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CONSTITUTIONAL AUTHORITY TO ENFORCE THE RIGHTS OF ADMINISTRATIVE JUSTICE AND ACCESS TO INFORMATION

JONATHAN KLAAREN*

INTRODUCTION

This article proposes a workable analysis for judging the constitutionality of the two pieces of constitutionally-mandated Bill of Rights legislation in s 32(2) and s 33(3) of the South African Constitution. Such an analysis could provide the Constitutional Court with a method to perform its inevitable task of assessing the constitutionality of this legislation. However, as will become clear below, the Court is not the only constitutional institution which can contribute to such an assessment. The analysis provided here can thus also inform the drafting task to be undertaken by Parliament (and civil society) in the near future.

This article aims further to employ a structural and institutional mode of constitutional interpretation. The crucial feature of this institutional analysis is the recognition of constitutional interpretation as a process of co-ordinate construction.[1] In a forthcoming article, David Dyzenhaus interprets Etienne Mureinik's culture of justification theory as opting for a democratic model of constitutional law rather than a liberal one.[2] The difference between the two models is one of constitutional structure. The liberal model is marked by judicial supremacism (such as is entailed in Dworkin's adjudication-based model). The democratic one allows the legislature a say in determining the content of constitutional rights and principles. Accepting Dyzenhaus' interpretation and distinction for the

* BA (Harvard) MA (Cape Town) JD (Columbia), Senior Lecturer in Law, University of the Witwatersrand. Thanks are due to Ross Kriel and Anthony Stein as well as to the students of Administrative Law B class, 1997 and my colleagues in the Wits staff seminar programme for constructive comments.

1 See J Klaaren 'Structures of Government in the 1996 Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3 (relations between the institutions of central government provide an important approach to interpreting the Constitution). See also H Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 *SAJHR* 185.

2 D Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' 14 *SAJHR* (forthcoming) (at 36-37 of typescript). As Anthony Stein points out, both models are democratic models, differing in how democracy is best realised.

moment, the analysis employed here would fit within a democratic model.[3]

I argue that the term 'give effect to' in s 32(2) and s 33(3) grants extra enforcement authority to Parliament but does not mean that the rights contained in those sections are not capable of being applied by a court in an appropriate case. Further, the constitutionally-mandated legislation such as the Open Democracy Bill (ODB) and the Administrative Justice Act (AJA)[4] after passage by Parliament will be subject to judicial review for consistency with the Bill of Rights, although deference should be given to Parliament's choice of enforcement mechanisms and procedures.

The scope of the argument is restricted to the national legislation envisaged in terms of s 32[5] and s 33.[6] Those sections both employ the

3 It is worth querying whether the theory of a culture of justification as put forward by Mureinik and as interpreted by Dyzenhaus pays adequate attention to some of the institutional competence issues addressed in an institutional analysis such as that employed here. In brief, it is necessary to go beyond a general limitations clause to give adequate expression to a democratic model of constitutional law. While a culture of justification as Dyzenhaus sees it would give an appropriate role to the legislature in interpreting the general limitations clause, the doctrine of justifiability as developed around the South African general limitations clause thus far has implied a predominant if not overwhelming judicial role.

4 A brief background to the drafting efforts surrounding these two pieces of legislation may be helpful. The effort to give effect to s 32, the right of access to information, is more advanced than that relating to s 33, the right of just administrative action.

A Task Group on Open Democracy consisting of, inter alia, Etienne Mureinik and Mojanku Gumbi, the legal adviser in the Office of Executive Deputy President Thabo Mbeki, was convened in late 1994 on the right of access to information. The Task Group compiled a set of policy proposals and drafted an Open Democracy Bill (ODB) in 1995. The process then largely disappeared from public view for over a year to the dismay of many within civil society. In 1997, Cabinet approved an 18 June 1997 draft of the ODB. According to a memorandum accompanying the Bill, this version was intended to give full effect to s 32(1)(a) and partial effect to s 32(1)(b) of the Constitution. In October, the ODB was published for comment in terms of s 154(2) of the Constitution with comments due to the Deputy President's office by the end of November. The Bill appears likely to be tabled in Parliament in the beginning of 1998. It is not clear what process if any exists for drafting legislation to give full effect to the remainder of s 32(1)(b).

As for drafting efforts to give effect to s 33, throughout 1997 the Ministry of Justice was in the process of instituting joint responsibility for initially drafting of an Administrative Justice Act between the South African Law Commission and the Centre for Applied Legal Studies. This process has been stalled since April 1997 but may begin again soon. More complete and recent information on both of these efforts is available at http://www.law.wits.ac.za.

5 Section 32, entitled 'Access to information' provides:

'(1) Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

6 Section 33, entitled 'Just administrative action' provides:

'(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 subsecs (1) and (2); and

(c) promote an efficient administration.'

term 'give effect to' and explicitly provide for a legislative as well as a judicial role in enforcing the fundamental right at issue.[7] In making this argument, one must consider the transitional provisions of Schedule 6[8] in addition to the wording of the Bill of Rights. For simplicity's sake, I will use s 33 to stand in for s 32 throughout this article, but the argument applies equally to both sections.

