

THE PRINCIPLE OF LEGALITY IN SOUTH AFRICAN ADMINISTRATIVE LAW

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I INTRODUCTION

In the 1970s and 1980s there was a resurgence of interest in the Rule of Law amongst South African liberals. It was felt that the doctrine might be used to compensate, at least to some extent, for the sovereignty of an unrepresentative Parliament and the absence of a justiciable Bill of Rights in our legal system. Mathews,¹ probably the most prominent South African writer on the subject, rejected what he called the bare 'law enforcement' approach to the Rule of Law.² Like Raz,³ and for very much the same reasons, he also rejected the 'material justice approach' as expounded by the International Commission of Jurists.⁴ However, his preferred version, which he termed the 'protection of basic rights' approach, was wider than Raz's procedural formulation. It was in fact a reformulation of Dicey's statement of the Rule of Law with the addition of a few fundamental rights such as freedom of conscience, speech, movement and association.⁵

Sadly, Mathews did not live to see very much of South Africa's miraculous transition from oppressive minority rule to constitutional democracy, a process that officially began ten years ago under the aegis of the *Constitution of the Republic of South Africa Act 200 of 1993* ('interim Constitution')⁶ and continues today under

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¹ See especially A S Mathews, 'The Rule of Law – A Reassessment' in Ellison Kahn (ed), *Fiat Iustitia: Essays in Memory of Oliver Deney Schreiner* (1983) 294; Anthony S Mathews, *Freedom, State Security and the Rule of Law* (1986) 1-30. See also John Dugard, *Human Rights and the South African Legal Order* (1978) ch 3.

² Mathews, *Freedom, State Security and the Rule of Law*, above n 1, 1-3.

³ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.

⁴ Mathews, *Freedom, State Security and the Rule of Law*, above n 1, 11-14. Mathews responds to the famous formulation of the International Commission of Jurists at Delhi in 1959. See also International Commission of Jurists, *South Africa: Human Rights and the Rule of Law* (1988).

⁵ Mathews, *Freedom, State Security and the Rule of Law*, above n 1, 15-22.

⁶ The interim Constitution, which was deliberately temporary, was the product of constitutional negotiations that took place between the government and major parties and liberation movements from December 1991. These negotiations began at the Conference for a Democratic South Africa (CODESA) and ended in a multi-party negotiation process. The interim Constitution was adopted by the existing Parliament on 22 December 1993 and it

the 'final' or 1996 Constitution.⁷ If he had, he might well have concluded that South Africans in general and administrative lawyers in particular no longer needed the Rule of Law. After all the 1996 Constitution, like its predecessor, is a voluminous document fairly bristling with human rights, including the rights to administrative justice set out in s 33. Furthermore, s 33(3) calls for the enactment of national legislation to give effect to these rights and to provide for judicial review of administrative action; and that detailed national legislation has been enacted as the *Promotion of Administrative Justice Act 3 of 2000* ('*Administrative Justice Act*'). With all this explicit justification for judicial intervention,⁸ and with all this specificity, who could possibly need the generality (and indeed the uncertainty) of the Rule of Law?

But it seems that South African administrative law does still need the Rule of Law. In what follows I hope to explain why this is so, and how our Constitutional Court's timely recourse to a 'principle of legality' may be the saving of administrative law as it is applied in the courts. Without it, we seem doomed to suffer from two closely linked tendencies that have bedevilled judicial review in administrative matters from the start: parsimony and conceptualism. These tendencies, first exhibited by the courts in their application of the common law, have unfortunately been embraced by the democratic legislature as well. It has apparently failed to appreciate that there are more subtle ways of managing the burden imposed by the principles of good administration.

This article begins with a brief treatment of these two tendencies in the pre-democratic era. There follows a discussion of the administrative justice clauses in both the interim and 1996 Constitutions showing that the constitutional era offered only partial solutions to the problems of parsimony and conceptualism. In the next

entered into force on 27 April 1994. It provided that the newly constituted Parliament would also act as a Constitutional Assembly for the purpose of drawing up a final Constitution, and it gave the Assembly two years in which to accomplish this. In terms of chapter 5 of the interim Constitution, the final Constitution would have to comply with 34 Constitutional Principles agreed on during the negotiation process and contained in Sch 4 to the interim Constitution. The negotiation process and its outcome are described more fully in Iain Currie and Johan de Waal (eds), *The New Constitutional and Administrative Law*, Volume I: *Constitutional Law* (2001) 57-65.

⁷ *Constitution of the Republic of South Africa Act 108 of 1996* ('1996 Constitution'). The 1996 Constitution was adopted by the Constitutional Assembly on 8 May 1996. Following one unsuccessful application to the Constitutional Court and subsequent amendments, that court certified that the new Constitution was consistent with the Constitutional Principles in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC). The 1996 Constitution took effect on 4 February 1997; See Currie and De Waal, above n 6, 66-71 for a fuller description of the making of the 1996 Constitution.

⁸ The express provisions of s 33 (as well as other sections of the Constitution) mean that South Africans have become complacent observers of the debate about whether it is the ultra vires principle or some other doctrine that justifies judicial review of administrative action in the United Kingdom. See, eg, Christopher Forsyth (ed), *Judicial Review and the Constitution* (2000); T R S Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) 61 *Cambridge Law Journal* 87; Paul Craig, 'Constitutional Foundations, the Rule of Law and Supremacy' (2003) *Public Law* 92.

section I argue that the definition of ‘administrative action’ in the *Administrative Justice Act* tends to perpetuate the two tendencies. The article then deals with the Constitutional Court’s ‘principle of legality’ (a part of the Rule of Law) and ends with a consideration of what this principle can teach South African administrative lawyers today.

II THE PRE-DEMOCRATIC ERA: CONCEPTUALISM AND PARSIMONY

Observers often assume that any faults of South African administrative law must have been caused by apartheid, the official policy of the National Party government that came to power in 1948. In this they are not entirely correct. Our public law of the pre-democratic era has aptly been described as ‘a pale reflection of the English law of a bygone age’.⁹ It inherited almost all its characteristics from English law, and certainly exhibited the unfortunate features of conceptualism and parsimony long before the middle of the twentieth century.¹⁰ But nor are they entirely wrong: the nightmare of apartheid made everything worse, including the law’s existing faults.

Under apartheid the unrepresentative legislature used its sovereign power to impose on South Africans a system of institutionalised racial discrimination, routinely conferring tremendously wide and invasive discretionary powers on government officials. Since original legislation could not be attacked on any but the narrowest procedural grounds, administrative law review was virtually the only method for challenging the invasion of rights. As is well known, the response of the courts was generally feeble. There were glimmers of light, such as the judicial refusal to capitulate to privative or ‘ouster’ clauses¹¹ and some fairly rigorous review of delegated legislation,¹² but for the most part the courts simply became more deferential and more formalistic as the pre-democratic era wore on.¹³ Under the

⁹ Lawrence Baxter, *Administrative Law* (1984) 34.

