THE CONSTITUTIONALISATION OF ADMINISTRATIVE LAW IN SOUTH AFRICA

AN EXAMINATION OF THE ADMINISTRATIVE JUSTICE CLAUSE IN THE INTERIM CONSTITUTION, CASE LAW PURSUANT THERETO AND PROPOSALS FOR THE CLAUSE IN THE FINAL CONSTITUTION.

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CHAPTER 1

INTRODUCTION

In February 1993 leading academic and practising administrative lawyers gathered in Cape Town for a three day workshop in order to conceive a vision of administrative law in the future South Africa. The portents and conditions for reform for this critical juncture of law and public power were the most propitious for nearly five decades. Three years had passed since the political logjam had been broken by the formal unbanning of the ANC and other proscribed movements and negotiations for a new democratic constitution were proceeding - albeit intermittently by reason of sporadic politic crises. For those of the participants in the workshop who were close to constitutional negotiations it must have been clear that the smokefilled rooms of Kempton Park would eventually produce a Bill of Rights with an administrative justice clause and thus an opportunity to rescue South African administrative law from its increasingly justified description as a *"dismal science"*.[1]

The workshop appears to have been an outstanding success, at least seen from the perspective of an outside observer and taking into account the plethora of legal conferences which seem an inevitable by-product of times of constitutional ferment. Apart from the publication[2] of a widely read book containing many of the challenging and thought provoking papers read at the workshop, the Workshop's overriding contribution may well have been the intensive sharing of ideas and discussions directed towards seeking to expand the horizons of South African administrative law. This harnessing of disparate energies led to the historic Breakwater Declaration.

In the run-up to the workshop and for the purposes of the preparation of papers, eight attributes of an ideal administrative law system were identified as requiring special focus. These included constitutional protection of a right of review of administrative action and legislative controls over the executive; the removal of barriers preventing access to lawyers,

[1]. W H B Dean "Our administrative law: a dismal science? (1986) 2 SAJHR 164.

[2]Administrative Law Reform - First published as Acta Juridica, 1993 Juta and Company Ltd

courts and other institutions for review of administrative action; a reconsideration of the grounds of the review of administrative action; open government; the public/private divide and state liability for actions and omissions. The aforementioned topics were all potential areas of concern for the drafters of a Constitutional Bill of Rights and in this light the consensus of the Conference regarding proposed constitutional changes, as expressed by the Breakwater Declaration, is particularly interesting.

Because of time constraints and the host of objections received to the workshop's initial draft clause entrenching the right to administrative justice in the Constitution, the Breakwater Declaration eventually incorporated the original draft clause together with a summary of the principal objections *"as a touchstone for further debate and consideration"*. The draft clause read as follows:

(a) *Anyone adversely affected by a decision made in the exercise of public power shall have the right to a decision which is lawful, procedurally fair and in accordance with the principles of equality and rationality, and shall have the right to seek redress from an independent court and any other body or tribunal established for that purpose.*

(b) *Sub-clause (a) shall not be construed as an exhaustive statement of the grounds upon which decisions made in the exercise of public power may be reviewed.*

(c) *In the exercise of the power of review due weight shall also be given to the principles of good governance and the need to empower all public authorities to undertake programmes to remedy social, political and economical disadvantages.*

Noteworthy in sub-clause (a) was the broad sweep of the clause in its reference to *"anyone adversely affected by a decision"* and moreover the embedding of the principles of *"equality and rationality"* against which standards all administrative acts could be measured. The draft clause envisaged no confining of the courts' power to develop the grounds of judicial review but at the same time sought to guard against the irony of a re-invigorated power of judicial review becoming a key instrument in the preservation of the socio-economic status quo. This fear gave rise to one of the three principal objections to the constitutionalisation of the right /

of judicial review, namely that it *"would engender expansive judicial review at the expense of programmes for socio-economic reconstruction"*. Others preferred the power of judicial review to derive from the Bill of Rights in general (by implication as it were) rather than through an entrenched clause. Some protagonists of constitutional entrenchment were unhappy with the qualifications introduced into sub-clauses (b) and (c), viewing these as opening the door to legislative ousters (sub-clause (b)) and, *"by too easily granting immunity from review"* where socio-economic reform programmes were concerned (sub-clause (c)).

At this early stage then the two schools of thought, later termed "optimalists" and "minimalists" by Du Plessis and Corder[3], were asserting their respective positions - the former seeking to constitutionally entrench a broad spectrum of rights, the latter group favouring a skeletal transitional Bill of Rights pending formulation of a final constitutional document at the hands of a fully elected constituent assembly.

The purpose of this dissertation is threefold: to examine and analyse the content of Section 24, the administrative justice clause in South Africa's interim Constitution; to consider the administrative law cases which have taken place since April 1994 and examine what effect, if any, Section 24 has had in their determination and finally, in anticipation of the Bill of Rights which will be adopted in our final Constitution, a process which is scheduled to culminate in May 1996, to critically examine the form of the proposed administrative justice clause.

[3]Du Plessis and Corder - Understanding South Africa's Transitional Bill of Rights - Juta and Co Ltd 1994, page 40 et seq.

CHAPTER 2

THE GENESIS OF SECTION 24

The engine behind the drafting of the Bill of Rights contained in Chapter 3 of the Interim Constitution[4] was the Technical Committee on Fundamental Rights whose function, described by Du Plessis and Corder[5] was to assist and advise the Negotiating Council in the Multiparty Negotiating Process on key aspects which had to be negotiated. The Technical Committee's proposal in its First Progress Report, that the right to administrative justice and to reasons for administrative action be included in the transitional Bill of Rights, does not in itself appear to have evoked any significant opposition from the negotiating parties. However, the precise formulation of the clause, in particular the yardstick against which administrative action was to be measured in the process of judicial review, was strongly contested and eventually gave rise to a compromise formulation.[6] The text of the first constitutional entrenchment of the right to administrative justice in South Africa eventually came to read as follows:

"Every person shall have the right to:-

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

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

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

[4]Constitution of the Republic of South Africa, Act 200 of 1993

[5]Op cit n3, page 39 et sequor

[6]Ibid page 55 paragraph 4.2.4.7

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

Bearing in mind that Chapter 3 is one of the few Bills of Rights to explicitly entrench the right to administrative justice, it terms are relatively detailed. Nonetheless the clause by no means speaks for itself. It has been a subject of considerable comment by academics seeking to divine its *"true"* meaning. Before embarking upon this exercise it is salutary to consider contending theories of statutory interpretation as they apply to constitutional texts and at the same time to juxtapose these against existing methods of statutory interpretation prevalent in South Africa.

In doing so it must be borne in mind that the field of constitutional interpretation is quite undeveloped in our country. Prior to 27 April 1994 the South African legal system has never had to deal with a sovereign constitution, one against which all existing and future legislation must be tested and one where the common law must also find congruence with constitutional principles and norms.

Du Plessis and Corder devote a lengthy chapter to the topic of constitutional interpretation[7]. It is beyond the scope of this dissertation to examine the detailed and sophisticated arguments which the authors bring to bear in their plea for a theory of constitutional interpretation which will equip constitutional lawyers with the tools to adequately interpret constitutional instruments. However, a discussion of the basic elements of their argument is both desirable and necessary before embarking upon a critique of the administrative justice clause. The authors assert in the first place that South African jurists lag behind in their understanding of the hermeneutical activity necessary to understand and interpret constitutional texts. Our courts have long adhered to a theory of interpretation which can best be described as literalist - cum intentionalist in nature but, assert Du Plessis and Corder, a more comprehensive theory is needed to meet the exigencies of the new constitutional era upon which South Africa has embarked. Arguing that our present theories of statutory interpretation are inadequate for the process, the following points are made:

[7]Ibid - Chapter 3 Observations on reading and understanding the Chapter of Fundamental Rights as a constitutional instrument.

1. The present theory is fundamentally flawed and ill-suited and must be replaced by a *"contextual and hence holistic"* approach.

2. South African courts will have to redefine, and accept, their inevitable political, although not party political, role in expounding and applying the Constitution.

3. By virtue of the timeless nature of a constitution and its supremacy as a legal instrument much more is needed of a theory than the mere searching for the *"intention"* of the drafters of the constitution - in this context *"present circumstances"* being more decisive than *"original intent"*.

4. In broad terms a purposive approach to constitutional interpretation is appropriate and furthermore one in which the rights and freedoms entrenched in the Bill of Rights should be generously construed.

5. Finally an understanding of the context within which the South African Constitution was drafted and finds itself is vital to any interpretation of the fundamental rights contained in the Bill of Rights.

Quoting from the seminal Canadian case of **Hunter et al v Southam Incorporated**[8], the essential difference between a constitution and an ordinary statutory instrument is emphasised by the authors:

> *"the statute defines presents rights and obligations. It is easily enacted and easily repealed. A Constitution, by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights of liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political, historical realities often unimagined by its framers. The*

[8](1984) 11 DLR (4th) 641 (SCC) 649

judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these conditions in mind".

Discussing the shortcomings of the literalist - cum intentionalist approach to statutory interpretation, Du Plessis and Corder argue that it is flawed thinking to consider that the clear language of a provision guarantees that the intention of the framers can be ascertained and therefore applied since there is no such thing as clear and unambiguous language in the abstract. As they put it *"(t)he language of a statute can, in other words, only be said to be clear once its meaning, interwoven with its full intra and extra-textual structure, has somehow been determined"* (my underlining). Inasmuch as a constitution does not merely express politico-philosophical ideals in the abstract but is a powerful legal instrument in the competition between the State's powers and the individuals rights and liberties, the participation of the judiciary in the process of the constitutional interpretation in law-making inevitably makes for judicialisation of politics. This is not to say that the judiciary must engage in party political approaches or even in making *"policy decisions"*. However the judiciary as an *"independent referee"* has no choice but to make political decisions and cannot remain aloof from this role on the simplistic basis that it wishes to abstain from *"policy decisions"*.

Du Plessis and Corder dismember the process of constitutional interpretation stating that its constituent elements are:

1. defining the rights or entitlements entrenched in the constitution and their scope;

2. understanding the law in force;

3. determining whether the law in force or administrative action prima facie limits rights or entitlements entrenched in the constitution, and;

4. adjudicating the constitutionality of any limitation through the general limitation clause.

The authors identify five methods of interpretation which are used in other jurisdictions in this process. These are grammatical interpretation, systematic interpretation, teleological interpretation (the determination of the ratio legis), historical interpretation and comparative interpretation.

After an in-depth discussion of the techniques briefly referred to above, Du Plessis and Corder conclude that a new method of constitutional interpretation will have to be developed by South African lawyers which will *"require a thorough understanding of the new political dispensation and of the role of the supreme Constitution as well as of demands of the human rights protection in a domestic but also an international context"*.

CHAPTER 3

THE ADMINISTRATIVE JUSTICE CLAUSE IN THE INTERIM CONSTITUTION

The phenomenon of the vast proliferation in state power and the consequent impact of the state, acting through its administration on the lives of citizens, has ensured the administrative justice clause of a position of prime importance in the Bill of Rights.

The very existence of a right to administrative action is a signal victory for the proponents of a rights-based legal culture. Only one other constitutional instrument, namely that of Nambia, had enshrined such a right in its constitution at the time when South Africa's interim Constitution was adopted. In the meantime Uganda has joined the company of its African neighbours in constitutionalising a right to administrative justice. Other legal systems such as Canada, Britain and the United States have evolved sophisticated administrative law dispensations without the use of constitutional guarantees but almost all have perceived the need for legislation to found and order administrative law rights.

It must first be noted that Section 24 does not purport to codify our body of administrative law but rather to constitutionalise the basic elements of the right. The question must then be asked what are the benefits and disadvantages of such an approach. In examining this question it is necessary to bear in mind that one of the main purposes of a constitution is to ensure governmental accountability for administrative action. However, as Prof Hugh Corder points out in his chapter in The New South African Legal Order[9], accountability can be achieved through a range of structures and can, theoretically at least, be attained through the exercise of other constitutionally guaranteed rights such as the right to equality[10] and through the individual's constitutional right to challenge all justiciable matters in a court of law. As the author points out[11], the fact that South Africa is writing a constitution at such a *"late"* stage

[9]Van Wyk, Dugard, De Villiers and Davis - Rights and Constitutionalism - The New South African Legal Order - Juta, 1st Edition, 1994, page 387 @ page 388

[10]Ibid, page 388 et sequor

[11]Ibid, page 390

has meant relatively modern concerns about administrative accountability have produced a substantial consensus amongst all parties to ensure that the Bill of Rights incorporates provisions guaranteeing the right to administrative justice.

Furthermore as several commentators have pointed out the writing of our constitution must be understood in the context of the somewhat chequered, if not bleak, history of the South African judiciary's treatment of administrative law rights over the last few decades. In particular the 1980's saw unprecedented inroads made into established administrative law doctrines, particularly where hard cases involving the governmental onslaught on the personal liberties of its subjects during successive States of Emergency. The failure of the South African courts, on the whole, to resist executive challenges arguably reached its nadir, in **Staatspresident v UDF**[12] where the Appellate Division held that despite the fact that an emergency regulation was so vague that it would ordinarily be unenforceable, it was immune from judicial review by virtue of an ouster clause in the Public Safety Act. Given this recent history it is not surprising that, although many would take issue with the precise formulation of the right, no influential voice has arisen against the constitutionalisation of the right to administrative justice per se.

