

2. THE CONTEXT

A background to the AJA

1. Important terms and concepts

There are some terms and concepts that we will use a lot when talking about the AJA. By the end of this section you will understand where the AJA came from, and why.

EXERCISE 2 – TERMS AND CONCEPTS

Before continuing, you will be asked by your facilitator to complete the following focus exercise. In the spaces provided, fill in what you understand by the terms listed.

The Constitution is:

The Bill of Rights is:

Legislation is:



BY THE END OF THIS SECTION

You will:

- Understand the background and context to the AJA;
- Be able to explain some of the important terms and concepts used;
- Identify the sections in the Constitution that are important for the AJA;
- Be able to explain why the Batho Pele White Paper is so significant both for the administration, and for the public.

Regulations are:

Administrative Law is:

An organ of state is:

Judicial review is:

a. The Constitution

South Africa is governed by the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution). One of the most important things that the Constitution does is to make South Africa a “**constitutional democracy**”. This means that **the Constitution is the highest law in the country and all laws and all people (including Parliament, the President, the Ministers, the administration and the courts) must follow and obey it.**

The Constitution contains the most important rules of our political system. It sets out what institutions make up the South African state, what their powers are, and how they may use their powers. The Constitution has a Bill of Rights (including the right to Just Administrative Action) that **protects the rights of all people inside the country**, and it explains what their obligations and duties are.

b. The Bill of Rights

Our Constitution contains a Bill of Rights (in Chapter 2). The Bill of Rights is a list of all the human rights that are protected. These are the **rights that all people in South Africa have, not only citizens**. The state has to “respect, promote and fulfil” these rights and cannot do anything that goes against these rights. The Bill of Rights is in the Constitution to make it part of the highest law and to make it possible for people to use it in court.

c. Legislation and regulations

The Constitution is the highest and most important law in South Africa, but it also **gives legislatures the power to make written laws**, such as the AJA. These written laws are called **legislation**. Although the Constitution is itself legislation (having been passed by Parliament in 1996), **all other legislation is subordinate to the Constitution**. This means that legislation will only be allowed if it complies with the Constitution.

Very often, legislation will set out a broad framework and will give (delegate) the power to an administrator to make rules for how the Act will work in practice. These rules are known as **regulations**.



CHANGING THE CONSTITUTION

Because the Constitution is the highest law it is more difficult to change than other laws. The Constitution can only be changed by Parliament if it uses special procedures and if two-thirds of the members of Parliament, and two-thirds of the House of Provinces agree to the change.

EXAMPLE

The South African Passports and Travel Documents Act 4 of 1994 (the Passports Act) deals with passports. But the Act says nothing about things like:

- What forms must be used when you apply for a passport;
- What the application fee is; or
- How long the passport is valid for and whether it can be renewed.

Instead, the Act gives the Minister of Home Affairs the power to make regulations to cover these. These regulations are therefore an important source of law on the subject of passports.

The AJA also has regulations to cover:

- Public inquiries;
- Public hearings;
- Notice and comment procedure;
- Notice of administrative action and rights; and
- Requests for reasons.

This is not a closed list though and the Minister has the power to make regulations over a wide range of issues.

d. Administrative Law

This is the branch of the law dealing with the administration. It is made up of:

1. **General administrative law.** This is the law that governs the administration by setting out:
 - General rules and principles that all administrators must follow; and
 - Remedies for people affected by administrative decisions.
2. **Particular administrative law.** This is the body of law governing specific areas of the administration. It is made up of laws that give the administration the power to act. For example, the law relating to refugees and im-



LEGISLATURES

Legislatures are the part of government that makes new laws; amends (changes) any written laws that need to be changed; and scraps old written laws that are no longer necessary.

In South Africa, we have:

- A national legislature (Parliament) to make laws for the whole country. These laws are known as Acts of Parliament or simply Acts;
- Provincial Legislatures to make laws for their province. These are called Provincial Acts; and
- Local legislatures, called municipal councils, to make laws (called By-Laws) for their municipal areas.

migration, vehicle licensing, state tendering procedures, land-use planning or civil aviation.

The AJA is part of general administrative law. It covers the entire administration at national, provincial and local levels. Because the rules in the AJA are general, they do not give powers to administrators. Instead, the AJA says how the powers given to administrators **by particular administrative laws** must be exercised.

e. Organs of state

You will note from both the Constitution and the AJA that these laws bind all ‘organs of state’. This term is used to cover:

1. **The legislature.** As we’ve already said, the legislature is made up of Parliament, the nine provincial legislatures and the municipal councils. Their main function is to pass new written laws (legislation) and to change or scrap existing laws.
2. **The judiciary.** The judiciary is made up of the courts and the judges and magistrates. Their function is to interpret and to enforce the law (including the Constitution).
3. **The executive.** The **National Executive** is made up of the President and the cabinet (the ministers). At **provincial level**, the executive is the Premier of a province and the provincial Executive Council. At **local level**, the executive is the respective District or Municipal Council. The executive makes **political** decisions. It develops policy and often writes legislation which it asks Parliament (or the other legislatures) to consider and pass.
4. **The administration.** That is, the government departments, police, army, parastatals and so on.

f. Judicial review

Because the government must obey the law it is possible to **take the government to court if you believe it has broken the law**. The power that courts have to decide whether a decision made by the administration is allowed by the law is called judicial review.

