TOWARDS A SUBSTANTIVE CONCEPTION OF THE SCOPE OF ADMINISTRATIVE-LAW REVIEW IN SOUTH AFRICA

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DECLARATION

I, the undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree.

I acknowledge that portions of this thesis have been published in an article under my name entitled 'Substantive Reasoning and the Concept of Administrative Action' (2019) 136 *South African Law Journal* 84-111.

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Johannesburg, 14 April 2020

ABSTRACT

Administrative law in South Africa is grounded in a constitutionally entrenched right to just administrative action and its progeny, the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The scope of administrative-law review in this country is thus synonymous with the meaning of 'administrative action' – the threshold concept referred to in s 33 of the Constitution and defined in some detail in PAJA.

In giving meaning to the concept of 'administrative action', courts should adopt a substantive, non-formalistic approach having regard not only to the language of PAJA but also to the values of the Constitution, including the separation of powers, accountability and good governance. The crucial question under a substantive approach is whether or not it is *appropriate* to subject the relevant decision to the rigours of administrative-law review. But this question is too open-ended. It is thus useful to assess whether substantive reasoning can be accommodated through the application of a relatively precise test for a particular definitional element of 'administrative action' or, if this is not possible, to adopt an open-ended test that allows for the consideration of various substantive factors.

The tests that our courts apply for distinguishing between public and private power and for delineating administrative action from executive action are open-ended. This is, in itself, unproblematic, provided that all relevant considerations are properly taken into account in the classification exercise. In applying and refining these tests over time, our courts should interrogate whether certain factors might amount to either necessary or sufficient conditions, should scrutinise the weight to be attached to the various factors, and should rigorously consider applicable precedent. Our courts' track record on this score has been inconsistent, resulting in jurisprudence that, in some respects, lacks coherence.

The approach of our courts to distinguishing administrative action from legislative or judicial action is more precise. As a proper reading of the case law suggests, a substantive approach to this distinction should emphasise not only the function that is at issue but also the nature of the functionary.

This thesis is dedicated to Claire, Aidan, Emma and Julia.

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CHAPTER ONE

ADMINISTRATIVE-LAW REVIEW IN CONSTITUTIONAL CONTEXT: THE NEED FOR A SUBSTANTIVE APPROACH

1 INTRODUCTION

It is commonplace for courts to scrutinise and overturn administrative decisions. While no one seems to doubt their authority to do so, in a number of jurisdictions the source of the courts' authority to review administrative action is uncertain. Much ink has, for example, been spilled in the United Kingdom on whether the constitutional basis for judicial review is located in the *ultra vires* doctrine or in the courts' power to enforce the common law.[1] The position in South Africa since the advent of constitutional democracy is fundamentally different. Administrative law in this country is firmly grounded in a constitutionally-entrenched right to just administrative action[2] – a right which not only underpins our courts' authority to engage in administrative-law review but also provides the impetus for the progressive development of administrative law.

Given this constitutional backdrop, it is vital that administrative law be developed in a manner that both recognises administrative justice as a fundamental right and pays due regard to the core constitutional values which animate this area of law. The Constitutional Court in *Pharmaceutical Manufacturers* described the importance of this branch of law and its connection to fundamental constitutional principles in the following terms:[3]

> '[A]dministrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them.'

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[1] See eg HWR Wade & CF Forsyth *Administrative Law* 11 ed (2014) 27-31 (who describe the *ultra vires* doctrine as 'the central principle of administrative law', while recognising the artificiality of this doctrine), Mark Elliott *Beatson, Matthews, & Elliott's Administrative Law: Text and Materials* 4 ed (2011) 11-22, Mark Elliott *The Constitutional Foundations of Judicial Review* (2001), D Oliver 'Is the *ultra vires* rule the basis for judicial review?' [1987] *Public Law* 543, Paul Craig '*Ultra vires* and the foundations of judicial review' [1998] *Cambridge Law Journal* 63.

[2] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 22.

[3] *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45.

The principle of administrative justice is entrenched as a fundamental right in s 33 of the Constitution. Section 33(1) proclaims that everyone has the right to 'administrative action' that is lawful, reasonable and procedurally fair, while s 33(2) goes on to provide for the right to written reasons where 'administrative action' adversely affects rights. The application of these fundamental rights – and, in their wake, the scope of administrative-law review – thus depends upon the characterisation of the relevant conduct as 'administrative action'.

While s 33 offers no definition of its own, the legislation enacted to give effect to that section, the Promotion of Administrative Justice Act 3 of 2000 (PAJA), defines the scope of administrative action. Nevertheless, it does so through a convoluted and, in some respects, restrictive definition that has attracted much attention in our case law. As the Supreme Court of Appeal recently remarked, '[c]ourts are so often called upon to decide whether or not a decision of a public official is administrative in nature that one is left to ponder to what extent PAJA has in fact muddied the waters rather than provided certainty on the issue'.[4] The result is a body of case law on the scope of 'administrative action' that is not wholly coherent and which, at times, strains the language of PAJA's definition.

In seeking to place administrative-law review on a more coherent footing, its contours need to be carefully drawn having regard not only to the language of s 33 and PAJA but also to the broader constitutional context within which administrative law now operates, including the principles of separation of powers, accountability and good governance. To use O'Regan J's phrase in *Sidumo*, the boundaries of administrative action must be 'based on a substantive understanding of s 33'.[5]

In this first chapter, I explain what I mean by substantive reasoning and why it is appropriate – and constitutionally mandated – to adopt a substantive approach to administrative law and, in particular, to the scope of administrative-law review. But first I briefly explain the general structure of administrative-law review.

2 THE GENERAL STRUCTURE OF ADMINISTRATIVE-LAW REVIEW

The constitutional source of administrative-law review is s 33 of the Constitution, which proclaims that:

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[4] *Minister of Education, Western Cape v Beauvallon Secondary School* 2015 (2) SA 154 (SCA) para 11. See also *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 21 ('The cumbersome definition of [administrative action] in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications'). See also Cora Hoexter ''Administrative action' in the courts' 2006 *Acta Juridica* 303 at 306-7.

[5] *Sidumo v Rustenburg Platinum Mines Limited* 2008 (2) SA 24 (CC) para 137.

'(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.'

PAJA, as the constitutionally mandated legislation that gives effect to s 33, is the vehicle through which administrative-law reviews must now generally be brought.[6] Its definition of 'administrative action', when read with the accompanying definition of 'decision', contains seven elements: (a) a decision of an administrative nature; (b) by an organ of state or another person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) does not fall within the listed exclusions.[7]

If conduct amounts to administrative action, it is susceptible to the detailed grounds of review set out in s 6(2) of PAJA. These grounds largely codify the common law grounds of review[8] and include administrative law staples such as bias or a reasonable suspicion of bias, failure to comply with a mandatory and material procedure or condition, procedural unfairness, error of law, ulterior purpose and a failure to take into account relevant considerations. The grounds of review also include unreasonableness or, in PAJA's language, the exercise of a power or the performance of a function that 'is so unreasonable that no reasonable person could have so exercised the power or performed the function'.[9]

The primary impact of conduct amounting to 'administrative action' is, simply put, that PAJA's grounds of review may be invoked to challenge that conduct and in certain, more

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[6] See chapter 2, para 3.
[7] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 33.
[8] *Bato Star* supra note 2 para 25.
[9] Section 6(2)(h) of PAJA.

limited, circumstances PAJA's requirements of procedural fairness and written reasons apply.[10]

3 TERMINOLOGY: THE MEANING OF ADMINISTRATIVE-LAW REVIEW

In this thesis, I use the term 'administrative-law review' to refer to judicial review which flows from s 33 of the Constitution and its progeny, PAJA. Viewed in this way, the scope of administrative-law review is synonymous with the concept of 'administrative action'.

Administrative-law review thus conceived is distinct from legality review – a form of constitutional review that is derived from the founding value of the rule of law.[11] The principle of legality applies broadly to every exercise of public power or performance of a public function. It acts as a 'safety net' providing for some measure of control over public power that does not constitute 'administrative action'.[12] Although, as explained in chapter two, the contours of legality review have not finally been drawn, it includes several grounds of review traditionally found in administrative law such as *ultra vires*, bad faith, irrationality, ulterior or improper motive, and mistake of fact. Nevertheless, it bears emphasis that legality review is more limited than administrative-law review. Perhaps most importantly, it does not include reasonableness review and only entails procedural fairness in some, as yet uncircumscribed though apparently exceptional, circumstances.[13]

It is also necessary to distinguish administrative-law review from two other forms of review that bear a close resemblance. The first is so-called private administrative law, which provides for the review of certain forms of private decision-making such as disciplinary and other coercive decisions of domestic tribunals set up by private voluntary associations. Our courts review these decisions on the basis of 'fundamental principles of justice',[14] which include compliance with the organisation's founding documents, the rules of natural justice, honesty, impartiality, rationality and (at least in some instances) reasonableness.[15] Reviews of

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[10] See ss 3(1), 4(1) and 5(1) of PAJA.
[11] Section 1(c) of the Constitution.
[12] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 124. See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 97.
[13] For a more detailed discussion of the ambit of legality review and its distinction from administrative-law review, see chapter 2, paras 3.1.1 and 3.1.2.
[14] *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) 646.
[15] See eg *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) 654, *Theron v Ring van Wellington van die NG Sendingskerk in Suid-Afrika* 1976 (2) SA 1 (A) at 20-3, *National Horseracing Authority of Southern Africa v Naidoo* 2010 (3) SA 182 (N) para 11 (per Levinsohn DJP), *Hendricks v Overstrand Municipality* (2015) 36 ILJ 163 (LAC) paras 22-4.

this nature are 'private-law reviews'[16] and, according to the case law, the basis for the court's review power in these instances arises from either an express or implied term of the contract that governs the relationship between the organisation and its members.[17]

The final category of review to be distinguished from administrative-law review as I use the term, is special statutory reviews. These reviews arise where a particular statute empowers a court or an administrative functionary or tribunal to review certain decisions either on traditional administrative-law grounds or on the grounds identified in the statute itself.[18] Statutory review is, in certain instances, a wider power than administrative-law review but is, in other instances, narrower – 'the precise extent of the power always depends on the particular statutory provision concerned'.[19]

4 NATURE AND SCOPE OF THESIS

4.1 Title and aim of thesis

This thesis is entitled 'Towards a substantive conception of the scope of administrative-law review in South Africa'. My aim is critically to assess the current state of our law on the meaning of 'administrative action' and to examine how it might be developed in a manner which best promotes substantive principle.

4.2 Research questions

The questions that I explore are as follows:

- the extent to which our courts' approach to selected aspects of the concept of administrative action in the constitutional era has been coherent, principled and constitutionally grounded;
- the manner in which those aspects of the concept of administrative action should be applied so as to promote a substantive approach to administrative-law review; and
- whether there is scope to refine the tests that our courts have to date adopted for giving meaning to the selected aspects of 'administrative action'.

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[16] *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) para 20, footnote 10.
[17] *Turner* supra note 14 at 646.
[18] Special statutory review thus constitutes another potential 'pathway' to review by a tribunal or court. Hoexter *Administrative Law* op cit note 12 at 113-14.
[19] Ibid at 113.

I do not examine each and every element of the concept of administrative action. I rather focus on those elements that most squarely raise issues of underlying principle, namely, the exercise of a public power or performance of a public function and the distinction between administrative action and legislative, judicial or executive action.

4.3 Methodology

This thesis takes the form of a desktop study. The focus is on relevant South African case law, particularly in the constitutional era, as well as the text of relevant provisions of the Constitution and PAJA. I also make extensive use of academic writing in the field of administrative and constitutional law.

5 A SUBSTANTIVE APPROACH IN CONSTITUTIONAL CONTEXT

Prior to examining what a substantive approach to adjudication requires in South Africa's constitutional context, I explain what I mean by substantive reasoning.

5.1 Substantive reasoning as distinct from formalism

A substantive approach to adjudication involves deciding matters according to their substance and the principles or values underpinning them rather than on the basis of their superficial form.

In their influential work comparing the American and English legal systems, Atiyah and Summers distinguish between substantive and formal reasoning. They describe a substantive reason as 'a moral, economic, political, institutional, or other social consideration' justifying a decision, and a formal reason as 'a legally authoritative reason on which judges and others are empowered or required to base a decision or action'.[20] They go on to explain that a formal reason 'usually excludes from consideration, overrides, or at least reduces the weight of, any countervailing substantive reason arising at the point of decision or action'.[21] Formal reasons thus operate as 'a screen'[22] or a 'barrier' which insulates 'the decision-making process from the reasons of substance not incorporated in the rule'.[23] A substantive reason might be described as a policy reason for a legal rule or one which weighs in favour of an outcome in a

[20] PS Atiyah & RS Summers *Form and Substance in Anglo-American Law* (1987) 1-2.
[21] Ibid at 2. The authors, at 16, describe this typical attribute of formal reasons as 'mandatory formality'.
[22] Alfred Cockrell 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1.
[23] Atiyah & Summers op cit note 20 at 2. See also Frederick Schauer 'Formalism' 97 *Yale LJ* 509 (1987-8) at 510, 535-7.

particular case, while a formal reason is an authoritative rule which provides the basis for the outcome (eg a rule that has been established by legislation or binding precedent).

It will be readily apparent that legal systems rely extensively on both formal and substantive reasons – that both type of reasons 'are inherent in any viable conception of law'.[24] Formal reasons, for example, come to the fore when courts apply the rule of precedent (*stare decisis*) or give effect to clear legislative rules – as they do every day. These mechanisms of adjudication rely on the primacy of formal reasons and the fact that they displace substantive reasoning. There is nothing objectionable about this. Formal reasons promote certainty and predictability and enhance the quality of judicial decision-making.[25] They recognise that legal rules constrain and do not leave adjudicators with unbridled substantive choice.

While a formal reason might displace substantive reasons in a particular case, substantive reasoning is crucial. It is, in particular, important that formal legal rules are based on substantive reasoning and that academics criticise, and courts revisit, judgments that fall short or become outdated.[26] Moreover, hard cases (where formal legal rules do not present a clear answer) should be decided on the basis of substantive considerations.

Substantive reasoning may broadly be contrasted with formalism – a concept which bears a range of meanings.[27] Given this range of meanings and, relatedly, the temptation to use the pejorative term 'formalist' as 'the adjective to describe any judicial decision, style of legal

[24] Atiyah & Summers op cit note 20 at 3.
[25] Ibid at 23-7. Atiyah & Summers explain that reliance by legal systems upon formal reasons is justified with reference to second-level substantive reasoning, eg 'rule of law' values, efficiency, certainty, predictability, finality, and minimising the risk of error. See also Schauer op cit note 23 at 539-42.
[26] Atiyah & Summers op cit note 20, at 2 and 5, note that '[a] formal reason usually incorporates or reflects substantive reasoning' and that substantive reasons 'inform the content of the very standards of criticism and evaluation brought to bear on existing law'.
[27] Schauer op cit note 23 at footnote 1 identifies, with reference to various authors, several uses of the term 'formalism': a refusal to acknowledge the necessity of choice in penumbral areas of law, a refusal to recognise the instrumental functions of law, excessive reliance on the written language of rules, constrained and comparatively apolitical decision-making, the view that rule application is mechanical and this mechanical application is just, a refusal to acknowledge the practical consequences of judicial decisions, artificial narrowing of the range of interpretive choices, or reliance on deductive logical reasoning. After pointing out that there is 'scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic', Schauer notes that at the heart of formalism is 'the concept of decision-making according to *rule*' and equates it with 'rulism' or 'ruleness' (at 510, 535, 537-8). Having adopted this relatively unobjectionable approach to formalism, Schauer goes on persuasively to argue that formalism should be rescued from 'conceptual banishment' and formal systems should not necessarily be condemned (at 544, 547-8). Schauer's use of the term 'formalism' is thus similar to the concept of formal reasons discussed above (ibid at 536-8). For another collection of the various meanings of formalism, see Anton Fagan 'A straw man, three red herrings, and a closet rule worshipper – A rejoinder to Davis JP' (2012) 129 *SALJ* 788 at 792-4.

thinking, or legal theory with which the user of the term disagrees'[28] or, worse, the charge that formalism is 'the straw man castigated by generations of bad legal philosophers',[29] it is necessary to explain what I mean by this term.

In the sense in which I use the term, formalism is more than mere reliance on formal reasons. It is an approach that 'prefers formal, technical or mechanistic reasons over substantive ones, and which is preoccupied with the outward appearance of legal problems at the expense of their substance'.[30] One manifestation of formalism in this sense is the application of rules of law or dicta of previous court decisions without having proper regard to whether the rule or dictum is appropriate to the substance and context of the case that is before the court, including the prevailing constitutional context.[31] This conception of formalism is comparable to what Atiyah and Summers refer to as 'formalistic reasoning'; a pejorative concept which they describe as 'a failure to take substantive considerations into account *when they ought to be taken into account*',[32] and which they helpfully illustrate with reference to various examples:[33]

> '[A]uthoritative formality degenerates into formalistic reasoning when, for example, a judge ignores gaps in the law, or refuses to acknowledge the nascent and fragmentary character of a piece of pre-existing valid law, and so over-extends that law as if it truly generated formal reasons governing the issue at hand. Another example occurs when a judge relies on a distinguishable precedent, or fails to see that he is confronted with a genuine case of first impression where it would be more appropriate to invoke substantive reasoning relevant to the merits of the dispute…. Interpretive formality degenerates into formalistic reasoning when, for instance, a judge adopts a

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[28] Schauer op cit note 23 at 510.
[29] Joseph Raz 'Formalism and the rule of law' in Robert P George (ed) *Natural Law Theory* (1992) 336. See also Fagan 'A straw man' op cit note 27 at 972.
[30] Cora Hoexter *The Transformation of South African Administrative Law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000* PhD thesis, University of the Witwatersrand (2009) 150. See also Cora Hoexter 'Contracts in administrative law: Life after formalism?' (2004) 121 *SALJ* 595 at 597, describing formalism as 'a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense' (quoted with approval by Froneman J in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* 2013 (4) SA 262 (CC) ('*KZN JLC*') para 80).
[31] Seven M Quevedo 'Formalist and instrumentalist legal reasoning and legal theory' 73 *Cal L Rev* 119 (1985) at 121-2 points out that legal realists criticised what they described as formalist courts for being mechanistic and unduly reliant on existing legal rules and logical deduction, with the result that 'legal rules became rigidly unchangeable, and law became inherently conservative'. He also explains that formalism is a style of judicial reasoning that uses concepts that are 'too old' and thus 'tends to overextend the life of legal concepts' (at 147-9, 155).
[32] Op cit note 20 at 29, emphasis in the original.
[33] Ibid at 28-9.

> conceptualistic interpretation of statutory language – an interpretation that ignores the elemental fact that the language has been incorporated into a statute to achieve a purpose plain on the face of the statute.'

Formalism is often said to obscure the real reasons for a judicial decision – by denying the choice that is open to the decision-maker and presenting the outcome as inexorable[34] – or to allow courts to avoid taking responsibility for the substantive choices that they make in adjudicating matters. It allows courts not to recognise their law-making function.

In contrast, substantive reasoning enhances transparent, principled and coherent judicial decision-making. A substantive approach – while sometimes giving rise to complexity and nuance – means that one is best able to explain, in a defensible way, why the result in one case is different to the result in another (perhaps in what might generally be considered to be different conceptual areas of law).[35] This is because such an approach encourages the fundamental principles or values of a legal system to permeate the various areas of law that make up that system.

Substantive reasoning, by its nature, involves considerations of morality and political principle and thus reduces the scope for distinguishing between legal reasoning and moral or political reasoning.[36] It inevitably requires courts, at times, to engage in moral or political reasoning. As Cockrell puts it, 'while the formal vision of law drives a notional wedge between legal reasoning on the one hand and moral and political reasoning on the other, the substantive vision of law is considerably less committed to maintaining the autonomy of legal discourse in this way'.[37]

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[34] Schauer op cit note 23 at 511-19.

[35] Hoexter 'Contracts in administrative law' op cit note 30 at 597 explains that, in contrast, '[i]n cases displaying formalistic reasoning the merits seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson. There is often reliance on what one might call *code*: legalistic shorthand that lawyers may understand, however dimly, but that others will find impenetrable and altogether mystifying' (quoted with approval in *KZN JLC* supra note 30 para 80).

[36] JC Froneman 'Legal reasoning and legal culture: our "vision" of law' (2005) 16 *Stell LR* 3 at 4: 'a substantive vision of law … acknowledges the inevitability of the interplay of law and politics'.

[37] Op cit note 22 at 13.

5.2 Substantive reasoning as compelled by the Constitution

5.2.1 *The value-laden nature of the Constitution, its radiating effect and substantive reasoning*

Even a casual reader of the Constitution will be struck by the fact that it is, to quote Sachs J, 'intensely value-laden'.[38] The preamble proclaims that the Constitution was adopted as the supreme law so as to 'establish a society based on democratic values, social justice and fundamental human rights.' The opening section goes on to list a number of founding 'values', including human dignity, equality, the advancement of human rights and freedoms and the rule of law,[39] while the first clause of the Bill of Rights states that the Bill affirms 'the democratic values of human dignity, equality and freedom'.[40] Reading further, a range of other values and principles may be identified, including those pertaining to public administration such as professional ethics, efficiency, development, impartiality, fairness, public participation, accountability, and transparency.[41]

These values are not simply included in the text as rhetorical flourishes but are central to constitutional analysis. They, importantly, inform the constitutional limitations enquiry[42] as well as the interpretive enterprise. Given that this thesis addresses an interpretive question (the meaning of 'administrative action' under both s 33 of the Constitution and PAJA), I focus on the role that values play in the interpretive context.

In relation to the Bill of Rights, the role of interpretive values is expressly provided for: s 39(1)(a) of the Constitution states that an interpretation of the Bill of Rights 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. But the role of values in constitutional interpretation is not confined to the Bill of Rights. The Constitution as a whole should be interpreted in light of its underlying values. The Constitutional Court has, for example, remarked that the founding values in s 1 of the Constitution 'inform the interpretation of the Constitution and other law'.[43] In a case

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[38] *S v Mhlungu* 1995 (3) SA 867 (CC) para 111. Dikgang Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 at 315 refers to the 'value-drenched notion of constitutional adjudication'.
[39] Section 1 of the Constitution.
[40] Section 7(1) of the Constitution.
[41] Section 195(1) of the Constitution.
[42] Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.
[43] *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) para 19.

involving the interpretation of provisions lying outside the Bill of Rights, Ngcobo J described the proper approach to constitutional interpretation in the following terms:[44]

> 'Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of the other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must thus be construed purposively in light of the Constitution as a whole.
>
> The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution.'

The interpretive role of constitutional values extends beyond the interpretation of the Constitution itself; it also operates at the level of statutory interpretation. In particular, s 39(2) of the Constitution requires courts, tribunals and fora to interpret legislation (and to develop the common law and customary law) in a manner that promotes the 'spirit, purport and objects' of the Bill of Rights. Courts must, to use Langa DP's phrase in *Hyundai*,[45] interpret legislation 'through the prism of the Bill of Rights'. As with constitutional interpretation, the Constitutional Court has, to some extent, extended this principle beyond the Bill of Rights, requiring courts to interpret legislation in a manner that gives effect to the Constitution's founding values[46] and to prefer an interpretation of legislation that better reflects the 'structural provisions of the Constitution as a whole'.[47] Courts are accordingly required to undertake their everyday interpretive tasks in the glow of the Constitution, allowing its rights and values, where appropriate, to mould the law.

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[44] *Matatiele Municipality v President of the Republic of South Africa (No 2)* 2007 (6) SA 477 (CC) paras 36-7.
[45] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 21.
[46] Ibid para 22; *UDM* supra note 43 para 19.
[47] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) para 47. See also *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28.

The value-laden nature of the Constitution, coupled with the injunctions in s 39(1)(a) and (2) and the extension of the interpretive principles to provisions that lie outside the Bill of Rights, means that courts are compelled to adopt a substantive approach in giving meaning both to the constitutional text and to legislation. It is not open to our courts to adopt a rigidly literal, formalistic approach to constitutional or statutory interpretation as this would leave little or no room for constitutional values to operate – even leaving aside the fact that it would in any event, at times, be necessary to resort to substantive reasoning in order to give meaning to the Constitution's open-textured and value-laden text. The Constitution, in Justice Froneman's words, 'appears to exclude the possibility that anything other than a substantive vision of the law still remains open to us'.[48]

The path towards substantive reasoning is not necessarily smooth. A number of authors have pointed out that formalism, as a style of legal reasoning, was prevalent in the pre-constitutional era and continues to influence legal argument and adjudication as part of our legal heritage and culture.[49] Reflecting on the first year of the Constitutional Court's jurisprudence, Cockrell perceptively noted that an important aspect of the transition to a 'substantive vision of law' as mandated by the Constitution 'is that judges who were accustomed to working with 'formal reasons' are now required to engage with 'substantive reasons' in the form of moral and political values'.[50]

It might be argued that substantive reasoning, and its reliance upon moral or political values, involves courts deciding cases based on *extra-legal* considerations. Atiyah and Summers, for example, note that one of the ways in which interpretation may be substantive is where the decision-maker relies on substantive reasons drawn from 'non-legal sources' such as 'where a judge draws on his own background political morality, or on the political morality which he attributes to the legislature or the public'.[51] Whatever the merits of this argument in other contexts, and without disputing that judges at times draw on their own

[48] Op cit note 36 at 17.
[49] Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 151, 166-72, Hoexter *Thesis* op cit note 30 at 151, 154-5, 157-8, Cockrell 'Rainbow jurisprudence' op cit note 22 at 7-10, Froneman op cit note 36 at 4, 15, Theunis Roux 'Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court' (2004) 20 *SAJHR* 511 at 533, Geo Quinot 'Substantive reasoning in administrative law adjudication' (2010) 3 *Constitutional Court Review* 111 at 115. Dennis M Davis 'To defer and when? Administrative law and constitutional democracy' in Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2006) 23 at 34 refers to the classification of functions as demonstrating the type of 'conceptual formalism' that dominated administrative law under apartheid, which treated the reviewing court as 'no more than a jurisprudential slot machine into which was placed the nature of the dispute … and out popped the answer to the review application'.
[50] 'Rainbow jurisprudence' op cit note 22 at 3. See also Froneman op cit note 36 at 10-11.
[51] Op cit note 20 at 15.

personal political morality (whether consciously or not),[52] this is not the form of substantive reasoning required by s 39(1) and (2) of the Constitution. A call for substantive reasoning, viewed against the backdrop of our constitutional landscape, is not to suggest that courts are to decide cases based upon considerations of, for example, morality or politics or economics at the expense of the application of law. On the contrary, it is a call for adjudication according to law – the fundamental law of the Constitution.[53] In the South African constitutional context, interpretation, as with other adjudicative tasks, is intertwined with moral and political reasoning. This, however, does not alter the fact that constitutional and statutory interpretation is grounded in our supreme law and is a *legal* exercise. As Chief Justice Langa noted:[54]

> 'There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked.'

The fact that it is a legal exercise does not, however, detract from the complexity of the task – and the fact that different adjudicators and academics may reach varying conclusions. This flows not only from the inherent indeterminacy of language but from the nature of the Constitution.

The Constitution is replete with broad, open-textured provisions and principles,[55] the application of which require courts to engage in moral or political reasoning. By way of example, terms such as 'freedom', 'equality' and 'human dignity' that pepper the Bill of Rights do not have self-evident meanings, and neither do constitutional principles such as the rule of law and separation of powers. As Froneman J noted in *Matiso*, '[t]he values and principles contained in the Constitution are, and could only be, formulated and expressed in

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[52] Legal realists have emphasised the impact of personal prejudices and preferences on adjudication. See eg John Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181 at 187-95. Klare op cit note 49 at 162-3 argues that a judge's 'personal/political values and sensibilities *cannot* be excluded from interpretive processes or adjudication'. Klare also usefully points to the role that legal culture (ie 'professional sensibilities, habits of mind, and intellectual reflexes' (at 166)) plays in adjudication (at 166-72).

[53] The courts' role is to decide cases that come before them based on *law*. If this were not the case, the democratic legitimacy of judicial review would be compromised. In terms of the Constitution, courts are subject only to 'the Constitution and the law' (s 165(2)) and judges are, in terms of item 6(1) of Schedule 2 to the Constitution, required to uphold and protect the Constitution and to administer justice 'in accordance with the Constitution and the law'.

[54] Justice Pius Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 353. The political nature of adjudication is well traversed in academic literature. See eg Dennis M Davis 'Adjudication and transformation: Out of the heart of darkness' 22 *Cardozo* LR 817 (2000-1).

[55] In the US context, Schauer op cit note 23 at 514 refers to the 'pervasive indeterminacy' of certain constitutional provisions, while Dennis Davis 'Dworkin: A viable theory of adjudication for the South African constitutional community' 2004 *Acta Juridica* 96 at 104 observes, in typically realist fashion, that 'a body of law like the Constitution permits a multiplicity of readings, a reader's preferred choice being dependent on the jurisprudential and ideological spectacles she wears'.

wide and general terms'.[56] In addition, the manner in which the various constitutional values are prioritised may be contested and resort to substantive reasoning may be required to resolve conflicts between constitutional values in concrete cases.[57] Section 39(2) of the Constitution adds a further layer of indeterminacy, requiring, as we have seen, interpretation that is not only consistent with the rights enumerated in the Bill of Rights but with its 'spirit, purport and objects'. Perhaps most dramatically, s 39(1)(a) of the Constitution requires courts, in interpreting the Bill of Rights, to have regard not only to the values specifically articulated in the Bill of Rights but to 'values that underlie an open and democratic society based on human dignity, equality and freedom'.

Given this level of indeterminacy, it is unrealistic to expect that judges' own sense of political morality will not play a role in the interpretive exercise. But there is a fundamental difference between instructing a court to promote the values of *the Constitution* and instructing it to interpret legislation in accordance with its own moral or political preferences. Under the Constitution, judges are required to decide matters of interpretation based not on their own personal moral or political compass but must rather proceed in the direction to which the constitutional compass points. This is apparent even in the open-ended wording of s 39(1)(a), which, despite its open-textured nature, identifies five key values which courts must promote in interpreting the Bill of Rights: openness, democracy, human dignity, equality and freedom.

The fact that substantive reasoning allows room for considerations of morality and political principle is, in my view, not a vice. It is a virtue. It ensures that our law is shaped so as to promote fundamental values such as equality, fairness, political and social justice, accountability, transparency and good governance. In doing so, substantive reasoning encourages legal development in line with the Constitution's 'objective, normative value system'.[58] It is thus likely to promote coherence[59] or, in Dworkin's terminology, political integrity – a political virtue that he places alongside justice and fairness.[60]

It bears emphasis that value-laden, substantive reasoning is not necessarily inconsistent with *all* conceptions of formalism. It might, for example, be argued that a formal, rule-based

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[56] *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SECLD) at 597.

[57] On the contested nature of constitutional values, see Catherine Albertyn & Dennis Davis 'Legal realism, transformation and the legacy of Dugard' (2010) 26 *SAJHR* 188 at 201, 210-13.

[58] *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) paras 54-5.

[59] The link between s 39(2) and coherence was drawn by Ngcobo J in *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 56.

[60] Ronald Dworkin *Law's Empire* (1986) at 166. Cf Anton Fagan 'Section 39(2) and political integrity' 2004 *Acta Juridica* 117 at 132,136-7.

approach itself requires substantive reasoning in circumstances where that reasoning is, at least to some extent, expressly required by the constitutional text.[61] Nevertheless, formalism in the sense that I use the term is anathema to our constitutional order. Given the constitutional injunctions discussed above, it is impermissible for courts to engage in mechanical or superficial reasoning which fails to pay proper regard to the substance of the matter, the constitutional context and issues of underlying principle. Moreover, formalistic reliance on legal concepts that are out-of-date, and an unwillingness to consider the continuing suitability of old rules to changed circumstances, undermines the Constitution's transformative vision,[62] the constitutional injunction to develop the common law, and the notion that the Constitution plays 'a creative and *dynamic* role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government'.[63] Our courts are required to consider cases that come before them in a dynamic manner, ensuring that the law develops in a constitutionally infused way without formalistic reliance on outdated legal concepts.

The Constitution's embrace of substantive reasoning does not, however, mean that formal reasons should not perform their usual screen-like function of excluding the application of substantive reasons in individual cases. On the contrary, formal reasons play a key role in constitutional litigation. For example, the Constitutional Court established formal rules in finding that 'mere differentiation' does not violate the right to equality if it is rationally related to a legitimate government objective[64] and that an expropriation requires the acquisition of property by the state.[65] Other courts, however well intended, are not at liberty to disregard these rules on the basis of their own substantive reasoning (whether based on constitutional principle or otherwise). This does not, however, detract from the fact that the Constitutional Court, in establishing the rules in these cases, should have done so based on substantive reasoning – properly informed by the Constitution and related case law – and that

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[61] It might, for example, be argued that the specific inclusion of values in the text of the Constitution, coupled with interpretive injunctions in relation not only to the interpretation of the Bill of Rights but also to the interpretation of legislation and the development of the common law (in s 39(1)(a) and (2)), means that even a formalist would acknowledge that the Constitution and legislation must be interpreted, and the common law developed, in the light of these values. Theunis Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stell LR* 258 at 273 makes a similar point in relation to transformative constitutionalism and Justice Antonin Scalia's democratic formalism.

[62] Hoexter *Thesis* op cit note 30 at 156.

[63] *Mhlungu* supra note 38 para 8 (emphasis added), quoting from *Government of the Republic of Namibia v Cultura 2000* 1994 (1) SA 407 (NmS) at 418.

[64] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25.

[65] *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 58.

the Court should revisit the rules if it is convinced that there are compelling substantive reasons for doing so.[66] As stated above, any properly functioning legal system relies on both formal and substantive reasoning. The South African system is no different.

The position is well put by Quinot, in the context of discussing transformative adjudication:[67]

> 'The notion of transformative adjudication does not amount to a call for substantive reasoning to the exclusion of formal reasoning. Form plays an important role in all legal reasoning. Indeed one may argue that judges cannot get away from form in adjudication, nor should they. Judges should not be allowed to decide cases with reference to any substantive considerations that they happen to favour, that is, free-floating social and political preferences. The mode of reasoning that transformative adjudication requires allows for formal reasoning, but not formalism. Under this approach judges are allowed and may at times be required to decide cases narrowly with reference to concepts and the text of rules for example, but not in an abstract formalistic manner.'

5.2.2 *Transformative constitutionalism*

As Quinot's statement makes clear, one important consequence of a substantive approach to constitutional adjudication is that it promotes transformative constitutionalism. Chief Justice Langa also drew this link:[68]

> 'At the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws. Purely formalist reasoning tends to avoid that responsibility.'

The phrase 'transformative constitutionalism' was coined by Klare, who described it as the project of 'transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction' and in a manner which promotes social justice, multiculturalism and diversity, environmentalism and the extension of democratic principles to the private sphere.[69] Transformative constitutionalism is well captured in Justice Moseneke's reference to 'the overarching constitutional enterprise of

[66] See Froneman op cit note 36 at 6, 10-11.
[67] Op cit note 49 at 116.
[68] Op cit note 54 at 357.
[69] Klare op cit note 49 at 150-1, 153-5.

transforming our society into a democratic, non-racial, non-discriminating, egalitarian, socially just and caring society'.[70]

Klare, emphasising the transformative nature of the Constitution and drawing on the approach of the critical legal studies (CLS) movement, argues that transformative constitutionalism is best pursued by judges adopting a self-conscious and transparent approach to the politics of adjudication.[71] It is, however, not necessary to adopt a CLS perspective in order to read the Constitution in this transformative way. Roux convincingly argues that a transformative reading of the Constitution is, having regard to the Constitution's text, non-contentious.[72] It is 'an uncontroversial reading of the Constitution that can be accepted by people of different political viewpoints and jurisprudential persuasions'.[73] It is, if one were to apply Dworkin's method of constructive interpretation, the best interpretation of the Constitution[74] while simultaneously serving as an exemplar of law as an instrument of social change of which instrumentalists would no doubt approve.[75]

The transformative character of the Constitution is immediately apparent from its preamble, which proclaims that the Constitution is adopted so as to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and human rights', '[l]ay the foundations for a democratic and open society', '[i]mprove the quality of life of all citizens and free the potential of each person' and '[b]uild a united and democratic South Africa'. This transformative character is enhanced by the requirement that the state must not only respect and protect but also promote and fulfil fundamental rights,[76] and by, amongst others, the entrenchment in the Bill of Rights of substantive equality[77] and socio-economic rights.[78] Given South Africa's transition from its past characterised by racism, repression, deprivation and the denial of basic human rights to a democratic constitution replete with a

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[70] Op cit note 38 at 319.
[71] Klare op cit note 49 at 164-5.
[72] Op cit note 61 at 261-2, 272-3.
[73] Ibid at 266.
[74] Ibid at 273-6. Roux explains that Dworkin's interpretive method 'offers a more easily defensible way of giving effect to the progressive values underlying the Constitution than the method Klare advocates' (at 250). This is partly because, while the South African Constitution is open-textured, its normative commitments are relatively clear (at 280-1). Roux, at 266, also points out that transformative constitutionalism is consistent with HLA Hart's conception of legal positivism or with Justice Scalia's democratic formalism.
[75] I accept, however, that the meaning of transformation, particularly in concrete cases, is contested. Albertyn & Davis op cit note 57 at 200: 'While there might be a rhetorical consensus on the idea of transformation, its constitutional meaning, content and effects have been contested in the Court's jurisprudence, within academia and more broadly within politics'.
[76] Section 7(2) of the Constitution.
[77] Section 9(2) of the Constitution.
[78] Sections 26 (housing), 27 (health care, food, water and social security) and 29 (education) of the Constitution.

panoply of fundamental rights and values, including a commitment to socio-economic rights and social justice, it would be astonishing if the Constitution was not considered to be transformative. It thus comes as no surprise that the Constitutional Court has remarked that the 'spirit of transition and transformation characterises the constitutional enterprise as a whole'[79] and has referred to the Constitution as 'a document committed to social transformation'[80] that must be understood 'as responding to our history and facilitating the transformation of our society'.[81] Sunstein has even described it as 'the world's leading example of a transformative constitution'.[82] To quote three judges of the Constitutional Court writing extra-judicially, 'the transformation of our society [is a] central concern of the Constitution,'[83] 'the notion of transformation has played and will play a vital role in interpreting the Constitution',[84] and the upholding and advancement of the Constitution's transformative design is a 'momentous constitutional imperative'.[85]

As explained above, a substantive approach to adjudication ensures that constitutional rights and values are best able to permeate our law – including through the interpretation of legislation and the development of the common law. Where these constitutional rights and values are aimed at advancing substantive equality and social justice (which, in the South African context, they undoubtedly are), it follows that a substantive approach will promote those constitutional goals. A substantive approach thus facilitates the dynamic development of our law in a manner suited to the Constitution's transformative vision.

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[79] *Hyundai* supra note 45 para 21.
[80] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 81.
[81] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 19. See also eg *S v Makwanyane* 1995 (3) SA 391 (CC) para 262, *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 8, *Bato Star* supra note 2 paras 73-4, *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 142, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 16-17, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 343-4.
[82] Cass R Sunstein 'Social and economic rights? Lessons from South Africa' 11 *Const F* (1999-2001) 123 at 125 – distinguishing between preservative and transformative constitutions.
[83] Froneman op cit note 36 at 15.
[84] Langa op cit note 54 at 351. See also Mr Justice Pius Langa 'The vision of the Constitution' (2003) 120 *SALJ* 670.
[85] Moseneke op cit note 38 at 314. Several academics have endorsed the transformative character of the Constitution. See eg Cathi Albertyn & Beth Goldblatt 'Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248, Marius Pieterse 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *SAPL* 155, AJ van der Walt 'Transformative constitutionalism and the development of South African property law (part 1)' 2005 *TSAR* 655 at 657, Dennis Davis 'Transformation: the constitutional promise and reality' (2010) 26 *SAJHR* 85 at 85-7, Dennis M Davis & Karl Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 404, Solanga Rosa 'Transformative constitutionalism in a democratic developmental state' 22 *Stell LR* (2011) 542 at 543-4, Jason Brickhill & Yana van Leeve 'Transformative constitutionalism – Guiding light or empty slogan?' 2015 *Acta Juridica* 141 at 146-8.

While it is readily apparent that South Africa's Constitution is transformative in nature and that it enjoins judges to promote transformation aimed at overcoming the legacy of our past, this does not mean that judges are invited strategically to pursue their own transformational agenda based on their private political convictions or ideology. They are – no less significantly – required to ensure that their decision-making is consistent with, and promotes the values of, the Constitution. Transformative constitutionalism should thus be viewed as part and parcel of the courts' work in giving effect to the clear constitutional injunction to promote the values of the Constitution, rather than a strategic ideological project to be undertaken by progressive judges.[86] Simply put, the full transformative vision of the Constitution cannot be realised unless courts are committed to developing our law in a manner which accords with fundamental constitutional values and principles.

5.2.3 *Promoting judicial accountability and transparency*

A further benefit of a substantive approach to adjudication is that it requires courts to justify the substance of their decisions which, in turn, advances the constitutional principles of accountability and transparency – principles that apply with as much force to the judiciary as to exercises of public power by the other branches of government.[87] In so doing, substantive reasoning promotes, to use Mureinik's oft-cited phrase, 'a culture of justification – a culture in which every exercise of power is expected to be justified'.[88] As Botha put it:[89]

> 'A culture of justification presupposes a commitment to 'a communicative practice of open and intelligible reason-giving'.[90] It requires candour on the part of judges about the reasons for their decisions, and is not satisfied by the kind of formalistic reasoning which pretends that the answers to legal questions can be derived from the relevant legal materials in a more or less neutral, mechanical manner.'

Courts should thus play a dual role in advancing a culture of justification: they should not only require suitable justification for the exercise of power by the other branches of government, they should justify the adjudicative power that they wield by explaining their reasoning in a substantively justifiable manner. In Quinot's words, '[c]ourts are thus required to both extract justification and reflect justification'.[91]

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[86] See Roux op cit note 61 at 277-83.
[87] Hoexter *Thesis* op cit note 30 at 156.
[88] Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32.
[89] Henk Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *SAJHR* 249 at 275.
[90] Quoting Frank I Michelman 'Foreword: Traces of self-government' (1986) 100 *Harvard LR* 4 at 34.
[91] Op cit note 49 at 113.

The themes of transformative constitutionalism and a culture of justification, and the link between them, are well illustrated by Chief Justice Langa's insistence that: '[u]nder a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values'.[92] The Constitution does not simply require any form of substantive reasoning. It requires 'justifiable substantive reasoning'[93] – reasoning that is, as Quinot puts it, 'rooted in the Constitution's normative framework', that is 'rigorous and theoretically well-founded' and thus 'able to stand up to critical scrutiny'.[94]

5.2.4 *The role of the legislative text (and precedent) under a substantive approach*

The substantive approach to adjudication that is mandated by the Constitution is not simply anti-formalist. It is an approach that pays due regard to *all* relevant constitutional principles, including the separation of powers and the rule of law. An important consequence of these principles is that the interpretive enterprise in which judges engage must show fidelity to the constitutional or legislative text.

While I accept that language is, when viewed in isolation, often indeterminate, the context in which it is used and our shared understanding of language (or, put differently, the social conventions of language) usually provide the necessary clarity. The ordinary meaning of a legislative text is thus often apparent[95] – and where this is the case, courts are generally not at liberty to disregard this meaning. Where, on the other hand, the legislative language is unclear and capable of a range of meanings, the court's interpretation must, at a minimum, fall within the range of meanings that can reasonably be attributed to the text.[96]

The constraints on judicial decision-making emanating from the language of the Constitution and applicable legislation – and, for that matter, from judicial precedent – may, at one level, be seen as limitations on substantive reasoning.[97] At a higher-order level,

[92] Op cit note 54 at 353.
[93] Quinot op cit note 49 at 117.
[94] Ibid.
[95] See Stu Woolman 'Language, power and the margin: Eliot's philosophy of language, Wittgenstein on following a rule, and statutory construction in Mankayi v Anglogold Ashanti Ltd' (2012) 129 *SALJ* 434, who argues that instances where language is genuinely unclear (cases at 'the margin') are relatively rare (which he refers to as 'the marginality of the margin') (at 437). See also Richard A Posner 'Legal formalism, legal realism, and the interpretation of statutes and the constitution' (1986-7) 37 *Case W Res L Rev* 179 at 191: 'No text is clear except in terms of a linguistic and cultural environment, but it does not follow that no text is clear'.
[96] I use the phrase 'at a minimum' because, as explained below, it is arguable that the utility of the text is not exhausted by identifying reasonable meanings but should also play a role in the choice between those meanings.
[97] Eg Langa op cit note 54 at 357: '[W]hile it is vital that we embrace the idea of substantive adjudication, there is a distinct limit as to how far we can go. Judges do not have a free reign to determine what the law is. Laws,

however, these constraints are derived from fundamental constitutional principle and thus form an integral part of substantive reasoning.

The separation of powers doctrine is undermined in circumstances where a court disregards the language of the legislation and, in effect, rewrites it without a finding of constitutional invalidity. This is the case even if the court is acting for the laudable purpose of giving effect to constitutional rights or values. The judicial rewriting of legislation under the guise of interpretation effectively results in findings of constitutional invalidity (of the actual legislative text) without a direct constitutional challenge to the legislation and, in the case of matters involving fundamental rights, without engaging in a limitations enquiry in which the state may have sought to justify the limitation on those rights.

Adjudication that takes place without proper regard to the constraining force of the legislative text – or without due regard to binding precedent – would also create significant uncertainty which would arguably undermine the rule of law.[98] It may, in particular, offend 'the rule of law requirement that the law must be clear and ascertainable'.[99]

The legislative text operates as a brake on interpretive discretion at both the constitutional and statutory level. At the level of constitutional interpretation, the Constitutional Court in its first judgment warned as follows:[100]

> 'While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean…. [E]ven a constitution is a legal instrument, the language of

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including the Constitution, do not mean "whatever we wish them to mean". This limit on judicial decision-making is encapsulated in the idea of the separation of powers'.

[98] See Michael Bishop & Jason Brickhill ''In the beginning was the word': The role of text in the interpretation of statutes' (2012) 129 *SALJ* 681 at 696-8.

[99] *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) para 92.

[100] *S v Zuma* 1995 (2) SA 642 (CC) paras 17-18. The question as to the extent to which the constitutional text constrains, or should constrain, constitutional interpretation has been debated at length, and in colourfully robust terms, in the context of the Constitutional Court's judgment in *Mhlungu* supra note 38. See Eduard Fagan 'The longest erratum note in history: *S v Mhlungu and Others*' (1996) 12 *SAJR* 76, Dennis Davis 'The twist of language and the two Fagans: 'Please sir may I have some more literalism!'' (1996) 12 *SAJHR* 504, Eduard Fagan 'The ordinary meaning of language – A response to Professor Davis' (1997) 13 *SAJHR* 174, Dennis Davis 'Of closure, the death of ideology and academic sandcastles – A reply to Dr Fagan' (1997) 13 *SAJHR* 178, Patrick Lenta 'Constitutional interpretation and the rule of law' (2005) 16 *Stell LR* 272. The topic has also received extensive coverage in other constitutional contexts. For a sample, see Botha op cit note 89, Woolman op cit note 95, Bishop & Brickhill op cit note 98.

> which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.'

Similarly, at the level of statutory interpretation, the Constitutional Court has emphasised that, while s 39(2) requires courts to interpret legislation in light of the spirit, purport and objects of the Bill of Rights, the meaning that a court gives to legislation must be reasonably ascribable to the language, or, put differently, it must not be an 'unduly strained' reading of the text.[101] Bishop and Brickhill describe the relationship between s 39(2) and the counterbalancing requirement that the interpretation must not be unduly strained in the following terms:[102]

> 'The first element is essentially dynamic, providing new sources of meaning by enriching the interpretive context. The second element is conservative, placing constraints on the dynamic force of the first element.'

A substantive approach can be viewed as treading a middle path between HLA Hart's twin vices of formalism and rule scepticism.[103] On the one hand, the Constitution's language and value-laden nature together with the injunctions in s 39(1)(a) and (2) appear to be premised on the fact that certain legal rules (and the language in which they are expressed) are open-textured or indeterminate. There would be no scope for interpreting the Bill of Rights or legislation in light of constitutional values if the literal language of the text left no room for judicial choice. These constitutional provisions thus avoid Hart's notion of formalism, ie the denial of judicial choice at the penumbra of a rule.[104] On the other hand, the Constitutional Court's jurisprudence – also flowing from constitutional principle – underscores the constraint that legislative language imposes on adjudication. This jurisprudence rejects the sceptical position that rules provide no constraint on judicial discretion or that 'there is little or no settled core to a legal rule, but only open texture'.[105] The Constitution envisages that

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[101] *Hyundai* supra note 45 paras 23-4, *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 24, *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) para 32. A further brake on individual judicial decision-making arises from the doctrine of precedent. This is not, correctly conceived, a formalistic device that ossifies the law. It is based on substantive considerations of consistency, predictability and fairness, and enhances the quality of adjudication.

[102] Op cit note 98 at 684.

[103] See generally HLA Hart *The Concept of Law* 3 ed (2012) at 124-54. Hart describes formalism and rule-scepticism as 'the Scylla and Charybdis of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them' (at 147).

[104] Ibid at 129. According to Hart, at 12, all rules have a 'penumbra of uncertainty' – beyond the central core of undisputed meaning – where a judge is required to choose between alternatives (or, put differently, where the application of the rule is uncertain). See also Brian H Bix *Jurisprudence: Theory and Context* 7 ed (2015) at 46.

[105] Quevedo op cit note 31 at 137.

rules are sufficiently open-textured to allow for the influence of fundamental values but not so open-textured as to give courts unbridled discretion.

The next question is what role should the legislative text play in the interpretive exercise? One approach – apparently favoured, at least formally, by the Constitutional Court – is that the only role of the text is to identify the various reasonable meanings that are in play, with the court then choosing the meaning that best promotes the values and purpose of the Constitution. I agree with Bishop and Brickhill that such an approach fails to pay adequate regard to the legislative text and that the two-stage approach to interpretative reasoning for which they advocate would be more appropriate.[106] The first stage, according to the Bishop & Brickhill, is to identify the textually plausible meanings of the statutory provision (ie the meanings that are not 'unduly strained'), having regard to the text, the context and the purpose.[107] The second stage involves choosing between these meanings having regard to, amongst others, the normative values of the Constitution and the textual fit.[108] The question of textual fit thus plays a role at both stages of the enquiry. This two-stage approach would, as the authors observe, helpfully 'push [judges] to consider the context and purpose of the legislation and the normative pull of the Constitution, but also the need for relative certainty reflected in a measure of fidelity to the text'.[109] It will 'discipline courts both to separate questions of textual plausibility from substantive desirability, and to consider textual fit as a substantive good'.[110]

As Bishop and Brickhill note,[111] the two-stage approach – and, in particular, having regard to the extent of textual fit in the second stage – reflects a slight modification of the Constitutional Court's approach in *Wary*, which requires courts to adopt the interpretation that '*better* promotes the spirit, purport and objects of the Bill of Rights'.[112]

6 SUBSTANTIVE REASONING IN ADMINISTRATIVE LAW

6.1 <u>The virtues of substantive reasoning in the administrative-law context</u>

Substantive reasoning has particular resonance in the context of administrative law. As Daly notes, 'judicial review of administrative action is a value-based enterprise' that is shaped by

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[106] Op cit note 98.
[107] Ibid at 712-3, 715-16.
[108] Ibid at 713-16.
[109] Ibid at 712.
[110] Ibid as 715.
[111] Ibid at 713.
[112] Supra note 47 paras 46-7, emphasis in the original.

the interaction between what he terms 'administrative law values', which he – writing against the backdrop of administrative law in the UK and other common-law jurisdictions – identifies as the rule of law, good administration, democracy and the separation of powers.[113]

In the South African context, a substantive approach encourages our courts to shape administrative law in a manner which best serves constitutional goals such as accountability, participation, transparency, responsiveness and administrative efficiency,[114] and which gives effect to the constitutional right to administrative justice. In so doing, the transformative project is enhanced as South Africa moves away from the culture of authority and secrecy that characterised the apartheid era to a culture of justification.[115] Administrative law plays a crucial role in progress towards a culture of justification, requiring, in certain circumstances, that affected persons must be notified of the purpose of proposed administrative action, that written reasons must be furnished, and that administrative action must be rational and reasonable.[116] As Mureinik remarked: 'Pre-eminently, … the aspiration for better justified decisions translates into a demand for review for unreasonableness…'.[117]

A substantive approach also requires courts to focus on the substance of matters rather than their superficial form, encourages them to engage rigorously with the relevant constitutional values and principles, and promotes reasoned, transparent judicial decision-making. Moreover, such an approach ensures that administrative-law adjudication duly emphasises the separation of powers – a constitutional principle that goes to the heart of administrative law.[118]

The attractiveness of substantive reasoning in the administrative-law sphere may be illustrated by a brief discussion of the judgments in *Walele*.[119] In this case, the Constitutional Court considered whether the City of Cape Town was required to allow a neighbor an opportunity to make representations prior to approving building plans in circumstances where

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[113] Paul Daly 'Administrative law: A values-based approach' in John Bell, Mark Elliott, Jason NE Varubas & Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (2016) 23 at 27-31. See also Paul Daly 'Administrative law: Characteristics, legitimacy, unity' in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark (eds) *Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (2018) 99 at 99-100.

[114] See ss 1(d), 41(1)(c) and 195 of the Constitution.

[115] Mureinik 'A bridge to where?' op cit note 88 at 32. On transformative constitutionalism in the context of administrative law, see Hoexter 'Life after formalism' op cit note 30 and Cora Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281.

[116] For a discussion of the role that administrative justice may play in fostering a culture of justification, see Mureinik 'A bridge to where?' op cit note 88 at 38-42.

[117] Etienne Mureinik 'Reconsidering review: Participation and accountability' 1993 *Acta Juridica* 35 at 40.

[118] For a discussion of separation of powers, see chapter 2.

[119] *Walele v City of Cape Town* 2008 (6) SA 129 (CC).

s 3(1) of PAJA provides that administrative action must be procedurally fair if it 'materially and adversely affects the *rights* or *legitimate expectations* of any person'. In giving meaning to s 3(1), Jafta AJ, writing for the majority, apparently endorsed the pre-constitutional common-law test for the application of *audi alteram partem*, ie was 'a pre-existing right' adversely affected or was there a legitimate expectation of a hearing arising either 'from a promise by the decision-maker or from a regular practice which is reasonably expected to continue'.[120] According to Jafta AJ, since the concept of a legitimate expectation is not defined in PAJA, 'it must be given its ordinary meaning as understood over time by the courts in this country'.[121]

This formalistic reasoning limits the scope of procedural fairness without engaging with substantive counter-arguments that may have led to a more expansive interpretation of s 3(1) – though not necessarily to a different result on the facts in *Walele*. Had the majority adopted a substantive approach, it might have: (i) emphasised that the scope of procedural fairness should be liberally drawn where the right to procedural fairness in s 33 of the Constitution is conferred in unqualified terms ('[e]veryone has the right to administrative action that is … procedurally fair');[122] (ii) engaged with the academic literature, written both before and after the Constitution, which expressed the view that the application of procedural fairness (or at least the ambit of 'administrative action') should not be limited to decisions that *deprive* persons of rights but should include those that *determine* rights;[123] and (iii) considered whether a person might be said to have a 'legitimate expectation' of a hearing where the impact of the decision is such that fairness would require a hearing (even in the absence of a promise or past practice). The majority's failure to consider the last aspect is particularly unfortunate given that Jafta AJ quoted the dictum in *SARFU* which seemed to provide support for an extended notion of legitimate expectations based on the duty to act fairly.[124]

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[120] Ibid paras 32, 34, 35, 39, 42. This conception of legitimate expectations is derived from the decision of the House of Lords in *Council of Civil Service Union v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 944, quoted in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 756. Jafta AJ did, however, acknowledge that the doctrine of legitimate expectations 'cannot be precisely defined' (para 35).

[121] Ibid para 37. See also para 30.

[122] Cf the qualified language of s 33(2) of the Constitution: '[e]veryone *whose rights have been adversely affected* by administrative action has the right to be given written reasons' (emphasis added).

[123] See eg Mureinik 'Reconsidering review' op cit note 117 at 36-9, Cora Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 at 516, Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 76-9, Cora Hoexter *Administrative Law in South Africa* 1 ed (2007) at 199-204.

[124] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 216: 'To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case' (quoted in *Walele* supra note 119 para 38).

The *Walele* majority, in part, justified its reliance on the common-law test for legitimate expectations by assuming that the legislature, in enacting PAJA, 'must have been aware of judicial decisions which applied the *audi* principle in its original and expanded forms, incorporating the doctrine of legitimate expectation' and that, as a result, the concepts of rights and legitimate expectations referred to in s 3(1) are not defined.[125] Relatedly, Jafta AJ noted that, while s 3(1) of PAJA apparently limits the scope of the right to administrative justice in s 33 of the Constitution, the applicant did not challenge its constitutionality but rather invoked s 3(1) in its present form.[126] It might thus be argued that the majority was sensitive to separation of powers concerns and gave effect to the democratic will of the legislature – and that placing emphasis on these considerations is consistent with substantive reasoning.

Such an argument, however, would rely upon a particularly narrow, conservative form of 'substantive' reasoning, which disregards other substantive considerations – such as the principles of accountability and administrative justice – in favour of strict adherence to the perceived intention of the legislature. Such an approach would serve not only to disregard the use to which constitutional values can otherwise be put in interpreting relatively open-ended concepts, such as 'legitimate expectations', but also to ossify the concept of 'legitimate expectations' by giving it the meaning that it happened to have in the common law as it stood at the time of, and in the decade or so leading up to, PAJA's enactment. While one might seek to defend all manner of formalistic reasoning based on secondary substantive reasoning (eg the desirability in a democracy of giving effect to the law-maker's intention or promoting certainty and predictability), true substantive reasoning is undermined, and constitutional values are not allowed sufficient room to operate, where open-textured concepts are interpreted in a manner which solely seeks to ascertain, and give effect to, the legislative intent.

O'Regan ADCJ's minority judgment in *Walele* (in which four judges concurred), in contrast to that of the majority, adopts a substantive approach to the ambit of s 3(1) of PAJA. The relevant portion of the minority judgment starts by noting two substantive considerations. First, s 3(1) is a key provision that gives effect to s 33 of the Constitution and must be interpreted in a manner which is both consistent with, and which promotes the spirit,

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[125] *Walele* supra note 119 para 30.
[126] Ibid.

purport and object of, the constitutional right.[127] Second, an important countervailing consideration to be taken into account in interpreting s 33 of the Constitution and s 3(1) of PAJA is the undesirability of imposing obligations upon government 'which will inhibit its ability to make and implement policy effectively'.[128] Turning to the meaning of 'legitimate expectations', which she described as an 'open-textured' concept,[129] O'Regan ADCJ remarked that 'a broader understanding of 'legitimate expectation' may be appropriate given the language of s 33 of the Constitution' and that it 'may well be that the concept of legitimate expectation in PAJA is not limited to the narrow requirement of a promise or a practice'.[130]

The minority's judgment in *Walele* approached the adjudicative task without undue reliance on the pre-existing meaning of the conceptual label 'legitimate expectations' and, in so doing, it left open the possibility of extending this concept beyond its traditional meaning in order better to give effect to the constitutional right to just administrative action (by allowing for a legitimate expectation to arise where administrative justice or fairness requires a hearing) but without, in my view, unduly straining PAJA's language.[131]

As *Walele* demonstrates, the virtue of substantive reasoning is that it facilitates the interpretation and application of formal legal rules (such as s 3(1) of PAJA) in a manner that is consistent with the normative value system of the Constitution. While there might be debate about how the various values should be weighed, a substantive approach ensures that judges justify their decisions based on substantive reasons grounded in the Constitution rather than through the mechanical application of pre-existing rules or concepts. This is as it should be, particularly when it comes to interpreting constitutionally mandated legislation such as PAJA.