¹⁰ See generally *ibid*, ch 1.

¹¹ Ouster clauses were frequently included in legislation to prevent review of action taken ‘in terms of’ or ‘under’ it. The courts reasoned that illegal action was not taken ‘in terms of’ the legislation, meaning that judicial review was ousted only where there was no illegality. Famous cases involving such reasoning include *Narainsamy v Principal Immigration Officer* 1923 AD 673 and *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A), a case all the more noteworthy because it was decided at a time of extreme judicial deference.

¹² Relying on *Kruse v Johnson* [1898] 2 QB 9, the courts reasoned that the legislature could not have intended the law making powers it delegated to others to be used unreasonably or in a discriminatory fashion – even when it was patently obvious that Parliament intended exactly that. This optimistic reasoning was no longer possible after the famous admission of Holmes JA in *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A) that the government’s apartheid policies were both intended to and bound to cause injustice and inequality.

¹³ See generally Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-50* (1984); C F Forsyth, *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950-80* (1985); David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa’s State of Emergency* (1992); David Dyzenhaus, *Truth, Reconciliation and the Apartheid Legal Order* (1998).

state of emergency declared by the government in the 1980s, one of our darkest periods, the courts proved largely unable or unwilling to use administrative law to prevent the abuse of power.¹⁴

When I say ‘parsimony’, I mean simply the pervasive sense, apparently shared by all three branches of the state, that administrative justice was something to be carefully hoarded and doled out only grudgingly. This tendency seems to have been informed mainly by fears of overburdening the administration.¹⁵

By ‘conceptualism’ I mean a kind of formalism.¹⁶ Broadly, formalism describes a judicial tendency to rely on technical or mechanistic reasoning instead of substantive principle, and to prefer formal reasons to moral, political, economic or other social considerations.¹⁷ As Karl Klare has observed,¹⁸ formalistic reasoning is a strong element in South Africa’s legal culture generally; and our administrative law is no exception to this.¹⁹ Conceptualism refers more specifically to reliance on legal concepts as a method of solving legal problems. It often entails the assumption ‘that the law applicable to a particular case can be discovered by simple syllogistic reasoning’,²⁰ since the presence or absence of the relevant concept is supposedly the key to the case.

In South African law of the pre-democratic era, parsimony combined with conceptualism in a way that was not only devastating for the victims of the system, but also for the development of judicial review. The courts’ energies were largely directed towards a negative enterprise: finding ways to *restrict* the application of principles of good administration and their obverse, the grounds of review. The results were an all-or-nothing application of those principles, with most victims of

¹⁴ See Kate O’Regan, ‘Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law’ (2004) 121 *South African Law Journal* 424.

¹⁵ In relation to fairness, see further Lawrence Baxter, ‘Fairness and Natural Justice in English and South African Administrative Law’ (1979) 96 *South African Law Journal* 607.

¹⁶ Standard dictionaries describe formalism as entailing ‘excessive adherence to prescribed forms’ and ‘use of forms without regard to inner significance’. See, eg, J B Sykes, *The Concise Oxford Dictionary of Current English (based on the Oxford English Dictionary and its Supplements)* (7th ed, 1982, reprint 1985) 385.

¹⁷ See P S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987) 1ff.

¹⁸ Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 166. Klare compares the ‘cautious traditions of analysis common to South African lawyers of all political outlooks’ with the more policy-based and consequentialist reasoning of lawyers in the USA: 168. He notes that we often seem to find persuasive or even compelling the sort of arguments that an American lawyer would find unconvincing; that we have a ‘relatively strong faith in the precision, determinacy and self-revealingness of words and texts’; and that our method of legal interpretation tends to be ‘more highly structured, technician, literal and rule-bound’ than in the USA: *Ibid.* However, he does not make any connection between this formalistic style and a particular political ideology. As he points out, formalistic reasoning is quite capable of producing politically progressive results: 170.

¹⁹ See also Cora Hoexter, ‘Contracts in Administrative Law: Life After Formalism?’ forthcoming in (2004) 121 *South African Law Journal*.

²⁰ David M Walker, *The Oxford Companion to Law* (1980) 266.

official action getting nothing. There was some judicial awareness of the potential variability of the principles, but (as the examples below indicate) the sort of variability resorted to was equally formalistic. The courts' focus meant that the most fundamental, helpful and positive question was never asked: What does administrative justice require in this case? It meant, in fact, that hardly any effort went into the essential task of working out the appropriate content of lawfulness, reasonableness and fairness in particular cases.

A Procedural Fairness in the Pre-Democratic Era

The courts' treatment of procedural fairness (natural justice we called it then) is a good illustration of the pre-democratic tendencies I have described above. As in other jurisdictions that came strongly under the influence of English law, procedural fairness was regarded as something that would somehow lose its value if applied too often. Even Schreiner JA, a judge revered by later generations for his liberalism, was guilty of perpetuating this view. In the infamous case of *Laubscher v Native Commissioner, Piet Retief*,²¹ he acknowledged the importance of the audi alteram partem principle but warned that 'its value would be lessened rather than increased if it were applied outside its proper limits'.²²

This rather perverse reasoning no doubt helped to explain the courts' stubborn reliance, in *Laubscher* and in hundreds of other cases, on the classification of administrative functions as a limiting device. The benefits of procedural fairness were carefully restricted to 'judicial' and 'quasi-judicial' cases in which 'existing rights' were adversely affected. This ruled out 'legislative' and 'purely administrative' cases. It meant, for instance, that mere applicants, who of course lacked 'existing rights' but were rather hoping to acquire them, were never entitled to procedural fairness. Preliminary decisions, because they were not final, and investigative action, because it did not *itself* abolish rights, also could not be regarded as affecting existing rights adversely; so these sorts of decisions did not attract procedural justice either.

The appellant in *Laubscher* was a lawyer and legal adviser to Zulu people occupying farms that belonged to the South African Native Trust. Officials of the Native Affairs department prevented him from visiting the Trust area, so that he was unable to consult with his clients. Several applications for permission to enter the area were refused. The appellant applied unsuccessfully to have these refusals set aside on review, and the case went all the way to the Appellate Division – the highest court.²³ In three separate judgments this court unanimously dismissed the appeal. In his judgment, in which Fagan CJ and Steyn JA concurred, Schreiner JA reasoned that the appellant

²¹ 1958 (1) SA 546 (A) ('*Laubscher*').

²² Ibid 549B-C.

