 101–10.

[4] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 516 states that the deprivation theory 'clearly creates an unacceptably high threshold for admission to the category of "administrative action" '.

[5] Some support for the determination theory may be found in the following *dictum* of Boruchowitz J in *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) at 997, in holding that the relevant decision amounted to administrative action: '[T]he Board's decision has plainly affected the rights and interests of the applicant. It has determined its rights.'

[6] This approach finds support in the case law dealing with the analogous right of access to information in the interim Constitution, which could only be invoked where it was necessary to protect a right. See above, § 62.7.

without establishing a contractual *nexus* between the individual and the state.[1] In this case, the term 'right' moves closer to the meaning of legitimate expectations.

(vii) *A direct external legal effect*

The final element of the AJA's definition of administrative action is that it must have 'a direct external legal effect'. This requirement, which was a late addition to the Act by the Parliamentary Portfolio Committee, derives from the German Federal Law of Administrative Procedure of 1976.[2] Pfaff & Schneider explain the phrase as follows:[3]

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

The most important implication of this definitional element is that, together with the phrase 'adversely affecting rights', it introduces the concept of finality. A decision will have a direct legal effect only if it has an actual impact on a person's rights or interests. It therefore appears that preparatory steps and recommendations without such impact will not amount to administrative action.[4] The phrase 'external effect' implies that the decision must have a direct impact on a person or entity other than the administrative actor. It would therefore exclude a decision of a subcommittee which makes a recommendation to the final decision-making body. The phrase should not be taken literally as excluding actions which affect the members of (or the persons within) the public body itself. The disciplining of a public servant or the internal transfer of a prisoner to a higher level of security has a direct, external legal effect on the relevant person and should constitute administrative action.

63.4 THE RIGHT TO LAWFUL ADMINISTRATIVE ACTION

The right to lawful administrative action was entrenched in s 24*(a)* of the interim Constitution and is entrenched in s 32(1) of the final Constitution. At a minimum, this component of the constitutional right serves the purpose of guarding against parliamentary ouster clauses. Unlike under the previous system of parliamentary sovereignty, an Act of Parliament can no longer oust a court's constitutional jurisdiction and deprive the courts of their review function

[1] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 32n10.

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

[3] Rainer Pfaff & Holger Schneider 'The Promotion of Administrative Justice Act from a German perspective' (2001) 17 *SAJHR* 59 at 71.

[4] This may be contrary to the decision in *Nextcom Cellular (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T), in which Coetzee AJ held that a recommendation of the South African Telecommunications Regulatory Authority to the Minister of Communications as to the award of the third cellular licence constituted a reviewable decision (see also *Jerpis Trading (Pty) Ltd v Westsun Hotel (Pty) Ltd & others* 1984 (2) SA 431 (D)).

to ensure the lawfulness of administrative action.[1] Furthermore, in line with the norm of the rule of law, this constitutional right may overrule the common-law position that Parliament, through the conferral of a wide discretion, could effectively exclude judicial review through the doctrine of subjective jurisdictional facts.[2] The level of judicial scrutiny is now determined by the Constitution and not the wording of the empowering legislation.

The right to lawful administrative action, in essence, enshrines the principle of legality in relation to administrative action.[3] This important constitutional principle has been described by our Constitutional Court as the principle that the executive 'may exercise no power and perform no function beyond that conferred upon them by law'.[4] It therefore constitutionalizes the fundamental rule of administrative law that a decision-maker must act within his or her powers and must not act *ultra vires*.[5] It is clear that this right requires that an administrator must act in terms of, and in accordance with, the terms of an empowering statute or other law. This right therefore prohibits a decision-maker acting beyond the terms of the relevant empowering legislation and thus outlaws action which is *ultra vires* in the narrow sense.[6]

It is submitted, however, that the right to lawful administrative action goes further and applies to acts which are *ultra vires* in the board sense. As Baxter and other writers have pointed out, the traditional grounds of common-law judicial review are founded on this broad *ultra vires* principle — where a decision-maker acts, for example, for an ulterior purpose, in bad faith, takes into account irrelevant considerations or fails to take into account relevant considerations, or makes an error of fact or law, he or she acts beyond his or her powers.[7]

[1] Parliamentary ouster clauses were, in the past, upheld in a number of cases, including *Staatspresident en andere v United Democratic Front en 'n ander* 1988 (4) SA 830 (A) and *Natal Indian Congress v State President & others* 1989 (3) SA 588 (D). One could argue, however, that the courts' general supervisory function with respect to administrative action is additionally or alternatively provided for by the right of access to court in s 34. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, & another* 2001 (3) SA 310 (C).

[2] For an identification of the purpose, see e g GE Devenish, K Govender & H Hulme *Administrative Law and Justice in South Africa* (2001) at 117: '[V]ery broad subjective discretions should, it is submitted, be construed as incompatible, if not with the letter, then at least the spirit of the Constitution.'

[3] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59. See below, § 63.10 for a discussion of the application of this constitutional principle beyond administrative action.

[4] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 56.

[5] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 50: 'What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality.'

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

[7] Lawrence Baxter *Administrative Law* (1984) 30–31. As Milne AJ stated in *Estate Geekie v Union Government & another* 1948 (2) SA 494 (N) AT 502: 'In considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted *ultra vires* or not.'

It is submitted that these common-law grounds of review are now constitutionally protected under the rubric of lawful administrative action.[1]

The right to lawful administrative action also appears to prohibit vague and uncertain delegations of law-making power and the conferral of over-broad discretionary powers on a decision-maker. This view finds support in the Constitutional Court case of *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO*,[2] in which the court struck down a provision of the Consumer Affairs (Unfair Business Practices) Act which empowered the Minister of Trade and Industry to take steps to prevent the continuation of business practices which were the subject of an investigation and to attach and freeze assets. The court held that these far-reaching powers could be used in the absence of procedural fairness and without guidance as to how they are to be exercised. Goldstone J, in striking down the relevant provision, concluded as follows:[3]

> 'Every conferment by the Legislature of an administrative discretion need not mirror the provisions of the Constitution or the common law regarding the proper exercise of such powers. However, as this court has already held (in the context of a limitations analysis), the constitutional obligation on the Legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.'

