

CHAPTER 1

Introduction to the Promotion of Administrative Justice Act

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Impact of the AJA

The Promotion of Administrative Justice Act 3 of 2000 (AJA) gives **[1.1]** legislative form and detail to the fundamental principles of administrative law entrenched in s 33 of the Constitution. The AJA is an important stage in the development of South African administrative law and in the consolidation of the constitutional democracy established by the 1996 Constitution.

[1.2]

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Since coming into operation on 30 November 2000, the AJA has become the legislative foundation of the general administrative law of South Africa. Its aim is to state comprehensively the general rules and principles relating to the control of administrative power. This body of rules and principles was previously governed by the common law and, since 1994, by direct application of the administrative justice rights in the Constitution. The Act gives effect to the constitutional right to lawful, reasonable and procedurally fair administrative action and the right to be given reasons for administrative action that adversely affects rights. Additionally, it contains provisions limiting those rights in the interests of administrative efficiency and good governance. The Act aims to ensure the procedural fairness of administrative action by setting out a minimum set of procedures applicable generally to administrative decision-making in ss 3 and 4. It gives effect to the right to reasons by requiring individuals to be given written reasons on request for certain decisions in s 5. The Act gives indirect effect to the rights to lawful, procedurally fair and reasonable administrative and the right to reasons by providing for the judicial review of administrative action on grounds listed in the Act and granting reviewing courts and tribunals powers to remedy administrative action infringing on these rights (ss 6, 7 and 8). The Act seeks to promote the development of administrative justice by requiring the Minister of Justice to make regulations with general effect prescribing decision-making procedures and a code of good administrative conduct (s 10).

The AJA as general administrative law

[1.2] General administrative law is the body of law governing the administration in general, prescribing general rules and principles for the lawful exercise of administrative power.¹ It has a similar relationship to particular administrative law as the rules of grammar of a language have to particular usages of that language. It also provides remedies for individuals affected by administrative decisions where administrative powers have not been properly exercised or obligations have not been complied with.

By contrast, particular administrative law comprises the legislation governing and the legal rules, principles and policies that have been developed in respect of *specific areas of administration*: for example,

¹ According to Lawrence Baxter *Administrative Law* (1984) 2, general administrative law comprises '[t]he general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. Except that it is not concerned with the organisation of administrative institutions, the AJA conforms to this description.

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

The AJA is general administrative law. This means, first, that it applies to and binds the entire administration at all levels of government — national, provincial and local. It provides a set of general rules and principles for the proper performance of administrative action in all areas, requires the giving of reasons for administrative action in certain circumstances, and sets out the remedies that are available if these rules are not complied with. Secondly, because the rules contained in the Act are general, they do not provide a specific source of power to administrators. In other words, the AJA prescribes how the powers that are given to administrators *by other laws* must be exercised. It lays down uniform, system-wide rules and principles governing the way in which administrative action *authorised by particular law* is carried out by administrators and gives members of the public the right to challenge administrative action that does not follow these rules and principles. Before an administrator can make a decision that affects the public he or she must be permitted by law to do so. In other words, a particular law must authorise the administrator to make a particular decision. Besides satisfying the requirements of the particular law, this decision must, in addition, comply with the general requirements of the AJA pertaining to just administrative action.

Administrative law can be understood as the law governing the administration in two senses of the word 'governing'. The first sense is that the rules and principles of administrative law *empower* (i e, give power or authority to) the administration to act. The second sense is that the rules and principles of administrative law *constrain* (i e, control or restrict) the power of the administration. For the most part, the AJA is not a source of general administrative authority² and can therefore be classified as administrative law of the second type. Nevertheless, the Act is concerned with good administrative practice in both a positive and a negative way. On the positive side, the Act aims at encouraging fair, rational and lawful decision-making and discouraging maladministration by setting out a minimum set of procedures relating to the making of decisions and requiring the provision of reasons for certain decisions. On the negative side, the Act aims — principally through the mechanism of judicial review — to remedy instances of maladministration.

The Act therefore supplements the enormous body of legislation that constitutes particular administrative law. However, following the rule that

[1.3]

² The Act does give specific administrative authority in places. For example, s 2 authorises the Minister to allow exemptions from the duties imposed by the Act, while s 7 requires the Rules Board to make and implement rules of procedure for judicial review.

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subsequent legislation repeals earlier inconsistent legislation, *prior* parliamentary legislation dealing with particular administrative law and inconsistent with the AJA is impliedly repealed by the AJA to the extent of the inconsistency.³ Contrary *subsequent* delegated and provincial legislation will be ultra vires the AJA itself. The relationship between the Act and the provisions of the Constitution relating to just administrative action is discussed further in paras 1.27–1.28 below. The relationship between the Act and the common-law rules and principles of administrative law is discussed further in paras 1.19–1.26 below.

A brief drafting history of the Act*Interim Constitution*

- [1.4]** The interim Constitution⁴ revolutionised the general administrative law of South Africa. The administrative justice clause (s 24) in the Bill of Rights entrenched a right to administrative action which was lawful, procedurally fair and ‘justifiable in relation to the reasons given for it’ and a right to be given written reasons for administrative action.⁵ The effect was that the review power of the courts was no longer grounded in the common law and, therefore, susceptible to being restricted or ousted by legislation. Instead, the Constitution itself conferred fundamental rights to administrative justice and, through the doctrine of constitutional supremacy, prevented legislation from infringing on those rights. Essentially, the clause had the effect of ‘constitutionalising’ what had previously been common-law grounds of judicial review of administrative action. This meant that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative action, involved the direct application of the Constitution.⁶

1996 Constitution

- [1.5]** The Constitutional Assembly adopted a different structure for the administrative justice clause in the 1996 Constitution. The constitutional provision (a considerably simplified version of the administrative justice rights in s 24 of the interim Constitution) was to be supplemented by national legislation:

³ See further para 1.18 below.

⁴ Constitution of the Republic of South Africa, Act 200 of 1993.

⁵ See further para 1.21 below.

⁶ *Pharmaceutical Manufacturers Association of SA: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). See further paras 1.19–1.24 below.

33 Just administrative action

(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.

Prior to the enactment of the national legislation required by s 33(3), the rights in s 33(1) and (2) were suspended. During the period of suspension, in terms of item 23 of Schedule 6 of the Constitution, s 24 of the interim Constitution⁷ continued to apply:

Schedule 6 (Transitional Provisions)

23 Bill of Rights

(1) National legislation envisaged in ss 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in ss 32(2) and 33(3) of the new Constitution is enacted . . .

(b) section 33(1) and (2) must be regarded to read as follows:

‘Every person has the right to

- (a) lawful administrative action where any of their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.’

(3) Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

A similar mechanism — requiring the enactment of national legislation to give effect to a constitutional right and the suspension of the right in the meantime — was adopted for the access to information right in s 32 of the 1996 Constitution. Again, during the period of suspension the corresponding access to information right in the interim Constitution

⁷ There are minor and insignificant differences between the text of s 24 and that in item 23. These reflect modifications made in conformity with the plain-language drafting conventions of the 1996 Constitution.

would continue to apply. The suspension of the access to information right was challenged during the constitutional certification process as a failure to give effect to Constitutional Principle IX, which required the constitutional text to make provision for ‘freedom of information so that there can be open and accountable administration at all levels of government’. The Constitutional Court’s decision in respect of this challenge sheds some light on the interpretation of the similar provisions of s 33 of the Constitution.