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[127] *Walele* supra note 119 para 123.
[128] Ibid, quoting *Premier, Mpumalanga v Executive Committee, Associate of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41.
[129] Ibid para 133.
[130] Ibid.
[131] For a critical discussion of this aspect of *Walele*, see Jonathan Klaaren & Glenn Penfold 'Just administrative action' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) at 63-92 to 63-94.

6.2 Forsyth's defence of formalism in administrative law

Forsyth argues that formalism plays a useful role in administrative law. He notes that 'every legal system worthy of its name must have a considerable degree of formalism within it'[132] and that formalism's benefits include consistency and predictability (which promote the rule of law), efficient (ie less complicated and time-consuming) adjudication, just outcomes (in the sense that like cases are treated alike), and certainty.[133] Forsyth also points out that 'formalism and conceptual reasoning bring clarity and understanding, enabling problems and difficulties to be recognised and often resolved'[134] and illustrates this with reference to his own 'theory of the second actor', which explains the conundrum that a legally invalid act can have legal effect.[135]

In considering Forsyth's argument, it is important to have regard to the conception of formalism with which he engages. He begins by referring to Atiyah and Summers' distinction between formal reasons (which are legally-authoritative) and substantive reasons (ie moral, economic, political, institutional or other social considerations justifying a particular decision).[136] Forsyth observes that formality in administrative law focusses upon 'the authoritative nature of the relevant sources of law' (ie legislation and relevant judicial decisions), and goes on to state:[137]

> 'Where the answer to a legal question is found in these sources, there is no need to have regard to the substantive reasons that persuaded parliament to enact the statute or persuaded the minister or other authority to make the delegated legislation. Nor, indeed, is it necessary to consider any more diffuse political or moral reasons that might favour one or other result in the litigation. These matters are simply irrelevant: all that is necessary is that the law should be applied according to its terms.'

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[132] Christopher Forsyth 'Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in administrative law' (2007) 66 *Cambridge Law Journal* 325 at 329.
[133] Ibid at 329-31, 333-6.
[134] Ibid at 327.
[135] Ibid at 340-1. Forsyth's theory was adopted by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2004 (6) SA 222 (SCA) para 29. See also Christopher Forsyth '"The metaphysics of nullity" Invalidity, conceptual reasoning and the rule of law' in Christopher Forsyth & Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998) 141, Christopher Forsyth 'Collateral challenge and the foundations of judicial review: Orthodoxy vindicated and procedural exclusivity rejected' [1998] *Public Law* 364, Christopher Forsyth 'The legal effect of an invalid administrative action: The theory of the second actor revisited' 2006 *Acta Juridica* 209.
[136] Forsyth op cit note 132 at 327.
[137] Ibid at 328.

Forsyth, however, accepts that ‘no branch of the law, and administrative law in particular, is sufficiently certain for all decisions to be taken simply in reliance upon formal sources of law’, and that law’s open texture means that the adjudicator has ‘a measure of choice’ which ‘necessarily implies unpredictability of outcome, or uncertainty’.[138]

While I have no difficulty with the majority of his thesis, it seems to me that Forsyth overstates the extent to which the meaning of rules may be interpreted without having regard to the reasons underpinning them. The open texture of language means that recourse must often be had to a rule’s purpose in giving meaning to the rule and applying it in a particular case. This is, however, simply a matter of emphasis.

More importantly for present purposes, it seems to me that acceptance of Forsyth’s attitude to the value of what he describes as formalism – which is, according to Hoexter, ‘a rather benign kind of formalism’[139] – is not inconsistent with the adoption of a substantive approach in South African administrative law. This is most apparent from his discussion of the impact of the UK’s Human Rights Act, 1998 and, in particular, s 3(1) of that Act, which requires courts ‘so far as it is possible’ to read and give effect to legislation in a way that is compatible with rights contained in the European Convention on Human Rights. Forsyth refers to the speech of Lord Nicholls in the decision of the House of Lords in *Ghaidan v Godin-Mendoza*,[140] stating that s 3(1) empowered courts to ‘modify the meaning, and hence the effect, of primary and secondary legislation’ subject to the qualification that the meaning ‘imported’ by the application of s 3(1) must not be ‘inconsistent with a fundamental feature of legislation’ and ‘must be compatible with the underlying thrust of the legislation being construed’.[141] This approach appears to go somewhat further than our courts have ventured under s 39(2) of the Constitution and leaves much room for the application of substantive reasoning (given that, as Forsyth acknowledges, Convention rights ‘are undeniably open-textured and have a range of moral and social considerations immanent within them’).[142] Importantly, Forsyth does not criticise the approach in *Ghaidan*. He rather emphasises that the House of Lords adopted a constraint on the courts’ interpretive functions that was derived from the language of the legislation (i.e. the ‘fundamental features of the legislation’), and points out that this means that ‘[f]orm structures and confines the judicial task’.[143] Forsyth

[138] Ibid at 335.
[139] Hoexter *Thesis* supra note 30 at 38.
[140] [2005] 2 AC 40 (HL). See Forsyth op cit note 132 at 342-3.
[141] *Ghaidan* supra note 140 paras 32-3.
[142] Forsyth op cit note 132 at 342.
[143] Ibid at 342-3.

went on to note that as judicial precedent develops more structure will emerge and 'the scope for substantive reasons will narrow'.[144]

Similarly, it can be said that the Constitutional Court's insistence that courts should not unduly strain legislative language serves to constrain the extent to which the Constitution's substantive values and principles are allowed to operate pursuant to, amongst others, the interpretive injunctions in s 39(1)(a) and (2) of the Constitution, and that the growing body of constitutional precedent progressively decreases the scope for substantive reasoning in individual cases. This is consistent with the constitutionally mandated approach to substantive reasoning discussed above.

6.3 A substantive approach to the scope of 'administrative action'

I have argued that it is desirable, and constitutionally required, to adopt a substantive, non-formalistic approach to administrative law. This approach is important to the subject of this thesis. The assessment as to whether or not conduct amounts to 'administrative action', and the circumstances in which the various requirements of administrative law apply, should not be based on technical, mechanical labelling or superficial reasoning but, as O'Regan J indicated in *Sidumo*, on substantive principle.[145]

The task of maintaining a substantive approach whilst navigating the conceptual terrain of administrative law should not be underestimated. While substantive reasoning might, as a general proposition, seek to reduce reliance upon labels – a tool favoured by formalism – the application of labels (and the attendant consequence of categorisation) cannot be avoided in relation to administrative-law review, with threshold concepts such as 'administrative', 'public', 'rights' and 'legitimate expectations' looming large.[146] These labels cannot be wished away or sidelined in an unprincipled fashion. They form part of the constitutionally mandated structure of administrative-law review. The challenge is rather to give them content in a substantive manner, paying careful attention to constitutional principle and to the reasons why we might expect the principles of administrative law to apply in a particular instance. The drawing of boundaries between, for example, 'public' and 'private' or between 'administrative' and 'judicial', 'legislative' or 'executive' is thus unavoidable. What is

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[144] Ibid at 344.
[145] *Sidumo* supra note 5 para 137.
[146] As Hoexter *Thesis* op cit note 30 at 187 points out, certain provisions of PAJA 'seem actively to encourage conceptualism, a particular type of formalism'. Hoexter notes that this approach may be viewed in contrast to s 33 of the Constitution which is 'a remarkable departure from the tradition of conceptualism' (at 176). See also Quinot op cit note 49 at 117.

important is to ensure that these boundaries, as well as the rules generated by the application of the labels, are substantively drawn.

It is, in particular, important that cases involving conduct at the margins of the various thresholds are decided not on the basis of arbitrary line-drawing but based on the reasons why more rigorous scrutiny is applied to action that is, for example, 'administrative' or 'public'.[147] To quote Cockrell: 'One of the pressing needs in modern South African law is for the articulation of rigorous and coherent principles that will guide legal intervention and non-intervention'.[148]

Substantive reasoning should affect both the formulation of the tests that are used to determine whether the various components of PAJA's definition of 'administrative action' are met as well as the manner in which those tests are applied to the facts of particular cases. In some instances, a commitment to substantive reasoning may require relatively open-ended tests for certain components of PAJA's definition; an approach that our courts have adopted in relation to the crucial distinctions between 'public' and 'private' power and, to a somewhat lesser extent, between 'administrative' and 'executive' action. These open-ended tests allow courts to take various substantive considerations into account in a context-sensitive manner.

Reliance upon open-ended tests is not unique to administrative law. Constitutional law is replete with such tests. One prominent example is the manner in which a large portion of Bill of Rights challenges are decided based on whether the limitation of the right is, in the language of s 36(1) of the Constitution, reasonable and justifiable 'taking into account all relevant factors'. Other examples, which similarly involve the assessment of broad-ranging considerations, are the courts' approach to whether discrimination is 'unfair' and whether a deprivation of property is 'arbitrary'.[149] As Botha has noted:[150]

> 'The Constitutional Court has generally resisted the temptation to reduce constitutional norms and guarantees to rigid boundaries, or to devise 'meta-principles' that would enable it to define the precise scope of conflicting constitutional

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[147] This approach is consistent with Dworkin's discussion of how certain hard cases are decided as 'pivotal' cases testing fundamental principle – principle that informs not just cases at the margin but also those at the core of a rule – rather than as 'borderline' cases decided on the basis of arbitrary line-drawing. See Dworkin op cit note 60 at 41-3.

[148] Alfred Cockrell '"Can you paradigm?" – Another perspective on the public law/private law divide' 1993 *Acta Juridica* 227 at 247.

[149] Botha op cit 89 at 277.

[150] Ibid.

> commitments. Instead, the court has tended to embrace broad, flexible standards that allow it to engage in a more contextual, case-by-case type of analysis.'

Roux has argued that the Constitutional Court's tendency 'to convert conceptual distinctions into multifactor balancing tests' is a pragmatic device aimed at maximizing the court's discretion to decide cases based on their particular facts, which gives the court greater flexibility 'to manage its relationship with the political branches' in contentious cases.[151] Perhaps a more principled explanation for the court's approach is that the adoption of relatively open-ended tests facilitates adjudication based on substantive considerations rather than more narrowly-cast rules which might leave material considerations out of account and thus undermine justice in individual cases? Botha has made a similar observation, noting that the use of flexible legal standards 'allow[s] for an articulation of the normative assumptions upon which decisions rest'.[152]

In the instances of constitutional adjudication mentioned above, open-ended tests allow for a balancing of competing considerations and interests, and thus accommodate various substantive considerations in the determination of constitutionality. In the context of PAJA's definitional elements, an open-ended test similarly provides the vessel into which various substantive considerations can be poured for purposes of ultimately assessing whether it is appropriate to subject the relevant decision to administrative-law review. This type of test thus avoids formalistic consequences that might result from narrowly-cast tests. By way of example, the adoption of a rule that the exercise of a contractual right is not 'public' eliminates from consideration various substantive reasons which might militate in favour of regarding particular conduct as 'public' even though it takes the form of the exercise of a contractual right (and it might not always be possible to accommodate these substantive considerations through a primary rule that is subject to exceptions, eg 'the exercise of a contractual right is not 'public' unless x, y or z').

The principal drawback of open-ended definitional tests is obvious: they produce uncertainty and potentially undermine consistency and predictability. This is not an insignificant concern. As I have noted above, consistency and predictability promote justice and legal integrity. Moreover, open-ended tests can provide fertile ground for judges to make decisions based on their personal preferences – emphasising certain factors and de-

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[151] Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' 7 *Int'l Const L* 106 (2009) at 133-6.

[152] Botha op cit note 89 at 278.

emphasising or ignoring others when it suits the outcome that they prefer. The challenge is thus to accommodate substantive reasoning while minimising inconsistency and unpredictability and placing appropriate constraint on judicial discretion.

A useful starting point is to seek to identify tests that are as precise as possible without sacrificing substantive reasoning. In the PAJA context, this may, in some instances, result in fairly precise tests for whether a particular definitional element is met (as may be the case, for example, in relation to whether a decision is excluded from 'administrative action' on the basis that it constitutes a legislative or judicial decision).[153] On the other hand, it might be found, after careful consideration, that the only test for a particular definitional element that adequately accommodates substantive reasoning is an open-ended one (as appears to be the case in relation to the distinction between public and private power).[154]

If an open-ended test is employed, it is important to recognise that not all cases should be decided by a *de novo* consideration of all relevant factors. It may be that certain factors, if met, result in a finding that the definitional element is met (without the need to consider other factors). The relevant factors should thus not simply be treated in an all-things-considered fashion. Care should be taken, where possible, to identify any necessary or sufficient conditions for the particular definitional element and to identify the weight attaching to the various factors.

It seems to me that substantive reasoning, certainty and constraint upon judicial discretion might be accommodated through the following approach to PAJA's definitional elements of 'administrative action'.

(i) The identification and application of the test for a particular definitional element must be compatible with the text of PAJA. It must be a reasonable interpretation of PAJA's language and must give due weight to that language.

(ii) If substantive reasoning can be accommodated through a relatively precise test in respect of a particular definitional element, this test should be identified and applied. This would be the case where the test can be formulated as: 'element x is met if a, b or c', with the possible addition of a proviso: 'unless d, e or f'.

(iii) If (ii) is not possible without compromising substantive reasoning, an open-ended test should be applied.

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153 See chapter 4, para 2.
154 See chapter 3.

(iv) The application of an open-ended test should, where possible, identify any applicable *necessary* conditions (ie any criteria that must be met in order to satisfy the test) or *sufficient* conditions (ie any conditions that, if met, satisfy the test).

(v) Factors which are relevant to the application of the test but which constitute neither necessary nor sufficient conditions contemplated in (iv) should be identified on the basis of substantive considerations. These factors might either point towards the conclusion that the definitional element is satisfied or point away from it.

(vi) The weighting accorded to the factors contemplated in (v) should ideally be specified and should depend on substantive considerations.

(vii) Over time our courts may identify clusters of factors that, if met, will collectively either constitute sufficient criteria contemplated in (iv) or strongly-weighted factors contemplated in (vi).

This approach might be illustrated with reference to PAJA's requirement that a decision must amount to the exercise of a public power or the performance of a public function in order to constitute 'administrative action'. If one accepts Langa CJ's view that there is no precise test for distinguishing between 'public' and 'private' power and that this distinction depends upon a consideration of various factors,[155] (ii) is not possible and an open-ended test should be applied. The next question is whether there are any sufficient or necessary conditions classifying a decision as 'public'. While it is unclear whether any necessary conditions arise, I suggest, in chapter three, that a decision of a government department is always 'public'. If this proposition is correct, any other considerations become irrelevant for purposes of the public/private classification in circumstances involving a decision of government (narrowly construed). A sufficient condition thus acts as a trump card; as does the absence of a necessary condition. Assuming then that a sufficient condition does not arise and any relevant necessary conditions are met in a particular case, the question as to whether the decision is 'public' needs to be decided by having regard to all relevant factors. But not all factors count the same. Some factors might weigh heavily in favour of a 'public' power (eg the exercise of a statutory power) while others make less impression on the 'public' side of the scale (eg the decision has an impact on the public) and yet others are placed on the

[155] *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para 186.

other ('private') side of the scale (eg the source of the power is a contract voluntarily concluded).

These aspects are potentially dynamic. For example, as the nature of government changes, it might be that a particular factor's weight increases or that it transforms from a factor to a sufficient condition. Change of this nature is, however, likely to occur only exceptionally and gradually. It might also be that a particular factor weighs more heavily in one context (or when combined with certain other factors) than another.

Judicial precedent will also, over time, promote increased certainty and predictability in the application of an open-ended test. If, by way of example, a court has previously held that a particular cluster of factors is a sufficient condition for the classification of conduct as 'public', the same result should follow in another case where that cluster arises. For example, if a court has held that Eskom (a state-owned company) exercises a public function when it decides to award a tender pursuant to its statutory function of transmitting electricity (a finding which might have taken into account various factors such as Eskom's status as a state-owned company, its obligation to act in the public interest in terms of legislation, and the fact that a tender award results in the expenditure of public funds), it would follow that Transnet similarly exercises a public function in awarding a tender pursuant to its statutory function of providing transport services. Of course, this would only be the case where the cluster in the Eskom case is such that it is treated as a sufficient condition for a finding that a decision is 'public' (which eliminates other countervailing considerations that might arise). If this is not the case, the cluster would rather be a heavily-weighted factor pointing towards the classification of the Transnet case as 'public' in the absence of strong countervailing considerations to distinguish the cases from each other.

The above approach has the advantage of allowing for the operation of substantive reasoning without the test for the relevant definitional element taking the form of an unconstrained, all-things-considered discretion. It promotes transparency, consistency and predictability, by requiring courts to engage with all relevant considerations, to identify the role that those considerations play and to engage with previous case law.

6.4 <u>The need for fidelity to PAJA's text</u>

As explained above, substantive reasoning requires fidelity to the statutory text. This principle has been placed under some strain in relation to PAJA's two controversial impact thresholds (ie thresholds based not on the nature of the action but on its impact):[156] the decision must 'adversely affect the rights of any person' and must have 'a direct, external legal effect'. The requirement of adversely affecting rights, in particular, is, at least on the face of it, very restrictive and calls into question the constitutionality of the statutory definition.[157]

Despite the initial controversy surrounding this requirement, it has commanded remarkably little attention from both judges and academics in the last decade or so. This is primarily due to the decision of the SCA in *Grey's Marine*,[158] which criticised PAJA's use of the phrase, said it should not be taken literally, and, most importantly, held that the threshold is met if the decision has the capacity to affect legal rights or (seemingly, when read in conjunction with 'direct, external legal effect') if it has a direct and immediate impact on individuals or groups.[159] It went so far as, in effect, to find that the requirement of *adversely* affecting rights was met where a *benefit* was conferred (in that case, on the lessee of waterfront property).[160]

Since then the academy has presumably (and understandably) breathed a collective sigh of relief that the scope of administrative-law review has been put on a principled, less restricted footing without the necessity for a constitutional challenge to PAJA, while numerous judgments, including those of the Constitutional Court, have uncritically followed *Grey's Marine*.[161]

Although it is tempting to leave things undisturbed without returning to the wording of PAJA and to the prospect that it raises constitutional difficulties, *Grey's Marine* is, in my view, wrong as a matter of constitutional principle. It seems to me that the court adopted an unduly strained interpretation of PAJA's definition – which is constitutionally problematic

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[156] JR de Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) at 37 uses the term 'impact threshold' to describe these elements of PAJA's definition of 'administrative action'.
[157] Hoexter 'The future of judicial review' op cit note 123 at 514-7.
[158] Supra note 4.
[159] Ibid paras 23, 24 and 28. The Constitutional Court in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) para 30, in endorsing the approach in *Grey's Marine* to the adversely affecting rights requirement, indicated that these requirements are cumulative (ie the 'or' should read 'and') but went on to note that the effect of this is that an own-interest litigant 'had to show that the decisions it seeks to attack had the capacity to affect its own legal rights *or its interests*' (emphasis added).
[160] *Grey's Marine* supra note 4 para 28.
[161] See eg *Giant Concerts* supra note 159 para 30, *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 37, *JDJ Properties CC v Umgeni Local Municipality* 2013 (2) SA 395 (SCA) paras 15-20, *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) paras 18-20. Cf the apparently stricter approach in *Tshwane City v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) paras 32-3, albeit in the context of a discussion of the 'direct, external legal effect' requirement and without making mention of the *Grey's Marine* approach.

even if it derives from the laudable aim of interpreting legislation in light of the values of the Bill of Rights.[162] As noted above, such an approach fails to respect the language of the legislature and, in so doing, undermines the separation of powers. The *Grey's Marine* court, in effect, appears to have redrafted PAJA without a finding of constitutional invalidity. If this is the case, the court not only impermissibly usurped the legislature's role; it also undermined the rule of law by applying PAJA in circumstances not contemplated in PAJA's text.

7 THE BUILDING BLOCKS OF A SUBSTANTIVE APPROACH TO THE SCOPE OF ADMINISTRATIVE-LAW REVIEW

Having regard to the discussion above, a substantive approach to the scope of administrative-law review – or, put differently, to the meaning of 'administrative action' – should, in my view, be informed by the following related principles.

First, recognition should be given to the fact that administrative law is a crucial branch of constitutional law aimed at controlling public power. Fundamental constitutional principles should be respected and promoted both in determining the content of administrative-law rules and the circumstances in which they apply. These principles include:

- the separation of powers – a doctrine that is implicit in the structure of the Constitution and which the SCA has described as 'foundational for the distinction between administrative and other forms of governmental action';[163]
- accountability, responsiveness and openness;[164] and
- good public administration, including administrative efficiency.[165]

Second, regard should be had to the status of administrative justice as a fundamental right – a right underpinned by 'the fundamental constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms'.[166]

Third, our courts' approach should, as a matter of substance, be coherent and consistent both internally (in the sense that the approach to the interpretation of the various elements of 'administrative action' is coherent and consistent) and externally (in the sense that it coheres

[162] For a criticism of the approach in *Grey's Marine*, see Klaaren & Penfold op cit note 131 at 63-71 to 63-73.
[163] *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) para 54.
[164] Section 1(d) of the Constitution.
[165] See s 195 of the Constitution. See also ss 33(3)(c) and 195(1)(b) of the Constitution.
[166] Froneman J in *Nakin v MEC Department of Education, Eastern Cape Province* 2008 (6) SA 320 (Ck) para 34. See chapter 2, para 2.

with related aspects of constitutional jurisprudence). Principled coherence is crucial both in ensuring that decisions as to the application of administrative-law review are fair and in promoting the legitimacy of judicial review.

Fourth, the constitutional structure of administrative justice should be respected. While PAJA must be interpreted in light of the Constitution, and the interpretation of the various elements of 'administrative action' should be based on the underlying purpose of those elements,[167] the meaning given to the language of PAJA should not be unduly strained.

Fifth, our courts should adopt a reasoned and transparent approach. Where appropriate, they should take care to either apply or distinguish similar cases, to engage with the language of PAJA and s 33, and to explain their reasoning – including the substantive bases for their decisions. As Quinot put it:[168]

> 'Courts are not simply required to explain their decisions, but required to provide *substantive* justification within the particular normative framework of the Constitution. Judges are thus obliged openly and honestly to tell us what the substantive bases of their decisions are, including what values, policy objectives or political considerations truly motivated a particular outcome.'

My thesis focuses on those elements of administrative action that most starkly raise issues of underlying principle. I first examine the meaning of exercising a public power or performing a public function. Drawing the line between public and private power is often a difficult exercise which should be undertaken with careful regard to the reasons why public power is held to heightened standards of accountability and transparency and in a manner which avoids the formalism that has characterised some of our courts' judgments on this issue. Next, I consider some key aspects of the requirement that the decision is 'of an administrative nature'. In particular, I consider the approach to distinguishing administrative action from legislative or judicial action or from other forms of executive action. It is important that these distinctions are drawn in a coherent and consistent manner having regard to, amongst others, the doctrine of separation of powers and constitutional accountability. Arguably, no other aspect of our court's treatment of the meaning of administrative action raises these issues of fundamental principle as starkly as the exclusion of executive action that is of a policy or political nature.

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[167] See eg *JDJ Properties* supra note 161 para 13.
[168] Op cit note 49 at 113, emphasis in the original.

8. SUMMARY

I have explained that a substantive conception of the scope of administrative-law review involves drawing the boundaries between conduct that is and is not 'administrative action' based on substantive principle, including having proper regard to the constitutional context. A substantive approach involves deciding matters based on their substance and the substance of the principles underpinning them rather than on the basis of superficial form. But the adoption of such an approach is not a licence to disregard the text of PAJA. It requires courts to tread a middle path: to accept the constraints flowing from the language of PAJA in relation to the elements of 'administrative action' while interpreting them in a manner that avoids formalism and promotes fundamental values.

As I hope to have demonstrated, a substantive conception of the scope of administrative-law review is not only desirable as a matter of principle; it is, in the South African context, mandated by our Constitution. In fact, as I see it, a substantive approach is, in our context, synonymous with a constitutionally grounded approach.

The adoption of a substantive conception of the scope of administrative-law review does not mean that all reliance on formal reasons should be abandoned. As with all areas of law, formal reasons play an important role in promoting certainty and predictability. They should, however, not do so at the expense of substantive principle. Formal reasons must be moulded, and where appropriate revisited, on the basis of substantive reasons. While it is preferable, where possible, to adopt a relatively precise test for a particular component of the definition of 'administrative action', the accommodation of substantive reasoning might, in some instances, require an open-ended test that has regard to a variety of relevant, substantive considerations – some of which might be weighted more heavily than others.

9. CHAPTER OUTLINE

Chapter 1: Introduction

In this chapter, I have explained what I mean by substantive reasoning, the importance of a substantive approach to the scope of administrative-law review, and the manner in which this approach both accords with constitutional principle and is mandated by the Constitution.

Chapter 2: The framework of administrative-law review

The next chapter describes the constitutional framework for administrative-law review in so far as is relevant to an analysis of the scope of that review, including: the nature of just administrative action as a constitutional right and the relationship between this right and PAJA; the distinction between administrative-law review and other forms of public-law review; the core principles of separation of powers, accountability, responsiveness, openness, participation and good government; and the roles of deference and variability in the project of giving meaning to 'administrative action'.

Chapter 3: The distinction between public and private powers or functions

The first of the selected elements of 'administrative action' that I consider is the meaning of *public* power or functions. In examining the various factors that our courts have identified for purposes of attempting to draw the distinction between public and private functions, I explore the manner in which this distinction might apply in relation, first, to government and, working outwards, to state-owned entities, statutory agencies and entities that owe their authority or mandate to some form of government involvement and then to entities that wield regulatory power that is not underpinned by governmental authority. I argue that a substantive approach to the public/private divide – one which emphasises the reasons why public power warrants different treatment to private power – suggests that government always acts publicly and there is little room to argue that the exercise of state-endorsed power is private in nature.

Chapter 4: Distinguishing between administrative action and other exercises of public power

Chapter 4 deals with the distinction between 'administrative action' and other forms of public power or functions based on the nature of the power or function. In the language of PAJA, the question is whether the conduct is 'of an administrative nature'.

The distinctions between administrative action, on the one hand, and legislative or judicial action, on the other, should be based firmly on the separation of powers and the system of accountability contemplated in the Constitution. Against this backdrop, I argue that a constitutionally grounded approach to these distinctions requires *both* an institutional and a functional test, ie a function constitutes an excluded legislative or judicial act only if it is: (i) a legislative act performed by an elected and deliberative legislature or (ii) a judicial (i.e. adjudicative) act performed by a court or judicial officer.

Turning to the distinction between administrative and executive action, the crucial consideration is whether or not it is appropriate to subject the relevant decision to the rigours of administrative-law review (as opposed to more limited review based on legality). This is an issue that goes to the heart of constitutional values such as the separation of powers and accountability and the courts' constitutional and institutional competence. I argue that the most important considerations on this score are whether the decision involves policy formulation or political judgement in the sense that it is constitutionally appropriate for political, rather than legal, accountability to attach to the decision, save where the bounds of legality are exceeded.

Chapter 5: Conclusion

In the concluding chapter, I pull together the key themes and conclusions of my study, including assessing the extent to which our courts have developed a coherent, substantive conception of the scope of administrative-law review and suggesting ways in which the approach might, in my view, be improved.

CHAPTER TWO

THE FRAMEWORK, PRINCIPLES AND VALUES OF ADMINISTRATIVE-LAW REVIEW

1 INTRODUCTION

In this chapter, I explore some of the key issues that animate administrative-law review and which play an important role in seeking to delineate the scope of that form of review. I start by considering the nature of administrative justice as a fundamental right and the relationship between that right and PAJA. Next, I distinguish administrative-law review from two other forms of public-law review, namely, legality review and unconscionable state conduct. This is followed by a discussion of the key constitutional principles and values which shape administrative law: the separation of powers and accountability, responsiveness, openness, participation and administrative efficiency. The final portion of this chapter deals with two additional concepts that are important to the determination of the scope of administrative-law review: variability and deference.

2 ADMINISTRATIVE JUSTICE AS A FUNDAMENTAL RIGHT

Section 33 of the Constitution entrenches the right to administrative action that is lawful, reasonable and procedurally fair as well as the right to written reasons. Just administrative action is thus a fundamental right.

Brassey argues that, save for in exceptional circumstances where a statutory power is 'specifically tailored to protect the individual *qua* individual',[1] administrative justice should be viewed not through the lens of individual rights but rather as a means to control public power in the public interest, and he suggests that it is mistaken to speak of individual rights in this context.[2] He even goes so far as to remark that 'in suggesting that everyone has a 'right to administrative justice', clause 33 of the Bill of Rights hopelessly oversimplifies the true state of the law'.[3] According to Brassey, it is thus acceptable to regard administrative-law review as a 'residuary', gap-filling mechanism the application of which expands and contracts depending on whether other appropriate means to control the relevant power are in

[1] Martin Brassey 'Back off but back up! Administrative law rightly yields to labour law' (2009) 2 *Constitutional Court Review* 209 at 234.
[2] Ibid at 220-1, 226-7, 234-5.
[3] Ibid at 221.

place.[4] Brassey colourfully likens this form of review to 'the Cheshire cat; it can exist at one time and then fade away, leaving only the reminder of its existence in the guise of a smile'.[5]

I disagree. As its language makes clear, s 33 of the Constitution is plainly a constitutional right. That being the case, it must be interpreted as right-conferring. The right to just administrative action is, as the Constitutional Court has held, 'a fundamental right like any other'.[6] The constitutional right cannot, as Brassey contends, '[oversimplify] the true state of the law'. Given the Constitution's supremacy, the law must, to the extent necessary, be moulded in light of the Bill of Rights and 'the true state of the law' cannot somehow exist apart from the Bill of Rights. As the Constitution makes clear, if there is any inconsistency between the common law (and statute or customary law), the common law must either yield or adapt in the face of the Bill of Rights.[7] A lawyer of Brassey's calibre must know this. That being the case, he presumably does not mean to suggest that s 33 of the Constitution and 'the true state of the law' are distinct. His suggestion that s 33 'hopelessly oversimplifies the true state of the law' might rather be intended to presage his contention that this section's inclusion in the Bill of Rights may have been a mistake.[8]

But it seems to me that, far from being a mistake, the constitutional entrenchment of the right to administrative justice was a deliberate, and salutary, acknowledgement of the dire impact that administrative injustice has on affected individuals and groups. As O'Regan has noted:[9]

> 'Recognising that there is a right to administrative justice is the most important starting point in addressing all the questions in modern administrative law. It places citizens at the heart of administrative law enquiries and should ensure that they are not forgotten when the importance of bureaucratic efficiency, cost-effectiveness and the proper democratic role of the judiciary … are asserted.'

While the right to administrative justice undoubtedly serves the public interest in accountable, participative, responsive, transparent and efficient administration, it is also

[4] Ibid at 220-1, 231-2.
[5] Ibid at 232.
[6] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 24.
[7] Sections 2 and 39(2) of the Constitution.
[8] Brassey op cit note 1 at 235. For the notion that individual rights should not be placed at the core of public law in the UK, see David Feldman 'The distinctiveness of public law' Mark Elliott & David Feldman (eds) *The Cambridge Companion to Public Law* (2015) 17 at 34 ('it is a mistake to try to put individual rights at the centre of 'public law' and its procedures'), *R v Somerset County Council* [1998] Env LR 111 at 121 ('Public law is not at base about rights … it is about wrongs – that is to say misuses of public power').
[9] Kate O'Regan 'Foreword' 2006 *Acta Juridica* vii at vii-viii.

underpinned by ‘the fundamental constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms’.[10] In advancing these values, administrative justice both serves the public interest and protects the interests of those individuals or groups who are at the sharp end of unlawful, unreasonable or procedurally unfair public decision-making. There is thus much to be said for Jowell’s view that the right to administrative justice is an essential democratic right:[11]

> ‘At its core [administrative justice] is the right to be treated lawfully and with due regard to the proper merits of a person’s cause. Failure to provide that treatment diminishes a person’s sense of individual worth. In a democracy properly so-called everyone has the right to equal respect, and it is this respect which administrative injustice denies. We all know the frustration, irritation, anger or sense of desperation that we feel when we are not properly listened to by those who wield public power, or when we are treated in a fashion that does not permit redress for decisions that vary from the arbitrary, gratuitously offensive to the unnecessarily oppressive. In a constitutional democracy we must have a right not to be treated that way by those who exercise power *on our behalf*.’

The point is starkly illustrated by South Africa’s past in which the state’s administrative machinery, and rampant administrative injustice, was central to the implementation of apartheid. As the Constitutional Court recently reminded us:[12]

> ‘The right to just administrative action has particular significance in the South African context. Hoexter explains that during the apartheid era, administrative law was used as ‘an instrument of oppression, a means of recognising and facilitating the use of wide discretionary power which was conferred for deliberately discriminatory ends’.’

Arbitrary administrative decision-making by the apartheid state – and our courts’ failure adequately to combat the abuse of power and to hold the administrative state to account – undermined the fabric of government. But it did more than that: it gave rise to significant

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[10] Froneman J in *Nakin v MEC Department of Education, Eastern Cape Province* 2008 (6) SA 320 (Ck) para 34.
[11] Jeffrey Jowell QC ‘The democratic necessity of administrative justice’ 2006 *Acta Juridica* 13 at 16-17, emphasis in original.
[12] *Gijima* supra note 6 para 25, quoting Cora Hoexter *The Transformation of South African Administrative Law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000* PhD thesis, University of the Witwatersrand (2009) at 231. See also *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (‘*SARFU*’) para 133: ‘In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability.’

hardship and suffering by those affected by the abuse of state power. This effect was felt not only in the benefits that were removed or denied or the burdens that were imposed through administrative decision-making, but in the impairment of dignity that arose when persons were prejudiced by arbitrary or unreasonable decision-making, when they were not given the opportunity to influence decisions that affected their lives and those of their families, or when they were not furnished with reasons for those decisions.

Section 33 of the Constitution is strongly instrumental in nature. It is underpinned by the constitutional aim of controlling, or preventing the abuse of, public power. But the public's interest in combatting the abuse of power should not detract from the notion that individual instances of abuse infringe the rights of affected persons. Moreover, the fact that the right to administrative justice is instrumental is not a good reason to deny it the status of a constitutional right. By way of example, the right to freedom of expression is clearly a fundamental right despite the fact that some of the most powerful rationales for protecting this right (such as the pursuit of truth or the proper functioning of democracy) are instrumental in character.[13]

3 THE RELATIONSHIP BETWEEN SECTION 33 AND PAJA

PAJA is constitutionally mandated legislation aimed at giving effect to the rights in s 33(1) and (2) of the Constitution.[14] It is the vehicle through which administrative-law reviews must generally be brought.[15] Accordingly, while s 33 of the Constitution may be used to challenge PAJA on the basis that it fails properly to give effect to the constitutional right,[16] litigants who seek to review administrative action may not sidestep PAJA and rely directly on s 33.[17] This accords with the principle of subsidiarity, one manifestation of which is that 'where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that

[13] Leo Boonzaier 'A decision to undo' (2018) 135 *SALJ* 642 at 653. For a discussion of the rationales underpinning freedom of expression, see Dario Milo, Glenn Penfold & Anthony Stein 'Freedom of expression' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) at 42.5.

[14] Section 33(3) of the Constitution read with PAJA's long title and preamble. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 25.

[15] *Bato Star* supra note 14 para 25, *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 96-7, 99, 436-7, *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 99. Other legislation, such as the Labour Relations Act 66 of 1995, may also perform this function. See *Sidumo v Rustenburg Platinum Mines Limited* 2008 (2) SA 24 (CC) paras 89-104.

[16] Section 33 of the Constitution may also be used as a basis to challenge other legislation. See *Zondi* supra note 15 para 99.

[17] *New Clicks* supra note 15 paras 96-7.

legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'.[18]

As explained in chapter one, all legislation must be interpreted in the light of constitutional values – particularly the values in the Bill of Rights[19] – and in a manner that is, in so far as reasonably possible, constitutionally compliant.[20] This is particularly true of legislation which is aimed at giving effect to a constitutional right. It thus comes as no surprise that our courts have regularly emphasised the need to interpret PAJA 'through the prism of s 33 of the Constitution'[21] and in a manner which, where possible, accords with s 33.[22] As Plasket AJA observed in *JDJ Properties*,[23] this means that 'PAJA should be interpreted generously and purposively and that austere formalism in its interpretation should be avoided'.

In relation to the meaning of 'administrative action', the Constitutional Court has adopted the approach that one must first assess whether the conduct falls within the meaning of this phrase in s 33 of the Constitution and only if this is the case does one then ask whether PAJA's definition nonetheless excludes it.[24] In other words, PAJA's definition 'only comes into the picture once it is determined that the conduct in question constitutes administrative action under s 33'.[25] That being the case, the meaning of 'administrative action' in PAJA can only be narrower, and not broader, than the constitutional conception of 'administrative action'.

This approach is, in my view, flawed. While PAJA is expressly aimed at giving effect to the constitutional right to just administrative action, there is no reason in principle why its drafters could not have extended the application of PAJA's administrative-law regime to a wider ambit of conduct than that envisaged in s 33.[26] It may, for example, be that, while s 33 is arguably limited to acts of the public administration, PAJA applies more broadly.[27]

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[18] *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 51. See also eg *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 73. For detailed discussions of the principle of subsidiarity, and the reasons underpinning it, see *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) paras 44-74, 160-182. See also para 3.3 infra.

[19] Section 39(2) of the Constitution.

[20] See eg *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 35, *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28. See chapter 1, para 5.2.1.

[21] *Gijima* supra note 6 para 30.

[22] See eg *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 41-3, *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 123 (per O'Regan ADCJ), *New Clicks* supra note 15 paras 100, 128, 451 (per Chaskalson CJ).

[23] *JDJ Properties CC v Umngeni Local Municipality* 2013 (2) SA 395 (SCA) para 13.

[24] *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) paras 139, 150, *Gijima* supra note 6 paras 31-2, *New Clicks* supra note 15 para 446 (per Ngcobo J), *Sidumo* supra note 15 paras 202, 240 (per Ngcobo J).

[25] *Chirwa* supra note 24 para 139.

[26] Boonzaier op cit note 13 at 650 makes a similar point in relation to standing.

[27] See chapter 3, para 1.

In his dissenting judgment in *MTO Forestry*,[28] Rogers AJA opined that the 'unstated reason' for the Constitutional Court's assumption that conduct is not reviewable in terms of PAJA if it is not 'administrative action' for purposes of s 33, 'must have been' that conduct which does not constitute 'administrative action' as envisaged in s 33 is not a decision 'of an administrative nature' and thus falls outside PAJA's definition.[29] While it seems to me unlikely that the Constitutional Court in fact intended its approach to be based on PAJA's language (and, in particular, on the inclusion of the phrase 'of an administrative nature' in PAJA's definition of 'decision'),[30] Rogers AJA's explanation has the attraction of grounding the Constitutional Court's approach in PAJA's text.

4 ADMINISTRATIVE-LAW REVIEW DISTINGUISHED FROM OTHER FORMS OF PUBLIC-LAW REVIEW

The most important consequence of classifying conduct as 'administrative action' is that it is reviewable on the grounds of review set out in s 6(2) of PAJA. It follows that one of the key questions that arises under a substantive approach to the meaning of 'administrative action' is whether or not it is *appropriate* to subject the decision to administrative-law review.[31] Proper consideration of this question requires one to take into account the extent to which public power is in any event subject to review beyond the four corners of PAJA. I thus turn to examine two species of constitutional review: legality review and review flowing from unconscionable state conduct.[32]

4.1 Legality review

4.1.1 *The content of legality review*

Legality review is a form of constitutional review which derives from the rule of law – a founding constitutional value entrenched in s 1(c) of the Constitution.[33] It applies to every

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[28] *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA).
[29] Ibid para 84.
[30] For example, in *New Clicks* supra note 15 para 446 Ngcobo J stated: 'The meaning of administrative action must be determined by reference to s 33 of the Constitution and not PAJA', while the court in *Gijima* op cit note 6 paras 31-2 relied on the fact that s 33(3) of the Constitution requires legislation to provide for the judicial review of 'administrative action' which must refer to the 'administrative action' contemplated in s 33(1) and (2).
[31] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 43.
[32] I leave aside, for present purposes, reviews which flow from contraventions of the Bill of Rights or other provisions of the Constitution as well as special statutory reviews. The latter is briefly discussed in chapter 1, para 3.
[33] *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 17.

exercise of public power or performance of a public function,[34] and is now a well-established 'alternative pathway to judicial review where PAJA finds no application'.[35] As is apparent from the discussion which follows, legality review includes a number of grounds of review traditionally found in administrative law. It has been described as 'a parallel universe of administrative law'.[36]

While the grounds of review embodied in the principle of legality developed rapidly and may evolve further,[37] it is now established that this principle includes the following grounds of review: the decision is not empowered by law (ie it is *ultra vires*);[38] it does not accord with the empowering provision;[39] the power was not exercised 'personally, in good faith and without misconstruing the nature of [the] power';[40] or the decision was tainted by ulterior or improper motive,[41] mistake of fact[42] or irrationality. In addition, our courts have held that the principle of legality includes, in certain contexts, the duty to give reasons for a decision.[43]

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[34] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58, *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) paras 39, 68, *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC) footnote 13. Cf *President of the Republic of South Africa v Democratic Alliance* 2019 (11) BCLR 1403 (CC) para 32, where the court, without deciding the issue, left open whether the President was correct in conceding that a decision to reshuffle Cabinet (a decision which the court, at para 29, described as 'located within the heartland of the Executive') has to be rational and is reviewable under legality. For the court a quo's judgment finding that the Cabinet reshuffle was subject to legality review, including for rationality, see *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) paras 18-19.

[35] *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA) (*NDPP v FUL*') para 28. See also Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 114-15.

[36] Cora Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 163 at 184. See also Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (DPhil thesis, Rhodes University, 2002) at 164, Jonathan Klaaren 'Redlight, greenlight' (1999) 15 *SAJHR* 209 at 212.

[37] See generally Cora Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165, Cora Hoexter 'The rule of law and the principle of legality in South African administrative law today' in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Matthews* (2011) 55, Alistair Price 'The evolution of the rule of law' (2013) 130 *SALJ* 649, Lauren Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 130 *SALJ* 810, Cora Hoexter 'A rainbow of one colour?' op cit note 36 at 163, Andrew Konstant 'Administrative action, the principle of legality and deference – The case of *Minister of Deference and Military Veterans v Motau*' *Constitutional Court Review* 7 (2015) 68 at 86.

[38] *Fedsure* supra note 34 para 58.

[39] *NDPP v FUL* supra note 35 para 29, *Minister of Education, Western Cape v Beauvallon Secondary School* 2015 (2) SA 154 (SCA) para 16, *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2018 (4) SA 125 (SCA) para 29.

[40] *SARFU* supra note 12 paras 148-9.

[41] *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 47.

[42] *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 32. For a useful recent discussion of mistake of fact, see *Airports Company South Africa v Tswelokgotso Trading Enterprises* 2019 (1) SA 204 (GJ) paras 8-14.

[43] *Judicial Services Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) paras 43-4, 51, *Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP) at 141.

Of the various components of legality review, rationality review has generated the most interest.[44] As originally conceived, rationality in this context was substantive: irrationality arises if a decision is not rationally related to the purpose for which the power was given.[45] The Constitutional Court subsequently took rationality review a significant step further, holding that it also has a procedural component. Procedural irrationality arises if a step in the decision-making process bears no rational relation to the purpose for which the power was conferred and 'the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality'.[46] Importantly, and controversially, procedural rationality has been applied, as a component of legality review, to challenge: (i) a failure to consider a relevant consideration which compromised the rationality of the decision-making process viewed as a whole;[47] and (ii) a failure to consult affected or interested parties.[48] The latter form of procedural irrationality arises where a failure to consult with interested persons is not rationally connected to the purpose sought to be achieved, including where there is no consultation with persons or organisations who have special knowledge bearing on the decision to be taken.[49]

While the Constitutional Court has from time to time proclaimed, in rather emphatic terms, that legality review does not include procedural fairness[50] – and has recently emphasised that procedural rationality is distinct from procedural fairness[51] – these concepts operate in a similar manner and it is, in practice, difficult to discern whether or not it is

[44] On rationality review generally, see Alistair Price 'The content and justification of rationality review' (2010) 25 *SAPL* 346, Max du Plessis & Stuart Scott 'The variable standard of rationality review: Suggestions for improved legality jurisprudence' (2013) 130 *SALJ* 597, and the articles cited supra note 37.
[45] *Pharmaceutical Manufacturers* supra note 33 para 85.
[46] *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) ('*DA v President*') para 37.
[47] Ibid para 86.
[48] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 50-1, 68-9, *Electronic Media Network Ltd v e.tv (Pty) Ltd* (CC) 2017 (9) BCLR 1108 (CC) paras 65-6, 129-31, 150-1.
[49] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) ('*Scalabrini I*') paras 68-72, *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) para 17, *Earthlife Africa v Minister of Energy* 2017 (5) SA 227 (WCC) paras 48-50. The finding in *Scalabrini I* that the failure to consult was irrational was also influenced by the fact that a government representative had undertaken to consult with the relevant organisations in relation to the category of decision (i.e. a decision to close a refugee reception office) and no explanation was given for not having done so (see paras 70 and 72).
[50] *SARFU* supra note 12 para 127, *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) paras 77-8, *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 59. Cf *Motau* supra note 31 paras 81-3, in which the Constitutional Court seemed to suggest that *Masetlha* should be confined to its context and the nature of the power at issue in that case, and expressly left open the question whether or not the principle of legality required the decision-maker in that case 'to act in a procedurally fair manner' (para 83).
[51] *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) para 64.

irrational not to hear affected persons in a particular case.[52] In a certain respect, any failure to hear affected persons (or at least those with special knowledge or a particular perspective bearing on the decision) is not rationally connected to the purpose of making a good decision. Indeed, one of the accepted rationales for insisting on procedural fairness in administrative law is that hearing affected persons enhances the quality of the eventual administrative decision.[53] In Hoexter's words: 'it is difficult to think of a decision whose rationality would not be enhanced by hearing both sides impartially'.[54] Nevertheless, it seems fairly clear, reading the case law as a whole, that procedural fairness (or a duty to consult) does not form a core, necessary component of the principle of legality and its application as a matter of legality review is likely to remain the exception rather than the rule. The application of procedural fairness is thus much narrower in the sphere of legality review than under PAJA.[55]

It might legitimately be asked whether it is appropriate for our courts to have extended the grounds of legality review in the manner described above.[56] That is an issue that lies beyond the scope of this thesis. It is, however, necessary to address the approach that the Constitutional Court recently adopted in *SARIPA*.[57] Although the court in *SARIPA* did not specifically locate its analysis in the context of legality review, it held that the exercise of all public power must not be arbitrary in the sense that 'every action taken in the exercise of public power must be underpinned by plausible reasons' and, perhaps most dramatically, those reasons 'must *justify* the action taken'.[58] Jafta J, writing on behalf of the majority, made clear that this requirement of non-arbitrariness is separate to, and entails a higher standard of review than, the concept of rationality.[59] On the facts, Jafta J concluded that the state's failure

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[52] For helpful discussions on this score, see Melanie Murcott 'Procedural fairness as a component of legality: Is reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 at 270-2, Price 'Evolution' op cit note 37 at 654-5.

[53] See eg Jonathan Klaaren & Glenn Penfold 'Just administrative action' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) at 63-81: 'The primary rationale for the right to procedural fairness is that it improves the quality of administrative decision-making by ensuring that all relevant information, interests and points of view are placed at the administrator's disposal'.

[54] 'The rule of law' op cit note 37 at 61. For decisions finding that procedural rationality did not require participation by affected persons, see *SAAB Grintek Defence (Pty) Ltd v South African Police Service* [2016] 3 All SA 669 (SCA) para 34, *National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) paras 16-27.

[55] In terms of s 3(1) of PAJA, procedural fairness applies whenever a person's rights or legitimate expectations are materially and adversely affected by administrative action.

[56] *Tswelokgotso Trading* supra note 42 paras 7, 15.

[57] *Minister of Justice v SA Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) ('*SARIPA*').

[58] Ibid para 49, emphasis added. See also ibid paras 47, 54.

[59] Ibid para 55. Cf *Rakgase v Minister of Rural Development and Land Reform* [2019] 4 All SA 511 (GP) paras 5.3.2 to 5.3.4, which refers to *SARIPA* and states that 'arbitrariness is but one of the forms of irrationality'.

to provide reasons justifying the difference in treatment of certain groups rendered the relevant policy arbitrary.[60]

SARIPA, in my view, goes too far in requiring reasons which *justify* action involving the exercise of public power. There are at least three reasons why this is the case. The primary difficulty is that, if applied to all exercises of public power, it would entail courts potentially invalidating executive decision-making on the basis that the decision has not been adequately justified in situations where separation of powers concerns might be at their highest (eg in matters involving economic policy or foreign relations or inherently political matters such as the appointment of Cabinet ministers). Second, applying a test of justifiability to all exercises of public power blurs the distinction between matters which involve limitations of fundamental rights and those which do not. Third, it is difficult to reconcile the reasoning in *SARIPA* with the case law which holds that 'mere differentiation' (ie unequal treatment that does not amount to discrimination) will survive scrutiny under s 9(1) of the Constitution if it is rationally related to a legitimate objective.[61] As the Constitutional Court stated in *Prinsloo*, in applying s 9(1)'s predecessor[62] to differentiation occasioned by legislation: 'The question of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification, but irrelevant to the question as to whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry'.[63]

The correctness of this aspect of *SARIPA* is therefore questionable. But, at the very least, it seems to me that the dictum in this case should be confined to instances where the public conduct results in unequal treatment[64] and, more importantly, that it involves a 'soft-look' approach to justification (eg might the reasons advanced by the decision-maker plausibly justify the decision?). If this were not the case, there would potentially be little difference between the level of scrutiny which applies when conduct infringes a fundamental right (ie

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[60] Ibid para 54.
[61] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) paras 25-6, *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 43, *Weare v Ndebele NO* 2009 (1) SA 600 (CC) para 60. Curiously, while the *SARIPA* judgment distinguishes between arbitrariness and irrationality (at para 55), the portion of the judgment which deals with arbitrariness relies upon a passage from *Prinsloo* which, on my reading, treats arbitrariness as the flip-side of rationality and concludes, in language that is consistent with the application of a rationality test, that the reasons 'must show that power was exercised to achieve a legitimate government purpose, for which that specific power was conferred' (paras 53-4).
[62] Section 8(1) of the interim Constitution.
[63] *Prinsloo* supra note 61 para 35.
[64] See the *SARIPA* court's statement, with reliance on *S v Makwanyane* 1995 (3) SA 391 (CC) para 52, that 'arbitrariness inevitably leads to unequal treatment proscribed by the Constitution' (ibid para 53).

the reasonableness and justifiability standard in s 36(1) of the Constitution) and that which applies to all exercises of public power. This would be problematic.

Another recent case worth mentioning is *Mbina-Mthembu*.[65] In this case, Plasket J stated that: (i) the common-law grounds of review apply to all exercises of public power; (ii) PAJA, in essence, codified (and developed) the common-law grounds of review; and (iii) '[a]s a result, and generally speaking, the same grounds of review in terms of s 6 of PAJA now apply to reviews in terms of the principle of legality'.[66] I agree with proposition (ii) but not with the other two propositions. While the common law might 'inform the content' of legality review,[67] this species of review owes its source not to the common law but to the principle of the rule of law in s 1(c) of the Constitution. Legality review should be shaped so as to suit its purpose of ensuring a measure of accountability in those contexts where it is inappropriate to subject a particular exercise of public power to the rigours of administrative-law review. This purpose would be undermined if legality review simply mirrors the grounds of review found in PAJA. That being the case, perhaps the best reading of *Mbina-Mthembu* is that Plasket J's use of the phrase 'generally speaking' means that proposition (iii) simply conveys that there is a large degree of overlap between the grounds of legality review and PAJA review? This reading would be consistent with the fact that Plasket J cites his own judgment on behalf of the SCA in *Minister of Home Affairs v Public Protector*[68] as authority for proposition (iii) and, in that judgment, Plasket AJA referred to two respects in which the grounds of legality review are, at least at present, narrower than PAJA's grounds: those exercising executive power are not obliged to act fairly and disproportionality 'has not yet been recognised as a ground of review, except in [Sachs J's minority judgment in *New Clicks*]'.[69]

4.1.2 *The distinction between legality review and administrative-law review*

As is apparent from the discussion above, there is plainly a significant degree of overlap between the grounds of review that apply as a matter of legality and the grounds of administrative-law review. Nevertheless, it is also apparent that PAJA involves 'a higher level of scrutiny' than the principle of legality[70] and that there remain material differences

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[65] *Mbina-Mthembu v Public Protector* 2019 (6) SA 534 (ECB).
[66] Ibid para 13.
[67] *Pharmaceutical Manufacturers* supra note 33 para 45.
[68] 2018 (3) SA 380 (SCA).
[69] Ibid para 38, footnote 25. See the discussion of Sachs J's judgment in *New Clicks* in chapter 4, para 2.2.2.
[70] *Motau* supra note 31 para 27.

between these species of review. To the extent that the judgment in *Mbina-Mthembu* might suggest otherwise, it is, in my view, incorrect.[71]

One difference between administrative-law and legality review, as we have already seen, is the more limited scope for procedural fairness under legality review. But perhaps the most significant difference between legality review and administrative-law review is that, while the latter includes review for unreasonableness, the former does not.[72]

Reasonableness review is sourced in s 6(2)(h) of PAJA, which provides that administrative action may be reviewed if it 'is so unreasonable that no reasonable person could have so exercised the power or performed the function'. Despite the literal language of s 6(2)(h) – which suggests an egregious level of unreasonableness – and in light of the unqualified right to reasonable administrative action in s 33 of the Constitution, the Constitutional Court in *Bato Star* held that this ground of review applies where the decision is, simply, 'one that a reasonable decision-maker could not reach'.[73] O'Regan J went on to state as follows:[74]

> 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the 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.'

Reasonableness review to some extent involves scrutiny of the merits (or substance) of the decision.[75] It requires the court to assess the substantive reasonableness (but not the

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[71] *Mbina-Mthembu* supra note 65 paras 12-13. See eg *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP) para 124: 'PAJA provides a broader range of review grounds than the principle of legality'.
[72] Cf the minority judgment of Sachs J in *New Clicks* supra note 15 paras 632-9 (legality review of delegated legislation should include review for unreasonableness).
[73] *Bato Star* supra note 14 para 44, with reliance on *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER (HL) at 157. See also *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 (2) SA 191 (SCA) para 12, which described the test as follows: 'whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached'. Cf Willis JA's dissenting judgment in *Mostert v Nash* 2018 (5) SA 409 (SCA), who stated that the test in s 6(2)(h) of PAJA is not 'ordinary' reasonableness and described the threshold for review as 'a high one' (paras 87 and 148).
[74] *Bato Star* supra note 14 para 45.
[75] *Sidumo* supra note 15 paras 108-9, *Medirite (Pty) Ltd v South African Pharmacy Council* 2015 JDR 0564 (SCA) para 10. While a number of other grounds of review, particularly rationality and mistake of fact, also involve scrutiny of the decision's merits, this scrutiny is more pronounced in reasonableness review.

correctness) of the administrative decision;[76] to assess whether the decision is one that was within the range of conduct open to a reasonable decision-maker.[77]

It appears that reasonableness requires, at a minimum, that a decision is both rational and proportionate.[78] As to the latter, Plasket J indicated in *Ehrlich*[79] that unreasonable decisions include those that are 'oppressive in the sense that they 'have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result''.[80] This is consistent with Hoexter's description of proportionality as avoiding 'an imbalance between the adverse and beneficial effects or consequences of an action' and encouraging the administrator 'to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end'.[81] It also worth noting that, according to *Bato* Star, a decision may be reviewed on the basis of unreasonableness if it 'will not reasonably result in the achievement of the [intended] goal', it is not 'reasonably supported on the facts' or it is 'not reasonable in the light of the reasons given for it'.[82] In addition, in those contexts in which an equilibrium is required to be struck with regard to a range of factors, reasonableness requires a decision that 'achieves a reasonable equilibrium'.[83]

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[76] *Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC) para 78, *Duncanmec (Pty) Ltd v Gaylard NO* 2018 (6) SA 335 (CC) paras 41-2, *Medirite* supra note 75 para 10.

[77] *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 at 554.

[78] Cora Hoexter 'Unreasonableness in the Administrative Justice Act' in Claudia Lange & Jakkie Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 148 at 153-4, Hugh Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) 121 *SALJ* 438 at 443, Cora Hoexter 'Standards of review of administrative action: review for reasonableness' in Jonathan Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 61 at 63, Cora Hoexter *Administrative Law* op cit note 35 at 340-6. On proportionality as a component of reasonableness review, see *Medirite* supra note 75 para 22, *Free Market Foundation v Minister of Labour* 2016 (4) SA 496 (GP) ('*FMF*') para 96, *New Clicks* supra note 15 para 637 (per Sachs J), *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) para 36, Hoexter 'A rainbow of one colour' op cit note 36 at 169, Du Plessis & Scott op cit note 44 at 601, Anashri Pillay 'Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?' (2005) 122 *SALJ* 419 at 420-1, Clive Plasket 'Disproportionality – The hidden ground of review: *Medirite (Pty) Ltd v South African Pharmacy Council & Another*' (2019) 136 *SALJ* 15.

[79] *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E).

[80] Ibid para 42, quoting Jeffrey Jowell 'Judicial review of the substance of official decisions' 1993 *Acta Juridica* 117 at 120. See also *Ehrlich* at paras 43-4, *Medirite* supra note 75 para 20.

[81] Hoexter 'Standards of review' op cit note 78 at 64. See also Paul Daly *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) at 143 (although Daly regards disproportionality as an indicium of, rather than as a self-standing test for, unreasonableness).

[82] *Bato Star* supra note 14 para 48.

[83] Ibid para 49. See also *Head, Western Cape Education Department v Governing Body, Point High School* 2008 (5) SA 18 (SCA) para 16.

Rationality is not only a component of reasonableness (in the sense that a decision which is irrational is per se unreasonable);[84] it is also an aspect of legality review – an aspect which involves (limited) scrutiny of the merits of the decision. Nevertheless, reasonableness review is conceptually different to rationality review[85] and involves a far more exacting standard of scrutiny.[86] In particular, rationality review simply requires a rational relationship between means and ends with no regard to proportionality or to an appropriate balancing of interests. The distinction between the two grounds of review is captured in a footnote in *Motau*:[87]

> 'Review for reasonableness is about testing 'the decision itself', whereas review for rationality is about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved – rationality is not about whether other means could have been used. Rationality review, as an evaluation of whether the 'minimum threshold' for the exercise of public power has been met, involves judicial restraint.'