²³ In the constitutional era the Appellate Division became the Supreme Court of Appeal, the highest court in non-constitutional matters, and the Constitutional Court was created as the highest court in constitutional matters.

clearly had no antecedent right to go upon the property and the refusal did not prejudicially affect his property or his liberty. Nor did it affect any legal right that he already held. It can be said to have affected his rights only in the sense that it prevented him from acquiring the right to go on to the property; to the same extent but no further it may be said to have involved legal consequences to him.²⁴

The decision in this case gives effect to what has been termed the ‘deprivation’ theory of administrative law, as opposed to the far more generous ‘determination’ theory.²⁵ The former would accord the benefits of fairness only to people whose rights are being abolished or forfeited as a result of official action – and not to people whose rights are being decided or established (‘determined’).

B Reasonableness in the Pre-Democratic Era

In relation to the requirement of reasonableness, the judicial fear was not so much of overburdening the administration as of violating the separation of powers by blurring the distinction between review and appeal.²⁶ However, the method the courts evolved for doling it out was equally cheese-paring. Thus the requirement of reasonableness applied only to ‘legislative’ administrative action (delegated legislation)²⁷ and eventually to ‘purely judicial’ administrative action such as disciplinary decisions.²⁸ But the requirement never extended to ‘purely administrative’ action – which was the biggest category by far, encompassing most decisions about welfare, licensing, immigration, national security and many other areas. In the leading case, *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited*,²⁹ Stratford JA said of this ‘purely administrative’ category:

[N]owhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is ‘inexplicable except on the assumption of *mala fides* or ulterior motive’ ... or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter

The term ‘symptomatic unreasonableness’³⁰ came to be used to describe this approach. In terms of it, courts could set aside ‘purely administrative’ decisions only if they were so grossly unreasonable (later, grossly unreasonable ‘to a striking

²⁴ *Laubscher* 1958 (1) SA 546 (A) 549E-G.

²⁵ Etienne Mureinik, ‘Reconsidering Review: Participation and Accountability’ in T W Bennett *et al* (eds), *Administrative Law Reform* (1993) 35, 36.

²⁶ See Baxter, above n 9, 476ff.

²⁷ See above n 12.

²⁸ *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).

²⁹ 1928 AD 220, 237.

³⁰ Jérôld Taitz ‘But ‘Twas a Famous Victory’ (1978) *Acta Juridica* 109, 111.

degree')³¹ as to suggest the presence of one of the older and less revolutionary-sounding grounds of review – mala fides, ulterior motive and failure to apply the mind.

C The Decline of the Classification of Functions

The classification of functions eventually became thoroughly discredited, particularly in relation to fairness, as the Appellate Division began to accept in the late 1980s (more than 20 years after *Ridge v Baldwin*³²) that the system was essentially unhelpful and artificial.³³ It is no mere coincidence that at about the same time the Appellate Division officially introduced the doctrine of legitimate expectations into South African law, thus softening its rigidity.³⁴ South African judges also began to show considerable interest in the 'duty to act fairly' as it had been expressed in English law.³⁵ This duty, because it applied to *all* kinds of administrative actions and decisions, seemed to offer an escape from the conceptual mess the courts had got themselves into.

Similarly, calls for a unified ground of reasonableness were matched by mounting evidence of the courts' willingness to apply the standard for 'purely judicial' decisions to all sorts of cases falling outside this category.³⁶

III THE CONSTITUTIONAL ERA

I have suggested that in the pre-democratic era, highly formalistic and conceptual reasoning led to decidedly parsimonious, all-or-nothing results in South Africa's administrative law. This was unfortunate for the victims of official action, obviously, since only a few got the full benefit of the various principles of good administration, while the vast majority of people affected by administrative decision-making were denied the benefits of fairness and reasonableness altogether. Less obvious, perhaps, were the damaging effects on judicial review in general. Because the focus of the law always seemed to be on ways to limit or prevent the *application* of fairness and reasonableness, the courts never seemed to deal with the crucial business of working out the substantive *content* of administrative justice. Legal concepts took the place of such substantive reasoning. They were the refuge of judges who could not bring themselves to be explicit about the factors that really moved them.

³¹ *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) 735G-H.

³² [1964] AC 40.

³³ See especially *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) ('Traub') 763H-I; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) 10J.

³⁴ In *Traub* 1989 (4) SA 731 (A).

³⁵ See Clive Plasket, *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis, Rhodes University, 2002) 402ff.

³⁶ See Baxter, above n 9, 499-501. See also Cora Hoexter, *1991 Supplement to Baxter's Administrative Law* (1992) 45.

A Section 24 of the Interim Constitution

In 1994 the picture changed dramatically when South Africans acquired rights to administrative justice in terms of our first democratic and supreme Constitution. Like other rights in the interim Constitution, s 24 rights were strictly guarded by the limitation clause. Rights could only be limited by the legislature in terms of ‘law of general application’, provided that the limitation was both reasonable and justifiable ‘in an open and democratic society based on freedom and equality’ and that it did not negate ‘the essential content of the right’.³⁷ But the wording of the administrative justice clause itself revealed that the familiar fears of overburdening the administration and violating the separation of powers were as alive as ever. The wording also suggested that the drafters’ faith in conceptualism was as strong as that of the courts, and apparently undimmed by years of living in an apartheid state.

Section 24 of the interim Constitution was very carefully calibrated.³⁸ It gave a right to lawful administrative action to the widest possible category of people: all those whose *rights or interests* were *affected or threatened*. Similarly, the right to be given reasons in writing was extended to those whose *rights or interests* were *affected* (but not merely threatened) by administrative action. The right to procedurally fair administrative action applied where *rights or legitimate expectations* (but not mere interests) were *affected or threatened*. Finally, there was a right to administrative action that was ‘justifiable in relation to the reasons given for it’ – code for a right to reasonable administrative action, which had proved too rich for the drafters’ blood. This particular right was extended only to those whose *rights* (and not legitimate expectations or mere interests) were *affected or threatened*.

As is evident from this wording, the focus of administrative justice remained on concepts such as ‘rights’. While s 24 of the interim Constitution was certainly more generous than the common law had ever been – particularly in allowing ‘interests’ to feature – the underlying philosophy remained one of essential parsimony, reflecting a determination to limit the application of these rights at all costs. The courts played along, particularly in so far as the new right to reasons was concerned.³⁹ In one case the court expressed the view, obiter, that reasons would not

³⁷ Interim Constitution s 33. Limitation as to rights also had to be ‘necessary’ whenever s 24 related to ‘free and fair political activity’.

³⁸ Interim Constitution, s 24: ‘Every person shall have the right to – (a) lawful administrative action where any of his or her rights or interests 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; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.’