During judicial review, the court will hear both sides of the argument as to whether the decision should be allowed to stand.

Once it has done this, it may decide that the administration's action was not allowed by the law and is therefore invalid.

The **AJA sets out the procedures and grounds for challenging administrative action**. If someone feels that a decision by an administrator is wrong, unlawful, unreasonable or that fair procedures were not followed, they can approach a court for judicial review of the decision.

2. Important sections in the Constitution

The **Constitution deals with the right to administrative justice in Section 33**. Before looking at this though, it is important to note that the Constitution deals with the administration in other places as well.

The first of these provisions relating to the administration are in the introductory sections to the Constitution (Sections 1 and 2) and the introduction to the Bill of Rights (Sections 7 and 8).

Section 1, 2, 7 and 8

Sections 1 and 2 are the introductory sections to the Constitution. Sections 7 and 8 introduce the Bill of Rights and explain who must follow it.

Section 1

This section says that South Africa is a **democratic state founded on the following values**:

- Human dignity, equality and the advancement of human rights and freedoms;
- Non-racialism and non-sexism;
- Constitutional supremacy (meaning the Constitution is the highest law) and the rule of law; and
- That everyone of 18 and older has the right to vote, that regular elections will be held and that the government must be democratic, accountable, responsive and open.

Section 2

This section says that the **Constitution is the highest law** in South Africa and that any law or conduct that goes against it will be invalid.

Section 7

Section 7 introduces the Bill of Rights. It stresses that “the **state must respect, protect, promote and fulfil the rights in the Bill of Rights**”.

Section 8

This section deals with who is bound by the Bill of Rights. It says the **Bill of Rights “applies to all law, and binds the legislature, executive, judiciary and all organs of state”** (which includes the administration).

The Constitution has an entire Chapter devoted to the administration – Chapter 10. Of the sections in Chapter 10, the most important is Section 195.

Section 195

Section 195 sets out the “**basic values and principles governing the public administration**”. These are that the administration must be governed by the democratic principles and values enshrined in the Constitution, including the following principles:

- A high standard of professional ethics must be maintained;
- Resources must be used efficiently, economically and effectively;
- The public administration must be development oriented;
- Services must be provided in a way that is impartial, fair, equitable and without bias;
- The administration must cater to people’s needs;
- People must be encouraged to participate in policy development;

- The administration must be accountable and transparent and the public must be given information that is timely, accessible and accurate;
- There must be good human resource management and career development practices for members of the administration;
- The administration must be broadly representative of the people of South Africa.

Of most importance for this Workbook though is the right to Just Administrative Action in Section 33 of the Bill of Rights, which reads as follows:

Just administrative action (Section 33)

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

Briefly, this means people have a right:

- To **fair and reasonable administrative action** that is allowed by the law;
- To be given **reasons** for administrative action that affects them in a negative way; and
- To **challenge decisions** that they believe are wrong.

3. Batho Pele

Since 1 October 1997, the South African public service has been guided by a **new service delivery approach** and framework. This new set of principles guiding the public service is found in the 'Batho Pele' White Paper. This policy calls for a change in systems, procedures, attitudes and behaviour of the public service for the benefit of internal and external customers. The AJA, having similar objectives, complements and advances the Batho Pele principles by means of legislation. This is very good news for all people who are receiving service from the administration!

The Batho Pele White Paper sets out eight national service delivery principles, which highlight improved service that people should be receiving from the public service:

- People should be **regularly consulted** about the level and quality of services they are receiving and should receive in future;
- The administration should set clear **service standards**, outlining the level and quality of services that customers can expect;
- People should benefit from **increased access to services**, especially those who find barriers to access (such as their race, gender or disability; where they live; how much money they have; their access to modern communication systems; their culture and so on);
- As customers of the public service, we should benefit from **higher levels of courtesy** – there should be standards of behaviour for the treatment of the public;
- People should be **provided with more and better information about services**, so that we have full, accurate, relevant and up-to-date information about the services that are available;
- **Increased openness and transparency** from the public service, about how services are delivered, how well they perform, the resources they use and who is in charge, should become features of the administration;
- We should benefit from an administration that **takes responsibility for, and remedies failures and mistakes**,



BATHO PELE

'Batho Pele' is a SeSotho term meaning 'People First'. The name was chosen to express the main message of the campaign – that the purpose of the Public Service is to serve all the people of South Africa.

so that when problems occur, there is a positive response and problems are sorted out; and

- The people should be **given the best possible value for money**, so that we feel that our taxes are used properly.

Batho Pele is really about **ensuring that the resources already used to run the public service are geared towards delivering quality services**. It is about getting rid of wasteful and expensive internal procedures and using the money saved to provide better services to more people. It is also about making sure that the state's priorities for where money should be spent are in line with the public's priorities.

Batho Pele is not only about putting 'the customer' first. It is also about giving the people who serve the customer – the front-line staff – a major role in the new public service. Front-line staff, whether serving the public directly or providing services to other parts of government, are often best placed to tell managers what needs to be done to improve services for both internal and external customers. Front-line staff and those who support and manage them now have the opportunity to have their say about how to change and streamline systems and procedures that often get in the way of providing a good service.