Here, the Constitutional Court found that an uncircumscribed administrative discretion together with other circumstances of the case was contrary to the right to procedural fairness.[4] This case represents authority for the fact that, in certain circumstances, an overbroad decision-making power, which does not give adequate guidance as the matter in which it is to be exercised, may be unconstitutional. Nevertheless it is important to note that the breadth of the power was only one of the factors which led the court to conclude that the right to procedural fairness was infringed in this particular instance.[5] The case does not stand for the proposition that such breadth on its own (at least in primary legislation) will constitute an infringement of the right of just administrative action. Each discretion will therefore need to be assessed on its own facts to determine whether it is constitutionally defective in the

[1] Yvonne Burns *Administrative Law under the 1996 Constitution* 138 supports this wide approach to lawful administrative action in terms of which 'lawfulness becomes an umbrella concept encompassing all the requirements for valid administrative action'. In this respect there may be an overlap between the rights to lawful, procedurally fair and reasonable administrative action. A decision of an administrator will not be lawful if it does not comply with the principles of both procedural fairness and reasonableness.

[2] 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

[3] *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 25. See also *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 42–8, which held that an uncircumscribed discretion would not comply with the limitations clause where a fundamental right is infringed. This decision applies only where the exercise of a discretion has the effect of infringing a fundamental right.

[4] This case illustrates the close connection between the requirement of lawful administrative action and procedural fairness as the court could just as easily have found that the relevant provisions contravened the right to lawful administrative action. This appears to have been accepted by the Constitutional Court (see *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 19).

[5] See *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 25. The court also emphasized the cumulative effect of the other features set out in para 23 of the judgment.

manner contemplated in the *Janse van Rensburg* case. The argument for an unconstitutionally broad delegation or discretion will be easier to make at the level of secondary legislation.

The AJA gives effect to this constitutional right to lawful administrative action principally by providing for judicial review of all administrative action in s 6 of the Act. Section 6(2) sets out a comprehensive list of grounds on which administrative action can be judicially reviewed, including the ground that the administrator was not authorized to take the action by the empowering provision; the administrator acted under a delegation of power which was not authorized by the empowering provision; a mandatory and material procedure or condition was not complied with; the action was taken for a reason not authorized by the empowering provision; and the action itself is not authorized by the empowering provision.[1] It is beyond the scope of this chapter to cover the materials interpreting each of these grounds of review.[2]

It is arguable that the common law relating to mistake of law is inconsistent with the right to lawful administrative action. In *Hira & another v Booysen & another*[3] the Appellate Division held that an agency's interpretation of its empowering provisions is reviewable unless the legislature intended to commit the question of interpretation solely to the agency's discretion. Michael Asimow convincingly argues that, under the Constitution, Parliament can no longer commit a question of legal interpretation to an agency's discretion as all interpretive issues must now be reviewable.[4] Instead, he suggests, appropriately in our view, that courts retain interpretive authority but give deference to carefully reasoned interpretations of ambiguous statutory language where an agency's expertise gives it some interpretive advantage over the courts.

63.5 THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

(a) General principles of procedural fairness

The right to procedural fairness was constitutionally entrenched in s 24*(b)* of the interim Constitution, which provided that 'every person shall have the right to procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened'. Section 33 of the final Constitution removed the in-built qualifications and simply provided that everyone is entitled to administrative action which is procedurally fair.[5]

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

[2] See Currie & Klaaren *Benchbook* 150–74.

[3] 1992 (4) SA 69 (A) at 93.

[4] Michael Asimow 'Administrative Law under South Africa's Final Constitution: The Need for an Administrative Justice Act' (1996) 113 *SALJ* 613 at 623.

[5] As discussed above, the right to procedurally fair administrative action may overlap with the right to lawful administrative action.

Procedural fairness is a flexible concept which implies that decisions must be made in a procedurally fair manner. Under our common law, procedural fairness was reflected in the rules of natural justice, which embodied two fundamental principles — the right to be heard (*audi alteram partem*) and the rule against bias (*nemo iudex in sua causa*). The primary rationale for the right to procedural fairness is that it improves the quality of decision-making by ensuring that all relevant information and interests are placed at the administrator's disposal.[1]

The constitutional right to procedural fairness constitutionalizes, at a minimum, the common-law principle of natural justice. The choice of the term 'procedural fairness', however, indicates that this right goes beyond the established rules of natural justice. As Farlam J stated in *Van Huysteen*,[2] procedural fairness is not limited to the right to be heard and the rule against bias, but entitles affected persons to 'the principles and procedures' which in the circumstances are 'right and just and fair'.

In fact, the unqualified wording of s 33 indicates that the duty to act fairly is now entrenched as a constitutional rule.[3] The effect of the duty to act fairly is that procedural fairness applies to all administrative action but that the content of procedural fairness varies according to circumstances. In other words, all administrative action must be taken in a procedurally fair manner. This, however, will not necessarily require that a hearing be granted but rather may be satisfied where some other fair procedure is followed, for example, notice and comment procedures in some circumstances.[4]

Procedural fairness is a flexible concept and its content varies according to the circumstances of the case, including the nature of the power.[5] The Constitutional Court's first decision turning on procedural fairness is *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, in which O'Regan J put the matter as follows:[6]

[1] As Goldstone J stated in *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 24: '[O]bservance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken.'