³⁹ The courts certainly tended to be more consistent in their approach to reasons than in relation to other aspects of s 24. With regard to the right to justifiable administrative action in s 24(c), for example, the courts vacillated rather wildly between the old standard of gross unreasonableness – which had surely become inappropriate by then – and assertions that the distinction between appeal and review had been done away with altogether.

have to be given for a decision to hold an investigative enquiry, since the enquiry would not affect existing rights – thus seeming to ignore altogether the word ‘interests’ in s 24(d).⁴⁰ In another case the two applicants had respectively been refused a temporary residence permit and the extension of an existing residence permit.⁴¹ It seemed clear that neither had any right to remain in the country, nor any legitimate expectation of remaining: the applicants had both been warned that their permits were strictly temporary. But the court actually went so far as to say that the applicants had failed to prove any *interest* in residence or continued residence.⁴² They were not, therefore, entitled to reasons under s 24(b) of the interim Constitution.

B Section 33 of the 1996 Constitution

Section 33 of the 1996 Constitution is much simpler in its design than s 24 of the interim Constitution. Section 33(2) relies on a familiar formula, conferring the right to reasons in writing only on those whose *rights* have been *adversely affected* by administrative action. Section 33(1), however, grasps the nettle in a most admirable fashion: it simply gives ‘everyone’ rights to administrative action that is lawful, reasonable and procedurally fair.⁴³ This is remarkable, even astonishing, when seen against the background of the common law and the wording of s 24. At the time it seemed a miracle. It certainly appeared to betoken the end of those twin evils, parsimony and conceptualism, at least in relation to three out of four principles of good administration. Everyone would now enjoy lawful, fair and reasonable administrative action, if not written reasons for that action; and the courts, realising that the burden thus imposed would have to be managed cleverly, would surely begin to grapple with the variable content of these principles from case to case.

Sadly, this proved to be not entirely the position. First, s 33 did not come into operation immediately. Pending the enactment of the national legislation mandated by s 33(3), the section had to be read as if it were s 24 of the interim Constitution.⁴⁴ This meant that the courts could not yet throw off the fetters of ‘rights’, ‘interests’ and the like. Second, the courts had already found a new concept to engage their attention: ‘administrative action’, a term appearing in both s 24 and s 33. This concept, unknown and apparently unneeded in the pre-democratic era, soon became a focal point of our post-democratic administrative law. The courts began to work

⁴⁰ *Podlas v Cohen and Bryden NNO* 1994 (4) SA 662 (T) 675I.

⁴¹ *Xu v Minister van Binnelandse Sake; Tsang v Minister van Binnelandse Sake* 1995 (1) SA 185 (T).

⁴² *Ibid* 192F-G.

⁴³ 1996 Constitution s 33: ‘(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.’

⁴⁴ 1996 Constitution sch 6 item 23 (a transitional provision).

out what sort of action did and did not count as 'administrative'. Third, the national legislation envisaged by s 33(3) was enacted within the time limit set by the 1996 Constitution,⁴⁵ and it, too, turned out to be imbued with the two evils.

IV THE CONCEPT OF ADMINISTRATIVE ACTION

A 'Administrative Action' in the Constitutional Court

The Constitutional Court, which began functioning in 1995, was soon called upon to decide what constituted 'administrative action'. At once it became apparent that the Court saw no need for the concept to be all-encompassing; and this is understandable. Administrative law review had in the bad old days been virtually the only tool for challenging governmental action, but South Africa had since acquired a full-scale Bill of Rights. Much of the work previously done by judicial review in administrative law would henceforth be performed by constitutional rights such as the right to equality⁴⁶ and the right of access to court.⁴⁷ This meant that the administrative justice right could now afford to have a narrower area of focus. Over the nine years since then there have been several Constitutional Court cases involving administrative action.⁴⁸ However, of more immediate interest, there has been a particular string of cases in which the Constitutional Court proved unwilling to classify the action in question as 'administrative'.

In *Bernstein and Others v Bester and Others NNO*⁴⁹ it was not strictly necessary for the court to decide whether the action was administrative action, and it declined to do so. The action in question was an investigation into the affairs of a company, which was part of the process of liquidation. Ackermann J had difficulty 'in fitting this into the mould of administrative action', particularly since the investigation 'was not aimed at making decisions binding on others'.⁵⁰ *Nel v Le Roux NO*⁵¹ concerned a statutory provision allowing for the pre-trial examination of a person

⁴⁵ 1996 Constitution sch 6 item 23(1), required the national legislation to be enacted within three years of the Constitution's taking effect, ie by 4 February 2000. The *Promotion of Administrative Justice Act* was signed into law by the President on 3 February 2000, although it only came into operation (and then only partially) on 30 November 2000. It is now fully in force, but the case law has not necessarily caught up with it: there are relatively few cases that grapple with the Act rather than the Constitution or the common law.

⁴⁶ 1996 Constitution s 9 (interim Constitution s 8).

⁴⁷ 1996 Constitution s 34 (interim Constitution s 22).

⁴⁸ See, eg, *Premier, Mpumalanga v Executive Committee of the Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) (decision to withdraw bursaries from state aided schools); *Dawood v Minister of Home Affairs*; *Shalibi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* ('Dawood') 2000 (3) SA 936 (CC) (powers to grant or extend residence permits); *Janse van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC) (powers to suspend activities of a company and freeze its assets); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) (adoption of a subsidy formula and allocations made in terms of the formula).

⁴⁹ 1996 (2) SA 751 (CC) ('Bernstein').

⁵⁰ *Ibid* [97].

⁵¹ 1996 (3) SA 562 (CC) ('Nel').

who was likely to give relevant information concerning the commission of an alleged offence. The statute also made provision for summary sentencing where the person refused to give evidence without 'just excuse'. The Court found that this summary procedure was clearly judicial and not administrative action; it was subject to appeal in the same way as a sentence imposed in any criminal case.⁵² As to the examination, the Court had 'grave doubts' that such an investigation amounted to administrative action, since its aim was the gathering of factual information.⁵³

In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*⁵⁴ the Court held that budgetary resolutions made by a local authority were clearly legislative and not administrative action, since the Constitution gave such resolutions the status of original legislation.⁵⁵ In *President of the Republic of South Africa v South African Rugby Football Union*⁵⁶ the Court found that the President's decision to appoint a commission of inquiry to investigate the administration of rugby was executive rather than administrative action. The relevant power was political in character, akin to a prerogative power,⁵⁷ and it did not involve the implementation of legislation, which is the hallmark of administrative action.⁵⁸

*Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*⁵⁹ had especially interesting facts. It concerned an Act of Parliament that regulated the sale and possession of medicines. The President, apparently acting on incorrect advice from the Department of Health, had proclaimed the statute into force prematurely, before various essential schedules and regulations were ready. The result was that the Act was completely unworkable and unenforceable. For instance, it might purport to prohibit the possession of dangerous drugs 'listed in Sch 3', but there was no Sch 3 and thus no list. An urgent but unsuccessful application was launched in a High Court to have the proclamation set aside. On appeal to a full bench,⁶⁰ the Court found for the applicants. The Court reasoned that the President had acted beyond the scope of his powers, since the legislature could not have intended its delegated law making power to be exercised prematurely.⁶¹ The matter was then referred to the Constitutional Court for confirmation.⁶² This Court, too, found a creative way

⁵² Ibid [24].

