David Pieter de Villiers

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The New Administrative Landscape – Implications of Managerialism for Administrative Law

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Prof. Hugh Corder

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1. INTRODUCTION

In the introductory section to Baxter's *Administrative Law,* the author in an attempt to delineate the field of administrative law stated the following:

> 'A factor retarding the development of administrative law as a significant discipline has been a lack of agreement as to what "administrative law" is. Most writers commence with the statement that "administrative law is the law relating to the administration". This is, of course, a safe but useless tautology. Disagreement begins the moment one attempts further amplification.'[1]

This disagreement has not precluded academic writers or the courts from developing this broad, if difficult to define, body of law. Yet, there remains a high level of uncertainty about the exact scope of administrative law. One might think that asking the question; 'What is considered to be an administrative act or an administrative action?' would remedy this problem to a degree. Again Baxter is aposite:

> 'The courts have attempted to marshal the wide diversity of administrative acts by grouping them into a set of simple categories. ... The labels "legislative", "judicial" and "administrative" have been adopted, along with variants such as "semi-" or "quasi-judicial", "purely administrative" and "ministerial". Once an administrative act has been labeled, the legal rules and principles applicable to it are supposedly clear. But the scheme of classification which has been adopted is in truth simplistic and misleading'[2]

Even though a right to just administrative action was included in the last two Constitutions of the Republic of South Africa[3], it has not provided any further certainty in this regard. Section 33 of the Final Constitution reads:

> '(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;

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[1] Lawrence Baxter *Administrative Law* (1984) at 49-50.
[2] Ibid at 344.
[3] Section 24 of The Constitution of the Republic of South Africa Act 200 of 1993 (hereafter 'the Interim Constitution') and section 33 of The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter 'the Final Constitution').

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

Until the legislation envisaged in subsection 3 is passed the wording of section 33(1) and (2) is deemed to read as section 24 of the Interim Constitution[4].

This section reads 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.'

It is clear from both these sections that the term 'administrative action' is a crucial threshold to the application of the right to just administrative action. Many South African academics have indicated the need to develop the jurisprudence around the exact scope of the term.[5] Some, who were present at the multi-party negotiations where the Interim Constitution was drafted, have indicated that the words 'administrative action' were chosen deliberately to encompass both administrative acts and administrative decisions and to go even wider than those concepts.[6] However, in the first major case where the Constitutional Court had the opportunity to implement this wider term in a way that would promote 'the values that underlie an open and democratic society based on human dignity, equality and freedom'[7], it gave a very restrictive interpretation.[8] Although Ackermann J, writing for the majority in this case, did not deal with the matter very comprehensively in his judgment, certain commentators have raised a suspicion that he was reverting to the classification of

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[4] Schedule 6 item 23(2)(b) of the Final Constitution.

[5] Andrew Henderson 'The Meaning of "Administrative Action"' (1998) 115 *SALJ* 634 at 644; Hugh Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 28 at 42 and 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38 at 45-48.

[6] Lourens du Plessis and Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 168.

[7] Section 39(1) of the Final Constitution.

[8] *Bernstein v Bester NO* 1996 (2) SA 751 (CC).

functions so critically assessed by Baxter.[9] The need for certainty in this regard is therefore clear. It is hoped that the drafters of the legislation envisaged in section 33(3) will rise to the occasion to give a clear and determinable, yet wide and flexible meaning to the term 'administrative action'.

One of the issues that will have to be addressed by the drafters of the Administrative Justice Act[10], when defining 'administrative action', is the determination of where the line should be drawn between public law and private law. There is an increasing perception that modern public administrations consist of more than just a bundle of state departments. The decentralisation and privatisation of state bodies and governmental services is a worldwide phenomena, even though its implementation in South Africa has begun quite recently.

On a more theoretical level the division between public and private, like so many institutional boundaries being questioned in terms of current postmodernist reasoning, is being attacked from many angles. One of the main proponents of the Critical Legal Studies movement in American jurisprudence, Roberto Unger, indicated this paradigm shift twenty years ago, in 1979:

> 'Private organisations are increasingly recognised and treated as entities with the kind of power that traditional doctrine viewed as the prerogative of the government. People may become more conscious of what was always partly true, though perhaps less so in early periods: society consists of a constellation of governments, rather that an association of individuals held together by a single government. The state that has lost both the reality and the consciousness of its separation from society is a corporate state.'[11]

It is this particular aspect of the scope of administrative law that I have investigated through this dissertation.

The meaning of 'administrative action' will play a central role throughout this inquiry, as for the drafters of the Administrative Justice Act. Although international literature on this topic is limited, within the South African context it is virtually non-

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[9] Dawid van Wyk 'Administrative Justice in *Bernstein v Bester* and *Nel v Roux*' (1997) 13 *SAJHR* 249 at 251.

[10] This is the name that Hugh Corder uses for the awaited legislation. See Corder (1997) op cit note 5 at 41.

[11] Roberto Unger *Law in Modern Society* (1976) at 193 as quoted in Dennis Davis '"Public Power": do Administrative Lawyers Really Care?' in Corder and Maluwa (eds) *Administrative Justice in Southern Africa* (1997) 43 at 44.

existent. I therefore refer to many international experiences and commentaries, primarily Australian, English and New Zealand literature.

The first step of the investigation looks at recent changes in public administration internationally. I have sketched the political and economic background before proceeding to the question of whether administrative law should adapt to these changing environments, and if so, on what grounds.

After the underlying justification for administrative law's expanding frontiers have been looked at, I have investigated a principled approach to dealing with the problem of the changing scope of administrative law. This problem has two distinct components. The first is that of deciding under what circumstances an action will constitute administrative action. The second is to decide what legal principles apply to these administrative actions, once they have been identified as such, and then through which mechanisms this process of accountability should take place. Section three will be reserved for the first component of the problem, and section four for the second component. In order to find a principled approach for the identification of administrative actions, I look at the ways in which the judiciaries of England and South Africa, have approached this problem. I also look at important criticisms of these approaches, before proposing a possible solution.

In section four I look at the consequences of an action being given the label 'administrative'. In this section I try to refer as much as possible to the implications for the Administrative Justice Act. While this is a vast field of public law, my intention is to shed some light on various issues involved.

2. BACKGROUND TO MANAGERIALISM

2.1 Managerialism and the new administration

During the last three decades governments worldwide have self-consciously sought to reconfigure themselves, and chose various methods to do so. Galligan[12] described the changes taking place in the United Kingdom within four different broad aspects. The first is the fragmentation of central government into what is called 'Next Step Agencies', i.e. small units, allocated specific tasks and objectives to fulfill. A government department is therefore 'replaced' by a range of these agencies. The

[12] D.J. Galligan 'Introduction: Socio-Legal Readings in Administrative Law' in Galligan (ed) *A Reader on Administrative Law* (1996) 1 at 9.

second method of restructuring consists of a range of activities such as the privatisation of public industries, the corporatisation of public organs and the contracting out of public services, which may be placed under the umbrella of 'contraction of the public sector'.[13] The third method is closely linked to the second and relates to the commercialisation of public functions and activities and the creation of contractual relations between different government departments and agencies. Galligan called this 'contracting-in' and cited the example of the National Health Service:

> 'Here various bodies within the service enter into contracts with each other for the provision of health care. Some parts of the service, such as hospitals, provide health care, other parts such as district health authorities or general practitioners, buy health care. The idea is that the purchasers of health care will be able to buy from different providers and that the former will naturally seek services at the best price available. This will create a sense of competition amongst providers, a kind of internal market.'[14]

The fourth aspect is a huge increase in the number of regulatory and supervisory bodies that are being established. In the United Kingdom these include tribunals, ombudsmen and inspectorates which regulate the first three emerging features of the new administration.

In Australia and New Zealand the methods that have been applied for the restructuring of the public administration correspond to a large degree with those cited by Galligan, with the emphasis on the second aspect of the 'contraction of the public service'. In the Australian public service the functions of service delivery and policy formation have increasingly been severed from each other in the last decade. Commercial management principles have been introduced for the running of administrative bodies, and in many instances have resulted in a change in the legal form and structure of the specific body.[15] In 1990 Michael Taggart described these ideas in New Zealand public administration as 'the pursuit of economic efficiency, the glorification of the private sector and the retreat of the State'.[16] By 1997 this process

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[13] Ibid at 10.
[14] Ibid at 11-12.
[15] Mark Aronson 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Taggart (ed) *The Province of Administrative Law* (1997) 40 at 41.
[16] Michael Taggart 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77.

of restructuring had occurred to such a degree, that one commentator described New Zealand as 'the most deregulated utility environment in the western world'.[17]

In South Africa the process of restructuring only started at a much later stage. Nevertheless, with a few minor exceptions, it has taken on the same general characteristics as those referred to above, with the aspect of the contracting state being the most prominent. After the Government of National Unity came to power in South Africa in 1994 the Reconstruction and Development Programme (RDP) was adopted, and this included state institutional reform as a major element of the programme. This particular aspect of the RDP was broken down into six objectives, namely; belt tightening, the reprioritisation of state expenditure, the restructuring of state assets and enterprises, the restructuring of the public service, the building of new inter-governmental relations and the developing of an internal monitoring mechanism for the programme.[18] 'Restructuring' was described 'substantial changes that affect ownership, accountability, function and location in the public sector'.[19] In global terms the government therefore paved the way for corporatisation, outsourcing and privatisation to be introduced as the methods for achieving this restructuring. In the foreword to a prospectus on the progress of the restructuring programme published in 1998, the Minister for Public Enterprises stated:

> '... contrary to media and "expert" opinion, our pace of privatisation is proceeding faster than that delivered by Britain's Thatcher government in the eighties. The privatisation of that country's national airline, for example, took a full ten years to complete. South African Airways on the other hand will transfer to private ownership after four years of transformation and restructuring.'[20]

It is clear that 'managerialism' – used here as a broad term to embody the ways in which governments have chosen to reconfigure themselves – is the trend of the new administrative landscape globally, with corporatisation, privatisation and outsourcing constituting the vestiges of this new landscape. This assertion is echoed by Michael Taggart:

> 'Today's "idealistic reformers" are largely economists, who glorify economic efficiency and give priority to the private sector and the "level playing field" of the market place.

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[17] Aronson op cit note 15 at 48.
[18] Ministry for Public Enterprises *National Framework Agreement* February 1996 at 1.
[19] Ministry for Public Enterprises *Discussion Document by the Government of National Unity on the Consultative and Implementation Framework for the Restructuring of the State Assets* 25 July 1995 at 11.
[20] Department of Public Enterprises *South Africa is Working* 1998 at 2.

> The influence of these ideas has been profound, transcending both national and ideological borders. The far-reaching structural adjustments brought about by these phenomena rival those wrought by the Depression.'[21]

2.2 Defining the terms

Before looking at the various justifications put forward for the new managerialism it is useful to define the notions of outsourcing, corporatisation and privatisation.

'Outsourcing' or 'contracting-out' describes the situation where a state organ contracts with a non-governmental organ and transfers the duty to provide certain services to members of the public from the former to the latter (thereafter called the service provider).[22] In the South African context reference is often made to 'joint ventures', which have been defined as 'a situation where two or more enterprises, whether private or public, work together on an economic activity'.[23] In the National Framework Agreement between the South African Government of National Unity and South African trade unions, outsourcing was regarded as being a subcategory of the broader concept of privatisation.[24]

Corporatisation can be defined as the separation of commercial and non-commercial objectives of public enterprise, entrusting the former to a public company owned by the government to be run on business principles. A 'government business enterprise' or a 'state-owned enterprise' may also be defined as:

> 'a public enterprise controlled by the government that has a legal personality separate from the government and that is principally engaged in commercial activities.'[25]

Privatisation simply refers to the conversion of public ownership of state assets to the private sector.[26]

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[21] Michael Taggart 'The Province of Administrative Law Determined' in Taggart (ed) *The Province of Administrative Law* (1997) 1 at 3.
[22] Aronson op cit note 15 at 41.
[23] Ministry of Public Enterprises op cit note 18 at 8. However, this definition might be misleading by giving the impression that joint ventures are used in situations of economic activity only. In the Chapter XIV of the Correctional Services Bill [B 65B-98] reference is made to joint venture prisons, which refers to the situation where the Minister of Correctional Services is given the power to enter into a contract with any party to operate any prison, amongst other things. It is doubtful whether the operation of a prison could be described as 'economic activity'.
[24] Ministry of Public Enterprises op cit note 18 at 8.
[25] Hannes Schoombee 'Privatisation and Contracting Out – Where Are We Going?' (1998) 87 *Canberra Bulletin of Public Administration* 89 at 90.
[26] Department of Public Enterprises op cit note 20 at 3.

