Chapter 4. Judicial Regulation of Administrative Action

Lauren Kohn & Hugh Corder

§1. BACKGROUND AND DEVELOPMENT

634. Context matters and today’s system of South African administrative law is quite evidently a product of the socio-political background out of which it evolved. It is a curious hybrid of the old and the new: in part, due to its common-law roots, it bears the stamp of the country’s unfortunate apartheid heritage, yet at the same time it is a field of law that epitomises the negotiated constitutional ‘revolution’\textsuperscript{1166} that indelibly changed the South African legal landscape. Chaskalson P explained the implications of this transformation in the benchmark decision of \textit{Pharmaceutical Manufacturers}:

\begin{quote}
[A]dministrative law occupies … a special place in our jurisprudence. … It is built on constitutional principles. ... Prior to the coming into force of the interim Constitution, the common law was ‘the main crucible’ for the development of these principles of constitutional law. The interim Constitution … was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of the common law to the prescripts of a written constitution which is the supreme law.\textsuperscript{1167}
\end{quote}

635. Prior to this shift, South African administrative law was entirely common law based and bore all the hallmarks of its parent English system. In particular, thanks in large part to the influence of the English constitutional lawyer, Albert Venn Dicey, it rested upon the twin pillars of parliamentary sovereignty and the rule of law with its obverse facet, the \textit{ultra vires} doctrine (which operated as the organizing rationale of administrative law). Along with the Westminster inheritance came a deep distrust of government and discretionary power, and a concomitantly heavy reliance on judicial review of administrative action as the principal means of checking such power. Unfortunately, transplanted into the South African context, these two key organizing principles of English constitutional law failed to complement one another. Under apartheid, parliamentary sovereignty came to be associated with rule \textit{by} law, rather than a substantive notion

\begin{flushright}
\textsuperscript{1166} Iain Currie \& Johan de Waal, \textit{The New Constitutional \& Administrative Law} vol. 1, 37 (Juta 2001).
\textsuperscript{1167} \textit{Pharmaceutical} (CC), para. 45.
\end{flushright}
of the rule of law pursuant to which law is insulated from politics, and judges serve as impartial and independent guardians of human rights. The separation of powers did not exist as a practical reality and parliamentary sovereignty came to be coupled with judicial timidity as the hamstrung courts struggled to find ways of controlling public power, which was largely abused in pursuit of racist ends.

636. The ‘old’ administrative law was thus ‘underdeveloped and functioned in an undemocratic system that was antagonistic to fundamental rights, was secretive and unaccountable’.\textsuperscript{1168} It was, in many respects, what Dean termed a ‘dismal science’,\textsuperscript{1169} and unfortunately this ‘science’ was the sole interface between citizen and state, operating in some ways as an informal but narrow Bill of Rights. Given this genesis, it evolved in a fairly casuistic manner and was spread too thinly.\textsuperscript{1170} In the absence of a legitimate constitutional and political theory to underpin it, the broad spectrum of common-law principles of administrative law lacked both consistency and coherency. The dawn of the constitutional era, based on the founding values of accountability, responsiveness and openness,\textsuperscript{1171} brought with it these fundamental theoretical underpinnings – primarily in the form of a full-scale Bill of Rights – that were previously lacking. With this shift came a reduction in the socio-political function of administrative law, which no longer has to operate as the primary bulwark against state excesses.\textsuperscript{1172}

637. In 1994, the Interim Constitution introduced, albeit in somewhat technical language, a substantial set of administrative justice rights,\textsuperscript{1173} including the fundamental entitlements to lawful\textsuperscript{1174} and procedurally fair\textsuperscript{1175} administrative action. In addition, ‘every person’ was afforded

\begin{itemize}
\item \textsuperscript{1171} Constitution, s. 1(d).
\item \textsuperscript{1172} Kate O’Regan, \textit{Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law}, 121 South African L. J. 429 (2004).
\item \textsuperscript{1173} Interim Constitution, s. 24.
\item \textsuperscript{1174} \textit{Ibid.}, s. 24(a).
\end{itemize}
the right to be given written reasons for administrative action affecting his or her ‘rights or interests’. Furthermore, given the limited life of the Interim Constitution and the fraught nature of the constitutional negotiations which produced it, the right stopped short of including review for reasonableness. As a compromise aimed at balancing administrative efficiency with accountability, the notion of ‘justifiability’ was introduced as an additional ground for review, formulated as follows: ‘every person’ was given the right to ‘administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened’. The twin requirements of reason-giving and justifiability were welcomed as a bold break from the past.

638. The enactment of the Constitution in 1996 brought with it a much simpler expression of a composite right. Section 33 states:

(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.

1175. Ibid., s. 24(b).

1176. Ibid., s. 24(c) (emphasis added).

1177. Ibid., s. 24(d) (emphasis added).
639. The mandate to enact the applicable legislative framework provided that the interim administrative justice right would remain in force\textsuperscript{1178} until 3 February 2000, when the PAJA was assented to by the President.\textsuperscript{1179} This Act now serves as the primary basis for judicial review of administrative action. Ironically, this ‘triumphal legislation’\textsuperscript{1180} has done more to curtail – rather than enhance – the enjoyment of the administrative justice rights. This is chiefly due to the Act’s narrow and overly-complicated definition of the gateway concept of ‘administrative action’. As a result, the ‘new administrative law’ of South Africa is suffering from its own complexity due to the emergence of a ‘proliferation of pathways’ to review\textsuperscript{1181} – including that of the common law which continues to play a fairly significant role\textsuperscript{1182} – in order to capture those exercises of public power which fall short of the PAJA version of ‘administrative action’. The discussion that follows elucidates how courts have sought to regulate the exercise of public power rather than merely its sub-set of ‘administrative action’ through each of these modes of review.

§2. JUDICIAL REGULATION OF THE EXERCISE OF PUBLIC POWER

I. Introduction

A. The Review/Appeal Dichotomy

640. Notwithstanding South Africa’s radical break from the past, judicial review continues to be the most prominent mechanism for curbing and controlling maladministration. It is not, however, an unbridled court process. Under the influence of the Diceyan heritage of a ‘watchdog’ theory of government (as a beast to be shackled and controlled, rather than empowered) and the doctrine of the separation of powers, South African law had endorsed the review/appeal dichotomy as a fundamental principle of administrative law and a key mechanism to limit the role of judicial politics. For this reason, the courts’ powers of judicial review, though fairly extensive, are limited. Both review and appeal allow the reconsideration of a decision, but they flow from contrary premises, and thus have fundamentally different aims. In terms of this distinction, the

\textsuperscript{1178} Authorized by item 23(2)(b) of Schedule 6 to the Constitution.

\textsuperscript{1179} 3 of 2000. The PAJA came into force only on 30 Nov. 2000.

\textsuperscript{1180} Sasol Oil (Pty) Ltd v. Metcalfe NO 2004 (5) SA 161 (W), para. 7.

\textsuperscript{1181} Cora Hoexter, Administrative Law in South Africa 131 (2d ed., Juta 2012).