To the extent that legality review, properly conceptualised, includes review for arbitrariness in the sense referred to in *SARIPA* (ie the action must be underpinned by plausible reasons that justify the action),[88] arbitrariness review would still require a materially lower level of justification than reasonableness review. There is, in particular, no indication in *SARIPA* that this form of arbitrariness review includes a proportionality enquiry. Whatever separation-of-power difficulties may arise from the inclusion of this ground of review in the menu of legality review grounds, this inclusion cannot be read as negating the distinction between reasonableness review under PAJA and legality review.

Another important sense in which administrative-law review, in my view, requires a more exacting level of scrutiny than its legality counterpart is the different nature of the rationality enquiry envisaged as part of legality review and that which applies in terms of s 6(2)(f)(ii) of PAJA.[89]

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[84] *Point High School* supra note 83 para 16, Price 'Evolution' op cit note 37 at 653. See also, in a non-administrative law context, *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) para 37.

[85] *DA v President* supra note 46 paras 29-32.

[86] *Scalabrini I* supra note 49 para 65, *SAAB Grintek* supra note 54 para 22, *New Clicks* supra note 15 para 108 (per Chaskalson CJ). See also Du Plessis & Scott supra note 44 at 601-3, Price 'Content and justification' supra note 44 at 357-9.

[87] Supra note 31 para 69, footnote 101.

[88] *SARIPA* supra note 57 para 49.

[89] Wallis JA refers to this possibility in *Minister of Defence v Xulu* 2018 (6) SA 460 (SCA) para 50: 'the concept of rationality that [the principle of legality] invokes is a narrow one, not necessarily the same as that applied in a review under s 6(2)(f)(ii) of PAJA'.

As explained above, substantive rationality as a component of legality review requires a rational relationship between the decision and the purpose for which the power was conferred, whilst procedural rationality requires a rational relationship between the decision-making steps and that purpose. The principle of legality thus requires a decision (and a process) that is rationally linked to the achievement of (or rationally capable of achieving) a particular purpose. Put differently, it requires 'a logical connection between the purpose sought and the method used to achieve that purpose'.[90] This conception of rationality (at least in its substantive, rather than procedural, incarnation)[91] is mirrored in s 6(2)(f)(ii)*(bb)* of PAJA, which refers to administrative action which is not rationally connected to 'the purpose of the empowering provision'. It is also similar to the type of rationality contemplated in s 6(2)(f)(ii)*(aa)* and, to a lesser extent, *(dd)* of PAJA, ie action that is not rationally connected to either 'the purpose for which it was taken' or 'the reasons given for it by the administrator'. All of these types of rationality require a decision that is designed to achieve an objective (with sub-paragraph *(dd)* going further and requiring the articulation of reasons in a manner which demonstrates a rational link between the decision and those reasons). A decision will survive scrutiny if it is rationally linked to a particular desired or mandated outcome.

The type of rationality envisaged in s 6(2)(f)(ii)*(cc)* is different.[92] This sub-paragraph provides that administrative action is reviewable if it is not rationally related to 'the information before the administrator'. This formulation cannot be read as simply contemplating a rational relationship between means and ends. It does not focus on the purpose at which the decision is aimed (or should be aimed) but rather goes to the relationship between the decision and the information that was at the decision-maker's disposal. Sub-paragraph *(cc)* thus requires the decision to be justified in some way by the information before the decision-maker. As Jafta J stated in his dissenting judgment in *Mamone*, s 6(2)(f)(ii)*(cc)* and *(dd)* require that 'the information on which the decision is based and the reasons given for such decision must *support and justify* the decision taken'.[93] It is thus apparent that the ground of review in sub-paragraph *(cc)*, and possibly the ground in

[90] Du Plessis & Scott supra note 44 at 617.
[91] Cf *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2019 (10) BCLR 1185 (CC) paras 48-50, holding that procedural rationality forms part of rationality review under s 6(2)(f)(ii) of PAJA. For a contrary view, see Jafta J's separate judgment in *PG Group* at paras 98, 106-19.
[92] Price 'Content and justification' op cit note 44 at 354 mentions that the rationality test in s 6(2)(f)(ii)*(cc)* is '[l]ess closely analogous' than the other sub-paragraphs of s 6(2)(f)(ii) to rationality as a component of legality review.
[93] Supra note 76 para 62, emphasis added.

sub-paragraph *(dd)*, involves more intensive scrutiny of the merits of the decision – and more closely approximates a reasonableness enquiry – than the types of rationality envisaged in the other sub-paragraphs of s 6(2)(f)(ii) and, more importantly for present purposes, the conception of rationality which flows from the principle of legality.[94]

4.2 Unconscionable state conduct

While the principle of legality is undoubtedly PAJA's 'current main competitor',[95] an additional basis for the constitutional review of public power has recently emerged in the Constitutional Court's jurisprudence: state conduct that is 'legally and constitutionally unconscionable when measured against public law standards of reliance, accountability and rationality'.[96]

This principle has its origin in *KZN JLC*,[97] in which the Constitutional Court held a provincial education department to its undertaking to pay a subsidy of stated (approximate) amounts to independent schools in circumstances in which the due date for the payment of the subsidy had already passed.[98] Cameron J, who wrote the majority judgment, remarked that the setting in which the department promised payment indicated 'that it was seriously given, in the expectation that it would be relied upon, and that payment in its terms would indeed be forthcoming, subject only to the possibility of due revocation'.[99] Accordingly, the department was not at liberty to reduce the subsidy after the due date for payment had passed for reasons of 'reliance, accountability and rationality'.[100] According to Cameron J, it 'seems both legally and constitutionally unconscionable that, more than a month after the first

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94 In *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) para 28 – a case involving a review of regulations – the court stated that one of the purposes served by rationality 'as a necessary element of lawful conduct by a functionary' was 'to ensure that the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base his action'. Although the phrase 'as a necessary element of lawful conduct by a functionary' suggests that the court was dealing with rationality as a component of the principle of legality and the court makes no mention of PAJA, the authority cited for this proposition, *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) para 21, dealt with the rationality enquiry in s 6(2)(f)(ii) of PAJA. To the extent that *SA Predator Breeders* may be read as authority for the proposition that the principle of legality, rather than PAJA, requires a rational connection between a decision and the facts or information available to the decision-maker, the court, in my view, erred. See also Cora Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *SALJ* 207 at 220.

95 Hoexter 'Enforcement of an official promise' op cit note 94 at 219, quoted with approval in *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) para 37.

96 This description of the majority's reasoning in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) ('*KZN JLC*') is taken from Froneman J's judgment on behalf of a unanimous court in *Pretorius* supra note 95 para 26. See also Froneman J's separate judgment in *KZN JLC* para 83.

97 Ibid.

98 Ibid paras 48, 52.

99 Ibid para 37.

100 Ibid paras 62-3.

tranche of the promised subsidy had already fallen due … the department should peremptorily reduce it'.[101]

While it is possible that unconscionable state conduct may in due course develop into a more general basis for review, it is, at present, arguably confined to the enforcement of promises made by public authorities upon which reliance was placed. While the enforcement of public-law promises raises issues such as the application of estoppel in a public-law context and the administrative-law concept of legitimate expectations (and their substantive protection),[102] there is, as things currently stand, not a significant overlap between the emerging principle of unconscionable state conduct and administrative-law review. This principle is thus not a current challenger to legality's status as PAJA's main competitor as a source of public-law review.

4.3 Subsidiarity

The principle of subsidiarity 'ensures that in litigation a lower-order and more detailed norm is resorted to in preference to a higher-order and more general norm'.[103] As we have seen, one manifestation of this principle is that a litigant must invoke constitutionally mandated legislation (such as PAJA) rather than bypassing that legislation and relying directly on the relevant constitutional right.

Although a number of judgments – including some emanating from the Constitutional Court – go the other way,[104] another implication of subsidiarity appears to be that a litigant may only invoke the principle of legality if the conduct does not amount to 'administrative action' and is thus not subject to PAJA review. In *Motau*,[105] Khampepe J stated the position in plain terms: 'The correct order of enquiry is to consider, first, whether PAJA applies, and only if it does not, what is demanded by general constitutional principles such as the rule of law'.[106]

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[101] Ibid para 57.
[102] M Murcott 'A future for the doctrine of substantive legitimate expectation? The implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Educations, KwaZulu-Natal*' *Potchefstroom Electronic Law Journal* (2015) 18(1) 3132, Hoexter 'Enforcement of an official promise' op cit note 94 at 223.
[103] Hoexter 'Enforcement of an official promise' op cit note 94 at 221. See also Melanie Murcott & Werner van der Westhuizen 'The ebb and flow of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43.
[104] See eg *Albutt* supra note 48 paras 81-3, *Beauvallon* supra note 39 para 16, *Ahmed v Minister of Home Affairs* 2019 (1) SA 1 (CC) para 45.
[105] Supra note 31.
[106] Ibid para 27, footnote 28. See also *NDPP v FUL* supra note 35 para 19, *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) paras 35-8, *Xulu* supra note 89 paras 47-50, *Minister of Home Affairs* supra note 68 para 28.

One exception to the preferent ordering of PAJA review over legality review has, however, recently arisen – an exception based not on the nature of the decision (or the decision-maker) but based rather on the identity of the person seeking to challenge the decision. In *Gijima* the Constitutional Court, controversially, held that an organ of state seeking to review its own decision does not have standing to bring an administrative-law review under PAJA, even if the decision amounts to administrative action, unless the organ of state relies upon public-interest standing.[107] In such circumstances, an organ of state must proceed by way of legality review.[108]

The implications of subsidiarity in respect of challenges based on unconscionable state conduct is somewhat unclear. Several judgments of the Constitutional Court suggest that the rule against unconscionable state conduct principle may be relied upon directly notwithstanding that the relevant conduct might constitute 'administrative action',[109] while an SCA judgment favours the application of subsidiarity in this context.[110] As Wallis JA put it in the latter case:[111] 'The development of a coherent administrative law demands that litigants and courts start with PAJA and only when PAJA does not apply should they look to the principle of legality and any other permissible grounds of review lying outside PAJA'.

5 KEY CONSTITUTIONAL PRINCIPLES AND VALUES

As explained in chapter one, several fundamental principles and values which emerge from the Constitution have an important role to play in shaping administrative law and, in particular, in delineating the scope of administrative-law review. In this portion of the

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[107] Supra note 6 paras 18-37 read with para 2. For criticism of the judgment in *Gijima*, see Boonzaier op cit note 13, Mitchel Nold de Beer 'A new role for the principle of legality in administrative law: *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*' (2018) 135 *SALJ* 613, Geo Quinot & Elsabé van der Sijde 'Opening at the close: Clarity from the Constitutional Court on the legal cause of action and regulatory framework for an organ of state in seeking to review its own decisions?' (2019) *TSAR* 324. In their dissenting judgment in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 112, Cameron and Froneman JJ forthrightly acknowledged the criticism levelled at *Gijima* and stated as follows: 'While its treatment of standing and delay has been the immediate target of this criticism, *Gijima* is also accused of aggravating the bifurcation or 'parallelism' in our administrative law between PAJA review as opposed to legality review. This has been a persisting source of academic concern. It may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time. Now is not that time. This is because the issue was not argued before us and also because this case may help show that the adverse consequences predicted of *Gijima* – which would be necessary to justify any fundamental change of course – may not necessarily eventuate.'

[108] *Gijima* supra note 6 paras 38-41.

[109] *KZN JLC* supra note 96, *Pretorius* supra note 95 para 36, *Hunter v Financial Sector Conduct Authority* 2018 (6) SA 348 (CC) para 100 (per Froneman J). See also Hoexter 'Enforcement of an official promise' op cit note 94 at 223-4.

[110] *Xulu* supra note 89 para 50.

[111] Ibid.

chapter, I briefly examine some of the constitutional principles and values that are particularly relevant to this enterprise.

5.1 Separation of powers

The separation of powers doctrine, which is implicit in the Constitution and forms 'part of our constitutional architecture',[112] is of special relevance to the topic of this thesis. Administrative law is itself 'an incident of the separation of powers'[113] and this doctrine is 'foundational for the distinction between administrative and other forms of governmental action'.[114]

Two components of the separation of powers are particularly relevant for purposes of this thesis. First, public power is divided between the various branches of government (legislative, executive and judicial).[115] Second, this separation is coupled with a system of checks and balances as between the various branches of government, which 'anticipates the necessary and unavoidable intrusion of one branch on the terrain of another'.[116] These two components were reflected in Constitutional Principle VI of the interim Constitution with which the (final) Constitution was required to comply: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.[117]

The Constitution's system of checks and balances includes the power of judicial review. The position in relation to constitutional matters is clear: law or conduct inconsistent with the Constitution is invalid,[118] and courts are obliged, when deciding a constitutional matter within their jurisdiction, to declare 'that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.[119] Judicial intrusion into the executive (and

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[112] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 91. On the doctrine of separation of powers generally, see Sebastian Seedorf & Sanele Sibanda 'Separation of powers' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) chap 15, K O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8 *Potchefstroom Electronic Law Journal* 1.
[113] *Pharmaceutical Manufacturers* supra note 33 para 45.
[114] *Scalabrini I* supra note 49 para 54.
[115] *SARFU* supra note 12 para 132, *e.tv* supra note 48 para 1.
[116] *Chairperson of the Constitutional Assembly, Ex parte: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 109.
[117] Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993.
[118] Section 2 of the Constitution.
[119] Section 172(1)*(a)* of the Constitution.

legislative) domain on constitutional matters is thus 'an intrusion mandated by the Constitution itself'.[120] As Langa CJ put it in *Glenister*:[121]

> 'In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.'

The final sentence of Langa CJ's dictum points to a further aspect of the separation of powers: courts are not to intrude into the domains of the political branches 'unless the intrusion is mandated by the Constitution itself'.[122] A similar concern is reflected in the judgment in *Doctors for Life*:[123]

> 'Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to the other branches of government. They too must observe the constitutional limits of their authority.'

Courts are thus required to tread the path of insisting upon compliance with the Constitution – and policing the rule of law – whilst not impermissibly intruding into the legislative or executive domain. Seedorf and Sibanda describe the court's dilemma in the following terms: 'the separation of powers principle demands that the Court should respect the domains and powers of the other branches of government, while at the same time ensuring that these branches act in accordance with the Constitution'.[124] Navigating this path,

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[120] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) ('*TAC*') para 99.

[121] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) para 33. See also *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) para 42, *SCAW* supra note 112 paras 91-3.

[122] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) ('*OUTA*') para 44.

[123] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 37. See also *e.tv* supra note 48 paras 1-5 (per Mogoeng CJ).

[124] Op cit note 112 at 12-56. See eg *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) ('*EFF*') para 93: 'Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impressible encroachment on the powers of the other arms of government.'

at times, requires courts to exercise restraint in their assessment of matters that fall within the domains of the other branches.

Given the topic of this thesis, judicial scrutiny of executive, rather than legislative, power is particularly relevant. The ensuing discussion thus focuses on the separation of powers in the context of the adjudication of executive power.

Two principled reasons are generally advanced for courts exercising restraint in adjudicating upon the exercise of executive power. The first relates to the 'constitutional competence' of the judicial and executive branches while the second relates to their 'institutional competence'.[125]

As I see it, there are two related aspects to *constitutional competence*. The first aspect arises directly from the separation of powers. It emphasises the proper role of courts in the constitutional structure (ie to adjudicate disputes based on the application of law) and that courts are required to be 'sensitive to the need to refrain from undue interference with the functional independence of other branches of government'.[126] They must, in other words, 'be sensitive to and respect' the constitutional design that certain matters 'are pre-eminently within the domain of one or other of the arms of government and not the others'.[127] The finding in *Bel Porto* that administrative action is not reviewable on the basis of substantive unfairness is a good example of the application of this separation-of-powers concern in the administrative-law context.[128] As Chaskalson CJ remarked: 'The setting of such a standard would drag Courts into matters which, according to the separation of powers, should be dealt with at a political and administrative level and not at a judicial level'.[129]

The second aspect of constitutional competence is based on the relative democratic pedigree of the executive and the judiciary. This aspect primarily derives from two ideas: (i) certain matters – particularly those involving policy or political judgement – are best allocated to those branches of government that enjoy superior democratic pedigree and are

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[125] Jeffrey Jowell 'Of vires and vacuums: The constitutional context of judicial review' 1999 *Public Law* 448 at 451.

[126] *EFF* supra note 124 para 92, See also *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 184.

[127] *TAC* supra note 120 para 98. See also eg *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 243-5 (per O'Regan J), *SCAW* supra note 112 para 105, *e.tv* supra note 48 paras 1-5, 26 (per Mogoeng J), *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) para 45, Seedorf & Sibanda op cit note 112 at 12.3*(d)*(i)*(aa)*.

[128] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 88.

[129] Ibid.

democratically accountable to the electorate (ie the legislature and the executive);[130] and (ii) in adjudicating upon the exercise of statutory power, courts should be sensitive to the fact that the legislature (the branch of government with the best democratic pedigree) has allocated the primary decision-making power to the executive.[131]

Institutional competence involves 'a practical evaluation of the capacity of decision making bodies to make certain decisions'.[132] It reflects the concern that courts are ill-equipped – or, at least, they are not better placed than the executive – to decide upon certain matters.[133] In particular, courts, and the nature and process of judicial decision-making, are not well suited to making decisions on matters that are deeply political, policy-laden or polycentric[134] or which require specialist expertise.[135] Various factors contribute to this state of affairs, including judges' relative lack of expertise (as compared to the primary decision-maker) and the adversarial nature of the adjudicative process (including practical and legal limitations on the production of evidence).[136] As Sachs J noted in *Du Plessis v De Klerk*:[137]

> 'The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary

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[130] See eg *Scalabrini I* supra note 49 paras 58-9. See also HWR Wade & CF Forsyth *Administrative Law* 11 ed (2014) at 309, Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580 at 588.

[131] See eg Clive Plasket 'Judicial review, administrative power and deference: A view from the Bench' 2018 135 *SALJ* 502 at 510.

[132] Jowell 'Of vires' op cit note 125 at 451.

[133] On institutional competence generally, see Lon L Fuller 'The forms and limits of adjudication' 92 *Harvard Law Review* (1978-1979) 353.

[134] Polycentric matters have been described as issues that 'cannot be resolved independently and sequentially; they are, rather, interdependent and a choice from one set of alternatives has implications for preferences within other sets of alternatives. The decision-maker must take into account the whole network before she can reach a single decision' (Anthony Ogus *Regulation: Legal Form and Economic Theory* (1994) at 117). Fuller op cit note 133 at 395 described polycentric situations as 'many centered' and involving 'interacting points of influence', and likened such situations to a spider's web in which '[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole'. Daly op cit note 81 at 92 observes that 'it is not the number of interests involved that make a question polycentric, but the fact that they interlock'.

[135] See eg *TAC* supra note 120 para 38, *Bato Star* supra note 14 para 48, *Kaunda* supra note 127 para 77, *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 305 (per Skweyiya J), *SCAW* supra note 112 paras 95, 101, *OUTA* supra note 122 para 68, *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) para 50, *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC) para 149, *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 53, *Scalabrini I* supra note 49 paras 58-9.

[136] See Daly op cit note 81 at 72-100, Bruce Harris 'Judicial review, justiciability and the prerogative of mercy' (2003) 62 *Cambridge Law Journal* 631 at 641, Price 'Rationality review' op cit note 130 at 588-9, Price 'Content and justification' op cit note 44 at 358, Kate O'Regan 'Forum for reason: Reflections on the role and work of the Constitutional Court' (2012) 28 *SAJHR* at 132, Plasket 'Judicial review' op cit note 131 at 510.

[137] 1996 (3) SA 850 (CC) para 180.

> priority decisions, which appropriate decision-making on social, economic, and political questions requires.'[138]

Within the constitutional framework developed by the Constitutional Court – which contemplates that *all* exercises of public power are subject to constitutional control and thus potentially to judicial review – it is not open to our courts to decline to adjudicate matters involving the exercise of public power.[139] This framework does not permit of a 'political question' doctrine.[140] It is, however, apparent from the Constitutional Court's jurisprudence that there are certain issues that our courts are not constitutionally entitled to decide upon, such as whether one policy is preferable to another or whether an administrator might have made a better decision. While our courts will test such conduct for legality and rationality – and, in certain cases, they will subject them to reasonableness review – they will not enquire into their correctness. In addition, it is apparent that our courts adopt varying levels of scrutiny to the exercise of public power and that while 'all exercise of public power is to some extent justiciable under our Constitution, … the precise scope of the justiciability will depend on a range of factors including the nature of the power being exercised'.[141]

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[138] See also *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 50: 'administrators often have expertise and understanding of policy, and they also have the means to investigate and ascertain facts if they have to; judges, on the other hand, lack, more often than not, the institutional competence, the administrative resources and the expertise to take many administrative decisions'.

[139] See eg *Kaunda* supra note 127 para 78 ('The exercise of all public power is subject to constitutional control'), *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) para 21 (the principle of legality 'admits of no exception'). Cf *Van Zyl v New National Party* [2003] 3 All SA 737 (C) paras 50-2, in which the court, despite expressly rejecting the political question doctrine, held that one of the decisions at issue in that case – a motion of no confidence passed by a provincial legislature – was 'not susceptible of judicial review').

[140] In terms of this doctrine, which derives from the separation of powers, courts refuse to adjudicate issues that are considered to be 'political questions' These questions are nonjusticiable and finally determined by the political branches of government. The most famous exposition of this doctrine is found in the decision of the US Supreme Court in *Baker v Carr* 369 US 186 (1962) at 217. For South African literature on the political question doctrine, see Seedorf & Sibanda op cit note 112 at 12.*3(d)*(ii)*(aa)*, C Okpaluba 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa' (2003) 18 *SAPL* 331, IM Rautenbach 'Policy and judicial review – Political questions, margins of appreciation and the South African Constitution' *TSAR* (2012) 20, Kate O'Regan 'Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa' 75 *Modern Law Review* (2012) 1 at 15-21, Mtendeweka Mhango 'Is it time for a coherent political question doctrine in South Africa? Lessons from the United States' *African Journal of Legal Studies* 7 (2014) 457, Mia Swart & Thomas Coggin 'The road note taken: Separation of powers, interim interdicts, rationality review and e-tolling in *National Treasury v Opposition to Urban Tolling*' (2014) 5 *Constitutional Court Review* 346 at 361-3.

[141] *Kaunda* supra note 127 para 244 (O'Regan J).

Seedorf and Sibanda usefully describe the position as follows:[142]

> 'The nature of political questions that fall outside the scope of judicial review becomes clearer if one does not look at the subject matter but rather at what the Court may be asked to do. As the Court put it in *UDM*:[143]
>
>> This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question that is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.
>
> This dictum emphasizes the distinction between political and legal questions *not* with regard to the subject matter of the dispute but with regard to the judiciary's function to adjudicate disputes that can be resolved through the application of law. The key to judicial review – and therefore the function of the courts in contrast to the other branches of government – is not what the dispute is about, but the review standard or yardstick that is applied.…
>
> It is therefore never the particular subject matter of the case that renders it 'political' and thus outside the review powers of the judiciary in general or the Constitutional Court in particular. Political questions in South Africa are not political matters or political cases. The determining factor is rather the methodology a court can apply in giving an answer to the question.'

Against this backdrop, two related concepts are central in attempting to navigate the difficult terrain of separation of powers in a principled manner: variability and deference. I return to these concepts in the final portion of this chapter.

5.2 <u>Accountability, responsiveness, openness and participation</u>

Accountability, responsiveness and openness are crucial values underpinning administrative law.[144] They are recognised as founding constitutional values[145] and are reflected in the basic

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[142] Op cite note 112 at 12-54 to 12-55, emphasis in the original.
[143] *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) para 11.
[144] The Constitutional Court has repeatedly emphasised the importance of these values. See eg *Joseph* supra note 22 para 43-6, *Khumalo v MEC for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC) paras 29, 35, *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) para 14.
[145] Section 1(d) of the Constitution.

principles governing public administration in s 195(1) of the Constitution.[146] They are vital to the proper development of administrative law and 'create an important normative framework within which specific constitutional texts must be interpreted'.[147]

Administrative law promotes these values both by requiring administrators to account for their decisions (and holding them to account when they fall short) and by requiring public decision-making that is responsive and transparent. Section 33 of the Constitution is thus 'one of the key constitutional provisions giving life to the constitutional values of accountability, responsiveness and openness'.[148] As Mureinik pointed out, administrative law, particularly in its post-constitutional form, promotes accountability and a 'culture of justification' by, most significantly, requiring administrators to give reasons for their decisions and holding them to standards of reasonableness.[149]

According to Mureinik, accountability is one of the principles that promotes responsive government – the other is participation.[150] The latter principle is reflected in, amongst others, the right to procedurally fair administrative action, the obligation to facilitate public involvement in the legislative process, the principle of encouraging public participation in policy making, and the requirement that legislatures' rules must be made with due regard to participatory democracy.[151] It is thus apparent that '[t]he importance of participation in decisions affecting the rights and interests of people is a general theme that runs throughout the Constitution'[152] and that participatory democracy is one of the 'basic and fundamental principles' of our democracy.[153]

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[146] Section 195(1)*(e)*, *(f)* and *(g)*. In addition, PAJA's preamble makes clear that PAJA is aimed at creating 'a culture of accountability, openness and transparency'.
[147] O'Regan 'Text matters' op cit note 140 at 15.
[148] *Sidumo* supra note 15 para 138 (per O'Regan J).
[149] Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 at 39-40. See also Etienne Mureinik 'Reconsidering review: Participation and accountability' 1993 *Acta Juridica* 35 at 40-3.
[150] 'Reconsidering review' op cit note 149 at 36.
[151] Sections 33(1), 57(1)*(b)*, 59(1)*(b)*, 70(1)*(b)*, 72(1)*(a)*, 116(1)*(b)*, 118(1)*(a)*, 160(4)*(b)* and 195(1)*(e)* of the Constitution.
[152] *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) para 137 (per Froneman and Skweyiya JJ).
[153] *Doctors for Life* supra note 123 para 116.

5.3 Administrative efficiency

Efficient government is an important value of good administration.[154] The importance of administrative efficiency is reflected in, amongst others, s 33(3)(c) of the Constitution, which provides that the legislation that gives effect to the right to just administrative action (ie PAJA) must 'promote an efficient administration'.

While the principles of accountability, responsiveness, openness and participation tend to point towards more invasive review of public decision-making, the principle of administrative efficiency might, at times, point the other way. Efficiency might, for instance, be undermined if burdensome and time-consuming administrative processes are imposed on government or other public bodies, or if their decisions are too easily overturned.[155] In the context of procedural fairness, for example, O'Regan J in *Premier, Mpumalanga* issued the following warning:[156]

> 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively…. As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'

It is, however, important to note that, while the promotion of administrative efficiency is generally viewed as requiring judicial restraint, it can, as Corder has pointed out, 'cut another way':[157]

> '[I]t could well be argued that the achievement of administrative efficiency is indeed *enhanced* by compliance with progressively improving levels of accountability, responsiveness and openness, so that it is not a basis for justifying the limitation of such values but rather for emphasizing their ever-expanding enforcement. In other words, the greater its accountability, the more efficient administrative action will become.'

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[154] Section 195(1)*(b)* of the Constitution. See eg Kate O'Regan 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) 121 *SALJ* 424 at 435-6 ('an efficient bureaucracy is a constitutional imperative').
[155] On the necessity of limitations on the right to administrative justice based on administrative efficiency, see Michael Asimow 'Administrative law under South Africa's final Constitution: The need for an Administrative Justice Act' (1997) 113 *SALJ* 617 at 627-8.
[156] *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41. See also *Walele* supra note 22 para 123 (per O'Regan ADCJ).
[157] Op cit note 78 at 440, emphasis in the original.

6 VARIABILITY AND DEFERENCE

As discussed above, the separation of powers doctrine requires courts to ensure compliance with the rule of law whilst remaining sensitive to limitations flowing from their constitutional and institutional competence. In addition, courts are to promote accountability, responsiveness, openness and participation whilst not undermining administrative efficiency. It is against this backdrop that 'rigorous and coherent principles that will guide legal intervention and non-intervention' are to be constructed.[158] The twin concepts of variability and deference are important tools in undertaking this project.

6.1 Variability

Variability is the notion that the grounds of judicial review 'need not be applied in an all-or-nothing fashion, and that the intensity of judicial scrutiny may vary according to the context'.[159]

As Hoexter has noted, variability 'informs the entire enterprise of constructing a theory of judicial intervention and non-intervention'.[160] It allows the courts, in appropriate cases, to accommodate separation of powers concerns by adopting a flexible approach to the manner in which legal compliance is assessed, having regard to considerations such as the nature of the power and the extent to which it is policy-laden or polycentric.[161] To use Knight's phraseology, 'the modulation of the depth of scrutiny in judicial review' allows for 'the mediation of the balance between *vigilance* and *restraint*'.[162] In addition, variability enables courts to modify the intensity of judicial scrutiny depending on other important considerations such as the impact of the decision on persons' rights or interests[163] and considerations of efficiency.[164] Hoexter sums up the position as follows:[165]

> 'The intensity of the court's scrutiny and its willingness to intervene in a particular case will naturally vary according to factors such as the policy content of the decision,

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[158] Alfred Cockrell ''Can you paradigm?' – Another perspective on the public law/private law divide' 1993 *Acta Juridica* 227 at 247.
[159] Cora Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 at 502.
[160] Ibid.
[161] See eg *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 20 (the Constitution distributes state power and the exercise of that power 'is subject to inherent constitutional constraint … the extent of which varies according to the nature of the power that is being exercised').
[162] Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (2018) at 243.
[163] Du Plessis & Scott op cit note 44 at 614. Cf Daly op cit note 81 at 216-19.
[164] Hoexter 'Future of judicial review' op cit note 159 at 508-9.
[165] Ibid at 503.

> the breadth of the discretion and the degree of expertise of the decision-maker. Other relevant factors include the impact of the decision, the degree of public participation in the decision-making process and the presence or absence of an opportunity for internal reconsideration.'

Price points out that two forms of variability may be discerned in constitutional law: variability *between* standards of review and variability *within* a standard of review.[166] The former is perhaps best illustrated by the difference between the minimum constitutional standard involved in rationality review and the higher standard of reasonableness review.[167] In the administrative-law context, the application of this type of variability is marked by the boundary between 'administrative action' (to which administrative-law review applies) and other forms of public decision-making (to which legality review applies). The Constitutional Court's approach of excluding conduct from the ambit of 'administrative action' and then reviewing it on more limited administrative-law grounds (under the principle of legality) is, to quote Hoexter, a 'species of variability: one that allows it to defer to the government at the margins without relinquishing its supervisory role completely'.[168]

Variability *within* a ground of review arises where the legal requirements of, or the level of scrutiny entailed by, a particular ground of review vary depending on the context. The clearest example of this is procedural fairness, where it has long been accepted – and is now entrenched in PAJA[169] – that the requirements of fairness vary depending on the context.[170] This variability has important implications for the ambit of 'administrative action' and the attraction, motivated by efficiency concerns, of excluding conduct from this concept in order to avoid the application of procedural fairness. Hoexter puts it well:[171] 'those wary of imposing too great a burden on the administration need not resort to definitional stops, the conceptual tools of all-or-nothing theorists. They may take legitimate refuge in flexibility.'

Other administrative-law grounds of review are also variable. Reasonableness review, for example, is variable in the sense that the manner in which reasonableness is assessed varies depending on, amongst other things, the nature of the decision – with a more rigorous

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[166] 'Content and justification' op cit note 44 at 361-2.
[167] Ibid.
[168] 'Future of judicial review' op cit note 159 at 507.
[169] Section 3(2)*(a)* of PAJA.
[170] As Burger CJ stated in the US Supreme Court decision of *Morrissey v Brewer* (1972) 408 US 471 at 481: 'It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands'. See also *Joseph* supra note 22 paras 56-8.
[171] 'Future of judicial review' op cit note 159 at 508-9.

standard applying to certain types of administrative action than others.[172] It even appears that rationality review is applied in a variable manner, depending on factors such as the nature of the power at issue.[173] Price draws a link between the variable application of rationality review and separation-of-powers concerns:[174]

> '[I]n what may roughly be labelled 'political' contexts, when courts assess the rationality of decisions lying close to the heart of executive power (eg those concerning foreign relations, national security, economic policy, and so forth), the court is bound to exercise considerable deference when deciding whether the purpose of the decision is legitimate and whether the decision is likely to serve that purpose. In such contexts, the considerations of democratic principle and institutional competence are particularly pressing and consequently oblige the court to pay a higher degree of respect to the empirical and normative judgements of the executive…. By contrast, in less 'political' contexts – that is, in cases where the considerations of institutional competence and democratic principle are less 'weighty' – the courts need not tread as lightly when evaluating the purpose and effect of the law or conduct in question.'

This quotation points not only to variability but to the related concept of deference, to which I now turn.

6.2 Deference

The concept of deference is, simply put, a call for judicial restraint in assessing an administrative decision and, in particular, in assessing the merits of the decision. As O'Regan J made clear in *Bato Star*, the concept of deference, in our constitutional context, flows from the separation of powers and takes the form of deference as respect:[175]

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[172] Such an approach finds support in various dicta of the Constitutional Court. See *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (section 21) (PE) Inc* 2001 (1) SA 257 (CC) paras 19, 22, *Bato Star* supra note 14 para 48, *New Clicks* supra note 15 para 108 (per Chaskalson CJ). See also O'Regan AJA, writing on behalf of the Namibian Supreme Court, in *Trustco Insurance t/a Legal Shield Namibia v Deed Registries Regulation Board* [2011] NASC 10 para 32, *FMF* supra note 78 paras 97-102. See also the 'contextual reasonableness standard' favoured by Geo Quinot & Sandra Liebenberg 'Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa' 22 *Stell LR* (2011) 639 at 645-52.

[173] Price 'Content and justification' op cit note 44 at 363-4, Price 'Rationality review' op cit note 130 at 588-90, Du Plessis & Scott op cit note 44 at 603-7.

[174] 'Content and justification' op cit note 44 at 363-4. See also Price 'Rationality review' op cit note 130 at 588-9, Du Plessis & Scott op cit note 44 at 610-14. Cf *DA v President* supra note 46 para 44: 'The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import to this case. Either the decision is rational or it is not.'

[175] Supra note 14 paras 46 and 48.

> 'The use of the word 'deference' may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself…. In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

The conception of 'deference as respect' embraced by the Constitutional Court in *Bato Star* is derived from Dyzenhaus, who contrasts it with 'deference as submission'.[176] Deference as respect avoids the 'overtones of servility' that might otherwise attach to the concept of deference.[177] It requires a balanced approach in which courts, on the one hand, scrutinise the lawfulness of conduct according to the requisite standard whilst, on the other hand, (i) respecting the constitutional or legislative allocation of power to the primary decision-maker; and (ii) treating the primary decision-maker's findings and reasoning with

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[176] David Dyzenhaus 'The politics of deference: Judicial review and democracy' in Michael Taggart (ed) *The Province of Administrative Law* (1997) 279 at 303.

[177] *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 (HL) at 240 (per Lord Hoffman).

respect or, put differently, giving weight to the decision which forms the subject of review.[178] As Hoexter stated prior to *Bato Star*:[179]

> 'the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate'.

The case for deference is most pressing in the context in which it arose in *Bato Star*: reasonableness review. This is because reasonableness review – more so than other grounds of administrative-law review – involves scrutiny of the merits of the decision that is the subject of review. It is in this sphere that the court is most likely to grapple with findings of fact, policy decisions and the striking of equilibria between competing interests and considerations, and where the distinction between appeal and review might be placed under pressure. And it is here that the separation-of-powers challenge of ensuring legal compliance whilst avoiding undue intrusion into the executive sphere is most prevalent. The concept of deference as respect is valuable in navigating this terrain.[180] In this context, deference is, to quote Elliott and Wilberg, 'a means by which an approach to substantive review that is

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[178] Daly op cit note 81 at 7-8 describes (ii) as 'epistemic deference' and contrasts it with 'doctrinal deference', which involves the allocation of authority and is, on my understanding, similar to (i).

[179] 'Future of judicial review' op cit note 159 at 501, quoted with approval in *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 21.

[180] For academic support for various permutations of a doctrine of deference, see eg Dyzenhaus op cit note 176, Hoexter 'Future of judicial review' op cit note 159 at 499-513, Murray Hunt 'Sovereignty's blight: Why contemporary public law needs the concept of 'due deference'' in Nicholas Bamforth & Peter Leyland *Public Law in a Multi-Layered Constitution* (2003) 337, John M Evans 'Deference with a difference: Of Rights, regulation and the judicial role in the administrative state' (2003) 120 *SALJ* 322, Dennis M Davis 'To defer and when – Administrative law and constitutional democracy' 2006 *Acta Juridica* 23, Jacques de Ville *Judicial Review of Administrative Action in South Africa* Revised 1 ed (2005) at 12-34, Aileen Kavanagh 'Defending deference in public law and constitutional theory' (2010) 126 *LQR* 222, Daly op cit note 81, Hoexter *Administrative Law* op cit note 35 at 147-55, Mark Elliott 'From bifurcation to calibration: Twin-track deference and the culture of justification' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 61, PJH Maree & Geo Quinot 'A decade and a half of deference (part 2)' (2016) *TSAR* 447. Cf Plasket 'Judicial review' op cit note 131 at 502, 520-3, who contends that the concept of deference has no 'separate stand-alone function' as 'respect for the decisions of properly empowered primary decision-makers is already embedded in the review functions of courts, principally as part of the doctrine of separation of powers' (at 502). Cf also TRS Allan 'Common law reason and the limits of judicial deference' in David Dyzenhaus (ed) *The Unity of Public Law* (2004) 289, TRS Allan 'Human rights and judicial review: A critique of 'due deference' (2006) 65 *Cambridge Law Journal* 671, TRS Allan 'Deference, defiance, and doctrine: Defining the limits of judicial review' (2010) 60 *University of Toronto Law Journal* 41.

potentially more intrusive in abstract or general terms can be rendered less intrusive when this is warranted by the particularities of the given case'.[181]

6.3 Final remarks on variability and deference

The concepts of variability and deference are important in assessing the impact of classifying conduct as administrative action. They add texture both to what it means to subject a decision to PAJA's administrative-law grounds of review as well as to the impact of excluding the decision from PAJA's reach and rather subjecting it to legality review. These concepts thus have a material bearing on a consideration which is central to a substantive approach to the meaning of 'administrative action': whether or not it is appropriate to subject a decision to administrative-law review. This is a consideration which, as we shall see in the ensuing chapters, plays a material role in giving meaning to some of the key elements of the definition of 'administrative action'.

[181] Mark Elliott & Hanna Wilberg 'Modern extensions of substantive review: A survey of themes in Taggart's work and in the wider literature' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 19 at 36.

CHAPTER THREE

THE DISTINCTION BETWEEN PUBLIC AND PRIVATE POWER

1 INTRODUCTION

The concept of 'administrative action' in s 33 of the Constitution is limited to the exercise of *public* powers or functions.[1] Similarly, the definition of 'administrative action' in PAJA, in effect, requires that the action must amount to the exercise of public power or the performance of a public function.[2] In particular, PAJA's definition refers to decisions by:

> '*(a)* an organ of state, when–
>
> (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...'[3]

Administrative-law review as contemplated in both the Constitution and PAJA thus does not extend to the exercise of private power.

The question as to whether action amounts to the exercise of a public power or the performance of a public function has assumed great importance in South African law in recent years. It is, as Hoexter puts it, 'a question that lies at the very heart of our

[1] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) ('*Cape Metro*') para 16, *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) para 23, *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1382. See also Cora Hoexter 'A matter of feel? Public powers and functions in South Africa' Mark Elliott, Jason NE Varuhas & Shona Wilson Stark (eds) *The Unity of Public Law?* (2018) 149 at 153. As the Constitutional Court explained in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45, administrative law is a means by which 'courts regulate and control the exercise of public power by other branches of government'.

[2] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 33; *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) para 21.

[3] Section 1 of PAJA, emphasis added. The use of the phrase 'empowering provision' in para *(b)* as opposed to 'legislation' in para *(a)*(ii) creates an anomaly in that it suggests that the definition of 'administrative action' is, in some respects, applicable to a narrower range of conduct by organs of state than by non-organs of state. For a discussion of this anomaly, and suggestions as to how it might be avoided (or at least reduced) through interpretation, see Jonathan Klaaren & Glenn Penfold 'Just administrative action' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) at 63.3*(c)*(iii).

administrative law'.[4] The public nature of the power or function is not only a definitional element of 'administrative action', it also determines when the constitutional principle of legality applies.[5] Moreover, it is central to the meaning of 'organ of state' under the Constitution[6] and 'public body' for purposes of the Promotion of Access to Information Act 2 of 2000 (PAIA). The former affects, amongst other things, the manner in which the Bill of Rights applies[7] while the latter subjects public bodies to a more rigorous regime of access to information.[8]

The line between public and private power is by no means easy to draw.[9] As Langa CJ noted in his dissenting judgment in *Chirwa*, determining whether a power or function is public is 'a notoriously difficult exercise' and '[t]here is no simple definition or clear test to be applied'.[10] Lord Nicholls made a similar observation in the decision of the House of Lords in *Aston Cantlow*:[11]

> 'What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today.'

One reason for uncertainty is that a number of activities have both public and private characteristics, and 'the exercise of public power generally occurs on a continuum with no

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[4] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 3.
[5] See chapter 2, para 3.1.1.
[6] Section 239 of the Constitution.
[7] Compare ss 8(1) and 8(2) of the Constitution. See Meghan Finn 'Organs of state: an anatomy' (2015) 31 *SAJHR* 631 at 647-50, Hoexter 'A matter of feel?' op cit note 1 at 151. A number of statutes also employ the concept of 'organ of state' as defined in s 239 of the Constitution. See eg the Companies Act 71 of 2008 and the South African Human Rights Commission Act 40 of 2013.
[8] Compare, eg, ss 11 and 51 of the Promotion of Access to Information Act 2 of 2000 (PAIA).
[9] In this chapter, unless the context otherwise indicates, I use the phrase 'public power' as an umbrella phrase to refer to both public powers and public functions.
[10] *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) para 186. Cameron J, writing for a unanimous Constitutional Court, endorsed this dictum in *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) para 75. See also eg *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) ('*MTN*') para 30, *Calibre* supra note 2 para 40. Hoexter 'A matter of feel?' op cit note 1 at 155: 'the importance of the 'public' question is not matched by the clarity of the answers offered by the courts'.
[11] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2004] 1 AC 546 (HL) para 12, quoted in *Calibre* supra note 2 para 30. See also *YL v Birmingham City Council* [2007] WLR 112 (HL) para 5 (per Lord Bingham), para 65 (per Baroness Hale). Mark Elliott 'Judicial review's scope, foundations and purposes: Joining the dots' *New Zealand Law Review* (2012) 75 at 76-7: '"publicness" is such an inherently imprecise notion that it is unsurprising that courts find it difficult to apply in a coherent manner'.

bright line marking the transition from one to another'.[12] The difficulty is compounded by the fact that the concept of public power 'is not static, but changes over time as different forms of public administration are implemented'.[13] Olivier JA in *Goodman Brothers*, for example, noted that the identification of administrative action as opposed to acts regulated by private law had become more difficult 'with the increasing use by the State of private law institutions, notably contract, to perform its duties'.[14]

Against this backdrop, our courts have not formulated a specific test for distinguishing between public and private power. They have rather adopted an open-ended test to the meaning of public power and have, by and large, resorted to identifying various factors to be taken into account in assessing on which side of the line particular conduct falls. The general approach is reflected in the following dictum of Langa CJ in *Chirwa*:[15]

> 'Determining whether a power or function is public … is a question that has to be answered with regard to all the relevant factors, including: *(a)* the relationship of coercion or power that the actor has in its capacity as a public institution; *(b)* the impact of the decision on the public; *(c)* the source of the power; and *(d)* whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.'

A host of other factors emerge from the case law and may be added to Langa CJ's list,[16] such as the nature and subject-matter of the power,[17] whether the function is governmental in nature,[18] the extent of state control,[19] state funding,[20] whether the function is integrated into a

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[12] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 25, quoted with approval in *AMCU* supra note 10 para 76. See also *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) para 119 (per O'Regan J), Hoexter 'A matter of feel?' op cit note 1 at 150.
[13] *MTN* supra note 10 para 30, with reliance on Paul Craig 'What is public power?' in Hugh Corder & Tiyanjana Maluwa (eds) *Administrative Justice in Southern Africa* (1997) at 25.
[14] *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 31.
[15] *Chirwa* supra note 10 para 186. Although Langa CJ was in the minority in *Chirwa*, this dictum was endorsed by a unanimous Constitutional Court in *AMCU* supra note 10 para 75.
[16] For a discussion of the various factors used by our courts in distinguishing between public and private powers, see Klaaren & Penfold op cit note 3 para 63.3(*b*)(ix). See also Finn op cit note 7 at 640-1.
[17] *AMCU* supra note 10 para 74.
[18] *Calibre* supra note 2 paras 38-40, *Goodman Brothers* supra note 14 para 30.
[19] *AAA Investments* supra note 12 paras 44-5, *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) paras 13-19, 27, *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 23, *Calibre* supra note 2 para 44. See also Hoexter *Administrative Law* op cit note 4 at 4: 'the extent of state involvement and control over the power or function – or, to use the terminology of the Constitutional Court, the absence of the autonomy one associates with a private enterprise – is an especially important consideration in deciding whether it is of a public nature'.

legislative or regulatory framework[21] or involves the exercise of a public duty,[22] whether the functionary exercises monopoly power,[23] and whether the decision binds persons without their consent.[24]

The principal focus in considering the various factors is on the nature of the function rather than the functionary. As Cameron J put it in *AMCU*:[25]

> '[T]he predominant focus is on the nature of the power being exercised. The question is not so much, who exercises the power, nor even, where does the power come from: but what does the power look and feel like? What does it do?'

Although the SCA's judgment in *Calibre* appeared to elevate the governmental nature of the function to the most important consideration,[26] it bears emphasis that the prevailing approach – reflected in the Constitutional Court's judgments in *AAA Investments* and *AMCU* – is to retain the focus on the question as to whether the power or function is *public*, and not to equate this with whether or not the power or function is *governmental*.[27] As Cameron J made clear in *AMCU*: 'public powers and public functions are wider than governmental powers and governmental functions'.[28]

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[20] *Calibre* supra note 2 paras 42 and 44, *Goodman Brothers* supra note 14 para 39, *M&G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Limited* 2011 (5) SA 163 (GSJ) para 259. Geo Quinot *State Commercial Activity: A legal framework* (2009) at 100-1 points out that the relevance of spending public funds 'amounts to a specific manifestation of the public interest'. He also notes, at 101, that many private parties are funded through the public purse, eg through grants or subsidies, and 'it would be unrealistic to subject all such action to public-law regulation'. See also *Dube v Zikalala* [2017] 4 All SA 365 (KZP) para 129 (fact that political parties are partly state funded does not mean that they exercise public power).

[21] *Calibre* supra note 2 para 42, relying on the dictum of Lord Hoffman in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853 (CA) at 874. See also *AAA Investments* supra note 12 para 119 (per O'Regan J), *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA) 835-6.

[22] *AMCU* supra note 10 para 74.

[23] *Goodman Brothers* supra note 14 para 8 (per Schutz JA). See also SA De Smith, H Woolf & JL Jowell *Judicial Review of Administrative Action* 5 ed (1995) at 170, referred to in *Mittalsteel* supra note 19 para 21, David Pannick 'Who is subject to judicial review and in respect of what?' *Public Law* (1992) 1 at 3-5. For a discussion of the relevance of monopoly power to the classification of power as either public or private, see Mark Elliott *Beatson, Matthews and Elliott's Administrative Law: Text and Materials* 4 ed (2005) at 136-7.

[24] *AMCU* supra note 10 para 81.

[25] Supra note 10 para 74. See also *Free Market Foundation v Minister of Labour* 2016 (4) SA 496 (GP) ('*FMF*') para 121.

[26] *Calibre* supra note 2 paras 23-42. Nugent JA, at para 40, however, described the question as to whether the power or function is governmental in nature as a 'useful enquiry' and made clear that it is not definitive.

[27] *AAA Investments* supra note 12 paras 38-41, *AMCU* supra note 10 para 69. See Finn op cit note 7 at 636-7.

[28] Supra note 10 para 69, quoting Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (DPhil thesis, Rhodes University, 2002) ('*Thesis*') at 195. See also *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) paras 55-6, Hoexter *Administrative Law* op cit note 4 at 4-5, Clive Plasket 'The fundamental principles of justice and legal vacuums: The regulatory powers of national sporting bodies' (2016) 133 *SALJ* 569 at 597-8.

This approach is distinct from that adopted by the English courts, which, as the *Calibre* court explained,[29] focus on whether or not the function is governmental in nature for purposes of deciding whether or not it is subject to public law review or, more recently, to the Human Rights Act.[30] The governmental focus of the English courts is reflected in the following passage in *Calibre*, quoting various dicta of those courts:[31]

> 'What has been considered to be relevant is the extent to which the functions concerned are 'woven into a system of governmental control', or 'integrated into a system of statutory regulation', or that the government 'regulates, supervises and inspects the performance of the function', or it is 'a task for which the public, in the shape of the state, have assumed responsibility', or it is 'linked to the functions and powers of government', or it constitutes 'a privatisation of the business of government itself', or it is publicly funded, or there is 'potentially a governmental interest in the decision-making power in question', or the body concerned is 'taking the place of central government or local authorities', and so on.'

While an approach which focuses exclusively on whether a function is governmental might conceivably be appropriate to assessing the scope of 'administrative action' in s 33 of the Constitution – as it is arguable, though by no means clear, that s 33 is confined to administrative acts of the state and organs of state (ie administrative acts of the public administration)[32] – para *(b)* of PAJA's definition of 'administrative action' sets its face against such an approach.[33] It does so, first, by extending administrative action to a decision by a natural or juristic person 'other than an organ of state' and, second, by specifying that the decision by such persons is administrative action if it amounts to the exercise of public

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[29] *Calibre* supra note 2 paras 23-31.
[30] Human Rights Act, 1998 c 42.
[31] Supra note 2 para 38.
[32] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paras 27-29 (the state is the bearer of the obligations under s 33 of the Constitution), *Daniels v Scribante* 2017 (4) SA 341 (CC) para 158 (s 33 applies only vertically, ie it is enforceable against the state and not against private persons), *Cape Metro* supra note 1 para 16, Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 592 (s 33, on the face of it, envisages 'the rights of individuals … to be treated in a just manner by the public administration'). The principles of public administration in s 195 of the Constitution apply to the administration in every sphere of government, organs of state (which, in terms of s 239, includes non-state entities that exercise public power and perform public functions but only to the extent that they do so in terms of legislation) and public enterprises (s 195(2)). See also s 33(3)(b) of the Constitution, which states that the national legislation enacted to give effect to the right to just administrative action must 'impose a duty *on the state* to give effect to the rights in [ss 33(1) and (2)]' (emphasis added). Cf Plasket *Thesis* op cit note 28 at 184-6, who argues that the rights in s 33 are capable of horizontal application, ie they potentially bind private actors.
[33] As noted in chapter 2, para 3, despite various dicta of our courts, including the Constitutional Court, there is, as I see it, no reason in principle why 'administrative action' cannot bear a wider meaning in PAJA than that phrase bears in s 33 of the Constitution.

power or the performance of a public function 'in terms of an empowering provision', which is broadly defined as 'a law, rule of common law, customary law, or an agreement, instrument or other document…'.[34]

In this chapter, I examine the distinction between public and private powers in various contexts. I do so by starting at the core of public power – the exercise of power by the government – and moving outward to those entities that are progressively less public in nature.[35]

This approach might at first blush strike some readers as odd given that it seems to be accepted that, in drawing the distinction between public and private power, 'the function matters more than the functionary'.[36] While I do not quibble with this as a starting point, it seems to me that analysing various functions through the lens of the different types of actors that might perform those functions is illuminating in at least three respects. First, an analysis of the position in relation to the government assists in exploring the substantive reasons why public functions are held to higher public-law standards. Second, examining the position of various types of actor emphasises that the nature of the functionary remains an important consideration in the classification of a function as either public or private – a consideration that, if applied correctly, is no less substantive than the nature of the function. Third, it facilitates an examination as to whether the factors to be taken into account in distinguishing between public and private powers, and the weight to be attached to those factors, might vary depending on the nature of the functionary.

I begin by examining powers and functions exercised by government in the narrow sense (i.e. government departments and municipalities). I then turn to examine the position of state-owned entities and regulatory and service-delivery agencies established by or in terms of legislation. Next, I examine the distinction between public and private functions in the context of decision-making by entities which derive their authority or mandate from government, focusing on two categories: the performance of functions pursuant to

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[34] Cora Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165 at 179: the definition of 'empowering provision' in PAJA 'places it beyond doubt that private bodies acting in terms of contract rather than statute are capable of performing administrative action'. The fact that PAJA extends beyond acts of the public administration is also apparent from its preamble, which refers to the aim of creating 'a culture of accountability, openness and transparency in the public administration *or* in the exercise of a public power or the performance of a public function' (emphasis added).
[35] As Craig 'What is public power?' op cit note 13 at 25 explains, this is an *institutional* approach to the distinction between public and private power.
[36] Hoexter 'A matter of feel?' op cit note 1 at 149. Hoexter's observation was made in the context of explaining that, under the South African approach, private actors are capable of exercising public powers or performing public functions. See also *AMCU* supra note 10 para 74.

government outsourcing or sub-contracting and entities whose authority is underpinned by statutory or other governmental compulsion. The analysis then moves a step further away from the governmental sphere to touch upon the position of private bodies exercising regulatory power without reliance on powers conferred, or compulsion imposed, by government.

As will be seen, a recurring theme that emerges from the case law is a tendency to pick and choose between various factors that the court wishes to emphasise in a particular matter and to adopt the approach that the function matters more than the functionary without adequate regard to the circumstances in which this approach is applied. The result is a body of case law that is, at times, insufficiently coherent and not always easily reconciled.

In attempting to bring coherence to this area of our law, it is important that all relevant factors are taken into account in the classification exercise, and that the exercise does not degenerate into an all-things-considered approach which is solely dependent on the judge's intuition. A more rigorous approach is required. In particular, care should be taken to identify any necessary or sufficient conditions for the characterisation of conduct as 'public' and to identify the weight attaching to the various factors. In undertaking this exercise, substantive considerations should be foregrounded and the context of each case is paramount.

One question that arises is whether certain factors (or a combination thereof) might be sufficient for the power or function to be 'public'. Another perhaps more important question is whether, despite the general statements of our courts, the nature of the functionary might – and should – in some instances predominate over the nature of the function. These questions arise most starkly in the next section of this chapter: the classification of government conduct.

2. GOVERNMENT

2.1 Core functions of government

The core activities in which government engages are clearly public in nature. These activities include the formulation and implementation of policy, the preparation of primary legislation, executive rule-making, regulatory decision-making, law enforcement, and the provision of public services.

Two important issues arise in this context. The first is *why* government's conduct is held to heightened standards and more demanding scrutiny. Why, for example, is a decision by a public hospital subject to the requirements of legality and administrative law while the same decision by a private hospital is not? Why are these requirements triggered by a relatively innocuous municipal town-planning decision but not by a private company's decision to close a factory with devastating effects for the adjoining town and its community? The second, related issue is whether there are any exceptions to the principle that government's conduct is public. I consider the first issue in this section, while the second issue is left for the section that follows.

A useful starting point is to note that the government's reason for existence, in a system of representative democracy as envisaged in the Constitution,[37] is to represent and serve the public.[38] The public-centric nature of government is reflected in, amongst others, the constitutional duty on all spheres of government, and all organs of state in each sphere, to 'secure the well-being of the people of the Republic'.[39] It is also reflected in the principles of public administration in s 195 of the Constitution, which include the injunctions that public administration must be 'development-orientated' and that '[p]eople's needs must be responded to…'.[40] In this sense, government exists to perform public functions.

The government also owes its mandate to the public. At the national level, the National Assembly is elected by adult citizens,[41] represents the people and must 'ensure government by the people under the Constitution'.[42] The National Assembly, in turn, elects the President, who appoints the Cabinet and heads the national executive.[43] The executive's mandate thus arises from the public through its parliamentary representatives. Similarly, the national executive's power is sourced, directly or indirectly, either in parliamentary legislation or in the Constitution[44] – the latter adopted, at least notionally, by 'the people of South Africa …

[37] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 111, 115-16.
[38] *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) para 15: 'Judges hold office to serve the people, just as members of the executive and legislature do'. See also *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) para 79.
[39] Section 41(1)(b) of the Constitution. See also the oaths or solemn affirmations of the President and the Deputy President in Schedule 2 to the Constitution.
[40] Sections 195(1)(c) and (e).
[41] Sections 19 and 46(1) of the Constitution.
[42] Section 42(3) of the Constitution. As O'Regan J stated in *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) para 53: 'In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will'. See also *South African Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49 para 18.
[43] Sections 85, 86(1) and 91(2) of the Constitution.
[44] See s 41(1)(f) of the Constitution. As O'Regan J put it in *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 218: 'the powers of all three arms of government arise from and are limited by the Constitution'. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*

through [their] freely elected representatives' and intended to lay the foundations for a society in which government is 'based on the will of the people'.[45] The position is the same at a provincial level.[46] At the level of local government, not only is the municipal council elected by members of the local community,[47] the objects of local government foreground municipalities' obligations to act in the interests of their communities. These objects include: 'to provide democratic and accountable government for local communities', 'to ensure the provision of services to communities in a sustainable manner' and 'to promote social and economic development'.[48]

Moreover, the government is funded by the public and is the custodian of public resources.[49] As Nkabinde J remarked in *Nyathi*: 'It cannot be disputed that government functions differently from private individuals and legal entities and that it has no resources which are truly its own'.[50] The expenditure of these funds, and the exploitation of these resources, is closely regulated,[51] and government (and other organs of state) are required to promote the '[e]fficient, economic and effective use of resources'.[52]

With the government's public duty and mandate, and its stewardship of public funds and resources, comes *public accountability*, meaning that 'the government has to justify its decisions to the people whom they govern'[53] Accountability is a core constitutional value[54] which is fostered by many aspects of public law, including the requirement to justify public conduct in accordance with prescripts of legality (and, where applicable, administrative law) as well as the duty to afford greater transparency and access to information in the public sphere.[55] The application of administrative law – including, perhaps most significantly, the

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1999 (1) SA 374 (CC) para 56, *Grey's Marine* supra note 12 para 20, Daniel Malan Pretorius 'The defence of the realm: Contract and natural justice' (2002) 119 *SALJ* 374 at 384-5, Quinot *State Commercial Activity* op cit note 20 at 37-8, 50, 218. Cf *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) para 40, which indicates that the government has the same rights as any other owner in respect of its property.

[45] Preamble to the Constitution.

[46] See, generally, Chapter 6 of the Constitution.

[47] Section 157 of the Constitution.

[48] Section 152(1)(a) to (c). See also s 153(a) of the Constitution.