[2] *Van Huysteen NO & others v Minister of Environmental Affairs and Tourism & others* 1995 (9) BCLR 1191 (C) at 1214, quoting Lord Morris of Borth-Y-Gest with approval. See also *Mpande Foodliner CC v Commissioner for the South African Revenue Service & others* 2000 (4) SA 1048 (T) at 1067.

[3] Patel AJ in *Mpande Foodliner CC v Commissioner for the South African Revenue Service & thers* 2000 (4) SA 1048 (T) at para 43 describes this as a 'dynamic third dimension' of the right to procedural fairness. For a discussion of the duty to act fairly, see *Chairman: Board on Tariff and Trade & others v Brence Inc & others* (unreported, SCA, 25 May 2001) at paras 13–14.

[4] For example, in *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) O'Regan J indicated that, in certain circumstances, procedural fairness may simply require reasonable notice of the termination of a benefit.

[5] *Attorney General v Blom; Premier, Mpumalanga* at para 39; *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 216; *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U- College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC) at para 19. See also s 3(2)(*a*) of the AJA.

[6] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 41.

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

In an important decision reiterating the circumstances-based nature of the right to procedural fairness the Constitutional Court has defined procedural fairness in a formulation that merges the scope and the content of the right to procedural fairness. In *Minister of Public Works & others v Kyalami Ridge Environmental Association & others*[1] Chaskalson P stated:[2]

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

The AJA contains detailed provisions relating to the scope, content, and protection of procedural fairness in ss 3, 4, and 6. Henceforth, the analysis of the right to procedural fairness will largely take place around the provisions of this Act, which we will now examine.

(b) AJA administrative action affecting any person

(i) *The scope of procedural fairness affecting any person*

Section 3(1) of the AJA provides that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'. The remainder of the section sets out the procedures to be followed in order to give effect to the right to procedurally fair administrative action in such circumstances. These procedures essentially relate to the opportunity to make representations.

The first difficulty with s 3(1) is that it applies to 'administrative action' which 'materially and adversely affects the rights or legitimate expectations of any person'. As stated above, 'administrative action' is defined in the AJA as a decision which adversely affects any person's rights. On the face of it, procedural fairness therefore appears, in some respects, to be applicable to a narrower category of action than 'administrative action' (the inclusion of the word 'materially') and, in other respects, to a wider category of action (that which affects legitimate expectations and not only rights). The latter conclusion would, however, be logically inconsistent as action must first constitute 'administrative action' under the AJA before one can consider whether it is subject to the requirement of procedural fairness. The ambit of s 3(1) cannot be wider than the ambit of 'administrative action' in s 1.

[1] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC).

[2] *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 101.

One approach to solving this logical problem is to emphasize the word 'materially'. The inclusion of this word indicates that a certain class of administrative action will not require the application of procedural fairness, that is, those actions which affect rights but do not affect one's rights or legitimate expectations in a material manner. In such a situation the rules of procedural fairness will apply if the action materially affects the relevant person's legitimate expectations.[1] According to this approach, legitimate expectations only matter when rights are adversely affected in a non-material manner.

Another possible approach may be to argue that the phrase 'materially and adversely affects rights' in s 3(1) refers only to decisions which deprive one of rights and not those which determine one's rights. This is different to the position under the definition of 'administrative action' where, we argue, the determination theory should apply.[2] 'Administrative action' could therefore include a broad category of action which determine one's rights and procedural fairness could apply to a narrower class of action which deprives one of one's rights or legitimate expectations. Although this approach seems somewhat artificial, it achieves constitutional purposes and enables some real meaning to be given to the term 'legitimate expectations'. In addition, this approach is supported by the fact that, unlike the definition of administrative action, s 3(1) couples the term 'rights' with 'legitimate expectations'. If rights meant the determination of one's rights, there would be no need to include the phrase 'legitimate expectations'.[3]

Whichever approach is adopted, it is important that the courts do not employ technical distinctions to deny the right to procedural fairness in circumstances where fairness requires a hearing. In doing so, the courts should bear in mind that the purpose of s 3(1) of the AJA is to give effect to the unqualified constitutional right of procedurally fair administrative action.

Indeed, reading from the Constitutional Court's decisions, it seems likely that the concept of legitimate expectations will continue to play an important role in assessing the scope of procedural fairness. In *Premier, Mpumalanga* O'Regan J restated Corbett CJ's decision in *Administrator, Transvaal & others v Traub & others*[4] in the following terms:[5]

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

The concept of legitimate expectations may be usefully thought of in three categories: express promise, regular and long-standing practice, and fairness. An official may engender

[1] This is the approach adopted by Currie & Klaaren *Benchbook* 93–4. It is accepted that this will only be applicable to a narrow class of action.

[2] See above, § 63.3*(b)*(vi).

[3] A similar argument is advanced by Etienne Mureinik in respect of s 24*(b)* of the interim Constitution ('A Bridge to Where? Introducing the Interim Bill of Rights (1994) 10 *SAJHR* 31). The down-side of this approach is that the scope of procedural fairness is limited in a manner which may not fully give effect to the constitutional right.

[4] 1989 (4) SA 731 (A).

[5] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 35.

a legitimate expectation through an express promise or one may be the result of a regular and long-standing administrative practice. Both of these categories fit into the category of the previous conduct of an official. The third category is a residual one, fairness, and is the first mentioned by O'Regan J.[1] This approach is clear from the following *dictum* of the Constitutional Court in the *SARFU* case:[2]

> 'To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case.'

It is important to note that a legitimate expectation can be either substantive or procedural, that is, as O'Regan J states, '[e]xpectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind'.[3] The above quote of O'Regan J should not be taken as suggesting that the previous conduct of an official can give rise to a legitimate expectation only if the expectation is of a procedural type. A legitimate expectation will arise not only where an official promises that a particular procedure will be followed but also where an official promises that a particular substantive benefit will be given.