\textsuperscript{1182} See the discussion on the role of the common law at §2.II.E below.
appeal process is about determining the correctness of a decision through an assessment of its substantive merits. It is a more searching process because it requires a court to make a finding as to whether the decision-maker in question was right or wrong. Review, on the other hand, is a less exacting procedure in terms of which the court solely assesses the decision-making process to determine whether the outcome was arrived at in an acceptable fashion, for example, in an unbiased and rational manner.

641. Since the advent of constitutional democracy with its emphasis on fairness and reasonableness, this bright line distinction is dimming as the courts – although not always explicitly – regularly assess the substantive merits of public decision-making in the course of indicating whether the decision in question was arrived at in an acceptable fashion.1183 This wider form of review has encouraged a fundamental shift away from an all-or-nothing approach to judicial review to a more nuanced or variable approach that has as its focus a determination of what (administrative) justice demands in a given case.

B. The Nature of Public Powers and Functions

642. Today, every exercise of public power is to some extent justiciable under the Constitution even if it falls short of the PAJA definition of administrative action.1184 The definition nonetheless has as its touchstone the ‘public’ element of a power or function,1185 and it is this aspect that guides the judicial control of state excesses more generally. Administrative law principles apply whenever there is action involving the use of public power or the performance of public functions – even when exercised by private entities, which are explicitly included in the purview of the PAJA.1186 The litmus test for reviewability in South African law is thus whether the power or function in question has a ‘public nature’. Precisely what this entails is being incrementally determined by South African courts. It suffices to note that they have moved away from the

1183. See e.g., Bato Star (CC), para. 45, where the Court notes that, ‘the review functions of the Court now have a substantive as well as a procedural ingredient, [yet] the distinction between appeals and reviews continues to be significant’.

1184. Kaunda (CC), para. 244.

1185. PAJA, 3 of 2000, s. 1(i)(a)(ii) & (i)(b).

1186. Ibid., s. 1(i)(b) (refers to ‘a natural or juristic person … when exercising a public power or performing a public function in terms of an empowering provision’).
narrow ‘governmental control’ test which emerged from Directory Advertising Cost Cutters v. Minister of Posts, Telecommunications and Broadcasting\(^{1187}\) to a broader enquiry stated in AAA Investments:

It is true that no bright line can be drawn between ‘public’ functions and private ordering. Courts in South Africa and England have long recognised that non-governmental agencies may be tasked with a regulatory function which is public in character. In determining whether rules are public in character, although made and implemented by a non-governmental agency, several criteria are relevant: whether the rules apply generally to the public or a section of the public; whether they are coercive in character and effect; and whether they are related to a clear legislative framework and purpose.\(^{1188}\)

643. Once action is found to fall within this broad class, it will be subject to judicial review via one of five possible ‘pathways’ to relief which have emerged over the past twenty years. These are review of administrative action as defined in terms of the PAJA; review according to the standards set in section 33 of the Constitution; review of certain forms of public power by reference to the requirements of the constitutional principle of legality; review according to specific statutory standards where administrative action is of a special type; and some residual review authority according to common-law standards. These various avenues are not equally important, but each will be considered in turn below.

II. The Five Pathways to Review

A. The PAJA

644. The PAJA is the national legislation that was passed to give effect to the rights contained in section 33 of the Constitution. Chaskalson CJ confirmed this in New Clicks in which he stressed that ‘[i]t was clearly intended to be, and in substance is, a codification of these rights. It

\(^{1187}\) 1996 (3) SA 800 (T), 810F-H.

\(^{1188}\) **AAA Investments (Proprietary) Limited v. Micro Finance Regulatory Council and Another** (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC), para. 119.
was required to cover the field and it purports to do so.\textsuperscript{1189} Certainly at least in relation to the grounds of review.\textsuperscript{1190} As a result, and in line with the principle of constitutional subsidiarity,\textsuperscript{1191} litigants seeking to vindicate their administrative justice rights cannot 'avoid the provisions of PAJA by going behind it, and seek[ing] to rely on section 33(1) of the Constitution or the common law'.\textsuperscript{1192} The procedures, standards and review grounds set out in PAJA thus constitute the primary avenue to review, once the definitional hurdle of ‘administrative action’ has been overcome.

645. During the transitional period, the constitutional incarnation of administrative action was expressed by the Constitutional Court in a significant trilogy of cases – \textit{Fedsure},\textsuperscript{1193} \textit{SARFU}\textsuperscript{1194} and \textit{Pharmaceutical Manufacturers}.\textsuperscript{1195} The different types of legislative and executive action that fell outside the purview of administrative action under section 33 stood instead to be reviewed under the flexible constitutional principle of legality – a crucial clarification that emerged out of this string of cases.\textsuperscript{1196} The concept of administrative action under section 33 seems to strike the right balance between giving proper effect to the right and ensuring not too onerous a burden on the administration. Unlike this approach, the legislative definition of administrative action in section 1 of the PAJA comprises of several technical constituent parts:

\begin{quote}
Administrative action means any decision taken, or any failure to take a decision, by –
\end{quote}

\begin{itemize}
\item[(a)] an organ of state, when –
\end{itemize}

\begin{footnotes}
\item[1189.] \textit{Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others} (CCT 59/2004) [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC), para. 95.
\item[1190.] Currie & de Waal, \textit{supra} n. 978, at 340.
\item[1191.] See Part III, Chapter 3, §4.II.
\item[1192.] \textit{New Clicks} (CC), para. 96.
\item[1193.] \textit{Fedsure Life}\textsuperscript{1194} (CC).
\item[1194.] \textit{President of the Republic of South Africa and Others v. South African Rugby Football Union and Others} (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.
\item[1195.] \textit{Pharmaceutical} (CC).
\item[1196.] See the discussion on this principle at (iii) below.
\end{footnotes}
(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

646. The restrictive and overly-elaborate definition has been criticized for unduly limiting the meaning of administrative action by ‘surrounding it with a palisade of qualifications’.1197 A discussion of each of these qualifications is beyond the purview of this Chapter. It suffices to highlight the essence of the definition which has been summarized as follows:

Administrative action is … in general terms, the conduct of the bureaucracy … in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.1198

647. The PAJA further curtails the realm of administrative action through the enumeration of various public powers and functions that are excluded from its scope.1199 In large part, these exclusions flow from the separation of powers. Thus, in respect of the three spheres of government, the quintessentially independent judicial function,1200 the executive function (associated with a high measure of policy and discretion, as opposed to ‘administrative’ ) and the legislative function are all excluded. A decision ‘to institute or continue a prosecution’1201 and a

1198. Ibid., para. 24.
1199. PAJA, 3 of 2000, s. 1(aa)-(ii).
1200. Ibid., s. 1(ee).
1201. Ibid., s. 1(ff).
decision relating to the appointment of a judicial officer by the JSC are also matters outside the reach of the PAJA. In addition, the Act specifically excludes any decision taken, or failure to take a decision, in terms of any provision of the PAJA’s sister statute, the Promotion of Access to Information Act (PAIA), which creates its own system of special statutory review. Finally, the PAJA excludes decisions taken under section 4(1) (‘Administrative action affecting the public’), which affords administrators a choice of procedure to facilitate public involvement where ‘administrative action materially and adversely affects the rights of the public’. By virtue of this PAJA exclusion, the administrator’s decision regarding the process adopted is final.