⁵³ Ibid.

⁵⁴ 1999 (1) SA 374 (CC) ('*Fedsure*').

⁵⁵ Ibid [33]-[45].

⁵⁶ 2000 (1) SA 1 (CC) ('*SARFU*').

⁵⁷ See 1996 Constitution s 84(2)(f). This is the power to appoint commissions of inquiry. Section 84(2) lists other former prerogatives, such as pardoning or reprieving offenders (s 84(2)(j)) and conferring honours (s 84(2)(k)).

⁵⁸ *SARFU* 2000 (1) SA 1 (CC) [142].

⁵⁹ 2000 (2) SA 674 (CC) ('*Pharmaceutical Manufacturers*').

⁶⁰ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 1999 (4) SA 788 (T).

⁶¹ Ibid 797I.

⁶² In terms of s 172(2) of the 1996 Constitution, an order of constitutional invalidity relating to an Act of Parliament has no force unless it is confirmed by the Constitutional Court.

(discussed under heading V below) of setting aside the proclamation; but it rejected the argument that the President's decision to bring the statute into force was administrative action. The decision, the Court said, required a 'political judgment', and thus lay closer to the legislative than to the administrative process.⁶³

Some of these decisions are more easily defended than others. *Fedsure*, one might think, is unimpeachable, *SARFU* is sound, and so is *Nel* – at least in relation to the status of the summary sentencing procedure. Some would certainly want to quarrel with *Bernstein* and *Nel* in relation to the investigative proceedings in those cases,⁶⁴ for the court's reasoning seems sadly reminiscent of pre-democratic thinking. However, the most awkward decision is *Pharmaceutical Manufacturers*. The Constitutional Court clearly thought so too: Chaskalson P described it as 'one of those difficult cases'.⁶⁵

This case undoubtedly *did* involve the implementation of legislation, which *SARFU* depicted as quintessential administrative action. Moreover, a proclamation of this kind, being delegated legislation, would certainly have been reviewable at common law. To overcome these obvious points the Court drew an artificial distinction between the proclamation itself – the 'implementation' part – and the antecedent decision to bring the statute into force – the 'political judgment' part. As I have suggested elsewhere,⁶⁶ the distinction is problematic not only because the proclamation itself is the only evidence of the 'antecedent decision', but also because on this reasoning the making of almost any delegated legislation will require a 'political judgment' as to its content and timing. Indeed, on this loose usage virtually any discretionary administrative task would involve political judgment.

The cases described above remain important because the Constitutional Court's distinctions between 'administrative', 'judicial', 'legislative' and 'executive' action came to be reflected in the *Administrative Justice Act* itself. As I shall indicate later on, however, some of these cases are even more important for what they say about the principle of legality.

B 'Administrative Action' in the *Administrative Justice Act*

The creation of the *Administrative Justice Act* represented a wonderful opportunity to get things right in South African administrative law. One hope was that the new

⁶³ *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC) [79].

⁶⁴ See Dawid van Wyk, 'Administrative Justice in *Bernstein v Bester* and *Nel v Le Roux*' (1997) 13 *South African Journal on Human Rights* 249. Ironically enough, the action in each case would have been reviewable in terms of the pre-democratic common law. As we have seen, however, the applicants would no doubt have been denied the benefits of fairness and reasonableness on the ground that investigative proceedings did not adversely affect any of their existing rights.

⁶⁵ *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC) [79].

⁶⁶ Cora Hoexter with Rosemary Lyster, (Iain Currie ed), *The New Constitutional and Administrative Law*, Volume II: *Administrative Law* (2002), 95.

Act would do something about the law's almost exclusive focus on judicial review at the expense of other methods of controlling administrative power.⁶⁷ Another was that, building on the inspiring simplicity of s 33(1) of the 1996 Constitution, the new Act would help to change the very style of South African administrative law. The Act would surely find ways of giving 'everyone' their rights in appropriate proportions – and, at the very least, it would not lead the courts back to their old formalism and their old attitude of exaggerated deference to legislature and executive.

However, the *Administrative Justice Act* proved disappointing in both of these respects.⁶⁸ The final drafters seemed to take the view that the instruction in s 33(3) to 'promote an efficient administration' justified them in jettisoning most of the provisions relating to future reform of the administrative system, and also in reducing the scope of the Act considerably. The Act is terribly flawed in areas in which the old enemies of conceptualism and parsimony make a most unwelcome reappearance. Undoubtedly the worst offender, in this regard, is the Act's definition of 'administrative action'.⁶⁹

Like the constitutional right itself, to which it 'gives effect', the Act applies only to administrative action. No decision or action may be reviewed in terms of the Act, and no remedy may be granted, except in respect of administrative action. This is made abundantly clear throughout the Act. Section 6, which lists the grounds of review, relates to 'judicial review of administrative action'. In turn ss 7 and 8 of the Act, which respectively deal with procedural matters and remedies, both refer to review 'in terms of' s 6. The concept of administrative action is in fact the gateway to the Act, and this means that all of the statute's users – aggrieved citizens, public

⁶⁷ For a discussion of the traditional (and continuing) primacy of judicial review in South African administrative law see Cora Hoexter, 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *South African Law Journal* 484, 485ff.

⁶⁸ Ibid.

⁶⁹ Other flaws include the over generous provision of loopholes for administrators who wish to escape the duties imposed by ss 3, 4 and 5; the uncertain relationship between ss 3 (fairness in individual cases) and 4 (fairness in cases involving the public); the fact that decisions taken under s 4(1) of the Act are unenforceable; the lack of clarity as to whether the Act applies to delegated legislation; a very confusing inconsistency between s 1, which insists that administrative action can only qualify as such if it adversely affects 'rights', and s 3, which requires fairness where 'rights or legitimate expectations' are 'materially and adversely' affected; and a too strict duty to exhaust domestic remedies. Another problem is the absence of any provision that is likely to lead to further reform of administrative law. In this last regard the Act compares very unfavourably with the version produced by the South African Law Commission. See further Hoexter, above n 67, 495-9. This is not to deny that there are some good and even excellent provisions in the Act. For example, the treatment of procedural fairness and the giving of reasons in ss 3, 4 and 5 of the Act is in some ways admirable: it reflects the essential flexibility of this part of the law and may well help to educate administrators as well as guide them. Section 3(2)(a), for instance, describes fairness as 'depend[ing] on the circumstances'. It sets out minimum requirements for fairness in individual cases and then invites administrators to think about any extra ingredients (such as an oral hearing and legal representation) that might be appropriate in serious cases.

officials, lawyers and courts – must first decide whether the action with which they are concerned amounts to administrative action.

