Towards Good Governance: Interpreting the Right to Administrative Justice in the Zimbabwean Constitution

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DECLARATION

I, **Paul Chidochashe Kaseke** declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

In 2013, Zimbabwe adopted a new constitution that replaced the 'Lancaster' Constitution adopted at independence in 1980. Unlike its predecessor, the 2013 Constitution introduced an administrative justice right in s68. This right provides every person with a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

The focus of this thesis is how courts should interpret the right to administrative justice in a manner that promotes good governance and administration. Good governance in the Zimbabwean Constitution bears a specific meaning that encompasses social justice, economic stability and the orderly transfer of power during elections. The thesis suggests how courts can approach the right in a way that transforms the nature of governance and administration in the country as part of building a progressive constitutional democracy. The s68 right unfortunately, creates tentative legal uncertainty in as far as the content of the right is concerned. The right may be ineffective if no useful guidelines are in place to inform its content and meaning. The challenge faced by the courts when interpreting this right is how it is to be construed and what protection it offers to the people of Zimbabwe.

It will be seen that the concepts of substantive fairness, prompt, efficient and proportionate administrative conduct are new additions to Zimbabwe's administrative law framework and these need to be defined accordingly. Substantive fairness is in fact a new addition to the principle of administrative law and a theory of this is postulated in the thesis to provide a starting point for the analysis of the right. It will also be seen that the realization of the s 68 right depends on a litany of factors. These include the creation of a new law to give effect to the constitutional right, creation of specialist tribunals dealing with administrative justice, institutional reform of the Zimbabwe Human Rights Commission, which is tasked with the protection of rights including the right to administrative justice and the willingness of courts to interpret s68 progressively. The thesis makes recommendations for the practical changes required to ensure that the right to administrative justice is realized and while doing so, enhancing good governance as defined in the Constitution of Zimbabwe.

Dedication

This study is dedicated to the loving memory of my late father, Professor Edwell Kaseke who motivated me to start this journey. I am saddened that he did not live to see its completion, but I am satisfied that this is a legacy to be added to his name and I know he would have been so proud to see the fruits of his motivation and principles.

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TABLE OF CONTENTS

Chapter 1

Introduction: The road to good governance

1.1 Background to the study 11

1.2 Nature and scope of the study 13

(a) Title and aim of the study 13

(b) Research question to be explored 14

(c) Problem statement 14

1.3 Synopsis of chapters and conclusion 15

Chapter 2

Structural Weaknesses of pre-2013 Zimbabwean administrative law

2.1 Introduction 17

2.2 Background to the creation of the Constitution 20

2.3 Introducing the administrative justice right 25

2.4 An overview of the ZAJA 28

2.5 Overview of the common law 32

2.6 Development of administrative law under the ZAJA 34

2.7 Principles of Natural Justice 37

2.8 Lawfulness 51

2.9 Reasonableness 59

2.10 Right to reasons 62

2.11 Remedies 66

2.12 Weaknesses of the Common Law 71

2.13 Weaknesses of the ZAJA 76

2.14 Conclusion 82

Chapter 3

Significance of s68 and the constitutionalisation of the right to administrative justice