[49] Yvonne Burns 'Government contracts and the public/private law divide' (1998) 13 *SAPL* 234 at 250, Raisa Cachalia 'Government contracts in South Africa: Constructing the framework' (2016) 1 *Stell LR* 88 at 99.

[50] *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) para 141.

[51] See eg Chapter 13 of the Constitution, the Public Finance Management Act 1 of 1999, the Municipal Finance Management Act 56 of 2003, the State Land Disposal Act 48 of 1961.

[52] Section 195(1)(b) of the Constitution.

[53] Etienne Mureinik 'Reconsidering review: Participation and accountability' 1993 *Acta Juridica* 35 at 36.

[54] Section 1(d) of the Constitution. See also s 41(1)(c) and, in respect of local government, s 152(1)(a) of the Constitution. See also *AAA Investments* supra note 12 para 44, *Black Sash* supra note 38 para 14.

[55] As s 41(1)(c) of the Constitution proclaims, all spheres of government and all organs of state within those spheres must 'provide effective, transparent, accountable and coherent government for the Republic as a whole'.

duty to give reasons and the requirement to act reasonably – is one of the key ways in which accountability is promoted,[56] and, as Nugent JA noted in *Calibre*: 'accountability to the public is what judicial review has always been about'.[57] It thus comes as no surprise that the government is the primary bearer of administrative-law obligations and that '[t]he principal function of s 33 [of the Constitution] is to regulate the conduct of the public administration'.[58]

This regulation of the public administration through the prescripts of public law serves not only to enhance accountability but also to promote effective and efficient administration or, put differently, to promote good governance.[59] It also promotes transparency as well as participation by those affected by public decision-making, which, in turn, promote responsive government.[60]

Another important feature of government is its duty to act in the public interest.[61] As Elliott observes, the uniqueness of government's position derives from a range of factors, including the facts that it 'is unusually powerful and is uniquely devoid of any legitimate self-

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See also s 195(1)(b), (c), (f) and (g) of the Constitution. In relation to the different scope of access to state-held information, as opposed to information in non-state hands, compare s 32(1)(a) and (b) of the Constitution.

[56] Mureinik 'Reconsidering review' op cit note 53 at 40-2. See also Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 at 38-9.

[57] Supra note 2 para 40.

[58] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ('*SARFU*') para 136. See also *Cape Metro* supra note 1 para 16, *Gijima* supra note 32 at paras 26 and 29, *Grey's Marine* supra note 12 para 24, *Dube v Zikalala* supra note 20 para 131. For a similar statement from the Namibian Supreme Court on the constitutional right to administrative justice in that country, see *Rössing Uranium Ltd v Former Members of the Rössing Pension Fund* 2017 JDR 1098 (NmS) para 70.

[59] Quinot *State Commercial Activity* op cit note 20 at 1-2, with reliance on Peter Cane 'Administrative law as regulation' in Christine Parker, Colin Scott, Nicola Lacey & John Braithwaite (eds) *Regulating Law* (2004) 207 at 213-16. *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 45: 'The scope of the s 33 right to just administrative action and the associated constitutional values, as given effect to under PAJA, must cover the field of public administration and bureaucratic practice in order properly to instrumentalise principles of good governance'. See also Mureinik 'Reconsidering review' op cit note 53 at 36-40.

[60] Responsive government is one of the founding values of the Constitution. See s 1(d) of the Constitution. Mureinik 'Reconsidering review' op cit note 53 at 36: 'Participation and accountability both make government responsive to the people governed'.

[61] Lawrence Baxter *Administrative Law* (1984) at 100: 'Public authorities may do only what they are empowered to do and when acting they must act in the public interest'. HWR Wade & CF Forsyth *Administrative Law* 11 ed (2014) at 296: 'a public authority … possesses powers solely in order that it may use them for the public good'. See also *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) para 3 ('public power must always be exercised … in the best interests of all our people'), *Nyathi* supra note 50 at para 141 (per Nkabinde J) (referred to the obligation 'to deal with limited State resources in the public interest'), *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] 2 All SA 493 (SCA) para 32 (referred to a municipality's 'duty to act in the public interest'), *Aston Cantlow* supra note 11 para 7 ('Behind the instinctive classification of [government departments, local authorities, the police and the armed forces] as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, *an obligation to act only in the public interest*, and a statutory constitution', emphasis added). This duty is, however, not necessarily justiciable but rather underpins the established grounds of review. In *FMF* supra note 25 paras 123-5, the court rejected the contention that there is a freestanding constitutional requirement that public power may only be exercised in the public interest (although it accepted that such power must be exercised 'for public purposes'). The *FMF* court, however, noted that: 'The vague and variable concept of the 'public interest' generally signifies the common concern among and the stake of citizens in the affairs of government' (para 56).

interests, meaning that it may properly act only in the public interest'.[62] Feldman describes the position as follows:[63]

> '[G]overnmental bodies have, and see themselves as having, concerns which are usually different from those of ordinary people. They use money raised from or on behalf of the people as a whole for purposes which reflect a sense of what is 'in the public interest', meaning that the activity in question is calculated to improve the lot of a section of the people or the social conditions in which the people live…. [P]ublic administration acts in the cause of a political conception of a good, or better, society. This justifies applying to public bodies a set of legal requirements different from, or at least additional to, those imposed on ordinary people…'

The link between the duty to act in the public interest and the application of public law is reflected in those judgments which have regard to either the presence or absence of this duty in deciding whether or not conduct is public in nature.[64] These cases indicate that a duty to act in the public interest, as opposed to being at liberty to act for one's own private advantage, is an important indication of public power. Perhaps the most dramatic example of this is *IDASA v ANC*, in which the High Court – in holding that political parties do not exercise a public function in relation to party fundraising – described a service or activity required to be undertaken in the public interest as an 'essential characteristic of a public

[62] Mark Elliott 'Judicial review's scope, foundations and purposes: Joining the dots' 2012 *New Zealand LR* (2012) 75 at 79.

[63] David Feldman 'The distinctiveness of public law' in Mark Elliott & David Feldman (eds) *The Cambridge Companion to Public Law* (2015) 17 at 34. See also Dawn Oliver 'The frontiers of the state: public authorities and public functions under the Human Rights Act' *Public Law* (2000) 476 at 483-4.

[64] See eg *AAA Investments* supra note 12 para 45, *Chirwa* supra note 10 paras 138, 186, 190, *Hoffmann* supra note 19 para 23, *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) para 6, *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) paras 69 and 76 (per Jafta J and Tshiqi AJ), *MTN* supra note 10 para 32, *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A) at 552, *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2008 (3) SA 91 (E) ('*POPCRU*') para 53, *Samons v Turnaround Management Association of Southern Africa NPC* 2019 (2) SA 596 (GJ) para 19, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) at 364-5. See also Baxter *Administrative Law* op cit note 61 at 100, Lawrence Baxter '"The state" and other basic terms of public law' (1982) 99 *SALJ* 212 at 256, Klaaren & Penfold op cit note 3 at 63-56, De Smith *et al* op cit note 23 at 167. Cf Finn op cit note 7 at 633, who regards the emphasis on a duty to act in the public interest in this context as circular – something which Baxter concedes (*Administrative Law* at 100, footnote 51). Cf also Craig 'What is public power?' op cit note 13 at 28: 'Statements that a body must have a sufficiently 'public element' or must be exercising a public duty cannot function as anything other than conclusory labels for whatever we choose to pour into them. They cannot guide our reasoning in advance'.

power or function'.[65] The importance of this consideration is also reflected in English law. As De Smith, Woolf and Jowell put it:[66]

> 'A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.'

Relatedly, the government is, in principle, required to treat all members of the political community fairly and with equal concern and respect. In the words of its preamble, the Constitution is intended to lay the foundations of a democratic and open society in which 'every citizen is equally protected by the law'.[67] This is more than an obligation to avoid unfair discrimination – which applies to both the state and non-state actors.[68] It requires the government seriously to consider all relevant and legitimate interests in its decision-making. As Dworkin has explained, the preconditions for democracy include an understanding that 'everyone's interests are to be taken into account, in the same way, in determining where the collective interest lies'.[69] While a particular government decision may prefer a certain individual or group (it may even prefer future generations over current generations, as might be the case with certain environmental decisions), it may do so only after properly considering any adverse impact that its decision may have on others and weighing those interests in good faith.

The duty to act in the public interest and the duty to treat members of the political community fairly and with equal concern and respect are advanced through the application of public law. By way of example, the principle of legality requires public functionaries to act rationally and in good faith,[70] while administrative law compels public decision-making that

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[65] *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) ('*IDASA v ANC*') para 27.

[66] Op cit note 23 at 167, quoted with approval in *Mittalsteel* supra note 19 para 20. See also Baroness Hale in her dissenting judgment in *YL* supra note 11 para 62: 'The contrast is between what is 'public' in the sense of being done for or by or on behalf of the people as a whole and what is 'private' in the sense of being done for one's own purposes'.

[67] See the dicta of Sachs J in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 42 ('the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect') and in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 60 ('[e]quality means equal concern and respect across difference'). See also *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC) ('*My Vote Counts II*') para 40.

[68] Sections 9(3) and (4) of the Constitution.

[69] Ronald Dworkin *Justice in Robes* (2006) at 134.

[70] See chapter 2, para 3.1.1.

is based on all materially relevant considerations and which is unbiased, procedurally fair, nonarbitrary, and reasonable.[71]

Another notable attribute of government is the enormous power that it wields. While inequality often characterises private-law relationships,[72] and some private entities – such as large corporations or monopoly providers – have significant power (which sometimes rivals that of the state),[73] the government's political, economic and constitutional position generally means that it wields power of a different magnitude to that which arises in the private sector. Governmental power is often coercive, exercised without the consent of affected persons and, importantly, backed by criminal sanction. With this extensive power, comes the responsibility to exercise it with care and in terms of elevated legal standards.

2.2 Can government act in a private capacity?

While it is uncontroversial that government's core functions are public in nature, it might be contended that government acts privately when it engages in conduct in which private actors commonly engage and which is not sourced in statute. This might be the case where government, for example, concludes contracts, exercises contractual or property rights, or makes employment decisions.

Quinot describes the prevailing approach in our law to state action as 'a classification approach'; the basic premise being that 'all state action can be classified as either private or public in nature, and is therefore subject to private-law or public-law regulation respectively'.[74]

This approach may be illustrated with reference to three judgments of the Supreme Court of Appeal.

Cape Metro[75] involved a decision of a municipal council summarily to cancel an outsourcing contract on grounds of fraud. In doing so, the council exercised its contractual right to cancel the contract (in circumstances where the right to cancel was also provided for

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[71] Section 6(2)(a)(iii), (c), (e)(iii), (e)(vi) and (h) of PAJA.

[72] See eg Alfred Cockrell '"Can you paradigm?" – Another perspective on the public law / private law divide' 1993 *Acta Juridica* 227 at 228: the claim that private law is concerned with relationships between persons possessing 'equal power' is countered 'by focusing attention onto the vast disparity in power that attaches to the unequal possession of material resources in contemporary society'. See also Froneman J in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* 2013 (4) SA 262 (CC) ('*JLC*') para 92, *Aga Khan* supra note 21 at 875 (per Hoffman LJ).

[73] Hoexter *Administrative Law* op cit note 4 at 158. This type of power is often subject to regulatory control in the form of sector-specific legislation (eg the Banks Act 94 of 1990, the Electricity Regulation Act 4 of 2006 and the Electronic Communications Act 36 of 2005) or general regulatory legislation (eg the Competition Act 89 of 1995, the Consumer Protection Act 68 of 2008, the Labour Relations Act 66 of 1995, and the National Environmental Management Act 107 of 1998).

[74] Quinot *State Commercial Activity* op cit note 20 at 52.

[75] Supra note 1.

in legislation). The party on the receiving end of the cancellation (Cape Metro) objected on the basis that it had not been given an opportunity to make representations prior to the termination of its appointment and had not been given reasons for the cancellation. The court rejected these arguments, holding that the decision to cancel was not public in nature and thus did not amount to administrative action in terms of the Constitution.[76] There would appear to be two reasons for the court's decision. First, the court placed formalistic reliance on the fact that the cancellation was sourced in the contract and the common law rather than in statute.[77] The court went so far as to acknowledge that the cancellation would have constituted administrative action had the council exercised its statutory right to cancel.[78] Second, the court emphasised the substantive consideration that the municipal council was in a position no different to that of a private entity and did not enjoy superior power in relation to the contract.[79] As Streicher JA put it:[80]

> '[The council] derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by [the council] by virtue of its position as a public authority. They were agreed by the first respondent, a very substantial commercial undertaking. The [council], when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the [council] was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.'

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[76] At the relevant time, the right to just administrative action was contained in item 23(1)(b) of Schedule 6 to the Constitution.
[77] For a criticism of *Cape Metro* on the basis of its formalism, see Cora Hoexter 'Contracts in administrative law: Life after formalism?' (2004) 121 *SALJ* 595 at 609-12. See also Plasket *Thesis* op cit note 28 at 146-8, Hoexter 'A matter of feel?' op cit note 1 at 163-5, Pretorius 'The defence of the realm' op cit note 44 at 389-90.
[78] *Cape Metro* supra note 1 at para 20.
[79] Hoexter 'Contracts in administrative law' op cit note 77 at 611 describes this aspect of the judgment in *Cape Metro*, and its emphasis on substantive considerations, as 'a considerable saving grace'.
[80] *Cape Metro* op cit note 1 para 18.

While *Cape Metro* might be read to suggest that the exercise of a contractual right by a public authority is generally not administrative action, the SCA restricted the potential impact of this judgment in *Logbro*. This case dealt with a tender by the KwaZulu-Natal provincial government to dispose of a property approved for the development of a filling station. The province argued that the applicable tender conditions gave it a contractual right to withdraw a property from tender and, with reliance on *Cape Metro*, that the exercise of this right did not constitute administrative action. In a judgment which Hoexter describes as marking a movement 'away from formalistic to more substantive reasoning in contractual administrative-law cases',[81] the SCA court rejected this argument. Cameron JA, writing for a unanimous court, held that, even if the tender conditions constituted a contract between the province and participating tenderers (an issue which he did not decide), the contract 'did not exhaust the province's duties toward the tenderers'.[82] Rather, the principles of administrative justice 'framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract'.[83] Cameron JA circumscribed the *ratio* in *Cape Metro* in the following manner:[84]

> '[*Cape Metro*] is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation of a contract concluded on equal terms with a major commercial undertaking, *without any element of authority or superiority deriving from its public position*, does not amount to the exercise of public power.'

Given that the province had 'dictated the tender conditions', the *Logbro* court held that the province was 'acting from a position of superiority or authority by virtue of its being a public authority' and was thus bound by public duties of fairness in exercising its contractual power.[85]

I pause to note that it is debatable whether any 'superiority or authority' that the provincial government enjoyed in relation to the tender at issue in *Logbro* arose *by virtue of* its status as a public authority or, put differently, 'flow[ed] from its public position'.[86] The position would

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81 'Contracts in administrative law' op cit note 77 at 596.
82 *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 7.
83 Ibid para 8. See also *Transnet Ltd v Owner of the MV Snow Crystal* 2008 (4) SA 111 (SCA) para 21.
84 *Logbro* supra note 82 para 10, emphasis added.
85 Ibid para 11.
86 *Chirwa* supra note 10 para 187 (per Langa CJ).

seem to be no different if, for example, a private company had decided to dispose of a property approved for the development of a filling station by means of a private tender process and had published the tender conditions in a 'take-it-or-leave it' fashion.[87]

Nevertheless, the judgment in *Logbro* provided a welcome caveat to *Cape Metro* and restricted the circumstances in which it might be argued that the exercise of a contractual right by the government is not public.[88] Given that the government and public entities are, save for in exceptional circumstances, required to engage in public tenders prior to concluding contracts, and that they would normally be in a position to, at least in large measure, determine the terms of the tender and the ensuing contract, the power differential will, on the reasoning in *Logbro*, mean that the subsequent exercise of contractual rights by government or the public body will generally be public in nature.[89] I agree with Hoexter's observation that:[90]

> 'Given the state's hugely superior economic power and resources, one suspects that bargaining power is not likely to be equal very often in such cases. Indeed, it is doubtful whether such equality can *ever* exist where the state is a party.'

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[87] For another case where conduct was intuitively public in nature but where the court's finding that the public entity was acting from a position of superiority or authority 'by virtue of being a public authority' seems questionable, see *Solidarity v Government Employees Pension Fund* 2018 JDR 0312 (GP) paras 48-9. See also Quinot *State Commercial Activity* op cit note 20 at 88, Baxter *Administrative Law* op cit note 61 at 61, footnote 95.

[88] *Logbro* supra note 82 at para 12 also overruled the decision of the Appellate Division in *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A), which, in a striking example of formalistic adjudication under apartheid, held that the termination of a statutory permit to occupy land was not susceptible to review on grounds of racial discrimination because the permission to occupy was embodied in a contract, and the termination of the permit was thus the exercise of a contractual right and not a statutory power (at 354-8). The *Logbro* court, at paras 12-13, also affirmed the correctness of Schreiner JA's dissenting judgment in *Mustapha*, and quoted, with approval, the following dictum from that dissent: 'The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he will from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied' (*Mustapha* a 347, quoted in para 12 of *Logbro*). For criticism of the formalistic reasoning in *Mustapha*, see Hoexter 'Contracts in administrative law' op cit note 77 at 601-2, Quinot *State Commercial Activity* op cit note 20 at 68-71.

[89] Quinot *State Commercial Activity* op cit note 20 at 227 expresses a similar view. See eg *Sanyathi Civil Engineering and Construction (Pty) Ltd v eThekwini Municipality* 2012 (1) BCLR 45 (KZP) para 23, *MEC, Department of Education, North West v KC Productions CC* [2009] ZANWHC 10 paras 18-20. For a critical analysis of the latter judgment, see Cachalia op cit note 49 at 105. Cf *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 12, *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) para 50: 'Once the tender is awarded the State and the tenderer are no more than equal contracting parties in an imminent sale'.

[90] 'A matter of feel?' op cit note 1 at 166. See also Calli Ferreira 'The quest for clarity: An examination of the law governing public contracts' (2011) 128 *SALJ* 172 at 189. On the fundamental distinctions between the state and private commercial parties, see Quinot *State Commercial Activity* op cit note 20 at 155-7.

The third of the SCA decisions, *Thabiso Chemicals*,[91] is particularly remarkable. In this case, the court – relying on *Cape Metro* and without considering the power relationship between the parties or even mentioning *Logbro*[92] – held that administrative law had no application to the cancellation of a contract by the State Tender Board because, after the tender had been awarded, 'the relationship between the parties was governed by the principles of contract law'.[93] The court adopted this formalistic approach despite acknowledging that the tender board, in cancelling the contract on behalf of government, relied on authority derived from a statutory power and notwithstanding that the grounds of cancellation were reflected in a regulation.[94]

Another case that is worth mentioning in this context is the recent decision of the High Court in *Gqweta*.[95] This case involved a municipality's cancellation of a lease which granted permission for a small-scale farmer to graze cattle on municipal land. The lease formed part of the municipality's economic development programme aimed at assisting small-scale, indigent farmers. It was cancelled in circumstances in which the lease was silent on the grounds justifying its cancellation and the municipality thus relied upon its common-law entitlement to cancel for material breach.[96] The court emphasised that the municipality was not exercising a power sourced in legislation, but rather one which was derived from the common law and which would have 'equally been available to a natural person leasing a farm to the small-scale farmer'.[97] Accordingly, the municipality, in cancelling the lease, was not 'acting from a stronger position by virtue of it being a public body'. It thus did not exercise a public power 'and was not burdened with duties of public fairness in terms of administrative law'.[98]

The court's conclusion and reasoning in *Gqweta* is, in my view, erroneous in a number of respects. First, it is difficult to fathom how the decision could be private in nature where it was taken in respect of a municipality's economic development programme – a programme that was clearly intended to promote the public interest – and it terminated a beneficiary's

[91] *Government of the Republic of South Africa v Thabiso Chemicals* 2009 (1) SA 163 (SCA) para 18.
[92] The High Court in *Staffmed CC v MEC for Health (Western Cape)* [2014] ZAWCHC 94 para 8 subsequently described the absence of any mention of *Logbro* in the *Thabiso Chemicals* judgment as 'remarkable'. See also Quinot *State Commercial Activity* op cit note 20 at 77, Ferreira op cit note 90 at 188, Hoexter 'A matter of feel?' op cit note 1 at 167.
[93] At para 18.
[94] Ibid. This aspect of *Thabiso Chemicals* is contrary to the dictum in *Cape Metro* at para 20. See *Staffmed* supra note 92 para 7, Hoexter 'A matter of feel?' op cit note 1 at 167. Finn op cit note 7 at 645, footnote 88 also points out that *Thabiso Chemicals* appears to be inconsistent with the approach in *Logbro*.
[95] *Tlokwe Local Municipality v Gqweta* 2018 JDR 0519 (GP).
[96] Ibid para 39.
[97] Ibid paras 40-3.
[98] Ibid paras 44-5.

participation in that programme.[99] Second, the court appeared to have insufficient regard to the fact that PAJA applies not only to the exercise of public *powers* but also to the performance of public *functions*.[100] Third, the fact that the municipality relied upon its common-law right to cancel does not alter the fact that the right to cancel for material breach is inextricably linked to the terms of the substantive contract and, in the absence of any suggestion to the contrary in the judgment, it seems unlikely that these terms were freely negotiated between the municipality and the small-scale farmer on equal bargaining terms. The reasoning in *Gqweta* is, in my view, formalistic. It places too much emphasis on the common-law source of the municipality's right to cancel and fails adequately to take into account the context in which the cancellation arose.

Leaving aside the merits of the individual cases discussed above, they all provide authority for the proposition that the government, at times, engages in private action – either, in the cases of *Cape Metro*, *Thabiso Chemicals* and *Gqweta*, by finding that the relevant function was private or, in *Logbro's* case, by acknowledging that some government conduct is private. This approach was recently affirmed by the Constitutional Court in *AMCU*, in which Cameron J stated, in passing and with reliance on *Cape Metro*, that 'the constitutional dispensation recognises that state organs and public authorities may perform acts that are not public in nature'.[101]

These cases also indicate that the distinction between public and private power, in the context of government decision-making in the contractual realm, depends on whether or not the governmental body acts from a position of superiority or authority 'by virtue of its being a public authority'. As Quinot observed, following the judgments in *Cape Metro* and *Logbro*, 'superior power or authority has now emerged as the primary criterion to classify state action in South Africa'.[102] This approach, and its reliance upon substantive considerations, is to be

[99] For authority for the proposition that a public purpose or the implementation of government policy is subject to review, see *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes* 1991 (1) SA 372 (SWA) at 379, *Ramburan v Minister of Housing (House of Delegates)* 1995 (1) SA 353 (D) at 361-2 and the discussion of these cases in Quinot *State Commercial Activity* op cit note 20 at 106-8. See also Pretorius 'The defence of the realm' op cit note 44 at 390-1, discussing *Scholtz v Cape Divisional Council* 1987 (1) SA 68 (C) which held that the termination of a lease by a local authority pursuant to a housing scheme was not subject to an implied term to the effect that it could not be exercised in an unfair manner.

[100] See also *Eye of Africa Developments (Pty) Ltd v Shear* 2012 (2) SA 186 (SCA) para 28, in which the court held that an internal communication between government departments 'cannot be administrative action as it was not an exercise of public power', without considering whether it amounted to the exercise of a public function (which was, in my view, the case).

[101] *AMCU* supra note 10 para 69.

[102] *State Commercial Activity* op cit note 20 at 83. See also the decision of the Namibian Supreme Court in *McLaren NO v Municipal Council of Windhoek* 2018 (1) NR 250 (SC) paras 7-13, which emphasised the contractual source of the power and the absence of an inequality of bargaining positions, in holding that the cancellation of a lease by the Municipality of Windhoek was not administrative action.

preferred over the formalistic position that government's exercise of a contractual right (as opposed to a statutory power) is not public in nature. It means that a contractual context alone 'can no longer suffice to transform what would have been an exercise of public power into something private'.[103]

Nevertheless, the 'classification approach' is, in my view, flawed. It rather seems to me, for the reasons set out below, that government *always* engages in public functions.

This view finds some, limited, support in those decisions of our courts which hold that government's conduct is public in circumstances where it performs a function that is common to both public and private actors. For example, the SCA, in *Bullock*[104] and *Grey's Marine*,[105] held that the exercise of property rights by government (ie decisions to grant a servitude (*Bullock*) and to conclude a lease (*Grey's Marine*)) in respect of state-owned property amounted to the exercise of public power.[106] In the latter case, the court rejected the argument that the state's ownership of the property meant that 'it may use the property as if it were a private owner and its conduct in doing so is not administrative action'.[107] It is also noteworthy that the Constitutional Court in *Gijima* held that the award of a government contract for IT services, which was concluded outside a public-tender context, was the exercise of a public power,[108] while the High Court recently held that a decision by the Government Employees Medical Scheme (GEMS) to cancel a contract, and thus to remove a service provider from its emergency dispatch system, amounted to the exercise of public power.[109]

Nevertheless, these cases, like *Logbro*, do not adopt the position that government *always* acts publicly when it acts as, for example, a contracting party or a property owner. In finding that the relevant action amounted to the exercise of public power in each case, they rather tended to emphasise certain public aspects that arose in the context of the particular case. For

[103] Hoexter 'A matter of feel?' op cit note 1 at 166. For post-*Logbro* cases which indicate that the exercise of contractual rights does not *per se* exclude the application of public law, see *Commissioner of the South African Revenue Service v Trend Finance (Pty) Ltd* 2007 (6) SA 117 (SCA) para 25, *MV Snow Crystal* supra note 83 para 21, *President of the Republic of South Africa v Reinecke* 2014 (3) SA 205 (SCA) para 16, *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA) paras 23-32, 35-9. See also Froneman J's concurring judgment in *JLC* supra note 72 at para 101. The purely contractual approach (ie that administrative law does not apply to relationships regulated by contract) was rejected even prior to the advent of the Constitution and PAJA, in *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A). For more on the 'purely contractual approach', see Hoexter 'Contracts in administrative law' op cit note 77 at 599-604.
[104] *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA).
[105] Supra note 12.
[106] See also *Kouga Municipality v De Beer* 2008 (5) SA 503 (E) para 8.
[107] *Grey's Marine* supra note 12 para 26.
[108] *Gijima* supra note 32 para 40.
[109] *Dynamic Emergency Medical Services CC v Government Employees Medical Scheme* 2017 JDR 1680 (ECB) paras 17-20.

example, in *Bullock* the SCA emphasised that the servitude was in respect of valuable property on the foreshore of Hartbeespoort Dam which 'curtailed access to that resource to the public',[110] and in *Grey's Marine* the court referred to the fact that the decision of the Minister of Public Works to lease waterfront property in Hout Bay harbour was taken in terms of legislation.[111] As for *Gijima*, state contracting is somewhat different to other contexts in which the state engages in conduct which is common to private actors because state contracting for goods and services is subject to specific constitutional (and statutory) regulation.[112]

Another significant judgment on this score is the recent decision of the SCA in *Granor Passi*,[113] which held that a municipal council's decision not to accept proof of payment from the purchaser of the municipality's immovable property, with the effect that the council did not consent to transfer of the property, amounted to administrative action. In particular, Wallis JA remarked that 'a decision regarding the implementation of a contract to which the municipality is a party is an act of administration' and the decision was taken by an organ of state 'exercising a public power or function in relation to the enforcement of a contract concluded in terms of the empowering provisions governing transactions of this character'.[114] While Wallis JA referred to the fact that the contract was concluded in terms of a statutory provision,[115] he did not indicate that the municipal council's resolution was the exercise of a statutory power or, importantly, that the contract was concluded in circumstances where the municipality was in a position of authority deriving from its position as a public body.

Arguably the best support in our case law for the emphatic approach that government always engages in public conduct arises in the Constitutional Court's treatment of another borderline area: public-sector employment decisions. Prior to the apparent resolution of the issue in *Chirwa*, there were two lines of judgments, some holding that such decisions are private while others held that they are public.[116]

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[110] *Bullock* supra note 104 para 14.
[111] *Grey's Marine* supra note 12 paras 3 and 28.
[112] Section 217 of the Constitution. See *Gijima* supra note 32 para 41.
[113] *Polokwane Local Municipality v Granor Passi (Pty) Ltd* [2019] 2 All SA 307 (SCA).
[114] Ibid para 11.
[115] Ibid footnote 3.
[116] See the cases cited by Ngcobo J in *Chirwa* supra note 10 para 128, footnotes 62 and 63. Prior to the advent of the Constitution, the dismissal of a public-sector employees constituted the exercise of a public power, in circumstances in which such employees did not enjoy the protection of labour legislation. *Zenzile* supra note 103 at 34, *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A) at 539.

The decision of the the Labour Court in *SAPU* provides an example of the former line of judgments.[117] In this case, Murphy AJ held that a decision of the Commissioner of the South African Police Service (SAPS) to change shift hours was not of a public nature but rather resided within 'the commercial or private domain of labour relations'[118] – notwithstanding that the power to determine working hours had a statutory source.[119] The court emphasised, amongst other things, that employment relationships are internal to government and that the adjustment of shifts took place in terms of a contract concluded, by means of collective bargaining, 'on equal terms between equal parties' and with no superiority or authority 'deriving from SAPS's public position'.[120] According to Murphy AJ, the setting of the working hours of police officers is not 'inherently public' and does not raise public-law concerns; it rather 'falls more readily within the domain of contractual regulation of private employment relations'.[121]

A good example of those cases which took the opposite approach is the High Court decision in *POPCRU*.[122] In this case, Plasket J held that the dismissal of correctional officers by the Department of Correctional Services constituted the exercise of public power given the power's statutory basis, the subservience of the department to the Constitution and, in particular, to the principles of public administration in s 195, as well as 'the public character of the department and the pre-eminence of the public interest in the proper administration of prisons'.[123]

The Constitutional Court seemed to resolve this thorny issue in *Chirwa* – a case dealing not with government in the narrow sense but with a state-owned entity: Transnet SOC Ltd.[124] During the course of his majority judgment, and after discussing *SAPU* and *POPCRU* as well as the divided opinions in the judgments in *Chirwa (SCA)*,[125] Ngcobo J held that the dismissal of a public-sector employee (in that case, the human resources manager of the Transnet

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[117] *South African Police Union v National Commissioner of the South African Police Service* (2005) 26 *ILJ* 2403 (LC) ('*SAPU*').
[118] Ibid para 56.
[119] Ibid para 51.
[120] Ibid paras 52 and 53. This portion of *SAPU* relied upon the reasoning in *Logbro* supra note 82.
[121] *SAPU* supra note 117 para 51.
[122] Supra note 64.
[123] Ibid para 54.
[124] Supra note 10. The position of state-owned entities, including the judgment in *Chirwa*, is discussed in more detail in the following section of this chapter.
[125] Ibid paras 130-6. The SCA judgment is reported as *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA).

Pension Fund) was the exercise of *public* power. Ngcobo J's reasoning is captured in the following passage:[126]

> 'In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power, and, '(t)hat power is *always* sourced in statutory provision, whether general or specific and, behind it, the Constitution'.'

The majority's judgment is consistent with Cameron JA's observation in *Chirwa (SCA)* that Transnet operates under statutory authority, it would not exist without statute and '[i]ts *every act* derives from its public, statutory character…'.[127] This language suggests that *all* the activities of a state-owned entity established by legislation (in that case, Transnet) constitute public functions. If this is the case for a state-owned entity, it must be true of government itself.

Notably, the majority's approach in *Chirwa* is also difficult to reconcile with the 'classification approach' adopted in cases such as *Cape Metro* and *Logbro* as there was no suggestion that Transnet derived any authority or superiority *from its public position*. On the contrary, it seems to me that Transnet's position vis-à-vis the human resources manager was no different to the relationship between any large corporation and its employees.[128]

While the majority in *Chirwa* seemed to have no difficulty in finding that the decision to dismiss a public-sector employee was public in nature, it is worth noting that a passing statement in the Constitutional Court's subsequent judgment in *Gcaba*[129] could be read to suggest that the court had second thoughts and intended to revise its finding of public power in *Chirwa*. Writing on behalf of a unanimous court in *Gcaba*, Van der Westhuizen J – in the context of a decision not to appoint Mr Gcaba as a station commissioner in the SAPS – described the reasoning in *SAPU* as 'persuasive'.[130] In referring to the reasoning in *SAPU*, the

[126] *Chirwa* supra note 10 para 138, emphasis added. The last portion of this passage quoted Cameron JA in *Chirwa (SCA)* supra note 125 para 52.
[127] *Chirwa (SCA)* supra note 125 para 52, emphasis added.
[128] Langa CJ made this point in his dissenting judgment in *Chirwa* supra note 10 para 187.
[129] *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC).
[130] Ibid para 65.

Gcaba court cited two paragraphs of the Labour Court judgment.[131] These paragraphs broadly dealt with the distinction between tendering decisions and employment decisions. The first of these paragraphs indicates that employment decisions are internal to the public authority and thus lack the external impact required for administrative action[132] – reasoning that arguably comports with the approach of the majority in *Chirwa*[133] and which does not seem to go to whether or not the decision is public. The second paragraph of the *SAPU* judgment cited by the *Gcaba* court indicated that the employment decision at issue in *SAPU* was not public in nature as it took place in terms of a contract concluded on equal terms in which the SAPS did not derive authority by virtue of its public position.[134] This second paragraph thus appeared to rely on the reasoning of the SCA in *Cape Metro* and *Logbro* and would appear to be at odds with *Chirwa*.

Gcaba should, in my view, not be read as undermining the finding in *Chirwa* that decisions in respect of public-sector employees are public in nature. If the *Gcaba* court intended to overrule *Chirwa* on this issue, one would expect it to have done so expressly rather than by referring in a footnote to a paragraph in a judgment of the Labour Court and describing the reasoning as 'persuasive'.[135]

The emphatic approach to which *Chirwa* points, while seemingly inconsistent with various other decisions of our courts, is, in my view, supported by substantive reasoning. In particular, if one has regard to the substantive reasons for subjecting government to the heightened standards and scrutiny of public law discussed in the previous section of this chapter, there would seem to be no good reason to distinguish between government's core functions and its other functions. On the contrary, these substantive reasons apply to *all* of government's activities: government *always* owes its mandate to the public, is publicly

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[131] Ibid footnote 100, citing paras 52 and 53 of *SAPU* supra note 117.
[132] *SAPU* supra note 117 para 52.
[133] See the discussion of *Chirwa* in chapter 4.
[134] *SAPU* supra note 117 para 53.
[135] The *Gcaba* judgment may have been deliberately vague in order to achieve unanimity on the court in circumstances in which *Chirwa* and other Constitutional Court decisions had given rise to uncertainty, particularly in relation to the related question of the jurisdiction of the Labour Court and the High Court on employment matters in the public sector. It is worth noting that Van der Westhuizen J (the author of *Gcaba*) concurred in Ngcobo J's judgment in *Chirwa*, Ngcobo J concurred in the *Gcaba* judgment, and Moseneke DCJ and Nkabinde J concurred in both judgments. On the other hand, Mokgoro and O'Regan JJ concurred in Langa CJ's judgment in *Chirwa*, holding that the dismissal at issue in that case was private, and subsequently concurred in the *Gcaba* judgment. Hoexter *Administrative Law* op cit note 4 at 216 notes that 'in *Gcaba* the element of public power was never in doubt, particularly given the majority holding of Ngcobo J in *Chirwa* that the dismissal there, though governed by contract, *was an exercise of public power*' (emphasis in original). See also Cora Hoexter 'From *Chirwa* to *Gcaba:* An administrative lawyer's view' in Michael Kidd & Shannon Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* (2010) 47 at 57.

funded, and should treat its citizens with equal concern and respect.[136] Moreover, the desirability of good governance seemingly animates all of government's functions. This is the case whether a government functionary is deciding, for example, to close a public school in terms of a statutory power or to exercise a contractual right to cancel a lease to which it is a party. It follows that the principle of accountability – and transparency – is always engaged by government conduct. An approach which applies the rigours of public law to *all* of government's activities thus promotes a culture of justification – 'a culture in which *every* exercise of power is to be justified'.[137] As Skweyiya J stated in *Khumalo*:[138]

> 'It is the duty of the courts to insist that the state, *in all its dealings*, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power.'

Government is, moreover, always required to act in the public interest.[139] This consideration, perhaps more than any other, distinguishes government's conduct from that of private parties – including when it contracts, exercises contractual or property rights or makes employment decisions. As Plasket points out, government is different to a private contracting party in that it contracts to further the public interest rather than its own private interests, which 'gives governmental contracts a public character, even if it uses private law modes of doing business'.[140] It is this public-interest requirement which, in Quinot's words, constitutes

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[136] The state must also always 'respect, protect, promote and fulfill the rights in the Bill of Rights'. Section 7(2) of the Constitution. See Cachalia op cit note 49 at 97. The Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) ('*AllPay II*') para 49 held that s 7(2) applies to all organs of state.

[137] Mureinik 'A bridge to where?' op cit note 56 at 32, emphasis added. See also Quinot *State Commercial Activity* op cit note 20 at 230-2, who adds that such an approach advances transformative constitutionalism.

[138] *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 29, emphasis added.

[139] See supra note 61. See also Quinot *State Commercial Activity* op cit note 20 at 104 ('all state actions are taken in the public interest, however general that interest may be'), Cachalia op cit note 49 at 99. Cf Pretorius 'The defence of the realm' op cit note 44 at 387, 396, Mark Aronson 'Public values in the common law' in Mark Elliott & David Feldman (eds) *The Cambridge Companion to Public Law* (2015) 134 at 144. Pretorius distinguishes between contracts concluded by the government which are of a 'purely commercial' nature as opposed to 'governmental' contracts and expresses the view that one criterion for distinguishing between these two types of contacts is that a 'purely commercial' contract arises in the rare instance where the contract to which government is a party is not aimed at achieving a public purpose or advancing the public interest. It is, however, important not to overlook the fact that, while Pretorius argues that procedural fairness (the *audi* rule) should not apply to the termination of 'purely commercial' contracts (at 387), he adopts the view that the termination of such contracts constitutes the exercise of a 'public power' and is thus constrained by the principle of legality (at 391). Cf also the surprising, and problematic, finding in *Botha v Matjhabeng Municipality* [2010] ZAFSHC 18 para 29.3 that a decision by the speaker of a municipal council to refuse a request for voting in respect of the removal of the mayor to take place by a secret ballot did not amount to the exercise of public power and there was 'no apparent need for it to be exercised in the public interest'.

[140] Clive Plasket 'Tendering for government contracts: Public procurement and judicial review' in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 159 at 160. See also Ferreira op cit note 90 at 173. For a useful discussion on the unique nature of the state as a contracting party, see Cachalia op cit note 49 at 94-102. Cachalia concludes that 'the state is *always* different to the private contractor' and that 'even as commercial

the 'added dimension' to state commercial activity which necessitates a difference in regulation as compared to private commercial activity.[141] In the context of employment decisions, Hoexter similarly notes that:[142]

> 'Public and private employers are not the same, for under our Constitution they are not under the same public duties. To put it simply, employers in the private sector have the luxury (to the extent that they are not thwarted by regulation) of acting out of pure self-interest. Organs of state do not have the same freedom, for they are generally constrained by their duty to act in the public interest – even when there is no legislation explicitly saying so.'

In light of these considerations, it seems to me that the constitutional values of accountability, participation and transparency require *all* government conduct to be regarded as public in nature.[143]

This emphatic approach is consistent with the approach that our courts adopt to the ambit of legality review. As explained in chapter two, the principle of legality applies to all public powers or public functions. This principle flows from the dictum in *Fedsure* that the legislature and the executive in every sphere of government 'are constrained by the principle that they may exercise *no power* and perform *no function* beyond that conferred upon them by law'.[144] Accordingly, the government is always constrained by the principle of legality and it follows that its powers or functions are always public in nature. Similarly, the preponderance of case law indicates that all state power must be sourced, either directly or indirectly, in the Constitution.[145] I thus agree with Quinot's observations, in the context of his comprehensive discussion of state commercial activity:

> 'State commercial powers cannot amount to more than mechanisms for the realisation of constitutionally mandated functions. This holds significant implications for the current treatment of state commercial activity in South African law. At the most basic

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players, public bodies are quite different to the ordinary contracting party because they are accountable to the broader public' (at 96 and 97, emphasis in the original). See also Alfred Cockrell 'The hegemony of contract' (1998) 115 *SALJ* 286 at 314: 'attempts to construe the state as just another actor in the marketplace fundamentally distorts notions of political obligation in their zeal to extend the primacy of market relations'.

[141] *State Commercial Activity* op cit note 20 at 227-8.

[142] Cora Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209 at 222-3. As Hoexter points out, at footnote 96, this 'most basic principle of administrative law' was expressed in Schreiner JA's dissent in *Mustapha* supra note 88 at 347.

[143] See Quinot *State Commercial Activity* supra note 20 at 230-1, 254. Cf Dawn Oliver 'Functions of a public nature under the Human Rights Act' [2004] *Public Law* 329 at 338, who argues that certain activities of public authorities, such as cleaning council offices and gardening in public parks, are clearly private in nature.

[144] *Fedsure* supra note 44 para 58, emphasis added. See also *AAA Investments* supra note 12 paras 39, 68.

[145] See the cases cited at supra note 44.

level it means that state commercial action can never be divorced from constitutional and hence public functions.'[146]

And:

'[A]n equation of state conduct of any nature with private conduct is untenable. When the state acts it always does so with public power and its actions are always public actions. The principle of legality thus always applies to the state.'[147]

This pervasive reach of the principle of legality with regard to government functions may, to some extent, be illustrated with reference to the Constitutional Court decision in *Kyalami Ridge*.[148] In that case, the court held that, in the absence of any empowering legislation, the government's decision temporarily to relocate flood victims to land forming part of a prison was sourced in the state's constitutional duty to provide access to housing as well as in government's right as the owner of the property to make it available to the flood victims.[149] The fact that government was exercising common-law rights in respect of its property did not detract from the fact that its conduct amounted to the exercise of a public power that was subject to legality review.[150] While government might have the rights of, or akin to, a private owner, it is not a private owner. To quote Schreiner JA in his dissent in *Mustapha*, government, unlike a private owner, is not entitled 'to act as arbitrarily as [it] pleases'.[151]

Support for the notion that government always acts publicly may, additionally, be found in those cases which indicate that state control is, in certain circumstances, an important consideration in determining whether a function is public. Perhaps the clearest illustration of this is *Mittalsteel*, which held that state control converts a function which might otherwise be

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[146] *State Commercial Activity* op cit note 20 at 50.
[147] Ibid at 223, quoted with approval in *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42 footnote 13. The footnote in *Shabangu* goes on to state that the Constitutional Court has on numerous occasions 'recognised that the exercise of *all* public power is subject to the principle of legality' (emphasis added).
[148] Supra note 44.
[149] Ibid paras 40 and 48.
[150] Ibid paras 48 and 54. See also Carnwath LJ in *R (on the application of Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548 (CA) para 48 (although the Crown enjoys the power to do whatever a private person can do, 'as an organ of government, it can only exercise those powers for the public benefit, and for identifiably 'governmental' purposes within limits set by the law'), Elliott 'Judicial review's scope' op cit note 62 at 93-4. It bears emphasis, however, that the government in *Kyalami Ridge* was not only exercising common-law powers – it was also giving effect to its duty to provide access to housing under s 26 of the Constitution (which undoubtedly constituted the performance of a public function). As Chaskalson P noted at para 51: 'The provision of relief to the victims of natural disasters is an essential role of government in a democratic State, and government would have failed in its duty to the victims of the floods if it had done nothing'.
[151] *Mustapha* supra note 88 at 347.

private (in that case, a manufacturing and trading function) into a public function.[152] If state *control* has this effect, it would seem to follow that the performance of a function by the government (ie by the state itself) is *per se* public.

3. STATE-OWNED ENTITIES

State-owned entities[153] established by (or in terms of) legislation plainly perform public functions insofar as they engage in their core functions.[154] This is the case when, for example, Eskom[155] transmits electricity, Transnet or PRASA[156] operate trains, or the SABC[157] broadcasts. The Constitutional Court thus had no hesitation in finding that City Power (Pty) Ltd – a municipal entity established as a private company by the City of Johannesburg Metropolitan Municipality[158] – performed a public function in distributing electricity to the local community.[159]

The proposition that state-owned entities perform public functions flows from the fact that they are established, owned and controlled by the state and exist in order to perform functions that are in the public interest and which would otherwise be undertaken by the government.[160] It is also consistent with the fact that many state-owned entities control public assets (eg airports or railway lines) and incur liabilities 'that ultimately will have to be borne by the public' (or potentially be borne by the public).[161] State ownership means that these entities' financial performance ultimately affects the public purse and they are thus, in effect, dealing with public funds.[162] Moreover, the public nature of most state-owned entities is enhanced by the fact that they receive funding (or other forms of financial assistance) from government,[163]

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[152] Supra note 19 para 19. This case is discussed in more detail in the following section of this chapter.
[153] In this section, 'state-owned entities' refers to state-owned companies or other state-owned enterprises established by or in terms of legislation.
[154] See eg *Hoffmann* supra note 19 para 23, *Goodman Brothers* supra note 14 para 37 (per Olivier JA), *Rail Commuters Action Group v Transnet Ltd* 2005 (2) SA 359 (CC) para 67, *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 8, *Snow Crystal* supra note 83 para 19, *Offit Enterprises* supra note 64 para 6, *Democratic Alliance v South African Broadcasting Corporation SOC Ltd* [2017] 1 All SA 530 (WCC) ('*DA v SABC*') para 157, *ISO Leisure* supra note 28 paras 59-62, *BHP Billiton PLC Inc v De Lange* 2013 (3) SA 571 (SCA) para 2, *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 4.
[155] Eskom Holdings SOC Ltd.
[156] Passenger Rail Agency of South Africa SOC Ltd.
[157] South African Broadcasting Corporation SOC Ltd.
[158] In terms of s 86C(1) of the Municipal Systems Act 32 of 2000.
[159] *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* 2015 (6) BCLR 660 (CC) paras 20-3.
[160] *Hoffmann* supra note 19 para 23 (and footnote 17), *Goodman Brothers* supra note 14 para 37, *Chirwa* supra note 10 para 138, *DA v SABC* supra note 154 para 154.
[161] *ISO Leisure* supra note 28 para 59.
[162] Ibid para 61.
[163] *Steenkamp v Central Energy Fund SOC Ltd* 2018 (1) SA 311 (WCC) ('*Steenkamp v CEF*') para 55: 'The state as shareholder [in a state-owned entity] is utilising public capital derived from the fiscus and therefore, ultimately, the general public.'

possess legislative powers or have a monopoly (or near-monopoly) in respect of some or all of their activities.[164]

Subjecting state-owned entities to the rigours of public law also ensures that government is not able to avoid its public-law obligations by establishing a separate state-owned entity and conferring powers or duties on that entity which would otherwise rest with government.[165] As the US Supreme Court has held, corporations created and controlled by government are, for many purposes, treated as part of the government itself because '[i]t surely cannot be that government, State or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to corporate form'.[166] The imperative of accountability in respect of state-owned entities is captured in the following dictum of Vally J in *ISO Leisure*:[167]

> 'It is not uncommon to find that modern governments have relinquished much of their duties and responsibilities of, inter alia, controlling public assets and funds, and have handed these functions to private bodies, such as, for example, [the Airports Company]. It may keep a controlling interest in these bodies, but does, nevertheless, empower them with substantial autonomy to control and administer these assets. In such a circumstance it is particularly worrisome if any party, adversely affected by the conduct of these bodies, is denied the forceps or scalpel of PAJA in order to surgically dissect the conduct, and seek relief from a court.'

The extent to which state-owned entities exercise public functions was tested in *Goodman Brothers*, in the context of Transnet's tender for gold watches to be awarded to long-serving employees. Transnet – a government-owned company established by legislation[168] that provides a transport service to the public and which the court described as having a near-monopoly over rail transport[169] – argued that, while it acts administratively in relation to its statutory mandate (eg where it invites tenders for the supply of locomotives), this is not the

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[164] *Goodman Brothers* supra note 14 para 39 (per Olivier JA) and para 8 (per Schutz JA).
[165] *AAA Investments* supra note 12 para 40.
[166] *Lebron v National Railroad Passenger Corporation* 513 US 374 (1995), quoted *AAA Investments* supra note 12 para 33.
[167] Supra note 28 para 55.
[168] Legal Succession to the South African Transport Services Act 9 of 1989 ('the Legal Succession Act').
[169] At para 8 (per Schutz JA). While it is fair to say that Transnet enjoys a near-monopoly in respect of freight rail, commuter rail services are largely provided by PRASA (another state-owned entity established by the Legal Succession Act, and formerly known as the South African Rail Commuter Corporation).

case where it invites tenders for toilet paper or gold watches.[170] In the latter instance, Transnet argued, it acted in a private, commercial capacity.[171]

The SCA rejected this argument, holding that Transnet's adjudication of the tender amounted to administrative action. Schutz JA stated that the distinction for which Transnet argued could not be drawn, especially where the purchase of gold watches was incidental to Transnet's general powers in that the watches were used to secure loyalty from its employees.[172] In his separate concurring judgment, Olivier JA added that Transnet, generally speaking, exercises public powers and performs public functions, in terms of its establishment legislation, 'of or on behalf of a government department'.[173] This is because Transnet stepped into the shoes of an entity that formed part of government,[174] the state controls it, and it is obliged to provide a service in the public interest.[175] Turning to the specific function of conducting a tender for gold watches, Olivier JA held that this function was public as it arose from legislation, was 'directly related to affairs not confined to the internal affairs of Transnet', and '[p]ublic funds and eventually State responsibility are involved'.[176]

The approach in *Goodman Brothers* suggests that procurement processes conducted by state-owned entities will invariably be public in nature. Given the indirect nature of the link between the procurement of gold watches and Transnet's public function of providing transport services, it is, in Quinot's words: 'difficult to imagine examples of procurement by Transnet that will not be sufficiently linked to its public function in order for such procurement activities to be exempted from public-law regulation. On this approach all procurement by Transnet will amount to a public function'.[177]

Another judgment which demonstrates the breadth of the application of public law to state-owned entities is that of the SCA in *Mittalsteel*.[178] The question that arose in that case was whether Iscor[179] (a steel producer owned by the apartheid state) constituted a public body

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[170] *Goodman Brothers* supra note 14 para 9 (per Schutz JA).
[171] Ibid para 18 (per Olivier JA).
[172] Ibid para 9.
[173] At para 38. In my view, Transnet does not exercise power or perform functions *on behalf of* a government department. It is a state-owned entity that succeeded to the performance of functions that were previously performed under the auspices of a government department but it does not act as an agent of government.
[174] South African Transport Services.
[175] Ibid para 37.
[176] Ibid para 39.
[177] *State Commercial Activity* op cit note 20 at 114.
[178] Supra note 19.
[179] South African Iron and Steel Industrial Corporation Ltd.

for purposes of a request for access to historical records relating to its labour relations.[180] The court held that these records were produced in the course of Iscor's usual business as a steel producer.[181] While the conduct of such a business might, in the normal course, constitute a private function, this was not the case for Iscor given that it performed this function subject to extensive state control.[182] As Conradie JA put it:[183]

> 'The control test[184] is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions.'

State control thus converts a function which is private in nature (the production of steel) into a public function, and the body which engages in that function is a public body, for purposes of PAIA, to the extent that it carries out that function (ie the function that is subject to state control). While the final portion of the quoted dictum ('for the time and to the extent that it carries out public functions') might be read to suggest that state-owned entities do not always engage in public functions, there is, on the approach adopted in *Mittalsteel*, very limited, if any, scope for arguing that a particular function of such an entity is private. This is because the state normally controls the overall functioning of the state-owned entity.

The scope for arguing that particular conduct of a state-owned entity is not public is further reduced (if not removed) by the Constitutional Court's decision in *Chirwa*[185] – another case involving Transnet. As noted above, *Chirwa* dealt with the tricky question of whether a decision to dismiss a public-sector employee amounted to administrative action in the context of Transnet's decision to dismiss the human resources manager of its pension fund.

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[180] The request was brought in terms of PAIA, which defines a public body as, amongst others, an institution 'exercising a public power or performing a public function in terms of any legislation'.
[181] *Mittalsteel* supra note 19 para 11.
[182] Ibid paras 23-7.
[183] Ibid para 19, emphasis added.
[184] In a number of cases, the control test – in terms of which an entity constituted an organ of state if it was subject to state control – resulted in findings that state-owned entities constituted organs of state. See eg *Directory Advertising Costs Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) (in relation to Telkom South Africa Ltd), *Claase v Transnet Bpk* 1999 (3) SA 1012 (T) (Transnet). For discussions of the control test, see Stuart Woolman 'Application' in Stuart Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed (2005) at 31.4(*f*)(ii), Quinot *State Commercial Activity* op cit note 20 at 63-7, Finn op cit note 7 at 633-5. As *Mittalsteel* supra note 19 indicates, at para 22, the control test is no longer determinative under the final Constitution. See eg *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA) para 20, *AllPay II* supra note 136 para 52.
[185] Supra note 10.

In his minority judgment, Langa CJ held that the dismissal did not constitute the exercise of a public power or the performance of a public function, and was thus not administrative action under PAJA. He gave a number of reasons for this view. First, with reliance on *Cape Metro*, Langa CJ emphasised that Transnet had no specific authority over its employees 'by virtue of the fact that it is a public body'.[186] Its power flowed rather from its position as an employer and would have been the same if Transnet had been a private company.[187] Second, the dismissal of the HR manager of the pension fund would have 'a very small impact, if any on the public'.[188] Third, the source of the power was contractual, which, while not decisive, 'point[s] strongly in the direction that the power is not a public one'.[189] Fourth, the pension fund did not have 'obviously public goals' and, in deciding to dismiss the HR manager, there was no duty to act in the public interest (as opposed to acting in the interests of the pension fund and Transnet's employees which stood to benefit from the smooth running of the fund).[190] Langa CJ, however, left open the possibility that the dismissal of a public employee may, in certain circumstances, amount to administrative action. This might be the case where, for example, the dismissal takes place in terms of a statutory provision or where 'the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed'.[191]

The majority of the *Chirwa* court took a different view, holding that, while the dismissal decision did not amount to administrative action, it was public in nature as it was 'vested in a public functionary, who is required to exercise the power in the public interest'.[192] As stated above, Ngcobo J went on to note that Transnet is a creature of statute and 'operates under statutory authority' and suggested that Transnet's power 'is always sourced in statutory provision, whether general or specific and, behind it, the Constitution'.[193]

Two recent High Court decisions also adopt a broad approach to the public nature of conduct by state-owned entities. First, in *DA v SABC*,[194] the court held that the SABC's decision (taken by its Group CEO) that an individual should resume responsibilities as the Group Executive: Corporate Affairs amounted to the exercise of a public power.[195] In

[186] Ibid para 187.
[187] Ibid.
[188] Ibid para 188.
[189] Ibid para 189.
[190] Ibid paras 190-3.
[191] Ibid para 194.
[192] Ibid para 138.
[193] Ibid para 138, quoting from *Chirwa (SCA)* supra 125 para 52.
[194] Supra note 154.
[195] Ibid para 157.

addition to stating that this view found 'strong support' in *Chirwa*, Rogers J emphasised that the SABC's power to engage staff is sourced in the Broadcasting Act,[196] that the SABC is required to act in the public interest, and that it should be accountable to the public for the decision.[197] Second, the court in *Steenkamp v CEF*[198] held that a decision of the board of directors of CEF[199] to remove the directors of its subsidiary, PetroSA,[200] amounted to the exercise of a public power or the performance of a public function.[201] In reaching this conclusion, Bozalek J emphasised that, while CEF and PetroSA to a certain extent function as companies in the private sphere, 'they are both owned and controlled by the state and perform vital functions in the state's overall energy policy and programmes'.[202] He added that CEF's powers to remove the directors of PetroSA 'were given in the interests of the proper conduct of the affairs of PetroSA, an important component of the state's energy policy and programmes, and a utility which has absorbed and continues to absorb considerable state financial resources'.[203]

In light of the judgments discussed above, it is difficult to conceive of a function that a state-owned, statutory entity could lawfully perform which is not public in nature. The decision at issue in *Chirwa*, in particular, was far removed from Transnet's public, statutory mandate yet it was still regarded as public in nature. These cases indicate that state-owned entities are, for the reasons discussed above, fundamentally different to private entities, and that this difference colours all that they do. As with the government itself, public accountability thus requires state-owned entities to be subject to the rigours of public law in respect of all of their activities.

A passage in the Constitutional Court's fairly recent decision in *Trencon*[204] may, however, be read as muddying the waters somewhat. In particular, Khampepe J remarked that, while the decision of the IDC[205] (a state-owned entity) to award a tender is a matter of public law, '[o]rdinarily, an issue like contract price adjustment that is subject to negotiation after the procurement process has taken place, ought to fall squarely within the domain of private

[196] Act 4 of 1999.
[197] *DA v SABC* supra note 154 paras 154-63.
[198] Supra note 163.
[199] Central Energy Fund SOC Ltd.
[200] Petroleum Oil and Gas Corporation SOC Ltd.
[201] *Steenkamp v CEF* supra note 163 para 58.
[202] Ibid para 57.
[203] Ibid para 58.
[204] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) para 75 and 77.
[205] Industrial Development Corporation of South Africa SOC Ltd.

law'.[206] The latter is, according to Khampepe J, 'subject to ordinary contractual negotiations between enterprising parties'.[207] These statements might be read to suggest that the conduct in which a state-owned entity engages after the award of a tender is private rather than public in nature. This reading of the *Trencon* passage would, in my view, be mistaken. It seems to me that the better reading of this passage is that the requirements of public law are unlikely to intrude in relation to post-tender negotiations (eg public law will be engaged only where the negotiations with the successful bidder lead to unfairness to the other bidders or potential bidders) not that public law is of no application in this realm. This reading of *Trencon* is consistent with Khampepe J's use of the word 'ordinarily', which indicates that post-tender negotiations are not exclusively, or necessarily, regulated by private law.