A further implication of the constitutionalisation of the right is that, in general, the simpler the formulation and the more broadly cast it is the more scope there is for the courts to flesh out the primary elements of the right. So, for example, if the core test against which the substantive merits of an administrative act is measured is left unspecified, the greater the scope for the courts to consider and introduce modern notions such as proportionality. Accepting too that the constitutional right to administrative justice constitutes a high water mark in this regard, overbreadth rather than too narrow or prescriptive a formulation is surely preferable.

The scope and meaning of Section 24 cannot be looked at in isolation. As with all fundamental rights contained in the Bill of Rights there are linkages and relationships between such rights. So, for example, the Scope of Application clause of the Bill of Rights (Section

[12]1988 (4) SA 830 (A)

7(1)), the Standing Rights clause (Section 7 (4) (a) and (b)), the Rights of Access to Court clause (Section 22), the Right of Access to Information clause (Section 23), the Limitation clause (Section 33) and the clause relating to the Suspension of Fundamental Rights in a State of Emergency (Section 34) all impact upon the right to administrative justice. Precisely how this impact is felt will be considered in greater detail later.

SECTION 24

The right to administrative justice has been enshrined in Section 24 of the Bill of Rights which is in turn contained in Chapter 3 of the Interim Constitution No 200 of 1993.

By contrast to the pithy and clear expression of the right in the Nambian constitution, the formulation in the interim constitution is a complicated - indeed, it may be argued - a convoluted clause which illustrates the intensity of the political negotiation and compromise which lies behind it.

It will be seen that Section 24 provides, in different sections, for lawful administrative action, procedural fairness, the right to reasons and administrative action which is justifiable. In this structure some commentators have seen a neat microcosm of the law of judicial review, not so much as it applied in South Africa prior to the enactment of the Constitution, but as in more developed administrative law systems such as the United Kingdom.[13] Indeed it is a measure of how far the cause of administrative justice is aided by Section 24 that only two of its constituent rights, viz procedural fairness and the right to lawful administrative action, and in the latter case subject to glaring exceptions, could be vouchsafed in South Africa pre-April 1994.

Section 24's wording avoids both the mention of the term *"judicial review"* and any reference to the rights being executable in a court of law. It can be surmised that this was by design rather than accident and perhaps that the reason therefor was to allow scope for the development of a separate system of administrative appeal tribunals before which

[13]Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus, -Fundamental Rights in the New Constitution, - Juta and Co Ltd, 1994, page 72

administrative decisions can be challenged either on a review basis or on the very merits thereof. Such a system might conceivably mirror that pertaining in Australia, although the cost implications are forbidding, or simply add yet further layers to the administrative appeal tribunals, not properly so called, already in existence in South Africa.

It is now proposed to examine each sub-clause in turn bearing in mind however that the inter-relatedness of the sub-clauses makes it undesirable, if not impossible, to examine the four component rights in isolation.

SECTION 24 (a) - LAWFUL ADMINISTRATIVE ACTION

There are two concepts which are common to the clause as a whole and which need to be considered initially. The first is the differing *"stake"* which a person might have in any particular matter which is, or may potentially be affected by administrative action. Used in this sense, *"stake"* denotes a right which the person may enjoy, a legitimate interest which such person may harbour or simply an interest. These differing personal or proprietary stakes have of course different weights and attract a differing arsenal of administrative law rights in terms of the overall clause. As such they have come to be commonly known as the *"thresholds"* to the various administrative law rights contained in Section 24. The concept of these thresholds is a key one in the interpretation of the clause.

The second concept common to all the sub-sections of the clause is how the aforementioned stakes require to be influenced before the various component rights in the section are triggered. This the drafters have chosen to do through the concept of such right, legitimate expectation or interest being either *"affected"* or *"threatened"*.

The first substantive question which arises is what constitutes *"administrative action"*, a further term common to all four sub-clauses. On the face of it the concept does not include administrative omissions or inaction and seems moreover to connote an act rather than a decision. On the other hand *"action"* is clearly capable of a wide meaning encompassing both *"acts"* and *"decisions"*. Prof Corder, a member of the Technical Committee in Kempton Park which was closely involved with the drafting of the section, has written that the formulation

of *"administrative action"* was indeed changed to encompass both of the abovementioned concepts *"and more"*.[14] Strangely, in Section 7 of the Chapter on Bill of Rights, where the scope of application of the Bill is determined and where one would expect the widest concepts to be employed, the phrase *"all administrative decisions taken and acts performed"* is used instead. There seems no good reason why the concept of *"administrative action"* should be any narrower than *"all administrative decisions taken and acts performed during the period of operation of (this) constitution"*. The *"and more"* referred to by Du Plessis and Corder will hopefully be interpreted by the courts as being administrative inaction or omission in, for example, the situation of an administrative authority refusing for some reason to process an application for a licence with extremely prejudicial results for an applicant. In these circumstances the right to lawful administrative action in terms of Section 24 (a) could well ground a mandamus in the face of calculated or even inadvertent passivity on the part of an administrative authority.

A further aspect to the question of what constitutes *"administrative action"* is where the dividing line is to be drawn between *"ordinary"* administrative action on the part of the executive e.g. a Ministerial decision which would be subject to the provisions of Section 24, and action by the executive which, because of its highly political nature, is immune from judicial review and other administrative law rights and remedies. Thus, for example, a decision by the head of state to declare war or to enter into a treaty with a foreign nation would fall outside the sphere of action which is subject to the challenge of administrative law. Section 42 of the interim Constitution provides that it *"shall bind all legislative, executive and judicial organs of state at all levels of government"*. Sections 82 and 88 (4) list the powers and functions of the President and include, for example, the power to appoint commissions of enquiry, to negotiate and sign international agreements, to declare a state of national emergency and to appoint or terminate the appointment of Cabinet Ministers. There can be little doubt that these powers and functions of the President are not subject to administrative control or challenge in terms of Section 24. Many of these executive powers are originally derived from state prerogative powers, a doctrine introduced into our law from the English legal system. Whilst our most recent constitutions, Act 32 of 1961 and Act 110 of 1983,

[14] Du Plessis and Corder op cit, n3, page 165 to 170 at 168

contained savings clauses preserving the executive's prerogative powers, until recently it had been thought that these powers were defined and limited having been frozen in 1674[15]. However the Appellate Division recently invoked the doctrine to establish a new prerogative power in the **Dilokong** case[16] in order to justify a beneficial scheme established by a government department which scheme had no statutory authorisation. It was held in that case that such an exercise of prerogative powers could be tested in judicial review proceedings. In contrast to our earlier constitutions, the interim Constitution makes no reference to unspecified prerogative powers thus reinforcing the view that there no longer remains any overall source of prerogative power in our law.

The immunity from administrative law control of the Presidential powers derives from the nature of such powers rather than from the fact that they are exercised by the President. As De Ville[17] points out, this does not mean that there are no boundaries to the exercise of the President's powers in terms of the aforementioned sections. Insofar as the interim Constitution prescribes certain procedural requirements, these require strict adherence. Where such requirements are not met, a litigant would be entitled to challenge an administrative/executive authority in the exercise of such powers or to challenge the legislation which authorises such exercise of powers. In fact an example of such a situation arose last year when former Deputy Minister Mandela was relieved of her post by the President without the necessary procedural requirements being met, in casu, consultation with certain political figures. When the irregularity became apparent, the dismissal of the Deputy Minister was rescinded by the President, only for the Deputy Minister to resign before a second dismissal could be effected. Certain prerogative powers have been successfully challenged in the United Kingdom but it remains to be seen where, in the development of our administrative law, the line will be drawn between ordinary administrative action and executive action which cannot be challenged in the courts.

[15]THRHR 1985 - Cora Hoexter 152 at 154 - 7

[16]**Dilokong Chrome Mines (Edms) Bpk v Direkteur Generaal, Departement van Handel en Nywerheid** 1992 (4) SA 1 (A)

[17]De Ville - The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution - SAJHR Vol 11 Part 2 1995, page 264

In regard to a related concept, that of the right to expedition in the enforcement of one's rights to administrative justice, the question has been asked whether Section 24 would not have benefitted from a provision compelling prompt responses on the part of the administrative authorities. The general explanation which has come from those close to the drafting process has been that the notion was considered but was rejected for fear that it would be interpreted as suggesting that other fundamental rights were not similarly subject to the need for expeditious delivery. In the light of the notorious bureaucratic delays which plague those dependent on administrative dispensations, together with the fact that such persons are usually those with limited resources who are unable to bring much pressure to bear upon a recalcitrant bureaucracy, it is suggested that good governance would be better served by a constitutional stipulation that unreasonable delay will not be tolerated. There is no reason for instance why a blanket caveat to this effect cannot form part of the preface to the Bill of Rights.

THE OVERALL SCHEME OF SECTION 24

Returning now to the concept of an individual's *"stake"* in the administrative process i.e. the varying thresholds which trigger the component rights in Section 24, a predominant feature of the Clause is that a hierarchy of stakes is created comprising rights, legitimate expectations and interests.

A right of course is the most substantial stake which an individual can hold, the meaning of which is reasonably clear. Where then do legitimate expectations and *"interests"*, rank on the ladder of *"stakes"*. The concept of legitimate expectations, although a relative newcomer, has been recognised in South African administrative law since it received the Appellate Division's stamp of approval in **Administrator, Transvaal and Others v Traub and Others**[18]. This quasi-right or quasi-interest, although not well defined, can be expressed as some substantive benefit, advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny without a hearing. At other times the doctrine is expressed in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the person concerned is taken.

The concept of an *"interest"* is even more elusive of definition. The wide spectrum which an interest can cover was well expressed in the inimitable tones of Devlin J when he stated:

> *"The word "interest" is not a word which has any well defined meaning. Anybody who has asked what it meant would at once want to know the context in which it was used before he could venture an opinion. It may mean a direct financial interest on the one hand, on the other hand it may mean nothing more than the ordinary human interest which everyone has in the outcome of proceedings in which he is likely to be a witness."*[19]

[18]1989 (4) SA 731 (A) and especially at 755 C

[19]Bearmans Ltd and Another v Metropolitan Police District Receiver (1961) 1 ER 384 (CA) at 391 F quoted in Cachalia et al at page 73.

In **Aquatur (Pty) Ltd v Sacks and Others**[20] the Court similarly recognised the potential breadth of an interest in distinguishing between *"a legal interest and a financial or commercial interest which may be prejudicially affected by the judgment of the Court"*. The question of course is where our courts will draw the line and whether persons with only a limited i.e. *"non legal"* interest in an administrative process will be recognised as having at a least a limited constitutional right to lawful administrative action.

The question of whether the Courts will afford a broad or a narrow interpretation to "interests" may perhaps be answered by having regard to provisions of Section 7 (4). It dramatically relaxes the requirements for standing to sue in the assertion of a constitutional right, at the same time greatly broadening the class of persons who may approach the Court for constitutional relief in a given case. The concept of an *"interest"* is widely used in that clause, finding its most expansive expression in the notion of "a person acting in the public interest". If we accept, as we must do, that every component of Section 24 comprises a right, it is arguable that, in terms of Section 7(4)(a), even the right of a person enjoying no more than an interest can be asserted by a person having no more than an interest in pursuing the case of the primary interest holder in the subject matter of the dispute. This is surely a pointer to the likelihood of the Court interpreting interest, in the context of Section 24, in the wider rather than the narrower sense. Basson[21] argues for the broader interpretation of interest to include those persons who have a mere interest in the outcome of the actions. He bases his case upon the need for the widest possible public participation in those areas where the need for judicial review is greatest e.g. in asserting the right to a healthy environment protected in terms of Section 29. He notes that Section 7(4), the standing clause, now also includes the class action and actio popularis with a view to broadening the class of persons who can assert constitutionally guaranteed fundamental rights.

[20]1989 (1) SA 56 (A)

[21]Dion Basson, South Africa's Interim Constitution Text and Notes, Juta and Co, revised edition, 1995, pages 34 - 37

Basson's view that public participation in the decision-making process must be maximized is echoed by Burns[22] who observes that although public participation does not automatically exclude abuses of power, it tends to render administrative decisions more acceptable to the public generally.

Even if the Court should plump for a narrow definition of *"interest"* it is clear that the scope of judicial review, from the point of view of who may invoke the remedy, has been considerably widened through the introduction of the concept of an *"interest"*. Being a term capable of flexible definition, it is moreover a useful tool for the development of administrative law remedies in years to come.