In this article, I aim to answer four questions and structure my argument around them. First, what is the Parliamentary authority to legislate in this area? Second, what is the enforceability of the substantive rights both before and after the passage of the envisaged legislation? Third, how can one determine that the envisaged legislation has been passed? Fourth, how can the constitutionality of the envisaged legislation be assessed? The article deals with these four questions in sequence.

I THE PARLIAMENTARY AUTHORITY TO LEGISLATE

What is the Parliamentary authority to legislate? Section 44 vests the national legislative authority in Parliament.[9] It is without doubt that this authority includes the power to make provision for access to information and for general procedures to ensure administrative justice. Thus, if ss 32 and 33 had not been included in the Bill of Rights, Parliament could still have enacted such legislation on its own.

The inclusion of ss 32 and 33 does not reduce this legislative authority of Parliament in any way, except in the usual constitutional sense that

7 Other provisions do not textually highlight such a tension. For instance, s 9(4) provides 'National legislation must be enacted to prevent or prohibit unfair discrimination'. However, there is no serious question over the propriety of the judicial role in enforcing the equality provisions and no suggestion that the constitutional command for legislation might preclude such a role. Likewise the numerous other legislation-forcing provisions in the Constitution do not raise such issues. See also s 8(3)(a) providing for a judicial role in giving effect to constitutional rights by developing the common law.

8 Item 23, entitled 'Bill of Rights' in Schedule 6 which is entitled 'Transitional Arrangements', provides: (1) National legislation envisaged in ss 9(4), 32(2) and 33(3) of the final Constitution must be enacted within three years of the date on which the final Constitution took effect. (2) Until the legislation envisaged in ss 32(2) and 33(3) of the final Constitution is enacted – (a) s 32(1) must be regarded to read as follows: '(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights'; and (b) s 33(1) and (2) must be regarded to read as follows: 'Every person has the right to – (a) lawful administrative action where any of their rights or interests is affected or threatened; (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened'. (3) Sections 32(2) and 33(3) of the final Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the final Constitution took effect.

9 The complication of the division of legislative competence between national and provincial governments is one that I wish to acknowledge but leave aside at the moment. There can be no serious suggestion that the enactment of such legislation is not within the competence of the national government, whatever the competence of provincial government may be.

any legislation as enacted may not infringe the rights contained in the Bill of Rights. Indeed, far from reducing Parliamentary authority, it is my argument that the inclusion of ss 32 and 33 expands the constitutional authority given Parliament to legislate in these areas. However, this additional authority is both limited and nuanced. It is limited as a textual matter to the two rights at issue which are the only places where the term 'national legislation to give effect to' is used. It is also nuanced as ss 32(2) and 33(3) only give Parliament additional enforcement authority, as discussed below.

In any event, Parliament does not simply enjoy the authority to legislate in this area. The legislation is not merely permitted by the Constitution; it is mandated. Parliament is under a constitutionally mandated duty to enact legislation on access to information and on administrative justice. The duty does not extend to the exercise of Parliament's general legislative authority but does cover the additional enforcement authority it is granted in terms of the 'give effect to' clause of s 33.

Where does this duty come from? It stems initially from the command contained in s 33(3) that '[n]ational legislation must be enacted to give effect to these rights'. Item 23(1) of Schedule 6 then further elaborates upon this duty and specifically provides that the envisaged legislation must be enacted within three years of the date on which the final Constitution took effect.[10] Counting three years from 4 February 1997 would mean that the envisaged legislation must be enacted by 4 February 2000.

What is the remedy for a failure to fulfil this duty? The specific provision of a remedy in item 23(3) of Schedule 6 controls over other available remedies.[11] In terms of this sub-item, ss 32(2) and 33(3) 'lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect'.[12] One should note that the availability of this remedy does not extend beyond the initial period of three years. Subsection 33(3) itself contains no provision for lapsing. The subsection only lapses if item 23(3) of Schedule 6 is triggered by a Parliamentary failure to pass envisaged legislation within three years. If the envisaged legislation is passed, subsec 33(3) and its duty to pass subsequent legislation (i.e. amending legislation) remain. This remedy obviously raises the question of how one determines whether the envisaged legislation has been enacted, a question considered in Part III below.

10 It is possible to interpret item 23(1) as providing a separate textual source for the duty to enact national legislation rather than as an interpretation or elaboration of the duty contained in the primary text in s 33(3)(c). It would seem that nothing turns on this possible interpretation, since, as argued below, even the availability of s 167(4)(e) remedial jurisdiction would be trumped by the specific remedy provided by item 23(3) of Schedule 6.

11 The likely alternative remedy would be an order of the Constitutional Court in the exercise of its exclusive jurisdiction in terms of s 167(4)(e) to decide whether Parliament has failed to fulfil a constitutional obligation.

12 But see R Kriel 'Codifying Pre-Adoption Procedures for Subordinate Legislation in South Africa' 13 *SAJHR* 354 at 359 (there is no sanction for a failure to legislate).

To this point, I have argued that there is textual support for a broad legislative authority (even a duty to legislate) in the areas of access to information and of administrative justice that goes beyond the Parliamentary general legislative power. The rationale behind this broad grant of authority to Parliament is usually given in the negative. The alternative to parliamentary legislation is the horror of the over-judicialisation of administrative justice. This argument has been stated most pertinently by Michael Asimow.[13] In brief, Asimow argues that, especially when viewed in comparison with American jurisprudence, the rights of administrative justice granted in either the interim or the final Constitutions are very broad. There is a need for an Administrative Justice Act as a mechanism to prune back such rights to avoid over-proceduralism and allow for effective administration.

