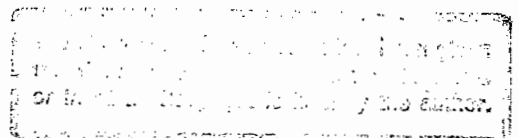
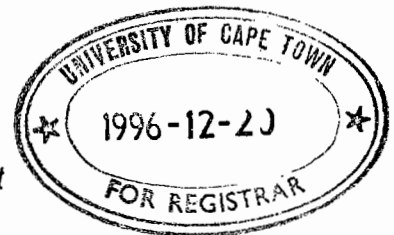


NEVER AGAIN:
SECTION 24 OF THE INTERIM CONSTITUTION
AND
ADMINISTRATIVE LAW IN SOUTH AFRICA

It is no accident that constitutions usually come into being as a result of bad rather than good experiences. Their text, or sub-text, is almost invariably - 'never again'. In the case of South Africa, the new constitution arises out of the need to escape from the profound humiliations and oppression created by apartheid. Through the constitution, we affirm that we learn something from our dolorous history.

Albie Sachs

Dissertation submitted in partial fulfilment
of a Masters in Public
Law by Elisabeth Mallet (MLLELIO06)



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INTRODUCTION

This paper intends to explore the implications for South African administrative law of the constitutionalisation of administrative justice in the interim Constitution. It is divided into two parts, the first dealing with the impact of the constitutionalisation of the clause, and the second dealing with the impact of each specific sub-section of section 24. These sub-sections are examined in the broader context of their effect on the various factors (I have divided them into six categories) that have limited the scope of judicial review at common law before the Constitution.

The analysis of the effect of section 24 will demonstrate the important (albeit limited in some respects) role that judicial review has to play in the achievement of the new democracy in South Africa, which will be discussed in general terms in Part One.

Therefore the main purpose of this paper will be to show the interaction between section 24 and broader issues of democracy. The analysis of the specific sections will illustrate how successful this interaction will be. These conclusions will be reached against the backdrop of judicial review and constitutionalism during the apartheid era in South Africa.

PART ONE

THE EFFECT OF THE CONSTITUTIONALISATION
OF
ADMINISTRATIVE JUSTICE

Before discussing the effect the specific provisions of section 24 have had on the common law, it is necessary to analyse the impact the existence of a constitutionalised administrative justice clause in its entirety will have on the overall scheme of administrative law in South Africa.

Although such an entrenchment would certainly have a profound effect in any jurisdiction and especially in a country in transition, almost all the participants in the South African constitutional debate accepted that administrative justice is a goal worth constitutionalising. This is illustrated by an overview of the various proposals, including, inter alia, those of the African National Congress, the Charter for Social Justice and the South African Law Commission, which all called for the constitutionalisation of the right to judicial review in one form or another in the pre-constitution negotiating phases.¹ This stance is surprising considering the very few instances where direct provision for a constitutional right of review has been made internationally. The only other analogous example of such a direct provision is that of Namibia.²

It appears that countries such as Australia, Germany, the United Kingdom, the United States, and Canada to name a few, while as concerned as Namibia with administrative accountability, have adopted alternative routes to achieve this accountability. For example, Australia's law reforms of the late 1970's consisted of four components. Most distinctively, the grounds, procedures and remedies of administrative law were set out in wide-ranging legislation, especially the Administrative Decisions (Judicial Review) Act of 1977. Secondly, administrative appeals tribunals, which have the power in certain circumstances to review decisions 'on the merits' were established. Thirdly, an Ombud was created and, finally, the Administrative Review Council was created to perform an investigative and supervisory function over the whole administrative justice system. This extremely terse description nevertheless illustrates how fundamental reform was undertaken without the entrenchment of administrative justice in a bill of rights. This is interesting to note as these reforms were described as 'the most deliberate and

¹ Corder 'Administrative Justice' in Van Wyk et al (Eds) Rights and Constitutionalism 390-393

² Article 18 of the Namibian Constitution of 1990

systematic reform of (its) administrative law in the whole of the British Commonwealth'.³

Canada, too, has revolutionised its administrative law without entrenching administrative justice in a bill of rights.⁴ However, Saunders, in her overview of administrative law reform in Australia points out that:

'... the intimate connection between administrative law and the operations of government make it necessary for any final model to be crafted to the history and current circumstances of the country concerned.'⁵

This sentiment is echoed by Corder in his writing about control of executive power through the constitution when he points out that:

'Much will depend on the political context and the philosophical foundations of the legal system concerned, for there are good reasons in certain circumstances for regarding the constitutionalisation of administrative justice as a retrograde step.'⁶

An analysis of South Africa's political context and the philosophical foundations of its legal system provide an explanation of the desirability of a constitutionally entrenched administrative justice clause. Similarly, a simplified overview of the Canadian context illustrates why South Africa needs such a clause and Canada does not. Indeed, an analysis of South Africa's situation with regard to administrative justice also explains why there are so few examples of direct constitutionalisation of administrative justice, and why it was necessary for South Africa to join the ranks of that small band.

³ Corder 'Piercing the Paper Curtain: Prospects for an Administrative Act' (forthcoming) 9

⁴ See below for an overview of the reform of Canadian administrative law.

⁵ Saunders 'Appeal or Review: Administrative Appeals in Australia' Corder, McLennan (Eds) Controlling Public Power 205

⁶ Corder note 1 387

THE SOUTH AFRICAN CONTEXT

One of the vital components of an effective democracy is a judiciary which has a nuanced understanding of the administrative system, with its imbalance of powerlessness on one hand and extreme concentration of economic, social and military power on the other.⁷ By administrative system, far more is meant than merely judicial review: issues such as independent tribunals, the public protector, access to information and the possibility of specialist courts, all play a vital role in the accountability of government. However, the confines of this paper do not admit a discussion of all these aspects. The bulk of the discussion fits within the confines of the debate about judicial review as a mechanism of accountability.

Traditionally this understanding is reflected in Dicey's classical interpretation of the rule of law.⁸ In essence, the principles expounded in this interpretation imply that the government is subject to the ordinary laws of the land, that the latter are clear and preannounced, and that accountability to those laws is achieved by scrutiny by an impartial judicial body.⁹ This is a rudimentary exposition of this view and it is necessary to point out that it has been updated by Prof. Tony Mathews to overcome some of its most glaring problems.¹⁰ Nevertheless it is adequate for the purpose of exposing its limits as a descriptive, or prescriptive theory of the workings of the judiciary, executive and legislature during the apartheid years.

If one examines how our ostensibly Westminster system operated in practice, a different picture to the one painted by Dicey emerges. The rule of law presupposes that executive officials may only exercise powers which have been conferred on them by law. Therefore the judicial arm may objectively scrutinise any executive action and set aside acts that

⁷ Asmal 'Administrative justice and democracy within the South African Context' in Van Wyk et al (Eds) Controlling Public Power 13

⁸ Dicey Introduction to the Study of the Law of the Constitution.

⁹ Cowling 'Judges and the Protection of Human Rights in South Africa' (1987) 3 SAJHR 179

¹⁰ Mathews Freedom, State Security and the Rule of Law ch.1

are not legally authorised. This theoretical grounding of judicial review of administrative action is often expressed as the *ultra vires* doctrine.¹¹ This doctrine is profoundly criticised by Breitenbach who concludes that it lacks cogency as an explanation of the court's powers on review, as it is patently self-contradictory and bears little empirical relevance to the South African polity.¹² Although a thorough critique of the claims and controversies of this justification is inappropriate here, an examination of the rule of law in practice will show this conclusion to be correct.

An examination of the rule of law in practice reveals that problems arise in relation to the executive arm of government. These problems arise as a result of the doctrine of legislative/parliamentary supremacy, which is central to the Westminsterian model, ostensibly in place in South Africa during the apartheid years. Ideally, this works (i.e. the principles of legality are observed so that legislation does not impinge on the basic essences of civil rights) because the legislature operates under either self-imposed or external restraints.¹³ Clearly the National Party government did not consider itself bound by any self-imposed restraints.¹⁴ Furthermore, the threat of being voted out of power was nullified as an effective external restraint by the fact that the groups disadvantaged by the legislation were disenfranchised. Therefore legislative supremacy existed without the corresponding limitations normally imposed by the rule of law. As a result the legislature 'rode roughshod over the common law' to the detriment of basic human rights protection.¹⁵

It has been argued that within this framework the courts were reduced to playing a subsidiary role of merely giving effect to the will of the legislature, as manifested in its enactments, and as a result became tainted with the stigma of the apartheid system.¹⁶ Of

¹¹ Breitenbach 'The justification for Judicial Review' (1992) SAJHR 512

¹² Breitenbach note 11 514

¹³ Mathews note 10 at 23

¹⁴ As evidenced by its dismal human rights record; see below

¹⁵ Dugard Human Rights and the South African Legal Order 36: for a detailed analysis of such legislation see Mathews note 10; Ellmann In a Time of Trouble.

¹⁶ Cowling note 9 181

course it is not strictly fair to condemn the judiciary for its lack of independence unless it actually possessed jurisdiction over disputes concerning basic rights. The writers who have examined the 'security legislation', which most characterised the era of judicial subservience and infringement of human rights, point out that the exclusion of the courts from traditional judicial concerns by such legislation was a serious violation of the rule of law. For example, the Public Safety Act¹⁷ led to the granting of practically unlimited power of arrest and detention to the most inexperienced member of the police force. This grant of power was cast in such wide discretionary terms that the jurisdiction of the courts would have been severely limited, but for the complete ousting of their jurisdiction by the Act.¹⁸ These measures led to unfettered power in the hands of the executive.¹⁹

This example of typical 'security legislation' seems to further the view that all the courts could do at the time was to inquire into whether or not the administrative action in question was in terms of the enabling legislation or not. Because of the terms of the legislation this meant that no matter how grossly the action in question violated human rights, it was nevertheless 'legal' from an administrative law perspective. Of course (as will be illustrated below) in a time of crisis it is possible for the judiciary to be neutral and independent arbiters of justice and upholders of human rights, rather than instruments of oppressive social policies.

This is so because it is not true that judges mechanically apply what is laid down by Parliament and exercise no interpretive function. This positivist outlook denies that a judge cannot be said to declare the law mechanically where there are competing interpretations, precedents and authorities. A judge can choose one interpretation, or elect to adopt one precedent and distinguish another. Dugard describes the factor upon which the final decision rests as the individual judge's inarticulate premise i.e

¹⁷ Act 3 of 1953

¹⁸ Regulation 15 of Act 3 of 1953

¹⁹ Corder 'Crowbars and Cobwebs' (1989) 5 SAJHR 7

subconscious prejudices and preferences.²⁰

The assertion that judges might be influenced, consciously or unconsciously, by personal and political factors is controversial. Forsyth illustrates this with his comparison of Van den Heever and Steyn. Both were Afrikaners, who spent much of their working lives as legal advisors to the state and were very able, learned men. There were differences in, for example, where they went to university, but there are enough similarities in their backgrounds to bear comparison. However, Steyn is considered to be far more executive-minded than Van den Heever.²¹ Nevertheless, the analysis of various judgements has made it possible to label certain judges as either executive-minded or liberal.²² The conclusion reached is that the type of man (the word 'man' is used deliberately) appointed to the Appellate Division since the mid 1950's is likely to be of a conservative disposition. Most likely he was born in the Orange Free State and spent much of his life in Pretoria. He is unrepresentative even of the white population of South Africa.²³ It is argued that this is a factor in the clear manifestation of a strong commitment to legislative policy and the ideology of the ruling group.²⁴

²⁰ Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 SALJ 181 at 187

²¹ Forsyth In Danger for their Talents 38

²² The most valuable works in this area are Corder Judges at Work and Forsyth note 21. See also Dean 'Our Administrative law: a Dismal Science' (1986)2 SAJHR 164; Corder note 19 4-21; Asimow 'Administrative law Under South Africa's Interim Constitution' (1996) 44 American Journal of Comparative Law 201; Mathews note 10; Dugard note 15.

²³ Forsyth note 21 46

²⁴ Corder note 22 229

EXECUTIVE-MINDEDNESS IN THE AREA OF THE APPLICATION OF AUDI ALTERAM PARTEM: SPECIFICALLY THE INTRINSIC V INSTRUMENTAL APPROACHES.

Whether or not the charges of executive-mindedness of the judiciary were justified can be seen from a brief overview of an area where the court had the opportunity to interpret the law in one of several ways and how it discharged this power. The opportunity in question arose in the circumstance where Parliament had neither specifically provided, nor excluded, the right to be heard in regard to a decision in specific circumstances. In such a situation it fell to the court to determine whether or not the person affected could invoke the *audi alteram partem* rule. The courts determined this question in several ways.

The earliest approach focused on whether the right to be heard was presumed to be granted by statute unless it was excluded, or whether it was presumed to be excluded by the statute unless the statute expressly granted it. An exposition of the decisions in this area will show whether the charges of executive-mindedness were justified.

Early on in the review period the Appellate Division, in Jeewa v Donges and others (a deportation case)²⁵ held that the right to be heard had to be clearly, if not expressly granted by the statute in order for *audi* to apply. The next case in which the Appellate Division considered the question stands in stark contrast to Jeewa. In R v Ngwevela²⁶ Ngwevela had been restricted in terms of the Suppression of Communism Act.²⁷ Sachs v Minister of Justice²⁸ also dealt with the restriction of certain persons to particular magisterial districts. In that case, the person affected was denied a hearing. However, in Ngwevela, Centlivres CJ proceeded from the assumption that the appellant had the right

²⁵ 1950 (3) SA 414 (A) at 422H- 423A, hereafter Jeewa

²⁶ 1954 (1) SA 123 (A), hereafter Ngwevela

²⁷ Act 44 of 1950

²⁸ 1934 AD 11, hereafter Sachs

to be heard unless the right were removed from the statute in question.²⁹ The right to be heard was thus not a privilege to be granted by statute as the dicta of Sachs and Jeewa suggested; it was a generally applicable right. This different approach clearly indicates the significance of the interpretive function of the judiciary, as there were indications in the Suppression of Communism Act³⁰ that the right to be heard was not granted by the Act. For instance the right to be heard was granted under some sections of the Act but not under the section which affected Ngwevela. Therefore, had the court been so inclined it could have used the maxim *expressio unius exclusio alterius* to argue that the right to be heard should have been granted to Ngwevela.³¹

Although this potentially far reaching approach was followed twice shortly afterwards in Saliwa v Minister of Native Affairs³² and Van Wyk NO v Van der Merwe,³³ where a pupil was expelled from school without a hearing, the judicial response to Ngwevela was cautious during the late 1950's and 1960's. In Minister van Naturellesake v Monnakgotla³⁴ an acting tribal chief was dismissed by the Minister without a hearing. The court's starting point, in favour of granting a hearing, was that there was a presumption in favour of granting *audi*, but then it shifted the emphasis back to an enquiry whether the statute granted, rather than removed, the right or not,³⁵ along Ngwevela lines. This case was of course a simple case of dismissal from office which did not challenge any important or controversial government policy and therefore there was no reason to refuse a hearing.