The next concept requiring examination is the nature of what may be termed the trigger-mechanism which activates the various right in Sections 24(a) - (d). This occurs when a right, legitimate expectation or interest *"is affected or threatened"*. What does this mean? De Ville[23] cites the case of **R v Markowitz**[24] in which *"a threat"* is defined as being a *"menace of destruction or injury to life, property or reputation"*. The author also notes that such a risk would have to be a real one rather than fanciful or too remote. As far as the meaning of the rather bland concept of *"affect"*, it would appear that Mureinik, in an unpublished paper[25] has made the greatest contribution towards establishing a coherent meaning of the word *"affect"* through his so-called *"deprivation"* and *"determination"* theories. In terms thereof affect can mean either the taking away of a right (deprivation) or the settling of a right i.e. the determination thereof. Thus, for example, a person applying for a liquor licence who has not previously applied therefor, will be *"affected"* by a decision refusing him a licence inasmuch as the administrative authority will determine whether his latent right is to be recognised or

[22]Administrative Justice - Yvonne Burns 1994 SA Public Law page 347 at page 348

[23]op cit, n17, page 268

[24]1911 TPD 555 at 588

[25]Presentatión given to the University Teachers of Law Conference held at the University of Port Elizabeth from 4 - 7 July 1994, a paper widely referred to by De Ville in his abovementioned article

not. It can be pointed out that such an instance is well dealt with under the rubric of a *"legitimate expectation"* but perhaps it is inevitable that there will be an overlapping of the three thresholds or stakes. Mureinik's deprivation/determination theory holds further that the context within the word *"affect"* appears in Section 24 will naturally be of great importance in establishing the sense in which the word is being used.

There is general consensus that *"affect"* implies a much greater degree of interference than does the concept of *"threaten"*. On a purely linguistic or grammatical basis this need not necessarily be the case. When any citizen's proprietary or personal stake in the subject matter of an administrative process is *"affected"* this can either be a positive or a negative development. In this sense the word *"affect"* is neutral and value free. *"Threaten"* however contains a much stronger connotation of a potentially prejudicial effect upon the stake in question. It is difficult to see what relief someone whose stake has not been harmed or left untouched, would wish to seek under Section 24 and thus proponents of the *"plain language"* school of drafting might prefer to see the word *"prejudicially"* inserted prior to the appearance of the word *"affected"* where ever it appears in the Section. Be that as it may, Section 24 can only make sense if *"affect"* is interpreted as being more prejudicial to the stake holder than a mere *"threat"* to his rights, interests or legitimate expectations.

Attributing the above meanings to the hierarchies of the various stakes and to the concept of *"affected or threatened"* the following overall scheme in Section 24 unfolds.

1. If rights are affected (the strongest stake together with the strongest encroachment thereon) relief under Sections 24 (a) - (d) can be sought. This may be termed the *"full house"*.

2. If rights are only threatened - (the lesser form of encroachment) relief can be sought under Section 24 (a), (b) and (d). As Du Plessis and Corder point out[26] this means that in this situation a complainant is only deprived of the right to seek reasons, as a constitutional right, although s/he may still contest *"the justifiability"* of the

[26]Op cit, n3, p 166

administrative action. It is somewhat difficult to see the logic in this formulation even accepting that its purpose is to lighten the burden of an administrative authority required to furnish reasons since, if the core right of justifiability is retained, retention of the obligation to furnish reasons can only enhance or help ensure the decision-making process culminates in a *"justifiable"* administrative act or decision.

3. If legitimate expectations are affected or threatened - relief can be sought under Section 24 (a), (b) and (c), only the right to justifiable administrative action being denied although curiously both where the encroachment is affected and where it is merely threatened.

4. If interests are affected - relief can be sought under Sections 24 (a) and (c) but, if interests are merely threatened - to continue the card playing analogy, the weakest hand one can be dealt - only relief under Section 24 (a) can be sought namely entitlement to lawful administrative action.

There is no doubt a certain congruence to this scheme but it is no exaggeration to describe it as *"idiosyncratic"* as has Mureinik[27]. Du Plessis and Corder on the other hand write that the scheme is certainly *"not unenforceable"* and that it should be seen as reflecting *"the level of disagreement among the parties as well as the somewhat confused state of South African administrative law"*[28].

The principal question which springs to mind is whether this intensely formulaic description of the entitlement to administrative justice with its mosaic of different classes of person holding different stakes, best serves the ideal of a broadly stated administrative justice clause affording wide latitude to the courts, and ultimately the Constitutional Court, for an organic and dynamic interpretation of the developing science of administrative law.

[27]Mureinik - A Bridge to Where? - Introducing the Interim Bill of Rights (1994) Volume 10 SAJHR page 31 at page 42

[28]Op cit, n3, page 168

Cachalia et al[29] furnish a plausible explanation for the peculiar nature of the scheme, contending that the reason for limiting the right to procedural fairness to those whose rights or legitimate expectations are affected or threatened, allows the State to identify those whom they have to treat in a procedurally fair manner. The State could not reasonably be expected to know whose *"interests"* may be *"affected or threatened by a decision"*. The purpose of the limitation on the right to justifiable administrative action (to only those whose rights are affected) is to limit the amount of time administrative authorities will be required to spend justifying their decisions in court, as opposed to pursuing their proper business of executing administrative action.

This rather glib reasoning fails in my view to place sufficient value on the quality of the decision-making process rather than the quantity of work performed by such administrative functionaries. Furthermore one may ask what good sense is served in establishing an elaborate panoply of rights to lawful administrative action, fair procedural action and written reasons when the core right viz a decision which is justifiable, is accorded only to a narrow class of affected rights holders. It is cold comfort to a holder of a legitimate expectation whose expectation was unreasonably not fulfilled to know that s/he is entitled to relief under Sections 24 (a), (b) and (c) but not to a justifiable decision. This somewhat stark interpretation of the eccentricities of the scheme created by Section 24 (a) to (d) is alleviated if *"lawful administrative action"* is interpreted as referring to the concept of ultra vires in its broad sense, a question which will now be addressed. Suffice it to say however, before concluding this discussion of the general scheme of Section 24, quoting Mureinik, that the Courts *"will have their work cut out developing a coherent theory to account for these variations"*[30].

We turn now to the vexed question of the meaning of the concept of *"lawful administrative action"* in Section 24 (a). One is inclined to echo the question which Carpenter raises[31] - does

[29]Op cit, n13, page 73/4

[30]Mureinik, op cit, n27, page 43

[31]Gretchen Carpenter - Administratiewe Geregtigheid - Meer vrae as antwoorde 1994 (57) THRHR, page 467 @ page 468

Section 24 add anything new to the rights of the individual or simply reflect the existing common law position? Is an individual not always entitled to *"lawful administrative action"*? Much of the commentary concerning the concept has suggested that its precise meaning depends upon whether it encompasses the narrow or the broad version of the ultra vires doctrine. If it is the narrow version all that the phrase betokens is that the administrative act must occur within the confines of the enabling act. So for example where an authority has delegated power which has already been delegated to him or her, any administrative act flowing from the exercise of such sub-delegated powers is ultra vires. Should the wider meaning of ultra vires be imported into Section 24 (a) all the presently accepted grounds for judicial reviews are encompassed under the umbrella of *"lawful administrative action"*. But, as Carpenter points out, if the broad version of ultra vires is accepted as being part of Section 24 (a) the rest of Section 24 becomes superfluous. This latter observation is however too broadly stated since the right to reasons is not part of our existing common law of judicial review. Nonetheless insofar as the observation refers to the right to procedural fairness and the right to *"justifiable"* administrative act, these concepts would surely and naturally form part of the doctrine of ultra vires in its broader sense.

Carpenter thus argues[32] that Section 24 (a) simply constitutionalises the notion of the narrow version of the ultra vires doctrine. In doing so she adds as a further reason for such an interpretation viz that it would ensure that no further previously undiscovered prerogative power may come to light - all administrative power will have to be exercised in terms of an enabling statute[33]. However the author does not address herself to a further possible meaning of *"lawful administrative action"*, one which has attracted the support of influential commentators such as Du Plessis and Corder and Mureinik. In their view the right to *"lawful administrative action"* constitutionally guarantees that the right of judicial review cannot be removed by way of so called *"ouster"* clauses. Mureinik bluntly states that *"the object of Section 24 (a) is to annul "ouster" clauses"*[34], his rationale being simply that administrative action which would be reviewable but for the existence of an ouster clause attempting to

[32]Ibid, page 469

[33]See in this regard: **Dilokong** op cit, n16

[34] op cit, n27, page 38

exclude judicial review is unlawful by virtue of being in conflict with the constitution. It is submitted that there is some substance to the suggestion that the aforementioned argument contains more than an element of circular reasoning thus begging the question as to what constitutes *"lawful administrative action"*. Nonetheless Mureinik's counter-argument to the effect that the vital fact which cannot be overlooked is that the provision constitutes a constitutional guarantee rather than a mere statutory prescription thereby elevating lawful administration action to a constitutional guarantee which may not be abridged by a mere statute, is itself persuasive. Moreover as and when the Constitutional Court is called upon to interpret such a definition the recent history of the emasculation of our administrative law through the State's widespread use of ouster clauses through the 1980's will not lightly be forgotten.

Running against the general stream of opinion on this question is De Ville[35] who argues that Section 24 (a) must be taken to include both the statutory and common law requirements for legality. The author finds confirmation of this interpretation in the ordinary meaning of the Afrikaans equivalent of *"lawful"* in the statute namely *"regsgeldig"*. He explains the apparently superfluous addition of Section 24 (b) - (d) as being *"different manifestations of administrative justice which do not overlap"*.

It is submitted that neither of the contending formulations is entirely satisfactory, since in essence, two separate clauses, 24 (a) and 24 (d), through the concepts of *"lawful administrative action"* and *"justifiability"* can be viewed as doing the work of incorporating all those established grounds of judicial review known to our common law prior to the introduction of the Constitution. Needless to say the uncertainty as to which of the two clauses is the operative one can vitally affect the range of rights to which different stakeholders faced with different encroachments upon their stakes, may be entitled. One is left with the impression that the clause could have been more clearly drafted. The only reasonably certain conclusion one can reach is that ouster clauses, by a just irony, are themselves ousted by Section 24 (a).

[35]Op cit, n17, page 269

Before leaving this topic, two further aspects of the question of ouster clauses need be mentioned. The first is that ouster clauses are not per se unconstitutional. These can still be legislated by Parliament which will simply then have to face the test of justifying them as an acceptable limitation in terms of Section 33 of the Bill of Rights. Obviously however the existence of such a test is a substantial brake upon a party seeking to preserve unchallenged administrative discretion. The second point which bears mention is the question of the impact of Section 24 (a) on the granting of substantial subjective discretion to administrators, in effect a partial ouster. As Du Plessis and Corder[36] state, this feature has become very common. They offer the view that the underlying values in the Constitution, including openness and accountability, coupled with the guarantee of access to Court under Section 22, are indicative of an intention to curtail the scope of such subjective discretion.

Carpenter[37], recognising that an ouster clause could survive the test Section 33, notes that this will only be with difficulty inasmuch as it is difficult to see anything other than a formal limitation, such as a time limit, not being held to negate the essential content of the right viz the right to lawful i.e. justiciable by a court, administrative action.

SECTION 24 (b) - PROCEDURAL FAIRNESS

Section 24 (b) does not occasion the same difficulties of interpretation as does 24 (a). The concept of procedural fairness is basic to our law of administrative justice and one reasonably well developed by our courts.

An attractive feature of Section 24, which denies procedural fairness only to those who have no more than an interest in the outcome of any administrative process, is that no attempt is made to specify what procedural fairness entails in differing situations. Thus the way is left open for the courts or the legislature to apply a flexible *"sliding scale"* of procedural fairness which is appropriate to the nature of the legitimate expectation or right which is at stake, the degree of encroachment or threatened encroachment upon such stake, the number of interested

[36]Op cit, n3, page 168

[37]Op cit, n31, page 471 and 472

parties who may be affected by the process and a range of other factors. It can be expected therefore that the requirement of procedural fairness will vary from a highly formal hearing on the one hand to simple *"notice and comment"* procedures for proposed regulations on the other.

Both Du Plessis and Corder[38] and Carpenter[39] find the notion of *"procedural fairness"* evocative of the *"general duty to act fairly"* contended for by Baxter in his seminal work[40] where he describes the duty to act fairly as being *"nothing other than the duty to observe the principles of natural justice expressed in more fundamental terms"*. These principles are so well known that they do not bear repetition herein. Mureinik[41] adds the twist that *"affected"* within the context of Section 24 (b) refers only to the deprivation of a right and not to the determination of a right. He takes this view for two reasons; firstly because the courts are cautious in their application of the audi alteram parte rule to cases of legitimate expectation, and, secondly, because the application of the audi rule to situations of all rights determinations would be logistically impossible for administrative authorities.

It is submitted that this view is overly pessimistic and narrow and that the question of what degree of procedural fairness a party whose rights are to be determined for the first time is entitled, such as an applicant for a liquor licence, will have to be determined in the context of the particular administrative situation which arises. Where a multiplicity of parties are concerned a hearing may well be impossible. In other situations it may well be appropriate and fair that a prior hearing be accorded. As was previously stated much will depend upon the general context in which the right is claimed.

Clearly as our courts are called upon to interpret the requirements of procedural fairness in different situations, a clearer idea will emerge of what guidelines will have to be followed

[38]Op cit, n3, page 160

[39]Op cit, n31, page 471

[40]Baxter - Administrative Law - Juta and Company Ltd 1st Edition 1984 corrected reprint January 1989

[41]Op cit, n 25

by administrative authorities. It is true that this process might take some time to unfold on a case by case basis but better this initial uncertainty than a fixed adherence to the deprivation theory in all circumstances where rights are determined. Certainly Mureinik's interpretation of this Section appears to read too much into it apart from unduly favouring the administration. Insofar as De Ville aligns himself with the view express by Mureinik in the above regard one finds oneself at odds with both commentators.