Given all this, one would naturally think it important for the Act to define administrative action in a way that is both generous and easily understandable. The Project Committee of the South African Law Commission that was charged with drafting the Act thought so; its original definition was certainly wide and, apart from a list of exceptions felt to be necessitated by the decisions of the Constitutional Court, fairly simple.⁷⁰ But the draft Bill it produced was thoroughly reworked by the Portfolio Committee on Justice before being enacted, and the ultimate version contained a definition of administrative action that is both convoluted and conceptual. Although some of its main elements are very widely cast, others have the effect of narrowing the definition down in a quite relentless fashion. The definition is very complicated, too, since some of its elements are themselves defined so as to add further elements. All in all, the definition is anything but generous and user-friendly.

In terms of the definition, administrative action means any ‘decision, or failure to take a decision’, which ‘adversely affects the rights of any person’, which has a ‘direct, external legal effect’, and which is not specifically excluded in the list of exceptions. The first five items in this list are an attempt to capture the Constitutional Court decisions discussed above, and perhaps to extend their reasoning somewhat in relation to executive, legislative and judicial functions. The next four exclusions relate to decisions to institute or continue a prosecution; decisions of the Judicial Service Commission concerning the appointment of judicial officers; decisions taken under the *Access to Information Act 2 of 2000*; and decisions taken (or not taken) in terms of s 4(1) of the *Administrative Justice Act* itself.⁷¹

The definition of ‘decision’ is an Australian import, an extremely broad one taken from the *Administrative Decisions (Judicial Review) Act 1997* (Cth) and including every conceivable sort of decision – except, it seems, the making of delegated legislation – provided it is ‘of an administrative nature’. This phrase adds an

⁷⁰ A draft Bill was appended to the South African Law Commission’s *Report on Administrative Justice* Project 115 (August 1999). Administrative action was defined there as ‘any act performed, decision taken or rule or standard made, or which should have been performed, taken or made, by (i) an organ of state; (ii) a judicial officer; (iii) a prosecuting agency; (iv) a natural or juristic person when exercising a public power or performing a public function’. There then followed a list of six matters excluded. This list largely aimed to reflect what had already been decided by the Constitutional Court in relation to executive, legislative and judicial functions. The draft Bill with its proposed definition was widely disseminated for comment before the report was compiled. In addition, four regional workshops were held within South Africa and the project committee also had the benefit of views expressed at a meeting of international experts in the UK in July 1999.

⁷¹ The last exclusion concerns fairness in cases involving the public, and it ensures that decisions and non-decisions relating to the use of notice and comment procedures or public inquiries are not enforceable. Only once an administrator has actually opted for a particular procedure can it be held to that procedure.

element that South Africans, at least, find somewhat confusing. Is 'of an administrative nature' intended simply to underscore the list of executive, legislative and judicial exclusions – or does it invite the South African courts to revert to the classification of administrative functions? For reasons that will be apparent by now, one fervently hopes that the courts will not treat it as the latter.

The definition retains its broad sweep when it comes to the performers of administrative action. These include not only organs of state but also natural or juristic persons 'when exercising a public power or performing a public function in terms of an empowering provision'. This provides at least part of the answer to a question that continues to puzzle administrative lawyers in several jurisdictions – whether and to what extent the actions of private bodies are reviewable. It does not tell us when powers and functions are 'public' ones, of course, but it is a good start. The definition of an 'empowering provision' itself is similarly enlightened, and encompasses not only legislation and rules of common law and customary law but also 'an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. This places it beyond doubt that private bodies acting in terms of contract rather than statute are capable of performing administrative action.

So far the definition of administrative action is not particularly objectionable except for being unnecessarily complicated – though it does throw up a couple of puzzles (Does it cover delegated legislation?⁷² What is meant by 'of an administrative nature'?). The next elements are more worrying. They require that the decision affect 'rights' adversely and that it have 'direct, external legal effect'. Significantly, both of these were deliberate choices of the final drafters of the Act; neither of them appeared in the draft Bill produced by the Law Commission.

The first element, and the deliberate choice of the word 'rights', seems to be another vote for the use of threshold concepts and for the narrow 'deprivation' approach that characterised the common law. (See heading II above.) This is because it is well established in our law that applicants ordinarily have an *interest* in the outcome of the application rather than a *right* to the desired outcome. The intended result would seem to be the familiar one that 'mere applicants' simply go without. The courts are alive to ways of ameliorating this situation, I am happy to report, but they have not yet fixed on a solution in the context of the Act itself.⁷³

⁷² It is unfortunately unclear whether delegated legislation counts as 'administrative action' in terms of the Act. On one hand, the provisions of s 4 apply most obviously to such delegated legislation. On the other, the final drafters of the Act deliberately used a definition of 'decision' that does not include rule-making, and they also deliberately deleted from the draft Bill several duties relating to rule-making as well as the ground of review relating to vagueness.

⁷³ In *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) [101] – but without specific reference to the Act – Chaskalson P expressed the tentative view that procedural fairness might be a requirement for administrative decisions affecting 'a material interest short of an enforceable or prospective right'. There is also a very bold decision of the Supreme Court of Appeal in the case of *Transnet Ltd v Goodman Brothers*

The requirement of 'direct, external legal effect'⁷⁴ comes from German federal administrative law, and certainly looks like a further vote for parsimony. In German law a 'direct' effect is apparently obtained only when a decision is final, so that preliminary and investigative decisions cannot count as administrative action. 'External' effect means that the action must be external to the administrative agency or department itself, so that interaction between a departmental head and an official of that department would not ordinarily be administrative action. A 'legal' effect is obtained in German law when 'subjective rights' are affected.⁷⁵ However, German law seems to follow the determination theory, so rights are affected more often than they would be here. In the South African context it is far from clear whether the inclusion of 'legal effect' softens the edges of 'rights'. The 'directness' would seem to suggest a stricter test than the common law doctrine of ripeness. As for 'external', this is a tremendous mystery. South African law has never had trouble with applications for the review of 'internal' matters, which is no doubt why it has never bothered to have a term for them. The truth is that 'direct, external legal effect' came to the attention of the Parliamentary Portfolio Committee at a very late stage and was added to the definition of administrative action on a whim. This is a pity, as it only increases the opacity and intricacy of an already complicated definition. It also has the effect of reducing the application of the Act still further.