²⁹ at 131H

³⁰ supra

³¹ Forsyth note 21 114

³² 1956 (2) SA 310 (A), hereafter Saliwa

³³ 1957 (1) SA 181 (A)

³⁴ 1959 (3) SA 517 (A), hereafter Monnakgotla

³⁵ When it held of Ngwevela that: 'daar is veel voor te se dat die vereiste van noodwendige implikasie te hoog gestel is en dat die bedoeling van die wetgewer nagegaan word en uitwerking daaraan gegee moet word mits die bedoeling maar duidelik is' at 521F

Ngwevela was again considered in Pretoria City Council v Modimola³⁶, an expropriation case, where Centlivres CJ distinguished the Ngwevela approach so that it did not apply to where 'circumstances or conduct of the person prejudicially affected...were irrelevant or unrelated to the decision'.³⁷ Therefore even if the statute did not expressly or by necessary implication exclude *audi* the court itself could, in the circumstances, decide that no purpose could be served by granting it.

The issue was next considered in South African Defence and Aid Fund and another v Minister of Justice,³⁸ a case of complicated facts but which in essence involved the declaration of the Defence and Aid Fund as unlawful in terms of the Suppression of Communism Act³⁹. Botha AJ held that the question was whether the right to be heard had been impliedly enacted by the statute in question.⁴⁰ This seemed to be the end of the Ngwevela approach but it was partly revived in Publications Control Board v Central News Agency,⁴¹ where Rumpff JA held that the enquiry was no longer whether the right had been incorporated, as that could be presumed.

The end of the instrumental approach to the application of *audi* in both security and non-security cases came with Attorney-General, Eastern Cape v Blom and others,⁴² where, after summing up the various approaches to the application of *audi alteram partem*, Corbett CJ found the 'implied incorporation' approach (in terms of which an incorporation of the right by implication is contemplated, followed by the possibility of the exclusion thereof by implication)⁴³ to be logically unsatisfactory. He held that he preferred the approach that where a statute empowered an official to give a decision

³⁶ 1966 (3) SA 250 (A), hereafter Modimola

³⁷ at 262B

³⁸ 1967 (1) SA 263 (A), hereafter Defence and Aid Fund

³⁹ Section 2(2) of Act 44 of 1950

⁴⁰ at 277A

⁴¹ 1970 (3) SA 479 (A) at 489C

⁴² 1988 (4) SA 645 (A) at 662 G-J, hereafter Blom

⁴³ As in Ngwevela at 489C-D

that may prejudicially affect the property or liberty of an individual, there is a right to be heard, unless the statute shows, either expressly or by implication, a clear intention on the part of the legislature to exclude such a right.⁴⁴

This was only one of the debates about the applicability of *audi alteram partem* (to be covered more systematically below), and it is possible to trace the attitudes of the judiciary further, firstly by examining the way in which it has discharged its interpretive function in the debates about whether the decision must prejudicially affect a pre-existent right, before a right to be heard exists.⁴⁵ Secondly the effect on the right to be heard of whether the function in question was classified as ‘quasi-judicial’ or ‘purely administrative’ is revealing. This second approach was much discussed in Defence and Aid and Laubscher but it must be pointed out that the significance of this approach has been undermined by criticisms in cases such as Oberholzer v Padraad van Outjo en ’n ander,⁴⁶ Pretoria North Town Council v A1 Ice Cream Factory⁴⁷ and Administrator Transvaal, and others v Traub and others,⁴⁸ where Corbett CJ said, ‘I do not think that the quasi-judicial/purely administrative classification...is of any material assistance in solving the problem presently before the court’⁴⁹ (viz was Traub entitled to a hearing?).⁵⁰

This examination of the cases in the discrete area of the right to be heard reveals a change in the lie of the land, so that the tide of judicial control retreated, leaving vast areas in which the administration was left free of any significant judicial check on its

⁴⁴ at 662H

⁴⁵ See Cassem en ’n ander v Oos-Kaapse Komitee van die Groepsgebiedraad en andere 1959 (3) SA 651 (A), hereafter Cassem; SA Defence and Aid Fund supra; Laubscher v Native Commissioner Piet Retief 1958 (1) SA 546 (A), hereafter Laubscher; Administrateur van Suidwes-Afrika v Pieters 1973 (211) SA 850 (A); hereafter Pieters.

⁴⁶ 1974 (4) SA 870 (A), hereafter Oberholzer

⁴⁷ 1953 (3) SA 1 (A), hereafter A1 Ice-Cream Factory

⁴⁸ 1989 (4) SA 731 (A), hereafter Traub

⁴⁹ at 763J

⁵⁰ For a more detailed exposition of this line of cases see the section, ‘Classification of Functions’.

activities. As Forsyth points out in his summary and conclusions of these cases,⁵¹ one cannot condemn judges for enforcing the clear words of a properly enacted statute, but in these cases the judges were faced with a choice and in the overwhelming majority of cases they chose to favour the executive. Therefore the right to be heard was seen to be a privilege granted on occasion by the legislature, not a basic right removable by the legislature in exceptional circumstances. Therefore in Defence and Aid Fund the court held that a *prima facie* lawful organisation could be dissolved by the administration without a hearing. In Modimola and Cassem group areas planners were given carte blanche to divide the country into racially exclusive areas and to expropriate at whim without affording a hearing to anyone. Deportees seeking a hearing before expulsion were dealt with summarily by the Appellate Division in Jeewa. Furthermore the reasoning behind this refusal to hold the administration accountable to the dictates of procedural justice was not convincing.

It would be fair to point out, however, that the retreat of judicial control was not uniform. In Monnakgotla where an individual was dismissed from office without a hearing, the courts granted a hearing, as it did in Oberholzer. However the areas in which the court was always sympathetic were those in which no deeply held government policy was challenged and so it would be inaccurate to counter charges of executive-mindedness with the evidence of such decisions.

Therefore, during the apartheid years the rule of law was eroded not only by the problems of legislative supremacy in practice but also, where there was room for the exercise of the judiciary's interpretive function, by a tendency on the part of the judiciary to relinquish judicial control in order to favour the executive. Therefore our Diceyan heritage is one of the factors that contributed to the inadequate development of our administrative law.

⁵¹ Forsyth note 21 126-128

AN ALTERNATIVE MODEL OF ADMINISTRATIVE JUSTICE

South Africa is faced with the challenge of generating a model of administrative justice which achieves a balance between democracy and administrative law. Democracy, however, has expanded in meaning with the growth of the benefactor state. Democracy is no longer seen as a matter of universal franchise. A more nuanced understanding of the notion of equality means that a modern democracy in this country must provide sufficient economic security to all South Africans so that citizenship can meet the substantive test of treating all persons with equal concern and respect.⁵² In order to meet the demands of this formulation of democracy, administrative law will (and is) going to play a crucial role in South Africa's immediate future as it is increasingly seen as the central mechanism of social and economic transformation, which must further policies which address economic inequality, lack of access to jobs, housing, health, education and social services.⁵³ In order to meet these requirements the continued existence of a substantial bureaucracy is necessary. Without corresponding mechanisms of accountability which ensure administrative procedures which are democratic in character, fully accountable, user-friendly, responsive, participatory and transparent,⁵⁴ and also accurate and efficient, the needs of our fledgling democracy will not be met.

Against this background, it is understandable that alternatives were sought, the most common being a bill of rights. As Sachs puts it:

'In the case of South Africa, the new constitution arises out of the need to escape from the profound humiliations and oppression created by apartheid. Through the constitution, we affirm that we learn something from our dolorous history.'⁵⁵

An analysis of the arguments behind this alternative leads us to an understanding of the

⁵² Davis 'Administrative Justice in a Democratic South Africa' in Corder, McLennan (Eds) Controlling Public Power 19

⁵³ Davis note 52 19-27

⁵⁴ Mureinik 'Reconsidering Review: Participation and Accountability in Corder, McLennan (Eds) Controlling Public Power 28-35

⁵⁵ Sachs 'The Constitution is Natural Justice Writ Large' in Corder, McLennan (Eds) Controlling Public Power 51

unequivocal call for the constitutionalisation of the administrative justice clause. The attraction of a bill of rights is that it does not seem to reject the entire concept of the rule of law. Rather, it could be argued (by those who cling to traditional formulations of democracy) that it transforms the rule of law into something more specific and concrete containing direct mechanisms for the protection of human rights in the form of effective remedies.⁵⁶ There must be effective remedies (for example, the setting aside of an administrative decision by a court of law) in addition to the specification of fundamental rights and freedoms, because without enforcement mechanisms a bill of rights will be as meaningless in practice as the rule of law has been shown to be.

The problems of the traditional rule of law in apartheid South Africa are overcome by ensuring separate spheres of sovereignty of the executive, the legislature and the judiciary. This is achieved by the abolition of the doctrine of legislative supremacy in favour of supremacy of the constitution.⁵⁷ Practically, this means that the rights entrenched in Chapter 3 of the interim Constitution are protected by the courts in the form of a remedy having two interlinking aspects. First, any person may approach the courts for relief whenever any fundamental right has been infringed.⁵⁸ In the second place the court has the power to set aside any legislative enactment or executive act which constitutes a violation of any of the fundamental rights entrenched in the bill of rights. While the judicial control of executive acts is, in theory, nothing new, the testing right is a new feature of the South African legal system as it is in effect a strong check on legislative supremacy. The courts now have a real and effective weapon against possible violations of human rights by the legislature.

At first sight this paints a picture of a bill of rights as a cure for all the ills that have befallen the South African legal system, but there are some issues concerning the role of the judiciary in this scenario, which have given some cause for concern in the debate about the desirability of the bill of rights. The concern is that the testing power removes power from the representatives of the electorate and confers it on a judicial body which

⁵⁶ Beinart 'The Rule of Law' (1962) Acta Juridica 99 at 135

⁵⁷ Section 4 of the Republic of South Africa Constitution Act 200 of 1993, hereafter the interim Constitution

⁵⁸ Section 24 of the interim Constitution for the purpose of this discussion

is not directly responsible to the electorate. Furthermore there is concern that this unelected body will have the power to impose restraints on the activities of the democratically elected community. This may hamper social and economic transformation. These concerns are based on a majoritarian view of democracy which equates democracy with process, and thus regards judicial review as counter-democratic as judges are unelected, and therefore their role is not validated by a democratic process.

Not only are these concerns grounded in a majoritarian view of democracy but they are informed also by a resistance or, in some cases, an inability, to see beyond a democratic model based on the rule of law and the Westminster system. The flaws in this model have already been pointed out and are abundantly clear to the participants in the debate about reform of administrative justice or constitutionalism. Nevertheless many participants are reluctant to base proposals for reform on any model other than one which grows from our traditional administrative law model.

One view of democracy which does not encounter the problems with judicial review which traditional models do, is that which focuses on the goal of just distribution of social and material resources. As the focus shifts from process as the primary goal of a democracy, the system will be democratic if the goal of equitable distribution of resources is met, despite the counter-democratic features of review. If this notion of democracy is adopted then there is no conflict with either an entrenched right to judicial review or with a bill of rights in general where the remedy for rights infringement lies primarily with the courts.

Davis, however, prefers a more nuanced notion of democracy which seeks to combine the ideal of administrative action which achieves just distribution of resources with the notion that each citizen matters equally and that participation in decision making is essential to the attainment of democracy.⁵⁹ He calls this integrative democracy and it is based on participation in public decisions, the principle of equal stake; which means that a person can only be counted as a full member of the political community if collective decisions treat him or her as an equal; and independence; which implies that people are individually, rather than collectively responsible for their moral and ethical judgements.

⁵⁹ Davis note 52 20

This model of democracy is neither concerned exclusively with process nor result and therefore it should theoretically be possible to use it as a foundation of review which values constitutional values of fairness, impartiality and rationality over the will of the majority or the designs of bureaucrats. These concerns must, in terms of this model, outweigh fears that judicial review could hamper social and economic transformation. These fears are not unfounded in view of the record of the judiciary in the past but the conservative leanings of the judiciary may not work against efforts to transform society. Indeed, in the new South Africa it will be those judges who adopt an activist or 'red light' approach who will be acting according to a conservative agenda, which balks at social and economic transformation. Therefore labels such as 'conservative' or 'liberal' must be treated with caution when critiquing the possibilities of success of various concepts of review, or indeed other mechanisms of executive accountability. Furthermore, a democratic model which is based on participation by the citizenry and the concept of equal stake is predicated on the assumption that the welfare of the state ultimately concerns the good of the citizenry. Therefore it should be possible to achieve the goal of just distribution of resources as well.

Davis however cautions against excessive expectations of judicial forms of administrative justice as there is what he terms a 'subjective/objective dichotomy' in the area of review.⁶⁰ This dichotomy arises because, on the one hand judicial control must be objective in order to hold administrative agents accountable, which could lead to excessive intervention into subjectively formulated policies based on specialist knowledge. On the other hand deference to the specialist knowledge of administrative agencies could result in minimal judicial intervention, rendering the bureaucracy unaccountable, by granting it excessive freedom to exercise arbitrary power. With the growth of the state, these problems are exacerbated by the increased measure of technical expertise required by an effective bureaucracy.⁶¹

Based on this critique Davis concludes that the courts may not always be the suitable

⁶⁰ Davis note 52 24

⁶¹ Wiechers 'Administrative Law and the Benefactor State' in Corder, McLennan (Eds) Controlling Public Power 130-131

site for mechanisms of administrative accountability.⁶² However, the fact that law is limited in its power to influence the democratic process does not mean that law cannot assist in promoting democratic conditions. Judicial review, within the framework of an entrenched constitution and a bill of rights, which includes the principles of formal and substantive equality, can hold an agency accountable to the values of the bill of rights which are essential to the democratic ideal.⁶³ Furthermore, in terms of this model, the agency is constrained to justify its performance not only in terms of the empowering legislation, but also in terms of its contribution to the attainment of the model of democracy furthered by the bill of rights. The crucial elements of this model are encapsulated in a system of administrative justice which promotes public participation and rational government.

An analysis of section 24 of the interim Constitution, and even more so of section 33 of the final Constitution illustrates how judicial review of administrative action, despite the limits of law discussed above, can promote these objectives. Davis outlines the steps which would contribute to public participation and rational government. They are: obliging administrative agencies to provide reasons for decisions; imposing a duty to consult affected parties and holding public hearings before decisions are taken which might affect communities. Mureinik also calls for responsive democracy, based on participation and accountability.⁶⁴ Furthermore the necessity of crossing the boundary between public and private power is highlighted, for private power can undermine the democratic process as much as public power.⁶⁵

Section 24 of the Interim Constitution and section 33 of the final Constitution constitutionalise these steps (to an extent and with qualifications), as we shall see when we move beyond the discussion of the clause in general and focus on the content of the administrative justice clauses in specific detail.

⁶² Davis note 52 24

⁶³ Omar 'Undermining Majority Rule or Facilitating Empowerment?' in Corder, McLennan (Eds) Controlling Public Power 40-41

⁶⁴ Mureinik note 54 28-37

⁶⁵ Davis note 52 25, Sachs note 55 52. See the section, 'Horizontality'.