According to the Constitutional Court, the qualified right of access to information in s 23 of the interim Constitution (and item 23 of the Sixth Schedule) did not comply with CP IX:

The transitional measure is obviously 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. The effect of the provision, as we interpret it, is that if the contemplated legislation is not enacted timeously, the transitional arrangement in NT sch 6 as well as the provisions of NT 32(2) fall away and the suspended NT 32(1) automatically comes into operation. The interim right given in NT sch 6 s 23(2)(a) does not comply with the requirements of CP IX, however. What is envisaged by the CP is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely, to ensure that there is open and accountable administration at all levels of government.⁸

The court held, however, that it was permissible for the Constitutional Assembly to make provision for the phasing-in of a suitable access to information regime in the manner that it did:

CP IX requires that ‘provision’ be made for freedom of information in the NT. That has been done in NT 32(1) read with NT sch 6 s 23(2)(a), which clearly delineates the right and puts the legislature on terms under the sanction of unqualified implementation. In the context of CP IX, and of what is reasonably required on the part of the legislature if such provision is to be made, that meets the requirements of the CP. If the legislation is not passed timeously the general but undefined right as formulated in NT 32(1) will come into operation. That is reasonable. The legislature is far better placed than the courts to lay down the practical requirements for the enforcement of the right and the definition of its limits. Although NT 32(1) is capable of being enforced by a court — and if the necessary legislation is not put in place within the prescribed time it will have to be — legislative regulation is obviously preferable.⁹

⁸ *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) para 83.

⁹ *First Certification* judgment (n 8 above) para 86.

The 1996 Constitution therefore required the enactment of national legislation giving effect to the right to just administrative action within a period of three years after commencement of the 1996 Constitution (i.e. by 3 February 2000).¹⁰

South African Law Commission's draft Bill

The South African Law Commission was given the task during November 1998 of producing a draft Bill which would comply with the requirements of s 33(3) of the Constitution.¹¹ The Commission published a Discussion Paper with its first public draft of the Bill in February 1999.¹² The Commission invited comments on the draft Bill and conducted a series of workshops in various regions, and presented the draft to a group of international experts before producing a revised and annotated Bill in May 1999. A final revised draft Bill was published with the Commission's *Report on Administrative Justice* (August 1999). This was the draft Bill presented to the Minister of Justice. [1.6]

According to the Commission, its draft Bill was an attempt to balance a number of 'competing concerns' that it had identified in its research and that had been highlighted by the responses received to earlier versions of the Bill: [1.7]

One has been the need to guard against imposing paralysing burdens on effective administration in South Africa. Another, however, has been the need to ensure that governmental agencies whose working methods are rooted in pre-constitutional dispensation, reflect administrative justice. A third has been the question of cost and accessibility.¹³

The Law Commission's draft Bill comprised seven chapters. The first chapter contained a list of definitions. At the core of the draft Bill was a wide definition of 'administrative action' as any act of an organ of state or natural or juristic person exercising a public power or performing a public function, subject to certain enumerated exceptions (essentially, legislative,

¹⁰ See J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549, 551–4 for an overview of the constitutional competence of Parliament to enact this legislation. See also H Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 28 (s 33 the result of a compromise between ANC, who wanted solely legislative provision of administrative justice, and other parties, who wanted a constitutional right).

¹¹ The history of the Commission's involvement in the drafting process is detailed in its report: SA Law Commission *Report on Administrative Justice* (August 1999) chapter 1 (available at <http://www.law.wits.ac.za/salc/report/adminsum.html>).

¹² SA Law Commission Discussion Paper 81 *Administrative Law* (February 1999) (available at <http://www.law.wits.ac.za/salc/discussn/dpadminsum.html>).

¹³ SA Law Commission *Report* (n 11 above) paras 3.3 and 3.4.

executive and judicial actions in addition to prosecution decisions).¹⁴ Chapter 2 imposed a duty on all administrators to give effect to the rights in s 33(1) and (2) of the Constitution and provided for the review of administrative action by the courts (defined to include designated magistrates' courts) and independent and impartial tribunals. Chapter 3 of the draft Bill required administrative action to be procedurally fair. This was achieved by a list of core requirements applying to all administrative action and a list of additional requirements that may apply in appropriate circumstances. Provision was made for departure from the mandatory provisions in exceptional circumstances to the extent necessary. A general obligation was placed on administrators to give reasons in writing when requested. This had to be done within 90 days after the person was informed of the administrative action and the reasons for it, or became aware of it, or might reasonably have been expected to have become aware of it. Chapter 4 focused on the grounds of review and the procedure for obtaining it. Clause 7 specified the grounds of review established at common law, adapted in the light of recent formulations in South Africa and in other countries with a similar review jurisdiction. Clause 9 specified remedies available in proceedings for judicial review. These encompassed both mandatory and prohibitory interdicts, declaratory orders, orders to give reasons, and review orders in the classic sense, setting aside the administrative action in question and either remitting it or, in exceptional cases, substituting or varying the administrative action and directing the payment of compensation.

Chapter 5 of the draft Bill dealt with rules and standards and required administrators in general and flexible terms to take appropriate steps to communicate rules to those likely to be affected by them, and to impose upon administrators flexible obligations relating to the manner in which this was to be achieved. In relation to rules and standards, administrators were required to compile registers and indices to ensure accessibility. Chapter 6 created an Administrative Review Council intended to maintain continuous oversight over the implementation of the Act and to suggest further reform of administrative law, with important powers and duties to prescribe procedures to be followed by administrators and to exempt certain administrators or classes of administrative action from some of the requirements of the Act.

Cabinet draft

[1.8] An Administrative Justice Bill 56 of 1999 (the 'Cabinet draft') was introduced in Parliament by the Minister of Justice.¹⁵ The Cabinet draft

¹⁴ The definition is reproduced in Table 1 at 9 below.

¹⁵ Available at <http://www.polity.org.za/govdocs/bills/1999/b56-99.pdf>

removed the provisions of the Law Commission's draft Bill dealing with rules and standards and the clauses requiring the establishment of an Administrative Review Council. Instead, the Minister was given a discretionary power to establish and impose duties on 'an advisory council'. Importantly, the Commission's definition of 'administrative action' was not changed significantly.

Parliamentary process

The Bill was considered by the National Assembly's Portfolio Committee on Justice and Constitutional Development, which made a number of significant changes.¹⁶ One of the most important was a considerable revision of the Law Commission's definition of administrative action.¹⁷ An additional definition of 'decision' (necessary for the revised definition of 'administrative action') based on the model of the Australian Administrative Decisions (Judicial Review) Act 1977 was inserted, as was a definition of 'empowering provision'. Another Committee innovation was the definition of 'failure'. The Committee's Bill also added the preamble to the Act (absent from the Law Commission and Cabinet draft). The definition of 'qualified litigant' inserted in the Cabinet draft was deleted. Important changes were also made to the provisions dealing with procedural fairness (ss 3 and 4 of the Act), diminishing the scope of application of the duty to follow the procedures outlined in the Act.¹⁸

The Committee's version of the Bill was duly passed by Parliament.

Table 1

Definition of 'administrative action'

This table shows the two draft versions of the definition of 'administrative action': (a) the Law Commission's draft Bill and (b) the Bill as introduced in Parliament by Cabinet. It also shows (in (c)) the version as finally enacted (highlighting the amendments made by the Portfolio Committee on Justice and Constitutional Development).

(a) South African Law Commission's draft Administrative Justice Bill (August 1999)

'administrative action' means any act performed, decision taken or rule or standard made, or which should have been performed, taken or made, by: —

¹⁶ The Committee presented an amended Bill to Parliament as the Promotion of Administrative Justice Bill 56B of 1999 (available at <http://www.polity.org.za/govdocs/bills/1999/b56b-99.pdf>). The minutes of the Committee are available at <http://www.pmg.org.za> and indicate (though, admittedly, not particularly clearly) that the intention behind the Parliamentary Committee's changes to the draft it received was to decrease the scope of judicial supervision of administrative action.

¹⁷ A comparative table of the various versions of the definition of 'administrative action' is included in Table 1 below.

¹⁸ See further Chapters 3 and 4 below.