4. STATUTORY AGENCIES

As is the case in many other jurisdictions, it has become common in South Africa to establish statutory agencies to perform either regulatory or service-delivery functions. The former category includes, for example, the National Energy Regulator of South Africa (NERSA), the Independent Communications Authority of South Africa (ICASA), the Financial Services Board, the Health Professions Council of South Africa, the National Gambling Board and the Competition Commission, while the latter include the South African Social Security Agency (SASSA) and the South African National Roads Agency (SANRAL).[208] In addition, some statutory agencies, such as South African National Parks (SANParks), perform both service-delivery and regulatory functions.[209]

The position in relation of these agencies is similar to that of state-owned entities. They are established in terms of legislation for the very purpose of performing functions in the public interest, eg regulating a particular industry or activity, delivering basic services, or providing public infrastructure.[210] The state also exercises a measure of control over statutory

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[206] *Trencon* supra note 204 para 75. See also *Steenkamp (SCA)* supra note 89 para 12.
[207] Ibid.
[208] These entities are, respectively, established in terms of the National Energy Regulator Act 40 of 2004 ('NER Act'), the Independent Communications Authority of South Africa Act 13 of 2000 ('ICASA Act'), the Financial Services Board Act 97 of 1990, the Health Professions Act 56 of 1974, the National Gambling Act 7 of 2004, the Competition Act 89 of 1998, the South African Social Security Agency Act 9 of 2004 ('SASSA Act'), and the South African National Roads Agency Limited and National Roads Act 7 of 1998.
[209] Eg SANParks is responsible for the protection, conservation and control of national parks and regulates traffic within those parks. See s 55(1)(b) and (fA) of the National Environmental Management: Protected Areas Act 57 of 2003 ('Protected Areas Act').
[210] In some instances, these agencies are expressly required to act in the public interest. See eg 10(1)(b) of the NER Act.

agencies by appointing the board or other governing body or functionary of the agency[211] and through reporting requirements.[212] Moreover, statutory agencies are invariably funded by the state or through charges imposed by or in terms of legislation.[213] They also generally wield significant power, and bear significant responsibilities, flowing from legislation. Regulatory agencies, for example, might be imbued with various powers otherwise reserved for the state, such as the power to suspend or withdraw licences or other authorisations, to conduct inspections or search and seizure operations, and to impose regulatory fines or other penalties.[214] In addition, the concern, discussed in the previous section of this chapter, that government should not be able to avoid the application of public-law obligations by establishing entities that perform functions which the government would otherwise perform, applies equally to statutory agencies. In the words of Yacoob J in *AAA Investments*: 'government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity'.[215]

Regulatory and service-delivery agencies thus invariably engage in public functions.[216] They are subject to public accountability and transparency in all that they do. And the principle of legality, similarly, applies to all their activities. A statutory agency may not engage in activities which are not either expressly or impliedly empowered by legislation. For example, ICASA, as the statutory communications regulator, may not decide to manufacture and sell telecommunications equipment without being empowered to do so by legislation. Accordingly, there is, as I see it, little, if any, scope to argue that regulatory or service-delivery agencies or any other statutory entity with a public-interest mandate engages in private actions.[217]

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[211] Eg s 5 of the NER Act, s 5 of the SASSA Act.
[212] Eg s 16 of the ICASA Act, s 11 of the SASSA Act, s 55 of the Public Finance Management Act 1 of 1999.
[213] Eg s 12 of the NER Act, s 9 of the SASSA Act.
[214] See eg ss 17E, 17F and 17G of the ICASA Act read with s 14 of the Electronic Communications Act 36 of 2005.
[215] Supra note 12 para 40.
[216] See eg *AllPay II* supra note 136 para 52 (in relation to SASSA), *National Gambling Board v Premier, KwaZulu-Natal* 2002 (2) SA 715 (CC) para 19 (National Gambling Board and KwaZulu-Natal Gambling Board), *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 74 (SANRAL), *Roux v Health Professions Council of South Africa* 2011 JDR 1132 (SCA) paras 29-30 (HPCSA), *South African Veterinary Council v Veterinary Defence Association* 2003 (4) SA 546 (SCA) para 34 (South African Veterinary Council), *Graham v Law Society of the Northern Provinces* 2014 (4) SA 229 (GP) para 80 (Law Society of the Northern Provinces), *Earthlife Africa v Minister of Energy* 2017 (5) SA 227 (WCC) paras 33-7 (NERSA), *Telkom SA SOC Ltd v Mncube NO* 2016 JDR 0338 (GP) para 17 (ICASA), *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) at 996 (Public Accountants' and Auditors' Board). See also Fanyana ka Mdumbe 'The meaning of 'organ of state' in the South African Constitution' (2005) 20 *SAPL* 1 at 24-6.
[217] Klaaren & Penfold op cit note 3 at 63-53.

MTO Forestry[218] is an interesting recent case in which the classification of the conduct of a statutory agency as either public or private divided the SCA. This case related to a tree-felling programme in the Tokai Forest (which forms part of the Table Mountain National Park) which a private party (MTO) was entitled, and obliged, to implement in terms of a lease agreement between MTO and SANParks.[219] A non-profit organisation (Parkscape) challenged SANParks' decision to approve an acceleration of the felling programme on the basis that it was required to consult with members of the public prior to agreeing to vary the lease.

The majority of the SCA rejected the contention that public-law responsibilities had no place in relation to the exercise of a contractual right. In particular, Dambuza JA emphasised the statutory backdrop against which SANParks decided to approve the acceleration of the tree-felling programme, stating that 'the contractual rights and responsibilities arising from the lease agreement also fell within' the legislative provision which outlined SANParks' functions in relation to, amongst others, national parks and protected areas.[220] The majority thus found that SANParks' decision constituted administrative action and that Parkscape and its members had a legitimate expectation to be consulted prior to the decision to vary the lease.[221]

In a concurring judgment Navsa JA and Davis AJA pointed to various factors involved in 'determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party'.[222] These factors include whether there is 'an equality of arms' between the parties, whether coercive state power is involved, 'whether the public interest is affected by the exercise of the contractual right', and the contractual terms themselves. In another judgment which reflects the 'classification approach' flowing from cases such as *Logbro*, Navsa JA and Davis AJA left open the possibility that, in certain circumstances, administrative law principles will not be activated by an organ of state's exercise of a contractual right:[223]

> 'It does not necessarily follow, where there is an equality of arms in relation to the conclusion of a contract and where the public interest is not directly involved, that the private party will be able to resort to administrative law principles.'

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[218] Supra note 103.
[219] The lease agreement was initially concluded with the Department of Water Affairs and Forestry and then assigned to SANParks.
[220] *MTO Forestry* supra note 103 para 29. Section 55 of the Protected Areas Act.
[221] Ibid paras 32 and 39.
[222] Ibid para 37.
[223] Ibid para 38.

Rogers AJA penned a dissenting judgment in *MTO Forestry*, concluding that SANParks' decision was not administrative action because it, first, was not taken 'in terms of legislation' as contemplated in para *(a)*(ii) of PAJA's definition of 'administrative action' and, second, did not involve the exercise of public power or the performance of a public function.[224] While Rogers AJA's second finding is most relevant to the present discussion, I pause to discuss two issues that emerge from his first finding.

In holding that the decision was not taken in terms of legislation, Rogers AJA rejected the argument that, in agreeing to the variation of the lease, SANParks was, indirectly, exercising its statutory power to manage national parks.[225] He did so with reliance on the minority judgment of Langa CJ in *Chirwa*, who was similarly unpersuaded by an argument that because Transnet was governed by its empowering statute, legislation was the source of all its powers and functions and provided the basis for all its operational activities, 'including those of a contractual nature'.[226] In Langa CJ's view:[227]

> 'This argument cannot hold water. It would render the requirement that the decision be taken 'in terms of legislation' meaningless, as all decisions taken by a body created by statute would meet the requirement. If that is what the legislature intended, one would have expected them to have said as much. Instead they chose to distinguish between powers exercised by the same body, including a body created by legislation, according to the source of the power.'

Rogers AJA remarked that, Langa CJ's reasoning, even though found in a minority judgment, had 'strong persuasive value, given that there is nothing in the majority judgments inconsistent with it.[228] I disagree. As I read it, the majority judgment of Ngcobo J in *Chirwa* is inconsistent with Langa CJ's reasoning. It is worth quoting the relevant passage from Ngcobo J's judgment again:[229]

> 'I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, '*(t)hat*

[224] Ibid para 40.
[225] Ibid paras 55-8.
[226] *Chirwa* supra note 10 para 183.
[227] Ibid, quoted in *MTO Forestry* supra note 103 para 57.
[228] *MTO Forestry* supra note 103 para 58.
[229] *Chirwa* supra note 10 at para 138, referring to Cameron JA's judgment in *Chirwa (SCA)* supra note 125 para 52 (emphasis added).

> *power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution*'.'

It seems to me that the majority judgment in *Chirwa* provides compelling authority for an argument that all of the actions of a statutory body like SANParks are taken, directly or indirectly, in terms of legislation.

In any event, even if one assumes that Rogers AJA was correct to hold that SANParks' decision was not taken 'in terms of any legislation', it does not necessarily follow that it was not 'administrative action'. If the decision was not taken in terms of legislation, it would, as I see it, follow that SANParks would *not* be an 'organ of state' in relation to the decision to approve the variation of the tree-felling programme.[230] Para *(a)* of the definition of 'administrative action' would thus not apply and SANParks would be a 'natural or juristic person, other than an organ of state', as contemplated in para *(b)*, in respect of this decision. That being the case, the decision to vary the lease would amount to 'administration action' if it involves the performance of a public function or the exercise of a public power in terms of an empowering provision. Given that PAJA's definition of an 'empowering provision' includes an agreement, it seems to me that the lease would have sufficed as a source for administrative action.[231]

Turning to the question as to whether or not SANParks' decision was 'public', Rogers AJA applied the proposition, flowing from *Cape Metro* and *Logbro*, that the exercise of a contractual power by an organ of state does not constitute the exercise of a public power (i) where 'the contractual power does not mirror a statutory provision' and (ii) where the contract is one, quoting Cameron JA in *Logbro*, 'concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position'.[232] Rogers AJA pointed out that SANParks' contractual right to approve a

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[230] Section 239*(b)*(ii) of the Constitution, unlike PAJA, limits the meaning of 'organ of state' (other than in respect of government departments or administration or constitutional institutions) to a functionary or institution 'exercising a public power or performing a public function *in terms of any legislation*' (emphasis added). The label 'organ of state' does not attach in an all-or-nothing fashion to these entities but rather depends on the nature and source of the particular function or power. These entities constitute 'organs of state' only to the extent that they engage in the functions or powers contemplated in those sub-paragraphs (as indicated by the use of the present participles '*exercising* a public power' and '*performing* a public function'). See Klaaren & Penfold op cit note 3 at 63-63 to 63-64. See eg the finding in *AllPay II* supra note 136 that Cash Paymaster was an organ of state 'for the purposes of the impugned contract [i.e. the contract for the administration of social grants]' (at para 52). This did not, however, mean that it constituted an organ of state for purposes of 'its entire commercial operation' (para 59). See also *Grinpal* supra note159 paras 23-4.

[231] See *MTO Forestry* supra note 103 para 48. I disagree with Rogers AJA's suggestion, at paras 53-4, that the reference to 'agreement' in the definition of 'empowering provision' might not include 'ordinary bilateral contracts'.

[232] Ibid para 65 read with para 63, quoting *Logbro* supra note 82 para 10.

change in the tree-felling schedule had 'no counterpart in legislation' and there was no indication that the lease was concluded in circumstances in which the organ of state negotiated from a position of superiority.[233] He thus held that the exercise of SANParks' contractual right was 'a private matter',[234] and that, as between SANParks' and members of the public (ie persons other than MTO) the contractual provision 'lacks altogether the element of power'.[235]

If one accepts the correctness of the approach in *Cape Metro* and *Logbro* – and there is no indication in any of the judgments in *MTO Forestry* that the court rejected this approach – it is difficult to fault Rogers AJA's conclusion that the decision at issue in *MTO Forestry* did not amount to the exercise of a public power. My difficulty with this aspect of Rogers AJA's judgment is not that it does not accord with precedent but rather that, as noted above in discussing government's exercise of contractual rights, the 'classification approach' flowing from *Cape Metro* and *Logbro* is flawed.

It would, in my view, have been more compelling for the SCA to have reasoned that SANParks' approval of the tree-felling programme amounted to the exercise of a public function because SANParks is established by legislation and controlled by the state and it wields power, including statutory power, in the public interest.[236] In short, SANParks is a statutory body whose reason for existence, and sole mandate, is to manage and conserve national parks, world heritage sites and protected areas and to perform its other statutory functions in the public and national interest. It is thus difficult to see how it can ever act privately. And, in the context of the specific decision at issue in *MTO Forestry*, that decision was, as the High Court noted, 'not just about the enforcement of a private-lease and the commercial considerations flowing therefrom'; it rather involved 'the management by SANParks of a valuable environmental resource and asset of national and international importance in the interest, and for the benefit, of the entire community…'.[237]

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[233] Ibid paras 63-4, 66.
[234] Ibid para 63.
[235] Ibid para 66.
[236] Cf Rogers AJA in *MTO Forestry* supra note 103 para 75: 'the contractual power conferred on SANParks … was not a 'power' which SANParks was required, or entitled, to exercise 'in the public interest', save in the limited sense that it is in the public interest that organs of state should act in accordance with contracts properly concluded'. See also *MTO Forestry* paras 77-8, where Rogers AJA indicates that the acceleration of the tree-felling programme would not have a material public impact.
[237] *Parkscape v MTO Forestry (Pty) Ltd* 2018 (1) SA 263 (WCC) para 66.

5. GOVERNMENT OUTSOURCING OR SUB-CONTRACTING

The government, state-owned entities or statutory agencies from time to time subcontract or, put differently, outsource their functions to private entities. For example, a regulatory agency might subcontract its investigative function to an auditing firm, or the Department of Correctional Services or SANRAL might outsource their functions to operate prisons or toll roads, respectively.

In such instances, it seems relatively clear that the private entity performs a public function and should be subject to the rigours of public law insofar as it does so.[238] Craig makes the point well in his discussion of the applicability of the UK Human Rights Act: the fact that a function has been subcontracted by a public authority does not change its nature and 'if it was properly regarded as a public function when performed by the public authority itself, then it should be so regarded when the same task is performed by the body to whom the power has been contracted out'.[239] Indeed, it would be problematic if public law applies where the government or a public entity performs a function itself but not when it subcontracts that function to a third party. To again refer to the dictum in *AAA Investments*: government cannot be released from its 'human rights and rule of law obligations' simply because it delegates its functions to another entity.[240]

The leading authority on the characterisation of public functions that have been outsourced to a private entity is the Constitutional Court's decision in *AllPay II*.[241] This case arose in the context of an agreement in terms of which SASSA contracted with a private entity (Cash Paymaster) to administer the countrywide payment of social grants on SASSA's behalf, and in circumstances where the court had found that the award of the tender to Cash Paymaster was invalid.[242] During the course of its judgment on remedy, the court held that, although Cash Paymaster was independent from and not controlled by SASSA, it was an organ of state for purposes of performing under the agreement as the function of administering social grants was 'fundamentally public in nature'.[243]

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[238] See *IDASA v ANC* supra note 65 para 27. In relation to a private company appointed to run a prison, see *POPRCU* supra note 64 para 54, quoting De Smith *et al* op cit note 23 para 3-031, *Aston Cantlow* supra note 11 para 9, *YL* supra note 11 para 63, Elliott 'Judicial review's scope' op cit note 62 at 105-6.

[239] Paul Craig *Administrative Law* 7 ed (2012) at 602 (see also at 840). Cf Oliver op cit note 143 at 340, *YL* supra note 11.

[240] Supra note 12 para 40.

[241] Supra note 136.

[242] The Constitutional Court's judgment on the merits is reported as *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC).

[243] *AllPay II* supra note 136 para 52. For an insightful discussion of this aspect of *AllPay II*, see Finn op cit note 7 at 643-6.

Froneman J, for a unanimous court, emphasised that SASSA's function to administer grants was delegated to Cash Paymaster in terms of legislation,[244] that Cash Paymaster acted as the 'operational arm' of government in respect of the payment of social grants, that it was 'the gatekeeper of the right to social security and effectively control[led] beneficiaries' access to social assistance', and that Cash Paymaster undertook constitutional obligations under the agreement.[245] Accordingly, the principle of accountability required Cash Paymaster to be regarded as an organ of state. As Froneman J put it: [246]

> 'When Cash Paymaster concluded the contract for the rendering of public services, it too [along with SASSA] became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs. This does not mean that its entire commercial operation suddenly becomes open to public scrutiny. But the commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects.'

The court concluded that Cash Paymaster, as an organ of state that had assumed the state's constitutional function in relation to social grants and had performed this function for a significant period, 'cannot simply walk away' following the invalidity of the agreement but had 'the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational'.[247]

The Constitutional Court, in *Grinpal*,[248] relied on the reasoning in *AllPay II* in holding that a private company (Grinpal) which manufactured, supplied, installed, operated and maintained prepaid electricity meters and electrical installations on behalf of City Power (a municipal entity established by the City of Johannesburg) performed a public function and thus constituted an organ of state.[249] Tshiqi AJ remarked as follows:[250]

> 'Grinpal and City Power are organs of state that perform public functions akin to those of a municipality. The Johannesburg Municipality cannot avoid its constitutional obligations and public accountability for the rendering of public services by forming a municipal entity like City Power. It remains accountable to the people of South Africa for the performance of those functions by City Power. Likewise, City Power cannot

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[244] Section 4(2)(a) of the South African Social Security Agency Act 9 of 2004.
[245] *AllPay II* supra note 136 paras 53-7.
[246] Ibid para 59. See also para 64.
[247] Ibid para 66. See also *Black Sash* supra note 38 paras 40-51.
[248] Supra note 159.
[249] Ibid para 23. See also *Joseph* supra note 59 para 47.
[250] Ibid.

> avoid its constitutional obligations and public accountability by delegating its functions to Grinpal.'

In the subsequent case of *Khaya Projects*[251] the City of Cape Town sought to rely on *AllPay II* in arguing that a private company (Khaya) that had been contracted to construct low-cost, state-funded housing exercised a public function – and thus constituted an organ of state and bore constitutional obligations in respect of the right to adequate housing. The SCA rejected this argument, and distinguished *AllPay II* on the basis that Khaya was not responsible for the entire administration of the housing projects.[252] It was, unlike Cash Paymaster, not the 'operational arm' of the City.[253] It was only involved in a single project among many and did not perform a nationwide function.[254] According to the court, the case was also distinguishable from *AllPay II* on the basis that Khaya had not contracted directly with the City (another private entity (Peer Africa) contracted with the City to provide oversight in respect of the housing project, and Peer Africa, in turn, contracted with Khaya to construct the houses) and did not undertake the City's constitutional obligations in respect of access to housing.[255]

In essence, it seems to me that the primary basis on which the facts in *Khaya Projects* were distinguished from *AllPay II* was that Khaya had not taken responsibility for the administration of the housing project but was responsible only for the relatively mechanical exercise of constructing houses. The City's prospects of success would have been considerably enhanced had they targeted Peer Africa rather than Khaya. As Victor AJA noted:[256]

> 'It was Peer Africa that the City contracted with to take responsibility for the housing project, and it was Peer Africa that was supposed to oversee the project. Khaya was simply a subcontractor hired by Peer Africa.'

The case law discussed above indicates that the outsourcing of public functions (other than, perhaps, relatively mechanical functions) to a private party will generally mean that the private party performs a public function and is thus subject to the demands of public law.

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[251] *City of Cape Town v Khaya Projects (Pty) Ltd* 2016 (5) SA 579 (SCA).
[252] Ibid para 24.
[253] Ibid.
[254] Ibid paras 25 and 28. The fact that Khaya did not perform a nationwide function is, in my view, irrelevant. There is no difference in principle between nationwide responsibility for the activities of a national government department or agency and responsibility for the administration of a portion of a municipality's functions within the jurisdiction of that municipality.
[255] Ibid para 29.
[256] Ibid para 29. See also para 31.

This is appropriate where government or a public entity outsources its service-delivery or other public-facing functions (ie the provision of services or goods to the public) or, put differently, where the government or public entity's institutional function is outsourced.[257]

This type of scenario should be distinguished from ordinary public procurement, given that a private party that is contracted to provide goods or services to government or a public entity would generally not be performing a public function in the sense that brings that function within the ambit of public law. It seems to me, for example, that a contractor which sells aircraft to South African Airways, supplies textbooks to a provincial department of education, or cleans a provincial legislature does not perform a public function in the sense that renders it subject to public law. As Baroness Hale put it in her minority judgment in the House of Lords decision in *YL*:[258]

> 'Not everything for which the state pays is a public function. The supply of goods and ancillary services such as laundry to a care home may well not be a public function. But providing a service to individual members of the public at public expense is different'.

Drawing on Lady Hale's remarks, Elliott observes as follows:[259]

> 'Clearly, circumstances would arise in which this line-drawing exercise would prove difficult; but the distinction between ancillary and public-facing services is a sensible criterion by which to attempt to draw the line. Such an approach reflects an underlying presumption that services for which the government has assumed responsibility should be provided in a manner that reflects the principles of public law, while recognising that the obligation to comply with those principles is appropriately concentrated upon those actors who are primarily charged with delivering the public service (as distinct from merely providing secondary support to such actors).'

The outsourcing of a public function should also be distinguished from the conferral of a right to use a public asset for one's own private advantage. For example, the fact that the state has authorised a person to operate a private game lodge within a portion of a national park for a defined period does not mean that the commercial operation of that lodge constitutes a

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[257] Treasury Regulation 16.1 (published under Government Notice R225 in *Government Gazette* 27388 of 15 March 2005) defines an 'institutional function', for purposes of in turn defining a 'public-private partnership', as including 'a service, task, assignment or other function that an institution [ie a department, constitutional institution or certain type of public entity] is entitled or obliged to perform– (i) in the public interest or (ii) on behalf of the public service generally …'.
[258] Supra note 11 para 68.
[259] 'Judicial review's scope' op cit note 62 at 108.

public function – although the lodge operator may perform a public function in relation to certain aspects of its activities, such as the conservation of the relevant portion of the park.

6. POWER OF PRIVATE ENTITIES UNDERPINNED BY STATUTORY OR GOVERNMENT COMPULSION

Private entities regularly wield significant power. A large corporation might, for instance, be in a position to dictate commercial terms to its customers, to impose conditions on its employees or to take decisions which have a dramatic impact on its natural and socio-economic environment. The exercise of this type of power is, however, not subject to public law. It is rather subject to legislative or common-law regulation such as that found in, for example, competition, consumer protection, labour or environmental law, or in sector-specific legislation. And where fundamental rights are infringed, this power is also constrained by the horizontal application of the Bill of Rights.[260]

The position may be different where the source of the private entity's power flows not from its wealth or its position in the market or in the community but rather from the state through legislation or some other means of government compulsion. In such circumstances, it may be appropriate to hold the private entity to the heightened standards of public law.

The decision of the Constitutional Court in *AAA Investments*[261] might be used to illustrate this point. This case considered whether the rules of the Micro Finance Regulatory Council (MFRC) amounted to the exercise of a public function. The MFRC was a non-profit company[262] which regulated micro-lenders.[263] It did so in circumstances in which the Minister of Trade and Industry had: (i) exempted micro-lending transactions from the application of the Usury Act,[264] including the maximum interest rate stipulated in that Act, provided that the lender was registered with a regulatory institution approved by the Minister and complied with the conditions of the exemption notice; and (ii) designated the MFRC as a regulatory institution. The MFRC was the only institution approved as a regulatory

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[260] Section 8(2) of the Constitution: 'A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.
[261] Supra note 12.
[262] The MFRC was registered as a s 21 company in terms of the Companies Act 61 of 1973.
[263] The subscribers to the MFRC comprised representatives of government, moneylending institutions and consumer-protection bodies, and its board of directors was to have 'equal and balanced representation between consumers and the moneylending industry'. *AAA Investments* supra note 12 paras 13 and 44.
[264] Act 73 of 1968.

institution.[265] As a result, 'all micro-lenders who wished to qualify in terms of the exemption notice had to be registered with [the MFRC] in order to bring themselves within the terms of the exemption'.[266]

When the case came before the SCA,[267] that court focused on the nature of the MFRC as a private company and the contractual relationship between it and the micro-lenders who had chosen to be registered with it. It found that the MFRC was a private regulator that did not exercise public power.[268] The SCA's approach is reflected in the following portion of the joint judgment of Navsa and Nugent JJA:[269]

> '[The MFRC] conducts business as a private regulator of lenders who choose to submit to its authority by agreement. In regulating micro-lenders who agree to such regulation, it does not purport to be exercising legislative or other public powers that require a constitutional or legislative source. It purports only to regulate those who are willing to submit to its regime and the source of its authority to do so is their consent.
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> …
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> The validity of its act in making [the] rules falls to be determined with reference to trite principles of company law and, in particular, whether it was empowered by its memorandum of association to do so.'

The SCA's approach was formalistic.[270] It placed undue emphasis on the MFRC's corporate form and the proximate source of the MFRC's power vis-à-vis its members (ie contract) and, in so doing, failed to have sufficient regard to the broader context, including the statutory context, in which the MFRC wielded power.[271] In particular, it overstated the voluntariness of the relationship between the MFRC and the micro-lenders.

On appeal, the Constitutional Court, unsurprisingly, set its face against the SCA's approach. The court, first, noted that the legislative purpose of empowering the Minister to impose conditions on an exemption from the Usury Act was to regulate exempt moneylending transactions, and remarked that the MFRC's regulatory function 'must, at

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[265] *AAA Investments* supra note 12 para 112.
[266] Ibid para 14.
[267] The SCA's judgment is reported as *Micro Finance Regulatory Council v AAA Investment (Pty) Ltd* 2006 (1) SA 27 (SCA).
[268] *AAA Investments (SCA)* supra note 267 para 24.
[269] Ibid paras 24, 26.
[270] Max du Plessis and Glenn Penfold 'Bill of Rights jurisprudence' in 2007 *Annual Survey of South African Law* 67 at 69, Richard Stacey 'Administrative law in public-sector employment relationships' (2008) 125 *SALJ* 307 at 316 describes the approach in *Chirwa (SCA)* as 'formalistic and categorical'.
[271] Hoexter 'A matter of feel?' op cit note 1 at 156: the SCA 'seemed to be more interested in the appearance and form of the body itself than the nature of its rules'.

least, be a public function' as the Minister had passed on his regulatory duty to the MFRC.[272] The court added that the public nature of the function was also demonstrated by the extent of control that the Minister exercised over the MFRC.[273] Yacoob J went on to reject the SCA's reasoning in the following terms:[274]

> 'The SCA relied on the fact that the memorandum of association empowered the [MFRC] to adopt its own rules for concluding that the [MFRC] was a mere private entity. This conclusion puts form over substance and disregards the nature of the function that the [MFRC] must perform. It ignores the reality of almost absolute ministerial control over the [MFRC's] functions. The provisions of the memorandum and articles of association fade into insignificance as an indicator of the nature of the [MFRC] in light of the overwhelming evidence of the true nature of the [MFRC's] functions. The fundamental difference between a private company registered in terms of the Companies Act and the [MFRC] is that the private company, while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfills them. The [MFRC's] composition and mandate show that, although its legal form is that of a private company, its functions are, essentially, regulatory of an industry. These functions are closely circumscribed by the ministerial notice. I strain to find any characteristic of autonomy in the functions of the [MFRC] equivalent to that of an enterprise of a private nature. The [MFRC] regulates, in the public interest and in the performance of a public duty.'

The court thus held that the MFRC, far from being a private regulator, performed a public function which was regulatory of an industry.

In her separate concurring judgment, O'Regan J provided a non-exhaustive list of criteria that are relevant in determining whether rules of a non-governmental agency are public in character, namely: '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

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[272] *AAA Investments* supra note 12 para 43. See also *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) ('*REDISA*') paras 156-8 and 182, where the High Court held that the Recycling and Economic Development Initiative of South Africa (Redisa) exercised a public function in administering a waste tyre management plan in circumstances in which the Minister of Environmental Affairs had, in effect, delegated the government (and constitutional) function of waste-tyre management, and the resultant prevention of pollution, to Redisa. In concluding that Redisa was 'without a doubt an organ of state', the court also emphasised that Redisa was required to carry out its activities for the benefit of the public and it did so in terms of a waste tyre management plan ('the Redisa Plan') which had been 'elevated to the status of subordinate legislation' via ministerial publication in the *Government Gazette* (at paras 156-8).

[273] *AAA Investments* supra note 12 para 44.

[274] Ibid para 45.

legislative framework or purpose'.[275] Applying these factors, O'Regan J held that the MFRC's rules were public in character.[276] In reaching this conclusion, she noted that: the purpose and effect of the MFRC's rules were to regulate the micro-lending industry and 'all the borrowers and lenders in that industry'; the rules were 'coercive and general in their effect' in that micro-lenders could not lawfully operate without registering with the MFRC and, once registered, they were bound by the rules; and the legislative framework meant that no one could make small loans of the sort envisaged in the exemption notice unless they registered with the MFRC and complied with its rules.[277]

An important aspect of *AAA Investments* – though one which featured more prominently in O'Regan J's judgment than in that of the majority – was that the statutory framework effectively compelled micro-lenders to register with the MFRC[278] and the agreement of the registrants to be bound by the MFRC's rules was thus in no real sense voluntary.[279] In making its rules, the MFRC was, in effect, exercising regulatory power conferred by the state not only because, as Yacoob J noted, it amounted to a delegation of the Minister's regulatory power,[280] but because the legislative framework, in substance, conferred coercive power on the MFRC. The SCA was alive to this argument but reasoned that, insofar as the consent to the MFRC's rules may be said to have been extracted by coercion, that coercion was not the product of the rules themselves but rather flowed from the Minister's exemption notice 'that compels any person who wishes to conduct business as a micro-lender to submit to the [MFRC's] regulatory regime'.[281] And this issue, according to the SCA, was not before the court as the validity of the exemption notice had not been challenged.[282] This reasoning, in my view, misses the point. The point is not whether or not the exemption notice was valid or invalid (in the absence of a successful challenge, it was to be treated as valid)[283] but rather that the notice, in effect, compelled registration with the MFRC which, in turn, meant that the MFRC wielded coercive, regulatory power pursuant to the notice.

[275] Ibid para 119.
[276] Ibid para 121.
[277] Ibid paras 120-1.
[278] The practical difficulties of engaging in microlending without an exemption from the Usury Act are mentioned in *AAA Investments* supra note 12 para 8.
[279] This aspect featured prominently in the judgment of the court *a quo* in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2004 (6) SA 557 (T) 564-5.
[280] *AAA Investments* supra note 12 para 43.
[281] *AAA Investments (SCA)* supra note 267 para 25.
[282] Ibid.
[283] *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2004 (6) SA 222 (SCA) para 26.

AMCU[284] is another important decision of the Constitutional Court in this context. This case dealt with the extension of a collective agreement to the employees of various mining companies. This extension is provided for in s 23(1)(d) of the LRA,[285] which provides that a collective agreement binds employees who are not members of the trade unions that are party to the agreement if: (i) those employees are identified in, and expressly bound by, the agreement; and (ii) the trade unions that are party to the agreement represent the majority of employees employed in the workplace. In other words, s 23(1)(d), in accordance with the principle of majoritarianism in labour law, empowers an employer and a majority trade union (or trade unions representing the majority of the employees) to extend the terms of their agreement to employees who are not members of the majority union(s).

Cameron J, who penned the judgment for a unanimous court in *AMCU*, relied upon an array of factors in finding that the extension of a collective agreement to non-parties amounted to the exercise of public power.[286] He, first, emphasised two factors identified in O'Regan J's judgment in *AAA Investments*: it was coercive in effect as the agreement was extended to parties 'entirely alien to it' and it resulted 'in binding consequences without those parties acquiescence',[287] and it was related to a 'clear legislative framework'.[288] On the latter score, the court placed much emphasis on the statutory source of the power to extend a collective agreement to non-parties.[289] The other factors upon which the court relied were: the LRA empowers contracting parties to extend their agreement 'with just about industry-wide effects'; the extension of the agreement had extensive implications for 'members of the public', ie non-member employees, and thus affected the public;[290] and the rationale for the power to extend collective agreements is a 'public goal', namely, 'the public interest in improving workers' conditions through collectively agreed bargains'.[291] Cameron J thus concluded that, whilst the parties to the collective agreement were not governmental actors, 'their conduct had a sufficiently public character and entailed sufficient public consequences, to make what they did the exercise of public power'.[292]

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[284] Supra note 10.
[285] Labour Relations Act 66 of 1995 ('LRA').
[286] Supra note 10 paras 74-80.
[287] Ibid paras 77-8, 81.
[288] Ibid paras 77-8.
[289] Ibid paras 79-81. As Cameron J noted at para 80: 'The conclusion of a collective agreement triggering a statutorily licensed extension under s 23(1)(d) is in its effects and substance an exercise of legislatively conferred public power'.
[290] Ibid paras 78-9. In this case, the extension of the collective agreement to non-member employees mean that they forfeited the right to strike on matters regulated by the agreement.
[291] Ibid paras 79, 81.
[292] Ibid para 82.

The Constitutional Court's judgments in both *AAA Investments* and *AMCU* neatly illustrate the benefit of substantive reasoning, and emphasise the need to have regard to all relevant considerations in assessing whether or not the actions of a private entity are 'public'. In both cases, the fact of state-sanctioned power – as well as the absence of consent (or, in the case of *AAA Investments*, meaningful consent), the impact of the action, and the surrounding public interest – played a significant part in the court's reasoning.

While I strongly agree with the court's classification of the conduct at issue in *AAA Investments* and *AMCU* as public, the conduct that formed the subject of the SCA's decision in *Calibre*[293] is more difficulty to classify.

Calibre – which was decided after *AAA Investments* but before *AMCU* – involved a review of a decision by a bargaining council, the National Bargaining Council for the Road Freight Industry ('the road freight council'), to appoint a service provider to manage its wellness fund. A bargaining council is an association of trade unions and employers' organisations formed in terms of the LRA.[294] It is, as the SCA explained, primarily a forum for collective bargaining and for the conclusion of collective agreements and it enjoys statutory powers to enforce those agreements.[295] Bargaining councils are also empowered to undertake functions directed at maintaining industrial harmony and promoting the welfare of the employees in the relevant industry.[296] In particular, a bargaining council is statutorily empowered to establish and administer schemes or funds 'for the benefit of one or more of the parties to the bargaining council or their members'.[297] In *Calibre,* the road freight council concluded a collective agreement to establish a wellness fund which, amongst other things, provided antiretroviral treatment to employees within the road freight industry, and which was to be financed through compulsory contributions levied on employers and employees.

Importantly, the LRA provides that the Minister of Labour may, in specified circumstances, extend collective agreements concluded in a bargaining council to non-parties within the council's registered scope.[298] Acting in terms of this power, the Minister had extended the agreement for the establishment of the wellness fund to the general road freight industry.

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[293] Supra note 2.
[294] Sections 27 and 29 of the LRA provide for the establishment, by registration, of a bargaining council for a particular industry and area.
[295] Sections 33 and 33A of the LRA.
[296] *Calibre* supra note 2 para 5.
[297] Section 28(1)(f) of the LRA.
[298] Section 32 of the LRA.

The primary issue in *Calibre* was whether the road freight council's decision to appoint a particular service provider to manage the wellness fund constituted administrative action. This boiled down to whether the decision amounted to the exercise of a public power or the performance of a public function.[299] In considering this question, Nugent JA examined, in some detail, the approach in England to the scope of common-law judicial review and review under the Human Rights Act, 1998, and noted that the courts in that country had always looked to features 'that might be said to be 'governmental' in nature'.[300] Whilst acknowledging that the Constitutional Court in *AAA Investments* pointed to a broader approach to the question of public power, Nugent JA stated that the basis for the decision in that case was that the MFRC performed a 'governmental' function.[301] He observed that, in cases involving public-law review, courts almost always look to 'features of the conduct concerned that is governmental in nature',[302] and added that judicial review 'is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship'.[303]

Turning to the conduct at issue in *Calibre*, the SCA emphasised the relationship between the road freight council and its members, noting that it was a voluntary association created by agreement to 'perform functions in the interest and for the benefit of its members'[304] and that the wellness programme was implemented for the benefit of the council's members 'with whom it is in a special relationship'.[305] The court thus had difficulty seeing how the council could be said to be publicly accountable in relation to the implementation of the programme. In addition, it noted that the implementation of the programme was not governmental in nature and stressed that it do did not involve public money.[306] Nugent JA concluded that the council, when procuring services for its wellness fund, 'was performing a quintessentially domestic function in the exercise of its domestic powers'.[307]

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[299] *Calibre* supra note 2 para 21.
[300] Ibid para 24. See also paras 23-31.
[301] Ibid paras 32-3.
[302] Ibid paras 38-9.
[303] Ibid para 40.
[304] Ibid para 41.
[305] Ibid para 41-2.
[306] Ibid para 42.
[307] Ibid para 46. See *Eden Security Services CC v Cape Peninsula University of Technology* 2014 JDR 2086 (WCC) paras 26-8, 47-9, which relied upon the reasoning in *Calibre*, in finding that a decision of a public higher education institution to award a tender for security services was not administrative action. Cf *Simunye Development CC v Lovedale Public FET College* 2010 JDR 4568 (ECG) para 20 (a tender award by a further

The SCA rejected the argument that the ministerial extension of the collective agreement across the industry meant that the road freight council exercised public power.[308] According to the court, the collective agreement was not the source of the council's power; that power was rather sourced in the council's constitution and the equivalent provisions of the LRA.[309] The collective agreement itself was 'no more than the terms upon which the parties have agreed that the council will exercise those powers'.[310] Nugent JA also remarked that the council did not expend public money but rather spent money emanating from its members 'and, in some cases, others in the industry', and that it is to these persons, rather than the public, that the council is accountable.[311] Nugent JA added that he could see no basis on which 'the commercial public' (which presumably included the appellant and other persons who had submitted bids to manage the wellness fund), who did not contribute to the funds, 'might justifiably be entitled to hold the council to account for the manner in which they are spent'.[312] Accordingly, the council's decision to appoint a service provider was 'not subject to review *at the instance of the appellants*'.[313]

It seems to me that the *Calibre* court did not place sufficient emphasis on the compulsion that arose from the extension of the collective agreement to non-parties across the industry.[314] This compulsion – which flowed from the ministerial exercise of a statutory power – meant that there was arguably no 'special relationship' between the council and *all* the persons to whom wellness services were provided and who were required to pay for the implementation of the programme. As Hoexter has asked: did the compulsory contributions not render the funds public money?[315] To this question might be added: should the council not have been

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education and training college amounted to the performance of a public function and constituted administrative action).

[308] *Calibre* supra note 2 para 43.

[309] Ibid.

[310] Ibid.

[311] Ibid para 44.

[312] Ibid.

[313] Ibid para 46, emphasis added. In footnote 47 (read with footnote 10), Nugent JA noted that the road freight council might, no doubt, 'be held to account for the exercise of its powers by members and others who have been subjected to its collective agreement' in terms of private-law review. The concept of private-law review (otherwise known as private administrative law) is briefly discussed in the following section of this chapter.

[314] See Hoexter *Administrative Law* op cit note 4 at 209-10.

[315] 'A matter of feel?' op cit note 1 at 159. In *REDISA* supra note 272, the High Court held, at paras 159-64, that the fees collected by a non-profit company (Redisa) for the administration of a waste tyre management plan were public funds. These fees were paid by tyre producers who subscribed to the Redisa Plan in circumstances in which tyre producers were compelled, by the Waste Act 59 of 2008 and under pain of criminal sanction, to subscribe to an 'integrated industry waste tyre management plan' prepared in terms of that Act (and where the Redisa Plan was the only such approved plan) (at paras 13, 18, 160-1). Henney J observed that there was 'no voluntary contribution that is made by any tyre producer' (at para 161), that the Redisa Plan sought was put in place for the public benefit, and Redisa performed a constitutional function (ie implementing measures to

publicly accountable on the basis that the employees and employers in the road freight industry to whom the agreement applied without the consent of their representatives constituted a section of the public? It bears emphasis that the *AMCU* court subsequently observed that the extension of a collective agreement to non-member employees had implications for 'members of the public' and thus affected the public.[316] If this is the case for employees of particular employers that are party to a collective agreement, it must surely be true of employees across an industry.

Moreover, while I accept that it is debatable whether the road freight council should be publicly accountable for its procurement activities, it is problematic to decide whether or not public accountability should attach by focusing on whether the reviewing party itself contributed to the funds that are being spent. Such an approach to some extent conflates questions of standing with the characterisation of conduct as either public or private. And there is no reason why a litigant cannot challenge a decision which involves the expenditure of public funds where that litigant has not itself contributed to those funds. This might, for example, be the case where a foreign tenderer who does not pay taxes in this country seeks to review the award of a state contract on public-law grounds.

The decision of the High Court in *FMF*[317] is another case which, like *Calibre*, dealt with bargaining councils and, like *AMCU*, arose in the context of the extension of collective agreements under the LRA. Section 32 of the LRA provides for the extension of a collective agreement concluded in a bargaining council in two instances. First, where the trade unions and employers' organisations that are party to the bargaining council represent or employ the majority of the employees who will fall within the scope of the extended agreement, provided various other objective preconditions are met, the Minister of Labour has no discretion and *must* extend the agreement in terms of s 32(2). If, however, the majority threshold is not met, the Minister enjoys a discretion as to whether or not to extend the agreement to non-parties in terms of s 32(5) if certain criteria are met, including that the parties to the bargaining council are 'sufficiently representative' within the registered scope of the bargaining council and that 'the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole'.

Writing on behalf of the full bench in *FMF*, Murphy J held that the bargaining council's request for the Minister to extend a collective agreement constituted the exercise of a public

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prevent pollution and ecological degradation as contemplated in s 24(b) of the Constitution) for the benefit of the public (at paras 162-3, 182).

[316] *AMCU* supra note 10 paras 78-9.

[317] Supra note 25.

power or the performance of a public function.[318] Later in the judgment, the court noted that the bargaining council performed a public function in making a request to the Minister (despite noting that the participants in the council were private actors, the council arguably did not exercise legislative power, and the collective agreement would normally advance the private interests of the participants in the council).[319] The only reason which the court appears to offer for this conclusion is that the bargaining council was 'vested with legal personality by the LRA'.[320]

The court's reasoning on this issue is remarkably thin. In particular, it failed to engage with all relevant considerations (such as the extent to which a bargaining council has a duty to act in the public interest, if at all) and failed to explain why the vesting of legal personality via the LRA is any different to the position of every company which is registered and imbued with legal personality in terms of the Companies Act.[321] It also failed adequately to explain why the bargaining council's function in requesting an extension of a collective agreement in circumstances where the Minister has a discretion to grant or refuse that request was distinguishable from the position in *Calibre*.[322] Having said that, the conclusion in *FMF* is not necessarily wrong and it remains to be seen how our highest courts will regard a bargaining council's functions under s 32 of the LRA.[323]

The cases discussed above indicate that private actors that exercise power underpinned by some form of statutory or governmental compulsion generally engage in public conduct. A question that arises is whether the fact that a coercive power is expressly conferred by legislation is sufficient to render the exercise of that power subject to public law. In other words, is the fact of statutory compulsion sufficient to render the applicable act public?

This issue arose in a flurry of litigation in respect of the power conferred on electronic communications network service licensees by s 22 of the Electronic Communications Act,[324] to enter upon land and to construct, maintain, alter or remove communications networks or facilities on or under that land.

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[318] Ibid para 73.
[319] Ibid para 121.
[320] Ibid.
[321] See *Calibre* supra note 2 para 46.
[322] See the cursory treatment of the finding in *Calibre* at *FMF* supra note 25 para 73.
[323] The court in *AMCU* supra note 10, footnote 89, left open the correctness of *FMF* in the following terms: 'Whatever the position in regard to s 32 [of the LRA], s 23 extensions entail the exercise of public power. A s 23(1)(d) extension occurs without more upon the conclusion of an agreement that conforms to the provision's specifications. Differently put, the parties' employment of the statutory provision by itself entails extension. This entails a public dimension. Unlike extensions under s 32, there is a single rather than a two-step process.'
[324] Act 36 of 2005 ('the ECA').

The SCA in *MTN* held that a decision by a licensee (in that case, a private company) to invoke s 22 of the ECA is public and constitutes administrative action.[325] In the main judgment on this aspect, Plasket AJA, drawing on his reasoning in *POPCRU*,[326] stated that the 'essential enquiry' in deciding whether a private actor exercises a public power is whether the power has to be exercised in the public interest.[327] He went on to state that even if the provision of the service by the licensee is motivated by profit, the licensee 'is required by the ECA to provide that service in the public interest' and that the power in s 22 is central to the attainment of the ECA's primary object: the regulation of electronic communications in the public interest.[328] The court went so far as to describe the provision of electronic communications by a private operator as 'a privatisation of the business of government itself' and a situation in which a private body is 'integrated into a system of statutory regulation'.[329]

It seems to me that this reasoning is questionable. Although certain electronic communications licensees might be obliged to act in the public interest in relation to aspects of their business (eg in complying with their universal service obligations or, perhaps, in providing a monopoly fixed-line telecommunications service), this would not, in my view, be the case for operators in a competitive communications market. As for the primary purpose of the ECA: the aim of regulating electronic communications in the public interest focusses on the role of the communications regulator (ICASA), coupled with the legislative regime, to regulate in the public interest, rather than on the provision of communications services by private operators. Moreover, the fact that the provision of telecommunications services was historically the exclusive preserve of government does not mean that the provision of these services by private players amounts to the privatisation of government business. Telecommunications operators (and other forms of electronic communications service providers) operate in a competitive commercial market. It is, in my view, generally inappropriate to regard these operators as being obliged to act in the public interest as opposed to in their own private interests. The fact that they, like participants in many other industries, are regulated by, and licensed in terms of, legislation does not mean that their functions are public in nature.

Plasket AJA also noted that: 'Coercive powers to enter land, and even to deprive owners of the use of land, for public purposes is a typical government power that is provided for in

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[325] Supra note 10 paras 21 and 35. This conclusion was endorsed by a different panel of the SCA in *Msunduzi Municipality v Dark Fibre Africa (RF) (Pty) Ltd* 2014 JDR 2156 (SCA) para 15.
[326] Supra note 64.
[327] *MTN* supra note 10 paras 31-2.
[328] Ibid para 33.
[329] Ibid para 34, quoting from Hoffman LJ in *Aga Khan* supra note 21 at 931-2.

democracies such as ours precisely in order to further the public interest'.[330] This is an important, compelling observation. There is no doubt that the power to enter third party's land without their consent is extraordinary and coercive and is usually a power reserved for the state and then only when there is a compelling public interest or public purpose.

Section 22 of the ECA subsequently came before the Constitutional Court in *Link Africa*.[331] While the majority of the court left open the question whether action taken by a licensee under s 22 constitutes administrative action,[332] the minority judgment of Jafta J and Tshiqi AJ opined that this was not the case. According to them, 'PAJA is not suitable for the circumstances of s 22'.[333]

Jafta J and Tshiqi AJ noted that the mere fact that a function was previously the preserve of the state, or an organ of state, does not mean it is a public function.[334] This, they pointed out, may be illustrated with reference to hospitals, schools and broadcasters – services that were previously performed exclusively by the state and which are now performed by private entities for profit.[335] The performance of these functions may be private even though the state is constitutionally obliged to provide some of these services (health care and education) and does so alongside private players.[336] They went on to state that PAJA does not apply to 'commercial decisions' made for financial gain, even if the general public would eventually benefit from the communications infrastructure.[337] As Jafta J and Tshiqi AJ put it later in their judgment:[338]

> 'These licensees bear no administrative obligation to develop electronic communications facilities. They do so purely as a matter of commercial business. No member of the public may demand that the licensees must build infrastructure, even on

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[330] *MTN* supra note 10 para 34.
[331] Supra note 64.
[332] Ibid paras 158-9 (per Cameron and Froneman JJ). The sentence in para 158 of the majority judgment which reads 'Network licensees acting under both the contested provisions are empowered by the Act to exercise public power and perform an important public function', could be read to indicate that, while the majority left open the question as to whether the conduct of licensees pursuant to s 22 is administrative action, it expressed the view that such conduct is public. This sentence, however, appears in a paragraph which primarily refers to the findings of the SCA in *MTN* (supra note 10) and *Dark Fibre* (supra note 325) and it seems to me, on balance and despite its literal wording, that it was intended to reflect the decisions in the SCA rather than the view of the majority in *Link Africa*. It would be surprising if the Constitutional Court majority intended in such a cursory manner to pronounce definitively on the characterisation of this conduct as public, particularly in circumstances in which the primary uncertainty as to whether the conduct was 'administrative action' revolved on whether or not it was public – the question which the majority expressly left open.
[333] *Link Africa* supra note 64 para 65.
[334] Ibid para 67.
[335] Ibid paras 67-8.
[336] Ibid para 68.
[337] Ibid para 69.
[338] Ibid para 76.

> that member's own property. The decision to build infrastructure and where it must be constructed is that of the licensee. That decision is informed by the licensee's internal commercial interests and nothing else.'

This is a salutary approach, which emphasises one of the core characteristics of public functions: the existence of a public duty.[339]

It is, however, unfortunate that the minority judgment in *Link Africa* did not clarify which element(s) of the definition of 'administrative action' are not, in its view, met in the context of s 22 of the ECA, and, despite indications to the contrary,[340] it remains uncertain whether or not the minority regarded the conduct of the licensees as a public function.[341] In addition, it seems sterile for the minority to have insisted that s 22 does not confer *power* but rather creates a statutory *right*.[342] The fact remains that s 22 authorises licensees to act in a coercive, rights-invasive manner; it confers 'the power to deprive people of their property'.[343] In such circumstances, it seems to be appropriate to describe s 22 as power-conferring.

Whatever the correct position might be in relation to s 22 of the ECA, the chain of case law on this provision indicates that the exercise of a statutory power (or right) does not necessarily mean that the power (or function) is public. This approach is consistent with the fact that para *(a)*(ii) of PAJA's definition of 'administrative action' refers to 'exercising a *public* power or performing a *public* function *in terms of any legislation*'.[344] If all legislative powers or functions were public, there would be no need to include the words 'public'. This, however, does not detract from the fact that the statutory source of a power remains a significant pointer to the public nature of that power.[345]

The s 22 saga also demonstrates that the factors to be taken into account in assessing whether a power or function is public vary as between different type of actors. If a statutory power of the type at issue in *Link Africa* were conferred on the government or a state-owned entity, its exercise would plainly constitute the exercise of a public power. This once again

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[339] Jafta J and Tshiqi AJ also made much of the fact that the decision-maker in s 22 of ECA was 'the licensee for whose benefit the decision is taken', which would invariably give rise to a reasonable perception of bias on the part of the decision-maker if the rules of administrative law were to apply. According to them, this strongly suggested that PAJA did not apply to such decisions. Ibid paras 70-4.
[340] Ibid paras 67.
[341] See ibid para 68.
[342] Ibid para 75.
[343] *MTN* supra note 10 para 27 (per Plasket AJA).
[344] Emphasis added.
[345] *POPCRU* supra note 64 footnote 55: the statutory source of a power 'is significant because 'it places the existence of public power largely, if not completely, beyond contention'' (quoting Brassey AJ in *Chirwa v Transnet Ltd* (unreported judgment in leave to appeal application under case no. 03/01052 at 7)). See also Elliott 'Judicial review's scope' op cit note 62 at 83-4.

reminds us that, in assessing whether power is public or private, the functionary can sometimes matter more than the function, and that a substantive approach requires one to assess all relevant considerations, including both the nature of the function and the functionary.

There are a wide variety of ways in which, and degrees to which, the state may confer coercive power on private persons. To the situations which emerge from the case law discussed above might be added, for example, the conferral by government of private monopoly power through licensing, contract or privatisation. This range of situations and other substantive considerations that might arise in particular contexts means that the statutory or governmental conferral of power is not determinative of the question as to whether a power or function is public in nature. Context is all important and other factors may swing the classification one way or the other. It thus appears that state conferral of power on a private person is simply one factor to be taken into account in deciding upon the classification of that power. Nevertheless, it is an important consideration and one which may well be determinative when the power is coercive and it is coupled with a duty to act in the public interest – which was the position in *AAA Investments*, might arguably have been the case in *Calibre* but was, in my view, not the case in *Link Africa*.

7. PRIVATE ENTITIES EXERCISING REGULATORY POWER

While regulatory power is normally exercised by the state or by organs of state (such as the regulatory agencies referred to above), power of this nature is not the sole preserve of the state. As O'Regan J noted in *AAA Investments*: 'Courts in South Africa and England have long recognised that non-governmental agencies may be tasked with a regulatory function that is public in character'.[346]

There are, of course, a wide variety of situations in which private bodies might regulate conduct in one form of another. For example, a voluntary association might regulate a particular economic activity,[347] a private school might enforce its disciplinary rules,[348] a body

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[346] Supra note 12 para 119.

[347] *Samons* supra note 64 paras 12-20 held that a decision by a voluntary association of business rescue practitioners to expel a member amounted to the exercise of public power, in circumstances where that expulsion had the statutory consequence that the affected person was no longer a member in good standing with a 'business management profession' which resulted in the Companies and Intellectual Property Commission revoking his licence to practise as a business rescue practitioner in terms of the Companies Act 71 of 2008.

[348] For authority for the proposition that independent schools do not exercise public power, see *Khan v Ansur NO* 2009 (3) SA 258 (O) para 32, *Klein v Dainfern College* 2006 (3) SA 73 (T) paras 29-30, *CB v Diocesan School for Girls* 2012 JDR 0720 (ECG) at 16-18, *PI v St Charles College, Pietermaritzburg* 2014 JDR 0099

corporate might make decisions which impact on members of a sectional title scheme,[349] a religious body might impose sanctions for breach of a code of conduct,[350] the committee of a recreational club might impose rules governing the behavior of its members, or the organiser of a weekly touch-rugby game might decide who is invited to play and what rules are to be observed. Some of these scenarios might be relatively public in nature, while others are more private. And as one moves further away from the public towards the private sphere, considerations of public accountability become less pressing, while concerns over interference with freedom of association (and other rights, such as privacy) correspondingly increase.

A case on the relatively public end of the spectrum is the famous decision of the English Court of Appeal in *Datafin*,[351] which held that the Panel on Take-overs and Mergers ('the panel') was subject to judicial review. Donaldson MR remarked that the panel oversaw and regulated an important part of the UK financial market 'without visible means of legal support'.[352] It had no statutory, prerogative or common law powers, and was not even in a contractual relationship with those affected by its decisions.[353] He, however, observed that, not only did the panel perform a public duty which impacted upon the rights of citizens, it enjoyed '[i]nvisible and indirect support … in abundance', including statutory consequences that flowed from the panel finding that its code had been breached.[354] While the panel was a self-regulatory body, it was 'supported and sustained by a periphery of statutory powers and penalties'.[355] Donaldson MR also emphasised that the Secretary of State for Trade and Industry had, in light of the panel's existence, decided not to impose further regulation in relation to take-overs and mergers but rather to 'use the panel as the centerpiece of his regulation of that market'.[356] Moreover, various other factors weighed with the members of the court in concluding that the panel was subject to judicial review, including the enormous

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(KZP) para 33, *Mlawuli v St Francis College* 2016 JDR 0733 (KZD) para 5, *Link Africa* supra note 64 para 67 (per Jafta J and Tshiqi AJ), *AB v Pridwin Preparatory School* [2019] 1 All SA 1 (SCA) paras 49-63.

[349] *Mogane v Rosen NO* 2015 JDR 0464 (GJ) para 19 held that the functions of court-appointed administrators of a body corporate were not public in nature. For cases finding that decisions of a homeowners' association of a residential estate are subject to the contract concluded between the residents and that association and not to PAJA, see *Abraham v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC)* 2014 JDR 1861 (KZD) para 23, *Singh v Mount Edgecombe Country Club Estate Management Association (RF) NPC* 2016 (5) SA 134 (KZD) para 81. Cf *Singh v Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* 2018 (1) SA 615 (KZP) para 31.

[350] See eg *Theron v Ring van Wellington van die NG Sendingskerk in Suid-Afrika* 1976 (2) SA 1 (A).

[351] Supra note 21.

[352] Ibid at 824.

[353] Ibid at 825.

[354] Ibid at 834-5, 838.

[355] Ibid at 835.

[356] Ibid at 838.

power that it wielded (with Lloyd LJ describing it as having 'a giant's strength'),[357] the involuntary relationship between the panel and those whom it regulates,[358] the public duty which it bore,[359] 'the leading part played by the Bank of England in setting up and running the panel',[360] and 'the wide-ranging nature and importance of the matters covered by the code'.[361] Against the backdrop of the nature of the panel and its functions, the Court of Appeal was clearly concerned to ensure that judicial review should act as a bulwark against abuse of power. For his part, Donaldson MR remarked that 'it is really unthinkable that … the panel should go on its way cocooned from the attention of the courts in defence of the citizenry',[362] while Lloyd LJ noted that the fact that the panel was a self-regulating body 'makes it not less but more appropriate that it should be subject to judicial review by the courts' and added that as long as there was 'a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility'.[363]

Similarly, in *Dawnlaan Beleggings*[364] – a case which, although it preceded *Datafin*, has been described as '[t]he South African equivalent to *Datafin*'[365] – Goldstone J held that, while the Johannesburg Stock Exchange (JSE) was not a statutory body, the decisions of its committee were subject to administrative-law review given the impact of its decisions on the general public and the economy as a whole and its duty, imposed under the Stock Exchanges Control Act 7 of 1947, to act in the public interest.[366] Goldstone J concluded that:[367]

> 'To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.'

Datafin and *Dawnlaan Beleggings* demonstrate that the nature of the function performed by a private body (together with other factors such as its impact on the public and its duty to act in the public interest) might mean that it is subject to public-law review, notwithstanding

[357] Ibid at 845. See also Donaldson MR at 826.
[358] Ibid at 838 (per Donaldson MR), 846 (per Lloyd LJ).
[359] Lloyd LJ at 847-8, Nicholls LJ at 852.
[360] Ibid at 852 (per Nicholls LJ).
[361] Ibid.
[362] Ibid at 839.
[363] Ibid at 845-6.
[364] Supra note 64.
[365] Cockrell 'Can you paradigm?' op cit note 72 at 232.
[366] *Dawnlaan Beleggings* supra note 64 at 364-5. On the reviewability of the decisions of the JSE, see also *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152-4, *ABSA Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 (1) SA 550 (GSJ) paras 51-2.
[367] *Dawnlaan Beleggings* op cit note 64 at 365.

that it is not a statutory body and does not wield statutory power. These cases, however, arose against a backdrop of statutory provisions which either, in the case of *Datafin*, shored up the private body's power or, in the case of *Dawnlaan Beleggings*, imposed a duty to act in the public interest.

An arguably more difficult question is whether private bodies wield public power when their power does not have a statutory source and is not underpinned by statutory or government compulsion. The case law on this score is far from harmonious. As Unterhalter J recently remarked in *Ndoro*:[368]

> 'Since [*Dawnlaan Beleggings*], and notwithstanding the advent of PAJA, courts have taken quite different approaches as to whether a private body may be said to exercise a public function susceptible to judicial review. Some courts have emphasised the primacy of the contract that binds parties and the consensual assumption of obligations. This has led to the conclusion that an association is a private regulator that does not exercise public functions.
>
> Other courts have inclined in the opposite direction. They have reasoned that where a non-statutory body enjoys monopoly powers of a coercive kind that are of general application to regulate matters of public interest and could readily have been the subject-matter of statutory regulation to ensure public accountability, then such powers will more readily be characterised as the exercise of a public function.'

As we have already seen, this divergence in approach manifested in the radically different approaches to regulatory decision-making adopted by the SCA and the Constitutional Court in *AAA Investments*.[369] It is also apparent in our courts' treatment of the type of private regulatory body at issue in *Ndoro*: sports governing bodies. It is thus useful, for purposes of this section of the chapter, to focus on our courts' approach to whether or not sporting bodies exercise public power.[370]

As the quoted portion of *Ndoro* indicates, the first approach emphasises that the power exercised by the sporting body flows from a contractual (rather than a statutory) source, that the body is independent of the state, and that it thus does not exercise public power. This

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[368] *Ndoro v South African Football Association* 2018 (5) SA 630 (GJ) paras 20-1. See also Hoexter 'A matter of feel?' op cit note 1 at 150: 'some judges seem more ready to discern public powers or functions while others appear to start from the assumption that the conduct of an apparently private body is private until proved otherwise'.