All things considered Section 24 (b) is the least innovative of the sub-components of Section 24. What it does do however is to extend the obligation to observe the principles of natural justice squarely to the realm of legitimate expectations, something which the courts have thus far been somewhat hesitant to do. Since procedural fairness can only be accorded prior to the taking of an administrative decision or action, this seemingly modest contribution may yet harvest great benefits through a balanced and fairer decision-making process, one which is not unilateral.

SECTION 24 (c) - THE RIGHT TO REASONS

It has been previously noted that the right to be furnished with written reasons for administrative action is available at the behest of those whose rights, legitimate expectations or interests have been affected. There is no doubt that Section 24 (c) represents a dramatic step forward for South African administrative law making a significant contribution to what Mureinik terms the *"ethos of justification"*.

He observes that South African administrative lawyers for decades sought in vain for a general duty on administrative officials to give reasons for their decisions. The furtherest that the courts would go down this road was to adopt the attitude, and only then in limited cases, that a refusal to supply reasons might indicate the existence of mala fides on the part of the decision-maker or at least the absence of well grounded reasons. Du Plessis and Corder[42] state that the importance of an obligation to furnish reasons *"in establishing a climate of accountability and state administration cannot be exaggerated"*. Even if this obligation had

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[42]Op cit, n3, page 169

only been imposed upon administrative authorities by way of a general statute, one ventures to suggest that its effect upon the administrative process and judicial review would be no less than transformative. Given the added weight of a constitutional guarantee of written reasons, Section 24 (c) must be seen as one of the most significant contributions to the development of our administrative law over the past few decades.

It is to be noted however that the obligation is not without its internal qualifications nor without its difficulties. On the first point quite what is to be made of the phrase *"unless the reasons for such action have been made public"* is not clear. One would hope that too broad a formulation hereof will not be adopted thus watering down the right. One would expect that of paramount importance in this regard would be the question of whether such reasons have in fact been communicated to the mind of affected party or are likely to have been so communicated. The qualification is also somewhat difficult to understand since, if reasons have already been made available it would surely be incumbent upon the decision maker, faced with a query for reasons from an affected party who is unaware of the reasons *"made public"* to refurnish those reasons or at least to state that they have already been made public to such parties. If this interpretation is accepted and pre-supposing that reasons are only furnishable upon request, which seems both reasonable and likely, then the qualification is superfluous and unlikely to relieve the administrative machinery of any burden which it might otherwise not have had to carry. It is doubtful then whether this qualification assists in reducing the potential burden on the workings of the public administration of the obligation to furnish reasons with its consequent cost in terms of cost, time and skill, a legitimate concern apparently held by some of the parties involved in drafting of Section 24 (c)[43].

However as Basson points out, the crucial question is whether the courts will be able to review the quality of the reasons given pursuant to the provisions of Section 24 (c). This question can only be addressed in conjunction with a consideration of the scope and meaning of Section 24 (d).

[43]Du Plessis and Corder, ibid, page 169

Baxter has expressed the view that reasons should be furnished automatically as a vital component in good administrative decision making[44] but this approach takes, in my view, insufficient account of the enormous administrative burden which this would lead to. Although this may be a justified development in years to come, at this stage of our history and given the demands to be made upon a transforming bureaucracy, it is not unreasonable to expect that reasons need only be furnished upon request.

De Ville[45] submits, correctly in my view, that non-compliance with Section 24 (c) by an administrative authority can found no more than a mandamus to provide the reasons sought. He goes further however and suggests that such an initial default on the part of an administrative authority should lead to a reversal of the onus so that the authority would have to prove all the requirements for lawful administrative action and the non-infringement of any fundamental right where this was asserted. It is difficult to see on what basis this reversal of the onus can be justified except by way of a penalty designed to discourage tardy or recalcitrant behaviour on the part of administrative authorities. It is doubtful whether this concern alone should justify the reversal of an onus. De Ville also explains why the right to reasons is not triggered when a persons *"stake"*, whatsoever it may be, is threatened. The reason, he argues, lies in the distinction between information on the one hand and reasons on the other. Where a person's rights or interests are threatened, necessarily a prospective threat, a party is entitled to no more than information. The question of reasons can only come into play once the threat has been given effect to in which event the right or interest has been *"affected"*. This line of reasoning, in my view, assumes, not necessarily correctly, that a threat must eventuate before administrative action can be said to have taken place or can be reviewed.

Several commentators, notably Mureinik, have tempered the enthusiasm which has greeted the introduction of the obligation to furnish reasons through Section 24 (c) by warning that in certain respects the right should be restrictively construed. To give a literal interpretation to Section 24 (c) would be to impose so onerous an obligation on the State that it may seek

[44]Baxter op cit, n40, page 232

[45]Op cit, n17, page 271

recourse either through an amendment of the Constitution thereby dispensing with the obligation or alternatively through seeking to limit the right under Section 33. The real and valid concerns which Mureinik raises here are better addressed when considering the content of the notion of *"justifiability"* in relation to the reasons given, the gravamen of Section 24 (d).

SECTION 24 (d) - THE RIGHT TO ADMINISTRATIVE ACTION *"JUSTIFIABLE IN RELATION TO THE REASONS GIVEN FOR IT"*

The right to administrative action is only triggered where a persons rights are affected or threatened. The parsimony with which this right is dispensed is no doubt a further product of the uneasy balance between the interests of *"orderly and efficient"* government and the counterposed interests of governmental accountability and the ethos of justification.

The obvious question which arises is what constitutes *"justifiable"* administrative action. In the first published commentary on the sub-clause Cachalia et al[46], having due regard to the linkage to the reasons given for the administrative action, contended that this established the requirement of administrative decisions being *"rational, coherent and capable of being reasonably sustained having due regard to the reasons for such decisions"*. One learns from Du Plessis and Corder[47] that at least the nomendature of *"justifiability"* traces its parentage back to Mureinik. Although the authors contend that the term *"justifiability"* moves towards the incorporation of the standard of *"reasonableness"*, they express their preference for the view of Cachalia et al viz that it accords the right to a *"rational and coherent decision making process"*. Such a process, they contend, although tending to produce a reasonable result, may on occasion not do so.

Burns[48] expresses the view that *"reasonableness"* is a wider concept than *"justifiable"* when viewed from the perspective of the subject of administrative power since although a decision

[46]op cit, n13, page 74

[47]op cit, n3, page 169

[48]op cit, n22, at page 357

may be justifiable on the reasons put forward, it *"need not necessarily have a reasonable effect on the rights, freedoms and legitimate expectations of the individual"*. This view appears to be well founded and is a powerful argument for constitutionalising the review standard of *"unreasonableness"* a concept well known to administrative lawyers.

Mureinik, however, perhaps impatient with the niceties of these distinctions, contends squarely that justifiability amounts to reasonableness. In a lengthy and fascinating footnote[49] he explains how considerable opposition arose to judicial review at the Kempton Park negotiations on the grounds of reasonableness for two main reasons: firstly, an irrational distrust of the word reasonable, and secondly, a concern that the introduction of the concept would lead to the usurping by the courts of the policy-making prerogatives of the executive. His compromise clause, directed at meeting these two objections, introduced the concept of *"justifiability"* but was only adopted in severely truncated form into the present Section 24, the word, *"justifiable"* being the sole survivor thereof. Against this background, Mureinik states that he takes the word *"justifiable"* to mean the same thing as *"reasonable",* it being a word apparently freer of the connotations which dismay those who fear *"reasonable"*. In this way, declares Mureinik, the final form of Section 24 met the irrational fear but failed to deal with the legitimate concern about the use of judicial review by an unelected and largely unrepresentative judiciary.

Intriguing though this behind the scenes account may be, it is to be strongly doubted whether any court can, in interpreting the concept, take account of the personal, no doubt somewhat coloured, version given by Mureinik of the ancestry of *"justifiability"*. A certain amount of hair-splitting furthermore seems to be involved in the distinctions made between the two possible meanings generally favoured by commentators.

In Van Wyk et al[50] Corder again articulates the fear that judicial review for reasonableness could well be misused to hold up vital social reform measures. However as we will see from a review of the cases in due course, almost two years after the coming into force of the

[49]op cit, n27, page 40 footnote 30

[50]op cit, n9, page 399

interim Constitution there is little if any evidence that this has indeed proved to be the case.

The leading proponent of the importation into our law of the European concept of proportionality as the test for administrative action, De Ville, is of the view that *"justifiability"* in fact does introduce the concept into our law. Thus he argues, for administrative action to pass muster administrative action must be *"suitable, necessary and proportionate"*[51]. His setting out in greater detail the requirements for proportionality: *"whether the decision maker considered all the serious objections to the decision taken and has answers which plausibly meet them; that the decision maker considered all the serious alternatives to the decision taken, and discarded them for plausible reasons; whether there is a rational connection between the premises and conclusion"*[52] reflects similar requirements for meeting the test of *"justifiability"* as set out by inter alia Mureinik and Corder. Carpenter[53] favours Baxter's formula of *"dialectic reasonableness"* (as opposed to pure reasonableness) as likely to gain the approval of the courts formulation of what precisely *"justifiability"* entails.

Faced with these divergent opinions one is driven to the prosaic conclusion that until such time as the Constitutional Court issue an authoritative pronouncement, the precise nature of *"justifiability"* remains uncertain. What is certain is that in appropriate circumstances our Courts are now empowered to scrutinize the decision-making process and thus the decision itself far more rigorously for coherence and rationality. A standard of review for unreasonableness will be approached, if not immediately whole-heartedly embraced. At the same time however the courts will have to steer a careful line between exercising the power of review, as it is traditionally understood in our law, and substituting its own opinion for that of the decision-maker - the essential difference between review and appeal. Whatever the final destination may be, it must be accepted that the previously prevailing doctrine of South African administrative law which, as Mureinik puts it, requires the decision to be *"grossly unreasonable to so striking a degree"* before the Courts will interfere - a doctrine of *"deep*

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[51]op cit, n17, page 272

[52]Ibid, page 273

[53]op cit, n31, page 471

deference" - has been dealt *"a blow which all friends of official accountability will wish to be mortal"*[54].

Despite the enthusiasm with which Section 24 (d) has been received, most commentators have warned against an interpretation of Section 24 (d) so generous as to render administrative action excessively vulnerable with the result that the concept of review for justifiability could of itself be completely undermined or discredited. Too liberal an interpretation could lead to the State building a credible case for a constitutional amendment to either free itself of the burden imposed by Section 24 or alternatively to water it down through the limitation clause perhaps thereby rendering the right innocuous.

The warning is given in the light of the requirement that administrative action be justifiable *"in relation to the reasons given for it"*. The question thus arises as to whether this refers to reasons supplied pursuant to the provisions in Section 24 (c), and if so, whether in judicial review proceedings, the State will be permitted to rely on reasons other than those initially furnished. Mureinik[55] postulates a situation where the administrative authority furnishes a carelessly drawn set of written reasons which are not full enough to demonstrate justifiability under Section 24 (d). In such a case if Section 24 (c) and (d) are held to be interlinked the State will be pinned to its prior written reasons and an administrative decision which might otherwise be justifiable will be struck down. Accordingly, with a view to preserving the integrity of Section 24 (d), albeit in a weaker form, Mureinik submits that the two crucial sub-clauses must be read as separate rather than interlinked. In this way an administrative authority can supplement its initial written reasons, provided of course that this is a bona fide exercise rather than an artificial manufacturing of reasons simply to withstand judicial review. He ingeniously supports this interpretation by arguing that the two sub-clauses refer to different classes of administrative action, pointing out that Section 24 (c) appears to apply to administrative action which affects one's rights or interests while Section 24 (d) appears to apply only where the disputed administrative action affects or threatens one's rights. The effect of adopting the interpretation for which he contends would be to permit administrative

[54]op cit, n27, page 40

[55]Ibid page 40

authorities to rely upon reasons supplied in the judicial review process itself rather than only those supplied pursuant to Section 24.

As Mureinik puts its, the end result would be to render Section 24 *"an instrument for improving governance, not frustrating it"*. Although the interpretation contended for by Mureinik is somewhat strained, bearing in mind the apparent close linkage between Section 24 (c) and 24 (d), his interpretation has much to commend it should it spell the difference between an emasculation of Section 24 (d) or its preservation as a striking advance in our law of judicial review.

LINKAGES BETWEEN SECTION 24 AND OTHER PROVISIONS OF THE BILL OF RIGHTS

SECTION 7: THE APPLICATION CLAUSE

We have already examined the effect of the standing clause in Section 7 (4) (a) and (b) concluding that, if anything, it is likely to extend the ambit of Section 24's application.