[1.9]

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- (i) an organ of state;
- (ii) a judicial officer;
- (iii) a prosecuting agency;
- (iv) a natural or juristic person when exercising a public power or performing a public function,

but does not include:

- (aa) the functions of the National Executive referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (g), (h), (i) and (k), 85(2), 91(2), (3), (4), (5), 92(3)(b), 93, 97, 98, 99 and 100 of the Constitution;
- (bb) the functions of the Provincial Executive referred to in sections 121(1) and (2), 125(2)(d), (e), (f), 126, 127(2)(a), (b), (c), (d) and (f), 132(2), 133(3)(b), 137, 138, 139, 145(1) of the Constitution;
- (cc) the legislative functions of Parliament, a provincial legislature or a municipal council;
- (dd) the judicial functions of a judicial officer;
- (ee) a decision to institute or continue a prosecution;
- (ff) a decision of the Judicial Service Commission;

(b) Cabinet draft (Administrative Justice Bill 56 of 1999)

'administrative action' means any act performed, decision taken, rule or standard made, or such act, decision, rule or standard which should have been performed, taken or made, by —

- (a) an organ of state;
- (b) a judicial officer;
- (c) a prosecuting agency; or
- (d) a natural or juristic person when exercising a public power or performing a public function,

but does not include —

- (i) the functions of the National Executive referred to in sections 79(1) and (4), 84(2), 85(2), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
- (ii) the functions of the Provincial Executive referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2)(a), (b), (c), (d) and (f), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
- (iii) the legislative functions of Parliament, a provincial legislature or a municipal council;
- (iv) the judicial functions of a judicial officer; or
- (v) a decision to institute or continue a prosecution;

(c) Section 1(i) Promotion of Administrative Justice Act 3 of 2000 (the principal insertions by the Portfolio Committee are underlined)

'administrative action' means any decision taken, or any failure to take a decision, by —

- (a) an organ of state, when —
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or

- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include —
- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (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);

Implementation of the Act

The Act was assented to by the President on 3 February 2000. Section 11 of the AJA provided that the Act would come into operation on a date fixed by the President by proclamation. The proclaimed date of commencement of the AJA was 30 November 2000 (GN R73 of 29 November 2000). The Act was brought into effect with the exception of s 4 (fair procedures for administrative action affecting the public) and s 10 (duties and powers of the Minister).¹⁹ **[1.10]**

At the date of commencement no regulations had yet been promulgated. Anxious to implement the Act, the Department of Justice and Constitutional Development determined that the Act (with the exception of ss 4 and 10) could be brought into effect without regulations. Indeed, some persons consulted by the Department were of the opinion that ss 4 and 10 could also be brought into effect without regulations.

¹⁹ The application of the Act to administrative action occurring between 4 February and 30 November 2000 is discussed in para 2.39 below.

[1.11]

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Draft Regulations on Fair Administrative Procedures (20 September 2000) and Draft Regulations on the Administrative Justice Advisory Council (20 September 2000) were circulated to certain stakeholders (such as universities) with comment requested by 20 November 2000. At the time of writing (May 2001) it appeared that the Regulations on Fair Administrative Procedures were unlikely to be put into effect before 1 June 2001.

- [1.11]** A number of government actors have been prominent in the implementation process of the AJA. The National Assembly's Portfolio Committee on Justice and Constitutional Development has continued to play a role in the implementation process. The Directorate: Secondary Legislation in the Department of Justice has co-ordinated the implementation effort within government. Training of magistrates and other Department of Justice personnel has been provided by Justice College. The Department of Justice has created links with other government departments to co-ordinate the implementation of the AJA. Co-operation with the Department of Public Service and Administration and the South African Management Development Institute (SAMDI) will be particularly necessary for assisting national and provincial departments to align their structures and systems to the requirements of the AJA and to provide the necessary training to officials. To ensure that local government is integrated into this process the Department of Provincial and Local Government and the South African Local Government Association (SALGA) should also play a role.

Batho Pele White Paper

- [1.12]** It should be noted that the Promotion of Administrative Justice Act is only one aspect of the drive to improve the quality of service provided by the South African public administration. In particular, the Department of Public Service and Administration has attempted to change the values upon which the public service operates. Its policy document, the *White Paper on Transforming Public Service Delivery* (1997) (Batho Pele White Paper) has identified a number of key 'transformation priorities', principles on which transformation of the public service is to be based.²⁰ There are eight Batho Pele principles covering the areas of consultation, service standards, access, courtesy, information, openness and transparency,

²⁰ GN 1459 of 1 October 1997 (available at http://www.polity.org.za/govdocs/white_papers/transform.html).

redress and value for money.²¹ The Promotion of Administrative Justice Act can be seen as another way to advance the Batho Pele principles and should be interpreted as far as possible as complementary to those principles.

Interpretation of the AJA

Constitutional status of the AJA

The AJA has a particular constitutional status: it is legislation mandated [1.13] by the Constitution to 'give effect to' the constitutional rights to administrative justice. This means that it is, at the same time, a statute (an embodiment of the legislative will) and a legislative elaboration of a constitutional provision (expressing values that stand above the will of the legislature). Both its existence and, to a degree, its content are mandated by the Constitution to give effect to constitutional rights. We read the term 'give effect to' here as synonymous with 'elaborate upon', 'make effective', 'promote'.²² To the extent that the Act provides fundamental rights and the mechanisms for their promotion and enforcement, it should be interpreted in the same way as the Bill of Rights itself. The Act must therefore be interpreted purposively.²³

Purposive interpretation of legislation giving effect to Constitutional rights

A purposive interpretation is one that starts off from the acknow- [1.14] ledgement that legislation cannot be precisely drafted to anticipate every eventuality, and that questions of interpretation should be resolved by reference to the broad purposes of the enactment. The Land Claims Court has adopted such an approach to the interpretation of legislation giving content and effect to constitutional rights — the Restitution of Land

²¹ The eight principles of Batho Pele are: 1. Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered. 2. Citizens should be told what level and quality of public services they will receive so that they are aware of what to expect. 3. All citizens should have equal access to the services to which they are entitled. 4. Citizens should be treated with courtesy and consideration. 5. Citizens should be given full, accurate information about the public services they are entitled to receive. 6. Citizens should be told how national and provincial departments are run, how much they cost and who is in charge. 7. If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response. 8. Public services should be provided economically and efficiently in order to give citizens the best possible value for money.

²² See further para 1.16 below.

²³ *S v Makwanyane* 1995 (3) SA 391 (CC) para 9.

[1.15]

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Rights Act 22 of 1994.²⁴ In *Minister of Land Affairs v Slamdien* the court provided a useful six-step account of the purposive approach to legislative interpretation:

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision; and
- (vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers. . . .

With reference to the last of these guidelines, the observation needs to be made that the adoption of a purposive approach will not always mean the adoption of a wide or literal interpretation of the words concerned. It may well be that, upon a proper analysis of the purpose of the provision, a meaning which is narrower than the ordinary, literal meaning of the provision is arrived at . . . A further observation which needs to be made in relation to the Constitutional Court decisions is that a purposive approach still allows reference to the maxims and presumptions of statutory interpretation.²⁵

[1.15] A distinction can be drawn between a purposive approach to constitutional interpretation and a purposive approach to interpreting legislation with a constitutional status such as the Restitution of Land Rights Act or the AJA.

Following the *Slamdien* six-step summary, this distinction is evident in step (ii). In a purposive interpretation of the constitutional provision it is only the drafting history of the constitutional provision that is significant. In a purposive interpretation of a statutory provision the drafting history of the constitutional provision *and* the drafting history of the consequent legislation may be significant. The AJA is legislation drafted after and as a consequence of the constitutional right to which it gives effect. Thus a

²⁴ The Restitution Act provides mechanisms for the enforcement of the right to restitution of dispossessed property in terms of s 121 of the interim Constitution and s 25(7) of the 1996 Constitution. The constitutional provisions that mandate the Restitution Act do use the 'give effect to' language of s 33(3). Nevertheless, it is submitted that the Acts are comparable, both being parliamentary legislation restating, elaborating on, and providing for the enforcement of constitutional rights.