3.1 Introduction and outline of chapter 87

3.2 Good governance 88

3.3 Constitutionalisation of rights 96

3.4 The significance of constitutionalisation of the right to administrative justice 111

Chapter 4

New concepts introduced by s68

4 Introduction and outline of chapter 119

4.1 Substantive Fairness 120

4.2 Proportional Administrative Conduct 152

4.3 Prompt Administrative Conduct 156

4.4 Efficient Administrative Conduct 163

4.5 Impartial Administrative Conduct 167

4.6 Conclusion 168

Chapter 5

Judicial Avoidance in the Engagement of s68

5. Introduction and Outline 171

5.1 Judicial Avoidance of s68 in Zimbabwe 172

5.2 The Doctrine of Constitutional Avoidance 179

5.3 Executive Evasion-avoidance of politically sensitive matters 194

5.4 Strategic avoidance 202

5.5 Textual difficulties 203

5.6 The cost of avoidance 204

5.7 Conclusion 207

Chapter 6

Recommendations and Suggested Guidelines

6.1 Introduction 209

6.2 Reform and Strengthening of Institutions giving Effect to s68 209

6.2.1 Human Rights Commission 210

6.2.2 Administrative Court 220

6.2.3 Setting up Administrative Tribunals 222

6.3 Creation of an Act giving Effect to s68 224

6.3.1 New Introductory Section and Purpose 228

6.3.2 A New Preamble 229

6.3.3 Definitions 230

6.3.4 Grounds of Review 234

6.3.5 Removal of Ouster Clauses 256

Chapter 7

7. Conclusion 262

Chapter One: Introduction and Background to Thesis: The Road to Good Governance

1.1 Background to the Thesis

In 2013, Zimbabwe adopted a new constitution that was the culmination of a ten-year protracted process.[1] The Constitution was a replacement of the first and only Constitution post-independent Zimbabwe had, which is often referred to as the Lancaster House Constitution.[2] This was not the first time that the country had attempted to replace the Lancaster Constitution but previous attempts were unsuccessful.[3] The first such attempt was the 2000 Draft Constitution drafted by a Constitutional Convention in 1999 and the second was the Kariba Draft Constitution drafted in 2007.[4] The 2000 Draft Constitution provided, amongst other things, that no compensation would be given to white farmers if the British government refused to pay the costs of such compensation. It also set out sweeping powers for the President's office, which was to be supplemented by the office of the Prime Minister. In terms of the 2000 Draft, the term of office for the President was further extended to include two successive five-year terms, which would only begin running from the time of the enactment of the Constitution. This meant that the then sitting President who had at that time completed 20 years in office, would be granted a further ten years if he won the elections. Unlike the Lancaster House Constitution, the 2000 Draft contained a wide array of civil liberties and rights.[5] These were apparently because of the influence of the South African Constitution which after 4 years of enactment, was hailed as one of the best constitutions in the world. [6] Although, to its credit, the Draft provided more protection for Zimbabweans than the Lancaster Constitution. One instance of such enhanced protection was the inclusion of a right to just administrative action. It provided that everyone would have the

[1] C Manyeruke & S Hamauswa 'Rethinking the Concept of a 'People-driven constitution in Zimbabwe: The Case of COPAC's constitution Making Process' (2013) 2 *Southern Peace Review Journal* 175, 175 -176.

[2] The full citation of the Constitution is the 1980 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

[3] Both the 2000 Draft Constitution and the Kariba Draft Constitution which were drafted in 2000 and 2007 respectively, failed to materialize beyond the draft stage. In the context of the 2000 draft, this was due to a referendum and in the context of the Kariba Draft, this was because the draft was abandoned when the new constitution making process began. For more, see National Constitutional Assembly's Report 'Shortcomings of the Kariba Draft Constitution' 2009.

[4] NCA 'Shortcomings of the Kariba Draft Constitution' *National Constitutional Assembly Report* 2009 1.

[5] These rights included extended rights for criminals during trials, enhanced media protection, rights to due process, property protection by the State and others which are discussed in the next paragraph.

[6] C Sunstein *Designing Democracy: What Constitutions Do* (2001) 261.

right to administrative action that is prompt, legal, reasonable, impartial, and procedurally fair.[7] It will later be seen that this right was a much shorter and practical right than the one subsequently created.

The Draft was rejected in a referendum in 2000 with 45% of voters endorsing it while 55% rejected it.[8] After the rejection of this Draft, talk of a new constitution remained the subject of political campaigns but it was only in 2009 that it became a reality. The constitutional drafting project started in April 2009 and was eventually concluded in 2013, hence the Constitution is referred to as the 2013 Constitution. The 2013 Constitution is the thrust of this study and in particular, the right to administrative justice that it creates.

From the outset, it must be noted that the 2013 Constitution entrenches the right to administrative justice,[9] however the Lancaster Constitution did not provide for this right. [10] The right to administrative action could instead be found in the Zimbabwean Administrative Justice Act (hereafter referred to as the "Act" or ZAJA) that codified the common law on administrative law in Zimbabwe.[11] It will be apparent that the concepts of administrative action and administrative conduct are used interchangeably in this section. The Act refers to administrative action while the Constitution refers to administrative conduct. For purposes of this section, the difference is immaterial, and the terms can be interchanged. The right to administrative conduct as encompassed in the current Constitution is intriguingly broad because it does not only cater for administrative conduct that is lawful, reasonable, and procedurally fair as currently provided for in the Act, but it goes further to include the right to efficient, proportional, impartial and substantively fair administrative action.[12] Section 68 reads as follows:

> *'Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Any*

[7] 2000 Draft Constitution, Article 32.
[8] "Zimbabwe's constitution vote", *The Independent*, 11 February 2000, 16.
[9]The Constitution of Zimbabwe Amendment (no.20) Act 2013, s68.
[10] 1980 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979, (Statutory Instrument 1979/1600 of the United Kingdom).
[11] Administration of Justice Act (12 /2004), S 3(1) (a).
[12] Constitution of Zimbabwe, s 68(1).

person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.'

The drafters of the Constitution included a duty for Parliament to enact a new Act, which must be created to give life to the right to administrative justice.[13] The insertion of such a clause may point to the fact that the drafters of the current Constitution were aware that the existing Act did not full embody the Constitutional right to administrative action. Due to the novelty of section 68, case law and academic literature is limited, and consequently, there is a lacuna in Zimbabwean administrative law that needs to be filled which is why this study is necessary.

This study focuses on how Zimbabwean courts should interpret the right to administrative justice in the 2013 Zimbabwean Constitution in a manner that promotes good governance and administration. It will be seen that like any right, the administrative justice right has its weaknesses and strengths, and this is particularly true of this right given its broad and wide sweeping formulation. This study aims to provide insights on how courts can approach the right in a manner that transforms the nature of governance and administration in the country as part of building a progressive constitutional democracy.

The desired change envisaged in this study hinges on a progressive interpretation of the elements to the administrative justice right. Ultimately, this study responds to the question of how the right to administrative justice in the 2013 Constitution can be interpreted by the judiciary in a manner that promotes and results in the realization of good governance and administration of the country - a key objective in the formulation of the right in the 2013 Constitution.