2.3 The justifications for the shift towards managerialism

Many justifications are offered for the shift to managerialism. Commentators have identified a loss of faith in the state to be the underlying factor in this shift.[27] In the United Kingdom an important role-player in the privatisation programme of the eighties, the then Financial Secretary to the Treasury, expressed this view unequivocably:

> 'Less government is good government. This is nowhere truer than in the state industrial sector. Privatisation hands back, to the people of this country, industries that have no place in the public sector.'[28]

Graham and Prosser point out that this loss of faith in the state has its origins in a 'real and justified dissatisfaction with nationalisation in Britain'.[29] The arguments put forward for nationalisation were linked to the idea that public authorities had an additional responsibility to pursue the public good, and this remained the traditional justification for the disparity between the effectiveness of the market and that of the public sector. However, this justification was vigorously attacked on a theoretical level by the 'public choice' school of political economists, who specifically studied non-economic decisions made by public authorities. The reasoning of this school of thought has been described as follows:

> '[T]he fundamental precept is that people act as rational, utility-maximising individuals. Politicians and public servants are all said to be motivated by their own self-interest; politicians attempting to maximise their chances of re-election and public servants seeking to protect and, if possible, expand their empires. ... As a general rule, public choice theorists prefer the market system to political systems. And, relatedly, at best the public choice movement is skeptical about the benefits of government and public administration and, at worst, is contemptuous of democracy.'[30]

The United Kingdom's experience of government intervention in public services confirmed many of these arguments. It was repeatedly shown that the definition of

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[27] Aronson op cit note 15 at 41.
[28] C. Graham and T. Prosser 'Rolling Back the Frontiers'? The Privatisation of State Enterprises' in Galligan (ed) *A Reader on Administrative Law* (1996) 63 at 64.
[29] Ibid at 65.
[30] Taggart op cit note 16 at 83-84.

"public good" changed over the short term, and that intervention was never done in terms of coherent medium- or long-term objectives or goals.[31]

Possibly, as a result of this vagueness inherent in the idea of the public good, other proponents of the new managerialism have also diluted the notion of the 'public good' or the 'public interest'. The Australian National Commission of Audit argued in its *Report to the Commonwealth Government*:

> 'Broadly, government commercial activities or services that operate in a competitive market ... should be retained in public ownership only where it is in the public interest that they be retained. *'Public interest' largely implies that there is some market failure*, for example, in areas such as quarantine and air safety. In general, if the private sector is adequately providing, or can provide, the service, there is unlikely to be a public interest reason for government to deliver the service.'[32]

As Aronson argues, correctly in my opinion, the public interest can hardly be defined as only referring to market failures and it is therefore necessary to re-examine the concept of public interest.

Another variant of the argument of the loss of faith in the state dates back to Peter Drucker's theory, published in 1969, that the state 'can formulate and mobilise policy, but cannot effectively or efficiently implement it'.[33] Hence, administrative bodies should be entrusted with the responsibility of enforcing and implementing policy directives, but should not be burdened with deciding the policy itself. That responsibility should remain in the hands of the responsible cabinet minister and his or her department.

This separation of policy-making from policy-enforcement has various effects, which are all employed as extra justifications for the severance. The first of these is that if administrative bodies only need to implement policy, they will then be able to give attention to the objective of doing so effectively. According to the proponents of the new managerialism, the most effective management will only be attained when it is governed by market forces. Effective management is thereby equated with economic efficiency. Some critics have expressed doubt as to the merits of the

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[31] Graham and Prosser op cit note 28 at 66.
[32] As quoted in Aronson op cit note 15 at 43 (my emphasis).
[33] Aronson op cit note 15 at 41. Drucker's theory was published in Drucker *The Age of Discontinuity: Guidelines to our Changing Society* (1969).

economic efficiency argument[34], but Hodge has pointed out that estimations have shown cost savings of between 9 and 14 per cent in contracting out worldwide. He also stated that some types of services show little or no cost saving, and that more sophisticated ways of determining cost savings tend to result in more modest findings,[35] but even self-proclaimed public lawyers have recently conceded that there is little to pose as an effective challenge to the economic justifications for the move to managerialism.[36]

A second effect of the separation of policy-making and policy implementing is that new lines of public accountability are introduced. Before separation administrative bodies were held accountable only to the relevant cabinet minister, and the minister was then accountable to Parliament (which is still the primary method of holding the executive accountable in all the commonwealth countries mentioned above). In terms of the new managerialism these bodies are now also held to be accountable in terms of economic indicators such as good management, cost-effectiveness and profit-maximisation.[37] In many cases this results in ministerial accountability to Parliament about the performance of state enterprises being bypassed, by the Minister defering to business judgement[38]. In cases of privatisation the political lines of accountability are more severely limited, with total reliance on market-related forms of accountability. Yet, this change in accountability is seen, by some, to be a change for the better. Before the privatisation-programme was introduced in the United Kingdom, public accountability of nationalised industries had been regarded as completely ineffectual:

> 'Government intervention was not implemented through published directions but through informal and usually secret processes. As a result, accountability was attenuated at vanishing-point: who could be accountable if it was not clear whether responsibility for decisions rested with the industry boards or with government? Parliamentary accountability has been deliberately limited by ministers and industry chairmen. ... Moreover, the consumer councils established to protect consumer

[34] Galligan op cit note 12 at 14.
[35] G Hodge *Contracting Out Government Services: a review of international evidence* (1996) at vi, as quoted in Schoombee op cit note 12.
[36] Aronson op cit note 15 at 44.
[37] Galligan op cit note 12 at 13.
[38] See Taggart op cit note 16 at 80-82 for a discussion of this aspect in the New Zealand context.

> interests were generally weak, unimaginative and hampered by an inability to gain information from the industries.'[39]

With privatisation these ineffectual forms of accountability were replaced with shareholder accountability which, it is argued, is a much more effective and direct form of accountability. The fact that the shareholders are also the customers, in many cases, supposedly increases their bargaining power and control – not only in terms of the efficiency of the enterprise, but also as a voice against price-increases.[40]

The position has been advanced that many developing countries were pressured by world financial institutions such as the World Bank and the International Monetary Fund, to restructure their state bureaucracies.[41] Whether or not this was the case in the South African context is not clear, but in 1995 the Ministry for Public Enterprises published a discussion document in which the background and motivation for restructuring was set out. One justification put forward in this document was that the government was facing certain challenges, which could be dealt with in a much more efficient way by the restructuring of the state enterprises. These challenges included the maximising of budgetary resources, the mobilising of new resources, the providing of efficient financing mechanisms and the redeploying of available resources.[42] Although it seems as if these challenges were all strictly related to the measuring of the economic efficiency of state enterprises, the need to ensure that the public interest was served, was also not negated in the document. Special mention was made of the responsibility of the public sector to meet basic needs such as electricity, water, telecommunications and roads.[43]

Apart from using the challenges as a negative justification, the discussion document also contained various objectives of restructuring that served as positive justification for the move to managerialism. These positive objectives included; the facilitation of economic growth and employment, the generating of funding for the Reconstruction and Development Programme, the creation of wider ownership in the South African economy, the mobilisation of private sector capital, the use of

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[39] Graham and Prosser op cit note 28 at 66.
[40] Ibid at 84.
[41] Aronson op cit note 15 at 42.
[42] Ministry for Public Enterprises op cit note 19 at 1.
[43] Ibid at 2.

proceeds for the reduction of state debt, the enhancement of competitiveness of state enterprises and the promotion of fair competition.[44] The justifications inherent in these objectives range from those founded upon economic efficiency on the one hand to public-interest orientated justifications on the other. This dual nature of the South African restructuring process was emphasised by the Minister of Public Enterprises:

> 'Transformation and unlocking of value in state-owned enterprises is one of several key strategies adopted by the democratic SA government its endeavour to improve the quality of life of all its citizens. ... Unlike other similar programmes in other parts of the world, like the UK, South Africa's privatisation process must in addition to the business needs of the enterprise, also serve to empower people and communities that were previously marginalised.'[45]

It is therefore clear, at least currently, that the South African government has not diluted the notion of the 'public interest' so as only to embody the correction of market failures as was done in the Australian report mentioned above.

3. TRANSPORTING ADMINISTRATIVE LAW TO THE NEW LANDSCAPE

3.1 Determining the scope of administrative law

How should administrative law respond to the new administrative landscape? In order to answer this question one would have to determine the place of administrative law within the broader legal system. Wiechers defined administrative law in the pre-constitutional South African context as follows:

> 'Administrative law is the body of legal rules governing the administration, organisation, powers and functions of administrative authorities. As such it forms part of public law, since it regulates public interests which come into play in legal relationships of subordination, either between administrative authorities themselves or between an administrative authority and private individuals.'[46]

The immediate question is whether, and if so to what extent, administrative law plays a role where either the administrative authority or the legal relationship referred to in Wiechers's definition is couched in a traditionally private law form. As the previous section suggests, the process of change towards the new administration concerns

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[44] Ibid at 4-5.
[45] Department of Public Enterprises op cit note 20 at 2.

this situation exactly. Public bodies and publicly held industries are progressively being cast in legal forms traditionally governed by private law, and the relationships between these bodies *inter se* and between these bodies and private individuals are, more and more, being constituted by networks of contracts and other private law relationships. Does this mean that administrative law is excluded from these situations? Wiechers's definition does not limit the application of administrative law exclusively to "public law" bodies or "public law" relationships, but states that because of the major role played by administrative law in regulating the public interest, it can be classified as forming *part* of public law. The scope of administrative law is therefore not necessarily coextensive with that of public law.[47] This is an important distinction, as it indicates the possibility that administrative law might even reach into the traditional ambits of other bodies of law, and the need to justify such an expanded scope.

In this section I look at the justifications put forward for the expansion of the scope of administrative law to include the regulation of the new administration. This presupposes an understanding of the theoretical underpinnings of administrative law, whether they allow for an expansion of the scope of administrative law, or whether certain of these underpinnings need to be challenged.

In the current South African constitutional context it might seem sufficient to consider the constitutional basis of administrative law, and to regard any exercise of looking at the common law as redundant. However, there are a few factors that point to the usefulness of having regard to the development of the common law in South Africa (together with the comparative experiences in countries such as the United Kingdom, New Zealand and Australia). Firstly, the constitutional protection of the right to just administrative action does not purport to codify the whole body of administrative law in South Africa.[48] The pre-constitution common law principles of administrative law continue to exist to the extent that they are not in conflict with the constitutional provision. Both the jurisprudence around the constitutional provision and the common law need to be developed, and it is arguable that they need to be developed interdependently in relation to each other. The fact that the South African

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[46] Marinus Wiechers 'Administrative law' in Joubert, Harms, Pienaar, and Rabie, (eds)*The Law of South Africa* (1993) par 56.
[47] See Taggart op cit note 21 at 1.
[48] Du Plessis and Corder op cit note 6 at 170.

common law principles of administrative law, and those of the commonwealth countries mentioned above, are firmly rooted in English administrative law makes a comparative approach all the more desirable.[49] Secondly, when comparing the relative novelty of the recent developments in South African public administration to the more advanced position in other countries, the justification for a comparative perspective becomes unquestionable. Such an approach is in any effect in concord with section 39 of the Constitution which provides that foreign law may be considered in interpreting the Bill of Rights.