In essence then, Davis proposes an administrative justice system informed by an integrative democracy model which realises the limits of judicial control, but nevertheless values the assistance such judicial control can provide in the founding of a restructured system of administrative justice.

OVERCOMING THE CRISIS OF LEGITIMACY IN THE JUDICIARY

The concerns about the suitability of the judiciary to oversee the protection of fundamental human rights do not stem only from structural, institutional or democratic concerns. In addition to such fears is the problem of executive-mindedness. In the judiciary's defence it is argued that it is capable of impartial decision making because of three characteristics: the absence of direct political pressure, the nature of their training and the fact that the whole judicial experience is geared towards balancing conflicting interests.⁶⁶ In contrast, politicians are subject to all kinds of political pressure and are not trained to decide issues in a neutral, impartial and objective manner. Nevertheless an overview of decisions in just one small area⁶⁷ indicated that judges may not be able to apply an entrenched bill of rights in an objective and neutral manner. Even if the judiciary has a choice as to whether to uphold fundamental rights or not, as it now does in terms of the doctrine of constitutional supremacy, (which ensures that it will no longer be constrained by the language of legislation which violates fundamental rights), it has been shown that the judiciary was, at times, restrained in the exercise of its control function as a result of a decision making process informed by its 'inarticulate premise'. However it must be pointed out that in regard to ordinary (nonsensitive or outside the 'political' arena) litigation the judges, in general, acquitted themselves well. Furthermore, as Corder states, at no stage was there 'an allegation of conscious or deliberate bias on the part of the judiciary'.⁶⁸

⁶⁶ Didcott 'Practical Workings of a Bill of Rights' in Van der Westhuizen, Viljoen (Eds) A Bill of Rights for South Africa 53

⁶⁷ See the overview above of the cases in the area of whether the right to be heard depends on its implied inclusion or exclusion in a statute.

⁶⁸ Quoted by Cowling note 9 195

Another factor which holds out hope for the integrity of the judiciary (but without trying to make the story a happier one than it really was) was the trend which emerged during the state of emergency during the mid to late 1980's, when mass struggles of black workers escalated, which seemed to favour civil liberties more than in the past. South Africa was still a profoundly unjust society and despite some of these decisions which protected an individual right, the unjust legislation remained on the statute books. Even so, the decisions indicate that the judiciary may be capable of protecting the rights entrenched in the bill of rights. For example, the move away from the 'implied incorporation' theory to one which would afford far greater availability of the *audi maxim* (in Blom) was not in keeping with the expected trend during a state of emergency to deny *audi* in 'security' cases. The Blom case was very much a security case as it dealt with the availability of a hearing to a person denied bail in terms of section 30 of the Internal Security Act.⁶⁹ Nevertheless, Corbett CJ held that there was no clear indication that Parliament intended to exclude the right of an arrested person to be heard before the making of the order to refuse bail.⁷⁰ This decision is even more remarkable because Parliament was traditionally reluctant to reveal 'sensitive information'. Information of this nature would most probably have to be revealed in a hearing of this kind. Therefore Parliament almost certainly did intend to exclude the possibility of a hearing under this Act, by implication.

This case is one example of the more benevolent attitude towards race and security laws during the 1980's state of emergency, at least on the part of some judges.⁷¹ Ellmann argues that cases such as these illustrate the existence of a human rights tradition, at least in what Ellmann calls the Corbett Court, which existed even in the long years in which the dominant white tradition gave that tradition short shrift.⁷² He analyses the

⁶⁹ 74 of 1982, a stereotypical example of 'security' legislation.

⁷⁰ at 669G

⁷¹ Notably, Corbett JA, Milne JP, Leon J and Didcott J. Other judges, such as Rabie CJ and Munnik JP, appeared not to share this attitude. Dugard 'Changing Attitudes towards a Bill of Rights' in Van der Westhuizen, Viljoen (Eds) A Bill Of Rights for South Africa 32

⁷² Ellmann In a Time of Trouble 205

sources of this tradition⁷³ and, firstly, identifies them as: the prestige of lawyers committed to this tradition, like Innes CJ and Schreiner JA. Secondly, he mentions the structure of the legal profession as a factor i.e it has traditional and elitist features, which may have unedifying effects, but nevertheless could encourage and provide insulation for lawyers who took up the cause of challenging apartheid. Despite this analysis however, Ellmann admits that the doctrinal changes that the court did not work attest to the diversity of views on human rights matters. They are a reminder that the human rights tradition in South Africa, despite the substantial institutional and normative support that it has, was not the dominant feature of South African law. The Corbett Court was a conservative institution, albeit one concerned about human rights and groping towards change.⁷⁴

In contrast, the 'Rabie Court' patently protected emergency power. Despite the iniquities perpetrated, Ellmann shows that the court's deference to judicial authority resembled the stance of other courts, like those of the United States and Britain, during times of what they perceived as 'emergency'.⁷⁵ There are indeed strong pressures on judges to reach executive-minded decisions at such times. An emergency exists, or is said to by the senior officials of the state, which places the people in danger. It must be dealt with by the political authorities of the country, for certainly the courts are in no position to undertake the task.⁷⁶

None of this means that the Rabie Court's decisions were inevitable. As the record of the Corbett Court shows, they were not, but they might have been a lot worse, as those of the judiciary in Nazi Germany or Pinochet's Chile were. For example, the German judges ruled that the orders and actions of the Gestapo were not subject to judicial review, and the Nazis carried out the worst of their oppression outside the domain of the law. In Pinochet's Chile human rights observers found that most Chilean judges

⁷³ Ellmann note 72 212-230

⁷⁴ Ellmann note 72 244

⁷⁵ Ellmann note 72 166

⁷⁶ Ellmann note 72 168

could be counted on to do the government's bidding.⁷⁷

In South Africa on the other hand, the white rulers were unusually conscientious about securing statutory authority for their abuses, and executive action was at least scrutinised for compliance with the empowering provision of the legislation in question (where the court did not feel that this power had been ousted by the legislation). Why South Africa did not travel as far down routes such as those of Nazi Germany and Pinochet's Chile can be explained by the court's determination to preserve a legal order in South Africa. This determination stemmed from an acceptance of the importance of adherence to the law. This acceptance is a result of law's efficacy and its usefulness as a basis for claiming legitimacy.⁷⁸ The conclusion from this analysis is that those judges who did not fall within the confines of the human rights tradition, were driven by a respect for the status quo.

This brings us back to the issue of whether the judiciary, in the light of its track record, is qualified to protect the rights entrenched in the bill of rights. It seems, simplistically, that the judiciary can be divided into the two camps mentioned above. In the case of the group that adheres to a human rights tradition, the protection of the rights entrenched in the bill of rights should present no conflict and one could rely on them to do just that. But what of the more conservative faction who have not prioritised the upholding of human rights in the past, preferring to favour the will of the executive? For this group too there should be no conflict. As Didcott J puts it, if the charge against infatuation with the literal sense of the words appearing in statutes is a fair one, think what an advantage the infatuation may turn out to be once the statute governing the case is the bill of rights.⁷⁹ To put it another way, if judges are concerned with the status quo, this means that the solution to the criticism that judges are status quo oriented lies in altering the status quo and, in strictly constitutional and legal terms, this solution lies in the adoption of the bill of rights that confers a testing right on the courts, and more narrowly, which sets out a positive standard of administrative justice. This would force

⁷⁷ Ellmann note 72 169-171

⁷⁸ Ellmann note 72 176

⁷⁹ Didcott note 66 53

judges to articulate their 'inarticulate premises'. This is because the authority of the rule of law, which did not correspond to its ideal formulation in practice, is now reinforced by the positive legal human rights standard of the bill of rights. Indeed the rule of law approach can be argued to be subservient to less traditional models of democracy, like the one proposed by Davis. By providing the vehicle for the actual implementation of the ideas contained in the rule of law, or integrative democracy, the inherent executive-minded tendencies of most of the judiciary should give way to an activist attitude towards human rights protection.

In South Africa, a constitutional framework for the future cannot afford the luxury of ignoring the history of the society. A programme for a future South Africa had to understand and redress the past. Given the dismal history of administrative justice in this country, it is clear that the same arguments which advanced the entrenchment of a bill of rights in the South African context advance the direct entrenchment of an administrative justice clause. In other words judges will now have to subject their inarticulate premises to the positive legal administrative justice standard of section 24 of the bill of rights and eventually to section 33 of the final Constitution. This will force the executive-minded tendencies of most of the judiciary to give way to what Mureinik calls 'a culture of justification'.⁸⁰ The need for this standard is illustrated by the priority placed on it in 1986 in a report on the degree of compliance in South Africa with human rights law, when Olivier J said of the requirements for a credible bill of rights, that: 'the first step should be the protection of the individual against the power of the state.'⁸¹

⁸⁰ Mureinik 'A Bridge to Where?' (1994) 10 SAJHR 38

⁸¹ Bindman (Ed) South Africa and the Rule of Law 165

THE CANADIAN CONTEXT

Canada too showed its commitment to human rights protection when it enacted a new constitution containing a fully-fledged entrenched bill of rights conferring direct testing powers on the courts in 1982.⁸² In Canada the idea of protecting rights had been making inroads since as early as the 1950's and in 1960 the Canadian Bill of Rights was enacted. As it was confined to the federal level the Bill was strictly speaking not a statute. Nevertheless, as a result of R v Drybones⁸³ the courts could declare a statute inoperative if it violated rights in the Bill.

The difference between South Africa and Canada is apparent from the comment that the Bill was interpreted narrowly but: 'it must be said that we should not, having regard to our traditions, expect to find an excessive number of statutes that violate fundamental rights.'⁸⁴ Furthermore, the approach of the Canadian judiciary to security laws is profoundly different from that of the majority of the South African judiciary. This is manifest in the statement by the Canadian McDonald Commission Report on security laws:

'Canada must meet both the requirements of security and the requirements of democracy: we must never forget that the fundamental purpose of the former is to secure the latter. Those who subvert Canada's democratic institutions would realise an ironic victory if Canadians were to permit their governors to violate the requisites of democracy in the course of protecting them from their opponents.'⁸⁵

Therefore Canada enacted a bill of rights to strengthen and clarify inherited traditions of freedom. This background is in stark contrast to the South African context. South

⁸² Constitution Act 1982 (incorporating the Charter of Rights and Freedoms, hereafter the Charter)

⁸³ [1970] S.C.R. 282

⁸⁴ LaForest 'The Canadian Charter of Rights and Freedoms: an overview' (1983) 61 Canadian Bar Review 19 at 22

⁸⁵ Bindman (Ed) note 81 149

Africa did not even have a democracy in the sense of universal franchise, or in any other sense, against which principles the judiciary could test the security laws. Therefore South Africa enacted a bill of rights to institute, not to strengthen a human rights culture.

As a result of Canada's political context, what Evans calls our 'extravagant grant of power over the entire administrative process' through the constitution was not, at that time, seen to be desirable. Rather, the Canadian Constitution, through the power of the federal executive to appoint judges, which has been given substantive content by the courts, ensures that the superior courts have the power to review the decisions of administrative tribunals. This is based on the rationale that the provinces should not undermine the authority of the higher courts. Secondly, because the Charter is supreme, the power of the courts to review the validity of decisions on the ground that they violate a right protected by the Charter is entrenched.⁸⁶ Therefore a specific right to administrative justice is regarded as unnecessary, because it is argued that the ability to challenge unlawful administrative action at law is sustained generally by the application of, for example, the right to equality to any act or omission of the executive branch of government. Furthermore, provision is made for a citizen's right to enforce such rights through a competent court of law.⁸⁷

An independent administrative justice clause was omitted not only because such an enactment was seen as unnecessary. In addition there is a distrust of judicial review as an effective means of controlling public power. This distrust arose from the following concerns.⁸⁸

Firstly, there is a concern of institutional competence i.e judges and lawyers often lack the expertise needed to examine the intricacies of certain complex administrative schemes. This lack of expertise could hinder effective implementation of some executive programmes. Secondly, the judicial review model often does not recognise public interests and focuses instead on the interests of the individual/s concerned. As a result

⁸⁶ Evans 'Administrative Appeal or Judicial Review: A Canadian Perspective' in Corder, McLennan (Eds) Controlling Public Power 228-230

⁸⁷ LaForest note 84

⁸⁸ Evans note 86 230

of this factor, coupled with the disparity of power which is a feature of disputes addressed by the courts, judicial review can lead to the marginalisation of community interests. Hand in hand with this problem is the issue of lack of access to the courts. These are all valuable criticisms of the efficacy of judicial review, and in essence centre around the perceived inability of the courts to reconcile the rights of individuals with the vigorous pursuit of socio-economic justice.

In the South African context however, the need for an entrenched administrative justice standard was pressing enough to trump these concerns. Indeed, it is within this context of an integrative democracy and the need to facilitate the benefactor state while controlling it that these concerns are not so much trumped, but rather taken account of and reconciled, while still recognising the limits of judicial review. Indeed it is because of the wholesale marginalisation of community interests in the past that an entrenched administrative justice clause is seen to be so desirable. It is hoped that, even though the role of law is inherently limited in the socio-economic transformation process, it can nevertheless assist effectively in that process.

To sum up, the Canadian judiciary, at the time of its reform process did not need more insurance of accountability through the courts than that provided for by the mechanisms described. The South African judiciary on the other hand, which is not yet inculcated with the doctrine of a human rights culture, and is required to further the needs of a benefactor state, requires the direct entrenchment of a positive, neutral, legal standard of administrative justice, as does Namibia, one of the very few other countries directly to entrench administrative justice in a bill of rights.

THE NAMIBIAN CONTEXT

The background to the Namibian Bill of Rights is very similar to that of South Africa's. It too 'articulates a jurisprudential philosophy which, in express and ringing tones, repudiates legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia.'⁸⁹ The same judge said:

'Throughout the preamble and substantive structure of the Namibian Constitution there is one golden and unbroken thread - an abiding 'revulsion' of racism and apartheid. It articulates a vigorous consciousness of the suffering and wounds which racism inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and to protect the gains of our long struggle' against the pathology of apartheid.'⁹⁰

Therefore administrative justice is provided for as follows:

'Administrative bodies and officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and any persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal.'⁹¹

The extent to which a positive standard of administrative justice was desired in Namibia after a judicial history much like our own is illustrated by the positive nature of the duty imposed on administrative officials. This is in contrast with section 24 of our interim bill of rights which, along the same lines as the common-law formulation of the remedy for unlawful administrative action, entitles people to, for example, lawful administrative

⁸⁹ Mahomed CJ in Government of the Republic of Namibia v Cultura 2000 1994 (1) SA 407 at 411

⁹⁰ S v Van Wyk 1992 (1) SACR 147

⁹¹ Constitution of the Republic of Namibia 1990 article 18

action in certain circumstances.⁹² Therefore our formulation of the right is not as broad as that of Namibia, although the right in section 33 of our final Constitution is broader than that formulated in section 24 of the interim Constitution. Perhaps, as we shall discuss later, this is not an indication of less of a commitment to administrative justice but rather an indication of concern that the clause will further administrative justice effectively in practice.⁹³

Another difference between the South African and Namibian clause is that the Namibian clause provides for redress before a tribunal as well as a court, whereas the South African clause provides only for a judicial remedy.⁹⁴ The Namibian clause is more in line with systems such as those of Australia, the UK and the US which have set up tribunals parallel to the ordinary courts.⁹⁵ Despite the wording of section 7(4)(a), section 22 provides that:

‘Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, *another independent and impartial forum.*’ (my italics)

It appears therefore that there is a possibility that disputes in the area covered by section 24 or indeed by any other right enshrined in the bill of rights, which have potentially been infringed by an administrative agent may be settled by a forum other than a court, like an administrative tribunal. The equivalent of section 22 of the interim Constitution in the final Constitution is section 34 which also makes provision for the settlement of disputes by a forum or a court. Unlike the interim Constitution however, section 33 of the final Constitution is in line with section 34 of the final Constitution, in that it speaks of review by a court or, where appropriate, an independent and impartial tribunal.⁹⁶ This raises many interesting issues about administrative law reform and more specifically about whether administrative appeals on the merits of

⁹² Section 24(a) of the interim Constitution

⁹³ See Part Two below dealing with the specific sub-sections of section 24

⁹⁴ Section 7(4)(a)

⁹⁵ Corder note 1 388

⁹⁶ Section 33(3)(a) of the final Constitution

administrative action are a desirable feature of this reform. Unfortunately these issues fall outside the scope of this paper and the focus will remain on judicial review of administrative action.