1.2 The Nature and Scope of Study

(a) The title and aim of the thesis

The focus of this study is how Zimbabwean courts should interpret the right to administrative justice in the 2013 Zimbabwean Constitution in a manner that promotes good governance and

[13] Ibid s 68(3).

administration. The right has its weaknesses and strengths in its broad and wide sweeping formulation and the thesis will suggest how courts can approach the right in a way that transforms the nature of governance and administration in the country as part of building a progressive constitutional democracy.

The desired change envisaged in this study hinges on a progressive interpretation of the elements to the administrative justice right, but it also hinges on development of select themes in administrative law. This thesis will explore such themes to achieve the desired effect.

(b) Research Question to Be Explored

The central research question in this study is how can the right to administrative justice in the 2013 Constitution be interpreted by the judiciary in a manner that promotes and results in the realization of good governance and administration of the country? This will be done by offering a doctrinal research, which will in some respects, draw lessons from relevant jurisdictions to fill the gap that currently exists. Due to a similar political and legal discourse, Kenya will be referred to quite extensively.

(c) Problem Statement

The right to administrative action in section 68 of the Zimbabwean Constitution creates tentative legal uncertainty in as far as the content of the right is concerned. While the right is expansive in its protection, a substantive realization of the right requires courts to interpret it in a manner that is progressive and affirms the intended broad scope of the right. The right may be ineffective if no useful guidelines are in place to inform its content and meaning. The challenge faced by the courts when interpreting this right is how it is must be construed and what protection it offers to the people of Zimbabwe. The Zimbabwean judiciary has never dealt with a constitutionally recognized right to administrative justice. The reasons for non-engagement vary and this thesis will explore the reasons for judicial avoidance of the right as this has an impact on how the clause is developed.

While there has been a statutory recognition of the right to administrative justice, the constitutional formulation of the right has contents that are foreign to Zimbabwean administrative law, which creates further difficulties for the judiciary. This challenge is one, which

this study hopes to address by providing guidelines that can be used to assist the judiciary in interpreting this right. Beyond the understanding and/or meaning of the right, this study will also consider the implications of the right in various contexts including, but not limited to, governance and administration.

1.3 Synopsis of Chapters and Conclusion

This study will examine subsets of this major theme and these will form the chapters in this study. Whereas this chapter has set out the creation of the Constitution and the s68 right and its background, Chapter Two of the study considers the structural weaknesses of the ZAJA and pre-2013 administrative law in Zimbabwe. Arguably, by examining these weaknesses, the interpretation of the constitutional right will avoid these loopholes. Chapter Three will examine the significance of the constitutionalisation of the administrative justice right while Chapter four considers the new concepts introduced by s68. Chapter Five examines the concept of judicial avoidance as seen from the courts that have failed to, or hesitated to, recognize the existence of the right and the seismic shift it brings to Zimbabwe administrative law. Chapter Six will explore possible lessons for the development of the right by proposing guidelines for interpretation that can be used by the judiciary in the future as well as legislative measures to be taken to ensure the right is also given effect to fully.

This introductory section has highlighted the road towards the creation of not just a new constitution but a constitutional right to administrative justice in Zimbabwe. The introduction of these signify a fundamental shift in administrative law and governance as defined by the Zimbabwean Constitution. The transformational shift introduced by the constitutional right to administrative justice can, however, only be realised if it is progressively interpreted. This study, therefore, seeks to highlight possible interpretations of elements in the right that can result in the transformation of Zimbabwean administrative law and Zimbabwe as a whole. The next chapter will consider the current framework of Zimbabwean administrative law and the shortfalls that need to be addressed to give effect to s68 of the Constitution.

Chapter Two: Structural Weaknesses of Pre-2013 Zimbabwean Administrative Law

2.1 Introduction

The preceding chapter set out a broad overview and background of the Zimbabwean Constitution to demonstrate why the 2013 Constitution represents a shift in governance and administrative law in particular. This chapter deals with a more technical aspect: the structural weakness of pre-2013 Zimbabwean administrative law, which covers both the common law and the Zimbabwean Administrative Justice Act (ZAJA).

This chapter, therefore, examines the existing legal framework governing administrative law in Zimbabwe and its compatibility with s68 of the Constitution. It will look at lessons to be drawn from the ZAJA and practices under the ZAJA that are inconsistent with s68. Where elements of the existing framework are deemed compatible with s68, these will be interrogated further to see how they can be developed to give effect to good governance and administration. The relevance of this chapter is that it will point to aspects that need to be developed further to give effect to the constitutional right. By examining these weaknesses, the interpretation of the constitutional right will avoid loopholes that have hindered administrative justice in the past. The examination of these weaknesses also leads one to conclude what the administrative justice right in the Constitution seeks to achieve. If administrative justice in Zimbabwe were without need for reform and change, then there would have been no need for the constitutionalisation of the right. The creation of a constitutional right, therefore, arguably points to flaws in the existing framework that necessitated its creation.