3.2 Dicey's legacy on administrative law

When looking at the theoretical underpinnings of common law administrative law, the first aspect to consider is the legacy left by A. V. Dicey on the jurisprudence of English constitutional and administrative law. This is a broad topic, and I will only deal with relevant aspects. The one thing contemporary administrative lawyers seem to agree on is that Dicey's views on the English constitution had a severely stifling effect on the development of a clear theoretical justification for administrative law in many commonwealth legal systems.[50] Dicey affirmed that the English constitutional archetype is that of parliamentary sovereignty. In deciding legal disputes this meant that the courts had to follow the express lead of Parliament. Where Parliament therefore delegated its authority to any government official by giving that official certain discretionary powers, the Courts could only review the formal validity of the exercise of the discretion and not the merits of the decision itself.

Secondly, and this is particularly relevant to the present inquiry, Dicey placed a heavy emphasis on the role played by the rule of law in the English constitution. What makes Dicey's conception of the rule of law so important for determining the scope of administrative law is the central role that it played in entrenching the public/private divide in English law.[51]

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[49] Hugh Corder 'Administrative Review in South African Law' (1998) 9 *Public Law Review* 89 at 90-91.

[50] See Corder op cit note 49 at 90-91; Taggart op cit note 21 at 20; and in Taggart (ed) *The Province of Administrative Law* (1997) see John Allison 'Theoretical and Institutional Underpinnings of a Separate Administrative Law' 71 at 89; H. Wade MacLauchlan 'Public Service Law and the New Public Management' 118 at 121; and Murray Hunt 'Constitutionalism and the Contractualisation of Government in the United Kingdom' 21 at 23-27.

[51] Allison op cit note 50 at 89 states that Dicey *rejected* the distinction between public and private law. Even though it might seem paradoxical to state that Dicey rejected the distinction and that his writings

> 'It is clear from his elaboration of the meaning of that ideal that, for Dicey, the rule of law was nothing short of the encapsulation of his particular ... conception of societal ordering, according to which the individual's private rights, of property, personal liberty and freedom of discussion and association, ought to be sacrosanct from the interference by the state. ... His account of the rule of law, in short, does nothing less than constitutionalise private law rights and with them the private law model of adjudication by which they are determined.'[52]

The consequences of Dicey's insistence on the 'constitutionalisation of private law rights', together with the limited power of review of administrative actions in the light of parliamentary sovereignty, were to obstruct the expansion of the scope of administrative law to regulate in situations created by the new administration. Where a power derived its source from a contract, or similar private law relationship, the courts did not have a power to review other than the normal 'private law model of adjudication'. Where a function was allocated to a private body, the courts would look at the nature of the body rather than the nature of the function to determine whether it had review power. If the Diceyan approach were still applicable in the new administrative landscape courts would have to decline to review any action of a private body irrespective of whether it fulfils a public power.

One aspect that should be made clear, is that the public/private divide supposedly reinforced by Dicey's legacy should not be ascribed to the fact that Dicey wanted to emphasise a divide between two substantive disciplines of law. On the contrary the divide can be seen as the result of a total denial by Dicey of the existence of any set of substantive principles that could constitute and justify a strong public law jurisprudence. It is not strange therefore that Dicey was purported to have stated that '[i]n England we know nothing of administrative law, and we wish to know nothing about it'.[53] This Diceyan spectre still haunts the systems of administrative law based on the common law and poses a real threat to the ability of these systems to expand, to be responsive to the changes in the administrative landscape. Hunt suggests:

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at the same time entrenched the divide, it will become clear how they constitute the same concept seen from different perspectives.

[52] Hunt op cit note 50 at 24.

[53] MacLauchlan op cit note 50 at 121 note 8.

> '[T]he contractualisation of government only presents a threat to the province of public law so long as English courts remain in thrall to the Diceyan version of constitutionalism. To the extent that English judges continue to adhere to an essentially Diceyan conception of their role and function, Freedland and Prosser are right to be concerned about the capacity of English public law to respond appropriately to contractualisation ... '[54]

As governments and state administrations expanded, especially after the Second World War, so administrative law developed. However, many of these changes were brought about without a need to challenge the Diceyan paradigm. The reason was that the 'growth in the bureaucratic-administrative state'[55] posed a specific threat to the private sphere that Dicey regarded with such sanctity. It was therefore possible for the courts, at least in England, to develop the common law grounds of review on the justification that the administrative state encroached upon the liberty and property rights of individuals.[56] It was only much more recently that administrative lawyers started to challenge Dicey's influence, on English and other common law systems of administrative law, by looking at the developing of a more substantive set of administrative law principles. In some sense the dawn of managerialism served as a crucial factor in bringing about this change:

> '[T]he response of many lawyers to these "reforms" has been to distill the essence of administrative law for transporting to the newly deregulated and privatised areas. It is no coincidence, in my view, that the self-conscious identification of "public law values" dates back to the early 1980's in Britain and was a response to deregulation, privatisation and the underlying theoretical attacks on the "public regarding" starting point of administrative law'.[57]

3.3 Theoretical underpinnings of administrative law

Australia was one of the first countries within the common law tradition to start thinking about the necessity of having a substantive system of regulating the state administration. In the early 1970's three governmental inquiries were set up to

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[54] Hunt op cit note 50 at 38.
[55] Hugh Corder 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' (1989) *SAJHR* 1 at 10.
[56] See David Mullan 'Administrative Law at the Margins' in Taggart (ed) *The Province of Administrative Law* (1997) 134 at 156 and Hunt op cit note 50 at 25.
[57] Taggart op cit note 21 at 3.

investigate the regulation of administrative discretion. In the findings of these bodies of inquiry it was stated that there was a need in Australia for:

> 'an integrated system which would
>
> - safeguard the interests of citizens affected by administrative decisions;
> - ensure that administrative decision-makers were accountable for their decisions;
> - ensure processes that were efficient, fair, open and impartial; and
> - supplement judicial review of decisions by the courts'[58]

Over the following years the Australian government enacted and implemented a series of statutes through which these objectives could be met. These included the Administrative Appeals Tribunal Act of 1975, the Ombudsman Act of 1976, the Administrative Decisions (Judicial Review) Act of 1977, the Freedom of Information Act of 1982 and the Privacy Act of 1988.[59] This revolutionary reestablishment of the role of administrative law was described by a South African commentator to have been the 'site of the most deliberate and systematic reform of ... administrative law in the British Commonwealth'.[60]

What is clear, though, is that there was a definite theoretical underpinning which justified these reforms. The same underpinning was gradually being expressed and identified in England and other commonwealth countries. Although written much later, Craig explained this underpinning as follows:

> 'An adequate understanding of the nature and purpose of administrative law ... requires us to articulate more specifically the type of democratic society in which we live and to have some vision of the political theory which that society espouses ... [E]very democratic society will have some ideas of rights, participation and accountability, but these will differ depending on the nature of that society.'[61]

In England the ideas that underlie administrative and public law are still being debated within the political reality of having an unwritten constitution. However, many writers have indicated that there has been a broad shift from the Diceyan approach to a more modern constitutionalism. This shift has taken place both within the area of academic legal writing and in case law. The English courts have not only started to develop a more substantive theory about their own role in reviewing administrative actions, but have also started to identify certain generally applicable

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[58] Justice Jane Mathews 'The Australian System of Administrative Review' *Aspects of Administrative Law* 63 at 64.
[59] Ibid at 64.
[60] Corder (1997) op cit note 5 at 35.
[61] Paul Craig *Administrative Law* (3ed) (1994) at 3 as quoted in Corder (1998) op cit note 5 at 40.

public law principles and values.[62] The development of English administrative law in adopting various doctrines such as those of legitimate expectation, a broader conception of standing and possibly even proportionality is indicative of this paradigm shift.[63]

In terms of South African law the 'new constitutionalism' was introduced in the form of a supreme Constitution. Yet, even before the Constitution was drafted many administrative lawyers – and here one should specifically mention Etienne Mureinik – stressed the importance of recognising the role that administrative law plays in ensuring democracy. Mureinik made it clear that the proper conception of democracy that administrative law should strive to uphold should be what he called 'responsive government'. The way in which administrative law upholds this form of government was described as follows:

> 'Participation in a decision that affects one means an opportunity to affect its content, to influence the outcome. Accountability means that government has to justify its decisions to the people whom they govern. Participation and accountability both make government responsive to the people governed...'[64]

As stated in the introduction the right to just administrative action was included in the Bill of Rights in both the Interim and Final Constitutions. The significance of this inclusion for administrative law is that it gives recognition to the role of administrative law in ensuring responsive government. Yet, the constitutional justification for administrative law stretches far wider than the inclusion of the right to administrative justice. Section 1 of the Final Constitution makes it clear that values such as openness, accountability and responsiveness are central to the new South African democratic ideal:

> 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.

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[62] See Hunt op cit note 50 at 25-6.
[63] Ibid at 26.
[64] Etienne Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 at 36.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, *to ensure accountability, responsiveness and openness.*' (emphasis added)

These core values of openness, responsiveness and accountability therefore form the basis of the new constitutional democracy, and hence every other reference in the Constitution to an 'open and democratic society'. This automatically invokes these values. Section 39(1) of the Final Constitution expressly states that in any interpretation of the Bill of Rights these values should be promoted and they are made indirectly applicable to the development of the common law in terms of section 39(2), which states that any such development should promote the spirit, purport and object of the Bill of Rights. The applicability of these values to the public administration is spelt out clearly, and in great detail, in section 195 of the Final Constitution. The introduction to the section reads that the public administration must be governed by the democratic values and principles enshrined in the Constitution.

In the light of the aforegoing it would not be an oversimplification to state that the underlying justification of South African administrative law, whether based on the common law grounds of review or the right to administrative action, is to promote the democratic conception of responsive, accountable and open government.

3.4 Can administrative law be transported to the new landscape?

It is all very well to state that administrative law contributes to open, responsive and accountable government, but it does not directly assist with the determination of the scope of administrative law. Ultimately this question depends to a large degree upon the definition of 'administration', 'government' or 'state'.

> 'If the state is closely linked to the distinction [between public and private law], uncertainty about the state can be expected to produce general uncertainty about the province of public law, about the legal consequences of administrative disputes generally, whether those consequences involve special procedures, special courts, or special principles of accountability. ... And to address that uncertainty ... further analysis of the state in required – analysis of the distinctness of its administration and

> of those attributes that justify the use of special legal principles, institutions, and procedures.'[65]

It is therefore necessary to devise some way of separating the public from the private in order to decide whether administrative measures of ensuring accountability should be applied. This is not an easy task. Various academics have indicated that the traditional divide between public law and private law is a problematic distinction, prone to a variety of criticisms.[66] Aronson indicated that just as economists have classified certain economic systems as being 'mixed economies' it would be possible to speak of 'mixed administrations'. The requirements for an administrative function to be described as 'mixed' are easy to determine – there should be both public and private sector involvement in the execution of the function.[67]

Even though the concept of 'mixed administrations' does not solve the problem of delineating what is meant by 'administration', it does provide some assistance in how to approach the problem. Immediately one is absolved from looking for one of two mutually exclusive answers. It is not necessary to be able to say that a specific function is either exclusively public or private. It might be better to conceptualise administrative functions as constituting a continuum, similarly to the way in which various other theoretical legal distinctions are applied to practical realities. Those functions, purely public in nature, are placed on the one end. Those that are purely private are placed on the other end. In between lie a diversity of different administrative functions, that can be described as 'mixed administrations'. In some, the level of public involvement would be more prominent than the private involvement, and vice versa. The public/private divide is therefore not done away with, it is only qualified. In fact it has been argued that the criticisms of the public/private divide only serve to clarify our compartmentalised thinking about it and do not deny the existence of the distinction:

> 'Although the distinction [between public and private] is much criticised, its rumoured decline is greatly exaggerated. It is well known that demarcating the public and private spheres of life is a complex, indeed tricky, business. It is done for many

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[65] Allison op cit note 50 at 89.
[66] See Alfred Cockrell '"Can you Paradigm?" – Another Perspective on the Public Law/Private Law Divide (1993) *Acta Juridica* 227; and Aronson op cit note 4.
[67] Aronson op cit note 15 at 52-3.