In *Premier, Mpumalanga* an association of governing bodies of 'Model C' schools, which mainly educated white children, challenged a decision of the Mpumalanga Provincial MEC for Education to terminate bursaries paid to those students as a violation of the right to procedural fairness. The MEC discontinued their bursaries retrospectively, without reasonable notice, and without affording the association of governing bodies an opportunity to be heard or to take action to avoid the impact of the action. The court decided that the association had a legitimate expectation and that the right to procedural fairness had been violated.[4]

In *Ed-U-College* the Constitutional Court examined all circumstances of the case in holding that procedural fairness does not require the right to a hearing for all affected persons simply because a decision is taken which has the effect of reducing annual subsidies to schools. The focus must be on whether the expectation of a hearing is reasonable in all the circumstances. As O' Regan J stated:[5]

> 'Subsidies are paid annually and, given the precarious financial circumstances of education departments at present, schools and parents cannot assume, in the absence of any undertaking or promise by an education department, that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the legislature has reduced the amount allocated for distribution.'

[1] This would include situations where a new applicant applies for a licence or where the holder of an expiring licence applies for a renewal of the licence. See Wade and Forsyth Administrative Law 7th ed (1994) at 524–5. This open-ended category of legitimate expectations should be accepted, although it is not generally included in judicial statements of the scope of legitimate expectations. See, for example, Lord Fraser of Tullybelton in *Council of Civil Service Unions & others v Minister of Civil Service* [1985] AC 374 (HL) at 401.

[2] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 216.

[3] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 36.

[4] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at paras 41–2. At para 41, O'Regan J alluded to a possible new doctrine in our administrative law — that a retroactive termination of benefits will never be fair, unless there is an overriding public interest. This is the approach taken by the European Court of Justice (see *Schwarze European Administrative Law* (1992) at 867–8).

[5] *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC) at para 22.

(ii) *The content of procedural fairness affecting any person*

Section 3 of the AJA divides the content of procedural fairness into mandatory elements and directory elements. Section 3(2)*(b)* falls into the former category and provides that an administrator 'must' give a person: adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action;[1] and adequate notice of any right of review or internal appeal and the right to request reasons. Subsection (3), on the other hand, falls into the latter category and provides that the administrator 'may, in his or her or its discretion'[2] give a person an opportunity to obtain assistance and, in serious or complex cases, legal representation; present and dispute information and arguments; and appear in person.

Section 3(4)*(a)* provides that an administrator may depart from any of the mandatory elements in subsec (2) if to do so is 'reasonable and justifiable in the circumstances'. Section 3(4)*(b)* goes on to provide that, in determining whether a departure is reasonable and justifiable, an administrator must take all relevant factors into account, including the urgency of taking the administrative action or the urgency of the matter and the need to promote an efficient administration and good governance.

Finally, s 3(5) provides that an administrator may act in accordance with a different procedure if he or she is empowered by an empowering provision to follow a different procedure which is 'fair'. In assessing the fairness of a different procedure, the courts should carefully scrutinize the relevant procedure to ensure that it gives affected persons an adequate opportunity to be heard, bearing in mind that one of the constitutionally mandated aims of the AJA is to give effect to the constitutional right to procedural fairness.

(c) Administrative action affecting the public

Section 4(1) of the AJA stipulates that where an administrative action 'materially and adversely affects the rights of the public' an administrator must decide between five courses of action.[3] He or she must either: hold a public inquiry;[4] follow a notice and comment procedure;[5] follow both the public inquiry and notice and comment procedure; follow a fair but different procedure in terms of an empowering provision; or follow another appropriate procedure which gives effect to the right to procedural fairness in s 3 of the AJA.[6]

The AJA therefore introduces general rule-making procedures which must be followed in relation to administrative action affecting the public generally. This development represents a change from the common-law position where rule-making which had a general, rather than

[1] This should include the provision of all the essential facts which will enable the affected person to make informed representations. See, for example, *Yuen v Minister of Home Affairs & another* 1998 (1) SA 958 (C).

[2] The use of this subjectively phrased discretion is unfortunate in an Act which is aimed at promoting administrative justice.

[3] Section 4 of the AJA is not yet in force.

[4] The procedure for a public inquiry is set out in s 4(2).

[5] The notice and comment procedure is set out in s 4(3).

[6] For a discussion of the effect of this latter provision, see Currie & Klaaren *Benchbook* 130–1.

a particular, effect was not subject to the requirements of natural justice.[1] This development is to be welcomed as it allows public participation in the administrative rule-making process, which is frequently used as modern legislatures devolve their law-making powers to administrative functionaries.

The important test of application in s 4 is whether the relevant administrative action 'materially and adversely affects the rights of the public'. Currie & Klaaren propose that the test for the application of s 4 is that the administrative action must: have a general impact; a significant public effect; and rights of the public must be in issue.[2] In order to have a general impact the administrative action must apply to members of the public 'equally' and 'impersonally', although it may impact on certain members of the public more than others (for example, a regulation prohibiting the consumption of alcohol on a particular day of the week).[3] The significance or materiality requirement will depend on the circumstances of each case and should be judged cumulatively rather than in relation to a particular section of the public.[4] The requirement that rights must be an issue is a relatively weak test and should be easily satisfied, particularly given the fact that, in order to constitute administrative action, the rights of any person must be adversely affected.