While post-independent Zimbabwe had a constitution with a Bill of Rights, the right to administrative justice was not included in the Lancaster Constitution. There was nothing unique about this exclusion, as many other African states that drafted constitutions at the same time as Zimbabwe did, omitted the right from their constitutions.[14] The right to administrative justice in Zimbabwe was secured statutorily in 2004 through the ZAJA, which codified the common law. Zimbabwean administrative law was principally found in two sources – the ZAJA and the common

[14] For example, the 1969 Constitution of Kenya did not contain a right to administrative justice. The same can be said of the 1979 Constitution of the Federal Republic of Nigeria and the Constitution of South Africa ,1983.

law. The Zimbabwean common law of administrative law is heavily informed by English Law [15] and more recently, South African law.[16] Both Zimbabwe and South Africa share a rich Roman Dutch legal heritage, which forms the core of their legal systems.[17]

In my view, the existence of the ZAJA in the absence of a constitutional obligation to create such a law, is noteworthy. This is so because most jurisdictions only enact an Administrative Justice Act in pursuance of a constitutional obligation.[18] In those countries, the enactment of administrative justice legislation is to give effect to a constitutional right to administrative justice. The corollary of this is that if there was no constitutional obligation to create an act giving effect to an administrative justice right, most of these jurisdictions would arguably not have administrative justice legislation.

Notwithstanding the above, however, it can be said that Zimbabwean administrative law was relegated to the history section of the law with very few instances of its application. Indeed, even the commentary on the subject is confined to one text, which was designed as a student guide for use at the University of Zimbabwe by Prof Feltoe.[19] The jurisprudence on administrative law in Zimbabwe is unsurprisingly thin and the engagement of the right by the courts could be better. The courts have been very reluctant to approach this area of law in what can only be termed as an avoidance of administrative law, but this is not without reason.[20] Writing on the South African context, Dean suggested that administrative law was a depressing area of South African law with little use and development[21] but not only is the Zimbabwean administrative law depressing, it is not engaged as it should be. It can be argued that because administrative law and the political framework of a country are so interlinked[22] and related, the 'disinterest' in administrative law or

[15] Feltoe notes that English law has had a profound influence on Zimbabwean administrative law, possibly in part due to the colonial legacy of English law in Zimbabwe see G Feltoe *Administrative Law Guide Zimbabwe* (2013) 1.
[16] Feltoe (note 2 above).
[17] L Madhuku *An Introduction to Zimbabwean Law* (2010) 17.
[18] This was the case for instance, with the South African Promotion of Administrative Justice Act (PAJA) enacted in 2000 to give effect to the constitutional right to administrative justice. One can also consider countries like Namibia and Malawi.
[19] See Feltoe (note 2 above).
[20] This shall be explored in greater detail in Chapter Four under the concept of constitutional avoidance.
[21] WHB Dean 'Our Administrative Law –A dismal science?' (1986) 2 *SAJHR* 164, 164.
[22] C Coglianese 'Administrative Law: The US and Beyond' (2016) *University of Pennsylvania Faculty Scholarship Paper* 1656.

its avoidance is in part due to an all-powerful Executive that is beyond reproach on one hand but also of a limited scope of administrative justice on the other.[23] This fear of engaging and confronting the Executive can aptly be referred to as 'Executive evasion' and will also receive due consideration later in this study. For these and other reasons, administrative law in Zimbabwe has remained relatively underdeveloped. It is hoped that the introduction of s68 will awaken Zimbabwean administrative justice from its deep slumber.

According to the Supreme Court in *U-Tow Trailers*, the ZAJA codified the common law understanding of administrative justice and as such, a detailed discussion of the common law is imperative and perhaps instructive.[24] Another equally important reason to engage the common law is that it was intended to operate alongside the ZAJA. In other words, the common law was not displaced by the ZAJA as will be seen later. This is different from the South African position where the common law was displaced as the primary basis for administrative justice review and now serves a dual role as an independent course for review and an interpretational tool for the Promotion of the Administrative Justice Act (the PAJA).[25] Consequently, the current Zimbabwean position is that essentially, litigants can seemingly choose to use the ZAJA or the common law. There is no hierarchical system that determines which source of law applicants are entitled to rely on in this regard. This is arguably an anomaly, which should fall away due to the creation of s68, which mandates the creation of an Act to give effect to the right and impliedly designates the envisaged Act as the primal mode of review. This Act should be the first port of call with reference to administrative law in Zimbabwe with the common law playing a subsidiary role.[26] Chief Justice Malaba expressed the hierarchical scheme as follows:

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[23] N Chowdhury & CE Skarstedt 'Principles of Good Governance' (2005) *Montreal: Centre for International Sustainable Development Law* 4, 6.

[24] See for example S Hofisi's discussion of the role of the common law <http://www.cfuzim.org/index.php/legal-the-law/8248-the-right-to-administrative-justice> and *Guruva* v *Traffic Safety Council of Zimbabwe* 2009 (1) ZLR 58 (S) 61C & Makarau J's explanation of the relationship between the common law and the ZAJA in *U-Tow Trailers (Pvt) Ltd* v *City of Harare and Another* 2009 (2) ZLR 259 (H) at 267 F-G

[25] See for instance O'Regan J's dictum in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) 22.