An overview of the Namibian administrative justice clause shows that its background is very similar to that of the South African clause. In 1990, when the Namibian Constitution was promulgated, there was an awareness of the demands on a state which is required to achieve substantive and formal equality in its societal conditions. Therefore an explanation for the direct entrenchment of administrative justice in South Africa and Namibia can be found not only in the past, but also in the demands of the future. In other words, what is required from administrative justice is so much more than what was previously required, that the mechanisms of achieving administrative justice will be more far reaching than anything encountered before. In this respect we are very fortunate to have drafted the interim (and final) Constitution, including the administrative justice clause, at a stage when our understanding of democracy and administrative accountability has been shaped by an awareness of the vast role played by the executive in the modern state.

To sum up, it has been shown that two factors have led to the entrenchment of an administrative justice clause in our bill of rights. The first is the inadequacy of the traditional democratic model. Proposals for new models have been advanced which require the constitutionalisation of administrative justice to assist in the restructuring of society. Fears about the suitability of the judiciary as the protectors of the entrenched rights have been addressed by an analysis of possible future trends, predicated on the new system of constitutionalisation. Secondly, it has been illustrated that the entrenchment of the administrative justice clause is crucial to the efficacy and accountability of the modern benefactor state. These arguments are supported by an overview of the Canadian and Namibian contexts within which their respective reform processes were undertaken. Therefore, in conclusion, the direct entrenchment of the administrative clause in the bill of rights of the South African interim (and final) Constitution is a vital step towards creating what Mureinik calls a 'culture of justification'⁹⁷ which will begin a new area of administrative justice, free from the

⁹⁷ Mureinik note 80 38

inequities of the past and equipped to tackle the needs of the future.

PART TWO

THE EFFECT OF SECTION 24 OF THE INTERIM CONSTITUTION
ON SOUTH AFRICAN ADMINISTRATIVE LAW

On 8 May 1996 the final Constitution was adopted by the Constitutional Assembly. The certification judgement of the Constitutional Court makes no mention of section 33, the section dealing with 'just administrative action', and therefore it can be assumed that this section will appear in the form it now takes in the final Constitution, which despite challenges to that document in the Constitutional Court, is expected to take effect within a matter of months.⁹⁸ In the light of these developments it may seem unnecessary to analyse the effect section 24 of the interim Constitution has had, and may have, on South African administrative law. However, in terms of the transitional arrangements laid down in the final Constitution, the national legislation envisaged in section 33(3)⁹⁹ must be enacted within three years of the date on which the new Constitution takes effect.¹⁰⁰ Until this legislation is enacted section 33(1) and (2) must be read to continue the administrative law provisions of the interim Constitution.¹⁰¹ If this legislation is not enacted then section 33(1) and (2) become rights on their own and in full. Of course if the legislation is not enacted then Parliament will still be entitled to enact legislation to limit the right, but the special circumstances of such enactment, which are provided for in section 33(3) will fall away, and the only test will be that contained in section 36 (the limitations section).¹⁰²

Another view is that the rights contained in section 33 are self-executing and therefore may be relied upon. Therefore the legislation referred to merely makes the practical implementation of these rights easier and more effective. This view is preferred because the opposing view would lead to a recognition of a right which is in fact only an 'almost-

⁹⁸ The Constitutional Court recently certified the final Constitution unanimously and it merely awaits the signature of the President to bring it into effect. Section 33 will therefore be in the same form that it is at the moment, in the final Constitution,

⁹⁹ A duty is imposed to enact legislation to give effect to the rights contained in section 33(1) and (2). The discussions about the content of this legislation form a separate topic on their own and therefore will not be dealt with as such in this paper. Certain points, however that are relevant to the topics in this paper, are dealt with from time to time. For a more detailed look at the work on the proposed legislation, see Asimow 'Administrative Law under South Africa's Final Constitution' SALJ (forthcoming) at 3 of the typescript; Asimow note 22; Corder note 3.

¹⁰⁰ Schedule 6, section 23 of the final Constitution

¹⁰¹ Schedule 6, section 23(2)(b)

¹⁰² Corder note 3 at 5 of the typescript

right. This would provide the opportunity for the courts to find that there are hierarchies of rights within the bill of rights which may have negative effects, as a way of thinking, on socio-economic rights.¹⁰³ A further argument along these lines is that Constitutional Principle 2 in the interim Constitution requires the final bill of rights to be drafted with due consideration for the rights contained in the current bill. If the status of 'right' is not conferred on section 33 of the final Constitution, this could be seen as an unconstitutional detraction from the guarantees provided for in the interim Constitution.¹⁰⁴ Therefore one side of the debate focuses on section 24, while the other sees section 33 as an independent right. Even if section 33 is seen as the site of focus it differs only slightly from section 24 of the interim Constitution, and then only in the availability of the rights and not in the rights themselves. What is apparent therefore, is that section 24 will continue to be of relevance beyond the coming into effect of the final Constitution and may be of assistance in the interpretation of section 33 should this be necessary.

The convoluted wording of section 24 raises many issues. Some, however, are self-evident, or not really of interest. Therefore, the following analysis will focus on the more interesting or relevant aspects of section 24.

HORIZONTALITY

It remains to be seen whether and to what extent section 24 could be applied horizontally. It is beyond the scope of this paper to comment meaningfully on the debate, other than to say that some academics have made convincing proposals that the horizontality of the section would be an important step towards making private power, which is sometimes just as capable of undermining the democratic process as public power, accountable.¹⁰⁵ The matter seems to be clearer in the final Constitution which provides, in section 8, that 'a provision of the Bill of Rights binds natural and juristic

¹⁰³ Corder note 3 6-8

¹⁰⁴ *ibid*

¹⁰⁵ Davis note 52 31-32 and Hutchinson 'Mice under the Chair: Democracy, Courts and the Administrative State.' 1990 Toronto Law Journal 607

persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right. The meaning of this convoluted section will have to be worked out in case law.¹⁰⁶

FACTORS WHICH AFFECT THE SCOPE OF JUDICIAL REVIEW

The Supreme Court is affected in its exercise of its inherent power of review (now underpinned by the interim Constitution) by a number of factors.¹⁰⁷ They are:

- (1) Parliamentary sovereignty and limited executive power, in terms of which Parliament had absolute power to define the powers of administrative agencies, subject only to restrictive interpretation by the courts;
- (2) the meaning given to *ultra vires*, the concept used to enforce the review function of the court
- (3) standing to sue
- (4) ouster clauses
- (5) the classification of administrative functions
- (6)(a) the willingness of the court to supervise the exercise of legal power by administrative agencies (justiciability) and the further limitation on this willingness to the extent that an administrative agency has disclosed the reasons for the decision; and
- (6)(b) the unwillingness, even if the matter is seen to be justiciable, to enquire into the reasonableness, of either the decision-making process, or the consequences of the decision. This unwillingness is enhanced by the scarcity of reasons given for a decision.

¹⁰⁶ For a very interesting and thorough treatment of this topic, including the comparative Canadian and American law see Cockrell 'The impact of the interim bill of rights on private law' (paper delivered as part of the course on 'The Scope and Implications of the Interim Bill of Rights' presented at UCT, 1994)

¹⁰⁷ Administrative Law Course Outline 1996 (University of Cape Town) Part II 1-6

Section 24 of the interim Constitution has considerably affected the extent to which the court is limited in its scope of judicial review. An analysis of the impact of section 24 on the effect of these factors will reveal a coherent picture of the way in which our administrative law has been changed by the interim Constitution.

Part One of this paper has already dealt with the way in which the interim Constitution has changed the constitutional structure in this country and more narrowly, the theoretical underpinnings of judicial review of administrative action. Therefore the impact of the interim Constitution on the first and second factors has already been explored, although the second factor dealing with the *ultra vires* doctrine will be touched on again while exploring the other factors. Therefore the next issue for discussion is the effect of the interim Constitution on 'standing to sue'.

STANDING TO SUE AND THE INTERIM CONSTITUTION

Section 24 enshrines the right to lawful,¹⁰⁸ procedurally fair,¹⁰⁹ administrative action which is justifiable in relation to the reasons given for it.¹¹⁰ Section 24(c) entrenches the right to reasons in writing for administrative action. These rights however are only available to 'every person' in certain circumstances i.e when a right or interest or legitimate expectation is affected or threatened. The availability of each subsection is dependent on a variation of these criteria. An analysis of each subsection will reveal how these criteria alter the position at common law in one way or another, but before embarking on such an analysis it must be pointed out that the availability of the rights in section 24 is further dependent on section 7(4). In terms of this section, relief may only be applied for, when section 24 (or any other right) is infringed or threatened, by -

¹⁰⁸ Section 24(a)

¹⁰⁹ Section 24(b)

¹¹⁰ Section 24(d)

- (i) a person acting in his or her own interest;
- (ii) an association acting in the interests of its members;
- (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
- (iv) a person acting as a member of or in the interest of a group or class of persons;
or
- (v) a person acting in the public interest.

The interaction of sections 24 and 7(4) may cause some confusion where the right to seek relief is available in terms of section 7(4), but does not appear to be available in terms of section 24. For example, a person may seek relief in terms of section 7(4)(i) in his or her own interest. However, in terms of section 24(d) a person only has the right to administrative action which is justifiable in terms of the reasons given for it where any of his or her *rights* (my italics) is affected or threatened. It seems, therefore, that even if a person wishes to seek relief where his or her interest is at stake, where administrative action is potentially not justifiable in terms of the reasons given for it, the person may not seek relief in terms of section 7(4)(a) because, technically, a right has not been infringed or threatened, because the right in section 24(d) is not protected until a right has been affected or threatened.

These problems will be ironed out by section 33 which has been drafted to provide greater flexibility and availability of the rights in section 33(1). Of course, this was possible (the right is stated simply as being available to 'Everyone') because section 33 does not stand alone and will, eventually, be fleshed out by detailed legislation. Section 24, on the other hand, stands on its own and must be interpreted as such. Therefore detailed and specific wording was necessary to avoid confusion and ambiguity. There is a clear desire, which is apparent in the wording of section 24, to impose some limitations on the rights entrenched in this section.

This desire is understandable when viewed from the perspective of some of the issues raised in Part One of this paper: namely, the concern that the activities of the benefactor state, seen as vital to democracy, should not be unnecessarily curtailed, and also the concern about the suitability of unelected judges to curtail such activities. Furthermore, there are concerns that, should the rights be available in unlimited form, the judicial

process would be clogged to the extent that the rights would no longer be available in practice and the legitimacy of the courts would be undermined. Particularly in relation to the right to reasons, the administration would be hindered in its effectiveness if there were not some curtailment of the right. Indeed, despite the limitations built into section 24, it seems clear that these concerns are proving to be well founded and that additional limitations in the form of legislation are necessary.¹¹¹

Of course it must not be forgotten that the limitations clause in the interim Constitution does allow limitations of the rights entrenched in Chapter 3, where those limitations are reasonable and justifiable in an open and democratic society, based on freedom and equality, and where they do not negate the content of the right in question.¹¹² It can easily be envisaged that a limitation of, for example the right to reasons, to the effect that in certain mass justice situations an oral statement, or check marks on a list of possible reasons would be given instead of a written statement, would meet the criteria of section 33 of the interim Constitution, because effectiveness of the administration would be furthered in a reasonable manner. Thus the limitation would be justifiable in an open and democratic society based on freedom and equality, and the essential content of the right would not be negated.

Where a right contains limitations within its wording, as the rights in section 24 do, particularly section 24(c),¹¹³ the interaction between that right and the limitations clause may be problematic. If the right is subject to the limitations clause, as it is, because section 33 of the interim Constitution applies to 'rights entrenched in this Chapter', then the internal limitations of section 24 must surely be redundant and little more than rhetorical flourishes. Therefore the only explanation that makes sense is that, as the limitations were obviously included for good reasons, the rights in question are not subject to section 33 and are limited only by the internal limitation of their wording. Therefore the inquiry must turn to the nature of the internal limitations, because it is possible that the limitations do not meet the criteria laid down in section 33. In such

¹¹¹ Asimow note 22

¹¹² Section 33 of the interim Constitution

¹¹³ The right to reasons is not available if the reasons have been made public.

cases conflict arises and resolution of the conflict would prove problematic.

This is an interesting conundrum but it is unlikely to cause problems in the area of section 24, as the internal limitations are likely, if subjected to scrutiny in the light of the section 33 criteria, to pass muster, particularly as the availability of the rights is based on principles of fairness, justifiability and openness. These principles would have informed the negotiating process because of the desire to rectify the wrongs of the past. Furthermore, the variable thresholds to the right to just administrative action are not present in section 33 of the final Constitution. In addition the limitation of the right to reasons is not present (although this right is limited in the sense that it is only available where rights have been adversely affected¹¹⁴ and not also where interests are affected, as the right appeared in the interim Constitution¹¹⁵).

Therefore the interaction between the limitations clause and section 33 of the final Constitution should be less problematic. The problems that do arise can be dealt with by the legislation which will be enacted to give effect to section 33.

Leaving aside the possible complications which may arise from the interaction between section 7(4), and either the variable gateways of section 24 or the limitations clause, it is possible to explore the impact of section 7(4) on the previous position on standing to sue. Stated simply, the previous position was that, in addition to capacity to sue, a personal, direct and sufficient interest was required to constitute standing to sue.¹¹⁶ This second requirement poses problems in public law where, unlike private law, illegality on the part of a public authority may be of too general a nature to create a clearly ascertainable right on the part of any particular individual. Furthermore, the rules of standing were developed in private law to prevent vexatious litigation. This is hardly likely to be a problem in public law. Because of the 'private law' outlook on the issue in public law, administrative action can be immune from judicial challenge, if no one individual can show a legally recognised interest, even if the action is flagrantly illegal.