²⁵ *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) paras 14–16. See also the approach of the Supreme Court of Appeal to the interpretation of legislation in order to 'promote the spirit, purport and objects of the Bill of Rights' in *Govender v Minister of Safety and Security* (SCA 1 June 2001, unreported) paras 10–11.

purposive interpretation of the AJA must consider the drafting history of the Act separately from and in addition to the drafting history of the constitutional right to administrative justice.²⁶ Paragraphs 1.4–1.5 above outline the drafting history of the constitutional provision underpinning the AJA and paras 1.6–1.9 above deal with the drafting history of the AJA itself.

Parliament's interpretation of the constitutional right of administrative justice is reflected in the AJA itself. Some deference should be given to the interpretations of Parliament with respect to the enforcement mechanisms of the constitutional right, although not with respect to its content.²⁷ Thus, in instances of possible discrepancy between the constitutional provision and the statutory provision related to enforcement mechanisms, the complete exercise of statutory purposive interpretation will be necessary to interpret the AJA.

Deriving from *Slamdien*, a statutory purposive interpretation applied to the AJA can be outlined as follows:

1. An interpreter of the AJA must have regard to the historical origins of the legislation. Besides the drafting history of the Act and the constitutional rights dealt with in paras 1.4–1.9 above, the legislation must be understood in the wider context of South African political history and, in particular, the long history of abuse and inadequate control of administrative power in twentieth-century South Africa.²⁸
2. The place occupied by the principles of administrative justice in the Constitution's project of legal control of public power must be assessed. According to the Constitutional Court in the *Pharmaceutical Manufacturers* decision, administrative law is 'an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on

²⁶ Traditionally, statutory interpretation ignores legislative drafting history. We would argue against such an approach to the AJA, given its status as constitutionally mandated legislation. The Constitutional Court has indicated an openness towards the use of drafting history in the interpretation of constitutional provisions: *S v Makwanyane* (n 23 above) paras 17–18. The *Slamdien* case (n 25 above) moreover indicates that the consideration of drafting history can greatly assist courts in interpreting statutes purposively.

²⁷ Klaaren (n 10 above).

²⁸ See Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992); Richard Abel *Politics by Other Means* (1995). For a comprehensive treatment of administrative law jurisprudence during the late apartheid period, see David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). For an example of a historical interpretation of the administrative justice rights in the interim Constitution see Etienne Mureinik 'A Bridge to Where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 (Bill of Rights seeks to create a culture of government no longer based on authority and coercion as in the past but on justification and persuasion: the administrative justice clause plays a prominent role in this project).

[1.16]

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constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them.²⁹

3. An interpreter of the AJA must have regard to the broad objects of the AJA and the values behind the AJA. These broad objects are identified and described in para 1.16 immediately below.
4. An interpreter of the AJA must have regard to the immediate context of the legislative provision at issue including related provisions. Presumptions of statutory interpretation may be referred to as part of this step. Additionally, it is submitted that the drafting history of the specific AJA provision may be part of the immediate interpretive context of a legislative provision.³⁰
5. An interpreter of the AJA must have regard to the wording of the provisions of the AJA being interpreted.
6. Within the confines of a purposive interpretation that may be narrower than a literal meaning, an interpreter of the AJA should employ a generous rather than a legalistic approach.

Purposes of the AJA

[1.16] It is possible here only to provide the most summary description of the Act's purposes. As legislation giving effect to constitutional rights concerned with the proper limits and control of public power, the Act's objects are as broad as those of the Constitution.

The purposes of the AJA are described as follows in the Act's Preamble:

PREAMBLE

WHEREAS section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;

AND WHEREAS section 33(3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to —

- * provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- * impose a duty on the state to give effect to those rights; and
- * promote an efficient administration;

AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33(3) must be enacted within three years of the date on which the Constitution took effect;

AND IN ORDER TO —

- * promote an efficient administration and good governance; and

²⁹ *Pharmaceutical Manufacturers* (n 6 above) para 45.

³⁰ See *S v Makwanyane* (n 23 above) paras 17–18.

- * create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.

...

The first point to draw from this is that the AJA is legislation enacted to 'give effect' to the constitutional right to just administrative action and in compliance with the requirements of s 33(3). Although its drafting history puts this beyond doubt, the Preamble confirms that Act is the 'national legislation' contemplated by s 33(3).

In the *First Certification* judgment the Constitutional Court saw the purpose of the similar 'give effect to' provision in the access to information right as follows:

The transitional measure is obviously 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.³¹

The term 'give effect to' should therefore be read as synonymous with 'make effective', 'promote', or 'implement'. The Act is required by the Constitution to define the nature and limits of the right and to set out procedures for its enforcement. This indicates that, as a starting point of analysis, the Act should, as far as possible, be read as co-extensive with the constitutional rights to just administrative action.³²

The Act, mandated by the Constitution, forms part of the wider project of identifying the limits of and ensuring the proper exercise of public power in a democracy.³³ The Constitution, premised as it is on the doctrine of constitutional supremacy, attempts to reconcile two conflicting goals: to establish a state system with enough power to govern, and to find ways of constraining and regulating that power so that it is not abused. The AJA, designed to provide content to the broad and abstract principles of the Constitution, starts out from the same problematic. The Act seeks to define the proper scope of administrative power in a democracy so as to reconcile individual rights with state power.

³¹ Note 8 above, para 83. See further para 1.5 above.

³² For example, the AJA is silent on the question of standing to enforce the rights it confers. Because the Act is intended to 'give effect to' the constitutional rights, the standing clause of the Bill of Rights (s 38) should be read into the Act. In other words, the Act should be read as conferring standing to the same extent as it is conferred by the Constitution for the direct enforcement of rights in the Bill of Rights. A more restrictive reading would involve a limitation of the constitutional administrative justice rights and should therefore be avoided. See further para 7.2 below.

³³ *Pharmaceutical Manufacturers* (n 6 above) para 40.

The central constitutional doctrine governing the exercise of public power is the rule of law. In turn, a good deal of the specific content of the constitutional right to just administrative action and the AJA is an elaboration of this idea. The specific entrenchment of the rule of law in s 1 of the Constitution gives further constitutional force to the related doctrine of legality.³⁴ Legality requires all organs of state to act in accordance with the legal principles and rules that apply to them. In the case of administrative action, the principle requires administrative conduct and decisions to be authorised by law. This conception of the rule of law informs the right to 'lawful' administrative action in s 33 as well as a number of specific provisions of the AJA such as the grounds of review in s 6(2)(a), (b) and (f).

The *Pharmaceutical Manufacturers* decision makes it clear that the rule of law means more than the value-neutral principle of legality. The principle also forbids arbitrary decision-making: organs of state may not act capriciously or arbitrarily.

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.³⁵

The Preamble identifies the Act as promoting a number of core constitutional values: an efficient administration, good governance, accountability, openness and transparency. A similar list of values can be found in s 195 of the Constitution, identifying the basic values and principles governing the public administration. As a starting point, the AJA's list of values can be divided up among three competing goals: efficiency, effectiveness and legitimacy. Administrative efficiency focuses on convenience, rapidity of decision-making and the cost-effective use of administrative resources. It looks at the input side of the administrative process. In pursuing the goal of administrative efficiency, the Act is sensitive to the resource constraints of the South African constitutional democracy. Effectiveness focuses on consequences and the results of administrative actions. It looks at the output side of the administrative process and at the overall process itself: the rationality of administrative action in achieving those results. In pursuing the goal of effectiveness, the Act is sensitive to the socio-economic and civil/political rights

³⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56–9.