Section 7 (3) makes it plain that juristic persons are, in general, entitled to the rights enumerated in the Bill of Rights. Such persons are often the objects of administrative decisions and there is no reason why *"persons"* in the introduction to Section 24 should not be read as including artificial persons. Section 7 (2) applied to Section 24 states in effect that only administrative decision taken or act performed after 27 April 1994 are governed by the new administrative law dispensation. Finally Section 7 (1) with its reference to *"all legislative and executive organs of state at all levels of government"* signals the fact that the Bill of Rights is principally of vertical application. Sub-clause 7 (1) is of course not exhaustive of what may comprise a breach of Section 24 and the considerable body of common law which has developed in our country concerning which administrative bodies, tribunals and even private bodies (where they exercise a disciplinary function) are subject to the rules of administrative law, remains intact and indeed can and probably should be developed further. A valuable instrument for such development is likely to be Section 35 (3) of the interpretation clause, the so called *"seepage"* clause. It provides, crucially, that *"In... the application and*

development of common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter".

Of latter years at least, there has been a blurring of the divide between the public and private sectors both in the reality of day to day commerce, inter alia through the emergence of para-statals and the phenomenon of privatisation, and in the practice of administrative law through a willingness to extend its field of its operation to bodies other than those previously considered strictly public. It may thus well be that the courts will be found to be more willing to assist in tempering the effects of substantial power exercised by bodies finding themselves within the penumbral zone between the public and the private spheres. In this exercise Section 35 (3) may provide a bridge for the wider application of the values and culture of justification which Section 24 strives to promote.

SECTION 23 - ACCESS TO INFORMATION

Section 23, the right of access to information is a close neighbour of Section 24 in more than simply the numerical sense. It provides the instrument for any person wishing to invoke their right to administrative justice, be they the holder of a right, a legitimate expectation or merely an interest in a matter, to seek disclosure from the administrative agency of information upon which the relevant decision was based, provided a case can be made that such information is *"required"* for the exercise of his/her administrative rights. If the required information is obtained e.g. through perusal of the official file, coupled with the right to be furnished with reasons, an aggrieved party can make his/her own valuation, prior to the institution of litigation, as to whether the decision-making process was a rational and coherent one producing a defensible or justifiable result.

Those parties who do not enjoy the right to procedural fairness, or to be furnished with reasons or to justifiable administrative action, can, theoretically at least, obtain *"discovery"* of the materials considered during the decision-making process. These may well indicate or confirm a suspicion that the decision or action was taken in breach of one of the existing common law grounds of review, thus providing the aggrieved party with the building blocks of a case for judicial review which s/he might otherwise have been unable to achieve.

The peculiar wording namely *"administrative decisions taken and acts performed"* suggests that administrative acts performed after 27 April 1994 implement decisions taken prior to that date can indeed be challenged in terms of Chapter 3, an interpretation advocated by Du Plessis and Corder[56]

SECTION 33 - THE LIMITATION CLAUSE

The likelihood or not of the government achieving a limitation of the right to administrative justice has already been discussed. Carpenter has difficulty in seeing how anything other than a formal limitation could pass the stringent test of reasonableness, justifiability in an open and democratic society and non-negation of the essential content of the right. While Section 24 does not fall within the class of rights which enjoy the additional protection that any limitation thereof must be *"necessary"*, this protection does come into play insofar as any limitation of Section 24 might relate to *"free and fair political activity"*. This added limitation would have had value in the recent past when open air gatherings, marches and other political demonstrations were proscribed by magistrates and policemen wielding wide untrammelled powers.

De Ville[57] has noted that, as it stands, Section 33 (1), with its requirement of *"law"* as a precondition for the limitation of a fundamental right, appears to overlook that such limitations can take place in the absence of law where the governing statute affords a discretion to an administrative body or official to take decisions which limit fundamental rights. On the premise that this creates too wide an exception and was not the intention of the Constitution's drafters, De Ville proposes the insertion of the words *"or pursuant to law"* in the introduction to Section 33 (1). In so doing he accepts that this would mean that administrative action which infringes fundamental rights would also have to be tested against the requirements of Section 33 (1).

[56]op cit, n3, page 115

[57]op cit, n17, page 270

SECTION 34 - THE SUSPENSION CLAUSE

Although Section 24 is not immune to suspension in consequence of the declaration of a state of emergency and although *"only to the extent necessary to restore peace or order"* (Section 34 (4)), Section 34 (3) provides an important exception to this Draconian power. It provides that any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof and any action taken, including any regulation enacted under such declaration.

The question arises as to what *"validity"* means in these circumstances. Is it merely the power of the court to determine whether the formal requirements of Section 34 have been complied with, or does it include the power to require proof of the substantive grounds justifying the proclamation of a state of emergency or any actions taken pursuant thereto? In keeping with a generous interpretation of the Bill of Rights, one inclining in favour of the rights of individuals, what commentary has thus far been published leans towards the latter view point. De Ville[58] interprets the sections as affording the courts full jurisdiction to enquire into the merits of any decision and suggests furthermore that his favoured proportionality test can again be used. He adds the qualification though, that, no doubt in view of the peculiar circumstances of the situation, the legislature should be left *"a margin of appreciation"* (and the executive where this is provided for in delegated legislation).

On the other hand Erasmus[59] advocates *"strict judicial scrutiny"* when the court acts in its *"critical role"* in terms of Section 34 (3). In his view the courts' powers extend beyond simply procedural matters to the substance of emergency proclamations. Thus for example where the Court must consider the "validity" of the state of emergency it would be entitled to test for the existence of the substantive grounds justifying the proclamation and to require sufficient factual proof of the existence of the threat of war, invasion etc.

[58]Ibid, page 27

[59]Van Wyk et al, op cit, n9, Part 3 Limitation and Suspension - Gerhard Erasmus

Given our legacy of the excesses of the past government under emergency rule, it is submitted that the courts should be astute to grasp the full array of powers afforded them under Section 34 (3). Since these powers essentially equip them to judicially review executive and legislative administrative action, the obvious and logical test to be applied is that which a court would normally apply in terms of Section 24 (d) when invoking the concept of justifiability. Whether or not a *"margin for appreciation"* should be granted to the State depends, in my view, on the powers which are invoked and the context in which this takes place. In accordance with the generally accepted notion that high executive powers involving a wide discretion and high political content, such as the declaration of war and relationships with foreign countries, the courts would be well advised to be more circumspect in interfering with the exercise of such powers. In so doing they would be protecting the integrity of the principle of the separation of powers. However different considerations apply and hence a stricter judicial approach is justified when dealing with the acts and rulings of police officials and magistrates pursuant to the declaration of a state of emergency.

CONCLUSION

While there is no shortage of criticism of both the substance and structure of Section 24, a balanced perspective must hold that the virtues of the interim administrative justice clause far exceed its shortcomings. The intricacy and, flowing therefrom, the over-prescriptiveness of the clause in certain respects should not obscure the fact that Section 24 affords the opportunity to our courts to make a quantum leap in developing our science of administrative law. Using Section 24 as a springboard our existing system can be freed from the shackles of executive mindedness which prevailed in the past and continues to prevail in many quarters and to bring our administrative law system into line with the rest of the world's maturer democracies.

The essential point of such an opportunity is not to rehabilitate the reputation of the judiciary in matters of administrative law however, but to rehabilitate our executive, legislative and administrative bodies and agencies in order to move away from what Mureinik aptly terms our past (and present?) *"culture of authority"* to a culture of justification, one *"in which every exercise of power is expected to be justified; in which the leadership given by the government*

rests on the cogency of the case offered in defence of its decision, and not the fear inspired by the force at its command."[60]

The true test will be whether the right to administrative justice as interpreted by the courts, which is essentially only a retrospective remedy *"will begin to exert a prospective influence on bureaucratic behaviour so that fairness and openness will become the hallmarks of administrative action - in effect obviating the need for review, except as a last resort."*[61] Assuming that the best features of section 24 are retained in the final constitution, only time will tell whether this goal will achieved.

[60]op cit, n27, page 30

[61]Corder and Du Plessis op cit, n3, page 170

CHAPTER 4

THE ROLE OF SECTION 24 IN CASE LAW SINCE APRIL 1994

In this chapter it is proposed to examine the leading reported judgments of our superior courts which have been handed down since 27 April 1994 and in which the courts have applied, or chosen not to apply, the provisions of Section 24.

A case which appears to enjoy the distinction of first invoking the provisions of Section 24 is **Tseleng v Chairman Unemployment Insurance Board and Another**[62]. The matter involved the review of the respondents decision not to award the applicant certain further unemployment benefits under the provisions of the Unemployment Insurance Act No 30 of 1966. The court set aside the decision on two grounds. Firstly it found that the respondent had misdirected itself on a material point of law relating to its interpretation of a section of the Act. It was in relation to the second successful ground of review however that the provisions of Section 24 came to the fore. It transpired that the Board had purported to consider the merits of the applicant's application for further benefits but had refused same as a matter of policy because the application before it did not reveal that the applicant had sought employment during the period when initial benefits had been paid to him. The applicant had not enjoyed a formal hearing at which this policy could have been conveyed to him and the form which he had completed in applying for the benefits had also not revealed the existence of the policy or directed his attention to it in any meaningful manner.

The Court found that where a statutory body adopts a policy that a certain factor or criterion is so material as itself to determine the fate of an application, then it should not keep that policy to itself but make it known and thereby afford any applicant an opportunity to show why s/he should be treated as one who qualifies within the terms of that policy.

It is submitted that without the existence of Section 24 the above conclusion could have been reached by a simple reliance on the principle of audi alteram partem. The Court however

[62] 1995 (2) BCLR 138 (T)

went out of its way to consider whether, in the circumstances, any constitutional right to administrative justice might apply. Citing Section 24 (b), the Court stated as follows:[63]

> *"Furthermore whether or not one brings the action of the Board in failing to disclose in advance to the applicant the existence and scope of its policy within an acknowledged ground of review, I would (notwithstanding the absence of submissions to me on this issue) be prepared to find that such failure amounts to the breach of the fundamental right conferred on the applicant by Section 24 ((b)) of the Constitution of the Republic of South Africa..."*

Ironically however it would appear that Section 24 did not apply, since, on the facts, the decision refusing the application appears to have been taken on or about 20 April 1994 i.e. before the coming into force of the interim Constitution. Regarding the first ground of review it is submitted that the Court could equally have invoked (on the erroneous assumption that Section 24 did apply) the provisions of Section 24 (a) or (d) since the Board's misdirection on a material point of law would arguably have rendered its decision ultra vires or at least unjustifiable.

The promising judicial readiness to give effect to the content and spirit of Section 24 evinced in Tseleng's case, was conspicuously absent in the second administrative law case to come before the Supreme Court in 1994. In **Xu v Minister van Binnelandse Sake**[64] the Transvaal Provincial Division, Stafford J presiding, was called upon to test the legality of an administrative act taken without written reasons as required by Section 24 (c) of the interim Constitution.

written reasons

The applicants were aliens whose applications for a temporary residence permit in terms of the Aliens Control Act No 96 of 1991 had been refused by an Immigration Officer. The applicants had then sought written reasons in terms of Section 24 (c) of the interim Constitution. When these were refused they sought orders from the Court compelling the

[63]At 151 D - F

[64]1995 (1) SA 18

respondent to justify the refusal by furnishing reasons. The respondent contended that the applicants did not have the necessary locus standi in the action and further submitted that the Applicants were not entitled to be furnished with the aforesaid reasons because there was no legal duty on the respondent to do so. The Court rejected the further contention that the respondent's conduct was not governed by administrative law but by public international law inasmuch as its act was that of a state vis a vis the citizens of a foreign country. Turning to the central question of whether the applicants were entitled to written reasons, the Court held that there could be no question of the applicants having rights capable of being affected or threatened by the respondent since they had no rights to, interests in or legitimate expectations of a continued residence in the Republic. Relying inter alia on Section 20 of the interim Constitution, the court held that only citizens of the Republic were guaranteed the right to enter and remain in the Republic and further that it was settled law that the State had an absolute and exclusive discretion as to whether it would allow foreign nationals in its territory.

The decision has been trenchantly criticised by Mireku[65] who contends, it is submitted with justification, that the Court misdirected itself in finding that the applicants had no constitutional rights and shifting the onus of proof of any such rights completely onto the applicants. Mireku cites strong English authority to the affect that there is no distinction between British nationals and others when it comes to the equal protection of the law. In **R v Home Secretary ex parte Khawaja** 1984 AC 74, the House of Lords, through Lord Scarman stated as follows:

> *"Habeas corpus protection is often expressed as limited to "British subjects". Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic "no" to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others."*

Mireku's strongest strictures relate however to the Court's failure to heed the culture of justification which Section 24, and in the particular circumstances of this case the provisions

[65]Obeng Mireku - Speaking with the Voice of the Oracle and the Administrative Justice Clause: Incompatibility in Action (1995) 10 SAPR/PL, page 211

of Section 24 (c), establish. That this was no idle criticism appears from the following concluding passage in the judgment:

> *"Indien elke persoon - ek beklemtoon die woord persoon - geregtig is op skriftelike redes waarom sy aansoek geweier is, sal chaos in die Departement van Binnelandse Sake ontstaan. Daar is myns insiens 'n bewyslas op 'n applikant om aan te toon watter regte en watter belange of selfs watter regmaatige verwagtings deur so 'n weiering geraak of bedreig word, voordat 'n applikant op skriftelike redes geregtig is."*

Elsewhere in the judgment the Court refers to the applicant's case as putting the cart before the horse. Yet this is precisely what the court did in looking to the perceived administrative consequences of the respondent furnishing reasons and in the light thereof importing a limitation into Section 24 (c) which its plain wording does not reveal. One cannot but agree with Mireku that the above passage *"is symptomatic of an authoritarian culture"*. Even conceding, for the sake of argument, that the applicants enjoyed neither a right nor a legitimate expectation of having their temporary residence's permits extended, it is difficult if not impossible to understand how the Court could find that they did not at least enjoy an interest in the subject matter of the administrative decision and as such were entitled as a constitutional right to written reasons for the decision in terms of Section 24 (c) of the interim Constitution.