648. Despite the diminished realm of administrative action under the PAJA, once an applicant is through this gateway, the Act offers a relatively rich array of review grounds which are primarily encompassed in section 6 (‘Judicial review of administrative action’), the provisions of which ‘reveal a clear purpose to codify the grounds of judicial review’ that were available under the common law. This section gives precise legislative expression to the constitutional rights to lawful, reasonable and procedurally fair administrative action. It is prefaced by section 5 which affords ‘any person whose rights have been materially and adversely affected by administrative action’ the right to request written reasons for that action ‘within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of [it]’. Sections 3 and 4 of the PAJA give meaningful expression to the prescripts of procedural fairness in respect of individuals and the public, respectively. The Act delineates the ‘procedure for judicial review’ and introduces two fairly stringent requirements for applicants. First, it prescribes a 180 day timeframe within which to institute judicial review proceedings, and, second, that such proceedings may be instituted only once all internal

1202. Ibid., s. 1(hh).
1203. 2 of 2000.
1204. PAJA, 3 of 2000, s. 1(ii).
1205. New Clicks (CC), para. 132.
1206. Bato Star (CC), para. 25.
1207. PAJA, 3 of 2000, s. 7. See also the Rules of Procedure for Judicial Review of Administrative Action, 2009, published in terms of PAJA, s. 7(3) under GN R966 in GG 32622 of 9 Oct. 2009. These rules have yet to be brought into operation.
1208. Ibid., s. 7(1) read with s. 9(1).
remedies have been exhausted. In this respect, the PAJA has been criticized for being ‘far more hostile to the right of access to court than the more nuanced common law’ in terms of which applicants must simply not delay unreasonably. Similarly, although there is a duty to exhaust domestic remedies at common law, this obligation has been enforced sparingly. In order to ameliorate the potential harshness of these procedural hurdles in the PAJA, the courts have tended to read these sections down to bring the Act in line with the more flexible common law.

649. The remainder of the PAJA sets out the various ‘[r]emedies in proceedings for judicial review’, and makes provision for the variation of the time-frames for applying for reasons and for instituting a review action. It also sets out further ancillary matters such as authorizing the Minister to make regulations on an array of topics, including ‘the establishment, duties and powers of an advisory council to monitor the application of [the] … Act and to advise the Minister’ in an effort to improve the system of administrative justice in South Africa. Regrettably in the view of most administrative lawyers, this anticipation has not been realized, as no advisory council has been established. Such a body would do much to reform the system by making it more integrated, and thereby reduce the prominence of judicial review with its inherent


1210. For example, in relation to the duty to exhaust internal remedies, the Constitutional Court held that, ‘an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress’ (para. 47), and that the requirement should not be employed by administrators to ‘frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny’ (at para. 38): Koyabe and Others v. Minister for Home Affairs and Others (CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC).

1211. PAJA, s. 8. See the discussion on remedies at C below.

1212. Ibid., s. 9(1)(a).

1213. Ibid., s. 9(1)(b).

1214. Ibid., s. 10. Thus far, the only regulations which have been promulgated are the Regulations on Fair Administrative Procedures, 2002, published under GN R1022 in Government Gazette 23674, 31 Jul. 2002.

1215. Ibid., s. 10(2).
inefficiencies. We turn now to canvass briefly key aspects of the development of the three primary grounds of review – lawfulness, reasonableness and procedural fairness – under the PAJA, as given effect to in the case law jurisprudence.

1. Lawfulness

650. Perhaps the most vital organizing rationale of administrative law is the requirement of lawfulness, or legality, pursuant to which every incident of public power must be sourced in, and carried out in exact accordance with, a lawful empowering source – or what the PAJA terms, ‘an empowering provision’. In this respect, the notion of lawfulness flows from the rule of law and lies at the heart of the constitutional order. Thus, in the Fedsure case, in which the Constitutional Court laid the foundations for the development of the constitutional principle of legality the Court held that, ‘[it is] central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. This pivotal aspect of legality is the requirement of authority and it, in particular, has animated the jurisprudence on legality, which has primarily centred on the rule against unlawful delegation of power.

651. The rule against unlawful delegation flows from the Latin maxim, delegatus delegare non potest, in terms of which a person performing a delegated function may not further delegate the performance of that function to another person or institution. The PAJA gives expression to the rule by allowing the review of administrative action where ‘the administrator who took it … acted under a delegation of power which was not authorized by the empowering provision’. The rule is, however, subject to limitation in that it is recognized that in the modern bureaucratic


1217. This notion is broadly defined in PAJA, s. 1(vi) to mean ‘a law, a rule of common law, customary law, or an agreement, instrument or other documents in terms of which an administrative action was purportedly taken’.

1218. Ibid., para. 58.

1219. AAA Investments (CC), para. 126.

1220. PAJA, s. 6(2)(1)(ii).
state, delegation (or, sub-delegation if done not by an original legislator, but by an administrator with delegated power) is necessary for the ‘daily practice of governance’.\textsuperscript{1221} Section 238 of the Constitution contemplates this inevitability:

An executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function performed.\textsuperscript{1222}

652. The courts have, in allowing exceptions to the general rule that delegated power must be exercised by the administrator on which it is conferred, formulated criteria to determine whether a delegation is acceptable. These were elucidated in \textit{AAA Investments}:

The character of the original delegation; the extent of the delegation of the delegated power; the extent to which the original delegee continues to review the exercise of the delegated power; considerations of practicality and effectiveness; and the identity of the institutions or persons by whom and to whom power is delegated.\textsuperscript{1223}

653. The other two broad requirements of legality are what have been termed in the relevant literature and case law as jurisdiction and abuse of discretion. Jurisdiction is the requirement that administrators remain within the substantive and procedural bounds of their powers and do not misconstrue them. Abuse of discretion is an umbrella ground fleshed out in some detail in the PAJA, which in practice tends to overlap with the more malleable notion of reasonableness. In this respect, the Act gives statutory form to most of the common-law constraints on the exercise of discretionary powers. It includes, for example, the requirements that administrative action not be taken: ‘for an ulterior purpose or motive’,\textsuperscript{1224} ‘because irrelevant considerations were taken

\begin{itemize}
\item \textsuperscript{1221} \textit{Dawood (CC)}, para. 54.
\item \textsuperscript{1222} Constitution, s. 238(a).
\item \textsuperscript{1223} \textit{AAA Investments (CC)}, para. 127.
\item \textsuperscript{1224} PAJA, s. 6(2)(e)(ii).
\end{itemize}
654. The first basis on which a court can review administrative action for want of jurisdiction is where an administrator interprets a legislative provision wrongly, even if inadvertently. Such an incorrect interpretation typically prevents administrators from appreciating the nature of their powers, and thus leads to them exercising their discretion improperly. This review ground is encapsulated as follows in the PAJA: ‘the action was materially influenced by an error of law’.  