(d) The rule against bias

The second principle of natural justice is the rule against bias. In our common law the test for the existence of bias was not whether there was a real likelihood of bias but rather whether there was a reasonable suspicion of bias.[5] This rule is now constitutionally entrenched in s 33(1), particularly when read with s 34 of the Constitution, which provides that an 'independent and impartial tribunal' is an appropriate alternative to a court of law. An

[1] *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A). For a general discussion of administrative rule-making, see Lawrence Baxter 'Rule-making and Policy Formulation in South African Administrative-law Reform' (1993) *Acta Juridica* 176. Currie & Klaaren *Benchbook* 108–9 identify four rationales for the inclusion of rule-making procedures. First, it gives general administrative action greater democratic legitimacy through allowing for public participation in the decision-making process: '[T]here is greater participative democracy where important administrative decisions affecting the public are discussed publicly — as, for example, in a notice and comment procedure or in a public inquiry procedure — than where decisions are made by administrators without such procedures.' Secondly, they help to inform the administrative process by obtaining additional information. Thirdly, public participation combats weakness of logic or analysis in the administrative action. Fourthly, the requirement, if appropriate, of general procedures makes it easier for courts to retroactively monitor the rule-making process and set it aside on judicial review.

[2] Currie & Klaaren *Benchbook* 114.

[3] See Currie & Klaaren *Benchbook* 114–16.

[4] An example of an administrative action affecting the public in a manner which does not meet the requirement of materiality would be Hugh Corder's example of a regulation requiring that the background of motor vehicle licence plates should be red rather than yellow (see Hugh Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38 at 46).

[5] *BTR Industries SA (Pty) Ltd & others v Metal and Allied Workers' Union & another* 1992 (3) SA 673 (A). See also *President of the Republic of South Africa & others v South Africa Rugby Football Union & others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at paras 36 and 48; *S v Roberts* 1999 (4) SA 915 (SCA) at paras 32 and 34; *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Ltd* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) in relation to judicial bias. As Lord Hewitt stated in *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256 at 259: '[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.'

administrative tribunal would therefore need to satisfy the requirements of independence and impartiality. The common-law test for bias has now specifically been included as a ground of review in s 6 of the AJA, which provides that an administrative action may be reviewed if the administrator who took it 'was biased or reasonably suspected of bias'.

The concept of institutional bias was accepted in our common law in limited circumstances where the legislature expressly by clear implication intended to exempt the particular decision from allegations of bias.[1] It appears that the law of institutional bias is now ripe for overhaul in light of the constitutional protection of procedural fairness.[2]

63.6 THE RIGHT TO REASONABLE ADMINISTRATIVE ACTION

(a) The pre-constitutional position

The concept of reviewing an administrative decision on the ground that it is unreasonable did not form part of pre-constitutional common law. The role played by reasonableness in our administrative law was limited to the application of two doctrines. First, symptomatic unreasonableness, in which unreasonableness itself was not a reviewable defect but was only reviewable to the extent that the unreasonableness pointed to the existence of another ground of review.[3] The second related doctrine was that of gross unreasonableness, which held that a decision will be set aside only if the degree of unreasonableness is particularly egregious. As stated in *National Transport Commission & another v Chetty's Motor Transport (Pty) Limited*,[4] a decision will be set aside if it is 'grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply . . . [the] mind'. The only significant role played by unreasonableness review was in the context of delegated legislation, where the rule in *Kruse v Johnson*[5] was applied in a 'long train of cases'.[6]

The traditional concern with review for unreasonableness is that it narrows the distinction between a review and an appeal and invites judicial scrutiny of the merits of the administrative discretion. It therefore opens the way for courts to interfere in executive policy decisions and thereby frustrate public reforms, redistribution and social upliftment. In addition, it undermines the separation of powers as it enables the judiciary to set aside a decision of the executive by examining the merits of the decision.

[1] *Council of Review, SADF, & others v Mönnig & others* 1992 (3) SA 482 (A) at 491.

[2] In *Financial Services Board & another v Pepkor Pension Fund & another* 1999 (1) SA 167 (C) the court carefully considered such a claim, but found the statutory structure to be independent and rejected the constitutional attack sourced in the right of access to courts.

[3] See, for example, *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 236–7.

[4] 1972 (3) SA 726 (A) at 735.

[5] [1898] 2 QB 91 at 99–100.

[6] *R v Jopp* 1944 (4) SA 11 (N) at 13. See Lawrence Baxter *Administrative Law* (1984) at 478–9 and, in particular, n 13. In *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* 1976 (2) SA 1 (A) Jansen JA applied unreasonableness as an independent ground of review, but only in relation to judicial administrative bodies.

(b) The constitutional right to reasonable administrative action

Section 24*(d)* of the interim Constitution dramatically altered the common-law position, in providing that 'every person shall have the right to administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'. As Klaaren stated in the previous edition of this chapter, this was the key substantive addition to the administrative justice clause as it amounted to a constitutional command for rational decision-making.[1] Although the term 'justifiable' was used in the interim Constitution, it was generally agreed that this was synonymous with reasonableness.[2] The latter term is preferred in s 33(1) of the final Constitution, which provides that everyone has the right to administrative action which is 'reasonable'.

It is clear that the Constitution has removed the doctrines of symptomatic unreasonableness and gross unreasonableness and introduced review for unreasonableness *per se*.[3] Nevertheless, there is still uncertainty as to the proper test to be applied to determine whether administrative action is reasonable. Generally speaking, essentially two approaches to this question have emerged.[4]

The first is to argue that reasonableness consists only of a rationality enquiry. A decision will therefore be reasonable if there is a rational connection between a legitimate state objective and the means used. Some support for this approach can be found in *Carephone (Pty) Ltd v Marcus NO & others*,[5] where Froneman DJP formulated the test for reasonableness in the following terms:

> '[I]s there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?'

This approach limits the scope of our courts to enquire into the merits of administrative decisions and thereby strictly safeguards the distinction between review and appeal.

A more robust approach was adopted by the court in *Roman v Williams NO*,[6] applying a test of 'suitability, necessity and proportionality'[7] to a decision of the Commission of

[1] At 25.8.

[2] See, for example, Etienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. But see Davis & Marcus 'Administrative Justice' in Davis, Cheadle & Haysom (eds) *Fundamental Rights in the Constitution: Commentary and cases* (1997) 161, who suggest that reasonableness might be a wider concept than justifiability since a decision may be justifiable, although the reasons for the decisions do not have an objectively reasonable basis.