> different purposes in many contexts. Although as a shorthand expression we refer to the public/private distinction, there is not one distinction but many.'[68]

The challenge of determining the scope of administrative law therefore shifts from classifying a function as being public, then applying administrative law standards to the exercise of the function, to determining the public nature of the function. Thereafter one needs to decide the degree to which administrative law standards should be applied. This clearly calls for a nuanced and principled approach to determine the scope of the applicability of the administrative law values of openness, responsiveness and accountability.

4. TOWARDS THE DEVELOPMENT OF A PRINCIPLED APPROACH

4.1 Judicial attempts at determining the scope of administrative law

The United Kingdom, which is probably the site where the new administrative paradigm has been phased in over the longest period of time, has also been the country where the judiciary has been the most prolific in considering the expanding scope of administrative law.[69] Craig has advanced a useful analytical tool with which to approach the wide range of cases, not only with respect to the UK, but also to the commonwealth countries. The traditional way in which courts have tried to determine whether they can review the actions or decisions of a body has been to look at the nature and type of the body itself. This is called the institutional approach.[70] Within the institutional approach there are different tests to determine whether a body can be classified as public and therefore subject to judicial review. These tests include the traditional 'source of the power' test as well as the more fluid 'nature of the power' test. However, both these tests, when used in isolation or when used together, can be criticized on numerous grounds. Before looking at the criticisms it might be useful to consider a few cases in which the courts used the institutional approach to determine whether administrative law applied.

The case of *R v Panel on Take-Overs and Mergers, Ex Parte Datafin plc*[71] is considered by many to have been a ground-breaking ruling by the English Court of

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[68] Taggart op cit note 21 at 4.
[69] Taggart op cit note 21 at 2.
[70] Paul Craig 'What is Public Power' in Corder and Maluwa (eds) (1997) *Administrative Justice in Southern Africa* 25 at 25.
[71] [1987] QB 815 (hereafter referred to as '*Datafin*')

Appeal. In this case a decision by the Panel on Take-Overs and Mergers (The Panel) was brought before the Court in an application for review. The Panel was the body responsible for administering the City Code on Take-Overs and Mergers (The Code). The Code did not have the force of law, and only represented a self-regulatory document that was drafted by major role-players affected by take-overs and mergers. The Panel was neither a statutory body nor an incorporated juristic person, but its existence was given statutory recognition, and it had the power to impose penalties.[72]

The Court per Sir John Donaldson M.R., Loyd L.J. and Nicholls L.J. held that the Panel was susceptible to judicial review. The argument of the Court was that the source of power test can only be applied where the source can be determined as being solely statutory or solely contractual. Where neither is the case the Court should look at the nature of the power to determine whether the body exercised a power that could be reviewed. The indicators mentioned by the Court as proof of the reviewability of the Panel were summarised by Craig:

> 'First the Panel although self-regulating did not operate consensually or voluntarily, but rather imposed a collective code on those within its ambit. Secondly, the Panel was performing a public duty as manifested by the government's willingness to limit legislation in this area, and to use the Panel as part of its regulatory machinery. ... Thirdly, its source of power was only partly moral persuasion, this being reinforced by statutory powers exercisable by the government and the Bank of England. Finally, the applicants did not appear to have any cause of action in contract or tort against the Panel.'[73]

However, the decision did not exchange the 'source of power' test with a broader 'nature of the power' test to determine the scope of administrative law. What the Court did was to merely add other factors to be taken into account when the source of power test could not give a sufficient answer as to whether or not to the Court could apply judicial review.[74]

In fact, the ongoing presence of the source of power test in the minds of English judges are made very clear, when considering the fact that in two

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[72] See Taggart op cit note 16 at 104.
[73] Craig op cit note 70 at 29-30.
[74] Hunt op cit note 50 at 29.

subsequent cases[75] after *Datafin* the courts were willing to presume a fictional statutory source of power where such a source was absent. The presumption went along the following lines: where the body under review exercised a public function that was recognised by statute and other governmental authorities, but happened to find its source of power in contract, then the court presumed that if the body did not exist a similar regulatory body would have been created by statute.[76]

In the case of *R. v. Football Association Ltd., ex parte Football League Ltd.*[77] the fictional parliamentary intention to regulate in the absence of self-regulation was found to be absent, resulting in a rejection of the application for judicial review. This covert use of the source of power test was finally exposed in the case of *R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan*[78], but only to re-implement its use openly and without shame. The facts of the case were: as any owner of racehorses in the UK is bound to register with the Jockey Club and to abide by its rules and regulations, the applicant (in this case being the owner of a racehorse) entered into such a contractual relationship with the Jockey Club. When one of the applicant's horses was disqualified by the Disciplinary Committee of the Jockey Club after winning a race, he applied for judicial review of the decision on the basis that the Jockey Club was the *de facto* regulator of a national activity and as such was fulfilling a public function that had to accord with the public interest. The Court of Appeal went as far as accepting that if the Jockey Club did not regulate the sport of racehorsing the government would probably have done so. Nevertheless, the Court found that the decision of the Disciplinary Committee was not susceptible to review, because the source of its power was considered to be the contractual agreement between the Jockey Club and the applicant.

Within the boundaries of the institutional approach to determine the scope of administrative law in particular circumstances, it is clear that in the UK the Courts have not been able to move away from the 'source of power' test towards the adoption of the wider 'nature of the power' test. Hunt puts the blame squarely on the shoulders of the Diceyan ghost that still haunts English administrative law:

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[75] *R. v. Advertising Standards Authority, ex parte The Insurance Service plc* (1990) 2 Admin LR 77 and *R. v. British Pharmaceutical Industry Association Code of Practice Committee, ex parte Professional Counselling Aids Ltd.* [1991] COD 228.
[76] Hunt op cit note 50 at 30.
[77] [1993] 2 All ER 833.
[78] [1993] 2 All ER 853 (hereafter referred to as '*Aga Khan*').

> 'Although since *Datafin* courts have professed to apply the new approach based on the nature of the function, the judicial development of the test for "public element" of "public duty" demonstrates the continued vitality of Diceyan thinking in two respects. First, courts have shown a marked reluctance to abandon reliance on "source" to justify the assumption of jurisdiction over the exercise of non-statutory powers, even resorting to fictions about parliamentary intention to justify the assumption of public law jurisdiction over powers which are clearly not derived from such a source. Second, courts have continued to rely on the fact that a particular power has its "source" in contract, or some other consensual submission, in order to justify *not* assuming a public law jurisdiction over such powers.'[79]

In recent South African case law there had been only a few cases of note that dealt with the scope of administrative law across the public/private divide. Yet it should be stated at the outset that over time the South African courts have developed exceptions to the initial position that it could only review statutory bodies. This general assumption of jurisdiction by the Supreme Court was recently restated as follows:

> 'Supreme Courts have, in addition to reviewing the conduct of statutory or public bodies, always asserted, and have, inherent power to review the conduct of non-statutory quasi-judicial bodies and domestic disciplinary tribunals.'[80]

The first that needs to be mentioned is the case of *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others*[81] (An interesting point to note is that it was decided four years before *Datafin).* In this case the applicant sought an order on review to set aside a decision made by the President and Committee of the Johannesburg Stock Exchange (JSE). In the *ratio decidendi* of the decision Goldstone J stated the following:

> 'Strictly speaking a stock exchange is not a statutory body. However, unlike companies or commercial banks or building societies formed under their respective statutes, the decisions of the committee of a stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy. It is for that reason the Act makes the public interest paramount. To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would

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[79] Hunt op cit note 50 at 30.
[80] *Yates v University of Bophuthatswana and Others* 1994 (3) SA 815 (BGD).
[81] 1983 (3) SA 344 (W) (hereafter referred to as '*Dawnlaan*').

> also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.'[82]

It is clear that *Dawnlaan* differs quite substantially from the English cases mentioned above, in the sense that the authority under consideration, the JSE, was to a large degree regulated in terms of a tight statutory framework. In that sense it was easier to determine the 'intention' of the Legislature in deciding whether or not the JSE should be susceptible for review. The Court did not have to revert to the source of power test at all, because the statute placed a clear duty on the Committee of the Stock Exchange to act in the public interest – one aspect of which included a duty to abide by its own rules. The Court therefore found that because of the nature of the power *as provided for in the statute* the Committee had to have acted lawfully. It is not clear from the reasoning of Justice Goldstone whether the same result would have been achieved if it had been a question of procedural fairness instead of lawfulness, or if the Act did not spell out the level of public interest involved so clearly.

Another South African case that is relevant to the determination of the scope of administrative law is *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*[83]. Once again, the case should be distinguished from the English cases in that the Court had to decide the fairly narrow question of whether Telkom South Africa Ltd (Telkom) was an executive organ of state. The Court per Van Dijkhorst J started by perusing the source of Telkom's authority in the telecommunications arena. The learned judge remarked that Telkom was an unusual company in the sense that its origins were not to be found in any form of private initiative; it was very evident that Telkom originated as an initiative of the State that culminated in the amendments of the Post Office Act 44 of 1958[84]. This state initiative was not only limited to the origin of Telkom, but also extended to its ownership, control and main objects[85]. Furthermore the Post Office Act made provision for various stringent limitations on the way in which Telkom could be managed. All of these characteristics led the Court to the conclusion that:

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[82] At 164-165.
[83] 1996 (3) SA 800 (T) (hereafter referred to as '*Cost Cutters*').
[84] Mainly the Post Office Amendment Act 85 of 1991.
[85] At 807-808.

> '[T]he umbilical cord between [Telkom] and the Minister is as strong as ever. It can be called a wholly owned "subsidiary" of the State, created to render a public service under State control.'[86]

The prime signifier to the Court that Telkom should have been considered to be an organ of State, was the high measure of State control[87]. However, the Court did not stop there: Van Dijkstra J then continued to peruse the test laid down in the case of *Baloro and Others v University of Bophuthatswana and Others*[88] to determine whether a body could be regarded as an organ of State. He then reached the following conclusions:

> 'Even if a private body running an old age home could be described as an agent of the State (which I doubt) it cannot be called an organ of State. Neither can a law society or the Medical and Dental Council be an organ of State. It is not functioning at a level of government. It regulates a very small group within a society – much smaller that the group of rugby players under the control of a provincial rugby union (which does not function at a level of government).

Although the Court had to decide a quite narrow question, as opposed to determining the scope of administrative law in the abstract, it is clear that the Court still followed the institutional approach to reach its conclusion. Strictly speaking, the Court did not follow the same source of power test as applied in the English cases because it did not limit its inquiry to the formal question of whether the power originated in statute or contract. In effect, the Court went a little further by determining the substantive source of control. Yet, when one looks at it carefully, this test advanced by the Court is nothing but a wider source of the power test. The last quotation from the judgment should make it clear that the Court did not consider the nature of the power to be a sufficient determinant of the whether or not the body could be considered an organ of state.