The courts are guided in the interrogation of such errors by factors such as the nature of the power or function, and the materiality of the error. Thus, the courts will more readily set aside an error of law where the function in question is of a purely judicial nature, lacks a strong discretionary component and was exercised pursuant to an error that is not material or fundamental in nature.  

655. The second basis on which South African courts are willing to set aside exercises of public power that exceed their jurisdictional limits is that of ‘material mistake of fact’. Such errors typically occur where an administrator fails to follow a prescribed procedure or makes a decision in breach of a substantive condition precedent, such as the formulation of an opinion as to the existence of a certain state of affairs. The last situation is to be seen in a phrase such as: when the administrator ‘is satisfied that’, or ‘of the opinion that’. Material mistakes of fact can enable administrators to inflate their jurisdiction by accumulating further powers for themselves beyond the contemplation of the empowering legislation. Despite the fact that this ground is not explicitly recognized in the PAJA, it is now firmly entrenched as a basis for judicial review in South African administrative law: ‘[t]here can be no talk of a just administrative action if it is

1225. Ibid., s. 6(2)(e)(iii).
1226. Ibid., s. 6(2)(e)(v).
1227. Ibid., s. 6(2)(e)(vi).
1228. Ibid., s. 6(2)(d).
1229. These were the factors laid down in the seminal case of Hira and Another v. Booysen and Another (308/90) [1992] ZASCA 112; 1992 (4) SA 69 (AD); [1992] 2 All SA 344 (A), para. 93-4.
based upon a fundamentally wrong premise’. The abuse of administrative discretion in one of the many ways known to the common law and now codified in the PAJA remains one of the most common grounds of review under the PAJA.

2. Reasonableness

656. Reasonableness has enjoyed prominence as an independent ground of review in administrative law since 1994. It was recognized in section 33 of the Constitution, which requires simply that administrative action be ‘reasonable’. Despite its current prominence, it nonetheless remains a contentious basis for review. This is because it inevitably draws the courts into that awkward space between review and appeal by requiring some assessment of the merits of administrative decisions. In applying the reasonableness standard, the courts have to fulfil the unenviable task of striking the right balance between ensuring proper judicial oversight and respect for the separation of powers. The South African courts have employed the concept of deference-as-respect, with its twin notion of variability, which emphasizes the need to let the context guide the degree of judicial scrutiny, to strike this delicate balance and cement the place of reasonableness review in the constitutional order.

657. It is now fairly widely accepted in the case law jurisprudence that ‘rationality plus (at least) proportionality equals reasonableness’. Rationality and reasonableness, despite overlapping and both animated by the constitutional principle of accountability, are distinct, and thus invoke different degrees of judicial scrutiny. It is perhaps for this reason that rationality is given expression separately in the PAJA, and lucidly so, despite being the minimal constitutional threshold requirement. Rationality under the PAJA demands that administrative action be rationally connected to:

1231. Mabethu v. MEC Social Development Eastern Cape Government (E1241/06) [2006] ZAECHC 68, para. 7.

1232. See the text supra nn. 63 to 66.


1234. As endorsed by the Constitutional Court in Bato Star (CC), para. 46.

(a) the purpose for which it was taken;

(b) the purpose of the empowering provision;

(c) the information before the administrator; or

(d) the reasons given for it by the administrator. 1236

658. Reasonableness, on the other hand, is rather clumsily described in the PAJA, 1237 but courts have given careful expression to it through its proportionality component, which essentially requires analysis aimed at determining whether the means chosen by an administrator justify the ends pursued. The Court in *Bato Star* set out the factors to guide judges in determining what constitutes a reasonable decision in a given case:

> [T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. 1238

659. Reasonableness may still be a controversial addition to the grounds of review in administrative law but both it and its apparently less threatening counterpart of rationality increasingly serve as vital safeguards against the abuse of public power. 1239

3. Procedural Fairness

660. Procedural fairness, much like reasonableness, places context at the heart of the enquiry: its prescripts are applied variably based on the facts of a case. This flexible ground of review in

1236. PAJA, s. 6(2)(f)(ii).

1237. *Ibid.*, s. 6(2)(h) which gives a ‘court or tribunal…the power to judicially review an administrative action if the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.’

1238. *Bato Star* (CC), para. 45.

1239. See, for example, *Bato Star* (CC), regarding reasonableness review, and the cases discussed at (iii)(a) below regarding rationality review under the principle of legality.
the ‘new South African administrative law’ in large part remains true to its age-old roots: it gives meaningful effect to the tenets of *audi alteram partem* (let the other side be heard) and *nemo iudex in sua causa* (the rule against bias). The PAJA gives effective expression to these tenets and develops them even further. Section 3(1) states that ‘[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair’. Section 3(2)(a) in turn sets out the minimum requirements of procedural fairness under the PAJA, which include:

(a) adequate notice of the nature and purpose of the proposed administrative action;

(b) a reasonable opportunity to make representations;

(c) a clear statement of the administrative action;

(d) adequate notice of any right of review or internal appeal … and

(e) adequate notice of the right to request reasons in terms of section 5.

661. Section 3(3) contains a trio of discretionary ingredients, which enhance the right to procedurally fair administrative action: (i) the right to legal representation ‘in serious or complex cases’;1240 (ii) the right to ‘present and dispute information and arguments’1241 and (iii) the right to ‘appear in person’.1242 Perhaps the most noteworthy innovation of the PAJA is section 4, which pertains to ‘[a]dministrative action affecting the public’. It gives expression to the constitutional commitment to a form of participatory democracy premised on the values of ‘accountability, responsiveness and openness’.1243 Under section 4, whenever administrative action ‘materially and adversely affects the rights of the public’, an administrator must give effect to the right to procedurally fair administrative action by electing one of the following five alternatives holding a public inquiry;1244 following a notice and comment procedure;1245 employing a hybrid of the

1240. PAJA, s. 3(3)(a).
1242. *Ibid.*, s. 3(3)(c).
1243. Constitution, s. 1(d) and see General Introduction §2.1.B and Part II, Chapter 1, §3.
1244. PAJA, s. 4(1)(a).
two.\textsuperscript{1246} following 'a procedure which is fair but different',\textsuperscript{1247} or, finally, by adopting 'another appropriate procedure'.\textsuperscript{1248} Importantly, the administrator’s choice in this regard, including a failure to decide, does not constitute administrative action under the Act, and thus cannot be subject to judicial review.\textsuperscript{1249}

662. The cumbersome definition of administrative action once again impacts on the applicability of the requirement of procedural fairness. The definition fails to refer to legitimate expectations which, somewhat incongruously, nonetheless trigger a duty to comply with the requirements of procedural fairness under section 3. The doctrine of legitimate expectation, an English law export, is an aspect of the \textit{audi} principle that gained prominence in South African law following the 1989 benchmark judgment in \textit{Traub}.\textsuperscript{1250} It has continued to be an invaluable source of administrative justice. It may be applied whenever a person enjoys a privilege or benefit, and stands to suffer an injustice if that privilege or benefit is denied in the absence of a hearing. Such an expectation may arise from reasonable reliance on either a promise made by a decision-maker or a regular practice which is reasonably expected to continue or from other equivalent administrative conduct, and it can have both a procedural and an interrelated substantive component.\textsuperscript{1251}

663. Fortunately, the PAJA’s failure to include legitimate expectations within the purview of administrative action as defined has been mitigated by the courts’ reading this omission down. In \textit{Walele}, the Constitutional Court, citing the critique of the definition of administrative action under the PAJA on this basis in \textit{Grey’s Marine},\textsuperscript{1252} held that, notwithstanding its lack of reference

\textsuperscript{1245}. \textit{Ibid.}, s. 4(1)(b).