[26] *Margaret Zinyemba v Minister of Lands and Rural Settlement* (2016) ZWCC. The South African position reflecting the preferability of the Administrative Justice Act as the primary basis of review is captured by Currie and De Waal in I Currie & J De Waal *Bill of Rights Handbook* 6ed. (2017) 646.

'Where there is an Administrative Justice Act which gives full effect to all the substantive and procedural requirements for effective protection of the fundamental rights guaranteed under s 68, the Act must surely govern the process for the determination of the question whether a specific administrative conduct is in accordance with the standards of administrative justice.'[27]

An important consideration to understanding s68 and how it fits into the scheme of the existing framework is to understand Constitution broadly, and more so, the circumstances leading to the creation of the Constitution, which embodies the administrative justice right.

2.2 Background to the creation of the Zimbabwean Constitution

Zimbabwe adopted a new constitution, which replaced the 'Lancaster Constitution' in 2013 after a four-year drafting period that ended with a referendum.[28] The Constitution was an express fulfillment of the Global Political Agreement (GPA) of 2009, which created the Government of National Unity (GNU) . The GNU was a power sharing arrangement between the ruling party, the Zimbabwe African National Union Patriotic Front, ZANU-PF, and the two Movement for Democratic Change formations after the much disputed 2008 elections.[29] The Agreement was the result of a mandate given by the Southern African Development Community (SADC) Extraordinary Summit on 29th March 2007. This mandate was then endorsed by SADC in Zambia in 2007 and was eventually adopted by the African Union Summit in the same year. Article VI of the Agreement specifically created a mandate for a parliamentary committee to spearhead a constitution making process.[30]

The GPA was necessitated by the heavily disputed and violent 2008 elections.[31] The elections were marred by both interparty and intraparty violence and were described as the most violent

[27] *Zinyemba* (note 13 above).
[28] C Manyeruke & S Hamauswa 'Rethinking the Concept of a 'People-driven constitution in Zimbabwe: The Case of COPAC's constitution Making Process' (2013) 2 *Southern Peace Review Journal* 175 ,175 -176.
[29] Zimbabwe Global Political Agreement, Article VI hereafter referred to as the GPA. See also J Smith-Höhn 'Unpacking the Zimbabwean Crisis: A Situation Report' *Institute for Security Studies* (2009).
[30] Ibid Article VI. This would later be referred to as the Constitutional Parliamentary Committee (COPAC).
[31] J Alexander & J McGregor 39 :4 (2013) 'Introduction: Politics, Patronage and Violence in Zimbabwe' *Journal of Southern African Studies* 749, 752.

elections held in Zimbabwe.[32] The violence was seen as mirroring a war with no end in sight.[33] The period was characterised chiefly by state security-led abductions of civic society and opposition party leaders, intimidation, rape, torture, and murder. According to the Zimbabwe Human Rights NGO Forum, by December 2008 there were 6 rape cases, 137 abductions, 1913 cases of assault ,19 cases of disappearances, 629 displacements, 2352 violations of fundamental rights, and 107 murders.[34] The election period was indeed full of state sponsored and indiscriminate brutality with no clear evidence of the Executive dealing with the crisis.[35] Some organisations noted that the police force, which is meant to protect the citizens from such violence, was to blame for not only ignoring the violations but for heavy-handedness in responding to lawful, peaceful protests. [36] The first round of elections failed to produce a winner as required by the Electoral Act, which requires a win of 50% + 1 to secure the highest office. The MDC and ZANU- PF were thus pitted against each other in a run- off election. Due to intensified violence, the MDC's candidate, Morgan Tsvangirai, pulled out of the election.[37] Both the SADC and the African Union (AU) asked the then South African President, Thabo Mbeki, to mediate and help bring peace to the country. After weeks of President Mbeki's 'silent diplomacy', the GNU was the compromise that brought the parties' leaders together in a power sharing coalition.[38] One of the GNU's major objectives was the ushering in of a new constitution to replace the Lancaster Constitution.

Unlike the Lancaster Constitution, the GPA required a people-driven constitutional drafting process.[39] Specifically, the Constitution Parliamentary Committee (COPAC) was required to hold public debates and consultations at grassroots level to ensure that the text would be reflective of the diverse views of the citizens.[40] In terms of the GPA, the draft would have to be voted for

[32] Zimbabwe Human Rights NGO Forum *Political Violence Report* December 2008
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid 25.
[37] https://www.theguardian.com/world/2008/jun/22/zimbabwe4.
[38] http://www.702.co.za/articles/11719/mbeki-s-quiet-diplomacy-was-a-choice-of-stability-over-democracy-in-zimbabwe
[39] GPA Article VI.
[40] GPA (note 16 above) Article VI.

during a referendum before its adoption. [41] This was another way of including the public in the process thereby ensuring that it was truly a reflection of the people's will.