Before looking at another recent case in which the distinction between public and private was challenged it is necessary to raise a few points about Van Dijkhorst's conclusion in the *Cost Cutters* case. The first point is that the question of whether or not a body is an organ of state is to a large degree irrelevant (at least in South African law) to the question of whether an action taken by the body is open for judicial review. There is no way better to illustrate this than to refer to a different

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[86] At 808.
[87] At 810.
[88] 1995 (4) SA 197 (B).

judgment of Van Dijkhorst J in the case of *Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad*[89]. Whereas in the *Cost Cutters* case the learned Judge stated very clearly that the Medical and Dental Council could not be considered to be an organ of state, in the *Nel* case he applied a previous decision of the Transvaal Provincial Decision[90] in order to review a decision taken by the Medical and Dental Council in terms of the common law grounds for judicial review of administrative action[91]. Furthermore, the right to just administrative action as contained in the Final Constitution is cast in wide terms, and does not make any mention of only being applicable to the executive branch of government or organs of state. The horizontal applicability of the Bill of Rights in terms of section 8(2) of the Final Constitution also supports this argument[92].

The second point about the decision in the *Cost Cutters* case that needs to be highlighted is the fact that the *obiter* remarks quoted above about which bodies could be considered as organs of state would probably not have been included in the judgment had the Final Constitution been in effect. The reason is simply that the definition of 'organ of state' contained in section 239 of the Final Constitution is definitely wide enough to include a body such as the Medical and Dental Council within its meaning:

'"organ of state" means —any department of state or administration in the national, provincial or local sphere of government; or

(a)

(b) any other functionary or institution—

(i) exercising a power or performing a function 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, but does not include a court or a judicial officer;'

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[89] 1996 (4) SA 1120 (T) (hereafter referred to as '*Nel*').

[90] *Veriava and Others v President, SA Medical and Dental Council and Others* 1985 (2) SA 293 (T).

[91] The *Nel* case at 1128.

[92] One might be concerned over the fact that the horizontal application of the Bill of Rights only applies to natural or juristic persons. Does this mean that a self-regulatory body such as the Panel on Take-overs and Mergers in *Datafin*, if it were to exist in South Africa, would not be bound by the right to just administrative action or any other rights contained in the Bill of Rights? The possibility that a body that is neither an organ of state nor a natural or juristic person should be able to escape the reach of the Bill of Rights is quite a worrying thought. However, space does not permit a further investigation of this question.

In the very recent case of *Post and Telecommunications Corporation v Modus Publications (Pvt) Ltd*[93] the Zimbabwe Supreme Court had to decide the public/private question from another angle. The reasoning of the court in this case shows a sophisticated understanding of the various indicators that all play a role in determining this type of question. The facts of the case were that the Post and Telecommunications Corporation (PTC) wanted to claim damages from the Defendant in a defamation claim. However, in law an organ of state could not institute an action for defamation. The Court per McNally JA (Gubbay CJ and Korsah JA concurring) had to consider whether the PTC was an organ of state for purposes of the defamation action.

The first commendable step that the Court took in order to come to a finding was to divorce itself from the private/public dichotomy where a body is considered to be either public or private. This is evident from the following observation by the Court:

> 'The Posts and Telecommunications Corporation Act Chap 12:03 (the Act), created the PTC as a body corporate capable of suing and being sued in its own right. It is really unnecessary to go further than that. Its individual legal personality is indisputable.
>
> By no means does it follow that because the PTC is a separate and distinct artificial *persona,* it cannot be a 'government instrumentality' ... One must be careful not to confuse distinctions made for one purpose with distinctions made for another. An entity such as the PTC may fall on one side of the line for one purpose, and on the other side for a different purpose. More exactly, one must be careful to appreciate that the conclusion may be different because the question is different.'[94]

The second laudable aspect of the Court's decision is the test that it applied to determine whether the PTC was a public or private body for the purposes of the case. The test that McNally JA applied consisted of the following seven questions:

> '1. Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion?
> 2. Whether the property vested in the corporation is held by it for and on behalf of the government.
> 3. Whether the corporation has any financial autonomy.
> 4. Whether the functions of the corporation are government functions. ...

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[93] 1998 (3) SA 1114 (ZSC) (hereafter 'the *PTC* case').
[94] Ibid at 1121-1122.

5. Whether, if the body is not a statutory trading corporation, it performs governmental functions either at local or national level. ...
6. Whether, if the body concerned is, at least largely or effectively, a monopoly, providing what are generally regarded as essential services traditionally provided by government...'[95]

I will return to this test at a later stage. Suffice it to say that most of the criticisms relating to the way in which courts generally have applied their minds to problem of defining the scope of administrative law that will be dealt with in the next section do not apply to the decision in the *PTC* case.

4.2 Criticisms of the judicial application of the institutional approach

There are a number of criticisms that one can raise about the way in which Courts have applied the institutional approach, many of which relate to the source of power test. Hunt identified the continuous utilisation of the Diceyan paradigm as the underlying justification for the source of power test, and argued quite convincingly that as soon as the foundation of administrative law principles is severed from these restraints the courts will start to move away from source of power. According to Hunt the aspect of this paradigm that most clearly shows its fundamental weakness is the artificiality of the fiction used in the *Advertising Standards* and *British Pharmaceutical* cases. This weakness can also be traced through the fiction's origin in the quasi-religious adherence to the *ultra vires* doctrine as the underpinning of judicial review[96]. According to this doctrine the courts can only review the formal exercise of any discretion granted by a sovereign Parliament to determine whether it was exercised *intra* or *ultra vires*. That the place of the doctrine is still defended regularly – not only by the judiciary but also by academics – in spite of this evident artificiality, is apparent from the following statement:

> 'The fig-leaf, like the swimming costume on a crowded beach, is to preserve the decencies. It enables individuals to interact in an appropriate manner without threatening the social order. The doctrine of ultra vires plays a similar role in public law. No one is so innocent as to suppose that judicial creativity does not form the grounds of judicial review; but by adhering to the doctrine of ultra vires the judiciary shows that it adheres to its proper constitutional position and that it recognises that

[95] Ibid at 1123.

> Parliament is free to dispense with the judicially developed principles of judicial review.'[97]

However, not even this defence addresses the logical error involved in the fiction of Parliamentary intent as used in the stated cases. Even accepting Forsyth's argument that the term 'Parliamentary intent' with relation to the *ultra vires* doctrine only signifies an acceptance of Parliament's sovereignty in the UK, it does not explain why the courts wanted to defer to the intention of Parliament in instances where Parliament has chosen not to regulate a specific area, irrespective of whether the choice was intentional or caused by oversight. In the cases mentioned above the Courts had no obligation in terms of its constitutional position to look at Parliament's intention as Parliament had not claimed any sovereignty for itself in that specific arena.

Hunt argues strongly that the Courts should rather look at a variety of substantive indicators when deciding whether or not administrative law principles should apply to the actions of an authority instead of the hypothetical source of its powers. I will return to the list of indicators put forward by Hunt at a later stage.

Clearly in the South African cases dealt with above the *ultra vires* doctrine does not hold as much sway in administrative law thinking than in the United Kingdom, and as such has not attracted the same degree of criticism from academics. This is also largely the case in Australia and New Zealand, judging by commentaries on judicial review. However, one aspect of the source of power test that still seems to play a role in all of these systems is the unwillingness of the judiciary to apply administrative law standards when dealing with a contractual situation. This insistence on preserving the public/private divide from the private law side has been the subject of much criticism. Aronson pointed out that the '*Datafin* project' has failed to question the supremacy of contractual autonomy in relation to the application of administrative law principles, and that even in the interpretation of Australia's statutory provisions relating to judicial review the judiciary has not been able to move away from this position[98].

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[96] Hunt op cit note 50 at 32.
[97] Christopher Forsyth 'Of Fig Leaves and Fairy Tales: the Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review.' (1996) 55(1) *Cambridge Law Journal* 122 at 136.
[98] Aronson op cit note 15 at 46.

In 1993 Cockrell dealt with the same challenge from the South African point of view[99]. The premise from which he started was the already recognised principle (in South African law) that domestic tribunals constituted by contract were held accountable in terms of administrative law standards of fairness and lawfulness when exercising quasi-judicial powers, unless such principles were expressly excluded from the contract. He then considered the origin of this principle and came to the conclusion that:

> 'The law's willingness to import the duty to comply with the administrative-law standards of bounded rationality may also be explained on the basis that the domestic tribunal possesses the sort of hierarchical power which mimics the exercise of state power. In sum, the role of the contract in the importation of these administrative-law duties seems to be a relatively passive one, since the contract is simply the empty vessel into which the duty is poured. The default presumption in favour of the inclusion of the duty is triggered by the nature of the power which the tribunal exercises.'[100]

This explanation exposes the warped reasoning of saying that because a specific power was exercised in terms of a contract administrative law cannot be applied. Unfortunately, in some instances the South African judiciary has succumbed to this type of reasoning[101]. But in more recent cases the South African Courts have succeeded in breaking away from the sanctity-of-contract approach with regard to certain types of contract, such as the area of employment contracts[102]. Nevertheless, the judiciary has failed to substitute a systematic and principled approach in its place, which leaves many aspects of the problem open for uncertainty.

One line of critique against the way in which Courts in the United Kingdom, Australia, New Zealand and South Africa have dealt with the applicability and scope of administrative law can be leveled at a higher and more fundamental level of abstraction. In effect the critique reiterates the challenge put forward in the previous

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[99] See Cockrell op cit note 66 at 230-232.
[100] Ibid.
[101] *Sibanyoni and Others v University of Fort Hare* 1985 (1) SA 19 (Ck) at 30. See also *Mkize v Rector, University of Zululand and Another* 1986 (1) SA 901 (D) and *Embling v Headmaster, St Andrew's College (Grahamstown) and Another* 1991 (4) SA 458 (E).
[102] See *Lunt v University of Cape Town and Another* 1989 (2) SA 438 (C); *Administrator Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) and *Administrator Natal and Another v Sibiya and Another* 1992 (4) SA 532 (A).

section, and displays the Courts' inability to rise to the challenge. Aronson stated it as follows:

> 'Whilst there are elements of the *Datafin* project which are attractive, its failure is ultimately deserved because in its present form, at least, it is unviable. ... Its rigid dichotomy of public and private power undercuts what was obviously the fact in that case, namely, that the regulatory body in question was exercising a *mix* of governmental and industrial power. This makes it difficult to choose sensibly within a dichotomous legal structure which is not reflected in political reality. It therefore becomes difficult to predict which sorts of power will be adjudged public, and which private.'[103]

If one recognises the 'political reality' that administrative functions can be plotted anywhere on the line between public and private, then the tests used by the Courts simply do not succeed in producing answers that meet that reality. In *Datafin* the Court went in the right direction by referring to the nature of the power as a guideline for whether or not the decision of the Panel could be reviewed, but the weakness of the decision lies in the fact that the Court still wanted to classify the Panel to be either a private body or a public body. In effect the Court therefore used a different test to arrive at an essentially arbitrary answer. In the English cases that were decided subsequent to *Datafin* (those dealt with above) it was this either-or trap that led the Courts back to the source of power test and all its inherent flaws. If it was not for the fact that the Court in the South African *Cost Cutters* case had to decide the fairly narrow question of whether or not the body in question was an organ of state, the Court's insistence on the importance of the amount of state control would have signified the same narrow-mindedness. It is therefore very important to distinguish the Court's reasoning in *Cost Cutters* from what it would have been had it been necessary for the Court to decide whether or not Telkom's decision was an administrative action.

The need for these types of administrative law problems to be dealt with more systematically has been stated over and over again in the last few years, together with a realisation that the courts have not succeeded in providing the necessary guidance[104]. If the courts have not been able to come forward with a principled approach to deal with this problem, one wonders firstly, whether the Courts are at all

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[103] Aronson op cit note 15 at 46-47 (his emphasis)
[104] See Mullan op cit note 56 at 136 and Taggart op cit note 21 at 2.

suitably equipped to deal with the problem, and secondly whether it is possible to find any principled approach that will reflect the realities of modern public administrations.