[369] Supra note 12.

[370] In this portion of the chapter, I use the phrase 'sporting body' to refer to a sport governing body or a sport regulatory body.

approach is illustrated by the decision in *Cronje*, which dealt with the decision of the United Cricket Board of South Africa (UCB) to impose a lifetime ban for match-fixing on the former South African cricket captain.[371] The UCB was the sole controlling body for cricket in this country[372] and it decided to ban Mr Cronje from all activities of the UCB and its affiliates in circumstances in which the contract between Mr Cronje and the UCB had already come to an end. The UCB, as a voluntary association, argued that its actions were an exercise of its right to freedom of association (which includes the freedom to dissociate).[373]

The court rejected Mr Cronje's contention that he was entitled to a hearing prior to the decision to impose the ban. It did so on the basis that the UCB did not exercise public power and its decision thus did not amount to administrative action. Kirk-Cohen J held as follows:[374]

> 'The [UCB] is not a public body. It is a voluntary association wholly unconnected to the State. It has its origins in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded. The applicant, indeed, makes the point that it 'has no statutory recognition or any "official" responsibility for the game of cricket in South Africa'.
>
> The conduct of private bodies, such as the [UCB], is ordinarily governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice.'

As this dictum indicates, Kirk-Cohen J placed great store by the fact the UCB did not exercise statutory power. He went on to note that where, in exceptional cases, 'private bodies are vested with public powers by statute' the application of public law rules flows 'not from the nature of the body or the impact of its conduct, but from the underlying statute'.[375]

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[371] Supra note 1. The events which gave rise to *Cronje* occurred in October 2000, the month before PAJA came into operation. PAJA thus did not apply. The court, however, considered PAJA's definition of 'administrative action' in cursory terms. See *Cronje* at 1382-3. See also the post-PAJA decision in *Hare v The President of the National Court of Appeal No 140* 2009 JDR 1171 (GSJ) paras 8-11, which relied upon *Cronje* in finding that the decision of the Court of Appeal of Motor Sport South Africa was not the exercise of a public power or the performance of a public function and was thus not administrative action.

[372] *Cronje* supra note 1 at 1366.

[373] Ibid at 1371-3, 1383. For authority for the proposition that the right to freedom of association in s 18 of the Constitution includes the right to refrain from association, see *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275 (T) at 1280-1, *Taylor v Kurtstag NO* 2005 (1) SA 362 (W) para 37.

[374] *Cronje* supra note 1 at 1375.

[375] Ibid at 1375. See also *Cronje* at 1382: 'Administrative action in the norm applies to organs of State or bodies deriving power from statutory authority'.

The finding in *Cronje*, as Kirk-Cohen J noted,[376] was consistent with two decisions of the English courts.[377] In *R v Football Association*,[378] the court held that the Football Association (FA) was not susceptible to judicial review even though that it controlled the game of football across the UK, it enjoyed 'virtually monopolistic powers' and its decisions were of importance to 'many members of the public who are not contractually bound to it'.[379] As Rose J put it, the FA's powers arose from private law and there was 'no sign of underpinning directly or indirectly by any organ or agency of the State or any potential government interest'.[380] Similarly, in *Aga Khan*,[381] the Court of Appeal held that the decisions of the English Jockey Club are not subject to judicial review.[382] It reached this conclusion despite acknowledging that the Jockey Club 'effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public',[383] noting that participants in horse racing had no real alternative but to submit to the Jockey Club's jurisdiction,[384] and one judge accepting that if the Jockey Club did not regulate horseracing 'the government would probably be driven to create a public body to do so'.[385] Bingham MR noted that the Jockey Club has 'not been woven into any system of governmental control of horse-racing' and that this meant that, 'while the Club's powers may be described as, in many ways, public, they are in no sense governmental'.[386] Hoffman LJ added the following perspective in his concurring judgment in *Aga Khan*:[387]

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[376] Ibid at 1377-9.
[377] For other decisions of the English courts finding that sporting bodies are not subject to judicial review, see eg *Law v National Greyhound Racing Club* [1983] 1 WLR 1302, *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin). The position in the UK is controversial and has not been followed in a number of other jurisdictions, including in Scotland. See eg Wade & Forsyth op cit 61 at 543-4. See, generally, Jack Anderson 'An accident of history: Why the decisions of sports governing bodies are not amenable to judicial review' (2006) 35 *Common Law World Review* 173.
[378] *R v Football Association Ltd, Ex parte Football League Ltd* [1993] 2 All ER 833 (QB).
[379] Ibid at 848.
[380] Ibid.
[381] Supra note 21.
[382] For a critical discussion of *Aga Khan*, see Plasket 'Fundamental principles of justice' op cit note 28 at 583-7.
[383] *Aga Khan* supra note 21 at 867 (per Bingham MR). See also Hoffmann LJ at 873: the Jockey Club enjoys 'considerable power over a section of the economy'.
[384] Ibid at 859 (per Bingham MR), 872 (per Farquharson LJ).
[385] Ibid at 866 (per Bingham MR). Farquharson LJ, however, found no grounds 'for supposing that, if the Jockey Club was dissolved, any governmental body would assume control of racing' (at 872) and Hoffmann LJ remarked that '[t]here is nothing to suggest that, if the Jockey Club had not voluntarily assumed the regulation of racing, the government would feel obliged or inclined to set up a statutory body for the purpose' (at 874). For a discussion of the difficulty with reliance upon the question as to whether the government would fill the gap in the absence of the relevant body (sometimes referred to as the 'but for' test), see Elliott 'Judicial review's scope' op cit note 62 at 88-9.
[386] *Aga Khan* supra note 21 at 867.
[387] Ibid at 875.

> '[T]he mere fact of power, even over a substantial area of economic activity is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law. If control is needed, it must be found in the law of contract, the doctrine of restraint of trade, the Restrictive Trade Practices Act, 1976, arts 85 and 86 of the EEC Treaty and all the other instruments available in law for curbing the excesses of private power.'

There is, however, a growing list of South African cases that have found that sporting bodies exercise public power.[388] These cases adopt a fundamentally different stance to that in *Cronje* and its English counterparts.[389] They emphasise, amongst other things, the coercive power wielded by sporting bodies, the involuntary nature of the relationship between such bodies and the people who are subject to their jurisdiction, and the public interest in the effective regulation of the relevant sport.

Ndoro[390] presents a good illustration of this approach. This case involved the review of a decision of the Arbitration Tribunal of the South African Football Association (Safa). Safa is responsible for the regulation of football throughout the country. It is a member association of Fifa,[391] which governs world football, and its local affiliates include the National Soccer League (NSL).

After referring to the divergent case law on bodies that regulate sporting codes,[392] Unterhalter J listed three principles that emerge from the cases.[393] First, 'private entities may discharge public functions by recourse to powers that do not have a statutory source'.[394]

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[388] *Coetzee v Comitis* 2001 (1) SA 1254 (C) para 17.8 (the National Soccer League performs a public function in the public interest), *Tirfu Raiders Rugby Club v South African Rugby Union* [2006] 2 All SA 549 (C) paras 28-9 (a decision of the South African Rugby Union relating to log positions of teams was administrative action), *Daniels v WP Rugby* [2011] ZAWCHC 481 (decision of Western Province Rugby Football Union to suspend a player for five years amounted to administrative action), *Louisvale Pirates v South African Football Association* 2012 JDR 0739 (GSJ) paras 22-9 (disciplinary procedure of South African Football Association is administrative action), *Ndoro* supra note 368 para 33. See also *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa* 2015 JDR 0832 (GP) paras 32-3. The question was left open in *Despatch Rugby Club v Eastern Cape Province Rugby Union* 2016 JDR 1753 (ECP) paras 12-14.

[389] For academic criticism of *Cronje*, see Sarah Driver and Clive Plasket 'Administrative Law' 2001 *Annual Survey of South African Law* 81 at 114-17, Yvonne Burns 'Do the principles of administrative justice apply to the actions of domestic bodies or voluntary associations such as the South African Rugby Football Union and the United Cricket Board?' 2002 *SAPL* 372 at 376-8, 381, Yvonne Burns & Margaret Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006) at 141, Plasket 'Fundamental principles of justice' op cit note 28 at 596-7.

[390] Supra note 368.

[391] Federation Internationale de Football Association.

[392] *Ndoro* supra note 368 paras18-22.

[393] Ibid para 23.

[394] As noted above, the wording of para *(b)* of PAJA's definition of 'administrative action' makes this plain.

Second, merely because a private entity exercises public power, this does not mean that all its conduct amounts to the exercise of a public power or the performance of a public function. Third, simply because 'a private entity is powerful and may do things of great interest to the public' does not mean that it 'discharges a public power or function'. According to Unterhalter J:[395]

> 'Rather, it is the assumption of exclusive, compulsory, coercive regulatory competence to secure public goods that reach beyond mere private advancement that attracts the supervisory disciplines of public law.'

The court in *Ndoro* pointed out that, while the bodies which regulate football (Fifa, Safa and the NSL) are private organisations and their rules are not derived from 'public statutes' but are rather founded upon contract,[396] they, collectively, provide a comprehensive scheme for the regulation of football.[397] In holding that these bodies discharge public functions which amount to administrative action,[398] Unterhalter J remarked as follows:[399]

> '[A]s a general matter, it is hard to escape the conclusion that what these bodies do and the objects they strive after are public in nature. First, the regulatory scheme constituted by the statutes and regulations [of Fifa and Safa] is exclusive, comprehensive, compulsory and coercive. There is no other way to conduct professional football, save in compliance with this regulatory scheme. Fifa and its progeny are the singular source of professional football regulation. Second, compliance is not optional and the rules are backed by coercive sanctions. Third, although many actors participate in football for great private reward, football is not the sum of these private actions. Rather it is a sport so widely enjoyed and passionately engaged in by large sections of the public that the flourishing of the game is a public good, and one that is often understood to be bound up with the wellbeing of the nation.'

The judgment in *Ndoro* thus emphasises not only the compulsory and coercive nature of the regulatory regime[400] but also that the flourishing of football – and the effective regulation

[395] *Ndoro* supra note 368 para 23.
[396] Ibid para 29.
[397] Ibid paras 26, 29.
[398] Ibid para 33.
[399] Ibid para 30.
[400] See also *Ndoro* supra note 368 para 43: 'membership of the associations that make up the institutional framework of professional football is not in any real sense elective. Fifa, Safa and the NSL have assumed exclusive competence to regulate professional football in South Africa. Players and clubs must join to participate, and on terms they are not free to determine on a consensual basis.'

of the sport[401] – is a public good. Accordingly, 'private associations that regulate football exercise public functions because they oversee a public good, and do not simply regulate private interests'.[402]

Another notable case is the decision of the full bench in *Naidoo*.[403] This case was decided in the intervening period between *Cronje* and *Ndoro* and involved a decision by the National Horseracing Authority (NHA) to impose the sanction of 'warning off' on a racehorse trainer, the effect of which was that the trainer was barred from all premises that were subject to the NHA's regulatory control and which effectively brought 'his career as a trainer to an end'.[404] While both judgments in *Naidoo* ultimately left open the question as to whether or not the NHA's conduct amounted to administrative action, the court's thinking on this issue was clearly divided.

Wallis J (who was in the minority on this issue) favoured the position that the NHA exercised public power in this case.[405] He observed that there was nothing in the language of PAJA's definition of 'administrative action' which indicated a clear intention to exclude sporting bodies that regulate in terms of a constitution and rules,[406] and went on to refer to both the public importance of, and government's interest in, sport:[407]

> 'Sport has a substantial influence in our society and can involve substantial sums of money as well as exercising control over who may earn their living from involvement in sporting activities. Sport raises important public issues as is apparent from the fact that the President has seen fit to appoint commissions of inquiry into both rugby and cricket. Government has a substantial interest in sport as evidenced by the existence of the department of Sport and Recreation and the creation of the Sports Commission. Its interest extends to the way in which sports are regulated by sporting bodies. Thus it is recorded in the preamble to the National Sport and Recreation Amendment Act 18 of 2007 that 'government has a constitutional obligation to ensure good and responsible governance of sport and recreation in the Republic' and 'the administration of sport and

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[401] Ibid para 31.
[402] Ibid.
[403] *National Horseracing Authority of Southern Africa v Naidoo* 2010 (3) SA 182 (N).
[404] Ibid para 10.
[405] Ibid para 27: 'There seems to me much to be said for the proposition that those are public functions, or involve the exercise of public powers, albeit by a private body, at least insofar as they impinge upon the right of individuals to participate in horseracing and earn a living from it' (see also paras 28-9). See also *Brandhouse* supra note 388 paras 32-4, in which the court adopted Wallis J's reasoning in *Naidoo* in finding that the decision of the Advertising Standards Authority of South Africa constituted administrative action.
[406] *Naidoo* supra note 403 para 22.
[407] Ibid para 22. Against this backdrop of governmental interest, Wallis J suggested that the NHA was analogous to the Panel on Take-overs and Mergers in *Datafin* (supra note 21).

> recreation in the Republic has been entrusted to sport and recreation bodies' and 'sport and recreation belongs to the nation over which government with its elected representatives have an overall responsibility.'

Wallis J also noted that, while there might be sports organisations with 'virtually no regulatory powers' operating in relation to 'relatively minor sports', which 'attract little public interest' and with 'no significant commercial interest', sporting bodies operating in respect of 'major sports such as horseracing, football, cricket and rugby stand on an entirely different footing'.[408] The sporting bodies that regulate these major sports wield significant power:[409]

> 'They exercise a virtually monopolistic control over all aspects of those sports from junior to national levels and are active in the international sphere. Public interest in those sports is massive and the amounts of money generated by these sporting activities are very considerable. A person excluded by one of these sporting bodies from participation in their sport is effectively deprived of their livelihood.'

In the other judgment in *Naidoo*, Levinsohn DJP (with whom Kruger J concurred) stated that he had 'considerable reservations' as to whether the disciplinary actions of the NHA could be said to be administrative action.[410] He expressed the *prima facie* view that the weight of authority favoured the view that private administrative law, as reflected in the Jockey Club cases,[411] continued to apply to associations of this nature and added that:[412]

> 'Any change in the law, particularly one that classifies the disciplinary powers of the [NHA] as being the exercise of public powers and therefore administrative action under the umbrella of PAJA would in my view result in a seismic shift in the state of the law, particularly as it affects the [NHA's] activities.'

Levinsohn DJP also questioned the implication in Wallis J's judgment that 'the size of the sporting body and the extent of its commercial enterprise should be the yardstick to determine whether it exercises a public function or not'.[413] In Levinsohn DJP's view, a uniform approach to the treatment of domestic disciplinary tribunals is in the public interest and an

[408] Ibid para 23.
[409] Ibid.
[410] Ibid para 2 (per Levinsohn DP).
[411] Infra note 415.
[412] *Naidoo* supra note 403 para 4.
[413] Ibid para 5.

approach which classifies sporting bodies on the basis of their prominence could reflect a 'lurking inequality' in respect of less visible sporting bodies.[414]

There is something to be said for the contention, implicit in Levinsohn DJP's judgment, that private administrative law provides an adequate constraint on the disciplinary powers of sporting bodies. As explained in chapter one, private administrative law involves courts reviewing decisions on the basis of 'fundamental principles of justice' with which the decision-maker is required to comply either as an express or implied term of the contract governing the relationship between the body and its members (eg the constitution and code of conduct applicable to a particular sporting body). Nevertheless, as *Cronje* demonstrates, one difficulty with the scope of application of private administrative law, arising from its contractual source, is that it does not operate in circumstances in which there is no extant contract with the individual. But the primary difficulty with this species of review as a constraint on power is that the 'fundamental principles of justice', deriving as they do from contract, may be excluded by contract.[415] For example, a sporting body could exclude the application of procedural fairness to its decisions through clear wording in its constitution or in the contracts with its members. Plasket makes the point crisply:[416]

> 'Effective control of the power and the line between the public and the private … can be maintained by the private power approach, but artificially so. What is the position when there is no contract between an aggrieved person and a powerful private body exercising monopoly power in an undertaking of importance to the public generally? Secondly, how is the power of such a body controlled if it has had the foresight or cynicism to exclude expressly what it considers to be the most troublesome of the rules of public law from its contracts with its members?'

While it might be said in response, with some justification, that a contractual exclusion of this nature would be contrary to public policy and thus unenforceable,[417] a finding of unenforceability would not remove the difficulty that, without an express or implied contractual term incorporating the principles of private administrative law (which term

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[414] Ibid.
[415] *Marlin v Durban Turf Club* 1942 AD 112 at 125-30, *Thandroyen v Sister Annuncia* 1959 (4) SA 632 (N) at 639, *Bekker v Western Province Sports Club (Inc.)* 1972 (3) SA 803 (C) at 812, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646, *Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W) at 726, *Naidoo* supra note 403 para 13 (per Wallis J).
[416] 'Fundamental principles of justice' op cit note 28 at 586.
[417] For the approach to considering whether a contract is contrary to public policy, see *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28-30, 45-67, *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 36-52, *AB v Pridwin* supra note 348 para 27.

cannot arise in the face of an express exclusion), a court would not have authority to review the sporting body's conduct on this basis. Accordingly, in the absence of a finding that the principles of private administrative justice arise from some other legal source – such as the horizontal application of the constitutional right to human dignity[418] or the right to choose one's occupation[419] – the position would seem to be that the contractual exclusion of these principles would put the body's decision beyond legal scrutiny (save for enforcing compliance with the terms of the contract) unless public law applies.

Proponents of the view that sporting bodies wield private rather than public power might draw support from decisions of the English courts which, as mentioned above, have held that sporting bodies are not subject to judicial review as they are not 'woven into any system of governmental control'.[420] They might be further emboldened by the judgment of the SCA in *Calibre*, which, in distinguishing between public and private conduct, relied on the approach of the English courts and focused on whether or not the function was governmental in nature.[421]

An approach which focusses exclusively on whether the body or function is integrated into a scheme of statutory or government regulation, or is governmental in nature, is, however, not only contrary to *Calibre* itself;[422] it is contrary to the preceding decision of the Constitutional Court in *AAA Investments* as well as its more recent decision in *AMCU*. As noted above, while the former judgment indicated that 'public' and 'governmental' should not be equated,[423] the latter made clear that the concept of 'public' is wider than 'governmental'.[424] Accordingly, while integration into a governmental regulatory framework is a strong indication that a power is public,[425] this is not a prerequisite for classifying non-governmental conduct as 'public'.[426] Viewed from this perspective, it is worth noting that some of the English case law might even support a finding that sporting bodies exercise public power or perform public functions. In *Aga Khan*, for example, Bingham MR concluded that 'while the

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418 Section 10 of the Constitution.
419 Section 22 of the Constitution.
420 *Aga Khan* supra note 21 at 866 (per Bingham MR), quoted in *Cronje* supra note 1 at 1378 and *Calibre* supra note 2 para 26.
421 *Calibre* supra note 2 paras 24-42. Cf Rogers AJA in *MTO Forestry* supra note 103 para 54, who describes the regulatory functions exercised by voluntary associations in relation to, amongst others, sport codes as 'governmental functions'.
422 In *Calibre* supra note 2 para 40, Nugent J indicated that the extent to which the power or function is governmental in nature is not definitive. See *ISO Leisure* supra note 28 paras 57-8.
423 *AAA Investments* supra note 12 paras 38-9.
424 *AMCU* supra note 10 para 69. Cameron J went on to state that: 'The constitutional guarantee of just administrative action is conferred without distinction as to whether the actor is governmental or non-governmental' (ibid).
425 See the judgment of the court *a quo* in *AAA Investments (High Court)* supra note 279 at 564F-G.
426 O'Regan J in *AAA Investments* supra note 12 para 119.

Jockey Club's powers *may be described as, in many ways, public*, they are in no sense governmental'.[427]

Having regard to the above analysis, it seems to me that there are a number of compelling reasons to regard major sporting bodies as exercising public power in relation to participants in the sports over which they exercise control. These participants are often a not insignificant section of the public,[428] and the broader public has an interest in the development, and effective administration, of these sports. As Wallis J observed in *Naidoo*, this interest is reflected not only in the fact that sport and recreation is a Cabinet portfolio but also in the preamble to the National Sport and Recreation Amendment Act.[429] Sporting bodies of this nature also wield regulatory power that is both analogous to state power and monopolistic.[430] Indeed, the competitive nature of sport and the need for the making and enforcement of rules governing competitive sports is conducive to both the establishment and monopolisation of sporting regulation. Moreover, the powers of major sporting bodies are extensive and may have a significant impact on those who participate in the relevant sport. In, for example, deciding to ban an individual from participation in a particular sport, a sporting body not only, as Wallis J points out,[431] potentially takes away a professional's livelihood, it also removes the pleasure and satisfaction that comes with participation in one's chosen competitive sport at the highest level and to the best of one's ability. And, importantly, the sporting body has the power to impose such a sanction in circumstances where, as Unterhalter J makes clear in *Ndoro*,[432] the individual's consent to the applicable code of conduct, and to the regulatory body's authority, cannot be said, in any real sense, to be

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427 *Aga Khan* supra note 21 at 866, emphasis added. See also *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1993] 2 All ER 249 (QB) at 254: 'To attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question'.

428 In *AAA Investments* supra note 12 para 119, O'Regan J noted that the factors to be taken into account in determining whether rules made by non-governmental agencies are public in character include 'whether the rules apply generally to the public *or a section of the public*' (emphasis added).

429 *Naidoo* supra note 403 para 22. See also Plasket 'Fundamental principles of justice' op cit note 28 at 588-91, Hoexter 'A matter of feel?' op cit note 1 at 163: 'one might think this preamble enough on its own to infuse the actions of all national sports bodies in South Africa with a public and even a 'governmental' character'.

430 Driver & Plasket op cit note 389 at 115-16. See also Plasket 'Fundamental principles of justice' op cit note 28 at 596 ('the [United Cricket Board's] power to regulate cricket stems from the fact that it exercises monopoly power in its field. In doing so, it performs the equivalent of governmental functions in its sphere'), Rogers AJA in dissent in *MTO Forestry* supra note 103 para 54 ('It may well be that the contractual 'empowering provisions' which the lawmaker had in mind in para *(b)* of the definition of 'administrative action' [in PAJA] were contracts by which private bodies exercise *governmental functions*. Examples would be the rules and constitutions by which voluntary associations exercise regulatory functions (for example, in relation to sporting codes, advertising and the like) and the contracts under which private bodies render services to the public where the state has outsourced such services' (emphasis added).

431 *Naidoo* supra note 403 para 23.

432 *Ndoro* supra note 368 para 30.

voluntary. The would-be participant is faced with the stark choice of either agreeing to the applicable rules, and the governing body's authority, or not participating in the sport. As Unterhalter J noted in relation to Safa, '[t]here is no other way to conduct professional football, save for compliance with this regulatory scheme'.[433] It is no answer to say, as Farquharson LJ did in *Aga Khan*, that, while anyone who wished to race horses in the UK had to submit to the Jockey Club's jurisdiction, 'nobody is obliged to race horses in this country'.[434] The fact that a participant may have agreed to be bound by the rules and the authority of the relevant sporting body is, in the circumstances, neither here nor there. As Pannick, writing shortly before the decision of the Court of Appeal in *Aga Khan*, states:

> 'Since *Datafin*, the issue for public lawyers is not whether one can identify a private law agreement in order to exclude judicial review, but whether the respondent body … has such a *de facto* monopoly over an important area of public life that an individual has no effective choice but to comply with their rules, regulations and decisions in order to operate in that area.
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> …
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> Judicial review should not be excluded by reason of 'consensual submission' where the relevant body has *de facto* monopolistic powers which the complainant has no practical choice but to acknowledge, whether by contract or otherwise, if he wishes to participate in the area of life governed by the body in question.'[435]

It thus seems to me that, at the very least, major sporting bodies should be publicly accountable in relation to the administration of their sport.[436] In fact, the above considerations suggest that public power is at play when sporting bodies of both major and minor sports wield regulatory power. Sporting bodies that govern their sports at either a national or regional level invariably exercise coercive power over participants whose consent is not truly voluntary. Such an approach draws support from the fact that, while there is, as the *Ndoro* court noted, substantial public interest in the flourishing of our major sporting codes, there is a compelling public interest in promoting sport more generally. It is also consistent with the

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[433] Ibid.
[434] *Aga Khan* supra note 21 at 871. See Elliott 'Judicial review's scope' op cit note 62 at 100-1.
[435] Op cit note 23 at 3-4. The reference to 'consensual submission' is taken from Donaldson MR's statement in *Datafin* supra note 21 at 838, discussing the English case law on the scope of judicial review: 'Possibly the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from the jurisdiction of bodies whose sole source of power is consensual submission to its jurisdiction'.
[436] See also Plasket 'Fundamental principles of justice' op cit note 28 at 573, 597-8, Hoexter 'A matter of feel?' op cit note 1 at 162-3.

well-founded concern of Levinsohn DJP in *Naidoo* that the size of a sporting body and 'the extent of its commercial enterprise' should not be 'the yardstick to determine whether it exercises a public function or not'.[437]

On the other hand, it may be unduly onerous to apply the full rigour of the rules of administrative law and other public-law principles to minor sporting bodies. Many of these rules are complex and one cannot necessarily expect decision-makers across all sporting bodies to be familiar with the intricacies of public law (or to have the resources at their disposal to comply in all respects). It might thus be necessary to modify certain rules of public law insofar as they apply to bodies of this nature – bearing in mind that, while s 6(2) of PAJA applies the listed grounds of review to all 'administrative action', a number of the grounds involve a degree of variability.[438] Such an approach would, in principle, be preferable to excluding minor sporting bodies from PAJA's scope altogether.

Finally, it should be noted that not all decisions of sporting bodies are necessarily public in nature. These bodies may well act privately where they do not regulate the conduct of sports participants but rather engage in other external-facing conduct, eg contracting with sponsors, broadcasters or suppliers. According to Plasket, many powers of sporting bodies 'are, without doubt, private, such as when they contract for goods or services, or purchase buildings for their offices, or invest money'.[439]

8. CONCLUSION

The analysis in this chapter suggests that the starting point which our courts adopt in distinguishing between public and private power is, by and large, correct: there is no clear test for drawing this distinction and it depends on a consideration of a variety of factors. This is most apparent from those instances where private entities wield regulatory power or power that is underpinned by statute or government compulsion. This power and the entities which exercise it take various forms and exist on a continuum, varying in relation to factors such as the extent to which the power is coercive, the degree of governmental involvement, and whether or not a duty to act in the public interest is engaged. It is seemingly impossible

[437] *Naidoo* supra note 403 para 5.
[438] As Craig 'What is public power?' op cit note 13 states at 38: 'the more broad ranging is our definition of public power, the more we require a nuanced approach in order to determine which of the public law principles should be held to apply to a body which appears somewhere along the line of the institutional spectrum of public power'. See also Jacques De Ville De Ville, JR *Judicial Review of Administrative Action in South Africa* Revised 1 ed (2005) at 49, 51, footnote 149. The concept of variability is discussed in chapter 2.
[439] 'Fundamental principles of justice' op cit note 28 at 573, footnote 18.

properly to characterise the conduct of these bodies without having regard to a range of considerations that might bear on this exercise.

I thus have no difficulty, in principle, with the fact that our courts have resorted to an open-ended test in seeking to draw the line between public and private power. As explained in chapter one, it is not inherently problematic to adopt a test of this nature; and it has the benefit of allowing courts to take various substantive considerations into account in a context-sensitive manner. Such an approach, however, carries the risk of undermining coherence and predictability. It is here that our courts' approach is less than satisfactory. While the task of considering a range of factors is inherently a difficult exercise, the judgments in this area, at times, suggest a judicial tendency to pick and choose the factors to take into account in the case before them, to emphasise some factors and to disregard others. This approach exacerbates the risk of outcomes-based adjudication in which the court's treatment of the factors is simply a means to justify its intuitive sense as to whether a particular power should be subject to public law scrutiny (or, worse, its sense as to whether or not the particular conduct should be set aside). Hoexter captures the unsatisfactory nature of the current situation in the following terms:[440]

> 'All too often one may be left with judicial intuition: a haphazard affair, as some judges seem more ready to discern public powers or functions while others appear to start from the assumption that the conduct of an apparently private body is private until proved otherwise. To add to the potential for arbitrariness, the factors tend not to be applied uniformly or evenly to the cases, so that features emphasised in one instance might not even be mentioned by the court in another. Neither is there clarity as to how the various factors are to be weighed, whether some count more than others or how many are needed to tip the balance. In the South African context, there is a further variation worth mentioning: the influence of English jurisprudence on judicial review, whether at common law or under the Human Rights Act 1998. Though generally quite strong in this area, this influence is not consistent but tends to fluctuate from case to case. All of this results in considerable uncertainty and a degree of incoherence. In the end, the boundary between public and private often seems to be a matter of 'feel', as Scott Baker LJ once described it.'[441]

[440] 'A matter of feel?' op cit note 1 at 150.
[441] Scott Baker LJ in *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599 at para 13.

While I accept that the classification of a particular power as either public or private might to some extent depend on judicial intuition or 'feel' – particularly in relation to the substantive question as to whether or not it is appropriate to subject the decision to the discipline of public law – care should be taken to ensure that all relevant considerations are properly taken into account in the classification exercise. The various factors should not simply be treated as a smorgasbord from which the judge can choose based on his or her appetite in the particular case.

In order to ensure that certainty and predictability is not undermined by a wholly intuitive, all-things-considered approach, and to ensure that a coherent substantive approach is crafted over time, it is important for our courts to: interrogate whether certain factors might amount to either necessary or sufficient conditions; scrutinise the weight to be attached to the various factors; and rigorously consider applicable precedent – neither sweeping it aside without proper consideration nor mechanically applying it when there are substantive reasons to distinguish it.

While I am not aware of any necessary criteria for classifying conduct as public (ie criteria without which the label 'public' cannot attach), it seems to me that government in the narrow sense (government departments and municipalities) *always* acts publicly – and the same is true of state-owned entities, and regulatory and service-delivery agencies, established by or in terms of legislation. In other words, the fact that a particular function is performed by a government department or municipality (or other public entity) is a sufficient condition for its classification as 'public'. The focus of the enquiry in these instances should not be on whether the particular conduct is public or private but rather on whether it is subject to administrative-law review (rather than the less rigorous grounds of legality review) and, if so, the content of that review in the circumstances of the particular case.

A foundation for this emphatic approach may be found in judgments of our highest courts dealing with state-owned entities. Most significantly, in *Chirwa* the Constitutional Court held that a state-owned entity acted publicly when it dismissed the human resources manager of its pension fund and remarked that 'as a public authority its decision to dismiss necessarily involves the exercise of public power, and, '(t)hat power is always sourced in statutory provision … and, behind it, the Constitution'.[442] And, in *Mittalsteel*, the SCA held that the fact of state control may convert functions 'which by their nature might as well be private

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[442] *Chirwa* supra note 10 para 138.

functions' into public functions.[443] If the fact of state control has this effect, one would have thought that the conduct of the state itself (ie government) is invariably public in nature.

The effect of the approach which I favour is that the classification of conduct as public or private should not always depend on a consideration of a variety of factors. When it comes to conduct of the government, state-owned entities and statutory agencies, this conduct should be considered to be public without the need to enquire into the nature of the function.

This is, however, not the approach adopted by our courts. As cases such as *Cape Metro*, *Logbro* and *MTO Forestry* demonstrate, the courts adopt what Quinot[444] refers to as a 'classification approach' in terms of which they consider various factors in assessing whether or not a particular government power or function is public in nature, with the most important factors being whether the power is sourced in statute and whether the government or public body acts from a position of superiority or authority deriving from its position as a public authority. This variable approach is problematic because it suggests that government may act privately and that its duty of public accountability is bounded and does not apply to all its conduct. It also produces anomalies: I am, for example, at a loss to understand how a decision by a state-owned entity to dismiss the human resources manager of its pension fund is public (as the *Chirwa* court found) yet a decision by a municipality to cancel an outsourcing contract is private (as the *Cape Metro* court decided).

If one adopts an emphatic approach of classifying the conduct of indisputably public bodies (ie government, state-owned entities and statutory agencies) as public, the functionary predominates over the function in relation to these bodies. This is as it should be. An approach which emphasises the nature of the function, rather than the functionary, when assessing the conduct of these type of bodies, risks undermining important substantive considerations that would otherwise point toward the application of public law – such as the promotion of public accountability and transparency and the overarching obligation that these bodies bear to act in the public interest.

It is only when one seeks to classify the conduct of private bodies that it can, in my view, be said that the nature of the function matters more than the functionary. It is in this context that the statement in *AMCU* that 'the predominant focus is on the nature of power that is being exercised'[445] is a welcome reminder that private bodies may exercise public power

[443] *Mittalsteel* supra note 19 para 19.
[444] Op cit note 20 at 52.
[445] *AMCU* supra note 10 para 74.

irrespective of their form or their connection to the state. And it is here that the distinction between public and private power is most difficult. As the High Court recently remarked:[446]

> 'Whether the conduct of private ie non-governmental entities constitutes the exercise of public power or a public function … is a controversial issue which has vexed many courts from time to time, both in this country as well as in foreign jurisdictions.'

As cases such as *AAA Investments* and *AMCU* demonstrate, a wide range of factors may, depending on the context, conceivably be relevant in assessing whether the conduct of these bodies is public or private. But all factors do not count the same. As I see it, the most important considerations are: whether the actor has a duty to act in the public interest or is at liberty to act for its own private advantage; the extent to which the actor is autonomous or, conversely, subject to control by the state; whether the power is sourced in statute or otherwise derived from government compulsion; and whether the power is coercive in the sense that persons who are bound by the decision have either not consented to the applicable rule or to the body's authority or their consent is not truly voluntary. Most importantly, in considering the various factors at play in a particular case, sight should not be lost of the core focus of a substantive approach to the public/private divide: whether or not it is *appropriate* to subject the power or function to public law.

Given the variable, context-sensitive nature of this enquiry, caution should be exercised in drawing emphatic conclusions in relation to the various scenarios discussed in this chapter. Nevertheless, it seems to me that a number of general propositions might usefully be stated in relation to the exercise of power or the performance of functions by private bodies.

First, the performance of a service-delivery or other public-facing function by a private body, pursuant to an outsourcing arrangement with government, a state-owned entity or a statutory agency, amounts to the exercise of a public function. This was, for example, the case in *AllPay II* and *Grinpal*. The position may, however, be different where the private body performs a relatively mechanical function (as was the case with the building contractor in *Khaya Projects*) or where the private body simply provides goods or services to an organ of state.

Second, while *Link Africa* and, to some extent, *Calibre* indicate that the conferral of power by statute or by other means of government compulsion does not mean that the exercise of the power is necessarily public, *AAA Investments* and *AMCU* show that the conferral of state-sanctioned power on a private actor is likely to mean that the exercise of that power is public

[446] *De Lille v Democratic Alliance* [2018] 3 All SA 684 (WCC) para 28.

in nature. This is particularly the case where the power is accompanied by a duty to act in the public interest.

Third, as the case law on sporting bodies illustrates, our courts have been particularly divided on the question as to whether private bodies wield public power when they regulate in the absence of statutory or government compulsion. Having regard to the substantive considerations as I see them, particularly the coercive nature of their power and the absence of meaningful consent from sport participants, it seems to me that the better view is that the exercise of regulatory power by national and regional sporting bodies amounts to public power.

CHAPTER FOUR

DISTINGUISHING ADMINISTRATIVE ACTION FROM LEGISLATIVE, JUDICIAL AND EXECUTIVE ACTION

1 INTRODUCTION

A number of early cases on the scope of the constitutional right to administrative justice sought to delineate administrative action from other types of public conduct, such as legislative, judicial and executive action. These cases shed light on what constitutes a decision of an administrative nature, which is not only an aspect of the constitutional concept of administrative action, it is also one of PAJA's definitional elements – an element that has been described as 'something of a puzzle'.[1]

In *Sokhela*, Wallis J noted that the requirement that the decision must be of an administrative nature serves two important, related purposes.[2] It, first, focusses attention on whether the conduct should properly be classified as administrative action by requiring the court to make a positive determination that the power or function is 'of an administrative character'.[3] Secondly, it ensures that the determination is not a mechanical, formalistic exercise of assessing whether the conduct falls within PAJA's listed exclusions – it 'demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character'.[4] Wallis J concluded this passage with a salutary reminder that this requirement calls for a substantive approach:[5]

> 'There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.'

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[1] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) ('*ARMSA*') para 4, *Sokhela v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal)* 2010 (5) SA 574 (KZP) para 61, quoting Cora Hoexter *Administrative Law in South Africa* (2007) at 190.
[2] *Sokhela* supra note 1 para 61. See also *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 34.
[3] Ibid.
[4] Ibid.
[5] Ibid.

In this chapter I examine the key distinctions between administrative action, on the one hand, and legislative, judicial and executive action, on the other.[6] My aim is to assess the extent to which our courts' approach to these distinctions is coherent, principled and constitutionally grounded and to consider how these distinctions might be approached in a manner which best accords with substantive reasoning.

2 ADMINISTRATIVE ACTION DISTINGUISHED FROM LEGISLATIVE OR JUDICIAL ACTION

2.1 Actions of legislatures and judicial officers

In a case decided shortly after the interim Constitution came into effect, the Constitutional Court in *Nel*[7] unsurprisingly held that the judicial functions of a judicial officer do not amount to administrative action. The court found that the summary sentencing procedure in s 205 of the Criminal Procedure Act[8] was 'clearly judicial and not administrative action' and noted that it was subject to appeal in the normal manner.[9]

In the subsequent decision in *Fedsure*,[10] the Constitutional Court also had relatively little difficulty in finding that the law-making functions of a local council did not amount to administrative action under the interim Constitution.[11] The court remarked that 'it is difficult to see how [the right to administrative justice in the interim Constitution] can have any application to by-laws made by the council', and emphasised that:[12]

> 'The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate.'

The court, in particular, observed that the making of by-laws, and the imposition of taxes by a local council, 'cannot appropriately' be made subject to challenge on procedural fairness

[6] I do not examine a number of other interesting issues to which the administrative-nature requirement gives rise, eg whether decisions made in the context of public-sector employment or decisions of the Public Protector meet this requirement. See, on this score, *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) para 142, *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para 68, *Minister of Home Affairs v Public Protector* 2018 (3) SA 380 (SCA) para 37.
[7] *Nel v Le Roux NO* 1996 (3) SA 562 (CC).
[8] Act 51 of 1977.
[9] *Nel* supra note 7 para 24.
[10] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
[11] Ibid paras 41-5. See also *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province v Ed-U-College* 2001 (2) SA 1 (CC) paras 12-14 (provincial legislation is not administrative action and neither is an estimate of expenditure contained in an explanatory memorandum that accompanies a provincial appropriation Bill).
[12] *Fedsure* supra note 10 para 41.

grounds by 'every person' whose rights or legitimate expectations are affected or threatened thereby (as contemplated in s 24*(b)* of the interim Constitution), and remarked that the rights to written reasons and to administrative action that is 'justifiable in relation to the reasons given for it' (as contemplated in s 24*(c)* and *(d)* of the interim Constitution) 'cannot sensibly' be applied to such decisions.[13] The court's reasons for the latter observation were as follows:[14]

> 'The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in such circumstances.'

The *Fedsure* court thus emphasised the inappropriateness of subjecting an elected, deliberative legislature to the strictures of administrative law, particularly given the political nature of decision-making by these bodies – as reflected in the permissibility of decision-making 'on political grounds' or that is 'influenced by political considerations' – and the legislature's political accountability to the electorate. As O'Regan J subsequently noted, the reasoning in *Fedsure* 'starts by understanding what s 24 of the interim Constitution required and then considers whether in the overall context of the interim Constitution, it is *appropriate* to understand the decisions of deliberative legislative assemblies as falling within the scope of s 24'.[15] *Fedsure* thus illustrates the centrality of substantive reasoning in distinguishing between administrative action and other forms of public power.

Following the lead of the Constitutional Court in *Fedsure* and *Nel*, PAJA now expressly excludes the legislative functions of Parliament, a provincial legislature or a municipal council and the judicial functions of a judicial officer or court, from the meaning of 'administrative action'.[16]

This does not, however, mean that all conduct of a legislature and the judiciary is excluded from the ambit of 'administrative action'. It is only the *legislative* functions of legislatures and the *judicial* functions of a court or judicial officer that are excluded. In engaging in other

[13] Ibid.
[14] Ibid.
[15] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 134, emphasis added.
[16] Paras *(dd)* and *(ee)* of PAJA's definition of 'administrative action'.

conduct, a legislature or judicial officer may, in certain circumstances, perform administrative acts.[17]

2.2 Administrative adjudication and rule-making

The distinction between administrative action, on the one hand, and legislative or judicial action, on the other, was relatively straightforward in *Fedsure* and *Nel*. The Constitutional Court has, however, been divided when it comes to the more difficult task of assessing whether legislative and adjudicative functions performed by functionaries other than legislatures or judicial officers are properly described as being 'administrative' in nature.

It seems to me that the primary source of divergence on this score flows from certain members of the court placing, in my view, formalistic emphasis on the following dicta in *SARFU*:[18] '[w]hat matters is not so much the functionary as the function' and '[t]he focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising'.[19]

These statements in *SARFU* helpfully emphasise the substantive consideration that the nature of the power or function is important in deciding whether or not it constitutes administrative action. It is, however, important to ensure that these statements are not applied by rote and to the exclusion of a consideration of the nature of the functionary. The *SARFU* court made these statements in the course of distinguishing between 'administrative' and 'executive' action; a context in which the nature of the functionary is generally of secondary importance (given that one is, in this context, generally trying to distinguish between 'administrative' acts of the executive and 'executive' acts of that same branch of government).

While the nature of the function is relevant in giving meaning to the legislative and judicial carve-outs from 'administrative action', it is, in my view, important not to regard the legislative or adjudicative nature of the function as determinative. Such an approach would lead to a conceptualist categorisation of functions akin to that which applied – and was

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[17] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ('*SARFU*') para 141, *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) para 37, *Kolbatschenko v King NO* 2001 (4) SA 336 (C) at 355-6. For a narrow approach to the ambit of administrative action in the context of the legislature, see *Lekota v Speaker, National Assembly* 2015 (4) SA 133 (WCC) paras 47-8 (rulings of the Speaker that a statement by a Member of Parliament was out of order and directing him to leave the National Assembly, made during the course of the Assembly exercising its legislative functions, did not constitute administrative action).
[18] Supra note 17.
[19] Ibid para 141.

discredited – in pre-constitutional administrative law.[20] The focus should rather be on the fact that the function is performed by a legislature or a judicial body as contemplated in the Constitution. This is because the legislature and the judiciary – in the performance of their legislative and judicial functions – are, as *Fedsure* and *Nel* indicate, subject to particular regimes of constitutional accountability, and it would, having regard to the doctrine of separation of powers, be inappropriate to subject these branches of government to the rigours of administrative law. The most important case on this score is *Sidumo*.[21]

2.2.1 *Administrative adjudication*

The issue that divided the Constitutional Court in *Sidumo* was whether or not arbitral decisions of the Commission for Conciliation, Mediation and Arbitration (CCMA) (ie compulsory statutory arbitrations conducted under the Labour Relations Act)[22] constitute administrative action for purposes of s 33 of the Constitution. The court, it seems, was split five and a half to four and a half.[23]

The majority held that these decisions constitute administrative action for purposes of the constitutional right to just administrative action.[24] Although Navsa AJ, who penned the majority judgment, noted various similarities between the CCMA and a court,[25] he emphasised that the CCMA is 'not a court of law'.[26] As he pointed out, the CCMA conducted arbitrations 'with the minimum of legal formalities', there was no blanket right to legal representation or system of binding precedent, and the commissioners did not enjoy the same security of tenure as judicial officers.[27]

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[20] As O'Regan J stated in her concurring judgment in *Sidumo* supra note 15 para 137: 'Seeking to draw a line … between administrative action and the adjudicative decisions of administrative tribunals will, I fear, lead us directly to the arid classifications of our old administrative law'. See also *Sidumo* para 135 (per O'Regan J), *ARMSA* supra note 1 para 41, Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 51 and 328.
[21] Supra note 15.
[22] Act 66 of 1995 ('*the LRA*').
[23] Four judges concurred in the majority judgment of Navsa AJ, three judges concurred in Ngcobo J's minority judgment, and Sachs J expressed agreement with both judgments and did not clearly indicate whether or not, in his view, s 33 of the Constitution applied to the CCMA's decision. See Sachs J's judgment in *Sidumo* supra note 15 paras 146, 158.
[24] Ibid para 88. The court, however, found that the decision of the CCMA was not subject to PAJA review but was rather to be reviewed in terms of the LRA (para 104). As Hoexter *Administrative Law* op cit note 20 notes, the *Sidumo* court found that the LRA is an instance of national legislation that gives effect to the right to just administrative action in the labour-law context (at 120-1 and 184).
[25] These similarities included the manner of adducing evidence, the questioning of witnesses, the power of subpoena, the availability of contempt proceedings, the award is final and may be enforced as though it were an order of court, and the commissioner's costs jurisdiction. *Sidumo* supra note 15 para 84.
[26] *Sidumo* supra note 15 para 85.
[27] Ibid.

In his minority judgment, Ngcobo J adopted a fundamentally different approach. In contrast to the *institutional* test adopted by the majority, Ngcobo J favoured a *functional* approach.[28] He placed much reliance on the *SARFU* dictum that '[w]hat matters is not so much the functionary as the function'[29] and went so far as to state that '[t]he identity of the functionary performing the function is *not relevant* for purposes of determining whether a particular conduct constitutes administrative action'.[30] Ngcobo J went on to examine the arbitral function of the CCMA – remarking that CCMA arbitrations 'bear all the hallmarks of a judicial function'[31] and are judicial or adjudicative in nature[32] – and concluded that it does not amount to administrative action but rather constitutes conduct of an independent and impartial tribunal to which the provisions of s 34 of the Constitution apply.[33]

Two aspects of the judgments in *Sidumo* call for particular consideration in the present context. The first is the minority judgment's insistence, with reliance on *SARFU*, that, in classifying conduct as 'administrative action', one looks to the function and not the functionary. As Ngcobo J put it: 'What is administrative action must now be determined not by looking at the identity of the body that performs the function but by considering the nature of the function that is being performed'.[34] With this as the guiding principle, it is unsurprising that Ngcobo J concluded that the CCMA's arbitral decisions are adjudicative in nature and consequently do not constitute administrative action.

The minority's approach is, in my view, formalistic and does not accord with the substantive approach mandated by the Constitution. As I have already noted, and as O'Regan J pointed out in her separate concurring judgment in *Sidumo*,[35] the *SARFU* dictum was made in the very different context of distinguishing between administrative and executive action. It did not, on my reading, mean to suggest that a member of the executive

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[28] Jonathan Klaaren & Glenn Penfold 'Just administrative action' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) at 63-45 (the majority in *Sidumo* adopted an institutional test in the sense that they focused on whether the CCMA was institutionally a court of law rather than by adopting a functional approach which would emphasis the nature of the CCMA's arbitral function).
[29] *SARFU* supra note 17 para 141. See the references to the *SARFU* dictum in *Sidumo* supra note 15 paras 203, 205, 217, 225, 230, 234.
[30] *Sidumo* supra note 15 para 203, emphasis added. See also ibid para 220: 'The fact that the CCMA is not a court of law and does not have judicial authority under the Constitution is irrelevant.'
[31] Ibid para 208. See also ibid para 207.
[32] Ibid paras 208-12, 236.
[33] Ibid paras 209, 215, 238-40. Section 34 of the Constitution reads as follows: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[34] *Sidumo* supra note 15 para 224.
[35] Ibid para 130.

does not engage in administrative action when she performs a function that is the same as (or similar to) the core function of one of the other branches of government.

But the minority's application of a preceding dictum out of its appropriate context is not the only respect in which its judgment fell short. More importantly, the minority, in my view, failed to pay adequate regard to the substantive principles that should be brought to bear in delineating the scope of administrative action. This is apparent when one has regard to O'Regan J's concurring judgment – a judgment that perhaps best exemplifies substantive reasoning in this context.

O'Regan J emphasised that the question as to whether the functions of the CCMA fall within the scope of s 33 of the Constitution 'should be answered by determining the constitutional purpose of s 33 and then considering whether it is constitutionally suitable to impose the requirements of s 33 on the conduct of the CCMA'.[36] With reference to previous decisions of the Constitutional Court, she emphasised the importance in this context of the separation of powers and the appropriateness of subjecting the relevant conduct to administrative-law review:[37]

> 'In my view, seeking to preserve a sphere of action for democratically elected legislative bodies (as we did in *Fedsure*), that does not constitute administrative action for the purposes of s 33 of the Constitution, flows from the doctrine of separation of powers. It recognises that courts are not appropriately placed to review the conduct of democratic legislatures under s 33. Similarly, this court's reasoning in *SARFU* recognises that the executive has a special sphere of operation in our constitutional order which it is not appropriate to subject to judicial scrutiny by way of s 33. Similarly too the distinction drawn in *De Lange*[38] also rests on the doctrine of separation of powers under our constitutional order and the need to recognise the special terrain of the judicial authority of the Republic.
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> The doctrine of separation of powers, however, has no application to the present case. There is no reason why, from a separation of powers perspective, the conduct of the CCMA should be immune from scrutiny under s 33.'

As O'Regan J put it, the question 'of purposive constitutional interpretation' that arose in *Sidumo* was 'whether it is constitutionally appropriate' to hold the CCMA to the standards of

[36] Ibid para 135. See also ibid para 132.
[37] Ibid paras 136-7.
[38] *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

lawful, procedurally fair and reasonable administrative action.[39] She concluded that this was the case given the important statutory task that the CCMA performed in the resolution of labour disputes.[40]

The other aspect of the *Sidumo* judgment which has important implications for the proper scope of administrative action is its treatment of the relationship between ss 33 and 34 of the Constitution. The applicant and the CCMA submitted that the rights implicated in CCMA arbitrations are the right to fair labour practices (s 23) and the right of access to courts (or independent and impartial tribunals) (s 34) and not the right to just administrative action.[41] The majority roundly rejected this submission.[42] Navsa AJ remarked that this submission was 'based on the misconception that the rights in ss 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments', and noted that 'these rights in part overlap and are interconnected'.[43] Accordingly, as O'Regan J stated, 'it does not necessarily follow that because independent and impartial tribunals are governed by s 34, they are not governed by s 33'.[44] She went on to caution against formalistic reasoning in this context:[45]

> 'I am concerned that if we understand s 33 and s 34 to be mutually exclusive constitutional provisions, we may end up with a formalist jurisprudence based on a distinction between 'administrative ' in s 33 and 'judicial' or 'adjudicative' decisions by tribunals governed by s 34 which is at odds with a substantive vision of our Constitution.'

This approach must be correct. As Sachs J observed in the sodomy case, 'a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights'.[46] That being the case, given that the right to just administrative action must be treated as a distinct, fundamental right – rather than as a residual, gap-filling right that applies only

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[39] *Sidumo* supra note 15 para 138.
[40] Ibid paras 139-40.
[41] Ibid para 111.
[42] Ibid para 112.
[43] Ibid.
[44] Ibid para 126. See also ibid paras 123-4. Cf Ngcobo J's judgment in *Sidumo*, which, while not expressly stating that the application of s 34 excludes the application of s 33, found that the CCMA's power to decide disputes 'derives from s 34 of the Constitution' and stated that the exercise of this power cannot 'be characterised as the implementation of legislation', does not amount to 'administration', and that the Constitution 'does not contemplate a function that will be both administrative and judicial' (ibid paras 215, 230).
[45] Ibid para 135.
[46] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 114 (per Sachs J). See also Sachs J in *Sidumo* supra note 15 paras 148, 151-8.

when other constitutional protections do not find application[47] – s 33 of the Constitution cannot simply be displaced by the application of either s 23 or s 34. 'If a right is truly fundamental, its substance should not vary depending on the other complementary rights that are placed alongside it (i.e. rights that operate in the same direction, as opposed to rights that are in opposition)'.[48] As Plasket J noted in *POPCRU*, in the context of an overlap between administrative law and labour law, it is important to 'give individuals the full measure of their fundamental rights' and '[t]here is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right applying to one act, or of more than one branch of law applying to the same set of facts'.[49]

Returning to the import of *Sidumo*, it is apparent from the majority judgment that the adjudicative nature of an act performed by a functionary other than a court of law or a judicial officer does not exclude that act from the ambit of administrative action.[50] In addition, the majority's approach illustrates – as we saw in relation to the distinction between public and private power[51] – that the classification of conduct as administrative action depends not only on the nature of the function but also on the nature of the functionary (and

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[47] See chapter 2, para 2.

[48] Klaaren & Penfold op cit note 28 at 63-37. See also Cora Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209 at 228-9, Richard Stacey 'Administrative law in public-sector employment relationships' 2008 (125) *SALJ* 307 at 324, Cora Hoexter 'From *Chirwa* to *Gcaba:* An administrative lawyer's view' in Michael Kidd & Shannon Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* (2010) 47 at 51-3.

[49] *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2008 (3) SA 91 (E) ('*POPCRU*') para 60. See also Langa CJ in *Chirwa* supra note 6 para 175 ('A litigant is entitled to the full protection of both rights, even when they seem to cover the same ground.'). Cf the majority judgment of Ngcobo J in *Chirwa*, holding that a decision by a state-owned entity to dismiss an employee of its pension fund did not constitute administrative action. Ngcobo J noted, at paras 143-4, that this finding was consistent with the structure of the Constitution, which deals with labour relations (in s 23) separately to administrative action (in s 33). For criticism of this aspect of *Chirwa*, see Stacey op cit note 48 at 323-30, Hoexter 'Clearing the intersection?' op cit note 48 at 228-9, Klaaren & Penfold op cit note 28 at 63-37 to 63-38 Cf Halton Cheadle 'Deconstructing Chirwa v Transnet' (2009) 30 *ILJ* 471. In *Gcaba* supra note 6 paras 53-4, the Constitutional Court clawed back somewhat from the reasoning in *Chirwa*, stating that the same conduct may violate different constitutional rights, that a 'rigid compartmentalisation should be avoided' and that 'human rights are intrinsically interdependent, indivisible and inseparable'.

[50] The Labour Appeal Court previously adopted a similar approach to the classification of the CCMA's arbitral function in *Carephone (Pty) Ltd v Marcus NO* 1993 (3) SA 304 (LAC) paras 18-19 (per Froneman DJP). For other cases holding that adjudication by organs of state amounts to administrative action, see eg *South African Veterinary Council v Veterinary Defence Association* 2003 (4) SA 546 (SCA) para 34 (decision of South African Veterinary Council's tribunal), *Young Ming Shan CC v Chagan NO* 2015 (3) SA 227 (GJ) paras 36-46 (decision of a rental housing tribunal), *Du Plessis v Independent Regulatory Board for Auditors* [2017] 3 All SA 137 (WCC) paras 7-18 (decision of disciplinary committee of the Independent Regulatory Board for Auditors), *Selota v Law Society of the Northern Provinces* 2018 JDR 0216 (GP) paras 46-8 (decision of a law society's disciplinary committee), *Basson v Hugo* 2018 (3) SA 46 (SCA) para 12 (decision of professional conduct committee of the Health Professions Council of South Africa), *National Credit Regulator v Lewis Stores (Pty) Ltd* 2020 (2) SA 390 (SCA) para 42 (decision of the National Consumer Tribunal). See also *Nedbank Ltd v Mendelow* 2013 (6) SA 130 (SCA) para 28 (to the extent that the Registrar of Deeds performs a quasi-judicial function, it would 'no doubt [be] reviewable under the PAJA').

[51] See chapter 3.

that the latter is no less substantive than the former).[52] As I explain in the next section, this reasoning has important implications for the question as to whether rule-making constitutes administrative action.[53]

2.2.2 *Administrative rule-making*

The Constitutional Court has not definitively resolved the question as to whether rule-making (such as regulations and other forms of delegated legislation)[54] constitutes administrative action. It gave 'a strong hint'[55] in *Fedsure* that delegated legislation fell within the concept of administrative action under the interim Constitution:[56]

> 'Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation', the process by which the legislation is made is in substance 'administrative'. The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described.'

The position that delegated legislation generally constitutes administrative action failed to attract majority support in *New Clicks*.[57] This case dealt with a challenge to medicine-pricing regulations promulgated under the Medicines Act,[58] which were made by the Minister of Health on the recommendation of an expert body (the Pricing Committee). Of the 11 judges who sat in *New Clicks*, six judges either wrote or signed on to judgments which grappled with this question.[59]

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[52] See also *Young Ming Shan* supra note 50 para 36: 'it is apparent [from a review of the cases] that while the nature of the actor is not determinative of whether or not its functions are administrative, it is a relevant factor that is taken into account in determining whether its functions … are administrative or not.'
[53] Klaaren & Penfold op cit note 28 at 63-48.
[54] I use the label 'delegated legislation' to refer to all forms of rule-making by the executive or other public bodies or functionaries, irrespective of whether or not the rule-making power has been delegated by statute or otherwise.
[55] Hoexter *Administrative Law* op cit note 20 at 181.
[56] *Fedsure* supra note 10 para 27.
[57] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC). The question had previously been left open in *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) paras 52-3.
[58] Medicines and Related Substances Control Act 101 of 1965.
[59] The other five judges (in judgments penned by Yacoob and Moseneke JJ) did not consider it necessary to decide whether or not the regulations constituted administrative action (*New Clicks* supra note 57 paras 671 and 793).

Chaskalson CJ (with whom O'Regan J concurred) held that regulations generally, though not necessarily invariably, constitute administrative action. He, first, noted that delegated legislation was reviewable in pre-constitutional administrative law,[60] and went on to find that delegated legislation (which he referred to as 'legislative administrative action') amounted to administrative action in s 33 of the Constitution.[61] In a striking example of substantive reasoning, Chaskalson CJ emphasised various relevant constitutional values, including accountability, responsiveness and participation,[62] and held as follows:[63]

> 'The making of delegated legislation by members of the Executive is an essential part of public administration. It gives effect to the policies set by the Legislature and provides the detailed infrastructure according to which this is to be done. The Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies. To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government.'