The Lancaster Constitution that was agreed to at the Lancaster House Conference was a transitional constitution wherein arrangements were made to end white minority rule in Rhodesia while establishing democratic rule.[42] It becomes important to examine and understand the deficiencies of the Lancaster Constitution as these deficiencies were the reason for the adoption of a new constitution. The GPA itself notes that the Lancaster Constitution was merely a transitory document that served its purpose but could no longer serve the country post the transition phase.[43] Naturally, it was a Constitution concluded in a rush and was not as expansive as other constitutions that were drafted over longer time frames. It should be noted that the Lancaster Constitution was created hurriedly over the space of three months and was not a people-centered or indeed a people-driven process.[44] It was instead, the result of much compromise and high-level negotiation. There was, therefore, no constitutional referendum or vote to adopt the Constitution. From its creation in 1979, the Constitution was amended 19 times.[45]

Tawana Nyabeze identifies some defects in the Lancaster Constitution that the drafters sought to remedy. [46] The first is that the Lancaster House Constitution preserved unequal distribution of land ownership between whites and black citizens, which was clearly undesirable since one of the main reasons for waging the liberation war was to regain the land they had been dispossessed of.[47] In most African societies, land is a representation of wealth and to be without land is to be without wealth.[48] The 2013 Constitution addresses this question by stating that equitable sharing

[41] Ibid.
[42] The Lancaster House Conference was held between 10 September 1979 and 15 December 1979. The Conference did not only cover transitional arrangements leading up to independence but also the ceasefire and the constitutional framework.
[43] GPA (note 16 above) Article VI.
[44] D Martin& P Johnson *The struggle for Zimbabwe- The Chimurenga* (1981) 400.
[45] T Nyabeze 'Progressive reform in The New Constitution' (2015) *Konrad-Adenauer-Stiftung e.V. Country Report* 7
[46] Ibid.
[47] Martin & Johnson (note 31 above) 19.
[48] Ibid.

of natural resources, including land, is an aspect of good governance.[49] The Constitution further dedicates two provisions to dealing with deprivation of land for land reform.[50]

Nyabeze has described the Lancaster Constitution as an 'imposed constitution', which excluded the Zimbabwean people from charting their own destiny.[51] It is for this reason that the Kariba Draft Constitution, which was drafted by representatives from political parties in 2007, was discarded, as it did not involve the public.[52] The 2013 Constitution differs greatly in that it was people-driven and people-centered. Representatives from the various political parties in the National Assembly drafted the 2013 Constitution. Collectively, they formed the 25 member-strong COPAC co-chaired by Paul Mangwana from ZANU-PF, Edward Mkhosi from MDC and Douglas Mwonzora from MDC-T.[53]

Nyabeze further notes that by leaving out important aspects, the Lancaster Constitution short-changed or undermined the gains of the liberation struggle.[54] This 'betrayal' had to be rectified to honor the sacrifice of fallen heroes who fought to liberate the country.[55] The 2013 Constitution specifically states that one of its founding principles is to honour the sacrifices made by fallen heroes and in this regard, it covers a very visible gap found in the Lancaster Constitution. [56]

Lastly, one of the major flaws of the Lancaster text is that it is not transformative – it was not created to transform Zimbabwe per se, but merely to ensure a smooth transition from colonialism to democracy.[57] The 2013 Constitution, on the other hand, envisages large scale transformation in almost every facet of society from governance to the economy. The reasons above go to illustrate why a new constitution was needed to replace the Lancaster Constitution.

[49] Constitution of Zimbabwe, s 3(2) (j)
[50] Ibid s 71, 72.
[51] Nyabeze (note32 above) 8.
[52] NCA (note 4 above).
[53] See COPAC Final Draft Constitution Explanatory Notes Section. The Movement for Democratic Change (MDC) has several but the one led by former Prime Minister, Morgan Tsvangirai is referred to as MDC- T. The other MDC formation that broke away from Mr. Tsvangirai's party is simply referred to as MDC.
[54] Nyabeze (note 32 above)
[55] Ibid.
[56] 2013 Constitution (note 9 above), s 3(1)(i)
[57] Nyabeze (note 32 above)

Beyond the above, it is also clear that the scope of the Lancaster Constitution was severely limited and thus it offered minimal protection for the citizenry. The Constitution did not allow for dual citizenship nor did it deal with a modern electoral system with checks and balances.[58] The concept of devolution of power was not dealt with at all and centralized power in the office of the President who enjoyed an unlimited term of office since the Constitution had no cap of terms that could be served.[59] The security sector was not accountable as it should be and allowed for excesses of power by holders of office in the security ranks.[60] The 2013 Constitution recognises these flaws, hence the creation of an independent prosecutorial body,[61] the introduction of dual citizenship[62], the establishment of bodies protecting democracy like the Zimbabwe Anti-Corruption Commission (ZACC)[63], and electoral reforms and limits to the terms of the President.[64]

Post-independent Zimbabwe was dodged by various claims of human rights abuses and a breakdown of the rule of law.[65] In explaining the MDC's lobbying for a new constitution, Mr. Tendai Biti, a former Minister of Finance and MDC-T leader, stated '[t]he current Zimbabwe state is largely based on a culture of violence, corruption and political predation, which in any event form the nucleus of ZANU-PF's DNA. The preamble to the 2013 Constitution makes very clear the need to create a new Zimbabwe underpinned by the values of democracy, rule of law, hard work and the supremacy of God.'[66] It becomes clear that one of the main reasons for the creation of the Constitution was to end the intolerant political climate and restore rule of law, which arguably was partially existent.