4.3 A proposal for a principled test

Leaving aside, for the moment, the question of the role of the Courts in the development of a principled approach to determine the scope of administrative law, some writers have started to propose pointers in the right direction. As stated above Hunt has listed a variety of indicators that courts can use to determine whether the actions of a particular body should be susceptible to administrative standards of bounded rationality. Unfortunately he also fell into the trap of devising a test 'for whether a body is "public"' and therefore did not acknowledge the possibility of 'mixed' bodies and a test that measured the ratio of 'publicness' against 'privateness'.[105] In spite of this, his list can serve as a useful starting point for the development of such a test:

> 'The relevant factors [for whether a body is "public"] should include the nature of the interests affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction, and the nature of the context in which the body operates.'[106]

The first thing to note about this list is that, with the exception of the second indicator, the questions 'build out from the paradigm of a body which unequivocally has public power'[107] and therefore still fall within Craig's concept of the institutional approach. Hunt clearly wanted to move away from the source of power test, but did not propose anything other than the nature of the power test to determine the 'publicness' of the body in question. One should not underestimate the significance of this observation. Nowhere in any of the criticisms relating to the Courts' way of dealing with this problem was there any problem to be found with the institutional approach per se, rather the criticisms related to the source of power test on the one hand, or to the strict private/public dichotomy within which the approach was

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[105] Hunt op cit note 50 at 32.
[106] Ibid.
[107] Craig op cit note 70 at 25.

normally applied, on the other. From these criticisms it seems clear that the core requirement of the test should be that it relates to the substance of the administrative function and not its form – something which can still be achieved in terms of the institutional approach.

When one looks at the list proposed by Hunt in detail, it is evident that he approaches the nature of the power test mainly from the point of view of those who are affected by the administrative body's authority. The first question that should be asked determines the nature of the interests that are affected. This question is well founded within the common law provisions of administrative law. The traditional statement of the application of the tenets of natural justice requires the applicant's rights, liberty and property to have been adversely affected. In recent times the doctrine of legitimate expectations joined the list.

However, in terms of the constitutional right to just administrative action as contained in the South African Interim Constitution this list was broadened to include rights and interests, but the extent to which they could open the doors for review to take place varied substantially, according to the ground of review on which the application was based. In the Final Constitution all references to the nature of the interests that are affected by administrative action have been removed from the right. One can draw one of two inferences from this omission. The first, is that the confusing internal thresholds to the right to just administrative action used in the Interim Constitution were considered to be obsolete, and that the right should apply widely, i.e. to every person whose rights, interests or legitimate expectations were affected in any way. The second inference that can be drawn with reference to section 33(3) is that Parliament is given the opportunity, in terms of the envisaged legislation, to determine the internal thresholds for the right to apply. Both inferences seem to be equally valid, which means that any limitations included in the legislation will have to be measured against the provisions of the general limitations clause (section 36 of the Final Constitution).

The second indicator included in Hunt's test can be seen to refer to the distinction between the deprivation theory and the determination theory of administrative law principles, especially within the context of procedural fairness. The deprivation theory states that a person is entitled to procedural fairness whenever any of his or her rights or interests have been *adversely* affected. The determination theory on the other hand requires procedural fairness in the much

wider category of actions where a person's rights or interests are simply determined[108]. Again, this was incorporated in the Interim Constitution's statement of the right to just administrative action, but a strong argument can be made that the omission of the word 'adversely' from section 24 indicates that the determination theory was implied. Again, as with the threshold requirements stated above, any mention of any prerequisites for the principles of reasonableness, lawfulness and procedural fairness to apply was omitted from section 33 of the Final Constitution. And again the same inferences can be drawn, namely that the exclusion opens the way for a liberal application of these principles together with the possibility of statutory limitations, as long as they can be justified in terms of section 36.

It is clear that the first two questions of Hunt's test can be assimilated with fairly standard aspects of the South African constitutional provisions of just administrative action, and that it would therefore be redundant to include it in the test for what comprises administrative action as well. However, the third and fourth questions, namely the monopoly of power held by the body under consideration and the broad context within which the body operates, constitute valuable directives towards the determination of whether it exercised administrative powers susceptible for review. Unfortunately on their own they are not comprehensive enough to be the sole determinants of when administrative principles should apply.

The only way in which one would be able to arrive at a more inclusive approach would be to identify those characteristics of obvious public bodies that distinguishes them from private bodies, and to turn these characteristics around to function as indicators in a test. What one would, in fact, be asking is why do we expect more from governmental bodies than from private bodies? The interesting thing about this question is that very few of the commentators who write in this specific field of administrative law have attempted to answer it, or even acknowledge the question.[109] Schoombee was confronted with the same question in relation to the judicial review of contractual powers and suggested five reasons for the higher expectation of government:

> 'First, the government as grantee of the power is subject, at least in theory, to the will of the grantor, Parliament. ... Second, the government is meant to act not for its own sake, but as a democratically elected representative – the 'public trust' doctrine can

[108] Mureinik op cit note 64 at 36
[109] This is confirmed by Taggart op cit note 16 at 83.

> be seen as a specific application of this notion. Third, when the government spends money, it is spending public money raised by taxes, and the assets it controls are under public ownership. Fourth, it has been suggested that government should act as an 'exemplar of virtue'. ... Fifth, public law restraints can be justified on a power/responsibility or benefit/burden link: as a trade-off for having the coercive power of the State vested in it, the Executive as the 'most dangerous branch' of government should be accountable and subject to judicial supervision.'[110]

I propose that if one carefully uses and adapts Schoombee's succinct explanation for the higher expectation of government it can be turned into a flexible, comprehensive and principled test to determine whether administrative law standards should be applied in a specific instance. I also propose that, at this stage of the inquiry, the test should in essence remain within the boundaries of the institutional approach, i.e. to limit itself to the determination of the nature of the power exercised by the particular body with relation to the action in question. The test can therefore be called the institutional test. I also want to stress the importance of not thinking in terms of the public/private dichotomy, but to try to determine where the body would lie on the continuum between public and private with relation to the specific action under consideration.

The first reason for the higher expectations for government suggested by Schoombee is that a state body acts on delegated power given to it by Parliament, which in turn receives its power to act from the electorate. Here one returns to the democratic foundation of administrative law dealt with in the beginning of this dissertation. Because of the belief that a substantive democracy is better than a formal democracy there is a higher expectation for government to be responsive to the public when it acts in terms of its democratically attained powers. This explanation can be turned around to form the first question of the test by asking what is the body's level of responsiveness towards government policy-making? In other words, is the body in question susceptible to short-term changes in government policy? If it is, then it might mean that the actions taken by the body itself had been taken in terms of indirect, yet influential government involvement in the management or regulation or control over the action. This state of affairs would then result in a higher expectation of accountability, because the original policy was decided on by

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[110] Hannes Schoombee 'The Judicial Review of Contractual Powers' in *Administrative Law: Setting the Pace or Being Left Behind?* (1996) 433 at 437-438.

democratically elected representatives. A good example is in the case of state-owned enterprises, such as Telkom. In the *Cost Cutters* case the Court pointed out the level of policy involvement by the Minister of Posts, Telecommunications and Broadcasting:

> 'Telkom requires the approval of the Minister for the determination of fees, rates, and charges levied, the hours of operation of its service, the imposition of any onerous conditions on its clients and the termination of any existing service in any area or to any subscriber.'[111]

The second reason advanced by Schoombee why government is held more accountable than private bodies can be found in the fact that the government should always act in the public interest. But governments are not the only authorities that can act in the public interest. It would certainly not make sense to state that the second question of the test would be to ask whether the body in question acts in the public interest, and if the answer is 'yes' to say that it should therefore be held more accountable than if it were not the case. However, if one asks Hunt's fourth question; '[what is] the nature of the context in which the body operates?'[112], and it is clear from the answer that there is an extra duty on it to act in the public interest, (because of the context in which it operates) the question becomes more astute. I would also suggest that the fourth reason stated by Schoombee, that governments should act as 'exemplars of virtue', can be tied in with this question. Many examples can be given of where a seemingly private body can be expected, at least to some degree, to act in the public interest, as a result of the type of activities that it is involved in. Providers of essential services such as electricity, telecommunications and water supplies are but one group. A positive characteristic of this question is that it illustrates the importance of abandoning the either-or approach, as some bodies will clearly carry a heavier duty to act in the public interest than others. So, for example, can one argue that the Department of Health, Eskom, The South African Rugby Football Union, a private school and a privately owned wine-cellar all carry some duties to act in the public interest. However, there is a strong argument to be made that if the magnitude of those duties were to be arranged from extensive to peripheral, that they would appear in the order that they are placed here.

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[111] The *Cost Cutters* case op cit note 83 at 808.
[112] See note 99 above and the relevant text.

Schoombee's third argument that governments should be accountable because they spend public money may look simple and obvious, but its reverse question for the purposes of this test can have interesting results. The question can be phrased in a number of ways, such as whether the body in question receives any subsidy from the Government and if so what percentage does it form of the body's income. It is trite law that even in order to receive government contracts the State requires a body to be more accountable.[113] Even indirect financial assistance, such as tax exemptions or benefits, can serve to indicate that a body should be placed more to the public side of the public/private continuum. One can also ask whether the body is managing government property for, and on behalf of, the State?

Since Schoombee's fourth contention can be grouped with his second, his fifth reason for the extra expectations held of government forms the basis for my fourth question. This reason encapsulates the traditional justification behind the nature of the power test: government bodies have an additional duty to be accountable in terms of administrative law standards of bounded rationality because of the power that they exert. If one were to turn this around as the fourth question of the test it would read as follows; what are the body's powers in terms of the affected interests, and how exclusively does those powers belong to the body alone? This correlates with Hunt's third question of 'whether the affected interests have any real choice but to submit to the body's jurisdiction'.[114] Academic commentators writing from different perspectives have referred to the English common law position whereby the Courts could hold persons or bodies wielding legal or *de facto* monopoly powers accountable to principles of non-abuse in terms of pricing and non-discrimination.[115] Aronson expressed his skepticism about the justiciability implications inherent in this common law regulation of monopoly power, but his skepticism is founded in a general disillusionment about the value of judicial review and not in a fundamental problem with the argument itself. In fact, he concedes that if one should apply the common law position with regard to common callings by analogy to the supply of essential services it would hold the advantage of dismantling the private/public dichotomy.[116]

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[113] See s of the Employment Equity Act.
[114] See note 105 above and the relevant text.
[115] See Forsyth op cit note 97 at 124-126 and Taggart op cit note 16 at 105.
[116] Aronson op cit note 15 at 48.

I would like to propose a last question that should form part of the test, namely; whether the person or persons whose interests have been affected have any other remedy available against the body in question? This question can often be used in an exclusive manner: if a person has a remedy in terms of, say, contract he or she will be barred from pursuing other remedies. This should not be the purpose for asking this question. One of the inherent problems that has been identified, in terms of outsourcing, is the lack of any feasible remedy that is available to aggrieved members of the community:

> 'Dissatisfied recipients dealing with a service provider will tend to find themselves without public law remedies against either the government agency or the service provider, and may also have very limited private law remedies against those parties. There may not be a contractual nexus between the service provider and the recipient. ... Even where some contractual relationship could be established (for example, where the recipient makes a payment for the service), the relationship may be skeletal and its contents ill-defined: there may be nothing explicit about when services may be terminated, or whether a duty to act fairly applies to such termination.'[117]

The question should, therefore, not be used to exclude administrative principles from being applied, but should rather serve to indicate where such recourse would constitute the only recourse available.