³⁵ *Pharmaceutical Manufacturers* (n 6 above) para 84.

deficits of the South African constitutional democracy. Legitimacy focuses on both lawfulness and legitimacy in the sense of democratic legitimacy. It looks at the process and the understanding of administrative action. In pursuing the goal of legitimacy, the Act is sensitive to the aims of accountability and participation — often achieved through the means of transparency.³⁶

The goals of the Act tend to pull in opposite directions.³⁷ The goal of efficiency, for example, may encourage the use of truncated decision-making procedures that may detract from the legitimacy of a decision. The goal of legitimacy may encourage over-proceduralisation of decision-making, leading to a loss of efficiency. For the Act to have any coherence it must be interpreted as an attempt to strike a balance between the competing goals that it seeks to honour.³⁸ The Act is simultaneously committed to the managerial concern of administrative efficiency and to the democratic concern of legitimacy. This is a typical response to a typical problem of modern democracies, in which devolution of considerable power to an unelected bureaucracy is an inevitable consequence of the complexity of problems facing the modern state. State power cannot be efficiently managed by the legislature or the judiciary. Although the administrative process must of practical necessity be under bureaucratic

³⁶ E Mureinik 'Reconsidering Review: Participation and Accountability' in H Corder (ed) (1993) *Administrative Law Reform* 35 (analysing the constitutional value of transparency as a means of achieving accountability and participation).

³⁷ A similar tension between the goals pursued by the interim Constitution was described as follows by the Constitutional Court in *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 1: 'This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured.'

At para 41 the court continued: '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.'

³⁸ Cf the remarks of the Federal Court of Australia in *Australian National University v Burns* (1982) 43 ALR 25 at 30: 'Commonwealth legislation in the field of administrative law is intended to seek a balance between justice to the individual and efficiency of administration, between private rights and public advantage. The administrative process must be efficient in the sense that government policy must be implemented effectively. Nevertheless the achievement of that objective must be consistent with fair play to the individual. The community must be satisfied that the administrative process is conducted with due regard to maintaining a balance between the public interest which it advances and the private interest which it disturbs.'

control, both judicial review and legislated procedural requirements are necessary to ensure that the administration gives proper attention to the rights and interests of individuals and groups in order to ensure democratic legitimacy.

Presumptions of statutory interpretation

- [1.17] The observation by the *Slamdien* court that the common-law presumptions of statutory interpretation have a role to play in a purposive interpretation of constitutionally mandated legislation bears emphasising. The AJA gives legislative form to a body of rules and principles of administrative justice developed in the common law and subsumed by the Constitution. At least one of the presumptions in favour of continuity — that Parliament does not intend to diminish existing rights — therefore applies with some force to the Act. A similar presumption — that Parliament does not intend to change the common law — has a much narrower field of operation when it comes to the AJA, since (as we will see in paras 1.22–1.24 below) almost the entire body of common-law administrative law has been constitutionalised.

Relationship between the AJA and other legislation

- [1.18] As was discussed above, the AJA is general administrative law. It sets out uniform, system-wide rules and principles applicable to all administrative action that falls within its ambit. Though the AJA is intended primarily as a supplement to existing legislation authorising and controlling administrative action, the AJA's generality means that it overrides prior inconsistent legislation. This is simply an application of the general principle of statutory interpretation that later legislation must be regarded as repealing earlier legislation, to the extent of any inconsistency between the two.³⁹ The AJA will also override, in the case of inconsistency, *subsequent* local and provincial legislation.⁴⁰ Subsequent delegated legislation inconsistent with the AJA will be *ultra vires* the AJA itself.

³⁹ *R v Sutherland* 1961 (2) SA 806 (A) at 815: 'The repeal of a law, which is a matter of substance and not of form, can be effected, apart from an expressed repeal, in more than one way. So, for instance, is subordinate legislation regarded as impliedly repealed upon the repeal of the enabling statute . . . and there is an implied repeal of a law by a later repugnant law of the same or a superior legislature. (Leges posteriores priores contrarias abrogant.)'

⁴⁰ Parliament has competence to make laws on those matters explicitly entrusted to it by various provisions of the Constitution. The Constitution contains a number of provisions — s 33(3) included — requiring the enactment of national legislation. In respect of such matters, only Parliament may make law, even if the law deals with or affects a matter that falls within the legislative competence of provincial legislatures in Schedules 4 or 5 of the Constitution. In the event of conflict between the AJA and provincial legislation the AJA will prevail. Section 149 provides that where a court determines that there is conflict between national and provincial legislation and that the national legislation 'prevails', it does not mean that the provincial legislation becomes invalid. The provincial legislation rather becomes inoperative to the extent of the conflict and for as long as the conflict remains.

Additionally, by virtue of the fact that it 'gives effect' to constitutional rights, the AJA has a special constitutional status. In recognition of this status the provisions of subsequent parliamentary legislation should be interpreted, if at all possible, to be consistent with the AJA, as the authoritative expression of Parliament on the interpretation of the administrative justice rights in the Constitution.⁴¹ This argument does not assume that the AJA takes the place of the constitutional right. Rather, it assumes that, at least in matters of the choice of structures and procedures to implement the right, Parliament has a definitive role to play in interpreting the constitutional right to administrative justice. The AJA represents its comprehensive and considered judgment on the issue. Of course, if Parliament has expressly provided that later legislation applies notwithstanding the contrary provisions of the AJA, then that command would have to be heeded. Similarly, if subsequent legislation by necessary implication is inconsistent with the AJA, it has to be considered a derogation of the provisions of the AJA.⁴²

Relationship between the Constitution and common-law administrative law

Before the interim Constitution, general administrative law and judicial review of administrative action had a common-law basis. Under the interim and 1996 Constitutions and prior to the coming into effect of the Promotion of Administrative Justice Act, judicial review was constitutionalised. This meant that challenges to the validity of administrative action involved the direct application of the administrative justice rights in the Bill of Rights. After commencement of the AJA, judicial review of most administrative action will be based on the rights, duties, procedures and remedies set out in the Act itself. The constitutional rights to just administrative action will henceforth play, for the most part, an indirect rather than direct role in judicial review.⁴³ [1.19]

Pre-1994 administrative law

Before 1994, general administrative law was based on the common law. The Supreme Court had a common-law power to review delegated [1.20]

⁴¹ See J Klaaren 'The New Access to Information Regulation in South Africa' (unpublished paper, CALS Law and Transformation Conference, August 2000).

⁴² It is a derogation rather than a repeal because of the general application of the AJA. The AJA applies generally to administrative action and survives any particular derogation from its provisions. If a later Act of Parliament derogates from the AJA, it derogates only in the particular field of administrative action to which it applies.

⁴³ Direct application of the Bill of Rights involves challenging the validity of law or conduct as an infringement of a right. The remedy, if the challenge is successful, is usually a declaration of invalidity of the law or conduct. Indirect application means using the Bill of Rights to interpret legislation or to develop the common law. See further J de Waal et al *The Bill of Rights Handbook* 4 ed (2001) 36–7.

[1.21]

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legislation and administrative action.⁴⁴ The legal principles and the body of law developed by the courts in the application of this power were referred to as administrative law. Legislation granted powers to administrators and, through the doctrine of ultra vires, the courts were able to control the exercise of those powers. Occasionally, statutes provided for specific judicial review powers and for appeals against particular decisions of administrators. There was, however, a fundamental constraint on the common-law review powers of the Supreme Court. This was the constitutional system of legislative supremacy. Though the courts could review the lawfulness of the actions of the administration, the legislatures could ultimately determine what was lawful and what was not. In addition, through the use of ouster clauses, legislatures could prevent the courts from reviewing certain administrative actions at all.