The reasons for the enactment of the Constitution also seemingly appear from the preamble, which cites entrenchment of democracy, good governance, a commitment to upholding and

[58] Nyabeze (note 32 above).
[59] Ibid 10.
[60] See for instance various instances where court orders were defied https://www.npr.org/sections/thetwo-way/2016/08/26/491503360/police-break-up-zimbabwe-mega-demonstration-in-defiance-of-court-order
[61] 2013 Constitution (note 9 above) s 39.
[62] Ibid s40.
[63] Ibid s254.
[64] Ibid s95.
[65] Nyabeze (note 32 above).
[66] B Pongo 'Constitution: Change for the sake of it' New Zimbabwe Article available on http://www.newzimbabwe.com/news/printVersion.aspx?newsID=9112

defending human rights and freedoms, as well as the desire to end all forms of oppression and domination as underlying reasons for the adoption of a new constitution.[67]

The making of the Constitution has not yet been fully documented, at least not in writing, but a documentary titled 'The democrats' by Cailia Neisson was released in 2014 showing some of the difficulties in creating the Constitution. [68]

2.3 The introduction of an administrative justice right

While the Lancaster Constitution created novel rights that were not recognized in pre-independent Zimbabwe, it left out several significant ones. It created a declaration of rights with some very basic human rights such as equality, privacy, and the protection from arbitrary state conduct, amongst other things. One of the rights that was left out of that Constitution is the right to administrative justice. This, however, was not a unique position for Zimbabwe and it certainly was not the only African state that omitted the right. The history of the right to administrative justice in Africa shows that this was common for most constitutions drafted in the 1970s and 1980s. Administrative justice was rarely recognised in African constitutions.[69] For example, the 1969 Constitution of Kenya did not contain a right to administrative justice.[70] This right only came about with the creation and adoption of the 2010 Constitution.[71] While this will become a significant discussion point later, it must be stated that the Kenyan narrative is similar to the Zimbabwean narrative and the two countries share a history of rundown governance, abuse of security services, maladministration, and human rights violations.[72] It is for this reason that this study will draw lessons from the Kenyan experience in interpreting provisions of the Constitution.

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[67] 2013 Constitution (note 9 above) Preamble.
[68] https://www.reuters.com/article/us-filmfestival-tribeca-democrats/documentary-democrats-explores-zimbabwes-quest-for-democracy-idUSKBN0ND1YI20150422
[69] For example, the 1969 Constitution of Kenya did not contain a right to administrative justice. The same can be said of the 1979 Constitution of the Federal Republic of Nigeria and the Constitution of South Africa ,1983.
[70] The Constitution of Kenya, 1969.
[71] The Constitution was promulgated on 27 August 2010 but some of its provisions only came into effect in 2013.
[72] A Migai *Institutional Reform in the New Constitution of Kenya* International Centre of Transitional Justice Report (2010) 15.

The 1979 Nigerian Constitution also did not contain a right to administrative justice.[73] South Africa did not have a constitutional right to administrative justice despite having a rather functional administrative law system.[74] Three decades later, many African countries still do not have a constitutional right to administrative justice.[75] In fact, the bulk of the continent still does not have a constitutional right to administrative justice.[76] This makes it indeed admirable that the Zimbabwean Constitution has such a right but it also makes it more difficult to find African comparator states for the purposes of this study.

As demonstrated earlier, the right to administrative justice in Zimbabwe was secured statutorily in 2004 through the Zimbabwean Administrative Justice Act (ZAJA), which canonized the common law. Prior to the adoption of the Constitution, Zimbabwean administrative law was found in two sources – the Act and the common law. Zimbabwean common law administrative justice is heavily informed by English Law and more recently, South African law, since the two jurisdictions are both based on the Roman Dutch law legal systems.[77] The very existence of the Act outside the existence of a constitutional right to administrative justice is noteworthy. Most jurisdictions only enact an Administrative Justice Act in pursuance of a constitutional obligation.[78] In those countries, the enactment of administrative justice legislation is thus to give effect to a constitutional right to administrative justice.