In summary my proposal for a principled yet flexible test that can be used to determine the degree to which a body can be considered to have exercised public power in relation to a specific action, consists of asking the following five questions:

1. How responsive is the body to government policy-making and interference?
2. Does the nature of the context in which the body operates place any duty on the body to act in the public interest?
3. Does the body receive any financial support or benefit from the Government, including benefits in terms of any agreement, and does the body hold property on behalf of the State?
4. What is the level of exclusive/monopoly power or authority wielded by the body in relation to the specific interests that are affected?

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[117] Schoombee op cit note 25 at 89.

5. Are there any other forms of recourse available to the person whose interests have been affected?

It is clear that this test incorporates all the questions asked by McNally JA in the *PTC* case mentioned above. In that case, the learned judge was more interested in whether the PTC could be regarded as an organ of state, and not so much whether its actions could be regarded as administrative actions. However, the two tests show a remarkable resemblance. I suggest that the answers to these questions, with relation to any body, would give a good indication of the body's position on the public/private continuum. The Panel on Take-Overs and Mergers would score low in terms of 'publicness' on questions one and three, but would score very high on the other three. Telkom would score high on all five questions. In terms of the scenario sketched in the *Aga Khan* case the Jockey Club would also have scored low on questions one and three, but fairly high on questions two, four and five. If one compares the final scores of *Aga Khan* with *Datafin* it is clear that there are some differences. The Panel's duty to act in the public interest seems to carry more weight because of the nature of the subject matter: major economic restructuring compared to a national recreational activity. The plaintiff in *Aga Khan* also had the possibility of pursuing a contractual action (even though it is difficult to conceive how the action would have been framed) whereas this was not the case in *Datafin*.

It should be evident that this proposed test is at least a step in the right direction, towards finding a principled approach for determining the scope of administrative law within the modern managerialist landscape. However, the test does not provide any answers as to the exact stage where administrative law principles should start to apply. I would suggest if on balance the body in question has exerted more public power than private, it should be sufficient as a threshold requirement. What would be more complex, though, is the question of whether to apply all administrative law principles equally when a body is deemed to have wielded 'essentially public' powers for the purposes of the inquiry. And then, there is the question of whether the remedies provided by judicial review of administrative action constitute the most effective way of dealing with the problem?

5. CONSIDERING THE FUNCTIONAL APPROACH

5.1 The consequences of wielding essentially public power

Mention has been made of Craig's useful analytical tool to distinguish between the different approaches that can be followed in order to decide whether judicial review can be applied, where it is not clear whether the body in question has acted publicly or not. The first broad approach, namely the institutional approach, has been dealt with in the previous section and an institutional test has been proposed to determine whether a body can be ascribed as having wielded essentially public powers, and can therefore be held accountable in terms of administrative law standards. The second approach that has purposefully not received any mention up till this point, is the functional approach. Craig described this approach as follows:

> 'The essence of the functional approach is to ask why one is seeking to ascribe the label public or private to a particular institution? What are the consequences of deciding that a particular body has public power? Now the normal response to inquiries of this nature is that it leads to the application of public law principles to such a body, even if it is nominally private. In a general sense this response is incontrovertible. The very generality of this response does, however, conceal a host of more specific questions, the answers to which are by no means obvious.'[118]

This host of questions, to which Craig refers, includes questions such as whether the whole body of administrative law should apply to essentially public actions, and if not, which standards should apply. One can also start to look at 'mixed remedies' for actions taken by 'mixed administrations'. In this section I will only look at two questions that would fall under the functional approach, namely what is meant by 'accountability' and what are the mechanisms that can ensure such accountability.

5.2 Distinguishing between the dual elements of accountability

In section 3, above, it was shown that accountability of the public administration is one of the core values that underpins a responsive democratic government, and as such is justified in being applied to all administrative functions. However, now that a test has been devised that can determine, at least to some degree, whether a body

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[118] Craig op cit note 70 at 26.

should be held accountable it might be necessary to illuminate what is meant by accountability.

Accountability was defined by Mureinik simply to mean that government should justify its decisions to the people they govern.[119] However, this broad description can, and should, be refined. In order to do this one can raise two questions, namely do the standards against which the decision should be justified always remain the same, and does 'people governed' always refer to the same body of governed or to different groups or bodies of people? Galligan offered a very useful distinction that answers both questions at the same time:

> 'It may be wise to begin by reminding ourselves of the dual element of the public good in relation to administrative processes: the effective and economical realization of statutory objectives and the fair treatment of persons. This dual character is highly pertinent in examining the various forms of accountability and recourse.'[120]

This means that there are different standards against which administrative authorities must justify their decisions. On the one hand it is necessary to show that a decision or action is justified, because it is necessary for promoting an efficient administration. On the other hand, decisions should also be justified according to the standards of lawfulness, reasonableness and procedural fairness. By their very nature these dual standards require accountability to different groups of people via different routes. The first standard of accountability, that accounts for the efficiency with which the administration is fulfilling its constitutive obligations, is to a large degree aimed at the broad electorate as the primary democratic decision-makers. Administrative authorities are accountable to other administrative authorities up to the executive authority of government, who, largely through accountability to Parliament, are accountable to the electorate as a whole. The second set of standards, on the other hand, are aimed at individual persons or smaller groups of people, who are directly or indirectly affected by the way in which administrative functions are being discharged. This aspect relates to the more traditional area of administrative law. Galligan explained it as follows:

> 'Administrative law itself is more concerned with the way individual persons are dealt with by administrative bodies and the forms of recourse open to them. ... Whatever

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[119] Mureinik op cit note 64 at 36.
[120] Galligan op cit note 12 at 41.

> the best terminology, the emphasis is on creating forms of recourse the main object of which is to ensure that individual cases are decided properly, and if not, that a complaint can be lodged and dealt with by a different, often superior authority. ... Properly decided here means decided in accordance with the prevailing statutory standards and any general common law principles, such as procedural fairness. For a person to have his case determined in this way is to have his rights respected and to be treated fairly.'[121]

I will refer to the first element of accountability as public accountability and to the second as individual accountability.

It might be possible to regard public accountability as a subdivision of political accountability, and therefore as something that falls outside the scope of administrative law. If, however, one goes back to the definition of administrative law given by Wiechers, it states that the public interest involved in subordinate relationships between administrative authorities themselves, also fall within the ambit of administrative law. The Constitutional provisions relating to the public administration indicate a definite recognition of both types of accountability. Section 33(1) of the Constitution clearly provides for individual accountability. Yet, this makes perfect sense as it is contained in the Bill of Rights – i.e. the part of the Constitution that is specifically aimed at protecting individuals or individual groups against the all-powerful state. However, section 33(3) states that legislation giving effect to section 33(1) must also promote an efficient administration. It might be argued that the inclusion of section 33(3)(c) did not so much create a positive duty on the legislature to ensure for measures of public accountability, than to create a way of limiting the forms and measures of recourse that would be available in terms of section 33(1). Hugh Corder pointed to the circumspection with which this argument should be approached:

> '[I]t ought not to be accepted that bureaucratic inability to adapt to new standards of responsiveness and accountability, which in turn causes the breakdown of public administration, somehow amounts to a failure to 'promote an efficient administration'. The more plausible and acceptable approach, which coincides clearly with the general emphasis of the Constitution, is that the whole series of measures concerned with administrative justice in the Constitution and in the yet-to-be-adopted legislation will conduce to administrative efficiency in time.'[122]

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[121] Ibid at 42.
[122] Corder (1998) op cit note 5 at 46.

It is in any case only necessary to take a look at section 195 of the Final Constitution to see that sufficient provision has been made to ensure public forms of accountability. The requirements of ensuring 'efficient, economic and effective use of resources'[123], transparency by 'promoting the public with timely, accessible and accurate information'[124] and participation in policy-making[125] clearly refer to the need for proper measures of public accountability to be set up.

Why is this distinction between public and individual accountability important? Two reasons can be advanced. The first, which relates to the South African context, is that although section 33(3) provides for the enacting of national legislation that should promote an efficient administration one can certainly question the viability of providing for measures of public accountability in an Administrative Justice Act that should largely focus on the aspect of individual accountability. The second reason why this distinction is important, is because policy-makers within government, or even the courts, can easily ignore the distinction, which could result in the one type of accountability being regarded as sufficient while the other is being neglected.

A good example of where this happened was in the New Zealand case of *The Wellington Regional Council v Post Office Bank Ltd.*[126]. After the New Zealand Post Office was incorporated as New Zealand Post Ltd and Post Office Bank Ltd the Government entered into an agreement with these companies that it would reimburse both companies for the expenses in running 600 'uneconomic' post offices. However, within six months the Government wanted to terminate this arrangement in order to save on spending. The two companies gave their approval, which meant that the post offices would be closed. The applicant in this matter wanted this decision reviewed. In a roundabout way Greig J came to consider the merits for the review application. However, instead of looking of whether the Post Office Bank should have been held accountable in terms of principles of individual accountability, such as the lawfulness of the decision or procedural fairness, the learned judge only considered the question of public accountability. In order to do this the Court looked at the New Zealand State-Owned Enterprises Act of 1986 where section 4 placed a duty on a SOE to exhibit 'a sense of social responsibility by

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[123] The Final Constitution, section 195(1)(b).
[124] Section 195(1)(g).
[125] Section 195(1)(e).
[126] High Court, Wellington, 22 December 1987, CP 720/87 as discussed in Taggart op cit note 16 at 84-87.

having regard to the interests of the community in which it operates'. This section provided in very general terms for measures of public accountability, and one can speculate on whether the Court would have reached the same result in terms of the principles of individual accountability.

Although the South African Department of Public Enterprises has more than once recognised the necessity for ensuring accountability when implementing its restructuring programme, without exception the scope of this acknowledgment only reached as far as public accountability. In the *National Framework Agreement* the following was stated with regard to one of the guiding principles for restructuring:

> 'It is essential that in the provision of essential services effective regulatory mechanisms are established. This applies in all circumstances no matter what the structure of the industry providing that service. Accordingly, appropriate legislation and constitutional mechanisms to facilitate the restructuring process at national and provincial levels should be provided. Regulatory structures should be staffed by knowledgeable persons and operate autonomously.'[127]

In a more recent and detailed discussion document the Government indicated how it would try to ensure a proper level of accountability from state owned enterprises. The document is entitled the *Protocol on Corporate Governance in the Public Sector*. In short this document sets out various ways of ensuring public accountability by means of open and transparent managing of state-owned enterprises (SOE's) and accountability towards the relevant shareholder (Cabinet Minister) in Government. These include provisions to the effect that the management of SOE's 'must have a full commitment to the strategic vision of the shareholder'[128] and that all SOE's must comply fully with the requirements of the Reporting by Pubic Entities Act 93 of 1992. The most far-reaching provision for accountability directly to the public (still 'public accountability') provides that every SOE should set up a programme for public education about the activities of the SOE and that updated information about the services provided by the SOE is readily made available. These provisions, still in draft form, at least show some commitment by Government to ensure that measures for public accountability are established.

There are various ways of ensuring for public accountability that have not been dealt with above. These would entail the inclusion of 'community service

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[127] Ministry of Public Enterprises op cit note 18 at 4.

obligations' in the constitutive legislation of SOE's or privatised SOE's[129]; the inclusion of provisions relating to price-regulation in the same legislation[130]; and the retention of Golden Shares by the Government Minister or State Department whereby the shareholder is given a veto-right over certain major decisions[131]. The scope of this dissertation is unfortunately not wide enough to deal with these measures more fully. It is undeniable that these measures are of vital importance in order to ensure for public accountability. However, no amount of public accountability will diminish or neutralise the duty to ensure for the provision of individual accountability with regard to essentially public actions. And this duty rests squarely on the shoulders of the Department of Justice which is responsible for the drafting of the Administrative Justice Legislation.