Interim Constitution

[1.21] The interim Constitution brought dramatic changes by protecting the institution of judicial review of administrative power from legislative interference, while providing individuals with directly justiciable constitutional rights to just administrative action. Section 24 of the Bill of Rights bound the administration to act in accordance with fundamental principles of fairness and rationality and prohibited the legislatures from authorising any departure from those principles:

24 Administrative justice

Every person has the right to

- (a) lawful administrative action where any of their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

Constitutionalisation of administrative law

[1.22] Until the Constitutional Court's decision in the *Pharmaceutical Manufacturers*⁴⁵ case there were two views about what the constitutional right

⁴⁴ See *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111 at 115: 'Whenever a public body has a duty imposed on 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. . . .'

⁴⁵ Note 6 above.

of administrative justice meant for the source of the courts' power of judicial review. The first was that the common-law principles underlying judicial review of administrative action had been constitutionalised. The second view was that the common law remained intact as an independent cause of action for administrative review and that administrative review could, in many cases, proceed without reference to the constitutional right.

In two separate decisions by different benches, the Supreme Court of Appeal declared itself in favour of both views. [1.23]

Under the interim Constitution the Appellate Division (the predecessor of the SCA) had no jurisdiction over issues involving the direct application of the Bill of Rights.⁴⁶ If all administrative law cases had become constitutionalised (i.e., an allegation that a rule of administrative law had been infringed amounted to an allegation that s 24 of the interim Constitution had been infringed), this would mean that the Appellate Division lacked jurisdiction to hear such matters. Administrative law appeals would therefore have to be referred to the Constitutional Court. This was the approach taken by the SCA in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.⁴⁷ According to Mahomed CJ for a unanimous court, 'in terms of the interim Constitution any attack on any administrative action on the ground that such administrative action was not lawful fell within the jurisdiction of the Constitutional Court and for that reason outside the jurisdiction of the Appellate Division'.⁴⁸ In other words, a contention that administrative action was ultra vires amounted to a contention that it violated s 24(a) of the interim Constitution (the right to lawful administrative action). The matter therefore involved the direct application of the Bill of Rights.⁴⁹

⁴⁶ Section 101(5) IC.

⁴⁷ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 1115 (SCA).

⁴⁸ *Fedsure* (n 47 above) at 1123J–1124A.

⁴⁹ *Fedsure* was duly referred to the Constitutional Court (n 34 above). Dealing with the issue of the jurisdiction of the Appellate Division to hear administrative law cases, the court held as follows (para 105):

[T]here can be no doubt . . . that persons denied lawful or procedurally fair administrative action can look to the courts to enforce rights vested in them by s 24, and that in terms of the Constitution this Court is the court of final instance in respect of any such dispute. Whether the direct application of the provisions of s 24 of the interim Constitution means that the common law must meet the requirements of the section, or that the section grounds a cause of action independent of the common law need not be decided. In either event the direct application of the interim Constitution is a matter over which this Court has jurisdiction. If that is so, it is hard to avoid the conclusion that has been reached by the Appellate Division, that under the interim Constitution it has no jurisdiction over matters concerning 'administrative action' as contemplated by s 24 of the interim Constitution.

In the subsequent *Pharmaceutical Manufacturers* case (n 6 above), the Constitutional Court had the opportunity to decide the question it left unanswered in *Fedsure*.

The other view was taken by the SCA in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*.⁵⁰ The matter involved a challenge to a decision of the Commissioner of Customs and Excise on the grounds that he had failed to apply his mind in the exercise of discretionary powers conferred by legislation. The court held that 'judicial review under the Constitution and the common law are different concepts'. Its reasoning appeared to be based upon the greater perceived flexibility of the common law as compared to constitutional law.⁵¹

In any case, the SCA was clear that the common law and the constitutional system were separate. According to Hefer JA, 'to 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'.⁵² In other words, administrative law had not been constitutionalised in its entirety and the common law could still be used as a basis of a challenge to administrative action.

[1.24] *Container Logistics* was overruled by the Constitutional Court in the *Pharmaceutical Manufacturers* case.⁵³ This case concerned the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998, passed by Parliament in 1998 and containing a section providing that the Act 'comes into operation on a date to be determined by the President'. In 1999 the President issued a proclamation declaring that the Act had come into operation. However, this was a mistake. Regulations essential to the operation of the Act (dividing types of medicine into categories subject to varying degrees of control) had not yet been drafted and promulgated. The Act repealed its predecessor. The result was a legal vacuum: it was not known which medicines were subject to which form of legal control. The Constitutional Court found that it was not objectively rational to bring the Act into operation in these circumstances. Even though the President's action was not administrative action, the court

⁵⁰ *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA).

⁵¹ According to the court (*Container Logistics* para 20), '[t]he grounds for review which the Courts have developed over the years can never be regarded as a *numerus clausus* for the simple reason that administrative law is not static. As new notions develop and take root, so must new measures be devised to control the exercise of administrative functions.'

⁵² *Container Logistics* (n 50 above) para 20. This approach was also taken (with little or no theorising on the issue) by numerous High Court decisions after commencement of the interim Constitution which simply applied the common-law principles of administrative law without any reference to the Constitution.

⁵³ Note 6 above.

struck down the decision to bring the Act into operation on the basis of the principle of legality.⁵⁴

The decision has significant administrative law implications. *Pharmaceutical Manufacturers* holds that the common-law principles of administrative law applicable to the exercise of public power have been constitutionalised. According to the court, '[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution'.⁵⁵ This meant that the power of judicial review of administrative action came from the Constitution and no longer from the common law.⁵⁶ A challenge to the validity of administrative action was now based on an allegation that one or more of the constitutional rights to lawful, procedurally fair and reasonable administrative action had been violated.

The *Pharmaceutical Manufacturers* case also makes clear that, to the extent that the exercise of a public power was not administrative action, it could be challenged under any of the provisions of the Bill of Rights (other than the administrative justice clause) or as a violation of the constitutional principle of legality. Under a system of constitutional supremacy the fact that judicial review of administrative action was now derived from the Constitution and not the common law meant that legislation could no longer provide for departures from the fundamental principles of legality, fairness and reasonableness.

⁵⁴ *Pharmaceutical Manufacturers* (n 6 above) para 85. The court found that the principle of legality entailed a duty to exercise public power in a rational manner: 'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'

⁵⁵ *Pharmaceutical Manufacturers* (n 6 above) para 33.

⁵⁶ *Pharmaceutical Manufacturers* (n 6 above) paras 46, 50: 'The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted *intra vires* or *ultra vires* in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted *ultra vires* is a finding that he acted in a manner that was inconsistent with the Constitution. The common law is not a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. 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. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them.'

Private power

- [1.25] Since the constitutionalised administrative law described in the *Pharmaceutical Manufacturers* decision is concerned with *public* power, the implication is that the exercise of *private* power is not subject to administrative law.⁵⁷ Before 1994, exercises of private power were occasionally subject to administrative law — for example, the disciplinary proceedings of private institutions governed by contract. To the extent that these exercises are not administrative action (in other words to the extent that these private bodies are not exercising public power or performing a public function), they are not governed by the new constitutionalised administrative law and remain subject to the common law. This is a very narrow sphere of operation: the conduct of private entities when not exercising statutory or public powers, in circumstances where such entities are required to observe principles of administrative law. The common law governing these circumstances continues to apply. However, though previously classified as administrative law, this body of common law is perhaps, after *Pharmaceutical Manufacturers*, better considered part of the law of contract.