The general thrust of Asimow's policy argument is consistent with the argument made here. However, one can make the argument more precise and expand it from the level of administrative to that of constitutional law.[14] It makes good sense for the Constitutional Assembly to have granted Parliament additional legislative power in this area. As a legislative body, Parliament is institutionally competent to address questions regarding the enforcement of administrative justice and access to information rights. In particular, it is more competent to engage in this function of institutional design. The Constitutional Court itself has recognized this point.[15]

This institutional competence argument can be made both generally and with specific reference to the area at issue. Generally, one can argue in terms of the separation of powers doctrine that that doctrine ought to be concerned at least as much with identifying an appropriate division of labour among co-operating branches as it should be with providing a check on an overpowering government through division.[16] In such a division of labour, the judiciary has an interpretive expertise and the

13 M Asimow 'Administrative Law Under South Africa's Final Constitution: The Need for an Administrative Justice Act' (1997) 113 *SALJ* 613. In particular, such a Parliamentary pruning will conserve the Court's legitimacy and resources in the event of a coming legitimacy crisis, which Asimow sees as likely.

14 See D Dyzenhaus 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 (1) *SAJHR* (forthcoming) (demonstrating how for Mureinik administrative law was constitutional law writ small and constitutional law administrative law writ large).

15 *Transvaal Agricultural Union v The Minister of Land Affairs and the Commission on Restitution of Land Rights* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 44 ('Parliament has full plenary power to enact legislation within the competences vested in it by the Constitution.'). See also J Klaaren op cit note 1 at 21-22 (arguing that the Constitutional Court used a structural approach in approving Parliament's choice of institutional form for the constitutionally-mandated Commission on Restitution of Land Rights).

16 J Korn *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* (1996); but see J Mashaw *Greed, Chaos, and Governance: Using Public Choice To Improve Public Law* (1997) at 191-195 (arguing that the legislative veto is more important than many commentators have thought).

legislature has an institutional design expertise. Specifically, it is evident that these two areas (access to information and administrative justice) are areas where Parliament has a particular expertise. For instance, the welcome constitutional status of the right of access to information should not overshadow the reality that most other jurisdictions have provided for such a right by statute.[17] The policy arguments for the primary role of the legislature in designing the scope and enforcement mechanisms of such a right are compelling.[18] While some might disagree, to recognize the special role of Parliament in the constitutional construction of these rights does not place them any lower in a hierarchy of rights.[19] It merely acknowledges the constitutional allocation of institutional authority in the protection, promotion, and fulfilment of these rights.

II The New Constitution Rights are Applicable Although they are Suspended Before the Enactment of the Envisaged Legislation

What is the enforceability of the substantive rights to administrative justice and to access to information both before and after the passage of the envisaged legislation? It is clear that until the legislation envisaged in s 33(3) is passed or three years elapses, the rights are suspended. 'Suspended' means that it is not possible for a litigant to found a cause of action on the right contained in the final Constitution. This much can be directly supported with Constitutional Court authority. In *Certification of the Constitution, 1996*[20] the Court rejected the notion that the suspension of the access to information right made the final Constitution non-certifiable.[21] The Court justified the suspension of the right in the following transitional terms:[22]

17 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) at paras 83 and 85.

18 See generally L Johannessen, J Klaaren, and J White 'A Motivation for Legislation on Access to Information' (1995) 112 *SALJ* 45.

19 Hugh Corder has argued that to suspend a right or to allow for its suspension is to place it lower on a hierarchy of rights. H Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 28 at 34.

20 Supra note 17.

21 Learned counsel made the argument that this suspension would be inconsistent with Constitutional Principle II which demanded 'due consideration' of the existing rights and Constitutional Principle IX stating that '[p]rovision shall be made for freedom of information'. Obviously, the non-certification argument was stronger for the access to information right but it existed also for the administrative justice right.

22 At para 82. Kriel interprets the reference to freedom of information legislation to indicate that the Court has indicated that Parliament has an interpretive power 'to define the nature and limits of the right', op cit note 12 at 359 n 24. It seems to me that too much should not be made of this passing reference and that Kriel is correct to note that the Court may have simply been describing the experience with information legislation in other jurisdictions. In any case, as Kriel notes, the crucial issue is not whether Parliament has some interpretive authority over the rights at issue but rather whether the 'give effect to' clauses give Parliament authority to the

'The transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.'

The Court was clear when it referred to the specific provision that mandates this suspension. The specific provision the Court was referring to as the 'transitional measure' is not s 32(2) (the equivalent of s 33(3)) but is rather item 23 of Schedule 6, precisely item 23(2)(a) of Schedule 6.