[3] Without explicitly basing his judgment on s 24*(d)* of the interim Constitution, Friedman J took the view, in *Standard Bank of Bophuthatswana Ltd v Reynolds NO & others* 1995 (3) BCLR 305 (B) at 325F, that the interim Constitution requires the courts to adopt a test of unreasonableness and not that of gross unreasonableness as the appropriate standard of judicial review of administrative action. But see De Villiers J in *SARFU & others v President of the Republic of South Africa & others* 1998 (10) BCLR 1256 (T) at 1301, who appeared to invoke these doctrines in stating that the President's conduct was 'so grossly unreasonable as to warrant the inference that he failed to apply his mind to the relevant issues . . .'

[4] See Ross Kriel 'Administrative Law' *Annual Survey of South African Law* (1998) at 94–7 for a useful discussion of the various approaches the courts have adopted to reasonableness review.

[5] 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) at para 37. This case dealt with a review under the Labour Relations Act 66 of 1995.

[6] 1998 (1) SA 270 (C).

[7] *Roman v Williams NO* 1998 (1) SA 270 (C) at 284.

Correctional Services to re-imprison a probationer who had, *inter alia*, violated his conditions of probation. In the course of his judgment Van Deventer J stated as follows:[1]

> 'The constitutional test embodies the requirement of proportionality between the means and the end. The role of the Courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well.'[2]

A similar approach is advocated by Hoexter, who argues that a reasonable decision must be rational in the sense that it is supported by the evidence before the decision-maker and the reasons given for it and is 'rationally connected to its purpose, or objectively capable of furthering that purpose'.[3] In addition, Hoexter states that 'a reasonable decision also reveals proportionality between ends and means, benefits and detriments'.[4]

In deciding on the appropriate test to adopt, one should not lose sight of the fact that the text of the Constitution specifically uses the term 'reasonable'. It is this term, rather than a substitute, that must be given meaning. As Froneman DJP, discussing the test of justifiability in the interim Constitution, remarked:[5]

> 'Without denying that the application of these formulations [of 'reasonableness, rationality' and 'proportionately'] in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters easier.'

Whatever approach is adopted, it seems clear that reasonableness review will, to some extent, require courts to examine the merits of the decision. Nevertheless, this does not remove the distinction between review and appeal. The proper concern of review will be limited to the reasonableness of the decision, while the correctness of a decision may be questioned on appeal. In this regard, the following *dictum* of Froneman DJP, commenting on the test of justifiability in the interim Constitution, is particularly instructive:[6]

> 'In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.'[7]

(c) Reasonableness review under the AJA

The concept of reasonableness review is included in two ways in the AJA. First, s 6(1)*(f)* provides that administrative action may be judicially reviewed if it is not 'rationally connected' to the purpose for which it was taken, the purpose of the empowering provision,

[1] *Roman v Williams NO* 1998 (1) SA 270 (C) at 284–5.

[2] In this regard, the learned Judge drew on the views of J R de Ville in 'Proportionality as a Requirement of the Legality and Administrative Law in Terms of the New Constitution' (1994) 9 *SA Public Law* at 360 and J R de Ville 'The Right to Administrative Justice: An Examination of Section 24' 1995 11 *SAJHR* 264.

[3] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 511.

[4] Ibid.

[5] *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) at para 37.

[6] At para 36.

[7] See also Etienne Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 at 40–3: ' "Reasonableness" marks off decisions as tolerable even where they may be wrong.' See also *Kotze v Minister of Health & another* 1996 (3) BCLR 417 (T) at 425E–426B.

the information before the administrator or the reasons given by the administrator. This provision clearly requires that administrative action must be rational. Section 6(2)*(h)* of the AJA goes further in providing that administrative action may be set aside if it is 'so unreasonable that no reasonable person could have so exercised the power or performed the function'.[1]

While it is arguable that the latter provision means that only particularly egregious instances of unreasonableness will be reviewable, such an approach should be avoided, as it would fail to give effect to the constitutional right to reasonable administrative action. Section 6(2)*(h)* should rather be read as simply providing for review for unreasonableness.[2] It is submitted that this standard requires a decision-maker to act reasonably, in the sense that the decision taken would have been one of the decision-making options open to the reasonable administrator in all the circumstances. It is therefore not the decision which a reasonable decision-maker would have made but rather one he or she could have made. In other words, reasonableness is assessed by examining whether the action of the administrator was one of the courses of action open to a reasonable administrator. This enquiry involves a limited proportionality enquiry as a wholly disproportionate action would not be one open to a reasonable decision-maker. Nevertheless, in reviewing decisions for reasonableness, courts should take care not to second-guess the policy choices of the executive.

63.7 THE RIGHT TO WRITTEN REASONS

Although a number of individual statutes required the giving of reasons for certain decisions, there was no right to written reasons in our common law. This was criticized on the basis that the obligation to furnish written reasons could promote administrative justice and good decision-making in a constructive manner without the need to rely on judicial review. If a decision-maker knows he or she is required to provide written reasons to justify his or her decision, he or she will be more inclined to consider all alternatives and to act in conformity with principles of good administration. The furnishing of written reasons has the added advantage of enabling persons to assess whether or not their rights have been infringed and therefore whether to take a particular decision on review.[3]

A constitutional right to written reasons was introduced in s 24*(c)* of the interim Constitution, which provided that every person had the right to 'be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public'. Section 33(2) of the final Constitution entrenched the right in the following terms: '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.' The application

[1] The draft of the Law Commission provided that a court could review administrative action if 'the effect of the action is unreasonable, including any: (i) disproportionality between the adverse and beneficial consequences of the action; and (ii) less restrictive means to achieve the purpose for which the action was taken'. See Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 518–19 for a criticism of s 6(2)*(h)*.