¹¹⁴ Section 33(2)

¹¹⁵ Section 24(c)

¹¹⁶ Baxter Administrative Law 652-659

For example at common law there was no '*actio popularis*' whereby any member of the public might apply for review in order to vindicate the public interest, if he or she was not affected personally by the action in question. In Bamford v Minister of Community Development,¹¹⁷ a claim by a member of Parliament that he had a right to represent the interests of the people in his constituency, by virtue of his office, was rejected¹¹⁸ (though his standing was granted on other grounds).

In terms of the rule it is nevertheless possible to seek relief when one's personal interest is shared by many members of the public at large. That interest, despite dicta in cases like Patz v Greene,¹¹⁹ need not be a special interest over and above that of other members of the public.¹²⁰ This is in contrast to actions to vindicate the public interest where no personal interest has been infringed. In such cases individuals normally have no standing.

However, some exceptions were made. Firstly, although the courts have refused to recognise the general rights of the taxpayer,¹²¹ it has been recognised in a number of cases that ratepayers may challenge the validity of action taken by their local authorities.¹²² Secondly, where legislation has been enacted in the interests of a particular individual or class of persons, the courts will presume that a violation of the legislation will automatically affect the interests of such an individual or class, and anyone falling into the protected category will have standing to challenge action taken in violation of legislation, without having to establish that his or her interests are in fact affected.¹²³

¹¹⁷ and State Auxiliary Services 1981 (3) SA 1054 (C), hereafter Bamford

¹¹⁸ at 1059E-G

¹¹⁹ 1907 TS 427, hereafter Patz v Greene

¹²⁰ Dalrymple v Colonial Treasurer 1910 TS 372 at 380-1, hereafter Dalrymple; Roberts v Chairman, Local Road Transportation Board (1) 1980 (2) SA 472 (C) at 474A-B, hereafter Roberts

¹²¹ Bagnall v the Colonial Government (1907) 24 SC 470

¹²² Dalrymple

¹²³ Patz v Greene

Thirdly, the liberal rules of standing for the *interdict de libero homine exhibendo*, in terms of which anyone may apply for the remedy if the detained person or his or her relatives is unable to do so, was extended. In Woods v Ondangwa Tribal Authority¹²⁴ standing was granted to the applicants, not in a case of the *interdict de libero homine exhibendo*, but for a prohibitory interdict sought in anticipation of unlawful detention, on behalf of persons who were able, strictly, to make the application personally as they were not yet in detention. However the applicants argued that they were not able to apply personally because of the distances involved, the limited means of those threatened and their lack of sophistication. Therefore standing was granted because those who did have the direct, personal and sufficient interest were not able to approach the court.¹²⁵ This rationale for the exception is surprising considering that it was clearly made on public interest grounds to provide a remedy where the liberty of an individual is threatened in emergency type situations. Therefore, although welcome, it would be wrong to regard this approach as anything more than a limited relaxation of the rules of standing.

In recent cases, *locus standi* has been granted on grounds of sufficient interest in circumstances which look a lot like 'public interest'. For example, in Johannesburg City Council v National Transport Commission¹²⁶ standing was granted to the council to contest the building of a toll road. In essence the council was representing the interests of the people who would be disadvantaged by the toll road but the court held that the applicant itself had a direct interest.¹²⁷ This seems to indicate a relaxing, at common law, of the rules of standing. However in Cabinet Transitional Government of SWA v Eins¹²⁸ Eins was denied *locus standi* to challenge an Act which could remove citizenship from anyone not born in Namibia, because the court held that there was no actual threat to his freedom of movement, only a potential threat which did not constitute a sufficient

¹²⁴ 1975 (2) SA 294 (A), hereafter Woods

¹²⁵ per Rumpff CJ at 311

¹²⁶ 1990 (1) SA 199 (WLD)

¹²⁷ at 203F

¹²⁸ 1988 (3) SA 1054 (C)

interest. This demonstrates the limits as to what the courts would regard as an interest.

Therefore, despite exceptions, the rules of standing at common law remained rigid. However the structure of the public administration has not, and, more than ever, the rules of standing, while suitable for private law, are not suitable for public law. Interests which cannot easily be accommodated by the individualised concepts of private law have acquired increased value; environmental concerns, public expenditure and social policies do not fit this mould. Pressures to expand the rules of standing were met with programmes of reform in England and America,¹²⁹ but until the interim Constitution, South Africa, as always, was not as responsive to pressures to reform.

Now however, section 7(4) has opened the doors to standing in 'public interest' cases where fundamental rights have been affected. The specific sub-sections of section 7(4) have already been covered, and what is clear is that a direct, personal and sufficient interest is no longer required to ground standing. Indeed specific provisions are made for class actions¹³⁰ and public interest litigation,¹³¹ as well as the situations covered by cases such as Woods v Ondangwa Tribal Authority.¹³² This stance recognises the fact that illegal administrative action should be subject to judicial challenge even if the action does not affect any one individual in the private law sense. It is difficult to see however, what use a class action will be in the area of rights claims. Because of the principle of *stare decisis*, cases in which one individual founds a rights claim are necessarily class actions encompassing everyone, in respect of that right.

Nevertheless it is apparent that the interim Constitution has significantly expanded the scope of judicial review. This can only enhance an integrative democracy based on participation, accountability and substantive as well as formal equality, as social schemes can be challenged without having to comply with the traditional criteria.

¹²⁹ Baxter note 116 667-672

¹³⁰ Section 7(4)(iv)

¹³¹ Section 7(4)(v)

¹³² Section 7(4)(iii)

However there are still concerns in the area of standing to sue. The main concern is that the courts will interpret the word 'interest' in section 7(4)(i) restrictively so that the effect of the section will be diluted, and the scope consequently narrowed. It is possible and indeed likely that the courts will continue to use the 'substantial, direct and personal' formula in the context of section 7(4). However it is also likely that the word 'interest' does not mean the same thing in each sub-clause, and in fact becomes a more diluted concept from section 7(4)(i) to (iv). Therefore (v) is a last resort and will hardly ever be used, particularly as it is difficult to envisage an interest which could be brought in terms of section 7(4)(v), which could not be brought under section 7(4)(iv). However it could be argued that sections 7(4)(iv) and (v) would be useful in some situations to add clout and to get around the *de minimis* rule. Whether or not section 7(4) will extend standing to a large extent depends on judicial interpretation of the word 'interest'. The way in which the courts approach this interpretation will be interesting because the word 'interest' also appears in section 24.

The second concern is that the rules of standing will continue to be restrictive for that type of administrative action which is not carried out by an organ of state, and therefore does not come within the parameters of the Constitution.¹³³ However the expanded test for standing may have an impact on more than the activities of organs of state. It is possible that this expanded notion of standing in respect of fundamental human rights will affect the common law rules of standing, because of the provisions of section 35(3). In terms of this section:

'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.'

The word 'shall' seems to indicate that the expanded notion of standing must affect the common law formulation of standing as the courts are enjoined to consider, for example, section 7(4), in its interpretation of the common law. Perhaps the consequence of this

¹³³ Because the action does not fall within the scope of section 7, the application section.

will be that the test for *locus standi* will be widened in the common law sphere as well. This is obviously an area in which judicial policy will play an important part but even a judge who is executive minded is likely to behave in a progressive manner, as this is the tendency of the executive at the moment.¹³⁴

OUSTER CLAUSES

Ouster clauses can be direct, in that they preclude judicial review of action taken 'in terms of' specific legislation or they can be indirect, in that they place such a degree of discretion in the hands of the administrator, that the jurisdiction of the courts is effectively ousted. This second type of mechanism by which the scope of judicial review is limited is best dealt with in the section dealing with the unwillingness of the court to supervise the exercise of executive power in the past. In any event, section 22 of the interim Constitution entrenches the right to have justiciable disputes settled in a court of law. The word 'disputes' probably effectively brings these types of provisions within reach of judicial review because, even if the court feels that the discretion is so wide as to render it non-justiciable, the mere fact that there is a dispute about the justiciability of the indirect ouster will mean that there is a right to have that dispute settled by a court of law. Therefore the focus will be on direct ouster clauses.

In the late 1980's the courts tackled the ouster clause in section 29(6) of the Internal Security Act¹³⁵ head-on. This section attempted to exclude action taken 'in terms of' the section in question from judicial review. In Minister of Law and Order v Hurley,¹³⁶ the appellants argued that this precluded the court from enquiring into the grounds which motivated an officer to make an arrest, in order to determine whether he had the 'reason to believe...' required by the Act. The court in this case echoed the presumption against ousters which, even where it appears that the court's jurisdiction has been ousted, strongly presumes that the legislation was not intended to have that effect.¹³⁷ Therefore Rabie J held that the court was competent to enquire whether the officer concerned had

¹³⁴ See the section on 'Horizontality'.

¹³⁵ 74 of 1982

¹³⁶ 1986 (3) SA 568 (A), hereafter Hurley

¹³⁷ at 584A-D

reasonable grounds for his belief that the person he arrested was a person contemplated by the Act.¹³⁸ This inquiry was held to be necessary because unless it was settled the court could not know whether the arrest was made 'in terms of' the section and therefore whether it could enquire further or not. Therefore in effect, the court in this case did not regard its jurisdiction as having been completely ousted.

However in Staatspresident v UDF¹³⁹ the court took the view that any inquiry into whether action was taken 'in terms of' the section was limited to an inquiry into whether the action was in strict compliance with the words of the statute, and not to any broader issues based on common law grounds of review. Therefore the court held that it had no jurisdiction to enquire into whether the regulation in question was void for vagueness. In effect this interpretation reinstated the intended effect of ousters, significantly limiting the scope of judicial review and putting large classes of administrative action beyond the glare of judicial scrutiny.

Section 24(a) however has changed that position. It reads:

'every person shall have the right to -

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

The primary purpose of paragraph (a) is to outlaw ouster clauses.¹⁴⁰ This is achieved because if the presence of some illegality makes administrative action unlawful then section 24(a) is infringed. If there is no illegality then the action is lawful and could not be struck down by a court of law even in the absence of the ouster.

The Constitutional Assembly's explanatory memoranda¹⁴¹ clears up the debate about whether 'lawful' refers to the wide (which incorporates all the grounds of review) or the

¹³⁸ at 586F-I

¹³⁹ 1988 (4) SA 830 (A)

¹⁴⁰ South African Constitutional Assembly, Draft Bill of Rights, Explanatory Memoranda 204 (Oct 1995); Du Plessis and Corder Understanding South Africa's Transitional Bill of Rights 163-68

¹⁴¹ *ibid*

narrow (which limits the inquiry to whether the action complied with the strict requirements of the wording) interpretation of *ultra vires*. Obviously the narrow meaning is preferred, not only because this has been expressly stated by the Constitutional Assembly¹⁴² but also because this is the only interpretation which makes sense of section 24. If 'lawful' in section 24(a) included all the grounds of review beyond those encapsulated by the narrow interpretation of *ultra vires* then the rest of section 24, which covers most of the other grounds of review, would be redundant.¹⁴³ It remains open to the state however to try to defend a particular ouster as a justifiable limitation on section 24(a), in terms of section 33 of the interim Constitution. This is highly unlikely to succeed however, as section 24(a) is reinforced by section 22 which entrenches the right of access to court. No internal limitations exist within section 24(a) as the right is available to every person 'where his or her rights or interests is affected or threatened'. Therefore section 33 of the interim Constitution is fully operational in respect of this right.

Each right in section 24 is available to a different class of people, depending on whether rights, legitimate expectations, or interests are affected or threatened. It is possible to see rights as stronger than legitimate expectations and both of them as stronger than interests. Furthermore if a right is affected then it is in more danger than if it is merely threatened. Therefore the different variations of these criteria in section 24 present thresholds to the rights of varying degrees of difficulty. The convoluted formulas which result are the product of fears that these rights may have an inhibiting effect on the ability of the transitional government meaningfully to pursue its policy of socio-economic transformation. However, the courts have been criticised for their unimaginative and restrictive application of the section thus far, and therefore these fears are proving groundless.¹⁴⁴ This is borne out by section 33 of the final Constitution which does away with the variable thresholds of section 24 and makes the rights available to 'everyone'. This was done obviously in the comforting knowledge that controls could be imposed by the legislation to be enacted to give effect to section 33.

¹⁴² *ibid*

¹⁴³ Carpenter 'Administratiewe Geregtigheid - Meer Vrae as Antwoorde' (1994) 57 THRHR 469-9

¹⁴⁴ Corder note 3 3

At the moment however, on our interpretation of 'right', and 'interest', and 'affected', and 'threatened', the right to lawful administrative action is available, as it is in the final Constitution, to the largest class of people.

The right in section 24(a) consequently brings within the reach of judicial review classes of administrative action which might otherwise lie beyond judicial scrutiny. This significantly expands the scope of judicial review and makes an important contribution to fostering what Mureinik calls 'a culture of justification'.¹⁴⁵

CLASSIFICATION OF FUNCTIONS

In South African law, the classification of functions approach was based on the traditional three fold classification of the powers of government into, firstly, legislative and executive functions. The executive functions were further divided into judicial and administrative functions. A further division was then made of the administrative functions into ministerial, quasi-judicial and purely administrative functions. The classification was taken from English law, where it was significant because of the issue whether the remedies of *certiorari* and prohibition were available to control courts alone, or whether they could control other bodies as well.¹⁴⁶ These issues are irrelevant to South African law and furthermore even in England, with the case of Ridge v Baldwin¹⁴⁷ the distinction has been discredited and the mechanical approach to the application of *audi alteram partem*, has been replaced by a general duty to act fairly.

South African courts however elevated the classification to the level of doctrine and used it mechanically to determine the grounds on which they were prepared to review administrative action, particularly to determine whether *audi alteram partem* was available or not.¹⁴⁸ Another approach was that defined by the terms, 'intrinsic' and

¹⁴⁵ Mureinik note 80 39

¹⁴⁶ Forsyth note 21 123

¹⁴⁷ [1964] AC 40

¹⁴⁸ This was covered superficially in the section on 'Executive-mindedness in the Application of *Audi Alteram Partem*'.

'instrumental'. These approaches have already been covered in the area exploring executive-mindedness in the application of *audi alteram partem* and won't be covered again here. They do tie up however with the classification of functions approach.

According to this approach, put simply, if a function is classified as purely administrative then *audi alteram partem* does not apply but if the function is classified as quasi-judicial then the maxim does apply.¹⁴⁹ The problem lies with the lack of guidance provided by the courts as to how to determine whether a function is quasi-judicial or administrative. Often the courts reduce the inquiry to whether the function affects legal rights or not, and if it does then it is quasi-judicial.¹⁵⁰ The way that this approach can be reconciled with the intrinsic or instrumental approaches is that often, the fact that a function can be classified as quasi-judicial will be seen as an indication that the legislature did intend to include the right to a hearing, or that the presumption in favour of a hearing should operate. This ties in with another approach to the applicability of *audi*, although it is apparent that it is extremely difficult to separate the approaches as they were often used together, sometimes even as the justification for one another, creating conceptual confusion.