\textsuperscript{1246}. \textit{Ibid.}, s. 4(1)(c).

\textsuperscript{1247}. \textit{Ibid.}, s. 4(1)(d).

\textsuperscript{1248}. \textit{Ibid.}, s. 4(1)(e).

\textsuperscript{1249}. \textit{Ibid.}, s. 1(ii) read with s. 6(1).

\textsuperscript{1250}. \textit{Administrator of Transvaal and Others v. Traub and Others} (4/88) [1989] ZASCA 90; [1989] 4 All SA 924 (AD).

\textsuperscript{1251}. For a useful exposition of the doctrine in South African law, see \textit{Walele v. City of Cape Town and Others} (CCT 64/07) [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC), paras 35-7.

\textsuperscript{1252}. \textit{Greys Marine} (CC), para. 23.
to administrative action that affects legitimate expectations, it should nonetheless be assumed that:

s 3 of PAJA confers the right to procedural fairness also on persons whose legitimate expectations are materially and adversely affected by an administrative decision…[for] applying the definition to s 3 would lead to an incongruity or absurdity not intended by Parliament. 1253

664. The doctrine thus continues to be an important aspect of natural justice or fairness under the Act as informed by the ‘well-established principles’ of the common law. 1254

B. Direct Reliance on Section 33 of the Constitution

665. In line with the principle of constitutional subsidiarity, South African courts have confirmed on numerous occasions that ‘[w]hen the legislature enacted the PAJA, it sought to codify extensively [the] grounds of review’. 1255 Applications for review of administrative action must thus ‘ordinarily be based on the PAJA’; 1256 which is the primary pathway to review. Direct review under section 33 is, as result, available only in limited instances. First, while the PAJA serves as the sword that enables citizens to hold the administration to account, section 33 ‘acts as a shield against laws, policies and practices that undermine administrative justice’. 1257 For example, in the Zondi case, 1258 the Constitutional Court tested the validity of the provisions of the Pound Ordinance 1259 directly against section 33. When legislation is challenged on the basis of a

1253. Walele (CC), para. 37.

1254. Premier, Province of Mpumalanga and Another v. Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal (CCT10/98) [1998] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151, para. 32.

1255. Walele (CC), para. 29.

1256. Ibid.


1258. Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others (CCT73/03) [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC).

1259. 32 of 1947.
conflict with the administrative justice right, the Court held, that right itself must be the
benchmark against which the conflict is assessed, not the PAJA. Second, section 33 plays a
direct role in informing the interpretation of the PAJA and keeping it within constitutional
bounds. Last, direct recourse may be had to section 33 to challenge the constitutionality of the
PAJA itself – a challenge which may eventuate given, for example, its severe curtailment of the
scope of administrative action. Despite the theoretical simplicity of this threefold function of
section 33 (when invoked directly), the case law reveals a frequently misplaced reliance on the
section. This appears to stem in large part from the complexity of the conceptual hurdles in the
PAJA (notably the definition of administrative action) which the courts (and litigants) tend to
bypass in favour of direct recourse to section 33, the common law or the flexible constitutional
principle of legality.

C. The Constitutional Principle of Legality

666. Review under the PAJA and section 33 is confined to those exercises of public power
that amount to administrative action. The narrow definition of administrative action in the PAJA
threatens to exclude from review many exercises of public power which had hitherto been
reviewable under the common law. Fortunately this outcome has been avoided by the
idiosyncratic but appropriate evolution of the system of administrative law through the
concomitant profusion of pathways to review. The most frequently used alternative pathway is
the principle of legality – an aspect of the founding constitutional value of the rule of law.

667. Despite its pre-eminence in the constitutional order, the principle of legality is a
venerable concept which originated in the royal prerogative. It is thus familiar to South African
administrative law. Its function today is essentially that of a constitutional safety net to enable the
review of the exercise of public power – typically in the form of executive action – that falls
outside the relatively narrow realm of ‘administrative action’ under the PAJA. This broader

1260. Ibid., para. 99.

1261. For example, in a case which concerned disciplinary decisions taken by a political party against the
applicants – the Court held that ‘it is unnecessary for me to express any opinion on whether the provisions
of s 3 of PAJA apply to the present case … In my view, the matter can be disposed of sufficiently by
having recourse to the provisions of s 33 of the Constitution’: Mafongosi v. United Democratic Movement
2002 (5) SA 567 (Tk), para. 12.

1262. Constitution, s. 1(c).
approach to the review of the exercise of public power, using the supple principle of legality and particularly its requirement of rationality, has burgeoned to accommodate the PAJA’s deficit and to encompass state excesses more generally. In this latter respect, it has proven to be an invaluable device to curb the corruption endemic in South Africa. Following a string of judgments handed down by the apex courts since 1999, the principle now covers all the quintessential administrative law review grounds to some extent,\(^{1263}\) and has thus been dubbed, ‘administrative law by another name’.\(^{1264}\) Some may see this as a negative development in undermining section 33 and the PAJA of the prominence in judicial review that they deserve and were intended to provide. It is also argued that resorting to the principle robs judicial review of predictable structure and places too much authority in judicial hands.\(^{1265}\)

668. Notwithstanding these concerns, the principle has been invoked to apply the precepts of lawfulness, rationality, procedural fairness (in a narrowly circumscribed case) and the duty to give reasons to exercises of power that do not fall within the definition of administrative action in the PAJA.

1. Legality and Rationality

669. At the heart of the principle of legality is the requirement of lawfulness, developed through three early cases of great importance. Thus, in *Fedsure*, which dealt with the power of a local authority to make budgetary resolutions, the Constitutional Court emphasized that ‘the exercise of public power is only legitimate where lawful’.\(^{1266}\) A year later, in the second case in the seminal trio, the *SARFU* judgment, the Constitutional Court subjected President Mandela’s decision to appoint a commission of inquiry under section 84(2)(f) of the Constitution, to review under the principle of legality on the basis of lawfulness. In particular, the Court held that ‘as is

---


1265. See Kohn, supra n. 1263, at 810.

1266. *Fedsure* (CC), para. 56.
implicit in the Constitution, the President must act in good faith and must not misconstrue [his] powers’. The last instalment in the trio dealt with the requirement of rationality – the purportedly most minimally invasive constitutional constraint and an aspect of the broader notion of reasonableness. In *Pharmaceutical Manufacturers*,1267 President Mandela, acting in good faith on the mistaken counsel of officials in the Department of Health, had brought an Act into force in the absence of the requisite subordinate legislation. The Constitutional Court found this decision to be irrational in the circumstances since the President, ‘through no fault of his own’, failed to exercise the public power in question ‘in an objectively rational manner’.1268 The Court laid the foundations for rationality review under the principle of legality by formulating the requirement as follows:

> 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.1269

670. This ‘minimum threshold requirement’1270 has in subsequent cases been stretched to necessitate a more searching analysis akin to full-blown proportionality, notwithstanding judicial insistence that it remains mere rationality and thus does not offend the separation of powers.1271 The recent Constitutional Court judgment of *Democratic Alliance v. President of the Republic of South Africa*1272 illustrates this development. This case brought to a close the controversial sequence of events surrounding the forced resignation of the NDPP and President Zuma’s appointment of Mr Simelane in his stead, despite the latter’s background which strongly pointed

1272. (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).
to his lack of fitness for the office. The Court, in reviewing this decision under the principle of legality, found it to be plainly irrational and thus set it aside.\textsuperscript{1273} In doing so, the Court developed the rationality requirement to cover rationality in process as well as outcome,\textsuperscript{1274} thereby indirectly affirming the unavoidable substantive ingredient to review under the Constitution:

\begin{quote}
   The decision of the President as Head of the National Executive can be successfully challenged [even if] only … a step in the process [as a whole] bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as whole and hence the ultimate decision with irrationality.\textsuperscript{1275}
\end{quote}

2. Procedural Fairness

\textit{Albutt v. Centre for the Study of Violence and Reconciliation}\textsuperscript{1276} established natural justice and in particular, its \textit{audi} requirement as part of the principle of legality, but only strictly in relation to the particular exercise of the public power in question. The case concerned an executive decision of President Mbeki who, acting under section 84(2)(j) of the Constitution, sought to introduce a special dispensation to enable political prisoners to apply for a presidential pardon. The dispensation was aimed at addressing the “unfinished business”\textsuperscript{1277} of the Truth and Reconciliation Commission and, despite its apparently laudable aims, none of the relevant documentation made reference to the victims of the crimes and in particular their right to be heard in the process.\textsuperscript{1278} The Constitutional Court thus had to decide whether the tenets of procedural fairness applied and, if so, whether they had been breached. Building on the foundations laid in

\begin{flushright}
\textsuperscript{1273} \textit{Ibid.}, paras 86-9 & 95. \hfill
\textsuperscript{1274} \textit{Ibid.}, para. 34. \hfill
\textsuperscript{1275} \textit{Ibid.}, para. 37 (emphasis added). \hfill
\textsuperscript{1276} (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC). \hfill
\textsuperscript{1277} \textit{Ibid.}, para. 4. \hfill
\textsuperscript{1278} \textit{Ibid.}, para. 7. \hfill
\end{flushright}
Masethla,\textsuperscript{1279} as well as the findings in Chonco,\textsuperscript{1280} the Court held this to be the case, although it strictly, and explicitly, limited \textit{audi} as an element of rationality to the unique circumstances in question:\textsuperscript{1281}

\[\text{T}e\text{ requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features ... and its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.}\textsuperscript{1282}

3. The Duty to Give Reasons

672. In \textit{Judicial Service Commission v. The Cape Bar Council},\textsuperscript{1283} the Supreme Court of Appeal had to answer the question whether the rationality requirement under the principle of legality entails a general duty to give reasons. This question arose pursuant to the JSC’s refusal to produce reasons for its decision not to recommend any of the qualified candidates for appointment to vacancies on the bench of the Western Cape High Court, despite the fact that the shortlisted candidates were strongly supported by the General Council of the Bar on the basis that they were ‘fit and proper’ as contemplated by section 174(1) of the Constitution.\textsuperscript{1284} In a strongly worded unanimous judgment, the Court answered this question in the affirmative and thereby

\textsuperscript{1279}. \textit{Masethla v. President of the Republic of South Africa and Another} (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1.

\textsuperscript{1280}. \textit{Minister for Justice and Constitutional Development v. Chonco and Others} (CCT 42/09) [2009] ZACC 25; 2010 (1) SACR 325 (CC); 2010 (2) BCLR 140 (CC); 2010 (4) SA 82 (CC), para. 30, where the Court held that the President’s power to confer pardons ‘entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay’.

\textsuperscript{1281}. \textit{Albutt} (CC), paras 75-6.

\textsuperscript{1282}. \textit{Ibid.}, para. 72.

\textsuperscript{1283}. (818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA).

\textsuperscript{1284}. \textit{Ibid.}, paras 37-9; this was accepted as common cause between the parties.
established the duty to give reasons in respect of non-administrative action. It held that ‘the JSC’s power to advise the President on the appointment of judges of the High Court is derived from s 174(6) of the Constitution [and] … is [thus] undoubtedly a public power’, which must be exercised rationally and in accordance with the constitutional values of transparency and accountability. As such, the Court held that, ‘as a matter of general principle’, the JSC is ‘obliged to give reasons’ in deciding ‘whether or not to recommend candidates for judicial appointment’.

D. Special Statutory Review

673. Although the PAJA is the generally applicable legislative standard, Parliament has seen fit to enact specific laws in an array of fields (such as competition, consumer protection, labour relations, and so on), which provide for analogous review regimes in relation to particular matters that might otherwise invoke the requirements of administrative justice under the PAJA. In such instances, special statutory review operates as a fourth pathway to review either alongside the PAJA or, as is ordinarily the case, to its exclusion. An obvious example of

1285. Ibid., para. 22.
1286. Ibid., para. 43.
1287. Ibid., para. 51.
1288. Ibid., para. 51.
1289. The Competition Act, 89 of 1998, provides for the establishment of a Competition Commission, to investigate and control restrictive practices, abuse of dominance, etc., as well as a Competition Tribunal and a Competition Appeal Court to hear appeals from the Tribunal and review its decisions.
1290. Consumer Protection Act, 68 of 2008, s. 85, establishes a National Consumer Commission as the specialized administrative tribunal tasked with, ensuring compliance and enforcement under the Act.
1291. The Labour Relations Act 66 of 1995 (‘LRA’) created: the Commission for Conciliation, Mediation and Arbitration (‘CCMA’) to resolve labour disputes and perform various administrative and adjudicative functions; the Labour Court and the Labour Appeal Court, and thereby established a comprehensive regulatory regime in the sphere of labour relations.
1292. See Sidumo (CC) (which pertains to the LRA, s. 145); Hoexter, Administrative Law 121 (the author notes that Sidumo-type review, which operates ‘alongside the PAJA … is not limited to the specific
the latter is the review of decisions of information officers under the Promotion of Access to Information Act, which are explicitly excluded from the realm of administrative action. A less obvious and more controversial example arises in the labour law context. Section 23 of the Constitution provides for rights in regard to ‘labour relations’, which are given detailed effect through the specialized legislative framework created by Labour Relations Act (LRA), which in turn incorporates administrative law principles such as the tenets of procedural fairness. The LRA and the PAJA have seemingly not been able to coexist comfortably in the public realm since ‘[t]he characterisation of powers exercised by a public entity in its employment relations has been hotly debated in South Africa’. This is because the courts have been distracted by the jurisdictional question that has repeatedly arisen in this context: can these pathways be pursued as alternatives to obtain relief, or must the specific legislation, based on the relevant constitutional right, regulate the matter to the exclusion of the PAJA? This question arises because employment decisions (such as dismissals) in the public sector seem to implicate not only labour rights but also those of administrative justice.