[2] See Currie & Klaaren *Benchbook* 171–3.

[3] See Lawrence Baxter *Administrative Law* (1994) at 228 for a discussion of the rationale for requiring written reasons. See also *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA) at paras 5–10.

of the right in the final Constitution is therefore narrower than that in the interim Constitution; it applies only when 'rights' are adversely affected and not when 'rights or interests' are affected or threatened.

Section 5(1) of the AJA gives this constitutional right statutory form. It provides that any person 'whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action' may request the administrator to furnish written reasons for the action.[1] The administrator is obliged to provide such reasons within 90 days after receiving the request.[2] Subsection (3) goes on to provide that if an administrator fails to furnish adequate reasons, it will be rebuttably presumed in any judicial review proceedings that the administrative action was taken without good reason. An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances[3] and may follow a fair but different procedure in terms of an empowering provision.[4]

The right to written reasons therefore only arises under the AJA if a person's 'rights' have been 'materially and adversely affected'. The first point to note is that the AJA adds the qualification 'materially' to the right to written reasons as expressed in the Constitution. In order to ensure that the AJA properly gives effect to the constitutional right, only fairly insignificant, trivial effects should fall short of the 'materially' requirement.[5]

As discussed above in relation to the meaning of administrative action, the phrase 'adversely affecting rights' should be read to mean administrative action that determines one's rights and the term 'rights' should be broadly interpreted.[6]

Section 5(1) of the AJA specifically provides that a person is only entitled to request written reasons if he or she 'has not been given reasons for the [administrative] action'. Two important qualifications used elsewhere in s 5 are missing from this phrase. It does not specifically require that the previous reasons must be 'in writing' or 'adequate'. These requirements should, however, be read into this phrase. The provision of inadequate or non-written reasons cannot be said to give effect to the constitutional right of everyone to be given 'written reasons'.[7]

The crucial question in terms of s 5 is what constitutes 'adequate reasons'. In this regard, the provisions of the AJA themselves do not provide guidance. The English courts have interpreted 'reasons' in terms of the English Tribunal and Inquiries Act, 1958, to mean that

> 'proper adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible but which deal with the substantive points that have been raised.'[8]

[1] The request for reasons must be made within 90 days from the date on which the affected person 'became aware of the action or might reasonably have been expected to have become aware of the action' (s 5(1)).

[2] Section 5(2).

[3] Section 5(4).

[4] Section 5(5).

[5] The refusal of written reasons in circumstances where a right is not materially affected is no doubt a reasonable and justifiable limitation on the constitutional right.

[6] See above, § 63.3*(b)*(vi). This is consistent with the approach of the Supreme Court of Appeal in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA), particularly Schutz JA at paras 11 and 12.

[7] Currie & Klaaren *Benchbook* 138–9 point out that the comprehensiveness of the required reasons may, however, be affected by the time at which they are given. If they are given contemporaneously with the decision, they need be less detailed than if given later pursuant to a request under the AJA.

[8] In *re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478.

In *Moletsane v Premier of the Free State & another*[1] the court laid down the general approach that 'the more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.' This approach links the level of detail to the impact on the persons affected by the action. Currie & Klaaren point out that there are other possible alternatives to interpreting what is adequate in the circumstances, including the level of complexity relating to the matter and the cost of providing detailed reasons in the circumstances.[2] They argue that '[t]he reason-giving requirement principally serves a justificatory function, explaining to the affected parties and to the public at large why a particular decision has been made'.[3]

The starting-point of the AJA's treatment of reasons is that the process is request-driven. While this would probably not affect the constitutionality of the AJA, it should not be taken as a signal for the legislature to depart from the recent legislative trend to require that reasons be automatically given in relation to certain decisions.[4] The automatic grant of written reasons serves the interests of good administration. In addition to adhering to this trend in legislative drafting, the provisions of s 5(6) should be employed for this purpose.[5]

63.8 Standing to Enforce the Right to Just Administrative Action

In administrative law, standing refers to the right of an applicant to approach the court for relief by way of judicial review. Section 38 of the Constitution expands the common-law grounds of standing where it is alleged that a constitutional right has been infringed or threatened. In such cases the following persons may approach a court: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members.[6]

Froneman J in *Ngxuza & others v Secretary, Department of Welfare, Eastern Cape Provincial Government & another*[7] adopted a broad approach to standing in relation to administrative justice:

> 'Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach [to standing]. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons

[1] 1996 (2) SA 95 (O) at 98G–H, 1995 (9) BCLR 1285 (O) at 1288B.

[2] Currie & Klaaren *Benchbook* 143–6.

[3] Currie & Klaaren *Benchbook* 143.

[4] For example, where a licence application is rejected.

[5] Section 5(6)*(a)* provides that '[i]n order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section'.

[6] See the discussion above, Chapter 8 'Access to the Courts and Justiciability'.

[7] 2000 (12) BCLR 1322 (E) at 1327.

may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality. All this speaks against a narrow interpretation of the rules of standing.'

In this case a number of applicants, whose disability grants under social legislation had been cancelled or suspended, sought a declaration that the suspension or cancellation was unlawful. The same relief was claimed by the applicants on behalf of any other persons in the same position as themselves. Froneman J emphasized the conditions of poverty in the Eastern Cape in holding that there was evidence that many people in similar circumstances as the applicants were unable to individually pursue their claims through poverty, do not have access to legal representation, and would have difficulty in obtaining legal aid. They were thus effectively unable to act in their own name.[1]

The court therefore held that the applicants had standing under s 38*(b)* on the ground that they were acting on behalf of others who could not act in their own names. The court also held that the applicants had standing on the basis that they were members of a class of persons (s 38*(c)*) and were acting in the public interest (s 38*(d)*).