The third approach is that before a right to be heard exists, the decision must prejudicially affect a pre-existent right. For example in Laubscher, where an attorney was not granted a hearing before being refused permission to consult with his clients on native trust land, the court held that the applicant had no antecedent right to go upon the property, and the refusal did not prejudicially affect his property or his liberty.¹⁵¹

The conceptual confusion is evident if one tries to reconcile this approach with the instrumental approach, because if the right to be heard is a privilege to be granted by the particular statute then it is irrelevant whether pre-existing rights are affected by the decision or not. The legislation may grant the right to persons who had no pre-existing rights, or it may deny it to persons whose rights are affected. Nevertheless all the

¹⁴⁹ Forsyth note 21 123

¹⁵⁰ Defence and Aid at 269E and Laubscher at 549

¹⁵¹ at 549F

approaches continued to be used to ground the application of *audi*, but often as ex post facto justifications of decisions that upheld the status quo. For example, Hall AJA in Laubscher also held that there was nothing quasi-judicial about issuing permits and that therefore there was no reason to grant a hearing.¹⁵²

Hall AJA came to this crucial conclusion without any definition of 'quasi-judicial' as Botha JA did in Defence and Aid. In that case Botha JA said that whether a function was quasi-judicial or not was the same thing as whether it affected rights or not, as the court did in Laubscher. This does nothing to explain what a quasi-judicial function is and furthermore, the definition of a pre-existing right is equally flimsy, because a right will not be seen as pre-existing until that right is recognised by the official or public body concerned, or by the court.

This type of reasoning cleared the way for a line of cases which were clear indications of the court's unwillingness to control the executive in matters of government policy. In Minister of the Interior v Mariam¹⁵³ Botha JA held that the function of expropriation was a purely administrative one as it did not affect any pre-existing rights.¹⁵⁴ If the expropriation of property does not affect existing rights then it is difficult to envisage circumstances which would. It is clear that Botha JA used the classification of functions approach, defined by the existing rights approach, to smooth the government's acquisition of land by expropriation with as little judicial control as possible.

Similarly, in Defence and Aid, in addition to the dictum that the right to be heard had to be incorporated by implication before it would be available, the court held that the function in question was purely administrative and did not affect existing rights. Botha JA reached this conclusion on the basis that there was no causal link between the decision of the State President to ban the organisation and the report of the committee, which had not granted a hearing¹⁵⁵, and therefore the decision did not affect the rights

¹⁵² at 554C

¹⁵³ 1961 (4) SA 740 (a), hereafter Mariam

¹⁵⁴ at 751D-H

¹⁵⁵ at 271E

of the organisation. Botha JA's argument is, as it was in Mariam, artificial and unrealistic. Again he was simply justifying his reluctance to control the executive in the 'security' area.

This judicial attitude is apparent in the subsequent split between security cases in which hearings were not granted and non-security cases in which they were. For example *audi* was not held to be applicable in Winter v Administrator in Executive Committee¹⁵⁶ because the right to be heard had not been positively implied by the statute in question¹⁵⁷ but in Oberholzer a hearing was granted in a case that did not involve issues of government policy, but involved the closure of a road. The distinction between quasi-judicial and administrative functions was criticised and a hearing was granted.¹⁵⁸ As has been discussed Blom fused the lines of security and non-security cases by firmly entrenching the intrinsic approach.

At the time of the decision in Blom the doctrine of legitimate expectation arose in the 'hospital' cases¹⁵⁹ and was confirmed by the Appellate Division in Traub. In terms of this doctrine an expectation becomes legitimate if there is an express promise of a hearing, or an existing practice of granting a hearing or the substantive benefit. If the expectation is legitimate this gives right to a legal right to be heard. This widened the availability of *audi* beyond the existing rights approach left in place by Blom. It was widened even further in Minister of Justice, Transkei v Gemi¹⁶⁰ in which the court held that the two instances in which the court in Traub had held that an expectation would be legitimate were merely crystallised instances, and did not preclude other ways of legitimising an expectation.

This case was a shot in the arm for the doctrine of legitimate expectation after two

¹⁵⁶ 1973 (1) SA 873 (A)

¹⁵⁷ at 889

¹⁵⁸ at 876A

¹⁵⁹ Tshabalala v Minister of Health 1987 (1) SA 513 (W), hereafter Tshabalala; Mokoena v Administrator, Transvaal 1988 (4) SA 912 (W), hereafter Mokoena; Langeni v Minister of Health 1988 (4) SA 93 (W), hereafter Langeni.

¹⁶⁰ 1994 (3) SA 27 (TCA), hereafter Gemi

cases that did not build on what seemed to be a very promising doctrine. In Traub Corbett CJ had been mindful of what might turn out to be an 'unruly horse'. Therefore he stated:

'...in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority and the contrary desirability of avoiding undue judicial interference in their administration.'¹⁶¹

Despite this admonishment, however, the doctrine offered great potential for affording judicial review in cases in which no existing rights in the traditional sense were prejudicially affected. Chief among these were the dismissals of public sector employees. Indeed, it was in these types of cases that the doctrine of legitimate expectation first arose in the provincial divisions.¹⁶² However, when these cases were confirmed by the Appellate Division in Administrators, Transvaal v Zenzile¹⁶³ the maxim of *audi alteram partem* was held to apply not on the basis of legitimate expectation, but in terms of the existing rights formula, on the argument that summary termination of employment affected rights arising from the contract of employment. Furthermore Hoexter JA attempted to narrow the doctrine, albeit *obiter*, by limiting the circumstances in which an expectation would be legitimate to where there was an express promise or existing practice of a hearing only, and not the substantive benefit.¹⁶⁴

This trend was continued in Administrator, Natal v Sibiya¹⁶⁵ in which, also in a dismissal case, Didcott J decided to grant a hearing not on the basis of legitimate expectation but on an extended interpretation of the existing rights formula, as he was argued that the

¹⁶¹ at 761F-G

¹⁶² Mokoena, Tshabalala, and Langeni

¹⁶³ 1991 (1) SA 21 (A), hereafter Zenzile

¹⁶⁴ at 39

¹⁶⁵ 1992 (4) SA 532 (A), hereafter Sibiya

expectation of remuneration was a form of a right to property.¹⁶⁶

Therefore the confirmation of the Traub doctrine in Gemi was very encouraging. In this confirmation of Traub, Gemi cemented the end of the classification of functions approach. In Traub Corbett CJ examined warnings in the past by the courts against a too ready adoption of this approach as a mechanical solution to a particular legal problem,¹⁶⁷ often as an ex post facto justification of a decision pandering to the executive, and said that:

‘...I do not think that the quasi-judicial/purely administrative classification, relied upon by council is of any material assistance in solving the problem presently before the court.’¹⁶⁸

Furthermore, with the adoption of the legitimate expectation doctrine the rigid formulation of the existing rights doctrine crumbled in the face of a new emphasis on fairness. This is illustrated by Corbett’s statement that there are many cases ‘where an adherence to the formula of liberty, property and existing rights would fail to provide a legal remedy when the facts cry out for one’.¹⁶⁹ He came to this conclusion after an excursus of the English cases in which the doctrine of legitimate expectation evolved, after which he held that:

‘A frequently recurring theme in these English cases concerning legitimate expectation is the duty on the part of the decision maker to "act fairly". As has been pointed out this

¹⁶⁶ at 538G-539B

¹⁶⁷ Pretoria North Town Council v A1 Electric Ice-Cream Factory 1953 (3) SA 1 (A) at 11A-C; Williamson JA in his dissenting judgement in Defence and Aid at 278C-D; Rumpff CJ in Oberholzer v Padraad van Outjo 1974 (4) SA 870 (A) at 875-876B; Goldstone J in Langeni at 96B-G. Another blow to the classification of functions approach was dealt in South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) where the Appellate Division took the significant step of rejecting the proposition that the *audi* principle never applies to acts of legislative character, noting that administrative actions which have a general impact may also cause particular prejudice to an individual or a particular group of individuals, at 12F-G

¹⁶⁸ at 763I-J

¹⁶⁹ at 761E

is simply another, and preferable, way of saying that the decision maker must observe the principles of natural justice....the phrase, "a duty to act fairly", must not be misunderstood or misused. It is not for the courts to judge whether a particular decision is fair. The courts are only concerned with the manner in which the decisions were taken and the extent of the duty to act fairly will vary greatly from case to case. Many features will come into play....'¹⁷⁰

The adoption of the legitimate expectation doctrine heralded a shift of the focus of inquiry from the results of the administrative act, as in the classification of functions approach and the existing rights approach, to the manner in which the decision was taken.¹⁷¹

Corbett CJ further observed, after reviewing the English judgements on the development of the doctrine of legitimate expectation, that they evolved in the social context of the age in order to make the grounds of interference with the decisions of public authorities co-extensive with notions of what is fair and not fair in the particular circumstances of the case.¹⁷²

Legitimate expectation, in other words, must not be seen as an isolated ground of review, but as a consequence of a development of judicial review towards the twin goals of discouraging unfair and irrational actions by those to whom public power has been conferred. Therefore Traub has reduced the considerations inherent in the quasi-judicial classification and the prior rights test from the status of absolute rules to mere *indicia* as to the fairness or otherwise of departures from natural justice.¹⁷³

The real import of the doctrine of legitimate expectation is therefore to place an onus

¹⁷⁰ at 758H-I

¹⁷¹ Although Mureinik argues that the legitimate expectation doctrine is merely another manifestation of the deprivation theory of judicial review, which focuses on the effects of the decision. Nevertheless the adoption of legitimate expectation in Traub also saw the adoption of a new and strong emphasis on fairness.

¹⁷² at 761B-C

¹⁷³ Grogan 'Audi after Traub' (1994) 111 SALJ 94

on the administrative authority which has *prima facie* acted unfairly to satisfy the court why it failed to grant a hearing in the circumstances of the case. This is borne out by the emphasis of natural justice in Gemi, when Goldin JA held that:

‘...The right of a claimant to be heard by invoking the doctrine of legitimate expectation is based on the concept of natural justice. The question of departure from natural justice does not arise in deciding whether the doctrine should be invoked or should be curbed for the reasons explained by Corbett CJ. Any limitation on or departure from the application of this doctrine must be justified by the concept of natural justice. The test is when do the rules of natural justice not require the application of the legitimate expectation doctrine and not when is it justified to depart from the rules of natural justice.’¹⁷⁴

Section 24(b)

Section 24(b) entrenches the right to procedurally fair administrative action where any rights or legitimate expectations are affected or threatened. Since the developments in Traub, which focused the inquiry on to the manner in which the decision is taken, the doctrine of legitimate expectation and the rules of natural justice, the scope of judicial review in the area of the application of *audi* has been substantially widened. Therefore section 24(b) does not represent an enormous departure from the common law. However in Van Huyssteen v Minister of Environmental Affairs and Tourism,¹⁷⁵ Farlam J held that section 24(b) does not codify the existing law unless it was already so wide and flexible that it was covered by the concept of procedural fairness. Therefore he argued that *audi alteram partem* and *nemo iudex in sua causa* are but two manifestations of the fundamental principles of fairness which find expression in the rules of natural justice in our law.¹⁷⁶ Therefore even if section 24(b) is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under the section is entitled, in appropriate cases, to more than just the application of the *audi* and the

¹⁷⁴ at 33C-E

¹⁷⁵ 1996 (1) SA 283 (C)

¹⁷⁶ at 304E-305B

nemo iudex maxims.¹⁷⁷ He or she is entitled to the principles and procedures which in the particular situation are right and just and fair.¹⁷⁸

According to Van Huyssteen therefore, section 24(b) brings South African administrative law into line with the English general duty to act fairly as enunciated in Ridge v Baldwin. However some cases dealing with section 24(b) still appear to be influenced by the classification of functions approach. For example, the case of Jeeva v Receiver of Revenue, Port Elizabeth¹⁷⁹ seems to import a notion of substantive fairness into the section 24(b) inquiry,¹⁸⁰ but holds that the applicants are entitled to administrative action which is lawful, justifiable, and both substantially and procedurally fair because the administrative action in question¹⁸¹ was quasi-judicial in nature, as it had a material bearing upon the rights and interests of the applicants.¹⁸²

In Standard Bank of Bophutatswana v Reynolds,¹⁸³ despite a promising judgement on the nature of the review for unreasonableness, the court was influenced by the fact that the administrative action in question was of a quasi-judicial nature. These cases demonstrate a tendency on the part of the court to continue to be influenced by the classification of functions approach despite the developments of Traub, the interim Constitution and Van Huyssteen.¹⁸⁴

¹⁷⁷ The scope of this paper does not permit a discussion of the content of *audi*, natural justice or procedural fairness. Reasons, although entrenched in a different section, are of course included to an extent and will be discussed below. The further details will have to be worked out by what is already available at common law, and what more is required by the principles enunciated in Van Huyssteen and elsewhere.

¹⁷⁸ following the words of Lord Morris of Borth-y-Gest in the English case of Wiseman v Borneman [1971] AC 297 (HL) at 308H-309B

¹⁷⁹ 1995 (2) SA 433 (SECLD), hereafter Jeeva.

¹⁸⁰ at 443I

¹⁸¹ an inquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973

¹⁸² at 443J

¹⁸³ 1995 (3) SA 74 (B), hereafter Reynolds

¹⁸⁴ These developments combine to form a tendency towards a judicial attitude predicated on the awareness of a general duty to act fairly.

The courts are also still influenced by the existing rights approach. In Podlas v Cohen and Bryden¹⁸⁵ the court held that a decision of the Master of the Supreme Court to hold an inquiry in terms of the Insolvency Act,¹⁸⁶ and to issue notices to attend the inquiry, did not prejudicially affect any existing rights and therefore it was not necessary to apply the maxim of *audi alteram partem*. Similarly the court did not feel obliged to set aside the administrative action on the basis of a failure to provide reasons.¹⁸⁷ The court was further influenced by the fact that the action in question was purely investigative, demonstrating an adherence to the classification of functions approach.¹⁸⁸

However one of the most recent cases on the subject, Foulds v Minister of Home Affairs,¹⁸⁹ seems to take a more progressive attitude to procedural justice. Streicher J mentioned, although without discussion, the possibility that 'affected' in section 24(b) may mean 'determine' and not 'deprive'.¹⁹⁰ Mureinik isolates two theories of natural justice in our law: the deprivation theory, which restricts the right to be heard to decisions that deprive a person of a prior legal right, and the determination, theory which requires that any decision which determines a legal right must be accompanied by a hearing.¹⁹¹ It is clear from the discussion of the approach taken to the applicability of *audi* that, in the past, the courts focused on the effects of the decision and therefore fell squarely within the parameters of the deprivation theory. This is, as has been shown, too restrictive, but Mureinik argues that the determination theory is too lenient and would impose unreasonable procedural restraints.¹⁹² Therefore he proposes a provisional

¹⁸⁵ 1994 (4) 662 (T), hereafter Podlas

¹⁸⁶ 24 of 1936

¹⁸⁷ at 675D-H

¹⁸⁸ It is questionable anyway whether an inquiry such as this would have been rather classified as quasi-judicial in any event, under the traditional system.