It is important to be as clear as the Court has been about where the suspension of the direct execution of the s 32 and s 33 rights comes from. It does not come from the term 'must give effect to' in s 33(3). Many have not been as precise as the Court and have suggested exactly this link between s 33(3) and the suspension of rights. Some who have suggested this have been academics treating the point in passing.[23] But others – particularly among the organs of civil society – have suggested the possibility of a permanent constitutional lock-out.[24] In this scenario, once the AJA and the Open Democracy Act (ODA) are operational, the sole legal recourse for a litigant wishing to assert her or his rights to access to

exclusion of the judiciary. In a personal communication with the author, Kriel has confirmed that his view is that the clauses transfer interpretive authority over both the substantive rights and the enforcement procedures and mechanisms from the Court to Parliament. The institutional analysis of this article argues that interpretive authority remains with the judiciary but that in respect of the enforcement procedures and mechanisms the courts ought to accord Parliament greater than usual deference.

23 The interpretation that the 'give effect to' clauses lead to the effective suspension of the substantive rights is apparently adopted by D Davis and G Marcus 'Information' in D Davis, H Cheadle and F Haysom (eds) *Fundamental Rights in the Constitution* (1997) 154. They write (emphasis added):

'The question must arise whether s 32(1) gives rise to an independent right to information other than that which may be contained in the national legislation referred to in s 32(2). In the narrow sense – that national legislation must comply with the ambit of the right in s 32(1) – it clearly does. But can an applicant choose to exercise her or his right to information by ignoring the statutory framework and relying directly on s 32(1)? There is no absolute answer to this question, but it is unlikely that the courts would sanction the use of this constitutional claim as a shortcut. *The wording employed in s 32(3) [sic] is 'give effect to' the rights guaranteed under s 32(1) and (2) [sic]. Hence the statute establishes the machinery for the concrete exercise of the constitutional right. Once it passes constitutional muster, by passing the test of subsecs (1) and (2) [sic], it becomes the sole legal avenue for such an application.*'

Davis and Marcus thus appear to depend on item 23 to suspend the operation of s 32(1) before the passage of the envisaged legislation but on the 'give effect to' clause to suspend its operation after the legislation envisaged passes an initial constitutional muster. For Hugh Corder's position see op cit note 19 at 33-34.

24 For a well-argued example see R Paschke 'Open Democracy Bill – Some Constitutional Issues' (unpublished memorandum presented at a workshop on the draft Open Democracy Bill presented by Idasa's Political Information and Monitoring Service, the Human Rights Committee, the Human Rights Commission (Cape Town Office), and the Black Sash, 28 August 1997). A substantial portion of the civil society lobbying and research resources around the Open Democracy Bill has been directed precisely at this question of constitutional lock-out.

information or to administrative justice would be in terms of the legislation passed in terms of s 32(2) or s 33(3). The applicability of the substantive rights contained in s 32(1) and s 33(1) and (2) would be permanently suspended by the operation of the AJA and the ODA. This permanent suspension argument depends on interpreting the term 'give effect to' as suspending the direct effect of the s 33 rights.

Could these others be correct? Could the 'give effect to' clauses operate in addition to item 23(2) to suspend the rights granted in ss 33(1) and 33(2)? While such an interpretation is unlikely given the certification judgment, it must be investigated. However, there are a number of difficulties – at least three – with this interpretation. First and most importantly, the Court has made it clear through the certification judgments that it will brook little interference with its constitutional review function. Attempts made by the Constitutional Assembly to insulate various statutes such as the Truth and Reconciliation Act and the Labour Relations Act from judicial review failed. Any suggestion that the rights granted in any portion of the Bill of Rights are inaccessible to the Court is not likely to meet with a warm reception.

Second, at least for s 33, the proponents of such a theory must acknowledge the redundancy of terminology on this interpretation since the same term 'give effect to' is used in the first phrase of s 33(3) as well as in s 33(3)(b). It would seem pointless to suspend the direct operation of already suspended rights.[25]

Finally, the holders of this lock-out theory seem wedded to a substantive test for determining how item 23(1) could be satisfied. Failing such satisfaction, s 33(3) lapses. As argued below in Part III, such a test is not persuasive. Without an adequate theory of determining that satisfaction, the argument for the permanent suspension interpretation is weakened.

Given these difficulties, I conclude that the suspension of the s 33(1) and 33(2) rights is solely a consequence of the operation of item 23(2) of the transitional arrangements and not of s 33(3). Whatever else it does mean, the term 'give effect to' does not mean that the substantive rights are not able to be applied directly by a court in an appropriate case. The result is that the answer to the enforceability of the constitutional rights before the envisaged legislation is enacted is of limited utility since the rights are suspended.[26] Thus, the conflation described above is also of

25 An enforcement authority reading allows the same meaning to be given to the same words in s 33(3) and s 33(3)(b). Just as the Administrative Justice Act will define a remedial scheme for giving effect to the administrative justice rights, it will place a duty on state officials to devise their own remedial schemes within their own areas of jurisdiction.

26 Limited utility is not no utility. Even if suspended, one can imagine an indirect application of the rights provided in ss 33(1) and 33(2). As M Asimow (op cite note 13) has suggested, one could give these rights some meaning as background provisions to use in the interpretation of item 23(2) of Schedule 6. Such indirect application could lead to practical results. For instance, such an interpretation could confirm the narrowing of the reach of the requirement to give written reasons by the shift from interests in the interim constitution (and maintained in item 23(2)) to rights adversely affected in the final Constitution's s 33(2). Further, s 33(1) could confirm that 'justifiable' is truly a synonym for 'reasonable'.

relatively little practical importance in the period before the envisaged legislation. But, as we have seen, it becomes much more important after such legislation is enacted. It is to determining when that period begins that I now turn.