Role of the common law in interpretation of AJA

- [1.26] The common law still has a considerable though indirect role to play in the interpretation of the administrative justice rights.⁵⁸ For example, the term 'legitimate expectations' (s 3(1)) can only be understood by reference to the common-law jurisprudence dealing with this concept.⁵⁹

Relationship between the Constitution and the AJA

- [1.27] The Promotion of Administrative Justice Act was enacted in compliance with the requirements of s 33(3) of the 1996 Constitution. Now that the national legislation required by s 33(3) has been enacted, what is the relationship between the rights in s 33 and the Act? Is it still possible to

⁵⁷ This is confirmed by *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* (SCA, 30 March 2001, unreported) (discussed further in para 2.28 below). The SCA held that a public body exercising a private power to terminate a contract on grounds of fraud was not subject to the constitutional administrative justice rights.

⁵⁸ *Pharmaceutical Manufacturers* (n 6 above) para 45: 'The interim Constitution . . . was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the precepts of a written constitution which is the supreme law. That 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.' On the application of the Act to private persons see further para 2.27 below.

⁵⁹ See, for example, *Premier, Mpumalanga* (n 37 above) para 36 (using common-law interpretation of 'legitimate expectation' to interpret s 24 of interim Constitution).

rely on the s 33 rights directly, just as s 24 of the interim Constitution could be relied on?

There are two possible answers. The first is that the Act is the entire expression of the rights (i e, the Act *is* the right to administrative justice) and there is no longer a possibility of relying directly on the constitutional right to administrative justice. This would be the position if 'give effect to' the rights meant 'create' the rights.

The other possibility is that the Act gives effect to the rights in the sense of making the right effective (i e, providing an elaborated and detailed expression of the right and providing for remedies to vindicate it). The important difference is that the constitutional right exists independently of the statute that gives effect to it. It is still possible on this interpretation to rely directly on the constitutional right. It is also possible that the AJA may be unconstitutional to the extent that it is incompatible with the constitutional right to administrative justice. This is not possible on the first interpretation.

Obviously, the second interpretation is preferable.⁶⁰ There would be no point in creating a right in the Bill of Rights that can be amended by ordinary legislation. (This would be the case if the AJA were amended or repealed, or later legislation contradicted the AJA.) The Constitution grants authority to Parliament to elaborate upon or give detail to the abstract requirements of the constitutional right to administrative justice. Giving some authority to Parliament in implementing a right (and possibly even requiring deference in interpretation in some areas) is not the same as giving Parliament a free hand to *construct* the right as it sees fit.

It was argued in the previous paragraph that there remains, after the AJA has commenced, a *free-standing constitutional right to administrative justice*. The question is therefore not *whether* but *when* the constitutional right to administrative justice can be directly relied on. The answer must be — only in the exceptional case where a provision of the AJA or other Parliamentary legislation is challenged as an infringement of s 33. This would be in accordance with the principle of avoidance, which dictates that remedies should be found in common law or legislation before resorting to constitutional remedies.⁶¹ This would also be in accordance with the related principle that norms of greater specificity should be relied on before resorting to norms of greater abstraction. Most compellingly, however, deference must be given to the constitutional authority of Parliament to give effect to the constitutional right to administrative justice. This means that the Act must be treated as the principal instrument

⁶⁰ See the discussion of the interpretation of 'give effect to' in para 1.16 above.

⁶¹ See *Zantsi v Council of State, Ciskei* 1995 (4) SA 614 (CC) paras 2–5.

defining and delineating the scope and content of the administrative justice rights, the mechanisms and procedures for their enforcement. The Constitutional right recedes to the background, indirectly informing the interpretation of the Act but directly applicable only to an allegation that the AJA or legislation beyond the control of the AJA is unconstitutional.

To reiterate: there are two categories of use of the constitutional right to administrative justice in relation to the AJA. First, the constitutional right to administrative justice can be directly relied on to *challenge a provision of the AJA*. For example, it could be argued that the definition of 'administrative action' in the Act is too narrow, and that it therefore does not properly give effect to the constitutional right. If so, the definition is a limitation of the constitutional right and arguably unconstitutional. This use of s 33 to challenge the AJA is discussed more fully in para 1.29 below. In a similar way, the constitutional right can be relied on to challenge parliamentary legislation passed *subsequent to the AJA* which is an infringement of the rights to administrative justice. Only subsequent parliamentary legislation needs such direct s 33 challenge because (as was argued in para 1.18 above) all *prior* contrary legislation has been impliedly repealed by the AJA to the extent of its inconsistency with the AJA and all contrary *subsequent* delegated and provincial legislation will be ultra vires the AJA itself.

Secondly, as we have seen, the constitutional right can and must be used indirectly to *interpret the AJA*.⁶² The AJA (and other legislation) must, as far as possible, be interpreted in a manner that conforms to s 33. The importance of the indirect application of the right to administrative justice should not be underestimated. As we will see, the AJA poses considerable interpretative difficulties in places. Many of these can be resolved by reference to the fact that the Act is intended to give legislative effect to the constitutional rights. In other words, as argued above, some difficulties of interpretation can be avoided or resolved by treating the Act as co-extensive with the constitutional rights.⁶³

It has been argued elsewhere that s 33 could be relied on directly to supplement the Act. For example, to the extent that the AJA clearly provides a definition of administrative action narrower than that in the Constitution, s 33 could be directly relied to supplement the under-inclusiveness of the Act. Governmental action can be challenged directly under the Constitution as administrative action where it is covered by the

⁶² See para 1.26 above. Indirect application aims at creating harmony between the Bill of Rights and ordinary law. See De Waal et al (n 43 above) 27: 'When indirectly applied, the Bill of Rights does not override ordinary law nor does it generate its own remedies. Instead, law is interpreted or developed in a way that makes it conform to the Constitution.'

⁶³ See para 1.16 above.

constitutional right but not covered by the AJA, avoiding the necessity of a finding that the Act is an unconstitutional restriction of the scope of the administrative justice rights.⁶⁴ In our view, such an approach fails to take seriously the AJA's declared purpose of giving effect to the constitutional rights. The AJA is the product of Parliament's exercise of its mandate to give comprehensive and general legislative form and content to the rights in s 33. If it is alleged that the Act draws the scope of administrative action too narrowly, this must be adjudicated as an allegation that the legislation is an unconstitutional infringement of rights. If found to be unconstitutional, the remedies to be considered are the striking down or severance of the unconstitutional provisions of the Act, or the reading-in of words to cure the constitutional defect, as well as providing relief to the particular litigant.⁶⁵

The AJA as a limitation of s 33

We have argued above that s 33 may be directly relied on to challenge the constitutional validity of provisions of the AJA.⁶⁶ Here a distinction can be drawn between three different types of challenge to the constitutionality of the AJA: the fundamentalist challenge, under-inclusive challenges and over-restrictive challenges. **[1.29]**

A first type of challenge to the constitutionality of the AJA can be termed the 'fundamentalist' challenge. This argues that the AJA cannot limit the constitutional right of administrative justice at all, given that Parliament has been specifically instructed to 'give effect to' the rights and not to 'limit' them. Some support for this argument can be found in the difference in wording between the 'give effect to' subsection in s 33 and the 'give effect to' subsection in s 32 (the closely related constitutional right of access to information).⁶⁷ Section 32(2) uses language (such as 'reasonable measures' and 'alleviating' the burden on the state) that is

⁶⁴ See De Waal et al (n 43 above) 496.

⁶⁵ On remedies in cases of direct application of the Bill of Rights, see De Waal et al (n 43 above) ch 8.

⁶⁶ A distinction can be made between the content of the s 33 rights (which Parliament through the AJA is not particularly authorised to interpret) and the procedures and structures to enforce these rights (which Parliament through the AJA is given a relatively free hand to specify). This distinction may be useful in supporting or opposing particular challenges to the AJA. See Klaaren (n 10 above).