¹⁸⁹ 1996 (4) SA 137 (WLD), hereafter Foulds

¹⁹⁰ at 142E-F

¹⁹¹ Mureinik note 54 29

¹⁹² *ibid*

determination theory, which gives anyone affected by a decision determining his or her rights a *prima facie* entitlement to participate in the decision making process, which may be defeated by a cogent case to the contrary.

It is submitted that this theory has been introduced into and confirmed in our law by Traub, Gemi, section 24 read with section 33 of the interim Constitution and Van Huyssteen. Therefore the scope of judicial review has been widened both by developments in the common law and by section 24(b). This fosters a culture of participation and accountability vital to the growth of an integrative democracy. These developments have been entrenched by section 33 of the final Constitution which entitles everyone, and not only the class of people entitled in terms of section 24(b), to procedurally fair administrative action. This is more in line with the provisional determination theory since there is no threshold of deprivation upon which the right depends, unlike section 24(b). Furthermore, the right is subject to the limitations clause and the tenets of the national legislation envisaged to give effect to the right, although such legislation will have to conform with section 36 (the limitations clause) of the final Constitution.

THE IMPACT OF THE INTERIM CONSTITUTION, PARTICULARLY SECTIONS 24(c) AND (d), ON THE COURTS' WILLINGNESS TO SUPERVISE THE EXERCISE OF LEGAL POWER BY THE EXECUTIVE

The sixth factor which limited the scope of judicial review was the unwillingness on the part of the court to supervise the exercise of legal power by the executive. As was outlined in Part One, this unwillingness was the result of several elements of South Africa's political context and the philosophical foundations of its legal and constitutional system. In short, because of the doctrines of Parliamentary sovereignty and separation of powers, the court perceived its role to be limited to giving effect to the will of the legislature. Therefore it was reluctant to question the exercise of discretion conferred upon the executive by the legislature and confined itself to inquiries which did not impinge on the merits of the decision and often, not even on the decision making process, unless there was some evidence of gross irregularity. Of course it is unrealistic

to pander to the view that the courts' role is always one of giving effect to the intention of the legislature and, where the courts had some leeway in the form of an interpretive function, they still displayed reluctance to question the exercise of legal power as a result of 'executive-mindedness'.

The review of discretion is a controversial area as, while the granting of discretion to administrative agents is vital in a modern state, the granting of discretion is akin to the granting of power to make policy, and the courts are not willing to interfere in matters of governmental policy. They will intervene on occasion but often this depends on the specificity of the grant of power. The more specific, the more willing the courts are to intervene. Fortunately, in the light of the interim Constitution as a whole and particularly its commitment to 'an open and democratic society', and access to the courts in section 22, such broad subjective discretions would be construed as incompatible if not with the letter, then at least with the spirit of the constitution.

At common law, before the constitution, two approaches were taken to the review of discretion. The honesty approach limited the review power to cases of proven dishonesty and progressed from the assumption that the administrative agent would act rationally. Therefore (almost) the only requirement for the valid exercise of the discretion would be honesty. The rationality approach on the other hand, proceeded from the assumption that the administrative agent might act irrationally and therefore the court would be willing to review the action for rationality or reasonableness in the decision making process. Baxter calls this kind of inquiry, review of 'dialectical unreasonableness', as opposed to substantive unreasonableness, which is unreasonableness as perceived as a result of the effects of the decision.¹⁹³ He uses this nomenclature to illustrate the point that review of unreasonableness, if confined to review for dialectical unreasonableness, need not cross the barrier between review and appeal, which the courts try to avoid as they see it as an unacceptable blurring of the roles of the legislature and the judiciary. Despite the desirability of the rationality approach, from the standpoint of accountability and openness, the courts followed the honesty approach.¹⁹⁴

¹⁹³ Baxter note 116 485

¹⁹⁴ Although Baxter argues that in fact, the courts have been following the rationality approach in practice. Baxter note 116 533

In Union Government v Union Steel¹⁹⁵ the court held that it could only review a mistake of fact if there was some evidence of dishonesty, thereby firmly entrenching the honesty approach. This approach was affirmed in Sachs v Minister of Justice and again in Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council.¹⁹⁶ In Firs Ogilvie-Thompson AJ expressly rejected the rationality approach and quoting Union Steel said:

‘There is no authority that I know of for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness;...emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is inexplicable except on the assumption of mala fides or ulterior motive...or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter.’¹⁹⁷

This passage illustrates the considerable onus resting upon a litigant seeking to set aside the exercise of a discretion on the ground of unreasonableness. He or she must show that the unreasonableness relied upon is so great as to, ‘on a preponderance of probabilities at the end of the case, warrant the inference of the existence of mala fides or one or the other of the further features mentioned...’.¹⁹⁸ This is often called the ‘symptomatic unreasonableness’ test.¹⁹⁹

While this seems a considerable onus indeed it was modified in National Transport Commission v Chetty’s Motor Transport,²⁰⁰ so that what was required was proof of gross unreasonableness to so striking a degree as to warrant the inference of a failure to apply the mind.

¹⁹⁵ 1928 AD 220, hereafter Union Steel

¹⁹⁶ 1971 (1) SA 56 (A), hereafter Firs

¹⁹⁷ at 80B-C, quoting Union Steel at 237,

¹⁹⁸ at 80E

¹⁹⁹ Taitz ‘But ’Twas a Famous Victory’ (1978) AJ 109 at 111

²⁰⁰ 1972 (3) SA 726 (A), hereafter Chetty’s Motor Transport

The heaviness of this onus was exacerbated by the frequent failure on the part of the administrative agency to provide reasons for decisions. It can be argued that the principles of natural justice imply a duty to give reasons²⁰¹ and therefore at common law a person should have been entitled to reasons where his or her existing rights were affected, or where he or she had a legitimate expectation. This, however was not the case. There was no right under preconstitutional law to give reasons.²⁰² Some cases however did hold that a failure to give reasons would constitute an adverse element in assessing the conduct of the person making that decision.²⁰³ Holmes JA however, in Chetty's Motor Transport, diluted this statement by stating that if there is direct *prima facie* evidence against an administrative agent, for example of arbitrariness, and it elects to remain silent, then the direct evidence will be strengthened. If, however the evidence is circumstantial then a failure to provide reasons will not strengthen the evidence.²⁰⁴

It is evident that the giving of reasons was hardly seen as a priority. This is not surprising as a decision maker who is compelled to give reasons must at least consider the appropriate factors and produce an apparently justified decision, which facilitates judicial scrutiny of that decision. These are not desirable developments for a court that was reluctant to hinder government policy, was executive-minded and was proceeding on the assumption that administrative agents almost always acted honestly. A combination of a reluctance to supervise the legal power, and a lack of material on which any possible control may have been exercised, severely limited the scope of judicial review and contributed to an atmosphere of extreme secrecy and unaccountability.

There were some exceptions however. Subordinate legislation of a local authority was

²⁰¹ Baxter note 116 569

²⁰² 'an agency would be well advised to give reasons but it is not required.' Chetty's Motor Transport at 736-37

²⁰³ Firs at 81F-G

²⁰⁴ at 736A-C

held to be subject to review for unreasonableness alone.²⁰⁵ The test for unreasonableness in these cases was relatively well worked out and centred on concepts of manifest injustice and inequality between the parties. One of the few ground breaking exceptions was formulated by Jansen JA in Theron v Ring van Wellington,²⁰⁶ on the basis of the common law presumption in favour of reasonable decisions. He argued that unreasonableness is an independent ground of review of the decisions of tribunals exercising powers emanating from contractual relationships, and of disciplinary tribunals created and established by statute. He identified the use of the 'formal standard' ('formele maatstaaf') which had been prevalent since Union Steel, (in essence, the symptomatic unreasonableness rule) and developed the extended formal standard to be used in the circumstances described.

The extended formal standard for intervention in review was held to apply²⁰⁷ in respect of decisions of a purely judicial nature, in cases not only in which the finding is based on no evidence whatsoever, but also to cases in which the evidence is not such that the finding may be reasonably made on the basis thereof. Furthermore Jansen emphasised that the extended formal standard, as it is not a test whether the court would have decided otherwise, does not breach the barrier between review and appeal. However he did point out that the Court would necessarily have to apply legally correct standards to establish the *facta probanda* and to judge what may be considered as evidence in the specific case.

Jansen distinguished cases like Union Steel, Chetty's Motor Transport and Firs by pointing out that those cases dealt with 'quasi-judicial decisions' whereas the test he envisaged applied only to purely judicial decisions, as the court was in a position to supervise the exercise of the discretion by bodies exercising judicial functions, as this is where the expertise of the court lies. Furthermore, Jansen expressed reservations about the 'formal standard' laid down in those cases as it involved a distinction between the merits of a pronouncement, and certain errors of fact or law which fell out of the

²⁰⁵ Sinovich v Hercules Municipal Council 1946 AD 783, following the English decision of Kruse v Johnson [1898] 2 QB 91

²⁰⁶ van die NGSK in SA 1976 (2) SA 1 (A), hereafter Theron

²⁰⁷ at 20D-F

purview of the merits. The formal standard did not involve cognisance of the presumption against unreasonableness, and other developments in the law, such as the reasonable evidence test which was prevalent in the USA and, according to Jansen JA had been developing in South African law since the Second World War.²⁰⁸

This novel and pioneering approach was unfortunately not always subsequently adhered to, and it appears that the courts still tended towards the traditional 'symptomatic unreasonableness' approach rather than the approach adopted by Jansen JA. Thus in Goldberg v Minister of Prisons²⁰⁹ the Appellate Division adopted the narrow view of unreasonableness by stating that it must be 'of so striking a degree as to warrant the inference that the repository of the discretionary power has acted in bad faith.'²¹⁰ However Corbett CJ referred to Jansen's dictum when he laid down the grounds upon which the Supreme Court exercises its power of review at common law, in Johannesburg Stock Exchange v Witswatersrand Nigel Ltd²¹¹ and again with approval in Hira v Booyesen in 1992.²¹² This case deals with review on the basis of mistake of law, and Corbett, like Jansen, held that the court will be more willing to interfere in a purely judicial kind of inquiry which requires the determination of objectively ascertainable criteria. In other kinds of inquiries the court is unlikely to interfere and more likely to determine that if there was a mistake of law the administrative agent had the discretion, as part of his or her policy laden powers, to make the mistake. In purely judicial decisions however, where the interpretation of a statutory principle, test or standard is not left to the sole and exclusive jurisdiction of the decision maker, the decision is reviewable for want of facts that, applying the correct criterion, reasonably justify the decision.²¹³ Mureinik argues that this settles once and for all that purely judicial decisions

²⁰⁸ at 17B-G

²⁰⁹ 1979 1 SA 14 (A), hereafter Goldberg

²¹⁰ at 38E

²¹¹ 1988 (3) SA 132 (A) at 152A-E, hereafter Wits Nigel

²¹² 1992 (4) SA 69 (A), hereafter Hira

²¹³ at 93H

are reviewable at the common law on the American substantial evidence standard,²¹⁴ which Baxter argues is the equivalent of the 'reasonable evidence' standard²¹⁵ (adopted by Jansen JA in Theron).

Therefore the law relating to the review of unreasonableness and the control of legal power seemed settled but the limits on judicial review remained firmly in place, at least in relation to decisions that were not purely judicial in nature. The unwillingness of the court to review for unreasonableness on its own had not been changed in these types of decisions, (despite the demise of the classification of functions approach and its implications on the willingness of the courts to review on the grounds of natural justice). Clearly the scope of judicial review was severely limited by the dominance of the honesty approach in cases other than those dealing with purely judicial decisions. Section 24, however, has been interpreted as opening the doors to a more flexible approach to review for unreasonableness.²¹⁶ One of the fundamental changes is the introduction of the right to reasons in section 24(c) which will make a considerable difference not only in the area of procedural justice, but also in the area of review for unreasonableness.

Section 24(c)

Section 24(c) entrenches the right to be furnished with reasons in writing where rights or interests are affected unless the reasons have been made public. This right is of profound significance and will improve the quality of administrative decision making and justice. The absence of the duty to give reasons greatly compounded the abuse of administrative power and discretion, particularly as the onus on an applicant seeking to establish reasons grew to an almost impossible burden. Therefore its importance in establishing a climate of accountability cannot be exaggerated.²¹⁷

²¹⁴ Mureinik (1993) Annual Survey of South African Law 741

²¹⁵ Baxter note 116 501

²¹⁶ This will be dealt with in the sub-section on section 24(d)

²¹⁷ Devenish 'The Interim Constitution and Administrative Justice in South Africa 1996 (3) TSAR 458 466

There is a concern however that the effect of this right could negatively impact on the efficiency of public administration, particularly as reasons have to be furnished in writing. To alleviate this potential problem there is an internal limitation that reasons will only be provided if they have not been made public. The parameters of 'made public' will have to be fleshed out judicially. What is required by reasons will also have to be worked out. There is scant case law on this subject but what there is indicates that the mere restatement of the requirements of the statute would not be sufficient.²¹⁸ In the English case of Re Poyer and Mills Arbitratum²¹⁹ the Queens Bench in applying and interpreting 'reasons' in section 12 of the Tribunals and Inquiries Act,²²⁰ which stipulates that certain tribunals must furnish reasons for decisions taken, explained:

'proper, adequate reasons must be given; the reasons that are set out must be reasons which will not only be intelligible but which deal with the substantial points that have been raised...'²²¹

Section 35(1) of the interim Constitution provides that, 'in interpreting the provisions of this Chapter a court of law.....may have regard to comparable foreign case law.' Therefore this case may be of some use in the interpretation of the word 'reasons'.

The requirement of 'unless made public' goes some way towards constraining the right to written reasons, but the right is available to a large class of people, and it seems as if the fear that accountability may outweigh the necessity for an effective administration may be justified. This is clearly what motivated the decision in Xu v Minister van Binnelandse Sake²²². In this case Stafford J held that the applicants, who were aliens as defined in the Aliens Control Act²²³, did not have any rights, interests or legitimate

²¹⁸ Nkondo and Gumede v Minister of Law and Order 1986 (2) SA 756 (A), hereafter Nkondo and Gumede.

²¹⁹ 1964 2 QB 467

²²⁰ 1971

²²¹ at 468

²²² 1995 (1) SA 185 (T), hereafter Xu

²²³ 96 of 1991

expectations of continued residence in South Africa and were therefore not entitled to reasons for the refusal to extend a temporary residence permit and a refusal to issue such a permit, respectively.²²⁴ The reason the court was reluctant to enforce section 24(c) was the fear that if every alien were to be granted the right to written reasons for a refusal of a temporary permit, administrative chaos would result.

Understandable though this reaction may be, it is submitted that this case was wrongly decided, particularly in the light of recent case law. In Tseleng v Chairman, Unemployment Insurance Board²²⁵ Heher J held:

‘It is beyond question administratively unfair to fail to draw the attention of an applicant that a board relies upon a particular policy and by such failure to deprive the applicant of the opportunity of making submissions as to why he should be treated as one who qualifies within the terms of that policy.’²²⁶

This too was a case where the applicant was applying for a benefit. Therefore it could have been argued that he had no right or interest, along the lines of Xu.