III When is the Transitional Provision Satisfied?

How can one determine when the envisaged legislation has been passed? An adequate and workable analysis of these 'give effect to' clauses needs to propose and argue for a coherent method of judging the satisfaction of item 23(1). Is the legislation enacted by Parliament the legislation envisaged by item 23 of Schedule 6? This is a crucial question since if item 23(1) is not satisfied, by the operation of item 23(3) read with item 23(1), s 33(3) lapses.[27] By contrast, if the transitional command is satisfied, the legislative duty I have argued inheres in s 33(3) and s 32(2) to give effect to the rights of administrative justice and access to information will continue beyond 4 February 2000.

A procedural rather than a substantive test should govern the assessment of the satisfaction of item 23. Textually, the term 'legislation envisaged' in item 23 refers to the initial legislation enacted by Parliament with the intention of giving full effect to the provisions of s 32(2) and s 33(3). In brief, absent any bad faith,[28] if Parliament announces (for instance in the explanatory memorandum accompanying the legislation) its intention that by passing legislation it is satisfying the duty to enact the envisaged legislation, then such initial legislation should be taken to be the envisaged legislation of item 23(3). Item 23(1) should then be taken to be satisfied and item 23(3) avoided. The low threshold test proposed for item 23 is thus purported passage by Parliament.

A procedural test for the satisfaction of item 23 is appropriate for three reasons. The first is that, as argued in Part II, one should not textually conflate the transitional command and the 'give effect to' clause of s 33(3). One should not propose a test for item 23 that links the test to the standards of s 33 as the substantive tests must do.

A second reason is that the procedural test encourages each constitutional actor to play their appropriate institutional roles. By adopting a procedural and easily satisfied test, Parliament is encouraged to legislate in this important area. The judiciary does not engage in the business of ex ante institutional design (a task which it would perform poorly) but rather assesses the ongoing constitutionality of the legislation in specific fact situations (a task for which it is well-suited).

27 Other than an initial use of 'national legislation', the sub-items 23(1), 23(2) and 23(3) of Schedule 6 use the same terminology when referring to the constitutionally mandated legislation: 'legislation envisaged'.

28 The bad faith exception provides at least a residual substantive test. Parliament must not be enacting legislation in the form of the constitutional mandate in order to avoid its substance. See Schreiner J's dissent in *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

Third, the procedural test fares better than its alternative, a substantive test. Such a substantive test for judging the adequacy of the legislation envisaged comes in three versions. On one version, the legislation enacted by Parliament should be measured against the substance of the rights contained in s 32(1) and in s 33(1) and (2). The question should be asked whether the rights there are fully given effect to. Some senior academics propose an important variant on this substantive test when they propose that the evaluative criteria to be used in such a substantive test are not the rights contained in s 32(1) or s 33(1) and (2) but rather the listed principles in s 32(2) and s 33(3) themselves.[29] A third version would join the two sets of criteria together into a global substantive test: the legislation would need to satisfy the listed principles in s 33(3) as well as the substantive rights in ss 33(1) and 33(2) in order to satisfy item 23.

The method of judging the satisfaction of item 23 by linking it to substantive criteria found in s 33 is not an interpretation precluded by the constitutional text. But it gains one nothing over the test for assessing the ongoing constitutionality of this legislation proposed above, and it presents at least two problems.

One problem is that of coverage. The premise of the substantive tests is that the Court can and should assess whether the enacted legislation is the complete envisaged legislation and can do so by means of the s 33 criteria. Yet, it will never be possible to say that the legislation completely gives effect to the rights, as discussed further below in Part IV.

A second problem is procedural. The implication of a substantive analysis is that an exhaustive or at least comprehensive examination of the enacted legislation will be undertaken, somewhat along the lines of the certification exercise.[30] On this interpretation, if the Court found that the Open Democracy Act as passed by Parliament failed to give full effect to the substantive criteria against which it should be measured, item 23 would not be satisfied and the Court would send the statute back to Parliament for re-drafting. If, for instance, an exhaustion of remedies requirement placed by Parliament on applications for judicial review were not up to constitutional standards, then item 23 would not be satisfied and the Court would send the statute back to Parliament for amendment.

However, there are some significant deviations from the certification model that argue strongly against the substantive test interpretation of item 23. For one thing, there are no special procedures provided for this legislation, implying that no certification-like exercise was intended by

29 In 'Administrative Justice' op cit note 23 at 163, Davis and Marcus write:
'Subsec [33](3) sets out the requirements for the prescribed legislation. It ensures that the legislation introduced by Parliament must be tested against subsec (3), thereby raising the possibility of constitutional challenge.'

30 The obvious analogy is to the Constitutional Principles, the Constitutional Assembly, and the Constitutional Court's task in relation to the text of the final constitution: *Certification of the Constitution, 1996* supra at paras 1-30.

the Constitutional Assembly.[31] Secondly, unlike the Constitutional Principles, the evaluative criteria proposed for this exercise do not fall away post-'certification'; they continue in force, undermining the claim that the enacted legislation would embody the principles contained in those criteria.[32] With these factors taken into account, the procedural test interpretation of item 23 fares best. Purported passage by Parliament will satisfy the provisions of Schedule 6. But the assessment of the constitutionality of the resulting legislation remains to be explored.