In **Podlas v Cohen N.O. and Others**[66] the Court also raised the spectre of administrative *"chaos"* in this instance were effect to be given to the audi alteram partem rule with regard to the issuing of a notice by the Master of the Supreme Court requiring a person to attend an insolvency interrogation. On this occasion however, it is submitted, the spectre had more justification than was in the case of **Xu**.

audi alteram rule.

[66]1994 (3) BCLR 137 (T)

Attorneys acting for two creditors in an insolvent estate had successfully applied to the Master for an urgent interrogation in terms of Section 152 of the Insolvency Act No 24 of 1936 pursuant to which the applicant, the sequestrated party, had been subpoenaed to attend as a witness. In seeking an interim interdict to prevent the proposed interrogation, pending an approach by her to the Constitutional Court in which the validity of the relevant provisions of the Insolvency Act were to be challenged, the applicant contended that her right to administrative justice contained in Section 24 of the interim Constitution had been infringed. The basis of the infringement contended for by applicant was that in issuing the notice summoning her to the interrogation, the Master had done so in response to the representations of the trustees' attorneys but had not called upon the persons who were to be summoned to make representations. It was further alleged that the Master had performed an administrative act as contemplated by the interim Constitution and that as such the audi alteram partem principle applied inasmuch as a decision was to be made which could prejudicially the applicant in her liberty, property or existing rights.

In rejecting this argument the court found that the audi alteram partem principle applied when a statute empowered a public official to make a decision prejudicially affecting an individual in his liberty, property or existing rights. The court found that the Master's decision to issue the notices, which were simply subpoenas, did not affect any such interest of the witness or witnesses. The notices called upon the persons summoned to perform an public duty and in those circumstances personal freedom became subordinate to the public interest. In making this latter finding the court expressly applied the limitation clause contained in Section 33 (1) stating[67]

> *"a person who is subpoenaed to give evidence before any legally constituted tribunal empowered to give evidence subpoena witnesses, is, generally speaking, obliged to obey it. This seems to be so because he or she is called upon to perform what may be described as a public duty ... . Personal freedom therefore becomes subordinate to the public interest. In the words of the Constitution, the right to freedom is limited to that extent because it is reasonable and justifiable to do so. (Section 33 (1) of the*

[67]at page 140 B

Constitution). It would be utter chaos if every official authorised to issue such a notice, summons or subpoena were required to hear the person who is to be summoned before actually issuing the notice, summons or subpoena. It would be grossly unreasonable to demand this. It also follows that no written reasons need to be furnished to anyone to justify the decision for issuing the notice, summons or subpoena."

In substantiation of its conclusion the Court pointed out that the envisaged enquiry was purely investigatory, the presiding officer making no finding which could detrimentally affect the persons rights nor determine any persons rights.

Insofar as the court was apparently not required to deal with the question of whether the enquiry infringed the applicants' right to a fair trial, it is submitted that both the substance of the decision, from an administrative law point of view, and the manner in which it was reached was correct. Rather than finding in built limitations in Section 24 (b), not justified by the plain meaning of the Section, the Court reached its decision on the basis that no right of the applicant was being affected or, to the extent that this might not be the case, that any such infringement was justified in terms of the limitation clause.

Although the Court did not engage in a studious discussion of the limitation clause, it would appear that this was unnecessary inasmuch as Section 24 (b) accords the right to procedurally fair administrative action only to parties whose rights or legitimate expectations are affected or threatened. No case was made out by the applicant on these grounds and, even assuming the applicant's interests were threatened or affected, such a limited *"stake"* does not call into play the right to procedural fairness embodied in Section 24.

The subject matter of the dispute in **Claude Neon Limited v City Council of Germiston and Another**[68] concerned the right of the holder of a legitimate expectation to procedurally fair administrative action in terms of Section 24 (b) of the interim Constitution. The applicant company had previously contracted with the local authority to be granted the sole and

[68] 1995 (5) BCLR 554 (W)

exclusive right to erect illuminated street signs. After the contract expired applicant's representatives met with an official of the local authority in an attempt to negotiate a renewal of the contract. The official advised applicant's representatives that tenders would be invited and undertook to notify the company when the tender documents were ready. Through an oversight the local authorities failed to honour this undertaking in time and then proceeded, over the protestations of the applicant company, to award the tender to a third party in the absence of the applicant's tender. The Witwatersrand Local Division of the Supreme Court, per Zulman J, found that the undertaking given by the official amounted to an administrative act which further gave rise to a legitimate expectation on the part of the company that it would receive procedurally fair administrative action in accordance with Section 24 (b) of the Constitution.

The judgment confirms, if this was needed, that the right to administrative justice is also enjoyed by artificial persons. The nub of the Court's finding, that in the light of the applicant's legitimate expectation of procedural fairness the local authority had no right to award a tender to a third party until it had properly considered the applicant's tender, was, it is submitted, wholly correct and unexceptionable. The decision was based inter alia on the Appellate Division's decision in **Traub** and the English case of **Council of Civil Service Unions v The Minister for the Civil Service**[69], the latter decision holding in terms that an *"express promise"* gave rise to a *"legitimate or reasonable"* expectation.

The same issue as confronted the Court in **Xu v Minister van Binnelandse Sake** viz the right of an alien to be furnished with reasons for a decision not to grant an extension to a temporary residence permit, arose in the matter of **Naidenov v Minister of Home Affairs**[70].

The applicant was a citizen of Bulgaria who had been detained by the South African Police pending his removal to Bulgaria. He sought an order declaring that his arrest was wrongful and seeking certain further relief, including written reasons in terms of Section 24 (c), for the decision not to extend his temporary residence permit. A significant difference between

[69](1985) AC 374 (HL)

[70]1995 (7) BCLR 891 (T)

his circumstances and those of **Xu** was that the applicant's residence permit had been extended on a number of occasions prior to his arrest and threatened deportation. Despite this Spoelstra J found no reason to differ from, let alone question, the judgment in **Xu**'s case. The learned Judge found that the applicant enjoyed no *"interest in the relevant administrative decision which entitled him to judicial protection in regard to that interest"*. Instead he described the applicant's interest, such as it was, as no more than a *"wish to remain in this country, or a wish not to be returned to his own country"* and that such an *"interest"* cannot be enforced in a court of law.

The court's interpretation of the level of interest necessary to found a right in terms of Section 24 (c) was disappointing in its narrowness. Furthermore its reasoning appears to be circular inasmuch as its finding that the applicant's *"wish"* did not amount to an interest suggests that any stake falling short of a right does not suffice. Inasmuch as the applicant contended that should he be deported to Bulgaria he would face a politically motivated criminal prosecution and that he intended to apply for political exile in South Africa, it is submitted that there was ample evidence that the applicant had, at the very least, an interest in the administrative decision as to whether or not his residence permit would be extended.

It is difficult to escape the conclusion that an unduly blinkered and xenophobic approach to the alien applicant lay behind the court's decision. What appears also to lie unexpressed in the Court's judgement is that the furnishing of reasons to the applicant would permit him to *"get a foot in the door"* leading to the extension of his temporary residence permit. The reluctance of the Court to compel the immigration authorities to furnish their reasons indicates a disturbing lack of appreciation of the need for the merits of such administrative decision to be fully ventilated.

It is to be hoped that the question of the rights of aliens to administrative justice will eventually be considered by a Court which places a higher value on the principles of administrative justice enshrined in Section 24.

In **Standard Bank of Bophuthatswana Ltd v Reynolds N.O.**[71] the Court was concerned with an application for the review and setting aside of an order of the Industrial Court. Friedman J P had occasion to discuss the various Supreme Court judgments applicable to the review of administrative decisions where it was alleged that the decision maker takes the decision unsupported by any evidence or by some evidence not sufficiently reasonable to justify the decision arrived at, or where the decision maker ignores uncontroverted evidence on which he was obliged to reflect. The Court concluded that the test of *"gross unreasonableness"* did not, in the light of the provisions of the interim Constitution, accord with a modern approach to judicial review. It held that it was necessary to adopt the less stringent test of *"unreasonableness"*.

Somewhat strangely, in the course of its lengthy discussion of the case, the Court made no mention of the test of justifiability explicitly provided for in Section 24 (d). Nonetheless its decision that the concept of *"unsupported by substantial evidence"* may be invoked to widen the scope of review as well as the principle of *"no reasonable evidence"* and its corollary, namely that if a decision maker fails to take into account all the evidence and considerations relevant to the decision the decision or finding is reviewable and may be set aside, is to be wholeheartedly welcomed.

In **Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others**[72] the Cape Provincial Division of the Supreme Court, Farlam J presiding, was required to grapple with a number of constitutional questions in an application to compel the first respondent to appoint a board of investigation in terms of Section 15 (1) of the Environment Conservation Act 1989 to assist respondent in the evaluation of the environmental consequences of building a steel mill on a portion of a farm at Saldahna near the West Coast National Park and the Langebaan Lagoon. In support of the relief sought, applicants relied on their right to procedural fairness in terms of Section 24 (b).

[71] 1995 (3) SA 74

[72] 1996 (1) SA 283

In upholding applicants claim the court held that anyone whose rights will be affected by a rezoning decision has the right, by reason of Section 24 (b), to procedural fairness in respect of such decision. That section, the court stated, does not merely codify the common law relating to natural justice which, it found, in any event was not limited to the audi alteram partem and nemo iudex in casa causa rules. The court exhibited praiseworthy flexibility in holding, further, that a party entitled to procedural fairness in terms of Section 24 (b) is entitled to *"the principles and procedures ... which in any particular situation or set of circumstances, are right and just and fair"*.

In a strong endorsement of a broad and generous approach to the interpretation of the Bill of Rights, the Court held that even if the aforementioned statement regarding the parameters of the right to procedural fairness did not correctly reflect the South African common law, then it was nonetheless the correct test to apply under Section 24 (b) of the interim Constitution. The Court relied heavily upon dicta of Lord Morris of Borth - y - Guest in **Wiseman v Borneman** which stressed that the rules of natural justice comprise a flexible set of principles and procedures which must be adapted to suit the particular circumstances of each occasion.

However the learned judge's remarks concerning the correct test to be applied in interpreting Section 24 (b) were of special and welcome significance for administrative lawyers. He specifically rejected[73] a *"reading down"* of Section 24 and, relying on Section 35 (1) and 35 (3) of the Constitution, the latter being the enjoinder to the courts to promote *"the values which underline an open and democratic society based on freedom and equality"*, he held as follows: *"the correct interpretation of the meaning of the right to procedurally fair administrative action" entrenched in Section 24 (b) must be a "generous" one, "avoiding what has been called "austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights ... referred to"*. Here the learned judge was adopting the language of Lord Wilberforce in **Minister of Home Affairs and Another v Collins McDonald Fisher and Another**[74] which was also approved by our Constitutional Court in

[73]at 305 F - G

[74](1980) AC 319 (PC) at 328 - 9

S v Zuma and Others[75].

One is struck by the sharp contrast between the approach to the interpretation of Section 24 by the Court in **Van Huyssteen**'s matter as opposed to that in **Xu** and **Naidenov**. It is unlikely that this difference can be attributed solely to the differing factual circumstances of the matter or to the fact the Court's in **Xu** and **Naidenov**'s matter were dealing with the rights of aliens temporarily resident in South Africa. One senses rather that the respective approaches are formed by completely different value systems and philosophical beliefs, the one emanating from a more authoritarian background which, it is submitted, is out of keeping with, and finds it difficult to adapt to, the sea change which our new era of constitutional sovereignty and a rights-based culture has ushered in.

CONCLUSION

Despite the fact that Section 24 spells out in relatively certain terms constitutionally guaranteed rights to administrative justice, significant parts of the judiciary are still predisposed to the executive-minded approach which has permeated our administrative law over the last three decades. One ventures to suggest that nothing less than a series of authoritative pronouncements by the Constitutional Court setting the tone for the rest of the judiciary will reverse this tendency and place us on the road to the culture of justification somewhat prematurely heralded by Mureinik.

At a broader level it is disappointing to note how few administrative law cases have come to the fore in the past two years and of those which have, in how few the courts have grasped the opportunity to use Section 24 to broaden the scope of governmental accountability. If nothing else this trickle of cases suggests that the spectre of the government's social reform program being cut down in its tracks by a rampant, conservative judiciary newly armed with an administrative justice clause is more bogeyman than a real threat. It is to be hoped that the form of our final administrative justice clause is shaped by this realization.