⁶⁷ Section 32 provides:

32. (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.

consistent with an interpretation that the mandated legislation is permitted to limit the rights in s 32(1). The s 33 subsection does not use similar language. Section 33(3) simply requires national legislation to ‘promote an efficient administration’, a goal found elsewhere in the Constitution⁶⁸ and not a special limitation.⁶⁹ From this, one can argue that the AJA is not permitted to limit s 33.

The fundamentalist challenge relies on an interpretation of the words ‘give effect to’ that we do not support. We have argued above that the AJA is general legislation aimed at making the constitutional right practically effective by providing specific rights and duties and establishing procedures and remedies for their enforcement.⁷⁰ In the course of making the right effective it is permissible for the AJA, like any other law of general application, to place limits on the right, provided it remains within constitutional boundaries when doing so.

There remain two further types of challenge to the content of the Act. Both accept that the Act can limit the constitutional right but insist that those limitations must be constitutionally justifiable. Under-inclusive challenges essentially claim that the scope of application of the Act is too narrow or, otherwise, that the Act does not go far enough in its content. Over-restrictive challenges essentially claim that the procedural provisions of the Act place too many obstacles in the way of access to the rights and remedies in the AJA.

Under-inclusive challenges to the AJA complain that the Act does not go far enough in its coverage. The AJA provides a package of procedures and a set of institutions (such as judicial review by magistrates’ courts) to enforce the right of administrative justice. The objection is that the Act does not reach widely enough. Or, that the Act does not go far enough in its detailing of the constitutional right to administrative justice. There are several possible attacks on the AJA on the basis that it is under-inclusive;

- The constitutional conception of administrative action is narrowed by the AJA’s definition of administrative action, which is confined to decisions that adversely affect rights.
- If the Act is interpreted as not covering rule-making (we argue the contrary at para 2.38), it could likewise be challenged for failing to give effect to the right to administrative justice.

⁶⁸ See s 195(1)(b).

⁶⁹ Special limitations are textual qualifications of rights that create special criteria (as opposed to the general criteria listed in s 36 of the Constitution) in terms of which the rights may be limited by the legislature. See De Waal et al (n 43 above) 164–5.

⁷⁰ See para 1.28 above.

- The Act could be challenged for failing to give detailed effect to the rights to lawful and reasonable administrative action.⁷¹

Over-restrictive challenges argue that the Act places restrictions on the right to just administrative action by the procedures that it creates. This type of constitutional challenge focuses less on what the AJA covers or does not cover and more on the procedures and institutions that the AJA chooses to give effect to its provisions.⁷² There are several possible challenges to the AJA on the basis that it is over-restrictive:

- The requirement of s 7(1) that proceedings for judicial review must be brought within 180 days is far more restrictive than the position under the common law and is arguably a limitation of the constitutional right.
- A similar challenge could be made to the rule requiring exhaustion of remedies in s 7(2), which is again more restrictive than the position under the common law.
- A third challenge would relate to the implementation of the right to reasons as a right to request reasons in s 5. This restriction could be seen as an onerous procedure that reduces access to the constitutional right.

Both the under-inclusive and the over-restrictive challenges require a type of limitations analysis: can the limitation of the right to administrative justice by the AJA be justified? There is some argument about the criteria to be used in this analysis.⁷³

Section 33(3) required the enactment of national legislation that would give effect to the constitutional rights but that would also 'promote an efficient administration'. Could one argue, for example, that the 180-day limitation on bringing review proceedings is designed to promote efficiency and is therefore constitutionally mandated? This is not, of course, an unassailable argument. 'Promote an efficient administration' can be read at least two ways. It could be read 'downwards' to mandate the reduction of legal burdens on the administration to promote cost-effectiveness and simplicity of procedures. It could also be read 'upwards', to require an administration that is accountable and participatory, promoting rational, effective and responsive (and thus, ultimately, more efficient) decision-making.

⁷¹ In contrast to the rights to reasons and procedural fairness which are given detailed and direct treatment in ss 3 and 4 the Act, lawful and reasonable administrative action is dealt with only indirectly in the list of review grounds in s 6.

⁷² As such, this type of challenge falls more squarely in the zone where the court owes Parliament a certain amount of deference.

⁷³ See generally Klaaren (n 10 above) 559–64 (discussing the assessment of the constitutionality of legislation giving effect to administrative justice).

[1.30]

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Another issue relates to the interaction between s 33(3) and s 36, the general limitations clause. What is the substantive content by which the legislation (and perhaps other legislation giving effect to/limiting the right to administrative justice) should be judged? To what extent, if at all, does s 33(3) change the interpretation or the application of the general limitations clause? It has been argued that s 33(3) does modify the operation of the general limitations clause in its application to legislation limiting the constitutional right to administrative justice. Considerations of cost and institutional convenience may be appropriate in examining Parliament's choice regarding implementation procedures and institutions.⁷⁴

Courts must, of course, be careful not to add hastily supplemental content or procedures to those that Parliament in its institutional judgment has mandated. This general principle bears particular force with respect to a statute such as the AJA that is concerned with the effective working of government.⁷⁵ Nevertheless, since it is a constitutional right that is at issue when the above arguments are raised, courts must be equally careful to consider such challenges diligently.

What the AJA does not do

[1.30] For a more complete picture of the scope and impact of the Act, it is also important to set out what it does not do. The Act is a legislative statement of general administrative law applying to a circumscribed class of administrative action. This means, first, that the AJA does not exhaust the possibility of review of the exercise of public power. Direct constitutional review of the exercise of public power remains available on the basis, inter alia, of the principle of legality in the case of exercises of public power that do not qualify as administrative action under the Constitution or the AJA. Secondly, the Act does not exhaustively set out the duties of administrators in relation to the lawful, reasonable and fair exercise of public power. Besides the AJA, these duties are prescribed in the Constitution and in the particular administrative law applicable to a particular exercise of public power. The Act also does not apply to the exercise of private power, which remains governed by the common law. It does not provide for review on the substance or merits of administrative decisions (i e, statutory

⁷⁴ Klaaren (n 10 above) 561.

⁷⁵ The classic statement against supplementary judicial procedural protections with regard to the American Administrative Procedures Act (APA) is *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council* 435 US 519 (1978) (administrative agencies may grant procedural rights in addition to the maximum procedural requirements of the APA, but reviewing courts are generally not free to impose such additional rights if the agencies have not chosen to grant them).

appeal along the lines of the Australian Administrative Appeals Tribunal Act 1975).⁷⁶ Instead the Act provides for judicial *review* on a list of grounds mostly derived from the common law.

Judicial review is essentially about the detection and correction of maladministration. This is an important remedy for individuals who are aggrieved by bad decision-making by administrators, but it is important to note that it is not the only remedy. An individual who wishes to challenge a particular administrative action has a number of options available besides the option of judicial review under the AJA. These may include an appeal to an administrative tribunal created by legislation.⁷⁷ The individual may complain to the Public Protector about an alleged instance of maladministration, or may request access to information from an administrator in terms of the Promotion of Access to Information Act 2 of 2000. Judicial review is expensive and time-consuming. It is usually turned to as a matter of last resort. Its importance as a remedy for maladministration should therefore not be overstated.

It is also important to stress that the AJA is more than a judicial review Act. It is not concerned merely with giving judges and magistrates the power to track down and correct maladministration in individual cases and after the fact. It aims to set out system-wide procedures and methods that will encourage good decision-making by administrators in the first place and before the fact, thereby reducing the need for judicial review.

⁷⁶ The Tribunal is an administrative body authorised to review the merits of specified exercises of discretion (listed in the Schedule to the Act, or provided for in particular legislation). The Tribunal is empowered to consider the facts of the case, determine the merits of a matter and to substitute its decision for that of the original decision-maker.

⁷⁷ The possibility of specialised *appeals* tribunals to hear merits appeals is mentioned in the Act only as one of the subjects on which an advisory council could advise the Minister: s 10(2)(a)(iii). See further para 7.1 below.