IV Assessing the Constitutionality of the Legislation Envisaged

How can the constitutionality of the legislation envisaged be assessed? To begin with, we should realise that the issue of whether the Court should conduct a certification-type exercise relates more properly to item 23 than to s 33. Indeed, once item 23 is satisfied, there is no exceptional character to the assessment of the constitutionality of the legislation envisaged. Once the chaff of a 'mini-certification' procedure is blown away, there are three issues worth worrying about in terms of assessing the constitutionality of the legislation: the content of the substantive criteria by which to judge the legislation, its degree of exclusivity, and the meaning of those criteria, in particular the definition of efficiency in s 33(3)(c).

First, one should ask against what criteria should the legislation be measured? As with the variants of the substantive tests considered for the satisfaction of item 23, there are essentially three variants here: that the

31 While the Constitutional Court would doubtless 'make a plan', there are conceptual and practical difficulties in conducting an abstract review for constitutionality of an entire statute. How can the Constitutional Court anticipate the myriad of factual situations and legal arguments that may be posed? Yet without such an examination, how can one say that the envisaged legislation has been enacted if one employs a substantive test? The Court does not have the resources to investigate even every constitutional question posed to it (*JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) at paras 15-17). Moreover, the argument available to the Court during the certification exercise – that the Legislature may flesh out the details later (*Certification of the Constitution, 1996* supra at para 30) – would be unavailable. These problems of abstract review are lessened but not eliminated by the use of the provisions of s 33(3) itself as a set of limited criteria against which to determine the substantive adequacy of such envisaged legislation.

32 Indeed, on one variant of the substantive test, it is if and only if the 'certification' is ultimately successful (that item 23(1) is satisfied) that the 'constitutional principles' (the listed principles in s 33(3)) continue to have legal force, since the non-lapsing of s 33(3) is dependent upon the satisfaction of item 23 within a period of three years. This differs markedly from the logic of the certification exercise with respect to the final Constitution and the Constitutional Principles. If the envisaged legislation were to successfully embody the substantive criteria of s 33 (as would be the case upon the satisfaction of item 23), one would expect that the criteria of s 33(3) would fall away – as the Constitutional Principles themselves have – rather than remain, having served their function and serving no further purpose.

One could imagine a further purpose for these criteria. They could serve as criteria against which further amendments to the national legislation could be tested. This is a workable interpretation. However, the Constitutional Assembly's choice for the ongoing operation of s 33(3) implies that the constitutional review of the enacted legislation should not be a once-off certification-like procedure but should rather be a continual series of testing and amendments and re-testing, as suggested in the main text.

legislation be measured only against the substantive rights, only against the principles identified in s 32(2) and s 33(3), or against both provisions.[33] As detailed below, I argue for a limited application of the third option, with the principles identified in s 32(2) and s 33(3) applying to the legislation only insofar as enforcement procedures and mechanisms are concerned. By virtue of its generality, an analysis in the mode of the limitations clause would seem to opt for an application of the listed principles to all portions of the legislation and on such an analysis it may be difficult to argue that the promotion of efficiency or the reasonable costs provision should not also apply to the legislation's elaboration of the substantive rights granted in s 33(1) and (2).[34]

Second, one must ask whether the legislation may serve as the sole legal avenue to vindicate the rights at issue. The answer to this should be a qualified yes. Where there is legislative coverage of a constitutional right, the legislation can provide for exhaustion of remedies before going to court. However, there are two qualifications: constitutionality and coverage. First, the system of exhaustion chosen by the legislature will itself need to be constitutional, although as an exercise of extra enforcement authority Parliament's choice should be given deference.[35] Second, where

33 Davis and Marcus have proposed a substantive test, seeing the issue as a species of limitations analysis. In relation to the access to information right, it is unclear whether Davis and Marcus are proposing that the substantive test includes only the substantive right or also the listed principles of the 'give effect to' clause as criteria for assessing the constitutionality of the proposed legislation. Their discussion apparently confuses the right of access to information with that of administrative justice and refers to subsec 32(3) which does not exist. It is thus impossible to ascertain whether their reference to subsecs 32(1) and 32(2) is intended to refer to those two subsecs (for example, the whole of s 32) or is based on a similar confusion with s 33 and is thus meant to refer only to subsec 32(1). See D Davis and G Marcus 'Information' in D Davis, H Cheadle, and F Haysom (eds) op cit note 23 at 153-54. In their discussion of the administrative justice right, they propose that the legislation be tested against the listed principles in s 33(3)(c). It seems likely that a fair reading of their understanding can be summarised as follows: (1) both the access to information and the administrative justice legislation will need to be tested in an initial constitutional muster exercise, employing both the substantive rights provisions and the listed principles in the 'give effect to' clauses as evaluative criteria and (2) once having passed such muster such legislation will serve as the sole avenue of recourse but can be continually tested for constitutionality. It is not clear on Davis and Marcus' account whether the ongoing testing of constitutionality would be done against both the substantive rights provisions and the listed principles in the 'give effect to' clauses or solely against the substantive rights provisions, although the inclusion of the listed principles would seem to be most consistent.