Chaskalson CJ then turned to consider the position under PAJA. He started by pointing out that PAJA's list of exclusions from the definition of 'administrative action', significantly, omitted the implementation of legislation.[64] He added that such an exclusion would have been inconsistent with the Constitution as the implementation of legislation is 'the core of administrative action'.[65] Chaskalson CJ went on to note that, while the making of regulations is not specifically listed in PAJA's definition of 'decision', regulation-making is an act 'of an administrative nature' and thus falls within this definition.[66] He also noted that s 4(1) of PAJA (which contemplates administrative action that materially affects the rights of the public) 'suggest[s] that regulations, the most common form of administrative action affecting the rights of the public, are indeed subject to review under PAJA'.[67] Chaskalson CJ thus

[60] *New Clicks* supra note 57 paras 102-4.
[61] Ibid para 118.
[62] Ibid paras 110-12.
[63] Ibid para 113.
[64] Ibid paras 124-6. See paras *(aa)* and *(bb)* of PAJA's definition of 'administrative action' read with ss 85(2)*(a)* and 125(2)*(a)* to *(c)* of the Constitution.
[65] Ibid para 126. See also *SARFU* supra note 17 para 142.
[66] *New Clicks* supra note 57 para 128.
[67] Ibid para 133.

concluded that the medicine-pricing regulations amounted to administrative action under PAJA.[68]

It should be noted that Chaskalson CJ did not hold that delegated legislation is *always* 'administrative action' for purposes of PAJA. Whilst he held that the making of regulations is an act of administrative nature, his judgment indicates that PAJA's other requirements of 'administrative action' must be met in order for regulations to so qualify.[69] In particular, the regulations must adversely affect rights and have a direct, external legal effect.[70]

I pause to note that, while several other judges in *New Clicks* described Chaskalson CJ's judgment as holding that PAJA 'in general' applies to regulation-making,[71] the SCA recently took issue with this description. According to Ploos van Amstel AJA, who penned the judgment in *Mostert*,[72] Chaskalson CJ rather 'confined himself in this regard to the specific regulations that the court was dealing with' and the other judges in *New Clicks* misinterpreted his judgment.[73] As I see it, the *Mostert* reading of *New Clicks* misses the mark in two respects. First, it seems to me that Chaskalson CJ's reasoning was not confined to the narrow question as to whether the regulations at issue in the case before him constituted administrative action. His judgment, in my view, does indicate that regulation-making is administrative in nature and will generally amount to administrative action. Second, the use of the phrase 'in general' in the other judgments in *New Clicks* should not be read as meaning that, as a general proposition, PAJA applies to *all* regulations. It rather means that PAJA ordinarily (ie generally) applies in such instances. This reading is not only consistent with what I regard as a fair reading of the Chaskalson judgment; it seems to me most unlikely that Chaskalson CJ's judgment would not have addressed the judgments of his colleagues on this score if they were mistaken.

Ngcobo J (in whose judgment Langa DCJ and Van der Westhuizen J concurred) confined himself to the regulations at issue in *New Clicks* (ie imposing a medicine pricing regime) and expressly left open whether PAJA applies to regulation-making in general.[74] While

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[68] Ibid para 135.
[69] Ibid paras 121, 135.
[70] Ibid para 135. These elements of 'administrative action' will, however, generally be met in respect of delegated legislation, particularly in light of the liberal approach that our courts have adopted in respect of these elements. See eg *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23, *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) para 30.
[71] See the judgments of Ngcobo J, Sachs J, Langa DCJ and Van der Westhuizen J in *New Clicks* supra note 57 at paras 422, 579, 843 and 851, respectively.
[72] *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA).
[73] Ibid paras 8 and 10.
[74] *New Clicks* supra note 57 para 422, footnote 242.

Ngcobo J's reasoning is in many respects similar to that of Chaskalson CJ,[75] he placed much emphasis on the detailed nature of the pricing regime contemplated in the regulations and the fact that the case concerned a 'unique process' in which the Minister made regulations on the recommendation of the Pricing Committee.[76] In addressing the applicability of s 33 of the Constitution, he referred to the statement in *SARFU* that the implementation of legislation ordinarily constitutes administrative action[77] and concluded as follows:[78]

> 'The nature of the power as well as its subject-matter is concerned with the implementation of legislation. The exercise of this power can readily be subjected to s 33. The exercise of the power conferred by [the empowering section] therefore constitutes administrative action within the meaning of s 33. To suggest that the performance of these functions does not amount to implementation of legislation, and therefore administrative action, because the Minister performs these functions through regulations, seems to me to put form over substance.'

As he would later do in *Sidumo*, Ngcobo J emphasised the *SARFU* dictum that, in classifying conduct as administrative action, what matters is not the functionary but the function.[79] He also noted that, as the court made clear in *Fedsure*, it may be that a particular process is legislative in form but administrative in substance.[80] It was thus important to assess the nature and effect of the power which, in this case, indicated that the imposition of the medicine-pricing regime by the Minister on the recommendation of the Pricing Committee was administrative action.[81]

The final judgment in *New Clicks* to deal with the question as to whether the regulations amounted to administrative action was that of Sachs J. He adopted the position that, while the regulation fixing a specific maximum dispensing fee for the sale of medicines was administrative action, the other aspects of the medicine-pricing regulations were not.[82] In his view, the right to just administrative action applies to specific administrative decision-making (which he referred to as 'adjudication') and not to general rule-making.[83]

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[75] See ibid paras 457-68.
[76] Ibid paras 450, 470-1.
[77] Ibid paras 448-9. *SARFU* supra note 17 para 142.
[78] *New Clicks* supra note 57 para 450.
[79] Ibid paras 448, 476.
[80] Ibid para 476.
[81] Ibid paras 476-80.
[82] Ibid para 586.
[83] Ibid para 596.

There are, in essence, four legs to Sachs J's reasoning. First, he emphasised that s 33 of the Constitution is not 'a solitary bulwark against arbitrary or unfair exercise of public power';[84] it is one of a range of constitutional provisions aimed at ensuring that the administration 'observes fundamental rights and acts both ethically and accountably'.[85] Second, Sachs J pointed out that s 33 forms part of the Bill of Rights, which 'focuses on the fundamental rights of all individuals in the country', and expressed the view that s 33 'is directed towards administrative acts of an adjudicative kind, and not to legislative functions carried out by the administration'.[86] Third, he contended, for reasons that I deal with below, that the text of PAJA indicates that it does not apply to subordinate legislation. Fourth, while Sachs J noted that subordinate legislation must be subject to proper constitutional control, it would, 'given the significant difference in character between the making of regulations of general impact … and their specific implementation in particular cases',[87] be preferable in Sachs J's view, on the one hand, for s 33 and PAJA to be focused on the rights of individuals or 'relatively small groups' who are adversely affected by 'administrative decisions touching directly on their lives' and, on the other hand, for judicial review of subordinate legislation to be developed without being 'forced to tip-toe on the narrow pedestal appropriate for reviewing administrative acts'.[88]

Sachs J favoured 'an expansive notion of legality' – which includes procedural fairness[89] and substantive reasonableness – as 'an alternative and better way of securing constitutional supervision of subordinate legislation'.[90] It is apparent that Sachs J did not call for the application of substantive principles and rules to delegated legislation that differ materially from those which apply to administrative action under PAJA. On the contrary, he stated that the consequences of review of delegated legislation whether under legality or PAJA 'should be at least roughly the same'.[91] As he put it, the differences between his approach and that of Chaskalson CJ and Ngcobo J 'do not relate … to philosophy about constitutional control of public power' but rather concern 'the appropriate constitutional pathway to be followed'.[92]

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[84] Ibid para 587.
[85] Ibid paras 587-90.
[86] Ibid paras 591, 596.
[87] Ibid para 608.
[88] Ibid para 609.
[89] Sachs J does not use the phrase 'procedural fairness' in this context but rather refers to 'participation in the law-making process' (ibid para 630).
[90] Ibid para 612 read with paras 629-30, 636-7.
[91] Ibid para 585.
[92] Ibid para 579. See also ibid para 585.

The divergent approaches reflected in the various judgments in *New Clicks* stand in contrast to academic opinion, which 'is fairly unanimous' in adopting the position that 'delegated or subordinate legislation and other forms of rule-making should be treated as administrative action'.[93] In addition, a number of decisions of the SCA have, in the years following *New Clicks*, indicated that regulation-making amounts to administrative action for purposes of PAJA.[94] Unfortunately, the SCA decisions give no reasons for this position and some of the judgments appear to refer to Chaskalson CJ's judgment as though it carried the authority of the Constitutional Court.[95] For example, in *Cable City* the SCA simply stated that it agreed with the appellant's contention 'that the making of regulations by a Minister constitutes administrative action within the meaning of [PAJA]'[96] and cited the judgment of Chaskalson CJ in *New Clicks* in support for this proposition, without acknowledging that this judgment did not enjoy the support of a majority of the court.[97] In addition, a High Court judgment has stated that '[t]he majority decision of the Constitutional Court in [*New Clicks*] found that the making of regulations constituted administrative action which was susceptible to review under PAJA'.[98]

I favour the approach adopted by Chaskalson CJ in *New Clicks.* In my view, delegated legislation and other forms of rule-making generally constitute administrative action for purposes of s 33 of the Constitution. In other words, administrative rule-making generally constitutes an act of an administrative nature and amounts to 'administrative action' for purposes of PAJA if the other elements of that definition are met.

This approach is not only, as Chaskalson CJ explained, consistent with PAJA's wording (interpreted in light of the Constitution), it is consistent with substantive reasoning. In particular, it promotes the constitutional values of accountability, responsiveness, openness

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[93] Klaaren & Penfold op cit note 28 at 63-38 and the authors cited at footnote 5.

[94] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) para 10, *Security Industry Alliance v Private Security Industry Regulatory Authority* 2015 (1) SA 169 (SCA) paras 15-16, *Medirite (Pty) Ltd v South African Pharmacy Council* 2015 JDR 0564 para 9. See also see *South African Dental Association NPC v Minister of Health* [2016] 1 All SA 73 (SCA) ('*SADA*') paras 41-2. Cf *Mostert* supra note 72 paras 8, 10 ('[t]he final word on regulation-making and the applicability of PAJA to it may … not have been spoken'), *McDonald v Minister of Minerals and Energy* 2007 (5) SA 642 (C) para 25 ('as appears from the various judgment in [*New Clicks*] it is still an open question whether the Minister's decision to make regulations amounts to administrative action for purposes of PAJA'), *Free Market Foundation v Minister of Labour* 2016 (4) SA 496 (GP) ('*FMF*') para 80, *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) paras 10-11.

[95] *Hospital Association of South Africa Ltd v Minister of Health* 2010 (10) BCLR 1047 (GNP) ('*HASA*') para 35.

[96] *Cable City* supra note 94 para 10.

[97] Ibid footnote 8. See the more recent decision of the SCA in *Mostert* supra note 72 para 10, which held obiter that *Cable City* stated the position 'too widely'.

[98] *HASA* supra note 95 para 35.

and participation. While an elected, deliberative legislature (eg Parliament or a provincial legislature) is subject to a particular regime of accountability, participation and transparency under the Constitution, this regime does not apply to delegated legislation produced by an executive functionary in terms of legislation. And there is, as I see it, no reason why an executive decision-maker should be less accountable, or subject to less exacting scrutiny, when it makes rules than when it engages in other forms of administrative decision-making. Moreover, the demand for participation is, if anything, stronger in relation to delegated legislation given the legislature's constitutional obligation to facilitate public involvement in its processes[99] and the anomaly that would arise if this obligation could be avoided through the delegation of law-making power.

To regard delegated legislation as generally constituting administrative action also promotes coherence. If *Sidumo* is correct in holding that a decision of a judicial (ie adjudicative) character taken by an administrative functionary amounts to administrative action (which, in my view, is the case), this would suggest that a decision of a legislative character (ie rule-making) taken by such a functionary would similarly constitute administrative action.[100] Coherence is also promoted by the fact that the classification of rule-making as administrative action ensures that the principle of participatory democracy applies in some form at all stages of public decision-making, and avoids the potential lacuna to which Sachs J referred in *New Clicks*:[101]

> 'It would be strange indeed if the principles of participatory democracy and consultation operated when the chain of public power began with the enactment of the original legislation, then vanished at the crucial stage when the general principles of the original statute were being converted into operational standards and procedures, only to resurface at the stage of the implementation of provisions impacting on specific individuals.'

Of course, Sachs J's view is that this lacuna is best avoided not through the application of PAJA to delegated legislation but rather through an extended notion of legality which includes both procedural fairness and substantive reasonableness. Our courts have, however, not adopted this approach to legality review. On the contrary, the Constitutional Court has

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[99] Sections 59(1)*(a)*, 71(1)*(a)* and 118(1)*(a)* of the Constitution. In *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) ('*DA v Ethekwini*') para 23, Brand JA held that the constitutional obligation to facilitate public participation also applies to the legislative and executive functions of municipal councils.

[100] Klaaren & Penfold op cit note 28 at 63-47 to 63-48.

[101] Supra note 57 para 626.

indicated that procedural unfairness is generally not a basis for legality review, that procedural rationality (a component of the principle of legality) only imposes a requirement of prior consultation in what appear to be exceptional circumstances, and that reasonableness review does not form part of legality review.[102] That being the case, 'the substantive underpinning' for Sachs J's judgment 'has been cut away',[103] and his judgment might thus now be read as supporting PAJA's application to delegated legislation. As Sachs J put it:[104]

> 'If the result of excluding [subordinate] law-making from the purview of s 33 and PAJA would effectively be to immunise subordinate legislation from judicial review, save for limited grounds such as bad faith or outright irrationality, the outcome would be constitutionally unacceptable. A strained reading of PAJA would in these circumstances have much to commend it.'

Moreover, it seems to me that the application of PAJA to delegated legislation is not, as Sachs J suggests, a 'strained reading' of that statute. The starting point of Sachs J's contrary view was his concern that the notions of procedural fairness and the right to written reasons, as contemplated in both s 33 and PAJA, 'fit in closely with adjudicative justice for individuals' and are not 'without undue interpretive strain consonant with subordinate legislation'.[105] This concern is, in my view, overstated. Given the variability of the requirements of both procedural fairness and the right to written reasons, I see no difficulty with the application of these requirements to delegated legislation.[106] The means by which a rule-making process might allow for a reasonable opportunity to make representations is, as Sachs J accepts, 'capable of infinite variation'.[107] This flexible approach to the content of procedural fairness is apparent in s 4 of PAJA, which envisages that the requirement of procedural fairness may be satisfied through, for example, a notice and comment process or a public inquiry. Similarly, the requirement to furnish 'adequate' written reasons in terms of s 5 of PAJA may, where appropriate in light of efficiency concerns, be tailored so as to require fairly high-level reasons in respect of delegated legislation. In addition, it bears emphasis that

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[102] See chapter 2, para 3.1.1.
[103] Klaaren & Penfold op cit note 28 at 63-43.
[104] *New Clicks* supra note 57 para 612.
[105] *New Clicks* supra note 57 para 596. See also ibid paras 597, 601-3.
[106] Klaaren & Penfold op cit note 28 at 63-43 to 63-44. On the variability of procedural fairness, see chapter 2, para 5.1.
[107] *New Clicks* supra note 57 para 630. See also Andrew Edgar 'Judicial review of delegated legislation: Why favour substantive review over procedural review?' in John Bell, Mark Elliott, Jason NE Varuhas & Phillip Murray (eds) *Public Law Adjudication in Common Law Systems* (2015) 189 at 197: 'practical concerns that arise with an extension of procedural fairness to decisions that affect the public generally can be resolved through adapting the form of procedure to suit such decisions'

PAJA accommodates justifiable departures from the requirements of both procedural fairness and written reasons.[108] This variability should address concerns that the application of procedural fairness and a reasons regime to administrative rule-making may undermine the principle of efficiency.

In addition to his views on the difficulties of applying the requirements of procedural fairness and written reasons to delegated legislation, Sachs J offered various textual reasons for suggesting that PAJA does not apply to delegated legislation. Some of these reasons might be summarised as follows: PAJA confines administrative action to a 'decision' (which, in Sachs J's view, 'points away from the idea of a generalised norm applicable in an open-ended way to the public at large'); the types of decisions listed in the definition of 'decision' are not analogous to law-making; PAJA does not confer an express power to review subordinate legislation (which he described as 'a glaring omission'); and the express power to set aside subordinate legislation is 'strikingly absent' from s 8(1) of PAJA.[109]

These textual considerations are not, in my view, persuasive. First, if it is accepted that delegated legislation falls within the concept of 'administrative action' as contemplated in s 33 of the Constitution (as, in my view, it should), the relevant question is not whether PAJA specifically mentions, or otherwise necessarily contemplates, the review of delegated legislation but rather whether its text demonstrates that this form of administrative conduct is excluded from PAJA's ambit. In my view, PAJA's text does not indicate that this is the case. On the contrary, the inclusion of s 4, which specifically contemplates administrative action of a general nature, points the other way. Second, as Chaskalson CJ pointed out in *New Clicks*, paragraph *(g)* of the definition of 'decision' includes the catch-all: 'doing … *any* other act or thing of an administrative nature'.[110] This wording is wide enough to include the making of regulations, which is clearly an *act* (or thing). Third, if one accepts, as Sachs J does,[111] that the making of regulations amounts to the implementation of legislation, it is difficult to argue

[108] Sections 3(4), 4(4) and 5(4) of PAJA. See eg *Eisenberg* supra note 57 para 58. See also s 2 of PAJA which allows for ministerial exemptions from, and variations of, the requirements of procedural fairness and written reasons.

[109] *New Clicks* supra note 57 paras 604-6. Sachs J also stated that: (i) s 3 of PAJA deals with administrative action affecting 'any person', which indicates that it concerns adjudicative acts rather than law-making (ibid paras 600-1); (ii) while s 4 of PAJA (dealing with procedural fairness in respect of administrative action affecting the public) 'is clearly capable of encompassing subordinate legislation', 'there is nothing in the language to suggest that it compels the inclusion of subordinate legislation' (ibid para 602); (iii) the regime for furnishing written reasons in s 5 of PAJA 'applies to administrative action that has already been completed, and not to the making of laws that will operate into the future' (ibid para 603); and (iv) the tenor of s 6 of PAJA 'is to subject to judicial review specific acts taken in the past by an administrator, and not to contemplate review of regulation-making of a general kind intended to apply in the future' (ibid para 604).

[110] Ibid para 128, emphasis in the original. See also ibid para 467 (per Ngcobo J).

[111] Ibid para 582.

that an entire category of legislative implementation (ie generalised rule-making) is excluded from PAJA's definition of 'administrative action' where the implementation of legislation is conspicuously omitted from the listed exclusions in paragraph *(aa)* of that definition. Fourth, the argument that delegated legislation generally amounts to 'administrative action' is bolstered by the fact that paragraph *(dd)* of PAJA's definition excludes the legislative functions of 'Parliament, a provincial legislature or a municipal council' but makes no mention of legislation produced by members of the executive or other functionaries. Fifth, PAJA's failure specifically to refer to rule-making and to confer express powers to review or set aside delegated legislation, are, in my view, not material or at least are not sufficient to displace the other considerations that point to PAJA's application to delegated legislation. If the making of delegated legislation is an act of an administrative nature, it falls within the definition of 'decision' and, if the other elements of administrative action are met, the powers to review and set aside 'administrative action' in s 6(2) and s 8(1)*(c)* of PAJA would apply.

The provision of PAJA that, as I see it, creates the most difficulty in practice when applied to delegated legislation is the so-called delay rule in s 7(1).[112] This section stipulates that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the relevant person was informed of the administrative action (or became aware of, or might reasonably have been expected to have become aware of, the action and its reasons). This is potentially problematic when the *substance* of regulations (rather than the regulation-making *process*) is challenged. In principle, a person ought to be able to challenge the substance of delegated legislation (eg on the grounds that it is unreasonable or substantively irrational) at a future time when the adverse impact of the relevant rule is experienced. This is consistent with the approach to unreasonable delay in the context of constitutional challenges to primary legislation. As the Constitutional Court held in *Quagliani*, while procedural challenges based on constitutional grounds must be brought timeously, the strong need for procedural finality 'should not be confused with the ever-present right to challenge the constitutional consistency of the resultant law'.[113]

The difficulty to which s 7(1) gives rise is, however, not insurmountable and is not a good basis, in itself, for holding that PAJA does not apply to delegated legislation. Section 9(1) of PAJA contemplates that the 180-day period in s 7(1) may be extended either by agreement or,

[112] See *Mostert* supra note 72 para 10: 'not all the provisions of PAJA, and particularly s 7, are tailored for the review of a regulation'.
[113] *President of the Republic of South Africa v Quagliani* 2009 (2) SA 466 (CC) para 30. See also *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 216-18, Max du Plessis, Glenn Penfold & Jason Brickhill *Constitutional Litigation* (2013) at 40-1.

on application,[114] by a court. The court may extend the period 'where the interests of justice so require'.[115] Given the general, norm-creating nature of delegated legislation, it is appropriate for courts to adopt a liberal approach in considering requests for condonation in proceedings seeking to review this category of administrative action in circumstances where the negative impact of the legislation is experienced in the future and the challenge is substantive. Courts may, however, take a stricter approach where the adverse impact is felt immediately, and the party seeking to review the delegated legislation is aware of the legislation and its impact but does not bring a timeous challenge. A liberal approach to condonation in respect of delegated legislation is also consistent with the fact that our law generally places less emphasis on the value of finality in respect of delegated legislation than other forms of administrative decision-making.[116] This is reflected in the principle that delegated legislation may generally be revised from time to time.[117] Generally speaking, the functionary who makes delegated legislation is, unlike administrative decision-makers in most other instances, not *functus officio* and may revisit it.

2.2.3 *The general approach to distinguishing administrative action from legislative or judicial action*

In light of the discussion above, it seems to me that the test for determining whether a function is administrative, legislative or judicial, for purposes of delimiting 'administrative action', is *both* institutional and functional, in the sense that a function will only constitute an excluded legislative or judicial act if it is: (a) a legislative act performed *by an elected and deliberative legislature*; or (b) a judicial (ie adjudicative) act performed *by a court or judicial officer*.[118] If that is the case, the legislative and judicial exclusions are covered by PAJA's express exclusions from the ambit of 'administrative action',[119] and the rule-making or adjudicative character of a decision by an executive functionary (or other organ of state not within the legislative or judicial branch) does not mean that it is not 'of an administrative nature'.

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[114] On the necessity of an application for condonation in this context, see *SADA* supra note 94 paras 38, 42.

[115] Section 9(2) of PAJA.

[116] The value of finality and certainty is a key reason for the delay rule in administrative law. See eg *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paras 43-4.

[117] Section 10(3) of the Interpretation Act 33 of 1957.

[118] Klaaren & Penfold op cit note 28 at 63-48.

[119] Paras *(dd)* and *(ee)* of PAJA's definition of 'administrative action' (supra note 16).

3. THE DISTINCTION BETWEEN ADMINISTRATIVE AND EXECUTIVE ACTION

Of the various thorny issues that arise in seeking to identify 'administrative action', arguably no area is more difficult than – nor raises the separation of powers as starkly as – the distinction between administrative and executive action.

As will be clear from the discussion below, 'executive action', when used in this context, is a term of art that does not mean an act of the executive branch of government (which would, of course, cover the vast majority of decisions that are properly considered to be administrative action).[120] It is rather a convenient label to refer to decisions by the executive which are, broadly speaking, of a high policy nature or which involve political judgement such that it is considered inappropriate to apply the rigours of administrative-law review to them. Writing before the concept of executive action had attracted the Constitutional Court's attention, Corder referred to this exclusion from the ambit of administrative action in the following, narrow terms:[121]

> '[T]here are undeniably acts of the executive which are so infused with issues of high policy (such as the recognition of states, or the signing of a treaty) that it would be undesirable to subject them to scrutiny in terms of the right to administrative justice…. Thus there is a class of 'executive action', probably relatively rare in occurrence, which is likely to be 'defined out' of 'administrative action'.'

The distinction between administrative and executive action is based on the separation of powers. Its effect is that administrative-law review is applied to those exercises of public power that amount to 'administrative action' while a less rigorous form of review (legality review) is applied to other exercises of public power by the executive. The distinction, in effect, creates two levels of scrutiny for public power. As Hoexter has noted, the application of legality review, as compared to administrative-law review, gives rise to a species of variability.[122] As with other forms of variability,[123] the exclusion of executive action from the ambit of administrative action facilitates a middle ground between a doctrine of non-justiciability (such as the 'political question doctrine') and courts applying administrative law without regard to separation of powers concerns. It means that, while 'all exercise of public power is to some extent justiciable under our Constitution', 'the precise scope of the

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[120] See *Motau* supra note 2 para 28.
[121] Hugh Corder 'Administrative justice: A cornerstone of South Africa's democracy' (1998) 14 *SAJHR* 38 at 45-6.
[122] Cora Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 at 507.
[123] See chapter 2, para 5.1.

justiciability will depend on a range of factors including the nature of the power being exercised'.[124]

3.1 Judicial treatment of the distinction between administrative and executive action

SARFU[125] was the first decision of the Constitutional Court to deal with the distinction between administrative and executive action, in the context of whether the President's power to appoint a commission of inquiry in terms of s 84(2)*(f)* of the Constitution amounted to administrative action for purposes of s 33 of the Constitution. A unanimous court essentially described the difference between administrative and executive action as a distinction between the implementation of legislation (which is generally administrative action) and the formulation of policy and the initiation of legislation (which is not).[126] The court held that the primary consideration in drawing this distinction is the nature of the power (rather than the arm of government to which the decision-maker belongs)[127] and added that:[128]

> 'A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other hand to the implementation of legislation, which is.'

This passage of the judgment concluded by emphasising the importance of substantive reasoning in this context:[129]

> 'Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for purposes of s 33. These will need to be carefully drawn in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration.'

According to the court, the nature of the power to appoint a commission of inquiry meant that it fell on the executive-action side of the line. This finding was based on various considerations, including the fact that it was an original constitutional power entrusted to the President as head of state (rather than as head of the national executive), it did not involve the

[124] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 244 (per O'Regan J).
[125] Supra note 17.
[126] Ibid paras 142-3.
[127] Ibid para 141, 143.
[128] Ibid para 143.
[129] Ibid.

implementation of legislation, and a commission of inquiry was 'an adjunct to the policy formation responsibility of the President'.[130]

Shortly after *SARFU*, the Constitutional Court, in *Pharmaceutical Manufacturers*,[131] grappled with the distinction between executive and administrative action in a case involving the President's decision to issue a proclamation bringing an Act of Parliament into operation. After describing the case as 'one of those difficult cases' and noting that the President's power 'lies between the law-making process and the administrative process', Chaskalson P concluded that the power was not administrative action as it was 'necessarily antecedent to the implementation of legislation', it was, in substance, closer to the legislative process than the administrative one, and it required 'a political judgment as to when the legislation should be brought into force'.[132]

It bears emphasis that the fact that a decision involves policy considerations or has policy implications does not necessarily remove that decision from the ambit of administrative action. On the contrary, many, if not most, administrative decisions have a policy element.[133] As the Constitutional Court indicated in *Ed-U-College*,[134] a distinction needs to be drawn between the formulation of policy in the broad sense and policy in the narrow sense.[135] The former includes the formulation of policy outside a legislative framework, involves 'a political decision' and will generally not constitute administrative action.[136] The latter involves the formulation of policy in the course of implementing legislation which, despite raising issues of political debate or policy issues, generally constitutes administrative action.[137] As the case law indicates, the line between policy in the broad sense and in the narrow sense is often difficult to draw.

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[130] Ibid paras 145-7. The appointment of commissions of inquiry was subsequently expressly excluded from PAJA's definition of 'administrative action' (para *(aa)* of the definition read with s 84(2)*(f)* of the Constitution).
[131] *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
[132] Ibid para 79. For a critical discussion of *Pharmaceutical Manufacturers*, see Hoexter *Administrative Law* op cit note 20 at 179-80.
[133] *Grey's Marine* supra note 70 para 27: 'There will be few administrative acts that are devoid of underlying policy…'.
[134] Supra note 11.
[135] Ibid para 18.
[136] Ibid.
[137] Ibid.

In a series of subsequent cases, our courts have held that a number of decisions lie on the executive-action side of the line. A brief discussion of five of these cases will serve to illustrate the courts' approach.[138]

Geuking[139] dealt with a decision of the President to consent to the extradition of Mr Geuking to Germany under s 3(2) of the Extradition Act.[140] Importantly, the effect of such consent was not that Mr Geuking would automatically be extradited but rather that he was *liable* to extradition (notwithstanding the absence of an extradition agreement between South Africa and Germany) following a process which would involve an enquiry by a magistrate and approval by the Minister of Justice. The President's consent, in effect, substituted for a pre-existing extradition agreement. The Constitutional Court, unsurprisingly, held that the President's decision was not administrative action. Goldstone J noted as follows:[141]

> 'It is a policy decision which may be based on considerations of comity or reciprocity between the Republic and the requesting State. The decision is not based on the merits of the application for extradition but on the relationship between this country and the requesting State…. The President in deciding whether to consent to the surrender of a person under s 3(2) must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what matters are appropriate or relevant to that purpose.'

In *Masetlha*, the Constitutional Court found that the President's decision to dismiss the head of the National Intelligence Agency (NIA) was executive action.[142] The court's

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[138] See also *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 130-1, *Premier, Western Cape v Overberg District Municipality* 2011 (4) SA 441 (SCA) para 37, *SAAB Grintek Defence (Pty) Ltd v South African Police Service* [2016] 3 All SA 669 (SCA) paras 12-21 and 34, *Tshwane City v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) paras 31, 43, *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2018 (4) SA 125 (SCA) ('*Scalabrini II*') paras 27-8, *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C) at 643-4, *Nephawe v Premier, Limpopo Province* 2003 (5) SA 245 (T) paras 88-93, *Diggers Development (Pty) Ltd v City of Matlosana* [2010] ZAPGGHC 15 paras 34-40, *Musenwa v Master of the North Gauteng High Court* 2010 JDR 13554 (GNP) para 11, *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development* 2015 (2) SA 430 (WCC) ('*SARIPA (High Court)*') paras 99-105, *Comair Ltd v Minister of Public Enterprises* 2016 (1) SA 1 (GP) paras 45-6, *Pioneer Foods (Pty) Ltd v Minister of Finance* 2019 (1) SA 273 (WCC) paras 26-31. See also *DA Ethekwini* supra note 99 paras 17-20, in which the SCA held that a decision by a municipal council to rename streets was not administrative action but left open whether it was legislative or executive action. In *South African National Roads Agency Ltd v City of Cape Town* 2017 (1) SA 468 (SCA) paras 74-5, 78 the SCA left open whether a decision of the Minister of Transport to approve the declaration of a national toll road amounted to administrative or executive action but was, surprisingly, inclined towards the view that it constituted executive action.

[139] *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC).

[140] Act 67 of 1962.

[141] *Geuking* supra note 139 paras 26-7.

[142] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 77.

reasoning on this issue is somewhat opaque. It appears to have turned on what Moseneke DCJ described as 'the special legal relationship' that obtains between the President and the head of the NIA, and the fact that the (implied) power to dismiss derived directly from the Constitution and was 'conferred specifically upon the President … for the effective pursuit of national security'.[143] Moseneke CJ also seemed to suggest that it was inappropriate for the power to dismiss the head of the NIA to be constrained by procedural fairness.[144]

ARMSA[145] dealt with a decision of the President, taken in term of the Magistrates Act,[146] to increase magistrates' remuneration by 5%. This decision was made with the approval of Parliament and following a process which involved a recommendation from the Independent Commission for the Remuneration of Public Office-bearers (which was statutorily required to take into account various relevant considerations and to consult with the Minister of Justice, the Minister of Finance and the Chief Justice or his designate).[147] During the course of this process, the Association of Regional Magistrates of South Africa (ARMSA) submitted comments on the Commission's recommendation to the Chief Justice but complained that the time period for submitting comments was too short and that ARMSA and its members were not afforded an opportunity to make representations to the President or the Commission.[148] The Constitutional Court rejected this argument on the basis that the President's decision did not amount to administrative action.[149] Nkabinde J emphasised that the remuneration of members of the judiciary is a 'sensitive issue' that 'goes to the heart of judicial independence and is of fundamental importance to our democratic state', that judicial officers should not be placed in a position of having to engage in negotiations with the executive over their salaries, and that the decision-making process involved various public actors.[150] She concluded as follows:[151]

> 'In essence, when the President made the determination he was exercising a power which impacts on a matter that is of importance to the independence of the Judiciary,

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[143] Ibid paras 75, 77. See also the reference to the reasoning in *SARFU* in footnote 39 of *Masetlha*.
[144] Ibid para 77. For a critical assessment of this aspect of *Masetlha*, see Hoexter 'Clearing the intersection?' op cit note 48 at 229-34.
[145] Supra note 1.
[146] Section 12(1)(a)(i) of the Magistrates Act 90 of 1993.
[147] *ARMSA* supra note 1 paras 4-6, 11-14, 20-21, 44. The Commission recommended an increase of 7%, which the President reduced to 5% following consultation with the Minister of Finance who advised that an increase of more than 5% 'would have negative implications for the fiscus' and that an increase of 7% was unaffordable. Ibid paras 13, 15.
[148] Ibid paras 6-8, 22, 28.
[149] Ibid paras 45, 59.
[150] Ibid para 43.
[151] Ibid para 45.

> in terms of a particular constitutional and legislative scheme, subject to clear statutory checks, balances and standards of review. In the light of this Court's decision in *Masetlha*, that renders his conduct 'executive' rather than 'administrative' in nature. Given the significance of the President's decision, the careful manner in which Parliament has prescribed that it should be taken and the complexity of the ultimate determination, I conclude that the President's decision did not constitute administrative action and that PAJA does not apply.'

Another important judgment is that of the SCA in *Scalabrini I*,[152] which held that a decision to close a refugee reception office constituted executive rather than administrative action. Nugent JA emphasised the importance of the separation of powers in this context[153] and the relevance of the extent to which the decision was influenced by policy considerations:[154]

> 'I think it is clear [from case law] that decisions heavily influenced by policy generally belong in the domain of the executive. It seems to me that if decisions of that kind are to be deferred to by the courts then that must necessarily be a strong guide to what falls outside 'administrative action' and the review powers given to the courts in PAJA. The more a decision is to be driven by considerations of executive policy the further it moves from being reviewable under PAJA and vice versa.'

Turning to the decision at issue, Nugent JA pointed to its policy-laden nature and raised concerns as to the courts' institutional and constitutional competence with regard to the matter:[155]

> 'While [the extent to which a decision is driven by considerations of executive policy] is not necessarily the only factor that is relevant to whether conduct is administrative action, I think it is sufficient for our decision in this case. The question whether a Refugee Reception Office is necessary for achieving the purpose of the [Refugees] Act is quintessentially one of policy. Where, and how many, offices should be established will necessarily be determined by matters like administrative effectiveness and efficiency, budgetary constraints, availability of human and other resources, policies of the department, the broader political framework within which it must function and the like. I do not think courts, not in possession of all that information,

[152] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) ('*Scalabrini I*').
[153] Ibid paras 54-6.
[154] Ibid para 57.
[155] Ibid para 58. See also ibid paras 59, 97.

> and not accountable to the electorate, are properly equipped or permitted to make those decisions.'[156]

In the most recent of this selection of cases, the Constitutional Court in *Afriforum*[157] emphasised the policy nature of the decision of the University of the Free State to adopt a language policy (making English the primary language of instruction), in finding that that decision, taken in terms of s 27(2) of the Higher Education Act,[158] was executive action.[159] Mogoeng CJ emphasised the fact that the decision was taken by the university's council (which existed to make policy decisions to be implemented by the university's management), noted that 'policy determination is, by its very nature, executive rather than administrative' and concluded that 'there is nothing about the decision that Council took … that gives it a character that is even remotely administrative'.[160]

It is, in light of the various dicta of our courts, tempting to see the distinction between executive and administrative action as resting purely on the extent to which the decision involves policy formulation or issues of policy. But the matter is more complex. First, some of the decisions that our courts have classified as 'executive' do not have a strong policy character but rather appear to be excluded from 'administrative action' because they are politically sensitive or of such a character that significant leeway should be given to the decision-maker without the prospect of judicial interference unless he or she exceeds the bounds of legality. For example, in *Masetlha* the sensitive nature of the decision to remove the head of the NIA, its direct constitutional origin and the 'special legal relationship' between the President and the head of an intelligence agency – rather than any policy characteristics of the decision – seemed to result in a finding that the decision was not administrative action.[161] Second, some decisions of our courts have held that various policy-laden decisions or those with policy implications fall on the administrative-action side of administrative/executive divide.[162] A good example of such a case is *Shuttleworth*,[163] in

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[156] The SCA in *Scalabrini II* supra note 138 paras 27-8 agreed that the closure of a refugee reception office amounted to executive action. It emphasised that the issue was 'quintessentially one of policy' and added that it 'concerns the manner in which the State determines how it will discharge its international obligations contained in the [Refugees] Act'.
[157] *Afriforum v University of the Free State* 2018 (2) SA 185 (CC).
[158] Act 101 of 1997.
[159] *Afriforum* supra note 157 paras 34-5.
[160] Ibid para 35.
[161] *Masetlha* supra note 142 paras 75-7.
[162] See eg *Grey's Marine* supra note 70 para 27, *Head of Department: Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) para 23, *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) paras 5, 11, 20-1, *Mkhatshwa v Mkhatshwa* 2002 (3) SA 441 (T) at 449-50, *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C) at 611-12, *Sebenza Forwarding &*

which the Constitutional Court held that the decision of the Minister of Finance to impose a 10% charge on the export of amounts of more than R750 000 amounted to 'narrow policy formulation directed at implementing legislation and was, unlike a broad or political policy formulation, subject to administrative review'.[164] The court made this finding despite the fact that the charge was a fiscal measure imposed by a Cabinet minister pursuant to a very broadly-framed power.[165]

Some of the judgments which classify conduct as executive action and those which find that other conduct is administrative action despite its policy or political nature are not easy to reconcile and the challenge is to develop a relatively clear test (or approach) to distinguish between administrative and executive action that is based on substantive reasoning. The judgment which, perhaps more than any other, paves the way for such an approach in this context is the decision of the Constitutional Court in *Motau*.[166]

Motau involved a decision by the Minister of Defence and Military Veterans to remove the chairperson and deputy chairperson of the board of directors of the Armaments Corporation of South Africa SOC Ltd (known as Armscor). The Minister's decision was taken in terms of s 8*(c)* of the Armscor Act,[167] which authorised the Minister to terminate the services of a board member 'on good cause shown'.[168]

Khampepe J commenced the majority judgment in *Motau* by emphasising that the case was about accountability both in the sense of the standards to which a minister may hold the leadership of a state-owned entity and, more importantly for our purposes, because it raised the question: 'to what standard should a court of law hold that minister when she exercises

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Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA 2006 (2) SA 52 (C) para 25, *Altech Autopage Cellular (Pty) Ltd v Chairperson of the Council of the Independent Communications Authority of South Africa* [2008] ZAGPHC 268 para 5.9, *Mlokoti v Amathole District Municipality* 2009 (6) SA 354 (E) at 376-7, *FMF* supra note 94 para 83. See also *Beauvallon Secondary School v Minister of Education of the Western Cape* [2013] ZAWCHC 101 ('*Beauvallon (High Court)*') paras 23-31, although this question was left open on appeal in *Minister of Education, Western Cape v Beauvallon Secondary School* 2015 (2) SA 154 (SCA) ('*Beauvallon (SCA)*') para 16.

[163] *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC).

[164] Ibid para 35.

[165] The empowering provision, regulation 10(1)(c) of the Exchange Control Regulations (GN R1111 *GG Extraordinary* 123, 1 December 1961), read, in relevant part, as follows: 'No person shall, except … in accordance with such conditions as the Treasury … may impose … enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.'

[166] Supra note 2. For a thoughtful discussion of this judgment, see Andrew Konstant 'Administrative action, the principle of legality and deference – The case of *Minister of Deference and Military Veterans v Motau*' (2015) 7 *Constitutional Court Review* 68.

[167] Armaments Corporation of South African Ltd Act 51 of 2003.

[168] See *Motau* supra note 2 para 8.

her powers of oversight in relation to that state-owned entity?'.[169] The important question was whether the Minister's decision amounted to administrative or executive action because, as we have seen, administrative action 'is subject to a higher level of scrutiny in terms of PAJA' while executive action 'is subject to less exacting constraints imposed by the principle of legality'.[170]

The court's analysis of the distinction between administrative and executive action started with the executive functions listed in s 85(2) of the Constitution. Whilst Khampepe J endorsed the approach adopted in previous case law which emphasised PAJA's exclusion of the implementation of legislation from the remit of 'administrative action', she also emphasised that PAJA's definition expressly excludes 'performing any other executive function *provided for … in national legislation*'.[171] This meant that 'the fact that a functionary performs a certain act in terms of an empowering legislative provision does not, without more, mean that the functionary is implementing legislation'.[172]

Khampepe J then turned to examine the nature of the power at issue in *Motau*. Drawing on previous case law, she remarked that executive powers are, in essence, 'high-policy or broad direction-giving powers', with the 'paradigm' cases being the formulation of policy and the initiation of legislation.[173] Administrative action, in contrast, usually entails the application of policy (rather than its creation) and administrative powers 'are in this sense generally lower-level powers, occurring after the formulation of policy'.[174] Khampepe J concluded that the 'important question' is how closely the power is related to the *formulation* of policy (which suggests that the power is executive) or how closely it relates to the *application* of policy or the *implementation* of legislation (which suggests it is administrative).[175] She went on to extract three 'pointers' from previous case law which are said to assist in drawing the line between executive and administrative action. It is worth considering precisely what the *Motau* court said in relation to these factors.

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169 Ibid para 1.
170 Ibid para 27.
171 Ibid paras 31-2.
172 Ibid para 32, emphasis in the original. Paragraph *(aa)* of the definition of 'administrative action' in PAJA read with s 85(2)*(a)* and *(e)* of the Constitution. As noted in *Motau* footnote 36, the latter proposition was apparent from previous decisions of the Constitutional Court in *ARMSA* supra note 1 paras 40-2 and *Geuking* supra note 139 para 26. It was also relied upon in *DA v Ethekwini* supra note 99 paras 18-19.
173 *Motau* supra note 2 para 37.
174 Ibid.
175 Ibid paras 38, 44, 51.

The first 'pointer' is the source of the power.[176] The relevance of this factor, according to the *Motau* court, is that a power sourced directly in the Constitution 'could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation'.[177] Khampepe J, however, noted that '[s]pecial care must … be exercised' in relying upon this first factor and acknowledged that it is only useful 'if at all, as a tentative signpost'.[178] As she pointed out, PAJA's text specifically contemplates that administrative power may be sourced in the Constitution and that executive power may be sourced in legislation.[179]

The second 'pointer' is the constraints imposed on the power or the level of discretion afforded to the decision-maker (with a more closely circumscribed power tending to be administrative in nature).[180] As with the first pointer, Khampepe J noted that 'caution is required' when placing reliance on this factor:[181]

> 'This factor's utility is that, when a discretion is particularly broad, it suggests that the exercise of the power is akin to the formulation of policy. However, while the presence of a wide-ranging discretion is often indicative of a broad policy-making power, it may equally be an incident of the subject-matter on which it is brought to bear. A functionary may, for example, be afforded considerable discretion in the exercise of a certain power simply because its exercise is heavily dependent on the factual circumstances that obtain in a particular case. Context is thus crucial in assessing the relevance of this factor.'[182]

It seems to me that this pointer is generally unhelpful in distinguishing executive from administrative action as it is common for administrative discretions to be conferred in broad terms.[183] For example, as Khampepe J noted, the Cape Land Use Planning Ordinance[184]

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[176] Ibid para 39. As the *Motau* court indicated, the relevance of this factor to the distinction between administrative and executive action had previously been recognised in *SARFU* supra note 17 para 143, *Ed-U-College* supra note 11 para 21 and *Masetlha* supra note 142 paras 75-7.
[177] *Motau* supra note 2 para 39.
[178] Ibid para 40.
[179] Ibid.
[180] Ibid paras 41-2. The *Motau* court relied upon *Ed-U-College* supra note 11 para 21 in this regard.
[181] *Motau* supra note 2 para 42.
[182] See also ibid footnote 54, which referred to *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 53: 'As noted by O'Regan J … a broad discretionary power may equally be conferred 'where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance', where the relevant factors are 'indisputably clear' or 'where the decision-maker is possessed of expertise relevant to the decisions to be made.'
[183] See, however, the useful manner in which this factor was employed in *Sokhela* supra note 1 paras 78-9 to distinguish the more circumscribed power at issue in that case from the power in *Masetlha*.
[184] Ordinance 15 of 1985, s 36(1).

'imports a large discretion in the evaluation of land-use applications, but it cannot seriously be contended that the taking of decisions in relation to such applications constitutes anything other than administrative action'.[185] Moreover, the broad nature of the statutory power at issue in *Shuttleworth*[186] did not deter the Constitutional Court from holding that the imposition of the exit charge on the export of capital amounted to administrative action, while the *ARMSA* court, on the other hand, relied upon, amongst others, 'the careful manner in which Parliament has prescribed that [the decision on the remuneration of magistrates] should be taken' in concluding that the decision did not constitute administrative action.[187]

The third 'pointer' identified in *Motau* is 'whether it is *appropriate* to subject the exercise of the power to the higher level of scrutiny under administrative-law review' – a factor which Khampepe J described as underpinning the enquiry and which goes to the heart of a substantive approach to the ambit of administrative action.[188] As Khampepe J stated:[189]

> 'It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject-matter or policy matters for which courts should show the Executive a greater level of deference. Thus, this Court [in *Fedsure*, *Geuking*, *Masetlha* and *ARMSA*, respectively] has found that administrative-law review is not appropriate where the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate; is based on considerations of comity or reciprocity between South Africa and foreign states, involving policy considerations regarding foreign affairs; is closely related to the special relationship between the President and the Director-General of a security agency; or involves the balancing of complex factors and sensitive subject matter relating to judicial independence.'

Two aspects of the first sentence of this passage are particularly noteworthy. First, Khampepe J linked the classification of conduct as 'executive action' to the application of judicial deference.[190] Second, she frankly acknowledged that it may be inappropriate to subject a particular power to the rigours of administrative-law review not only where it involves policy matters in respect of which deference is owed but also in instances where the power bears on 'particularly sensitive subject-matter'.

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[185] *Motau* supra note 2 para 42, footnote 54.
[186] See note 165 supra.
[187] *ARMSA* supra note 1 para 45.
[188] Supra note 2 para 44, emphasis added.
[189] Ibid para 43.
[190] See also *Scalabrini I* supra note 152 para 57, quoted above.

Turning to the ministerial decision at issue in *Motau*, the majority held that the decision to remove the directors was executive action.[191] The court's reasons for this conclusion may be summarised as follows: (i) the Minister of Defence was statutorily charged with 'high-level supervision' of Armscor and bore political responsibility in relation to defence;[192] (ii) the statutory power to remove the directors is 'an adjunct to her power to formulate defence policy' as it is 'the means by which the minister gives direction in the vital area of military procurement';[193] (iii) the power to remove directors is 'not a low-level bureaucratic power' involving the application of policy but rather forms part of the Minister's power 'to supervise high-level public office bearers' who have been appointed 'in accordance with her policy dictates';[194] and (iv) the Minister has 'a level of discretion in determining when directors should be removed' as she need only demonstrate good cause in exercising this power and need not 'satisfy a list of jurisdictional requirements'.[195] While Khampepe J's judgment is somewhat ambiguous on the degree to which the power to remove board members involved policy formulation,[196] she ultimately concluded that it was 'more closely related to the formulation of policy than its application'.[197]

Jafta J penned a dissenting judgment in *Motau* (in which Madlanga and Zondo JJ concurred), which opined that the Minister's decision to remove the directors amounted to administrative action.[198] This judgment emphasised, amongst other things, that: the power to remove directors involved the implementation of legislation and not the formulation of policy; the power was constrained by the requirement of 'good cause'; and the conferral of discretion is 'the hallmark of most administrative functions'.[199] All of these observations have merit, as does Jafta J's insistence that the relationship between the power to remove directors and policy formulation is very different to the power at issue in *SARFU*.[200] While a decision to initiate a commission of inquiry aimed at furnishing the President with information and advice that may be used to make policy decisions might readily be described

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[191] Supra note 2 paras 47, 51.
[192] Ibid para 46.
[193] Ibid paras 47-8, footnote 67 referring to *SARFU* supra note 17 para 147. The majority in *Motau* appears to have regarded this factor as the most significant. See ibid para 51.
[194] Ibid para 49.
[195] Ibid para 50.
[196] At ibid para 47 Khampepe J stated that the Minister 'formulates policy' on defence procurement '[i]n terms of [the] power [to dismiss in s 8(c) of the Armscor Act]', while she went on to note that the appointment and dismissal of board members was 'not the formulation of policy as such' (at para 48).
[197] Ibid para 51.
[198] Ibid para 127.
[199] Ibid paras 107, 119, 120, 126.
[200] Ibid paras 121-2.

as part and parcel of policy formulation (as was the case in *SARFU*),[201] the same cannot be said of decisions which might be motivated by, or constitute a manifestation of, policy but which do not in themselves facilitate the formulation of policy.

While I have misgivings about the conclusion of the *Motau* majority that the removal of the directors constituted executive action,[202] the majority's judgment is carefully crafted and its emphasis on the question as to whether it is *appropriate* to subject the particular power to administrative-law review is a welcome endorsement of the importance of substantive reasoning in this context.[203]

3.2 PAJA's text: express exclusions of executive action

The text of PAJA is an important, and in some instances decisive, consideration in distinguishing between administrative and executive action. In particular, paragraphs *(aa)* to *(cc)* of the definition of 'administrative action' exclude the executive powers of the national executive, provincial executives and municipal councils, respectively, from that definition. While paragraph *(cc)* simply excludes 'the executive powers and functions of a municipal council', paragraphs *(aa)* and *(bb)* list a number of specific exclusions with reference to sections of the Constitution.

Paragraph *(aa)* of the definition states that 'administrative action' does not include the executive powers or functions of the national executive, including powers or functions referred to in various listed provisions of the Constitution.

The listed exclusions include most of the powers in s 84(2) of the Constitution, ie the President's powers as head of state which 'have their origin in the prerogative powers',[204] starting with the powers to assent to bills, to refer them back to the National Assembly for

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[201] *SARFU* supra note 17 para 147. See *Motau* supra note 2 para 121.

[202] On the classification of decisions to remove directors of state-owned entities, see also *Steenkamp v Central Energy Fund SOC Ltd* 2018 (1) SA 311 (WCC) paras 52-4 (respondent's decision to remove the directors of its subsidiary, the Petroleum Oil and Gas Corporation SOC Ltd, was administrative rather than executive action). See also *Sokhela* supra note 1 para 83, which held that the decision of the MEC for Agriculture to suspend the members of the KwaZulu-Natal Conservation Board constituted administrative action (and indicated, in contrast and obiter, that the appointment of statutory bodies would generally not constitute administrative action (at paras 74-6)). The *Motau* court noted, at footnote 72, that it was unnecessary to examine the correctness of the finding in *Sokhela*, given the differences between the power that formed the subject of that case and the power at issue in *Motau*.

[203] Danie Brand & Melanie Murcott 'Administrative law' 2014 *Annual Survey of South African Law* 46 at 53-4 support such an approach and criticise the *Motau* court's failure properly to analyse this issue, stating that the court 'must determine whether it is desirable, possible and necessary to scrutinise the power against all standards imposed by the PAJA'.

[204] *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 31. See also *SARFU* supra note 17 para 144-5, *Minister of Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) ('*Chonco (CC)*') para 36.

reconsideration or to refer them to the Constitutional Court for abstract review.[205] The *SARFU* court had, prior to PAJA, described these powers as 'very specifically controlled constitutional responsibilities related to the legislative process and the constitutional relationship between the Executive, the Legislature and the courts' and noted that the President, in exercising these responsibilities, 'is clearly not performing administrative acts within the meaning of s 33 [of the Constitution]'.[206] The next excluded s 84(2) power is the President's powers to summon Parliament to an extraordinary sitting,[207] which the *SARFU* court described as a narrow constitutional responsibility that is 'not related to the administration of legislation but to the execution of provisions of the Constitution',[208] and which Hoexter describes as a 'distinctively political' function.[209] Also excluded are the President's powers to appoint a commission of inquiry, the 'political function' of calling a national referendum,[210] the 'ceremonial functions' of receiving and recognising foreign diplomatic and consular representatives and conferring honours,[211] and the power to appoint ambassadors, plenipotentiaries, and diplomatic and consular representatives.[212] *SARFU* described these powers as narrow, discretionary powers 'which are not constrained in any express manner by the Constitution', are 'closely related to policy' and do not involve the implementation of legislation.[213] The court added that '[i]t is readily apparent that 'these responsibilities cannot suitably be subjected to s 33'.[214]

PAJA's list of exclusions goes on to refer to most of the executive powers listed in s 85(2) of the Constitution, namely, the development and implementation of national policy, coordinating the functions of state departments and administrators, preparing and initiating legislation and 'performing any other executive function provided for in the Constitution or national legislation'.[215] In addition, PAJA specifically excludes the following executive powers or functions from the ambit of 'administrative action': the President's power to appoint and dismiss the Deputy President, ministers and deputy ministers as well as the leader of government business in the National Assembly;[216] the assistance which the Deputy

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[205] Sections 79(1) and (4), 82(2)*(a)* to *(c)* of the Constitution.
[206] Supra note 17 para 145.
[207] Section 84(2)*(d)* of the Constitution.
[208] Supra note 17 para 145.
[209] Hoexter *Administrative Law* op cit note 20 at 236.
[210] Ibid.
[211] Ibid.
[212] Section 84(2)*(f)* to *(i)* and *(k)* of the Constitution.
[213] Supra note 17 para 146.
[214] Ibid.
[215] Section 85(2)*(b)* to *(e)* of the Constitution.
[216] Sections 91(2), 91(3) and 93 of the Constitution.

President provides to the President in executing the functions of government;[217] the obligation on Cabinet members to report to Parliament;[218] the President's power to transfer or assign powers and functions to members of Cabinet;[219] Cabinet members' powers to assign powers or functions to members of a provincial executive council (MECs) or to a municipal council;[220] and national intervention in a provincial administration.[221]

Strikingly, the exclusions in paragraph *(aa)* of PAJA's definition of 'administrative action' do not include two powers referred to in s 84(2) of the Constitution – ie the President's powers to make appointments as required by the Constitution or legislation 'other than as head of the national executive' and to pardon or reprieve offenders and to remit fines, penalties or forfeitures[222] – and one broad-ranging function listed in s 85(2) – ie the implementation of national legislation.[223] The latter omission is unsurprising as the implementation of legislation forms the core of administration action.[224] As Ngcobo J stated in *New Clicks*: 'The conclusion that the deliberate exclusion of implementing legislation from the list of executive powers or functions that do not fall within the ambit of PAJA was intended to bring the exercise of those powers or functions within the ambit of PAJA is irresistible'.[225]

Similarly, if PAJA's text is to be taken seriously, the omission of the President's power, in s 84(2)*(j)* of the Constitution, to pardon or reprieve offenders – which must, like the omission of s 85(2)*(a)*, have been deliberate – indicates that the exercise of this power constitutes administrative action for purposes of PAJA.[226] At the very least, it strongly suggests that the

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[217] Section 91(5) of the Constitution.
[218] Section 92(3) of the Constitution.
[219] Sections 97 and 98 of the Constitution.
[220] Section 99 of the Constitution.
[221] Section 100 of the Constitution. Paragraph *(bb)* of PAJA's definition of 'administrative action' goes on specifically to exclude the following powers or functions of a provincial executive: the Premier's power to assent to Bills, to refer them back to the provincial legislature for reconsideration or to refer them to the Constitutional Court for abstract review; the development and implementation of provincial policy; coordinating the functions of the provincial administration; preparing and initiating provincial legislation; the power of an MEC to assign powers or functions to a municipal council; the Premier's powers to summon the provincial legislature to an extraordinary sitting, to appoint commissions of inquiry, to call a referendum in the province, and to appoint and dismiss MECs; MECs' obligations to report to the legislature; the Premier's power to transfer or assign powers or functions to MECs; and provincial intervention in local government.
[222] Section 84(2)*(e)* and *(j)* of the Constitution.
[223] Section 85(2)*(a)* of the Constitution.
[224] *New Clicks* supra note 57 paras 125-6 (per Chaskalson CJ).
[225] Ibid para 461. For authority for the proposition that the implementation of legislation does not necessarily constitute administrative action, see *Sokhela* supra note 1 para 74.
[226] In *Centre for the Study of Violence and Reconciliation v President of the Republic of South Africa* [2009] ZAGPPHC 35 para 7.3, Seriti J placed reliance on the *expressio unius* principle of statutory construction, in holding that PAJA did not exclude the President's power of pardon from the meaning of 'administrative action'. See also Jafta J's obiter statement in his dissenting judgment in *Motau* supra note 2 para 106.

exercise of this power is not *per se* executive action, ie some decisions to pardon or reprieve prisoners are administrative in nature. The Constitutional Court, in *Albutt*,[227] left open the question as to whether the exercise of the President's pardoning power constituted 'administrative action' for purposes of PAJA,[228] whilst remarking that there is 'a substantial measure of doubt' as to whether this was the case.[229] There is thus a distinct possibility that the court will ultimately decide this question in the negative.[230]

One basis on which the court might decide that the pardoning power is not administrative action arises from the combination of the following propositions: (i) the *SARFU* court's suggestion that all the powers in s 84(2), including presidential pardons, do not constitute 'administrative action' for purposes of s 33 of the Constitution;[231] and (ii) the Constitutional Court's insistence that the scope of 'administrative action' is not wider under PAJA than it is in s 33.[232] If these propositions are both correct, presidential pardons cannot constitute 'administrative action' for purposes of PAJA. While I have no difficulty with proposition (i), it seems to me, as explained in chapter two,[233] that proposition (ii) is flawed. There is, as I see it, no good reason why PAJA cannot extend the concept of 'administrative action' beyond that envisaged in s 33.[234] If that is the case, there is no jurisprudential barrier to recognising that presidential pardons may constitute 'administrative action' under that Act.

On the other hand, it would be mistaken to assume that the non-inclusion of s 84(2)*(j)* in PAJA's listed exclusions automatically means that all presidential pardons amount to administrative action.[235] It rather seems to me that the appropriate approach is to recognise that presidential pardons may, but do not invariably, constitute 'administrative action' under PAJA. The enquiry in each instance is then whether, having regard to the nature of the particular pardoning power, the exercise of that power is 'of an administrative nature'.[236]

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[227] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC). *Albutt* was an appeal against the decision in *Centre for the Study of Violence* supra note 226.
[228] Ibid paras 79-83. See also *Minister of Justice and Constitutional Development v Chonco* 2009 (6) SA 1 (SCA) para 42, and *Chonco (CC)* supra note 204 para 42.
[229] *Albutt* supra note 227 para 80.
[230] Karthy Govender 'Judicial review of the pardon power in section 84(2)(j) of the Constitution of the Republic of South Africa, 1996' 23 *Stell LR* (2012) 490 at 496-8 expresses the view that the Constitutional Court is likely to find that the exercise of the pardon power in s 84(2)*(j)* of the Constitution is the exercise of executive power and is not administrative action for purposes of PAJA.
[231] *SARFU* supra note 17 paras 145-6.
[232] See chapter 2, para 3.
[233] Ibid.
[234] Cf *Albutt* supra note 227 para 80.
[235] Hoexter *Administrative Law* op cit note 20 at 235-6.
[236] This view is apparently shared by Christina Murray & Richard Stacey 'The President and the national executive' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) at 18-15.

The import of PAJA's omission of s 84(2)*(e)* from paragraph *(aa)* of the definition of 'administrative action' (ie the President's power to make appointments other than as head of the national executive) is also unclear. This omission, coupled with the express exclusion of specific appointment powers contained elsewhere in the Constitution (eg the President's power to appoint Cabinet ministers),[237] might indicate that other presidential appointments are administrative action for purposes of PAJA.[238] On the other hand, a compelling argument can be made that the omission of s 84(2)*(e)* merely means that not *all* presidential appointments contemplated in that paragraph (ie appointments other than as head of the national executive)[239] constitute executive action.[240] Some of these appointments might constitute administrative action whilst others are executive action.