In Foulds the applicant sought reasons for the board’s rejection of his application for permanent residence status. Therefore the facts bear a similarity to those in Xu. The case was decided very differently, however. After a review of foreign case law, in terms of section 35(3) of the interim Constitution, Streicher J came to the conclusion that while it was correct that the applicant had no right to, or legitimate expectation of the granting of the permit, he did have a legitimate expectation that the Board would act fairly. This would include informing him of adverse information on which they may base their decision. Although section 24(c) refers to rights or interests, it is not incorrect to base this decision on a legitimate expectation as interests include legitimate expectations, although not all interests will qualify as legitimate expectations.

Streicher J dispenses with the fears of a chaotic administration and states:

²²⁴ at 194B-D

²²⁵ 1995 (3) SA 162 (T), hereafter Tseleng

²²⁶ at 178J-179A

'In the light of the facts placed before me in this case, there is therefore no reason to believe that to require the respondents to inform the applicant of adverse information obtained and of adverse policy considerations would constitute undue judicial interference with the respondents administration and would cause major administrative problems.'²²⁷

It is apparent that the courts are now far more willing to supervise the exercise of administrative discretion and to require reasons of the administrative agents. This is particularly striking in Foulds as Streicher J decided to determine the case on the common law as there was no need to have recourse to section 24.²²⁸ This case illustrates the move towards the general duty to act fairly at common law as well as a more flexible approach to the supervision of the exercise of discretion by the executive.

Despite the lenient approach to the application of the right to reasons shown by these cases, the right to reasons has been substantially cut down in section 33 of the final Constitution. It states that everyone whose rights are affected by administrative action is entitled to written reasons whereas section 24(c) affords this right also to those whose interests are affected. This attenuation arose from concerns about the workability of section 24, particularly in terms of the burden which it places on administrators to be accountable for their actions. The ANC negotiators were concerned that practices developed over decades were not coping with the demands of openness and justifiability, particularly in the area of supplying reasons. Some negotiators were even of the opinion that the right to reasons was placing the administration under such a burden that the right should be removed altogether. The resulting section is a compromise in that the right is cast in generous and simple terms but its operation (depending on the interpretation given to the words 'given effect to' in section 33) is suspended pending the adoption of national legislation.²²⁹ That such legislation is vital is accepted,²³⁰ but it

²²⁷ at 149 E-F

²²⁸ at 142E-F

²²⁹ See Corder note 3 6

²³⁰ See Asimow note 99

is nevertheless a dilution of the principles of administrative justice. Compared with the common law however, it is a breakthrough, as is section 24(d).

Section 24(d)

Section 24(d) provides for the right to administrative action which is justifiable in terms of the reasons given for it where rights are affected or threatened. The first thing to point out is that the reasons referred to are not confined to those produced in terms of section 24(c), because if this were the case, the strain on the administration would not be feasible, as the reasons produced in terms of section 24(c) would have to be sufficiently detailed to stand up to section 24(d) scrutiny. Mureinik argues that if the point of the bill of rights is to foster a culture of justification, which he argues it is, then sections 24(c) and (d) should not be interpreted as to be read together, particularly as they govern different classes of administrative action.²³¹

Section 24(d), despite debates as to the meaning of 'justifiable', is the solution to the courts unwillingness to review the exercise of discretion by way of anything other than the traditional symptomatic unreasonableness test and honesty approach, as well as the concomitant extremely burdensome onus on the litigant seeking to establish unreasonableness. Mureinik argues that the notion of justifiability is the same as that of reasonableness, and that the only reason that the word 'reasonable' was not used was because of persistent dissension in the relevant drafting committee.²³² Basson too is of the opinion that the terms 'justifiable' and 'reasonable' should be given the same meaning.²³³

If this line of argument is accepted, as there is no reason why it should not be, then the debate centres around what is meant by reasonable. One of the more likely approaches is that review on the basis of justifiability will follow the substantial evidence test which is used effectively when reviewing formal adjudication and rule making in the USA.

²³¹ Mureinik note 80 42

²³² Mureinik note 80 (n.33) 40

²³³ Basson South Africa's Interim Constitution (n49) 34

Devenish provides a definition of what would constitute substantial evidence:

‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’²³⁴

This seems to be the interpretation adopted by the most recent case on review for unreasonableness.

In Reynolds, Friedman JP examines the line of reasoning initiated by Jansen JA in Theron and confirmed by favourable comment by Chaskalson SC (as he then was)²³⁵ and the dicta of Corbett CJ in Wits Nigel and Hira. He also looks at recent developments in the law relating to judicial review,²³⁶ in order to hold that the test of gross unreasonableness did not, in view of the testing rights given to the courts in the interim Constitution, accord with the modern approach to judicial review, particularly when applied to a constitution that contains a bill of rights which is binding ‘on all legislative and executive organs of state at all levels of government’.²³⁷ Friedman JP held that in the light of these considerations it was necessary to adopt the less stringent test of ‘unreasonableness’ rather than the more restricted test of ‘gross unreasonableness’.²³⁸

Friedman JP went on to suggest the use of the substantial evidence test to widen the scope of review, and the reasonable evidence test to resolve questions of fact. As has been discussed these two tests are often seen as equivalent, and therefore the influence of Jansen JA’s reasonable evidence test in Theron is evident. Despite Friedman J showing an awareness of the interim Constitution, he decided the case on the basis of the common law as influenced by the legal development of the interim Constitution, and without reference to the standard of ‘justifiability’ in section 24(d). Furthermore the application of the more flexible approach to review for unreasonableness was influenced

²³⁴ Devenish note 217 469

²³⁵ Chaskalson ‘Legal Control of the Administrative Process’ (1985) 102 SALJ 422

²³⁶ at 89F-94J

²³⁷ section 7 of the interim Constitution

²³⁸ at 96G-H

by the fact that the administrative action in question, like that in Theron, was of a quasi-judicial nature, and therefore, the court demonstrated an adherence to the undesirable classification of functions approach. Therefore, while being extremely helpful as a standard for review of administrative action which falls within these parameters, it fails to provide an interpretation of 'justifiability' which is more widely applicable. It is hoped however that the case law will adopt the substantial evidence standard as the test for review of all administrative action in terms of section 24(d), so that unreasonableness tested by the substantial evidence standard can be elevated to a separate ground of review.

This test is distinguishable from that of pure reasonableness which is proposed by Mureinik.²³⁹ It lies somewhere between the standard of dialectical unreasonableness and substantive reasonableness as explained by Baxter²⁴⁰ Such an approach would preserve the doctrine of separation of powers and prevent the courts from substituting their own decisions for those of the executive.

If the substantial evidence test is not held to be more widely applicable, then it remains to be seen as to what interpretation will be given to the word 'justifiable' in section 24(d). It seems clear that at least this section will mean review for dialectical unreasonableness, in that the manner in which the administrative action is taken or a decision is made must be 'rational, coherent, and capable of being reasonably sustained having due regard to the reasons for the decision and the reasons given therefore.'²⁴¹ Although this definition certainly requires rationality in the decision making process it seems as if it may also import the reasonable evidence test in the words 'capable of being reasonably sustained having due regard to the reasons for the decision.'

In all the debates about the meaning of justifiable it is not often suggested that this section may import review for the unreasonable effects of the decision.²⁴² The

²³⁹ Mureinik note 54 356-357

²⁴⁰ Baxter note 116 485

²⁴¹ Cachalia et al Fundamental Rights in the New Constitution 74

²⁴² except by Wiechers Administratiefreg 268-286

Westminsterian background against which the courts have operated thus far baulks at the breach of separation of powers which this 'enquiry on the merits' would entail. Mureinik, even though he is a proponent of the view that justifiability allows review for unreasonable decisions on their own, would not go so far as to promote review for the unreasonableness of the effects of the decision because of the legitimate fear that the courts would usurp the legislature's policy making power, and the function of the executive, if 'justifiable' were to be interpreted in this way.²⁴³ Therefore it is submitted that a preferable view is that a justifiable decision need not be a reasonable one, in that it may be justifiable in terms of the reasons put forward for it, but need not necessarily have a reasonable effect on the individual concerned.²⁴⁴ This potentially far-reaching provision should provide sufficient constraints to cure the accumulation of executive power and consequent maladministration, repression, corruption and arbitrary abuses of the past, without trespassing into the legitimate territory of the executive, especially where such trespassing is likely to undermine attempts at socio-economic redistribution of power which are an essential part of our new democracy.²⁴⁵

Another way of interpreting 'justifiable' is as 'proportional'. De Ville proposes²⁴⁶ that the principle of proportionality provides a solution to the problem of substantively defective administrative decisions. Disproportionality has never been used as a ground of review in South Africa, in contrast to many European countries.²⁴⁷ In Germany the principle of proportionality stems from the concept of the material constitutional state (Rechtsstaat), which is based on principles like separation of powers, the principle of legality and the guarantee of fundamental rights. The main characteristic of the material constitutional state is that state authority is subject to higher legal values which are contained in a

²⁴³ Mureinik note 80 (n34) 40

²⁴⁴ Burns 'Administrative Justice' (1994) 9 SA Public Law 357

²⁴⁵ Corder 'Introduction: Controlling Public Power' in Corder, McLennan (Eds) Controlling Public Power 7

²⁴⁶ De Ville 'Proportionality as a Requirement of the Legality in Administrative Law in terms of the New Constitution' 1994 SA Public Law 360

²⁴⁷ For example France, Germany and Switzerland. It is also applied by the European Court of Justice.

written constitution.²⁴⁸ It is apparent that South Africa now fits these criteria (the fact that South Africa is regarded as a constitutional state is apparent by the reference to this term in the Preamble). The principle of proportionality is one of the principles upon which such a state is based and therefore de Ville argues that section 24(d) read with the Preamble (as well as sections 33(i), 34(1) and (4), which he argues further the principle of proportionality) demands proportionality.

There are three elements to this concept.²⁴⁹ The first one is suitability. In terms of this standard the action must have a legally authorised purpose; it must be objectively the best way of achieving that purpose and the measure must be factually and legally feasible. The second element is necessity. In terms of this standard the administrative agent must choose the least burdensome suitable measure. Thirdly, the measure must be proportional in the narrow sense in that the advantages to the community or individual must outweigh the disadvantages. This last element also involves the weighing up of the interests at stake.

De Ville addresses the concern about the breaching of review and appeal and admits that review for disproportionality will collapse this distinction. He submits however that this is not as startling as it seems as section 24(d), by entrenching justifiability, has already crossed the barrier between review and appeal. He hastens to add however, that this does not mean that the courts will substitute their decisions for that of the administrators, as they will only examine the substance of decisions in order to ensure that the administration keeps within the bounds of legality.²⁵⁰

It remains to be seen whether this version of the meaning of section 24(d) will be accepted, especially in the light of Van Huyssteen and the substantial evidence test adopted in that case. Section 33 of the final Constitution entrenches the right to 'reasonable' administrative action which will clear up some of the confusion which is rife about the meaning of 'justifiable'. This is one of the last steps towards bringing our law

²⁴⁸ de Ville note 246 363

²⁴⁹ De Ville note 246 365-367

²⁵⁰ de Ville note 246 374

on judicial review into line with international standards, like the general duty to act fairly in English law or the duty on administrative officials in Namibia to act fairly and reasonably.²⁵¹ The courts, however will have to determine what is meant by reasonable. Previous discussion on that topic has illustrated that this is a rich area for debate.

What is clear despite the debate about the exact meaning of 'justifiability', is that administrative officials will now be obliged to draft their reasons with care and ensure that the process of decision making is undertaken with rationality and logic, (although the administrative action needs only be justifiable in terms of the reasons given for it, this remains a far more onerous system of accountability than under the common law). According to Mureinik and Klaaren, in developing a theory of what makes action justifiable the courts will need to develop a theory of justifiability.²⁵² This theory will involve the examination of the soundness of the decision making process, and will promote a new phase of executive accountability. This new phase is a culmination of a series of developments towards a new attitude to the control by the judiciary of the power and discretion exercised by the executive. Friedman JP in Reynolds sums up these developments and factors:²⁵³

- (a) Most importantly, the adoption of the interim Constitution.
- (b) The Constitution contains a more profound role for the judiciary and entrenches judicial activism through features such as the 'testing right', and the embodiment of judicial review in the Constitution.
- (c) Over the past few years the courts have become more effectual and stimulating in their judicial review of administrative action.
- (d) There has been a move towards a more resourceful and purposive approach to the interpretation of statutes.
- (e) The work of academics has influenced the widening of the scope of judicial review.
- (f) In England insular attitudes towards the protection of individual rights

²⁵¹ In article 18 of the Namibian Constitution of 1990. See Corder note 3 6

²⁵² Mureinik and Klaaren note 214 43

²⁵³ at 95

from governmental incursions have undergone marked changes.

- (g) Recent decisions have shown a greater willingness to review the exercise of the executive's discretionary powers.

Therefore, section 24(d) combined with section 24(c), have radically widened the scope of judicial review, perhaps more so than the other clauses of section 24. Together they form a restraining mechanism not only after the decision has been made but during the decision making process as well. This ushers in a new era of accountability and transparency that can only enhance the quality of decision making in South Africa. It is submitted, furthermore, that this restraining mechanism does not go too far so that the executive is unduly fettered. A balance is struck between ensuring that potential abuses of executive power are avoided while still ensuring that the executive can carry out its policies effectively.

CONCLUSION

This overview of the impact of section 24 on the South African administrative law has shown that the six factors which used to limit the scope of judicial review have been significantly affected by the provisions of section 24. In each case the scope of judicial review has been broadened, some in complete contrast to the common law, for example 'standing to sue', and some as the consequence of a natural progression from developments in the case law before the Constitution, for example in the area of classification of functions.

This widening of the scope of judicial review, through the Constitution, was analysed in Part One, to be a necessary step in the political and philosophical context of the South African past, and its new democratic future. This new democratic future, it is argued, should be based on the principles of integrative democracy which is built on the pillars of participation, independence and equal stake. This version of democracy values formal values of fairness, impartiality and rationality as well as those of substantive equality, because real participation and equal stake cannot be achieved without meeting the basic standards of substantive equality.

The provisions of section 24 are crucial to the achievement of this form of democracy, as they entrench the mechanisms whereby the pillars of this model can be met: participation, fairness and rationality. It is recognised, of course, that judicial review and section 24 are limited in the extent to which they can achieve this model of democracy and that many other alternative mechanisms are required. Nevertheless the assistance in this task that can be provided by the constitutionalisation of this widened formula of judicial review, is credited as a useful and meaningful element in this process.

Thus the new constitutionalisation, whilst guarding against over-judicialisation, has an important place for judicial review. Discretionary powers can never again be unfettered and will be subjected to scrutiny so that they are based on clearly spelt out criteria. The new system will bring about transparency in decision making and accountability to guard against secrecy, corruption and tyranny by the government. Never again will a South African, black or white, have to suffer such a fate under the Constitution. It is hoped

that the judiciary can be the guardian of the democratic values while also adopting an approach to human rights, especially socio-economic rights, that can advance the cause of the poor, the landless, the oppressed and the exploited.

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