674. The Constitutional Court seemed to have resolved this debate in the case of Chirwa v. Transnet Ltd, which concerned a challenge framed on administrative law grounds to a dismissal in the public sector. The Court was at pains to distinguish the facts of the case from its predecessor, Fredericks v. MEC for Education and Training, Eastern Cape, notwithstanding the fact that the issue in question was clearly analogous. In Chirwa, the Court framed the ‘central question’ as follows: ‘whether Parliament conferred the jurisdiction to

grounds listed in the relevant statute … [but rather] full-scale administrative review is applied irrespective of the limits of the grounds themselves’.

1293. PAJA, s. 1(i)(hh).
1294. LRA.
1296. 2008 (4) SA 367.
1297. Ibid., para. 58.
1299. The Court in Fredericks held that ‘there is no general jurisdiction afforded to the Labour Court in employment matters, [thus] the jurisdiction of the High Court is not ousted by s. 157(1) simply because a dispute is one that falls within the overall sphere of labour relations.’ Ibid., para. 40.
determine the applicant’s case upon the Labour Court and the other mechanisms established by the LRA, in such a manner that it … exclude[s] the jurisdiction of the High Court, and thereby, in addition, excludes relief on administrative law grounds. The Court held this to be the case, despite the fact that Chirwa founded her cause of action solely in administrative law. Essentially, the Court reasoned that the LRA is the ‘pre-eminent legislation in labour matters’ and creates a ‘one-stop-shop’ for all labour-related disputes through an integrated system of specialized dispute resolution mechanisms, forums and remedies. Furthermore, by virtue of section 157(1) of the LRA where exclusive jurisdiction over a matter is conferred upon the Labour Court, the jurisdiction of the High Court is ousted. Chirwa was therefore not allowed to pursue her case on administrative law grounds, for to do so would undermine ‘the finely-tuned dispute resolution structures created by the LRA’, which would in turn lead to the creation of a ‘dual system of law’. This would have the undesirable knock-on effect of encouraging forum-shopping and giving public-sector employees an unfair advantage over those in the private sector.

675. This decision met with strongly expressed approval and criticism, which continued until the Constitutional Court put a gloss on Chirwa’s finding in the case of Gcaba v. Minister for Safety and Security. In essence, the Court affirmed that the system of special statutory review under the LRA applies to the exclusion of the PAJA, unless the conduct in question has a broad public impact and can thus be said to amount to administrative action. Put differently:

1300. Ibid., para. 20.
1301. Ibid., para. 50.
1302. Ibid., para. 59.
1303. Ibid., para. 65.
1304. Ibid.
1305. Ibid., para. 66.
1307. 2010 (1) SA 238 (CC).
Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.1308

676. The default position in South African law is thus that the existence of a system of special statutory review operates to the exclusion of review under the PAJA, save where the offending conduct clearly constitutes administrative action or where the labour-related conduct has a ‘public impact’ in which case the applicant can ground his or her cause of action in either regime.1309

E. The Common Law

677. In Pharmaceutical Manufacturers, the Constitutional Court pronounced that ‘[t]here are not two systems of law … [but] only one … [which] is shaped by the Constitution … and all law, including the common law, derives its force from the Constitution and is subject to constitutional control’.1310 Since the advent of democracy and the enactment of the comprehensive Bill of Rights, especially section 33, the common law is thus no longer the mainspring of administrative law. However, it certainly lives on and in fact continues to play a fairly extensive role in the system of administrative justice. This role is essentially fivefold.1311

678. The first role is that which was originally intended for it: an interpretive, informative and supplementary role to guide the interpretation of the PAJA and section 33. In the Manong case, the High Court highlighted the importance of this role, stating that many of the concepts used in the PAJA ‘require recourse to common law jurisprudence’ in order to give meaning to them.1312 The case of Premier of Mpumalanga1313 provides a useful example. The Constitutional Court

1308. Ibid., para. 64.
1309. Hoexter, supra, n. 1306, 120.
1310. Pharmaceutical (CC), para. 44.
1312. Manong and Associates v. Director-General: Department of Public Works 2005 (10) BCLR 1017 (C), paras 1026H-1027A.
1313. Premier of Mpumalanga (CC).
interpreted the concept of legitimate expectation as used in section 24 of the Interim Constitution by drawing on the rich common-law jurisprudence on the subject.

679. Second, particularly given the loopholes in section 6(2) of the PAJA, the common law plays a gap-filling role in respect of certain well-established grounds of review that have been omitted from the Act. Thus, for example, the grounds of vagueness, abdication and the no-fettering rule (also known as ‘rigidity’) – all well-known at common law – continue to find direct application through section 6(2)(i) (the ‘catch-all ground’), which also serves to enable further developments of the common law that can be fed into the PAJA.

680. Third, the common law mitigates the harshness of certain provisions of the PAJA such as the section 7 duties to institute judicial review proceedings within 180 days and to exhaust internal remedies which are prima facie less in step with constitutional values than the more nuanced common law principles. Fourth, the common law provides a contextual backdrop against which new grounds of review – such as reasonableness – that were not available at common law, can be interpreted and developed.1314

681. Finally, the common law continues to play an independent review role in cases not covered by the PAJA or by the Constitution more generally.1315 For example, in relation to the reviewability of private power (particularly in a disciplinary setting) exercised by private voluntary associations such as religious bodies and sporting clubs, the common law remains a pathway to judicial review to the extent that the PAJA’s formulation of administrative action excludes such conduct. In this way, the principles of natural justice which emerged in the string of Jockey-Club-type cases1316 continue to find direct application in similar circumstances through the common law.

1314. See e.g., Bato Star (CC), para. 44. The Court drew from the English common law in giving meaning to section 6(2)(h) of PAJA and referred to Lord Cooke’s insights on unreasonableness in the case of R v. Chief Constable of Sussex, Ex Parte International Trader’s Ferry Ltd [1999] 1 All ER 129 (HL) 157 to hold that, ‘[s]ection 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.’

1315. Hoexter, supra, n. 1306, 253.

1316. See e.g., Turner v. Jockey Club of South Africa 1974 (3) SA 633 (A); Cronje v. United Cricket Board of South Africa 2001 (4) SA 1361 (T).
III. Remedies

682. Section 8 of the PAJA provides specifically for ‘[r]emedies in proceedings for judicial review’. Section 8(1) empowers a court in review proceedings to ‘grant any order that is just and equitable’, and section 8(2) allows the same in respect of the review of a failure to take a decision under section 6(3). Section 8 then lists (non-exhaustively) different remedial orders that a review court may award, including the archetypal common law remedies: (i) setting aside\(^{1317}\) (pursuant to which the decision in question is declared invalid by the court and this finding operates retrospectively in accordance with the doctrine of objective invalidity\(^{1318}\)) and (ii) correcting\(^{1319}\) (which operates as the exception rather than the rule in accordance with the doctrine of separation of powers). Setting aside is a fundamental remedy that flows from the rule of law in terms of which unlawful administrative action must be declared invalid.\(^{1320}\) It may be the most straightforward remedy, but, in accordance with the dictates of justice and equity, it still has a discretionary component. As the Supreme Court of Appeal emphasized in Oudekraal:\(^{1321}\)

\[\text{A} \text{ court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy. It is this discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.}\]

\(^{1317}\) PAJA, s. 8(1)(c).