It is evident that, while some of the exclusions in paragraphs *(aa)* and *(bb)* are specific and easily identifiable (such as the appointment of a commission of inquiry, calling a national or provincial referendum or appointing a Cabinet member), other exclusions are open-textured. In particular, the meaning of the excluded category in s 85(2)*(e)* ('any other executive function provided for in the Constitution or in national legislation'), and how it is to be distinguished from the implementation of legislation contemplated in s 85(2)*(a)*, is most unclear. As the court noted in *Motau*, the key distinguishing feature between these two categories is the verb 'implement' in s 85(2)*(a)*,[241] which 'may serve as a useful guide' and suggests that 'administrative powers usually entail the application of formulated policy to particular factual circumstances' or, put differently, 'the exercise of administrative powers is policy brought into effect, rather than its creation'.[242]

As is apparent from these quotations from *Motau*, the court held that the application of policy generally amounts to administrative action[243] – a proposition which finds support in a

Murray & Stacey, however, go on to state that: 'it seems unlikely that [a] s 84(2) power will ever fall within the definition of administrative action' (at 18-16).

[237] Para *(aa)* of PAJA's definition of 'administrative action' read with s 91(2) of the Constitution.

[238] See *Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128(GNP) at 138-9. See also *Motau* supra note 2 para 106 (per Jafta J).

[239] It will be recalled that the Constitutional Court in *Masetlha* supra note 142 held that the President's power to dismiss the head of the NIA (which was implied in the power to appoint the head of the NIA in s 209(2) of the Constitution) constituted executive action. Section 209(2) specifically states that this appointment power vests in the President as the head of the national executive. It is thus not a power contemplated in s 84(2)*(e)* of the Constitution.

[240] See Murray & Stacey op cit note 236 at 18-16.

[241] Supra note 2 paras 32, 37.

[242] Ibid para 37.

[243] See also ibid paras 38, 49.

number of decisions of our courts.[244] This proposition is not easily squared with the express exclusion of ss 85(2)*(b)* and 125(2)*(d)* of the Constitution from PAJA's definition of 'administrative action', ie 'developing and *implementing* national policy' and 'developing and *implementing* provincial policy'.[245] These exclusions have received remarkably little attention in the case law (or in the academic literature). The only judgment of which I am aware that touches upon this issue is the dissenting judgment of Jafta J in *Motau*, who notes, in passing, that 'the emphasis is usually placed on the formulation part of the power [in s 85(2)*(b)*] and not on implementation' and adds that '[o]nce a policy has been formulated and translated into legislation, its implementation would ordinarily constitute an administrative act'.[246]

To interpret the definition of 'administrative action' as excluding every decision that might be described as the implementation of a policy would exclude a core aspect of administrative action from PAJA's reach which would, in my view, render PAJA unconstitutional. The question which thus arises is whether it is possible to interpret PAJA's exclusion of the implementation of national and provincial policy in a constitutionally compliant manner.

The first point to note on this score is that the implementation of *policy* (as contemplated in ss 85(2)*(b)* and 125(2)*(d)* of the Constitution) is to be distinguished from the implementation of *legislation* (contemplated in ss 85(2)*(a)* and 125(2)*(a)* and *(b)*). As Jafta J suggested in *Motau*, once a policy takes legislative form, or is implemented via a legislative power, it is ordinarily to be characterised as the implementation of legislation rather than the implementation of policy. For example, while the promotion of local businesses through granting preferences in the allocation of licences might form the subject of a national policy, the concretisation of these preferences through the exercise of statutory powers – eg promulgating regulations or granting a licence – would constitute the implementation of legislation rather than of policy.

The decision of the High Court in *Beauvallon*[247] provides a good illustration of this approach. In this case, the Western Cape Minister of Education contended that his decisions

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[244] See eg *Grey's Marine* supra note 70 paras 24, 27 ('administrative action is most often the implementation of policy that has been given legal effect'), *Security Industry Alliance* supra note 94 para 16, *Beauvallon (SCA)* supra note 162 para 11, *Nambiti* supra note 138 para 31.

[245] Paragraphs *(aa)* and *(bb)* of the PAJA definition read with ss 85(2)*(b)* and 125(2)*(d)* of the Constitution, emphasis added.

[246] Supra note 2 para 114.

[247] *Beauvallon (High Court)* supra note 162.

to close several public schools in terms of s 33 of the Schools Act[248] did not constitute 'administrative action' as they amounted to the implementation of provincial policy as envisaged in s 125(2)*(d)* of the Constitution.[249] In particular, the Minister argued that the closure decisions involved the implementation of a policy on 'the rationalisation or closure of small or non-viable schools' which his department had adopted after its initial development by the National Department of Education.[250] Bozalek J rejected this argument, noting that 'simply because a policy background to certain decisions is present or decisions are taken pursuant to a policy [it] does not follow that such decisions amount to '*developing and implementing provincial policy*' within the parameters of s 125(2)(d) of the Constitution'.[251] In going on to hold that the closure decisions amounted to 'administrative action' for purposes of PAJA, Bozalek J considered various factors and remarked that 'whilst there [was] undoubtedly a policy linkage and background to the closure decisions', this consideration was outweighed by the statutory source and nature of the power.[252]

It is, however, not necessarily the case that all policy implementation which takes a statutory form constitutes administrative action. There might be exceptional cases in which the high policy nature of a decision so predominates that it retains its characterisation as the implementation of policy notwithstanding that it takes the form of the exercise of a statutory power.[253]

The remaining issue arising from PAJA's exclusion of the implementation of national and provincial policy is more limited: are all forms of policy implementation that take place *outside* a statutory framework excluded from PAJA's concept of 'administrative action'?[254] It would, in my view, be constitutionally problematic if this were the case. Such an approach would, for example, exclude decisions to grant or withhold non-statutory, beneficial

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[248] South African Schools Act 84 of 1996.
[249] *Beauvallon (High Court)* supra note 162 para 24.
[250] Ibid.
[251] Ibid para 30, emphasis in the original.
[252] Ibid para 31.
[253] This was arguably the approach adopted in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) paras 42-44,102-3. On the question as to whether the exercise of a statutory power to make policy constitutes the formulation of national policy as contemplated in s 85(2)*(d)* of the Constitution, see the contrasting reasoning in *Electronic Media Network Ltd v e.tv (Pty) Ltd* (CC) 2017 (9) BCLR 1108 (CC) at paras 26-30 (per Mogoeng CJ) and paras 110-18 (per Cameron and Froneman JJ). See also *SARIPA (High Court)* supra note 138 para 105.
[254] A related difficulty is that PAJA's definition of 'administrative action', in so far as it applies to organs of state, is limited to the exercise of a power in terms of the Constitution or a provincial constitution or the exercise of a public power or the performance of a public function 'in terms of any legislation'. See chapter 3, note 3.

dispositions[255] (such as a local production film subsidy)[256] or some decisions by the state as a property owner. This difficulty might be overcome in the following manner. First, the references to 'national' and 'provincial' policy arguably point to policies that are general in nature. These are the sort of matters that one might find in a white paper (or a green paper) and include the government's policy on energy or health care, the promotion of domestic industry or the recognition of foreign governments. Whether or not one agrees with this first proposition, it might be argued that, in order to fall within ss 85(2)*(b)* and 125(2)*(d)*, the implementation of policy must be at a fairly high level of abstraction and it does not extend to the conferral of specific benefits or the imposition of specific obligations (unless, perhaps, the high policy nature of a particular decision is so predominant that it constitutes the implementation of policy despite its concrete form).[257] The implementation (or formulation) of national policy may, for example, include a decision to privatise a particular state asset or to restructure a state-owned entity but not a decision to dispose of state property to a particular purchaser.

As the discussion above indicates, the categories of listed exclusions in paragraphs *(aa)* and *(bb)* of PAJA's definition of 'administrative action' reflect a range of powers and functions. In addition to excluding, for example, the President's functions as head of state and policy-laden functions, some inherently political decisions are also excluded. A good example of the latter is the President's power to appoint and dismiss Cabinet members. The classification of this type of decision as executive action is perhaps best explained by its nakedly political nature, in the sense that it is constitutionally appropriate for the President to be given significant leeway in relation to such decisions and for *political* accountability rather than *legal* accountability to attach thereto (provided that the President remains within the bounds of legality). Simply put, the President should be politically responsible for Cabinet's performance in an absolute sense. It would, by way of illustration, be undesirable for the President's accountability for the conduct of a Cabinet minister to be diminished by that

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[255] On purely beneficial dispositions, see *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A).

[256] See *Minister of Home Affairs v American Ninja IV Partnership* 1993 (1) SA 257 (A) (holding that an undertaking by the state to pay a subsidy for a locally produced film was contractually binding on the state).

[257] The statement in parenthesis finds support in *SCAW*, which suggests that the imposition of anti-dumping duties constitutes the formulation or implementation of policy despite its concrete, coercive form. *SCAW* supra note 253 paras 44, 103. See also *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) para 51 (the decision to establish a temporary transit camp for flood victims was lawful having regard to, amongst others, government's 'executive power to implement policy decisions').

person remaining in office by virtue of a court order setting aside his or her dismissal on substantive grounds.

A final textual issue that requires brief mention is the relationship between the specific exclusions of executive action in paragraphs *(aa)* to *(cc)* of PAJA's definition of 'administrative action' and the requirement, located in PAJA's definition of 'decision', that the decision must be 'of an administrative nature'. As we have seen, one effect of the latter requirement is that executive action is excluded from the meaning of administrative action.

Nevertheless, when it comes to conduct of the national or provincial executive, it seems to me that the correct starting point in seeking to classify that conduct is not the general phrase 'of an administrative nature' but rather the somewhat more specific question as to whether or not the conduct falls within paragraphs *(aa)* and *(bb)* of PAJA's definition. Two questions arise in this regard: (i) does the conduct fall within any of the listed exclusions in paragraphs *(aa)* or *(bb)*; and, (ii) if not, does it nonetheless amount to an executive power or function of the national or provincial executive? I pause to note that the second of these questions can arise only if the powers or functions listed in these paragraphs are not exhaustive, which, in my view and contrary to the dictum of Ngcobo J in *New Clicks*,[258] is the case. This view finds support in the following statement in *Motau*:[259]

> 'PAJA thus expressly excludes 'executive powers or functions of the National Executive' from administrative-law review. *In addition to this general exclusion*, the section lists particular executive powers that are excluded.'

If the answer to either (i) or (ii) is in the affirmative, the conduct falls within paragraphs *(aa)* or *(bb)* and it does not constitute 'administrative action' for purposes of PAJA. The same is true of the executive powers or functions of a municipal council, as contemplated in paragraph *(cc)*. It is, in such instances, unnecessary to consider whether or not it is 'of an administrative nature'. But not all executive action is performed by the national or provincial executive or by a municipal council.[260] In such instances, the question as to whether the decision is 'of an administrative nature' does the work of distinguishing administrative from executive action.

[258] *New Clicks* supra note 57 para 459.
[259] *Motau* supra note 2 para 30, emphasis added. See also Hoexter *Administrative Law* op cit note 20 at 235.
[260] Eg the court in *Afriforum* supra note 157 paras 34.5 found that the decision of a university council to adopt a language policy constituted executive action.

3.3 Following *Motau's* lead: Towards a substantive approach to the distinction between administrative and executive action

3.3.1 *Appropriateness, reasonableness, deference and variability*

As is apparent from the case law discussed above, there is no 'universal test' for distinguishing between administrative and executive action.[261] There is, as Khampepe J put it, 'no ready-made panacea or solve-all formula'.[262] Our courts rather have regard to a range of factors in assessing, on a case-by-case basis, whether a particular power or function is administrative or executive,[263] placing particular emphasis on the nature of the power or function.[264]

There is much work to be done in seeking to develop a principled and coherent approach to the distinction between administrative and executive action. This approach must be based on the substantive reasons why certain public decisions are reviewable on administrative-law grounds and others are not. The guiding principle in this regard, as *Motau* makes clear, is whether or not it is *appropriate* to subject the decision to administrative-law review. But the question as to appropriateness is too blunt an instrument for drawing the line between administrative and executive action. Such an approach would undermine consistency and predictability and would leave too much scope for judicial intuition and the concomitant threat of outcomes-based decision-making.

It is thus important to consider the factors that impact on whether a decision is administrative or executive in nature, and to scrutinise the weight attaching to those factors, having regard to substantive considerations. It is, in particular, important to identify the characteristics that render a decision 'executive' and which thus insulate it from the scrutiny of administrative-law review, and to assess when the nature of a particular power means that the rigours of that species of review are inappropriate.

This exercise cannot take place in a vacuum, with courts baldly asserting that it is inappropriate to subject a particular decision to the rigours of administrative-law review. Regard must be had to the level of scrutiny that administrative-law review in fact entails and the scrutiny that would in any event apply if the conduct is labelled as executive action. It is now trite that executive action is not immune from review; it is, as explained in chapter two,

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[261] *Scalabrini I* supra note 152 para 53.
[262] *Motau* supra note 2 para 36. See also *Beauvallon (SCA)* supra note 162 para 12.
[263] *SARFU* supra note 17 para 143, *Kaunda* supra note 124 para 244 (per O'Regan J).
[264] *SARFU* supra note 17 paras 141, 143.

subject to legality review, which includes several grounds of review traditionally found in administrative law.[265] To the extent that the grounds of administrative-law review overlap with those which in any event arise under legality review, these grounds are irrelevant in deciding whether it is appropriate to subject a particular exercise of public power to administrative-law scrutiny. The focus thus needs to be on those grounds of review which apply in terms of PAJA but which are not duplicated in legality review.

The ground of review that most clearly falls into this category is reasonableness review,[266] given that the other primary contender, procedural fairness, forms part of legality review in certain contexts.[267] It is thus useful, in considering whether a decision is administrative or executive action, to assess the appropriateness of subjecting it to reasonableness review rather than the less exacting standard of rationality (as a component of legality review). While reasonableness review and rationality review both, to some extent, involve scrutiny of the merits of the decision, the former is a materially more demanding standard than the latter.[268]

In considering the rigour entailed in reasonableness review, it is important to bear in mind that our courts are, in accordance with the separation of powers, required to show deference (or respect) to the policy choices and findings of fact of the administrative decision-maker.[269] Appropriate judicial deference should adequately address separation of powers concerns in most instances in which one might be concerned about the appropriateness of applying reasonableness review to the exercise of a particular public power. In addition, variability has an important role to play. If, as seems to be the case, reasonableness review is variable in the sense that a more rigorous standard is applied to certain types of administrative decisions than others,[270] this should also alleviate separation of powers concerns as it allows courts to tailor the requirements of reasonableness (and, in effect, the level of scrutiny) to suit the particular decision.

The approach of our courts, however, suggests that judicial deference cannot always be accommodated through the manner in which the court applies the administrative-law standard

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[265] Chapter 2, para 3.1.1.
[266] To the extent that reasonableness review includes review for irrationality, it overlaps with legality review. But reasonableness review is a more searching enquiry than rationality review. In addition, irrationality in relation to the information before the administrator forms part of administrative-law review (s 6(2)*(f)*(ii)*(cc)* of PAJA) but does not seem to form part of legality review. See chapter 2, para 3.1.2.
[267] Chapter 2, para 3.1.1. Cf *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) paras 63-5.
[268] Chapter 2, para 3.1.2.
[269] Chapter 2, para 5.2.
[270] Chapter 2, para 5.1.

of scrutiny (including reasonableness review) but sometimes requires that the decision should not be subject to that standard at all.[271] As the *Motau* court stated, administrative-law scrutiny may not be appropriate in a particular case 'given that the power bears on *particularly sensitive subject-matter or policy matters* for which courts should show the executive a greater degree of deference'.[272]

A crucial consideration that emerges is whether or not the separation of powers (and the accompanying principle of judicial restraint) is appropriately addressed in respect of a particular power by courts reviewing the reasonableness of the exercise of that power whilst showing respect to the choices and findings of the decision-maker and applying a less rigorous variety of reasonableness (ie through a combination of deference and variability), or whether judicial restraint is adequately addressed only by not subjecting the decision to scrutiny for reasonableness (but only enquiring into its rationality). The link between these varying levels of scrutiny, the separation of powers and the administrative/executive divide is captured in the following dictum of the Constitutional Court:[273]

> 'The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large.'

The overarching enquiry as to whether it is appropriate to subject the exercise of a public power to administrative-law review thus translates, in large measure, into the question as to whether the separation of powers and the accompanying need for judicial restraint indicate that the power ought to be subject to reasonableness review.

In assessing whether proper judicial restraint points to the application of a less intrusive level of scrutiny rather than simply indicating that the court should apply a less onerous form of reasonableness review or should generally show respect to the decision-maker's views, Elliott's distinction between what he refers to as *intrinsic* deference and *adjudicative* deference is useful.[274] According to Elliott, intrinsic deference relates to the burden-allocation

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[271] *Motau* supra note 2 para 43, *Scalabrini I* supra note 152 paras 54-66. Cf Andrew Konstant 'Administrative action and procedural fairness - *Minister of Defence and Military Veterans v Motau*' (2016) 13 *SALJ* 491.
[272] Supra note 2 para 43, emphasis added.
[273] *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) para 41.
[274] Mark Elliott 'From bifurcation to calibration: Twin-track deference and the culture of justification' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 61 at 71-87.

aspect of substantive review (ie a context which calls for greater deference produces a level of scrutiny which imposes a less demanding 'burden of justification' on the decision-maker).[275] This form of deference might explain whether the court should scrutinise a decision for reasonableness or rationality or some other substantive measure.[276] Adjudicative deference, on the other hand, involves showing due respect in the adjudicative process, ie 'deference may call for the ascription of respect to the decision-maker's view when the court assesses whether the burden of justification should be taken to have been discharged'.[277] As Elliott explains, separating intrinsic deference from adjudicative deference 'is helpful because it acknowledges the distinction between, on the one hand, the level of review that is normatively warranted and, on the other hand, the level of review that can appropriately be supplied given the particularities of the individual case'.[278]

While a range of factors may play a role in determining the appropriate level of judicial restraint and in assessing the appropriate degree of *adjudicative* deference, the important question, for purposes of delimiting the contours of administrative and executive action, is which factors are material to *intrinsic* deference and thus potentially influence the characterisation of public conduct as executive action. In other words, what factors explain the 'step change' from the application of reasonableness review to rationality review (and, more generally, the application of grounds of review that are in some respects less rigorous than those provided for in PAJA)?

Konstant argues that defining a decision as executive action on the basis of a desire to apply deference to the decision 'would be a rather unprincipled way of defining executive action' and that such an approach 'conflates the nature of the power with the respect that a court should show it'.[279] While there is merit in this argument, it seems to me that it would be addressed by ensuring that the use to which deference is put in the context of distinguishing between administrative and executive action is based on principled considerations relating to the nature of the power – which considerations point to the application of less intense judicial scrutiny – rather than on the pragmatic considerations that may underpin deference in other contexts. As explained in the next section, this points to an approach which emphasises issues

[275] Ibid at 79-80.
[276] Elliott ibid at 80 offers the following examples of varying levels of substantive scrutiny: reasonable in the *Wednesbury* sense (ie 'so unreasonable that no reasonable authority could ever have come to it') versus 'cogent reasons' for the decision, reasonable versus proportionate, 'reasonably necessary' versus 'strictly necessary', and 'manifestly lacking a reasonable justification' versus 'accompanied by very weighty reasons'.
[277] Ibid at 80.
[278] Ibid at 84.
[279] Konstant 'Legality and deference' op cit note 166 at 77.

of constitutional competence (or democratic legitimacy) rather than the courts' institutional competence.

3.3.2 *In search of a principled, coherent approach to the distinction between administrative and executive action*

As explained in chapter two, the separation of powers requires courts simultaneously to insist on constitutional compliance whilst not impermissibly intruding into the executive domain. There is a need for judicial restraint flowing from concerns as to the constitutional and institutional competence of the courts and from the principle of administrative efficiency.[280]

The concern as to *constitutional competence* (sometimes referred to as democratic legitimacy) has two aspects in the present context: (a) the need to refrain from undue judicial interference in the independence and pre-eminent domain of the executive branch; and (b) the executive's superior democratic pedigree (as compared to the courts). Aspect (b), in turn, arises from two ideas: (i) certain matters are best allocated to a branch of government that enjoys superior democratic pedigree and is accountable to the electorate; and (ii) in the case of statutory power, the legislature (which enjoys superior democratic pedigree) has allocated the power to the executive decision-maker.

While all of these concerns underpin the need for *adjudicative* deference, (b)(ii) is unhelpful in seeking to distinguish between administrative and executive action. This is because the majority of administrative action consists of the exercise of statutory power.[281] On the other hand, it seems to me that (a) and (b)(i) have an important role to play in delineating administrative action from executive action. In particular, these aspects of constitutional competence suggest that matters that go to the heart of government's executive role, and in respect of which one would expect democratic (or political) accountability to predominate over legal accountability, might be subject to less rigorous judicial scrutiny. The best examples of these type of matters are those that involve 'high policy' or where 'political judgement' predominates. I return to these categories of decisions below.

The role of *institutional competence* in seeking to distinguish administrative from executive action is less clear. It will be recalled that this concern is based on the notion that courts are not well suited to making decisions on certain matters, ie those that are deeply political, policy-laden or polycentric or those that require specialist expertise.

[280] Chapter 2, paras 4.1 and 4.3.
[281] *Motau* supra note 2 para 39.

It seems to me that the fact that the court might be somewhat hamstrung in interrogating the reasonableness of a decision, due to its relative lack of expertise on technical or policy matters, can in most instances be addressed through appropriate adjudicative deference (together with variability), particularly where, as is now trite, a reviewing court does not assess the correctness of the administrative decision. It is thus ordinarily unnecessary to exclude decisions from the application of administrative-law review on the basis of concerns as to the courts' institutional competence. This is reflected in those cases in which our courts have scrutinised highly complex decisions on administrative-law grounds. They have, for example, subjected complex, polycentric decision-making in the context of fishing rights allocations to scrutiny under PAJA,[282] despite the SCA acknowledging, in *Phambili Fisheries*, that '[j]udicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency' and noting that the court 'cannot even pretend to have the skills and access to knowledge that is available to the Chief Director [of Marine Coastal Management]'.[283] The Constitutional Court has also been undeterred by the technical nature of decisions, or the technical expertise of the decision-maker, in applying PAJA to the determination of a medicine dispensing fee on the recommendation of a specialist pricing committee[284] and, more recently, to the energy regulator's determination of a maximum gas price.[285]

Accordingly, while the level of complexity and technical expertise might necessitate adjudicative deference, these considerations are not, in my view, a good basis to categorise the relevant decision as executive action. I thus disagree with the emphasis that the *ARMSA* court placed on the complexity of the determination of magistrates' remuneration in finding that such determination constituted executive action.[286]

The difficulties of institutional competence that arise in relation to decisions that are polycentric or policy-laden may, however, have some relevance in considering whether or not such decisions amount to executive action. In this context, the judicial task of scrutinising the reasonableness of the decision is particularly challenging and the relative institutional shortcomings of the court may be pronounced. One reason for this would appear to be that

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[282] *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA), *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 183 (SCA).
[283] Supra note 282 para 53. Another category of cases in which polycentric decision-making is regularly subject to administrative-law scrutiny arises in the context of town planning and building permissions.
[284] *New Clicks* supra note 57.
[285] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2019 (10) BCLR 1185 (CC).
[286] Supra note 1 para 43.

decisions on an appropriate policy depend not so much on technical expertise which might be explained to the court through expert evidence, but on practical expertise arising from repeated exposure to the issues that arise in, for example, foreign policy and international relations. It is also in this area that uncertainty as to the likely consequences of the decision-maker's actions is likely to be particularly pronounced 'because the set of variables which determines the future may not be fully known or understood'.[287] Simply put, it is difficult for a court to establish a yardstick for measuring the reasonableness of decisions which are heavily policy-laden and then to measure whether or not the decision falls short.

The concern based on institutional competence in relation to policy-laden decisions should, however, not be overstated. As noted elsewhere in this chapter, our courts do not always shy away from reviewing policy-laden decisions on administrative-law grounds. Moreover, in Bill of Rights cases our courts are accustomed to reviewing the reasonableness of policies.[288] In particular, they have readily reviewed the reasonableness of measures (including policies) aimed at the progressive realisation of socio-economic rights[289] – an area where decision-making is heavily influenced by policy considerations, potentially impacting on financial expenditure and resource allocation.[290] But it bears emphasis that courts do so pursuant to a clear constitutional mandate to review the reasonableness of such measures[291] and where it might be said that the courts' questionable institutional incompetence on policy matters is a small price to pay for justiciable, enforceable socio-economic rights.

It thus seems to me that concerns as to the institutional competence of courts might bolster the argument from constitutional competence described above, but that a relative lack of institutional competence is not, on its own, a particularly compelling basis for classifying conduct as executive action.

The other constitutional consideration that might militate in favour of judicial restraint is the principle of administrative efficiency. Nevertheless, it seems to me that efficiency

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[287] Paul Daly *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) at 94. Daly refers to national security and economic policy as fields where uncertainty as to likely future consequences is particularly pronounced (ibid).

[288] Eg government conduct which infringes fundamental rights is subject to scrutiny for reasonableness and justifiability under the limitations clause (s 36(1) of the Constitution).

[289] See eg *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 41-2, *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) paras 97-114.

[290] See eg Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) at 565-8, Mia Swart & Thomas Coggin 'The road note taken: Separation of powers, interim interdicts, rationality review and e-tolling in *National Treasury v Opposition to Urban Tolling*' (2014) 5 *Constitutional Court Review* 346 at 357-8.

[291] Eg s 27(2) of the Constitution requires the state to take 'reasonable' measures to achieve the progressive realisation of the rights to health care, food, water and social security.

concerns are not a good basis for delineating between administrative and executive action. Not only can efficiency cut both ways (in that it may either be undermined or promoted by judicial review),[292] concerns as to administrative efficiency should, generally, affect the *content* of administrative-law review rather than its *scope*. Skweyiya J made this salutary point in *Joseph*:[293]

> 'Administrative efficiency is an important goal in a democracy, and courts must remain vigilant not to impose unduly onerous administrative burdens on the State bureaucracy. In my view, however, the issue of administrative efficiency primarily informs the content of the duties imposed by administrative law rather than the scope of application of administrative law. The latter is fundamentally determined by the relationship between the administrative State and its citizens and should not be strictly delimited.'

The analysis set out above suggests that the most significant factors in assessing whether or not conduct amounts to executive action are the extent to which the decision involves the formulation of policy (or, perhaps, is otherwise policy-laden) and the extent to which it involves what can be referred to as political judgement. I now turn to consider these related factors prior to considering other factors that may be relevant to the distinction between executive and administrative action.

(a) The most significant factors: policy-laden nature and political judgement

As noted above, the first Constitutional Court judgment to distinguish administrative action from executive action, *SARFU*, described the distinction as being between the implementation of legislation and the formulation of policy (or the initiation of legislation) and indicated that the line between these concepts may be difficult to draw.[294] The relevance of policy formulation to the line-drawing exercise is also apparent in the statement in *Motau* that 'the important question' in the context of that case was 'whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative'.[295]

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[292] Hugh Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) 121 *SALJ* 438 at 440.
[293] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 29.
[294] *SARFU* supra note 17 paras 142-3.
[295] Supra note 2 para 44.

A number of cases decided since *SARFU* have held not only that policy formulation constitutes executive action[296] but also that the policy-laden nature of a decision may place it on the executive end of the continuum between administrative action and executive action.[297] As the SCA noted in *Beauvallon*, 'a decision heavily influenced by considerations of policy is a clear indication of it being executive, rather than administrative, in nature'.[298] Perhaps the best example of such a case is *Scalabrini I*, in which the SCA held that the decision to close a refugee reception office was executive in nature because it was heavily influenced by policy.[299] Nugent JA went so far as to say that, while the extent to which a decision is driven by considerations of executive policy is not necessarily the only factor to be taken into account, it was determinative in that case.[300]

It is difficult to discern when the policy nature of a decision is sufficient to take it beyond the realm of administrative action. As the Constitutional Court made clear in *Ed-U-College*, even policy formulation can, in certain instances, constitute administrative action – if it constitutes policy in the narrow sense (ie the formulation of policy in the course of implementing legislation).[301] In addition, we have seen that our courts have not only emphasised that most administrative actions involve a policy element; they have, in cases like *Shuttleworth*, held that conduct with a strong policy component constitutes administrative action.

In attempting to ascertain when the policy nature of a decision is sufficient for that decision to constitute executive action, it is, as explained above, important, first and foremost, to have regard to the question of constitutional competence. This calls for a consideration as to whether the application of administrative-law review (particularly by means of reasonableness review) would inappropriately intrude into the executive's pre-eminent domain in circumstances in which the executive decision-maker enjoys superior democratic pedigree as compared to the court. As I see it, this translates into the, admittedly open-textured, question as to whether it is appropriate for the decision to be subject to democratic

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[296] Eg *Afriforum* supra note 157 para 35, *SARIPA (High Court)* supra note 138 paras 100-5.
[297] *Scalabrini I* supra note 152 paras 57-8, *Beauvallon (SCA)* supra note 162 para 12.
[298] *Beauvallon (SCA)* supra note 162 para 12.
[299] Supra note 152 paras 57-8.
[300] Ibid para 58.
[301] *Ed-U-College* supra note 11 para 18.

(or political) accountability rather than legal accountability[302] or whether there is some other compelling reason why the decision should not be subject to reasonableness review.

The concern as to constitutional competence has particular resonance in the context of policy decisions in that the application of reasonableness review to such decisions can, in certain instances, act as a barrier to the adoption of a particular policy. For example, if the courts were to find that it is unreasonable to establish toll roads in major metropolitan areas, to authorise the construction of nuclear power stations, to privatise a state-owned entity, or to conclude a multilateral treaty, the government might not necessarily be able simply to adjust the policy by changing the manner of its implementation. This would frustrate the democratic enterprise as the government would be unable to govern in accordance with what might constitute its key policies, in circumstances where those policies do not necessarily infringe fundamental rights.

The analysis set out above indicates that the exclusion of policy decisions from the ambit of administrative action should be confined to matters of 'high policy',[303] ie policy formulation and policy-based decisions that lie at the heart of executive power such that it would be inappropriate to subject them to administrative-law scrutiny. These matters are most likely to arise in sensitive, policy-driven areas such as foreign affairs and economic policy.[304] They would include, for example, decisions as to whether or not to grant diplomatic protection,[305] to withdraw from a treaty or to adjust interest rates. They could also include more mundane policy decisions such as a decision to dispose of state property,[306] to

[302] As Froneman J noted in his separate judgment in *National Treasury v Opposition to Urban Tolling Alliance* 201 (6) SA 223 (CC) para 93: 'The playing field for the contestation of executive-government policy is the political process, not the judicial one'. See also Davis J in *Mazibuko NO v Sisulu NO* 2013 (4) SA 243 (WCC) at 256, Cora Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 163 at 191-2. The exercise of all public power is, of course, subject to some measure of legal accountability in the form of legality review.

[303] *Motau* supra note 2 para 37: 'Executive powers are, in essence, high-policy or broad direction-giving powers'.

[304] Alistair Price 'The content and justification of rationality review' (2010) 25 *SAPL* 346 at 363, in discussing the variable application of rationality review, describes these type of decisions as 'lying close to the heart of executive power'.

[305] *Kaunda* supra note 124 para 77: 'A decision as to whether [diplomatic] protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the Executive'. See also *Kaunda* para 172 (per Ngcobo J).

[306] *Londoloza Forestry Consortium (Pty) Ltd v SA Forestry Company Ltd* 2008 JDR 0816 (T) at 15-16. Contrary to the (prima facie) view expressed in *Diggers Development* supra note 138 paras 39-40, executive action should, in my view, not include a decision of a municipal council to approve the sale of municipal land to a particular purchaser.

outsource the provision of goods or services, or, arguably, to cancel a tender on the basis that the goods or services are no longer required.[307]

Executive action should, however, not include regulatory functions in the sense of decisions which coerce or allocate benefits to (or withhold benefits from) members of the public or regulated persons. These sorts of decisions – such as a decision by a regulator to grant a licence or to impose an obligation on a licensee by means of an amendment to its licence conditions – are quintessentially administrative acts.[308] They should not be excluded from the ambit of administrative action simply because they may be heavily influenced by policy considerations. By way of example, the imposition of licence conditions constitutes administrative action even if (as is often, if not invariably, the case) it is motivated by policy considerations such as the promotion of black economic empowerment, consumer protection, health and safety or the protection of the environment.

A similar approach to that outlined above should be adopted to the other main factor identified by our courts as pointing to the categorisation of conduct as executive action: the exercise of 'political judgement'[309] or, put differently, 'distinctively political decisions'.[310] Decisions should be characterised as executive action on this basis only if the decision involves political judgement of such a degree that it would be inappropriate to apply the rigour of administrative-law review.[311] This category of exclusion should be limited to instances where the decision is subject to political, rather than legal, accountability (save for contraventions of legality).

Perhaps the best example of these types of decisions are some of the President's constitutional powers that are specifically excluded from PAJA's definition of 'administrative action', such as, appointing a commission of inquiry, calling a national referendum, and

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[307] *SAAB Grintek* supra note 138 paras 20-1. See also *Nambiti* supra note 138 paras 31, 43.

[308] See eg *Scalabrini I* supra note 152 para 95, *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA) para 74. See also paras *(c)* and *(d)* of PAJA's definition of 'decision'.

[309] The phrase 'political judgment' was first used by the Constitutional Court in the context of delineating administrative action in *Pharmaceutical Manufacturers* supra note 131 para 72.

[310] *Moerane v Buffalo City Metropolitan Municipality* [2017] ZAECGHC 126 para 20.

[311] The idea that certain public decisions may be made on political grounds is reflected in *Fedsure* supra note 10. As discussed above, the court held, at para 41, that the legislative decisions of a municipal council are 'influenced by political considerations for which they are accountable to the electorate' and members of the council are entitled to vote for or against the resolution on 'political grounds'. See also *DA v Ethekwini* supra note 99 para 19.

appointing ambassadors and members of Cabinet.[312] As Rogers J recently noted in relation to the latter:[313]

> 'It is difficult to imagine a power closer to the heartland of the President's personal preferences than the power to appoint and dismiss ministers and deputy ministers; it is by its nature highly discretionary. It may well be that the exercise of these powers can be impeached on the ground of irrationality but the threshold for judicial interference is likely to be very high. Of course, if bad faith could be properly proved by satisfactory evidence, interference might follow more readily. In general, though, I think it can be said that the primary consequence of decisions to appoint and fire cabinet ministers which the public or sectors of it regard as bad decisions, is political rather than legal.'

Another example of a decision that is of such a political character so as to fall beyond the scope of administrative action is a decision by members of a legislature to adopt a motion of no confidence.[314] In these sort of instances, we might accept that a decision is so political in nature that it is not required to be reasonable. If we accept that such a decision may be made for nakedly political reasons, it seems futile to apply the constraint of reasonableness as it is virtually impossible to ascertain what constitutes a reasonable or an unreasonable basis for the decision. As Van Reenen J indicated in *Van Zyl*, a motion of no confidence vote is not capable of assessment against the criterion of reasonableness.[315]

Matters of high politics appear to be the type of decision which Khampepe J had in mind in *Motau*, in stating that the higher level of scrutiny which administrative-law review entails may not be appropriate where 'the power bears on particularly sensitive subject-matter'.[316] The classification of these decisions as executive action reduces the separation of powers tension that might arise in respect of politically sensitive matters, by ensuring that courts do not become embroiled in assessing the reasonableness of such decisions except where the infringement of fundamental rights is at stake.

The focus of the enquiry should, however, remain firmly on the nature of the power rather than on the fact that a particular decision might be politically sensitive or the subject of party-

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[312] Sections 84(2)*(f)*, *(g)* and *(i)* and 91(2) of the Constitution read with para *(aa)* of PAJA's definition of 'administrative action'.
[313] *Democratic Alliance v President of the Republic of South Africa* [2017] ZAWCHC 34 para 7.
[314] See *Van Zyl v New National Party* [2003] 3 All SA 737 (C) para 42.
[315] Ibid para 50.
[316] Supra note 2 para 43.

political controversy. It is the inherently political nature of a decision that may give rise to concerns relating to the courts' constitutional competence, not the political sensitivity of a particular decision. If, for example, a decision to deny a visa constitutes administrative action, that decision should not transform into executive action simply because the person to whom a visa is denied is politically controversial.[317] Similarly, a decision should not be categorised as executive action simply on the basis that it excites political controversy. On the contrary, administrative decisions often give rise to political controversy. For example, administrative decisions to grant environmental approval to a coal-based power station or to authorise fracking are likely to be far more politically controversial than most Cabinet appointments.

It would also be incorrect to regard administrative action as confined to what the *Motau* court referred to as 'lower-level powers' or 'low-level bureaucratic power'.[318] The use of these phrases in *Motau* was, on my reading, simply intended to convey that executive action involves matters of 'high' policy, which generally consists of broad decision-making, and that administrative action, in contrast, is more specific and at a lower level of abstraction. It is also consistent with the approach to matters involving political judgement discussed above, ie high-level decisions which are properly subject only to political accountability and which tend to be made by high-level functionaries.[319] This, however, does not detract from the fact that administrative acts are often taken by the most senior of functionaries (eg the President and Cabinet ministers) and may have very significant effects (eg determining the maximum price of medicines or the charge imposed on the export of capital).[320]

(b) Other potentially relevant factors

The Constitutional Court in *Motau*, tentatively, identified two additional factors, namely, the constitutional source of the power and the relatively unconstrained nature of the power, as pointing towards executive action. As noted above, neither of these factors is particularly helpful in attempting to distinguish executive from administrative action. These pointers are, as Khampepe J acknowledged in *Motau*, often merely 'symptoms' of the 'bigger questions' as to whether the decision is more closely related to the formulation of policy than the

[317] *Buthelezi v Minister of Home Affairs* [2012] ZAWCHC 3 para 16 (dealing with a delay in considering a visa application for the Dalai Lama). The classification of the grant or refusal of a visa as administrative action was not addressed on appeal in *Buthelezi v Minister of Home Affairs* 2013 (3) SA 325 (SCA).
[318] Supra note 2 paras 37, 49. Similarly, it would be mistaken to regard administrative action as decisions that are purely 'operational'. Cf *Afriforum* supra note 157 para 34.
[319] See *Sokhela* supra note 1 para 67, footnote 49, which indicates that 'the executive functions of government' include 'the actions of high political office bearers in the upper tier of decision-making in government'.
[320] *New Clicks* supra note 57, *Shuttleworth* supra note 163.

implementation of legislation and whether or not it is appropriate to subject the decision to the more rigorous scrutiny of administrative-law review.[321]

I have also explained that, contrary to the Constitutional Court's reasoning in *ARMSA*, the complexity of the decision and its significance are not, in my view, good bases to distinguish executive action from administrative action.[322] In addition, it seems to me that one of the factors identified in *SARFU*, ie whether the action 'involves the exercise of a public duty',[323] is unhelpful in drawing this distinction, given that a public duty will often underlie both executive and administrative action.

It appears from the case law that three further factors might potentially play a useful role in distinguishing between administrative and executive action.

The first factor is the statutory source of the power. Our courts have, in particular, held that, while an executive power may be sourced in statute, a statutory source generally points towards the classification of the power as administrative action.[324] Indeed, as we have seen, the implementation of legislation lies at the core of the concept of administrative action.[325]

Another factor to which our courts have, on occasion, had regard in this line-drawing exercise is the impact of the decision on affected persons. For example, the High Court in *Beauvallon* suggested that the far-reaching consequences of the decision to close public schools strongly pointed towards the decisions 'being subject to the full range of review grounds set out in PAJA'.[326] This factor is a relatively weak consideration that should, in my view, be applied with caution, particularly given that executive action can often have far-reaching consequences, including impacting on fundamental rights. In addition, this factor does not seem to play a role where the decision impacts on the rights or interests of persons who occupy high public or political office, such as the head of the NIA.[327]

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[321] Supra note 2 para 44.
[322] Cf *ARMSA* supra note 1 para 43.
[323] Supra note 17 para 143.
[324] *Motau* supra note 2 paras 39-40.
[325] *SARFU* supra note 17 paras 142-3, *New Clicks* supra note 57 para 126, *Motau* supra note 2 para 37. See also *Motala* supra note 308 para 72, stating that, although the keeping of a panel of persons found to be suitable for appointment as liquidators and administrators of estates has no statutory base, 'it is a tool used for the implementation of a power bestowed by legislation upon the Master; a factor which weighs heavily in favour of the compilation of the panel being of an administrative nature'.
[326] *Beauvallon (High Court)* supra note 162 para 31. The court also stated that the impact of the decisions on fundamental rights was an important consideration in determining whether the decisions constituted administrative action (ibid). See also *Sokhela* supra note 1 para 81.
[327] Eg *Masetlha* supra note 142.

The other factor upon which reliance is placed in some cases, particularly those involving decisions of municipal councils, is that the decision is taken by a deliberative, elected body. In *Steele*, for example, the High Court held that a resolution of a local council to remove speed bumps from two public roads did not constitute administrative action, remarking that the council did not implement any particular law and that the decision was taken by 'a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted'.[328] This factor also weighed with the SCA in *DA v Ethekwini*, in holding that a decision by a municipal council to change street names did not constitute administrative action (although the court did not decide the 'somewhat intricate question' as to whether the decision constituted executive or legislative action).[329]

In my view, the fact that a decision is taken by an elected, deliberative body the members of which may have disparate reasons for voting in favour of the decision is not, in itself, a good basis for holding that the decision does not constitute administrative action.[330] Such an approach undermines the principle of accountability. It results in a situation in which decision X taken by an individual functionary is administrative action but decision Y taken by a collective is not, even though there may be no substantive difference between decisions X and Y. It enables a local authority 'to avoid the requirements of administrative law by making administrative decisions in a deliberative forum'.[331] It is also inconsistent with at least one judgment which held that a decision of a local council to close a taxi rank constituted administrative action.[332] Moreover, the emphasis on the impracticality of furnishing reasons for deliberative decisions is at odds with the decision in *JSC v Cape Bar Council*,[333] which rejected an argument that the Judicial Services Commission is not required to give reasons for its decisions that were taken by majority vote pursuant to a secret ballot.

The focus in cases involving deliberative decisions of municipal councils should rather be on whether, given the nature of the decision at issue, it is constitutionally acceptable for the decision to be made for purely political reasons and for the council to be subject only to political accountability (provided it stays within the bounds of legality). This is consistent

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[328] *Steele v Southern Peninsula Municipal Council* 2001 (3) SA 640 (C) at 644.
[329] Supra note 99 paras 18-20. See also *Mazibuko v Johannesburg* supra note 138 para 130, and, in the context of a provincial legislature, *Van Zyl* supra note 314 paras 42-50.
[330] For a criticism of *Steele* on this basis, see Klaaren and Penfold op cit note 28 at 63-33.
[331] Klaaren and Penfold op cit note 28 at 63-33.
[332] *King William's Town Transitional Local Council v Border Alliance Taxi Association* 2002 (4) SA 152 (E).
[333] *Judicial Services Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) para 50.

with the SCA's emphasis in *DA v Ethekwini* on the original constitutional source of the power and the fact that the decisions to rename streets 'were clearly influenced by political considerations for which the elected members are politically accountable to the electorate'.[334] That being the case, this category of exclusion is an instance of decisions involving political judgement discussed above.

4. CONCLUSION

The distinction between administrative action and the other core types of public power – legislative, executive and judicial action – provides a good illustration of the relationship between substantive reasoning and the nature of the test to be adopted in determining whether or not conduct amounts to administrative action.

In distinguishing administrative action from legislative and judicial action, it is possible, without compromising substantive reasoning, to formulate the test in relatively precise terms. It is, however, formalistic to apply a test to these distinctions – as some judgments have suggested – which focusses only on the *function* and asks whether it is legislative (ie rule-making) or judicial (ie adjudicative) in nature. As the approach of the majority in *Sidumo* makes clear, regard should also be had to the *functionary*. The test for determining whether a function is administrative, legislative or judicial, for purposes of delimiting 'administrative action', is thus *both* institutional and functional, in the sense that a function will only constitute an excluded legislative or judicial act if it is: (a) a legislative act performed by an elected and deliberative legislature; or (b) a judicial (ie adjudicative) act performed by a court or judicial officer.[335]

That being the case, administrative adjudication or, put differently, quasi-judicial decision-making, constitutes administrative action. Similarly, administrative rule-making would generally constitute decision-making 'of an administrative nature' and would amount to 'administrative action' if the other elements of PAJA's definition are met. This approach accords with substantive reasoning and is, to use O'Regan J's phrase in *Sidumo*, 'constitutionally appropriate'.[336] There is, in particular, no compelling separation-of-powers reason why administrative-law review should not apply to adjudication and rule-making by an executive functionary. Moreover, the application of administrative-law review to these forms of decision-making enhances accountability, responsiveness, openness and

[334] Supra note 99 para 19.
[335] Klaaren & Penfold op cit note 28 at 63-48.
[336] Supra note 15 para 138.

participation, particularly where these forms of decision-making are, unlike the legislative and judicial acts of an elected legislature or a judicial officer, not subject to alternative forms of constitutional accountability.

The distinction between administrative and executive action is more complex. In this context, our courts, correctly, note that it is not possible to formulate a precise test for drawing this distinction. Various factors are rather considered, with the underpinning question being 'whether it is *appropriate* to subject the power to the more rigorous, administrative-law review standard'.[337] This open-ended test allows for various substantive considerations to be taken into account in assessing whether the conduct is administrative or executive in nature.

A perusal of the case law indicates that the open-ended test for delimiting administrative and executive action has produced various anomalies. By way of illustration, it is difficult to reconcile those cases, like *Scalabrini I*, which indicate that the policy-laden nature of a decision is, in certain instances, sufficient to remove it from the ambit of 'administrative action', with the finding in *Shuttleworth* that a decision with significant policy and fiscal overtones fell within that concept. It is also not easy to reconcile the judicial statements that administrative action consists of 'lower-level powers'[338] and that increased complexity points towards executive action[339] with cases such as *New Clicks* and *Phambili Fisheries*, in which far-reaching, complex decisions by senior members of the executive were reviewed as administrative action, or *PG Group*, where the court classified highly complex decision-making by a specialist regulator as administrative action. Moreover, the *ARMSA* court's reliance on the fact that the decision to determine magistrates' remuneration was carefully prescribed by legislation in concluding that the decision constituted executive action[340] is difficult to square with the statement in *Motau* that the fact that a power is closely circumscribed by legislation 'might be indicative of the fact that a power is administrative in nature'.[341]

The challenge is to develop a coherent, principled approach to the distinction between administrative and executive action, and for our courts, in individual cases, to engage in what

[337] *Motau* supra note 2 para 44.
[338] Ibid para 37.
[339] *ARMSA* supra note 1 para 45.
[340] Ibid.
[341] *Motau* supra note 2 para 41.

Wallis J in *Sokhela* described as 'a detailed analysis … of the nature of the public power or public function in question, to determine its true character'.[342]

This enquiry should turn on the question as to whether it is, in light of the separation of powers, appropriate to subject the decision to the more rigorous scrutiny of administrative-law review, as compared to legality review. First and foremost, this more rigorous scrutiny involves the application of reasonableness review. It thus becomes crucial to consider whether or not the separation of powers (and the accompanying principle of judicial restraint) is adequately addressed by courts reviewing the reasonableness of the exercise of the relevant power whilst showing respect to the choices and findings of the decision-maker (and doing so in a manner in which the intensity of reasonableness review varies depending on the nature of the decision), or whether judicial restraint is adequately addressed only by not subjecting the decision to scrutiny for reasonableness. This primarily depends on considerations that go to constitutional competence, namely, the need for courts not unduly to intrude on the independent functioning and pre-eminent domain of the executive, and to recognise that certain matters are best allocated to the executive given its superior democratic pedigree. These are the areas where it can be said that 'the executive has a special sphere of operation in our constitutional order which it is not appropriate to subject to judicial scrutiny by way of s 33 [of the Constitution]'.[343]

This analysis suggests that it is only those matters that go to the heart of the executive's role, and in respect of which one would expect democratic (or political) accountability to predominate over legal accountability, that should be excluded from the ambit of administrative action on the basis of their executive nature. It follows that the factors that should carry the most weight in undertaking this assessment are the extent to which the decision involves policy formulation, is otherwise heavily policy-laden, or is a matter of political judgement – not in the sense that it is politically controversial or the subject of party-political debate but rather in the sense that it should properly be subject to political accountability rather than to legal accountability, provided that the decision-maker does not exceed the bounds of legality.

That being the case, it seems to me that the category of executive actions is relatively narrow. It is limited to matters of high policy or high politics that lie at the heart of executive power such that it would be inappropriate to subject them to administrative-law scrutiny.

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[342] Supra note 1 para 34.
[343] *Sidumo* supra note 15 para 136 (per O'Regan J).

Examples would include matters of economic or foreign policy or a decision to privatise a state asset or, as PAJA makes clear, the calling of a referendum or the appointment and dismissal of Cabinet members.

Motau, tentatively, identified two other factors potentially pointing towards the classification of conduct as executive action: the constitutional source of the power and the breadth of the discretion conferred, or the level of constraints imposed, upon the decision-maker. [344] While these pointers are often unhelpful in seeking to distinguish between administrative and executive action, they may play a useful role in certain circumstances. In addition, it seems to me that the following potentially useful factors might, also tentatively, be extracted from the case law: whether or not the power has a statutory source; the decision's impact on affected persons; and whether the decision was taken by an elected, deliberative body.

[344] Supra note 2 paras 39-42.

CHAPTER FIVE

CONCLUSION

The task of determining the scope of administrative-law review cannot be a formalistic, mechanical exercise. It is task that is to be undertaken having regard not only to the language of PAJA but also to the constitutional landscape and the values emanating from the Constitution, including the separation of powers, accountability and good governance. This calls for a substantive approach – an approach that involves deciding matters according to their substance and the principles or values underpinning them rather than on the basis of their superficial form.

The crucial question under a substantive approach – both for purposes of distinguishing public from private power and for purposes of distinguishing between administrative action and other forms of public power – is whether or not it is *appropriate* to subject the relevant decision to the rigours of administrative-law review. But this question is far too open-ended to serve as the test for distinguishing administrative action from other forms of conduct. As Elliott stated in a different context, there is a need 'to temper an open-textured approach that is appropriately sensitive to underlying concerns with one that recognises the practical need to avoid reducing the field to a state of unhelpful shapelessness'.[1] It is thus useful to assess, first, whether substantive reasoning can be accommodated through the application of a relatively precise test for a particular definitional element of 'administrative action' or, if this is not possible, to adopt an open-ended test that allows for the consideration of various substantive factors.

In seeking to distinguish administrative action from legislative or judicial action, cases such as *Nel*,[2] *Fedsure*,[3] *New Clicks*[4] and *Sidumo*[5] suggest that a relatively precise test is available. It is, in this context, important to avoid formalistic reliance on the *SARFU* dictum that '[w]hat matters is not so much the functionary as the function'.[6] Contrary to Ngcobo J's

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[1] Mark Elliott 'From bifurcation to calibration: Twin-track deference and the culture of justification' in Hanna Wilberg & Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 61 at 75.
[2] *Nel v Le Roux NO* 1996 (3) SA 562 (CC).
[3] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
[4] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).
[5] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).
[6] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 141.

minority judgment in *Sidumo*,[7] the identity of the functionary is relevant to this enquiry, and it is a consideration that I would suggest is no less substantive than the nature of the function.

The test for distinguishing administrative action from legislative or judicial action should thus be both *institutional* and *functional*, ie a function will only constitute an excluded legislative or judicial act if it is: (i) a legislative act performed by an elected and deliberative legislature; or (ii) an adjudicative act performed by a court or judicial officer. If that is the case, the *Sidumo* majority was correct in finding that administrative adjudication amounts to administrative action. This test also indicates that the making of delegated legislation generally amounts to administrative action – a conclusion that is both consistent with PAJA's text and with substantive principle. While this conclusion finds support in Chaskalson J's judgment in *New Clicks* as well as in several SCA judgments given in the wake of that judgment, the issue has not been definitively resolved given that Chaskalson J's judgment did not attract majority support in *New Clicks* and, in the years following that judgment, none of the SCA judgments took the opportunity to analyse this question in any detail.

The type of test that is to be employed in seeking to distinguish between public and private powers or functions and between administrative and executive action is very different. Our highest courts have remarked, in the case of the former, that there is 'no simple definition or clear test to be applied'[8] and, in the case of the latter, that there is 'no universal test'[9] or 'no ready-made panacea or solve-all formula'.[10] In both these contexts, our courts have regard to a range of factors in assessing, on a case-by-case basis, whether the power is public and, if so, whether it constitutes administrative or executive action.

While the use of open-ended tests in these contexts is not, in itself, problematic (as they allow for various substantive considerations to be taken into account in a context-sensitive manner), their open-textured nature presents a risk to certainty, consistency and predictability and carries the potential for outcomes-based adjudication. The track record of our courts on this score is patchy. While some judgments are carefully and openly reasoned, others either err on the side of formalism or do not engage sufficiently with binding precedent. The result is a jurisprudence which is not entirely coherent and judgments that are not always easily reconciled. For example, the suggestion in *Chirwa* that all conduct of a state-owned entity is

[7] Supra note 5 para 203.
[8] Langa CJ in *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) para 186, cited with approval in *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) para 75.
[9] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) para 53.
[10] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 36.

public[11] is difficult to square with those judgments, like *Cape Metro*,[12] which indicate that government sometimes acts privately, and it is not easy to reconcile the judgments that find that a policy-laden decision amounts to executive action with those judgments that conclude that some decisions constitute administrative action despite being heavily influenced by policy considerations. As Hoexter has noted in the context of the distinction between public and private power: '[a]ll too often one may be left with judicial intuition: a haphazard affair' and '[t]o add to the potential for arbitrariness, the factors tend not to be applied uniformly or evenly to the cases, so that features emphasised in one instance might not even be mentioned by the court in another'.[13]

It is thus important, in drawing the lines between public and private power and between administrative and executive action, that care is taken to ensure that all relevant considerations are properly taken into account in the classification exercise. In addition, courts should interrogate whether certain factors might amount to either necessary or sufficient conditions, should scrutinise the weight to be attached to the various factors, and should rigorously consider applicable precedent, neither disregarding it nor mechanically applying it when there are good reasons to distinguish it.

The test for distinguishing between public and private power should, in my view, be refined in one important respect. It should, contrary to the 'classification approach'[14] reflected in decisions such as *Cape Metro*, *Logbro*,[15] *Thabiso Chemicals*,[16] be recognised that government *always* acts publicly – and that the same is true of state-owned entities, and regulatory or service-delivery agencies, established by statute. This approach is consistent with *Chirwa*[17] and, more importantly, with substantive principle. Having regard to the reasons why government is subject to the higher standards and scrutiny of public law, there would seem to be no good reason for distinguishing between government's core functions and its other functions. In particular, government always owes its mandate to the public and is publicly funded, it is always required to act in the public interest, and the desirability of good governance, accountability and transparency animates all of government's functions.

[11] *Chirwa* supra note 8 para 138.
[12] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA).
[13] Cora Hoexter 'A matter of feel? Public powers and functions in South Africa' Mark Elliott, Jason NE Varuhas & Shona Wilson Stark (eds) *The Unity of Public Law?* (2018) 149 at 150.
[14] The term 'classification approach' is taken from Geo Quinot *State Commercial Activity: A legal framework* (2009) at 52.
[15] *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA).
[16] *Government of the Republic of South Africa v Thabiso Chemicals* 2009 (1) SA 163 (SCA).
[17] Supra note 8.

If one adopts this emphatic approach in relation to indisputably public bodies (ie government, state-owned entities and statutory agencies), the functionary predominates over the function in relation to these bodies. It is only when one seeks to classify the conduct of private bodies that it can be said that the nature of the function matters more than the functionary. It is in this context that, as the court states in *AMCU*, 'the predominant focus is on the nature of power that is being exercised'.[18] And the focus of this enquiry should be on whether or not it is appropriate to hold the private entity to the heightened standards of public law (which is a broader enquiry than the question as to whether administrative law should apply). In assessing the nature of the power or function for this purpose, the most important considerations, as I see it, are: whether the actor has a duty to act in the public interest or is at liberty to act for its own private advantage; the extent to which the actor is autonomous or, conversely, subject to control by the state; whether the power is sourced in statute or otherwise derived from government compulsion; and whether the power is coercive in the sense that persons who are bound by the decision have either not consented to the applicable rule or to the body's authority or their consent is not truly voluntary.

While the line between public and private power is difficult to draw, the line between administrative and executive action is even more challenging. In the latter instance, our courts have regard to a range of considerations while *Motau* makes clear that the question as to 'whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review' underpins the enquiry.[19] This question is to be answered having regard to the separation of powers and the accompanying principle of judicial restraint, and largely translates into the question whether separation-of-powers concerns can be addressed by the application of suitable deference (combined with variability) in the reasonableness enquiry or whether it is inappropriate to subject the decision to reasonableness review at all.

The most important factors on this score are whether the relevant decision involves policy formulation or political judgement (or is otherwise heavily policy-laden) to such a degree that administrative-law review is inappropriate. This does not turn on whether the decision is politically controversial or the subject of party-political debate but rather whether it should be subject to political accountability rather than to legal accountability, provided that the decision-maker does not exceed the bounds of legality. The proper scope of executive action

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[18] *AMCU* supra note 8 para 74.
[19] *Motau* supra note 10 para 44.

is thus confined to matters involving high policy or those of a distinctly political character – matters that go to the heart of executive power.

It is important, in making this assessment, that the courts take into account all relevant factors (including also, for example, the source of the power) and that they have careful regard to precedent. And perhaps even more importantly in this most sensitive of areas – where the separation of powers is front and centre and the enterprise of judicial review is conceivably under strain – courts should openly articulate their reasons for either applying PAJA review or the less rigorous grounds of legality review. In this way, a coherent, principled framework might be developed which, in a fairly predictable manner, guides the circumstances in which courts calibrate the level of scrutiny applied to public decision-making.

In contrast to other more controversial elements of the definition of 'administrative action',[20] our courts have generally shown fidelity to PAJA's text in drawing the distinction between administrative and other forms of public power. They have, for example, emphasised the omission of s 85(2)*(a)* from PAJA's list of excluded actions and have indicated that the implementation of legislation, as contemplated in that section, goes to the core of administrative action. The courts have, however, not grappled with the potential difficulty that paragraphs *(aa)* and *(bb)* of the definition of 'administrative action', read with ss 85(2)*(b)* and 125(2)*(d)* of the Constitution, expressly exclude the *implementation* of national and provincial policy. Given the potential breadth of this exclusion, which could be read as excluding various categories of decisions that undoubtedly constitute administrative action in the constitutional sense, our courts will either need to read it down or to find that it is unconstitutional.

[20] See the treatment of the adversely affects right and 'direct, external legal effect' requirements in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA), discussed in chapter 1, para 6.4.

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