The result is that the Act applies only to a narrow category of matters: final decisions of a non-internal administrative nature that are made in terms of public powers or relate to public functions, that affect rights adversely and that do not feature in the list of exclusions. Mere applications and preliminary decisions, or final ones that affect only interests or legitimate expectations rather than rights, do not seem to qualify. This has astonishing consequences: it seems to mean that even the most basic requirements of lawfulness cannot be enforced in relation to such matters. Some of them might be reviewable in terms of special statutory regimes, of course; and decisions of *private* contractual bodies, such as churches and clubs, could presumably be controlled by the common law as they always have been. But many decisions of a public nature that would have been reviewable at common law now simply fall outside the purview of the Act.

The Act could of course be challenged on the basis of non-compliance with the mandate to 'give effect to' s 33 of the 1996 Constitution; for it is surely misguided

(Pty) Ltd 2001 (1) SA 853 (SCA) in which the court uses constitutional rights in place of the more traditional 'existing right' required at common law – and then proceeds to use one administrative justice right (the right to lawfulness) to trigger another (the right to reasons). On the reasoning employed in this case, everyone inevitably has an affected right in the shape of one of the administrative justice rights. This approach would certainly solve the problem posed by the Act, but it does so by making nothing of the drafters' deliberate choice of the word 'rights'.

⁷⁴ *Federal Law of Administrative Procedure 1976* s 35. On its meaning, see generally Rainer Pfaff and Holger Schneider, 'The Promotion of Administrative Justice Act from a German Perspective' (2001) 17 *South African Journal on Human Rights* 59.

⁷⁵ Mahendra P Singh, *German Administrative Law in Common Law Perspective* (1985) 35.

to equate the ‘efficiency’ called for by s 33(3) with parsimony.⁷⁶ Failing that, we are back to a pattern of all or nothing – or at least we would be if it were not for the principle of legality.

V THE PRINCIPLE OF LEGALITY

I have already outlined some of the most important cases in which the Constitutional Court defined the concept of administrative action before the coming into force (and indeed, largely before the enactment) of the *Administrative Justice Act*. Some of those decisions are reflected in the Act as exclusions from the definition of administrative action. But the real interest of these cases lies elsewhere than in the cogency of their reasoning in relation to administrative action; for in *Fedsure*,⁷⁷ in *SARFU*⁷⁸ and in *Pharmaceutical Manufacturers*⁷⁹ the finding in this regard was by no means the end of the matter. In each of these three cases the Constitutional Court went on to rely on a constitutional ‘principle of legality’ which imposed its own requirements on the holder of the power in question.

It was in *Fedsure* that the Constitutional Court first identified the principle of legality and described it as part of the doctrine of the Rule of Law – but separate from the administrative justice clause itself. The principle, it said, was not written down anywhere in particular. Rather, in relation to action that did not constitute administrative action, such as legislation and executive acts, it was ‘necessarily implicit in the Constitution’.⁸⁰ It was not necessary to consider its exact ambit, such as whether the Rule of Law had greater content than this principle of legality. The principle generally expressed the idea that ‘the exercise of public power is only legitimate where lawful’;⁸¹ and in this particular case it implied that the local authority had to act within the powers lawfully conferred upon it. However, the court was evenly divided on whether the local authority had in fact acted within its powers in resolving to levy a certain rate.

The *SARFU* case, it will be remembered, had to do with the President’s appointment of a commission of inquiry in terms of s 84(2)(f) of the 1996 Constitution. Here the content of the principle of legality was considerably developed, with two more elements being added to it. The fact that the President’s conduct in this case did not constitute administrative action, the court noted, did not mean that there were no constraints upon it.⁸² On the contrary, there were explicit

⁷⁶ Administrative justice and administrative efficiency ought not to be treated as inconsistent with each other. As Iain Currie and Jonathan Klaaren put it in *The Promotion of Administrative Justice Act Benchbook* (2001), para 1.29, 31 the term ‘efficient administration’ in s 33(3) can be read ‘to require an administration that is accountable and participatory, promoting rational, effective and responsive (and thus, ultimately, more efficient) decision-making’.

⁷⁷ *Fedsure* 1999 (1) SA 374 (CC).

⁷⁸ *SARFU* 2000 (1) SA 1 (CC).

⁷⁹ *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC).

⁸⁰ *Fedsure* 1999 (1) SA 374 (CC) [59].

⁸¹ *Ibid* [56].

⁸² *SARFU* 2000 (1) SA 1 (CC) [148].

requirements in the Constitution itself – the President’s decision to appoint had to be recorded in writing and signed, for instance – and there were also requirements implicit in the Constitution. These were that the President had to act in good faith and must not misconstrue his powers.⁸³ Such ‘significant constraints’ were to be found not in the administrative justice clause but ‘throughout the Constitution’.⁸⁴ They turned out not to have been breached, however, and the court found the President’s conduct had been perfectly lawful.

Still further development of the principle of legality took place in the *Pharmaceutical Manufacturers* case. Here, too, the President’s decision could not be classified as administrative action; but again, there were constraints imposed by the Constitution in general. One of these was rationality, a ‘minimum threshold requirement applicable to the exercise of all public power’.⁸⁵ Chaskalson P, giving judgment for a unanimous court, explained it thus:

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.⁸⁶

He went on to find that the President’s decision to bring the statute into operation prematurely had not been ‘objectively rational’.⁸⁷ While the courts could not interfere with a decision simply because it disagreed with it, this applied only to rational decisions; and ‘it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational’.⁸⁸

These three cases are by no means the only ones in which the Constitutional Court has placed reliance on the Rule of Law or some version of it. In other cases this court has decided, for instance, that the Rule of Law requires laws to be accessible, clear and general⁸⁹ and that it prevents Parliament from acting arbitrarily or capriciously when making law.⁹⁰ The Rule of Law also demands that judges give reasons for their decisions,⁹¹ and it prevents people from taking the law into their own hands.⁹² The Constitutional Court has clearly not been slow to appreciate the rich possibilities of the Rule of Law as a foundational value of our constitutional

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC) [90].

⁸⁶ Ibid [85].

⁸⁷ Ibid [90].

⁸⁸ Ibid.

⁸⁹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [102]; *Dawood* 2000 (3) SA 936 (CC) [47].

⁹⁰ *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) [19].

⁹¹ *Mphahlele v First National Bank of South Africa* 1999 (2) SA 667 (CC) (*‘Mphahlele’*) [12].