\(^{1318}\) Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1, para. 27 (where the Court explained that where a decision is set aside as being invalid, the invalidity operates with retrospective effect).

\(^{1319}\) PAJA, s. 8(1)(c)(ii)(aa), which allows the court to grant an order ‘in exceptional cases’ aimed at ‘substituting or varying the administrative action or correcting a defect result from the administrative action.’

\(^{1320}\) Bengwenyama Minerals (Pty) Ltd and Others v. Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC), para. 84.

\(^{1321}\) Oudekraal Estates (Pty) Ltd v. The City of Cape Town and Others (25/08) [2009] ZASCA 85; 2010 (1) SA 333 (SCA).

\(^{1322}\) Ibid., para. 36.
This discretionary ‘moderating tool’ was innovatively applied by the Supreme Court of Appeal in *Millennium Waste*, in which the Court held a consortium’s tender for medical waste removal services invalid on the basis that it was “materially influenced by an error of law” as contemplated in s 6(2)(d) of PAJA. Despite this finding, in exercising its discretionary power to grant just and equitable relief, the Court hesitated to set aside the impugned tender because to do so would have adverse consequences for the public purse. Furthermore, the termination of the tender contract would disrupt the delivery of the important public service of ensuring safe and expeditious removal of medical waste from public hospitals. The Court solved this dilemma by granting a remedy aimed at striking the right balance between the competing interests of the parties and the public at large: it directed the tender board to re-evaluate both the consortium’s and Millennium Waste’s tenders relative to one another by a particular date in order to determine ‘which tender ought properly to have been accepted’. If indeed it should have been the latter’s, then further orders of the Court would issue, including setting aside the original tender award.

Other remedies provided for in section 8 include directing the administrator to give reasons or to act (or desist from acting) in a particular manner; a declaration of the rights of

---

1323. See also the case of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. CEO of the South African Social Security Agency and Others* (678/12) [2013] ZASCA 29; [2013] 2 All SA 501 (SCA); 2013 (4) SA 557 (SCA), paras 99-107, in which the Supreme Court of Appeal noted obiter that the tender in question, which was for social grant services (albeit flawed by various ‘inconsequential irregularities’), could not be summarily set aside, for such a remedy would cause ‘immense disruption … with dire consequences to millions of the elderly, children and the poor.’


1330. PAJA, s. 8(1)(a)-(b).
the parties in respect of the matter to which the administrative action relates; \textsuperscript{1331} granting a temporary interdict or other temporary relief; \textsuperscript{1332} and making any order as to costs. \textsuperscript{1333} Section 8(1)(c)(ii)(\textit{bb}) provides for a creative remedy in the public law context: it enables a court in ‘exceptional circumstances’ to direct ‘the administrator or any other party to the proceedings to pay compensation’. This innovative addition to the PAJA’s remedial framework is bolstered by section 38 of the Constitution (‘Enforcement of Rights’), which empowers a competent court to grant ‘appropriate relief’ that may include an award of constitutional damages aimed at promoting respect for the right in question and deterring future violations. In \textit{Steenkamp NO v. Provincial Tender Board, Eastern Cape}, \textsuperscript{1334} the Constitutional Court highlighted that ‘[j]ust compensation today can be achieved where necessary by means of PAJA’, which renders it unnecessary to ‘stretch the common law’ principles in question. \textsuperscript{1335} The dissenting judgment stated that ‘the power to direct the payment of compensation conferred by s 8(1)(c)(ii)(\textit{bb}) will result in the development of administrative law principles governing the payment of compensation to vindicate the constitutional right to administrative justice’. \textsuperscript{1336}

IV. Concluding Remarks

685. This Chapter presents a high-level analysis of administrative law of the past and present: it seeks to summarize the salient aspects of the ‘new South African administrative law’ as informed by its ‘old’ common-law roots. As the analysis with its case law focus indicates, the ‘new’ system of administrative law is still dominated by judicial review which is now available via five ‘pathways’. However, both the Constitution and the PAJA display a willingness to countenance non-judicial review of administrative action and public power more generally and thus seem to promise a more integrated future for the South African system of administrative justice more broadly. Thus, for example, the Constitution in Chapter 9 establishes various

\begin{itemize}
\item \textsuperscript{1331} \textit{Ibid.}, s. 8(1)(d).
\item \textsuperscript{1332} \textit{Ibid.}, s. 8(1)(e).
\item \textsuperscript{1333} \textit{Ibid.}, s. 8(1)(f).
\item \textsuperscript{1334} 2007 (3) SA 121 (CC).
\item \textsuperscript{1335} \textit{Ibid.}, para. 101.
\item \textsuperscript{1336} \textit{Ibid.}, para. 97.
\end{itemize}
institutions to investigate and address instances of maladministration and corruption. It also guarantees the right of access to information in section 32, to which right detailed effect is given in the PAIA. These constitutional safeguards indicate the overriding constitutional commitment to a version of democracy that is representative, deliberative and participatory in nature, and give real meaning to the values of responsiveness, accountability and openness.

686. In relation to the exercise of administrative action, the constitutional commitment to participatory democracy is strengthened by the legislative measures included in the fairly creative section 4 of the PAJA, requiring a form of public comment procedure in administrative action which affects the public. Section 10 of the PAJA is also full of promise – it enables the Minister to make Regulations for example on the ‘establishment, duties and powers of an advisory council’ in the nature of an Administrative Justice Advisory Council, which again holds a potential contribution to the development of a fully-integrated system of administrative in South Africa.

687. In sum, South Africa’s administrative law is characterized by a state of fluid development, in which judicial pronouncements from the highest courts are eagerly anticipated, as lawyers and litigants seek a greater degree of certainty and adherence to predictable principle. This is hardly surprising, given the fact that administrative law has evolved rapidly in the last two decades. The form and processes of administrative law which served the constitutional regime under apartheid reflected legislative dominance, the rapid and untrammelled growth of executive discretion, and the relatively weak position of the judicial branch of government. Now that the Constitution contemplates a representative and participatory democracy, the formal authority of the courts has been elevated and the pattern of constitutional governance in South Africa has changed radically. The chief challenge of this new system is to secure fidelity to constitutional

1337. Constitution, ss 182-3 provide for the establishment of a ‘Public Protector’ charged with, inter alia, investigating ‘any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice’: s. 182(1)(a). Sections 188-9 establish the office of the Auditor-General, tasked with the function of auditing and reporting on the financial affairs of, inter alia, ‘all national and provincial state departments and administrations [and] municipalities’. See Part III, Chapter 6.

prescripts while widening the focus from judicial review of administrative action to the demands of administrative justice.