5.3 Different forums for ensuring individual accountability

Up till now I have focussed on judicial review as the primary mechanism for review of administrative action. In terms of the functional approach towards ensuring accountability of bodies wielding essentially public power, it is also important to question the suitability of judicial review for achieving such accountability, and to consider some alternative options.

It is clear from the short investigation of the courts' responses to the new administrative landscape in section 4, that most courts have not adjusted well to managerialism as it has advanced and become the practical reality of public administrations worldwide. With very few exceptions, the courts have failed to develop a principled approach with which to deal with the particular problems of a deregulated and corporatised administrative environment. It is not difficult to infer that the courts' failure to deal with this lacuna in administrative accountability has largely contributed to the recent criticisms leveled against the mechanism of judicial review itself.[132] Aronson listed the following concerns with judicial review, and then explained how situations of outsourcing and privatisation exacerbate these concerns:

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[128] *Protocol on Corporate Governance in the Public Sector* dated 14 October 1997 (draft document) at 8.
[129] See Aronson op cit note 15 at 66.
[130] See Graham and Prosser op cit note 28 at 71-74.
[131] Ibid at 74-77.
[132] See Taggart op cit note 21 at 3, as well as references listed there.

> 'Judicial review of the service provider ... is subject to all the usual defects of judicial review generally, together with some peculiar to that area. The usual defects are familiar. Judicial review can occasionally remedy individual grievances, but rarely provides systemic relief. The decisions to litigate and to maintain litigation can be happenstantial. Judicial review proceeding often pose no real threat to the respondent, which is usually free, on its redetermination of the substantive issue, to come to the same result but in a way which is impervious to judicial criticism. ... Review in the wake of privatisation and outsourcing carries the additional problem that the complainant is typically conceived as a consumer with a consumer complaint, which is not the business of judicial review.'[133]

These are important concerns that need to be addressed in order to provide for effective measures of accountability. As stated before, in the United Kingdom one of the aspects of the new administration identified by Galligan is the increase in regulatory and supervisory bodies. These include measures ensuring for internal review, ombudsmen and appeals tribunals.[134] The situation is much the same in Australia and New Zealand. Before the coming into effect of the Interim Constitution, the primary mechanism for ensuring administrative accountability in South Africa was judicial review. There existed no Ombudsman, freedom of information legislation, right to be given reasons or general appeals tribunal.[135] The first three of these measures have since been brought into existence. The Public Protector was set up in terms of section 110 of the Interim Constitution and has been given the power 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice'.[136] The right of access to information has been entrenched in the Bill of Rights[137], as well as the right to be given written reasons.[138]

However, many of these new mechanisms for ensuring accountability have also been the subject of criticism, especially with regard to the specific problems posed by privatisation, corporatisation and outsourcing. Galligan showed that although internal review in the United Kingdom has the advantages of 'speed, informality, and economy'[139] there are still a number of problems. The primary

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[133] Aronson op cit note 15 at 47.
[134] See note 12 above.
[135] Corder op cit note 49 at 91.
[136] Section 182(1) of the Final Constitution.
[137] Section 23 of the Interim Constitution and section 32 of the Final Constitution.
[138] Section 24(c) of the Interim Constitution, and section 33(2) of the Final Constitution.
[139] Galligan op cit note 12 at 43.

problem seems to be the reluctance on the side of administrative officials to assess their own decisions critically. Where there is no danger of a further appeal mechanism to which the official will have to justify his or her decision, internal review renders little recourse.[140]

Ombudsmen constitute another mechanism whereby accountability can be enforced. Taggart pointed out that in the New Zealand context the existence of the Ombudsmen and the corresponding possibility to effect impartial review of decisions and actions of the public administration have resulted in accountability where there would have been none. The Ombudsmen Act of 1975 gave New Zealand Ombudsmen wide powers to recommend corrective action, even where the action under review was exercised by a state-owned enterprise. The result is that the Ombudsmen received many consumer complaints, of which many could be resolved informally. The Ombudsmen also had wider powers to investigate the exercise of public power, even where it was not linked to an individual complaint. Taggart gave the example of where the Ombudsmen investigated astrictive clauses in the standard telephone subscriber contract of Telecom, which at that stage was a state-owned enterprise, and achieved a measurement of success.[141] One of the problems with Ombudsmen and managerialism is the question of jurisdiction. Taggart indicated that the moment a state-owned enterprise was privatised its actions fell outside the jurisdiction of the Ombudsmen. In the South African context the jurisdiction of the Public Protector seems to be somewhat wider than that of its New Zealand counterpart. Section 6(4) of the Public Protector Act[142] states the following:

> 'In addition to the powers and functions assigned to the Public Protector by section 112 [182(1)] of the Constitution, he or she shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged—
>
> (a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992);
>
> (b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);

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[140] Ibid at 44.
[141] See Taggart op cit note 16 at 89-91.
[142] Act 23 of 1994.

(c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or

(d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.

The definition section of the Reporting by Public Entities Act[143] referred to in subsection 6(4)(a) defines a public entity as 'an institution that operates a system of financial administration separate from the national, provincial and local spheres of government and in which the State has a material financial interest'. Material financial interest with regard to a public entity is then defined as meaning:

' ... an interest arising when—

(a) 50 per cent or more of the entity's expenditure is defrayed directly or indirectly from funds voted by Parliament; or

(b) the entity is or was dependent for 50 per cent or more of its total permanent capital needs, including share capital, loans or other forms of permanent capital, on funds voted by Parliament, and the State still holds a direct or indirect interest of 50 per cent or more in such permanent capital; or

(c) the entity supplies products or services that are related to the broad public interest under monopolistic rights conferred on it by an Act of Parliament; or

(d) the State has a financial interest and the majority of the entity's directors are appointed by the State; or

(e) the State creates the possibility through contingent liability that funds voted by Parliament will have to be used in future to defray 50 per cent or more of the entity's expenditure or to provide 50 per cent or more of the entity's permanent capital; or

(f) the State administers funds, assets or other property in an entity on a trust basis on behalf of the inhabitants of the Republic or of a particular interest group;'

It is clear from this definition that a public entity for the purposes of the Reporting by Public Entities Act also includes privatised enterprises in circumstances where they have monopoly power over the supply of essential services or products. The Public Protector's powers are therefore very wide. However, there is another problem that exists with regard to Ombudsmen that is of particular importance in the South African

[143] Act 93 of 1992.

context, namely the cost implications involved in providing an efficient mechanism for ensuring accountability. The practical realities resulting from this problem in the South African context were aptly stated by Corder:

> 'Perhaps of greater significance is the apparent difficulty which the government is experiencing in providing adequate financial support to the SISCDs [State Institutions Supporting Constitutional Democracy]: there has been inadequate forward planning for their establishment and operations which has retarded their potential as accessible and expeditious conduits for the achievement of fundamental rights and administrative justice.'[144]

Administrative Appeal Tribunals seem to have the most effective track record, as mechanisms ensuring accountability, worldwide. Yet, the same problem of jurisdiction can be experienced when the drafters of legislation do not provide for Tribunals to have sufficiently wide powers. Aronson pointed out that the old problem of contractual arrangements' immunity from administrative law measures of accountability is still barring the Administrative Appeals Tribunal from reviewing governmental decisions made under contract.[145] The Administrative Review Council recently investigated this question, but came to the conclusion that consumer problems should be dealt with through in-house and external complaints monitoring, without the possibility of an appeal against the original decision.[146] In South Africa the prospect of establishing a general Appeals Tribunal is seriously hampered by the problem of resources, stated above, in relation to the Public Protector. The most that one can hope for is the enacting of a conceptual foundation for the establishment of such a Tribunal with a wide jurisdiction, and to make provision for the progressive realisation thereof.

It is therefore clear, that in spite of all the other mechanisms that can exist to hold the public administration accountable, the role of judicial review is far from exhausted. This seems to be more the case in South Africa. The problems inherent in judicial review as stated by Aronson are real problems, and there is very little that one can do to remedy them. However, the strength of judicial review lies in the fact that the courts are not creatures of statute; they are only bound in terms of the Constitution and the common law. They do not have to adhere to strict statutory jurisdictions and they have the ability to re-examine the law, 'happenstantially'

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[144] Corder op cit note 49 at 44.
[145] Aronson op cit note 15 at 63.

notwithstanding, in the light of changing circumstances that might not have been foreseen by the legislature. The ideal situation would be to leave judicial review as the last form of recourse, when all the other possibilities fail.

6. Conclusion

The drafters of the Administrative Justice Act are faced with an immense challenge. On the one hand the legislation envisaged by section 33 of the Final Constitution should reflect the flexibility and open-endedness encapsulated in the wording of the right to administrative justice. On the other hand it should provide for certainty in an area of law that until very recently was rife with uncertainty and arbitrariness, and in a sense still is. This is not a new legal challenge – it is something that legal systems all over the world have to deal with constantly.

In this essay I have looked at the changes that are taking place in public administrations across the globe. These changes are interesting from the point of view that they defy conceptual legal boundaries that have been developed for decades, and longer, with the sole purpose of creating a legal counterweight for the power wielded by the modern nation-state. Ironically, these changes are brought about by the simple restructuring of the formal composition of governmental organs, and relationships between these organs inter se, and between them and individuals. Public power is being defused not in terms of its effect, but in terms of its form and direction, and as such it defies legal control. Again these changes play on the law's ability to be flexible in order to adapt to a changing environment, while at the same time providing certainty with regard to the addressing of injustice.

It is clear that the new managerialism and the primary methods of its implementation – privatisation, corporatisation and outsourcing – are here to stay. The need to redetermine the scope of administrative law, as well as the meaning of terms such as 'public body' and 'administrative action' is unquestionable. The only way to approach such a task, in a way that would ensure both certainty and flexibility, is to apply a principled solution to the problem. Courts in the United Kingdom and in South Africa have found it difficult to develop such an approach, while the legislatures in New Zealand and Australia have in some instances

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[146] Ibid at 64.

unwittingly limited the scope of their administrative law machineries to develop such an approach. I have suggested a flexible yet principled test that could be used to indicate whether a specific action carries enough 'public' weight to be labeled as an 'administrative action'.

A possible way in which the test could be applied would be to incorporate it in the new Administrative Justice Act. It would still be possible to define 'administrative action' in the same manner as 'public entity' was defined in the Reporting by Public Entities Act, but the definition could be made open-ended. An easy way to achieve such a result would be to state that an administrative action can be defined to include the following, followed by a list of items. In the section of the Act dealing with judicial review one can then state that, notwithstanding the definition of administrative action, the High Court can classify any action to be an administrative action after considering the indicators, followed by the test (stated above).

It was also shown that the identification of an administrative action is but the first step in the application of administrative law standards of bounded rationality and accountability. The Administrative Justice Act should set up accessible mechanisms with which to enforce these principles, and should also distinguish between public accountability and individual accountability. Fortunately, South African law is not significantly restricted by complex distinctions of jurisdiction or procedure between 'public' and 'private' law. It is true that there are different procedural and substantive legal norms that apply to different factual situations, but it is arguable that the new constitutionalism that was formally introduced on 27 April 1994 holds the potential to bring even these closer together. The drafters of the legislation will therefore not be burdened with trying to widen the scope of administrative law only to face immeasurable difficulties with its implication.

With this dissertation it is hoped that what Mullan stated as an objective for the courts should also be recognised as a general objective for the drafting of the Administrative Justice Legislation and even the development of South African administrative law in general:

> 'I regard the project for the courts as no longer being one where they simply view their role as that of deciding in individual cases whether there are any situation-specific reasons for an interpenetration of the principles of private and public ordering. Under such an approach, administrative law cases at the margins will

continue to be viewed as isolated, discrete instances; marginalia, in other words. Rather, what is needed is the development of general principles and criteria for the conducting of such evaluations leading to the eventual emergence of a more coherent set of principles and body of case law.'[147]

[147] Mullan op cit note 56 at 136.

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