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[75] 1995 (2) SA 642 (CC) at 651 A - D

CHAPTER 5

THE PROPOSED NEW ADMINISTRATIVE JUSTICE CLAUSE IN THE FINAL CONSTITUTION

In terms of Section 68 of the interim Constitution, the National Assembly and the Senate, sitting jointly as the Constitutional Assembly, is required to draft and adopt a new constitutional text in accordance with Chapter 5 of the interim Constitution. In turn Section 71 of Chapter 5 requires that the new constitutional text comply with the Constitutional Principles contained in Schedule 4, be passed by the Constitutional Assembly and thereafter *"will not be of any force and effect"* unless and until the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles.

The National Assembly having first sat on 9 May 1994, Section 73 of the interim Constitution requires that a new constitutional text be passed by a majority of at least two thirds of all members of the Constitutional Assembly within two years, viz on or before 9 May 1996. Deadlock breaking mechanisms exist in the form of a panel of constitutional experts and a referendum in the event that the required two thirds majority is not obtained. Early May 1996 will probably see the Constitutional Assembly convening to consider the text of the working draft of the new Constitution.

Despite the fact that the Constitutional Assembly has sat many hours and despite the labours of various theme committees and constitutional committees, a large number of the clauses in the draft Bill of Rights feature one or more optional versions of the right and, within such options, optional choices as to the wording thereof.

The administrative justice clause is one which offers two optional versions. These read as follows:

"JUST ADMINISTRATIVE ACTION

Option 1

Clause 32

1. *Everyone has the right to administrative action that is lawful, (reasonable/justifiable), and procedurally fair.*

2. *Everyone has the right to be given reasons for administrative action, unless the reasons have been published.*

Option 2

1. *No-one may be adversely affected by administrative action that is unlawful or unreasonable.*

2. *Everyone whose rights are adversely affected by administrative action has the right to fair procedure unless the administrative action is of general application.*

3. *Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons."*

It is proposed to discuss the merits and demerits of the two versions regard being had to the existing administrative justice clause and the cases which have followed therefrom. Before doing so however it is as well to examine the formal submissions of various political parties to theme committee 4, which was concerned with fundamental rights, prior to the drafting of the two options. These submissions highlight the interpretations placed on Section 24 by the parties and what they perceived as the problems emanating therefrom which needed to be addressed in the new formulation.

The theme committee received submissions from the African Christian Democratic Party (ACDP), the African National Congress (ANC), the Democratic Party (DP), the Freedom Front (FF), the National Party (NP) and the Pan African Congress (PAC). Little time need be spent on the submissions of the PAC, which were utterly lacking in substance nor on the submissions of the ACDP much of which constituted religious propaganda. The latter party did however make the interesting submission that the administrative justice clause should be made applicable against *"para-statals and non-governmental organisations including banks, multi-nationals and other corporative (sic) bodies"*. The Freedom Front's proposals were marked by an extremely conservative approach one which saw Section 24 (a) as superfluous, which set its face against reasonableness as a ground for review on the basis on that its acceptance would lead to *"a overwhelming number of administrative acts"* being *"redone by the courts"*, and which advocated a cutting back of the right to procedural fairness to apply only to quasi judicial acts and the removal or severe restriction of the right to written reasons as provided by Section 24 (c). In short the Freedom Front's proposals would have the pre-April 1994 administrative law dispensation frozen into the new constitution.

THE DEMOCRATIC PARTY

In its proposals, which appear to bear the unmistakable imprint of Professor Etienne Mureinik, the Democratic Party emerged as an unequivocal supporter of a constitutionalised right to administrative justice contained in a simple and uncluttered clause. The submissions place great reliance on Constitutional Principles VI and IX which provide for a separation of powers between the three levels of government *"with appropriate checks and balances to ensure accountability, responsiveness and openness"*[76] and for freedom of information *"so that there can be open and accountable administration on all levels of government"*[77]. The Democratic Party emphasised the need for the administrative justice clause to promote governmental accountability and participatory government. The former is promoted by the right to be given reasons for administrative action and the right to question the justifiability of administrative action whilst the latter goal, participatory government, is enhanced by the

[76]Constitutional Principle VI

[77]Constitutional Principle IX

right to *"procedurally fair"* administrative action.

The DP's proposals submitted further that the ideal of "open government" depends primarily upon an unqualified right to information and hence it argued for the removal of the qualifications to the right of access to information embodied in the words *"insofar as such information is required for the exercise or protection of any of his or her rights"*.[78] The party proposed two alternative formulations for Section 24. In the first it proposed that the qualification *"where any of his or her rights or interests is affected or threatened"* be deleted as well as the deletion of the similar qualification in Section 24 (c) thus creating a virtually unqualified right to reasons. In its alternative formulation, the right to administrative justice would be simplified to an overall entitlement to administrative action which is neither *"unlawful, unreasonably or unprocedurally unfair"* coupled with the right to written reasons for anyone *"adversely affected by decisions made in the exercise of public power"*. It advocated further that the clause applied to *"anybody which exercises a public power"*. Somewhat surprisingly it suggested that the bearers of the right be limited to natural persons.

THE NATIONAL PARTY

The National Party also came out in favour of a constitutionally entrenched right to administrative justice and in essence motivated for the retention of Section 24 of the interim Constitution subject to clarification concerning what it considered to be certain confusing aspects thereof. For example, it questioned why Section 24 (c) did not apply to persons having a legitimate expectation, apparently unaware that such a quasi-right was automatically included inasmuch as it is encompassed by the notion of an interest in an administrative decision. The NP also questioned why the right to justifiable administrative action should only apply to the bearers of *"rights"*. It cited divergent academic opinion on the meaning of *"justifiable"* administrative action as guaranteed by Section 24 (d) and suggested that it would helpful for the Technical Committee to clarify the point. Contrary to the DP, the NP was of the view that juristic persons should also be bearers of the right to administrative action although it appeared to be operating under a misconception of the present state of our law.

[78]Section 23 of the interim Constitution

The NP suggested that the right to administrative justice should also apply to private bodies exercising powers over the individuals.

THE AFRICAN NATIONAL CONGRESS

In its very brief preliminary submission the **ANC**, although proclaiming strong support for a constitutionalised right to administrative justice, set itself apart from the NP and DP by proposing two major and one minor limitations of the right as formulated in Section 24. The one minor limitation, that of suggesting that the right to reasons be limited to where a specific request for such reasons was made, appears to be based upon a misunderstanding of Section 24 (c) since it clearly does not provide for an automatic furnishing of reasons. The major limitation proposed by the ANC, that the right to administrative justice be amended to make it *"subject to the necessary practicalities of governance"*, clearly reflects the changed perspective of a party which has moved from a state of opposition into the seat of power. It argued that such an amendment would *"serve to limit a broad and perhaps impracticable formulation of the right as currently drafted and restrict the possible review of legitimate administrative action in the interests of effective government"*. The further limitation which it proposed was the exclusion of the reference to *"legitimate expectations"* in Section 24 (b). As regards the application of the right, the ANC proposed that the bearers of the rights should be private persons or *"where appropriate, groups or social structures"*.

The divergence between the expansive views of the DP and, to a lesser extent, the NP on the one hand and the relatively restrictive proposals of the ANC on the other hand, set, at this early stage, the scene for a contentious debate over the appropriate form of the administrative justice clause in the final constitution.

THE REPORT OF THEME COMMITTEE 4

In its summation of the various proposals Theme Committee 4 flagged as non-contentious the following points:

1. that the right to administrative justice be constitutionalised through a separate clause;

2. that the State be obliged to enforce the right;

3. that natural persons be the bearers of the right;

4. that the right should be subject to limitation per the general limitation clause and the emergency measure clause.

It noted as contentious or outstanding the precise form of the clause, whether the right be applicable to common and customary law and whether the right should be extended to bodies exercising public power or bodies existing outside the public sphere. It noted as well that outstanding issues were whether the clause should be subject to a special limitation viz, *"the necessary practicalities of governance"* as proposed by the ANC and whether the present approach to limitations contained in the general limitations clause should be preserved.

THE WORK OF TECHNICAL COMMITTEE 4

On 9 October 1995 the Constitutional sub-committee released an Explanatory Memorandum relating to the draft Bill of Rights entitled *"Overview of Method of Work Prepared by Technical Committee of Theme Committee 4"*. In this report, puzzlingly, three options of an administrative justice clause are set out. The first option is identical to the first option contained in the Working Draft of the new Constitution which falls to be considered by the Constitutional Assembly in the coming months. The second option is but a slight variation of option 1 in the Working Draft being amended only by the deletion of the words *"lawful"* and *"procedurally"* from sub-section 1. The third option is clumsily framed, bears little relation to the second option contained in the working draft and appears now to have disappeared from the debate.

Nonetheless it is instructive to examine some of the explanatory material contained in the Memorandum since it has no doubt influenced the thinking of the various parties and their

approach to the question of what constitutes the optimal administrative justice clause. Referring to the concept of an *"interest"* the Committee noted that the word had no well defined meaning but could include both a financial interest or an ordinary human interest in the outcome of the proceedings. As regards the meaning of *"affect"* the committee noted that there was uncertainty about the meaning of this term. It referred to Mureinik's view that the term could have a narrow meaning - in the sense of *"deprive"*, or a broad meaning in the sense of *"determine"*. However it could also carry its ordinary meaning namely to *"have effect on"* a meaning contended for by Klaaren[79]. Returning to Section 24 the committee noted that its effect was inter alia to vitiate legislative provisions seeking to exclude administrative action from judicial review. As such, in the committee's view it overruled **Staatspresident v UDF**[80].

Turning to Section 24 (c), the committee queried why legitimate expectations are excluded from the sub-section but stated, correctly it is submitted, that it was probably implied therein insofar as the word *"interest"* is broader than *"legitimate expectation"*. In regard to Section 24 (d) the committee expressed the view that this granted a court the power to review administrative action for unreasonableness but was limited to *"rights"* since extending the right to review decisions taken which affected *"interests"* and *"legitimate expectations"* went *"beyond the common law"*.

Referring to the case of **Xu v Minister Binnelandse Sake**[81], the Committee opined that the right clearly extended to all natural persons, including aliens. In its comments on option 1, being the same first option as contained in the Working Draft of the New Constitution, the Committee stated that the formulation captured the essence of the present Section 24 and all the rights to administrative justice contained therein, and stated, again correctly in my view, that the omission of the words which have troubled many parties and academic commentators, viz *"rights"*, *"interests"*, *"legitimate expectations"*, *"affect"* and *"threatened"* did not betoken

[79]Constitutional Law of South Africa (loose leaf) eds Chaskalson, Kentridge, Klaaren, Spitz and Woolman

[80]op cit, n12

[81]op cit, n64

that *"rights", "interests"* and *"legitimate expectations"* would not be protected. The Committee correctly pointed out that the aforementioned concepts would be applied (or more accurately could be applied) when a court interprets this section in the context of a particular dispute. In short, it stated, *"this formulation will allow our courts to develop a coherent administrative law based on the constitution and common law principles".*

The Committee saw option 1 as avoiding the difficulties created by the *"cumbersome"* phrase *"justifiable in relation to the reasons given for it"* more particularly inasmuch as the existing formulation could give rise to a particularly wide power of judicial review if the *"reasons"* are interpreted to refer to the reasons referred to in Section 24 (c). It concluded that the options thus departed *"more in language than in substance from Section 24 (d) of the interim Constitution".*

OPTION 1, SECTION 32, WORKING DRAFT OF THE NEW CONSTITUTION

The first point which warrants comment is that the new heading of the clause *"Just Administrative Action"* is scarcely an improvement on its predecessor *"Administrative Justice".* In this instance it would appear that the praiseworthy aim of a constitution written in *"plain language"* has been taken to an ungrammatical extreme.

Clause 1 of Section 32 has the great merit of simplicity, combining as it does the elements of the existing Section 24 (a), (d) and (c) into one sentence. The elimination of any reference to any parties' rights, interests or legitimate expectations avoids the *"idiosyncratic"* structure of Section 24 which has been noted by almost all commentators. More importantly the removal of the aforementioned terms, as noted by Theme Committee 4, clears the way for the Constitutional or Supreme Court to include such *"stake holders"* as bearers of all aspects of the right to administrative justice. Option 1 hedges its bets as to the exact standard or test against which administrative action will be reviewable by the courts through posing the alternative formulations of *"reasonable"* and *"justifiable".* Inclusion of the notion of the *"justifiability"* may afford the Courts more scope to introduce the increasingly favoured standard, at least in European jurisdictions, of *"proportionality"* since the concept of reasonableness is largely self-defining. On the other hand the latter concept is one with which

our courts are more familiar and as such has the benefit that it will not initially require the imprimatur of the Constitutional Court.

Similarly clause 2 of option 1 produces a more uncluttered and flexible version of Section 24 (c) in the interim Constitution. It leaves it to the discretion of the courts, through case law, to accord the right to written reasons, progressively if needs be, to the bearers of rights, legitimate expectations and interests.

Notwithstanding its advantages, the attractive simplicity of option 1 does expose it to criticism. Principal objections are the very breadth and simplicity of the clause means that its terms and implications will have to be developed on a case by case basis by the courts. This will be a time-consuming process, and one during which many divergent views may be expected from various divisions of the Supreme Court. It is unrealistic to expect moreover that the Constitutional Court will, in one neat case, deliver an authoritative judgment as to the exact scope and meaning of the clause.