The finding that the applicants had standing on the basis that they were members of a class was upheld on appeal by the Supreme Court of Appeal.[2] In the course of his judgment Cameron JA emphasized that the class of applicants were drawn from a poor community, their claims were small and they were widely spread. The learned judge therefore remarked that the situation 'seemed pattern-made for class proceedings'.[3]

This class action litigation supports the argument that the broad constitutional provision relating to standing should be applied in the context of review under the AJA. Such a broad approach would also be consistent with the fact that s 6(1) of the AJA provides that 'any person' may institute judicial review proceedings.

63.9 Substantive Remedies in Administrative Law

A detailed discussion of the judicial remedies available in administrative law falls beyond the scope of this chapter.[4] Nevertheless, a crucial issue is the circumstances in which a court will grant substantive relief. In other words, when will a court substitute the decision of the administrator, rather than providing the normal remedy of setting aside the decision and referring it back to the relevant decision-maker?

[1] *Ngxuza & others v Secretary, Department of Welfare, Eastern Cape Provincial Government & another* 2000 (12) BCLR 1322 (E) at 1331.

[2] *The Permanent Secretary, Department of Welfare, Eastern Cape, & others v Ngxuza & others* 2001 (4) SA 1184 (SCA). It was unnecessary for the SCA to decide on the other grounds of standing as the applicants had subsequently chosen to proceed with a class action.

[3] At para 11.

[4] Section 8 of the AJA provides that a court of tribunal in proceedings for judicial review of administrative action may grant 'any order that is just and equitable' including, for example, directing the administrator to give reasons, prohibiting the administrator from acting in a particular manner, setting aside the administrative action and remitting it for reconsideration, declaring the rights of the parties, granting a temporary interdict or other temporary relief.

Under our common law the courts have been reluctant to substitute the decision of the original decision-maker but will do so in certain exceptional circumstances. Hiemstra J in *Johannesburg City Council v Administrator, Transvaal, & another*[1] identified two such circumstances: where the end result is 'a foregone conclusion' and the reviewed decision-maker 'has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again'. O'Regan J, in the *Premier, Mpumalanga* case,[2] indicated that our courts should be particularly cautious in providing substantive relief, particularly where the relevant decision is of a political nature. The learned judge clearly indicated a concern of undermining the separation of powers in stating that[3]

> 'a Court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government'.

Section 8(1)*(c)*(ii) of the AJA specifically provides that 'in exceptional cases' the court may substitute or vary the administrative action or correct a defect resulting from the administrative action. The courts will probably be slow to invoke this provision and will only do so in circumstances similar to those established in the common law.

63.10 THE PRINCIPLES OF LEGALITY AND RATIONALITY

In a series of cases crucial for the project of constitutionalism the Constitutional Court has identified clearly a principle of legality that is distinct from yet supportive of the constitutional right of just administrative action. In *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others*[4] the court applied the principle of legality, which requires that public power may only be exercised in accordance with law, beyond the ambit of administrative action. It was held that the principle of legality was a constitutional principle founded on the rule of law.[5] As Chaskalson P, Goldstone J and O'Regan J stated:[6]

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

The Constitutional Court went further in the *SARFU* case,[7] holding that, although the President's decision to appoint a commission of inquiry was not administrative action, it was

[1] 1969 (2) SA 72 (T) at 76.

[2] *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC).

[3] At para 51.

[4] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC).

[5] Section 1*(c)* of the final Constitution proclaims that two of the foundational values of the Republic of South Africa are supremacy of the Constitution and the rule of law.

[6] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 58.

[7] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC).

constrained by the principle of legality and the requirement that the President act personally, in good faith, and without misconstruing the nature of his powers.[1]

A third case reaffirmed the principle of legality and articulated an additional one of rationality — a principle with perhaps less clear outlines. In *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the RSA & others*[2] the Constitutional Court dealt with the President's decision to bring an Act into force despite the fact that the regulatory infrastructure for the operation of the Act had not yet been put in place. The court held that the President's decision was not 'administrative action'.[3] Nevertheless, Chaskalson P stated that it was a general requirement of the Constitution that public officials should not only exercise their powers in good faith but that such powers may not be exercised arbitrarily. Decisions must therefore 'be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement'.[4] The court therefore struck down the President's decision to bring the Act into operation on the basis that it was objectively irrational in the circumstances. Chaskalson P summed up the position, in words reminiscent of the traditional administrative law concerns over review on the merits:[5]

> 'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.'[6]

[1] At paras 148 and 149.

[2] 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

[3] See above, § 63.3*(a)*(iii).

[4] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 85. In adopting this approach Chaskalson P drew on the court's previous equality jurisprudence relating to mere differentiation (see, for example, *Prinsloo v van der Linde & another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25).

[5] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 90.

[6] Thus far, the Constitutional Court has only applied this principle of rationality to hold invalid executive actions and not legislative acts. A concern not to extend a constitutional principle of rationality to legislative acts may be reflected in Chaskalson P repeating the phrase 'the executive and other functionaries' a number of times in his discussion relating to rationality. Some support for the application of the principle of rationality beyond administrative and executive action may, however, be found in various locations of Constitutional Court jurisprudence. See the judgment of Ackermann J in *S v Makwanyane & another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 156: 'We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.' See also *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 (non-rational mere differentiation violates the right of equality) and *New National Party of South Africa v Government of the Republic of South Africa & others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 19 (applying a rational relationship test) and at para 122 (advocating a reasonableness standard) (O'Regan J, dissenting).

Although drawing their force from constitutional law, the principles of legality and rationality applied by the Constitutional Court are in substance the application of principles of administrative law beyond the ambit of administrative action.[1] In relation to the executive and other public functionaries, this jurisprudence has the effect that the exercise of such public power will be scrutinized for compliance with administrative law-type principles, even though such principles are less exacting than those required by the Constitution's administrative justice clause.

[1] Klaaren 'Redlight, Greenlight' (1999) 15 *SAJHR* 209.