⁹² *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) [11].

order⁹³ – a value that may be used to inform and supplement the written law and the written Constitution itself, since the Rule of Law is immanent in the latter. Nor is the Constitutional Court the only court that is alive to these possibilities. For example, in a recent case to which the *Administrative Justice Act* did not apply,⁹⁴ and where there was doubt about the status of material mistake of fact as a ground of review, a unanimous Supreme Court of Appeal resorted to the principle of legality as expounded by the Constitutional Court. The doctrine, Cloete JA said, ‘requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie, on the basis of the true facts’.⁹⁵

The cases I have described will be interesting to anyone who is concerned with public power and its use. In the final part of this article I want to suggest that they are of special interest to administrative lawyers, and to indicate more precisely where I think that interest lies.

VI BACK TO BASICS: A LESSON FROM THE RULE OF LAW

The cases noted above show the constitutional principle of legality, part of the Rule of Law, to be a wonderfully useful and flexible device. In the first place it operates as a residual repository of fundamental norms about how public power ought to be used. It thus acts as a kind of safety net, catching exercises of public power that do not qualify as administrative action. Its spread is reassuringly wide: it covers a good deal of the area protected by the administrative justice clause. To say that the wielders of public power must act within their powers, in good faith and without misconstruing their powers is to summarise a considerable number of well established administrative law grounds. The statement could easily be seen as covering all the grounds relating to authority, delegation, jurisdiction, errors of fact and law, ulterior purpose and motive and ‘failure to apply the mind’, including such detailed grounds as having regard to irrelevant considerations and acting under dictation. The further requirement of ‘objective rationality’ takes one even deeper into the realm of administrative justice, for in South African law today rationality is uncontroversially an ingredient of reasonableness.⁹⁶

The Constitutional Court’s principle of legality does not yet cover procedural fairness, of course, and has not yet been made to require the giving of reasons by an administrator.⁹⁷ Nor does it seem to demand proportionality, which is the other half

⁹³ The Rule of Law is explicitly listed as a foundational value in s 1 of the 1996 Constitution. Others include human dignity, equality, non-racialism and non-sexism.

⁹⁴ *Pepkor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA), where the facts arose before the coming into force of the Act.

⁹⁵ Ibid [59].

⁹⁶ See Cora Hoexter, ‘Unreasonableness in the Administrative Justice Act’ in Claudia Lange and Jakkie Wessels (eds), *The Right to Know: South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 148, 154.

⁹⁷ See *Mphahlele* 1999 (2) SA 667 (CC) [12]. The Constitutional Court found, however, that the Rule of Law ‘requires judges not to act arbitrarily and to be accountable’, ordinarily by furnishing reasons for their decisions.

of reasonableness⁹⁸ – unless it can be said to be irrational or a misconstruction of one's power not to give due regard to proportionality. Nevertheless, the principle is already an extensive one; and who knows where it might go in future? Even narrowly procedural accounts of the Rule of Law easily cover the requirements of natural justice, for instance. Thus Raz, who is scathing about the 'promiscuous'⁹⁹ use of the term 'Rule of Law', lists the observance of natural justice as one of the most important principles implied by the doctrine. As he puts it, '[o]pen and fair hearing, absence of bias and the like are obviously essential for the correct application of the law and thus ... to its ability to guide action'.¹⁰⁰ Housing the ordinary demands of administrative law within a slightly more promiscuous account, such as that of Mathews,¹⁰¹ would present no difficulty at all.

Primarily, the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards. It is thus also a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts. But in performing this important function the principle surely exposes the conceptual traps into which we have fallen, and it shows us how to go on. At one time our courts looked to the 'duty to act fairly' to rescue themselves from the conceptual wilderness of the classification of functions.¹⁰² Similarly, we now seem to need the principle of legality to tell us that it is perverse to spend our time working out whether decisions pass the test of 'administrative action'.

This threshold exercise is, I would argue, largely a waste of judicial energy and effort. For one thing, it distracts the courts' attention from far more interesting questions – such as what the content of lawfulness, reasonableness and procedural fairness is in particular cases, and why it is. These questions *must* be answered if the perennial problem of overburdening the administration is ever to be solved. Furthermore, it effectively encourages courts to hide behind a screen of reasoning about 'decisions' and 'rights' instead of articulating their real concerns about the case, and quite possibly about why they feel inclined or disinclined to intervene. Instead of giving explicit recognition to whatever feature is moving them – doubts about their institutional competence, for example – the courts are actually encouraged to use code.¹⁰³ The exercise is thus inimical to a project whose importance South African administrative lawyers are beginning to appreciate: building a theory of deference or respect.¹⁰⁴

⁹⁸ See Hoexter, above n 96, 154-5.

⁹⁹ Raz, above n 3, 198.

¹⁰⁰ Ibid 201.

¹⁰¹ Mathews, above n 1.

¹⁰² See, above n 35, and accompanying text.

¹⁰³ See Hoexter, above n 19, where I have suggested that the use of code, or legalistic shorthand, does not serve the values and aspirations of South Africa's democratic era, and that the real reasons for decisions should not be encoded but spelt out.

¹⁰⁴ See further Hoexter, above n 67, 499-513; John M Evans, 'Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State' (2003) 120 *South African*

By telling us that *all* exercises of public power must comply with standards such as lawfulness, reasonableness and fairness, the principle of legality points away from all this conceptualism and parsimony and perversity. It shows up the silliness of having two parallel systems of administrative law instead of one.¹⁰⁵ It tells us not to waste our time on conceptual reasoning, and not to be fearful of opening the floodgates, but rather to apply our minds to what administrative justice requires in every case. And it tells us that it is, in fact, possible to give appropriate content to lawfulness, reasonableness and fairness in individual cases. For example, we learn that perhaps it would not be such a bad thing after all if the President had to consult with officials in the relevant department before he proclaimed a statute into force. Such a 'hearing' would, in fact, have prevented the President from making the serious error that led to the *Pharmaceutical Manufacturers* case.

Notwithstanding all that is explicit in our Constitution and in our legislation, we still need the generality of the Rule of Law. Will we ever stop needing it? Perhaps – when it has finally taught us that there is no real sense in distinguishing between public and private power, and that *all* power should be exercised according to certain minimum standards. Perhaps then ...

Law Journal 322; O'Regan, above n 14 ; Hugh Corder, 'Without Deference, With Respect: A Reply to Justice O'Regan' (2004) 121 *South African Law Journal* 438.

¹⁰⁵ Somewhat ironically, in *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC) [44] Chaskalson P made a similar point in response to the proposition that South Africa had two different systems of administrative-law review – a common-law version and a constitutional version, each having different requirements. There are, he said, not two systems of law but only one, and that system is shaped by the supreme Constitution.