34 One might be able to sneak an institutional analysis in the back door here by arguing that the limitations analysis should apply in one strength to the enforcement provisions of the envisaged legislation and to the substantive right definition portions in another.

35 The extent to which the legislation is the sole legal avenue will stem from Parliament's institutional choices (for example, whether and to what extent to require interested persons to satisfy administrative exhaustion requirements before seeking judicial review) rather than from the 'give effect to' clause directly. The character of the legislation as a primary legal avenue may be constitutionally permitted but it is not mandated and must be agreed to by both the legislature and the judiciary. The primary textual location for the determination of this issue in the field of administrative justice will be s 33(3)(a)'s provision that such legislation 'must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal'. It is submitted that at least some exhaustion requirements are consistent with this provision.

there are no enforcement mechanisms provided by legislation for a right, judicial remedies should be available pending such provision. Both of these qualifications are explored further below.

The third question concerns the meaning and impact of the term 'efficiency', regardless of whether it is applied to all portions of the legislation or only to the enforcement procedures. One could interpret the command in s 33(3)(c) that the enacted legislation 'promote an efficient administration' in one of two ways. On a 'levelling-down' interpretation, the term 'efficient administration' may mean a cost-efficient administration. On a 'levelling-up' interpretation, the term 'efficient administration' may mean one that is accountable and participatory and thus effective, rational and responsive.

Due to the ambiguity of the Court's limitations jurisprudence, either of these interpretations of efficiency is arguably consistent with the standard of 'reasonable and justifiable' in the general limitations clause.[36] While the picture is hardly clear, the levelling-down interpretation may already be the standard emerging from the Constitutional Court's general limitations analysis.[37] This is certainly the interpretation feared by Corder[38] and appears to be the dominant reading of the text.[39] On the other hand, there is an argument that the second interpretation would be more consistent with the values informing the general limitations analysis. As with the general limitations clause, it is likewise unclear which interpretation of efficiency in the context of s 33(3)(c) will be favoured by the Constitutional Court.

In contrast to the dominant limitations-based analysis, I propose an enforcement authority reading of s 33(3) in order to provide a workable analysis of the ongoing task of judging the constitutionality of the legislation giving effect to the rights in s 33. I suggest that special deference be granted to Parliament where, but also only where, its special enforcement power is being exercised. Where that power is not at work, only the ordinary deference due a co-ordinate structure of government is appropriate.

36 These two interpretive possibilities are also noted in Davis and Marcus, 'Administrative Justice' op cit note 23 at 163.

37 See *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC) at para 44 (limited resources of the state are a factor in terms of the limitations analysis of IC s 33(2)) (per Mahomed DP) and *S v Ntuli* 1996 (1) SA 1207 (CC) at para 23 (administrative difficulties a consideration that counts in terms of the limitations analysis of s 33(1)) (per Didcott J). See also Asimow op cit note 13 at 627, n 72 (courts and Parliament should consider administrative efficiency in applying s 33(1) of the interim Constitution).

38 Corder notes that constitutional negotiators of the present majority party, the African National Congress, desired the dilution or elimination of the rights of administrative justice (op cit note 19 at 32-33).

39 Corder's view is apparently that the term 'an efficient administration' suggests a standard lower than that of the general limitations clause (ibid at 32). Davis and Marcus seem to feel that both subsec 33(3)(c)'s term 'promote an efficient administration' and the general limitations clause should be interpreted to be consistent with the guarantees of the administrative justice and access to information rights (Davis and Marcus op cit note 23 at 163).

In terms of this enforcement authority analysis, one can then divide the provisions of the enacted legislation into two categories. For the definition and detailing of substantive rights, no special deference is due to the legislation. For the procedures and structures to enforce these rights, some extra deference is due to Parliament. Such deference might mean, for instance, that the court should be more hesitant to find a violation of the scheme of separation of powers in this area than in legislation in other areas.[40]

Some practical examples of the operation of this enforcement authority test may help to illustrate it. The AJA may well prescribe rules for rule-making, rules for adjudication, and the scope of judicial and tribunal review in enforcing administrative justice rights. In these matters, to the extent that Parliament is exercising its enforcement authority, I would argue that deference is due. The issue of the constitutionality of the enforcement structures set up by the ODA should be treated likewise. For instance, the details of the scheme of exhaustion of remedies and the scope of review by courts should be considered with an eye to the institutional competence of Parliament to make such choices. However, this deference is not a blanket one. Deference will not be due to the definition of the right of procedural fairness, in the specification of the right to a written statement of reasons, or in the elaboration of the right to reasonable administrative action. Nor will it be due to the legislative statement of the right of access to information, for instance the choice as to whether that right also includes the right to open meetings.

An institutional analysis such as proposed in Part I would justify the enforcement authority test proposed here. This analysis looks at the sources of Parliamentary authority. Where Parliament is purporting to detail or make more specific the substantive guarantees of s 32(1) or of s 33(1) and (2), Parliament is only exercising its usual legislative power. However, where it is providing the enforcement mechanisms and implementation measures related to those rights, Parliament exercises not only

40 The real difficulties of applying this distinction should not be glossed over. How is one to know whether enforcement authority has been exercised or whether a substantive right is at issue? An intermediate category of legislative provisions presents particularly hard questions. In the definition, elaboration, and detailing of the reach of rights (as opposed to their content), is some extra deference is due Parliament? As an example, the ODA limits the ambit of the right of access to information by setting fees for certain categories of users. In judging the constitutionality of these reach provisions, one could argue that the Court should recognize that Parliament is acting in part under its s 32(2) enforcement authority and should thus grant deference to Parliament's enforcement choices. However, the counter-argument that it is often impossible to separate questions of the reach of the right from its content seems strong here.