The second principal objection is that option 1 contains no internal limitation e.g. as to what procedural fairness will involve in particular cases. This in turn raises the spectre, at least in the short term, of an administration which becomes bogged down in defending administrative decisions rather than going about the business of efficient administration. On the other hand there is a strong argument that the pursuit of openness, accountability and participatory decision-making would require administrative authorities to concentrate on the quality of its decision making and in so doing promote truly democratic government as opposed to a *"snapshot democracy"* where popular power is limited to voting in elections at five-yearly intervals.

OPTION 2, WORKING DRAFT OF THE NEW CONSTITUTION

Option 2 is clearly the more circumscribed version of Section 24. Judging from the positions adopted by representatives of the ANC, DP and NP at a workshop on the proposed administrative justice clause held at Parliament on 19 February 1996, Option 1 is espoused by the latter two parties whilst the ANC's favoured version is Option 2.

Whilst it is gratifying that the ANC appears to have committed itself whole heartedly to the concept of judicial review for reasonableness, some of the limitations contained in option 2 and the lack of clarity concerning its terms are disquieting. Moreover one is concerned to hear a representative of the ANC repeatedly state that there are *"whole classes of administrative action which need to be excluded"* without specifying what these are, why they should be excluded and how Option 2 will achieve this. The concept of being *"adversely affected"* by administrative action is not widely known and may prove difficult to define. It has been suggested that the simple term *"affected"* be used since it is most doubtful that anyone who has been beneficially affected by administrative action will take issue therewith.

The same criticism applies to sub clause (2) where *"adversely affected"* is used once again. A significant limitation of clause 2 is that the right to fair procedure is limited to those whose rights are affected. It is submitted that there is no warrant for removing the right to procedural fairness from the holders of legitimate expectations or indeed for failing to extend it to those who have an *"interest"* in administrative action. The *"mischief"* which the sub-clause is intended to negate is the burdening of administrative authorities with the task of deciding in advance of any given decision whether there are persons having a legitimate expectation or an interest in the decision who must be afforded fair procedure and what such procedure entails. It is submitted however that it is precisely through the mechanism of having to determine whose legitimate expectations or interests are affected that better decision-making is promoted. Whilst there may be a case for continuing to exclude those who merely have an *"interest"*, given that the courts are inherently conservative, to narrowly define the right to fair procedure in administrative actions in the constitution is to impose a ceiling which could very well prove inappropriate in time to come. Leaving this right more broadly stated or flexible allows the courts, which are well qualified to do so, to set guidelines as to what the limits of procedural fairness should be in the cases of the three different stakeholders.

The further qualification to the right to procedural fairness *"unless the administrative action is of general application"* has likewise caused consternation. There is little clarity as to what the qualification means. Again it is submitted that any qualifications to the right to procedural fairness should be set by the courts, if necessary pursuant to the provisions of the general

limitation clause. The argument that the narrowing of the right to procedural fairness does not mean that the right is completely removed but only that it is not constitutionally guaranteed is, with respect, a somewhat hollow assurance. The constitution represents the highwater mark of the rights enjoyed by citizens and any limitation thereof is best achieved through the natural operation of the general limitation clause.

Sub clause 3 of Option 2 has the same scope as Section 24 as regards the bearers of the right. It is submitted however that it could be improved by the insertion of the phrase *"legitimate expectations"* which will enhance its clarity. The sub-clause suffers, as do the other sub-clauses, from the presence of the phrase *"adversely affected"*.

In general terms it would seem that the ANC's preoccupation with refashioning the administrative justice clause to take account of the *"practical necessities of governance"* has been translated into a limitation of the right of procedural justice to only those whose rights are adversely affected. In this regard it should be noted that there is no empirical evidence at all that the broadening of the right to administrative justice by Section 24 has produced an avalanche of requests for reasons or applications for judicial review which have hamstrung efficient administration by government or lesser administrative bodies. Indeed both feedback at the Parliamentary workshop and common experience strongly suggest that the right to administrative justice and in particular the right to call for reasons for administrative decisions has, in the short period during which the interim Constitution has operated, proved to be an invaluable tool for persons representing the indigent and powerless in asserting their rights.

It would appear that a central question in considering the desirability of either option 1 or option 2 of the Working Draft is the question of whether the right to administrative justice should have in-built limitations or whether any limitations should be effected through the operation of limitations clause. There has been much criticism of the bifurcated approach in the present limitations clause and this has probably given rise to the much simpler format adopted in Section 35, the limitation of rights clause in the Working Draft of the final Constitution. That clause proposes a range of possible tests from three in which the concept of *"reasonableness"* is central on the one hand to other formulations in which *"necessity"* and *"justifiability"* are the touchstones. Whatever formulation is finally settled upon, it is

submitted that it is far preferable that the limitation clause *"does the work"* of setting limits to the right to administrative justice. In this way the decision will be ultimately left to an impartial Constitutional Court which will have the benefit of full argument concerning the practicality and desirability of extending or restricting the right.

As far as the impact of related clauses in the Working Draft of the new Constitution upon the administrative action clause, it is worth noting that Section 33, which governs the right of access to court, contains the qualification that *"where appropriate or necessary, another independent and impartial forum"* can be used in invoking the right to have any dispute resolved by law. This formulation leaves open the possibility that the right to administrative justice can be claimed in an administrative appeals tribunal rather than exclusively through the ordinary courts of the land. Section 31, which contains the right to access to information contains a broadened right to information unfettered by the qualification that such information is available only where it is required *"for the exercise or protection of rights"*. If this clause is passed in the proposed form it is likely to prove to be an important adjunct to the right to administrative justice.

As far as related clauses in the final Constitution's Working Draft are concerned it is to be noted that Section 37 of the Working Draft of the final Constitution, entitled *"Enforcement of Rights"* is cast in the same broad terms as was the previous standing section, Section 7 (4) (a). The right however is confined to a *"right to apply to a competent court"*. Since administrative appeal tribunals may well be extensively developed in our law, it is submitted that the right of access should be broadened in relation thereto as well by the insertion of the phrase *"or judicial or quasi-judicial tribunal"*. Section 38, the application clause, confirms that juristic persons are entitled to the right to administrative justice. Section 38 (1) confirms that the Bill of Rights applies to *"the legislature, the executive ... of all other organs of state"*. From the point of view of the development of our system of administrative law, these provisions are to be welcomed. Finally, Section 39 dealing with the interpretation of the Bill of Rights proposes to re-enact the section of enjoining the ordinary courts, when interpreting legislation or developing the common law to *"promote the spirit, purposes and objects of the Bill of Rights"*.

POSTSCRIPT

Such is the fluidity of the negotiating process, particularly now that the final stage of the Constitution-making process has been reached, that it comes as no great surprise to learn that the two administrative justice clause options have now apparently been jettisoned in favour of a draft clause reading as follows:

"(1) The state must provide by way of relevant legislation access to just administrative action.

(2) The legislation referred to in subsection (1) must -

(a) provide for the review of administrative action by a court of law or an independent and impartial tribunal;

(b) impose a duty on the state and the organs of state to take lawful, reasonable and procedurally fair administrative action;

(c) be justifiable in an open and democratic society based on freedom and equality; and

(d) promote an efficient administration."

Although the report accompanying the official publication of the clause states that there was *"no indication of major difficulties"* and that *"the section (was) likely to be finalised soon"*[82], experience suggests that detailed comment on the clause might itself become redundant should the negotiations throw up yet another option. Nonetheless the new direction taken by the clause deserves consideration.

The clause reveals that the negotiators have now explicitly recognised that any

[82]Constitutional Talk 8 - 28 March 1996, No 2 - Official News Letter of the Constitutional Assembly

constitutionalisation of the right to administrative justice must, if it is to be meaningful, be accompanied or supported by an appropriate statute spelling out the finer detail of the right and creating structures and procedures through which various aspects of the entrenched right to administrative justice can be realised. It is suggested however that the preamble to the clause could state this far more clearly than the obtuse reference to *"access to administrative action"*.

The guarantee of administrative justice would be worth little if the clause contained no standards which the statutory instrument would have to meet. The requirements in Section 2 (a) firstly entrench the right to review of administrative action, either in a court or an administrative tribunal, thereby indicating that the statute may well also create or, less likely, build upon existing administrative appeal tribunal structures. Sub-section 2 (b) is unexcipiable in providing for *"lawful, reasonable and procedurally fair"* administrative action, assuming always that *"lawful"* will act as a block to ouster clauses. The introduction of the internal limitation in sub-section 2 (c) leaves it unclear how it will interact with any general limitation clause. If this qualification is interpreted as setting up a double limitation test, unnecessary confusion is likely to result. That said the content of the internal limitation, mirroring stage 2 of the existing limitation contained in Section 33 of the interim Constitution is, it is submitted, entirely reasonable notwithstanding the elusiveness of the standard which it sets.

The final requirement viz that the legislation must *"promote an efficient administration"* is the sting in the tail of the clause and no doubt is intended to allay the fears of the ANC that *"good governance"* will be sacrificed on the altar of administrative justice. A great deal will of course depend on what meaning the courts attach to the notion of *"an efficient administration"*. If this is determined one dimensionally, or from the subjective point of view of the administration only, then the right to administrative justice will be commensurately diluted. There is scope however for a more generous interpretation of the concept, one which envisages an efficient administration as striving also for transparency, accountability and the participation of interested parties in its decision-making processes, rather than a state or state organ which seeks to take a maximum number of administrative decisions in the shortest possible time.

Although the new draft clause has some significant advantages and **could** portend a progressive piece of legislation, the absence of a right to reasons can only be seen as a retrogressive step, one representing a lamentable failure of nerve largely, it would seem, on the part of the ANC. The other significant divergence from Section 24, the omission of any reference to rights, legitimate expectations and interests, may yet nonetheless afford the courts the opportunity to create a similar dispensation to that existing in Section 24. If however the statute is restrictively phrased in this regard, the opportunity may well not present itself to the courts. This highlights the perils of an approach which allows even the *"large print"* of the right to administrative justice to be written in a statute which can be determined by a simple majority in Parliament, rather than ensuring that the core rights are enshrined in the Constitution.

CHAPTER 6

CONCLUSION

Stepping away from the wording of the administrative justice clause, of which there is perhaps a tendency to expect too much, there can be little doubt that an *"Administrative Justice Act"* is necessary to flesh out the constitutional right to administrative justice which, in the nature of a constitutional instrument, can be no more than a skeleton. Such an Act would clarify inter alia who the bearers of the right to administrative justice would be, the forums or tribunals where the right to review administrative action may be exercised and the precise parameters of the right to procedural fairness. Other questions which a statute could address would be the exact scope of administrative action, more particularly where the line is to be drawn between the public and the private divides and to what extent subordinate legislation should also be subject to administrative law remedies. Such an Act would carry the great advantage of making administrative law more certain and accessible rather than remaining a somewhat amorphous and confusing body of law. It is envisaged that the Act could make provision for a system of administrative appeal tribunals, in the early stages at least on a restricted basis, taking into account that our society has limited administrative resources. Any such *"Administrative Justice Act"* will of course have to be tested against the scope of the administrative justice clause in the final Constitution.

The administrative justice clause in Section 24 has attracted considerable criticism for its unnecessarily intricate and, in certain instances, eccentric structure. It is submitted however that, with the added perspective of two years of its operation since coming into force, the clause's stature as a bold and progressive step towards a reinvigorated and constitutionally entrenched system of administrative law has been confirmed. Although memories of the authoritarian rule of the executive in South Africa, which reached unparalled heights in the 1980's, have faded, a high price will be paid if the lessons of the last four decades are forgotten. Administrative law has a vital role to play in the new order where the bureaucratic process must deploy limited resources amidst an ever-growing number of competing claims. It will be deeply ironic and, it is submitted, a lamentable lost opportunity, if the gains temporarily won through Section 24 of the interim Constitution, particularly the right to

reasons and the extension of administrative justice rights to the holders of legitimate expectations and interests, are lost in the final Constitution.

Turning the clock back three years ago to the Breakwater Declaration's draft administrative justice clause, one is struck by two points. Firstly, there is the remarkable persistence of the fear, despite the lack of supporting evidence therefor, that an overbearing judiciary will sabotage the socio-economic reforms of administrative authorities. Secondly, despite the conspicuous omission of a right to reasons, sub-clause (a) still provides, with the substitution of the review standards of *"reasonableness"* or *"justifiability"* and the addition of the right to reasons, a perfectly adequate administrative justice clause. Such an omnibus clause duly tailored as above, could read:-

> *"(a) Anyone adversely affected by a decision made in the exercise of public power shall, in addition to the right to written reasons therefor, have the right to a decision which is lawful, procedurally fair and reasonable."*

Whatever the final formulation of the administrative justice clause may be, one trusts that an acceptable compromise will be reached between the somewhat over-broad terms of Option 1, the unduly restrictive terms of Option 2 and the latest draft formulation, the deficiencies in which have been discussed in the postscript to Chapter 5.

Finally, it is to be hoped that the eventual form of the administrative justice clause will err towards generosity to the subjects of administrative action. In so doing the Constitution will better perform the vital task of reforming our administrative law to meet the challenge of an increasingly powerful and ever-encroaching state and at the same time satisfy our new democracy's aspirations towards a system of open, accountable and participative administrative government.

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