Still, these difficulties are not without parallels and should not be exaggerated. See *S v Vermaas* 1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC) para 16 (per Didcott J) (recognition of the financial and administrative steps to be taken to 'give effect to' the right of legal representation in s 25(3)(e) of the interim Constitution); G de Búrca 'Giving Effect to European Community Directives' (1992) 55 *Modern LR* 215 (discussing enforcement procedures in national legal systems); and L Tribe, 'Congressional Power to Enforce the Fourteenth and Fifteenth Amendments' in *American Constitutional Law* (2 ed) (1988) 334-350.

its usual legislative power but also enjoys an extra enforcement power in terms of s 33(3). Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretive authority over the rights, Parliament receives no extra deference there.

The remedies associated with the operation of this test are straightforward and are the usual ones. To the extent that the Court finds the sections of the legislation envisaged unconstitutional, it will declare the legislation invalid. Nonetheless, since the item 23 test will have been satisfied, s 33(3) will remain and Parliament will still be under the s 33(3) duty to monitor and to enact supplementary legislation to give effect to the administrative justice and access to information rights. In practice, what is likely to develop is an institutional give-and-take between the Court and the legislature not unlike the conversation between these two bodies in respect of other constitutional issues. In particular, the kind of constitutional review forecast here is an ongoing one and does not take the form of a certification-like procedure. Litigants are always free to come back with future challenges to the extent they come up with new arguments or present new factual situations.

There remains the possibility that Parliament will in fact under-enforce the constitutional rights at issue in its enacted legislation. It is most likely that the enacted legislation will never be complete, even after amendments. For instance, take Kriel's argument that the constitution mandates some minimal pre-adoption procedures for subordinate legislation.[41] Parliament may well not exercise its own enforcement authority to mandate such procedures when it enacts its initial legislation. However, such a situation of under-enforcement is not exceptional.[42] In such instances, the Court should be more willing to enforce or protect such a right directly.[43] In so doing, the Court will be giving effect to the right.[44] To take an example, suppose, as is presently the case, that there is no statutory publication requirement for internal yet binding departmental law. Properly interpreted, such a publication requirement exists as a matter of s 32 and s 33. I would argue that there is a continuing duty on Parliament to give effect to such a right. In the meantime, courts should be quick to enforce such a right directly. In this way, a

41 Op cit note 12.

42 Sager 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 *Harvard LR* 122 (even where enforcement of a constitutional requirement by one constitutional actor is precluded, that requirement retains significance for other actors).

43 An imperfect analogy exists with EC law. See De Búrca op cit note 40 (procedures to ensure the execution of Community law are left to national legal systems). For an extension of the principle to an instance of judicial protection where a national system underenforces a binding norm, see R Caranta, 'Governmental Liability After Francovitch' (1993) 52 *Cambridge LJ* 272 (interpreting *Francovitch* in light of the principle of effective protection of individuals).

44 There is an analogy here to the judiciary's power to transform the common law in order to give effect to fundamental rights in terms of s 8(3) of the final Constitution.

back-and-forth relationship between judicial decision and parliamentary legislation will be created.

Conclusion

The dominant view within the legal profession of the administrative justice and the access to information clauses locates all the action within the limitations clause. The view is that there is an incentive[45] for Parliament to legislate in this area within three years since any such legislation will be tested under a limitations standard more favourable to the government.[46] This article has questioned the primary location of this analysis within the limitations clause since to do so is to fail to adopt a sufficiently democratic model of constitutional law.[47] For a decisive break with the constitutional culture of the past, it is necessary to take into account the institutional and structural relations between the various organs of state in order to provide a workable and democratic model of constitutional law. The 'give effect to' clauses contained in the administrative justice and access to information rights are two good places to employ an institutional analysis and to allow both Parliament and the judiciary to play a role in constitutional interpretation.

45 It is by no means clear that there is a coherent scheme of incentive to draw from these interlinked provisions. To the extent that such a scheme is coherent, it is possible to state the institutional analysis proposed in this article in terms of an incentive argument: Parliament has an incentive to exercise its power to give effect to the administrative justice rights in terms of s 33(3) since to do so preserves that power because s 33(3) will thus not lapse.

46 See, for example, Corder op cit note 19 at 32 ('The general result of the inclusion of s 33(3) is to sanction a restrictive standard for the drafting of an Administrative Justice Act (which will inevitably amount to a limitation of the generous grant of these rights in s 33).')

47 While Dyzenhaus bases his characterization of the South African model of constitutional law as democratic at least partly on the existence of a general limitations clause, it is possible that such a view does not go far enough in pursuit of constitutional democracy. The focus on a limitations clause itself inherently remains within an adjudication or liberal model of constitutional law. Dyzenhaus op cit note 2 at 35 (of typescript).