In my view, administrative law when fully utilized, has the potential to remedy and stamp out most elements of bad governance, especially in the Zimbabwean context. This is so because it

[73] Nigeria still does not have a constitutional right to administrative justice- it is instead governed by the common law in this respect. See further J Badamasiny & M Bello 'An appraisal of administrative justice and good governance in Nigeria' (2013) 6 (2) *Journal of Politics and Law* 216.
[74] See the Constitution of South Africa, Act 110 of 1983.
[75] Countries like Angola, Botswana, the Democratic Republic of Congo, Lesotho, Mozambique and Nigeria still do not have a constitutional right to administrative justice.
[76] Of interest is the Zambian Constitutional Amendment of 2016 which though very extensive, fails to create a constitutional right to administrative justice. This further illustrates that many African states still do not see the importance of creating such a right.
[77] L Madhuku *An Introduction to Zimbabwean Law* (2010) 17.
[78] This was the case for instance, with the South African Promotion of Administrative Justice Act (PAJA) enacted in 2000 to give effect to the constitutional right to administrative justice.

forces governments to act within a particular threshold of good administrative practices, thus producing better governance.[79]

Since the adoption of the Constitution, the Government of Zimbabwe has embarked on an exercise to align the various laws and statutory instruments to the Constitution to ensure constitutional compliance.[80] Although the process has been wrought with controversy and has been called a farce by most commentators, it is intended to fulfill the various constitutional provisions that demand specific laws to give effect to the constitutional right.[81] The right to administrative justice is one of those rights. To be exact, s68 (3) of the Constitution states the following:

> *An Act of Parliament must give effect to these rights, and must—*
> *a. provide for the review of administrative conduct by a court or, where appropriate, by 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.*

In Zimbabwe, the standard approach to alignment of various statutes by the relevant government ministry has been to amend existing legislation and insert new provisions determined by the Constitution.[82] While this approach saves time and expedites the alignment process, this is wholly inappropriate where new constitutional rights have been created because the Act being amended was created outside the constitutional framework. In the specific case of the ZAJA, it was not drafted because of a constitutional imperative or mandate and consequently there are no constitutional values it gives effect to. This means that the ZAJA is premised on the common law understanding of administrative law and it would be inadequate to simply provide 'touch ups' and amendments to the Act since this would amount to amending substantial portions of it.

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[79] P Cane *Administrative Law* 4th ed (2004) 439.
[80] https://www.newsday.co.zw/2016/01/21/govt-aligns-154-acts-to-new-constitution/
[81] https://www.dailynews.co.zw/articles/2016/05/03/align-media-laws-with-constitution , See also Veritas Zimbabwe http://www.thezimbabwean.co/2017/05/laws-aligned-constitution/ and Andrew Kunambura 'Government renders Constitution a paper tiger' http://www.financialgazette.co.zw/government-renders-constitution-a-paper-tiger/
[82] This has been the case with the Labour Act, Act 16 1985; the Education Act, Act 5 1987 and Defence Forces Act, Act 27 1982 amongst others.

This thesis will reveal the various deficiencies of the ZAJA, which make it inappropriate for a simple amendment. Feltoe already notes that the Act may well be unconstitutional in some respects and this indicates the need for proper interpretation of the right and corresponding alignment processes.[83] If the right to administrative justice is to be used and seen as a catalyst of both reform and transformation of the Zimbabwean governance landscape, then the Act giving effect to it needs to encompass values and rights enshrined in the Constitution which translates to overhauling the entire existing framework.

2.4 An Overview of the Zimbabwean Administrative Justice Act (ZAJA)

The Zimbabwe Administrative Justice Act (ZAJA) was enacted on the 3rd of September 2004.[84] It was created to canonize the common law around administrative law in Zimbabwe even though no constitutional imperative necessitated its adoption. [85] There is unfortunately no literature on the passage and reasons behind the Act's enactment, therefore, the reason for its enactment without a constitutional imperative to do so, remains debatable.

The effect of the Act was best summed up by then Judge President of the High Court, Rita Makarau in the first litmus test case of the Act. In *U-Tow Trailers v City of Harare and Another*, she held:

> '*That the promulgation of the Act brings in an era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3 (3) of the Act, apply*'.[86]

The Act, however, unlike its counterparts in other jurisdictions, is not the first port of call, nor is it the final resort in administrative law in Zimbabwe. This is clear from section 2 of the Act which states that the rights to appeal and review do not lie exclusively with the Act and the provisions

[83] Feltoe *Administrative Law Guide Zimbabwe* (2013) 22.
[84] The full citation of the Act is The Administrative Justice Act No. 12/2004 (Chapter 8: 28).
[85] *Zindoga & Others v Minister of Public Service* (2006) 2 ZLR 10 (H) 13D-E.
[86] *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) 267 F-G.

of the Act are in addition to existing rights and/or recourse that may exist outside the Act. Thus, by implication, recourse in terms of administrative justice can take place outside the legislative framework.[87]

The preamble sets out the three primary aims of the Act. The first aim is to provide for the right to administrative action and decisions that are lawful, reasonable, and procedurally fair.[88] The Act aims to also provide for the right to reasons for administrative actions or decisions. Lastly, the Act aims to provide courts with appropriate relief for actions or decisions contrary to the provisions of the Act.

ZAJA defines administrative action as any action taken or a decision made by an administrative authority.[89] This simple definition will receive further attention in the thesis, but it should be noted that by doing so, the definition avoids the 'classification exercise' that courts in other jurisdictions spend a great deal of time working on. In South Africa, one of the greatest hurdles to be overcome by any administrative lawyer is the classification of functions, which in part determines if actions fall under the ambit of the PAJA (which is the South African equivalent of the ZAJA).[90] Lawyers in that context have to weigh whether actions are legislative, executive, or administrative and this still does not leave a clear answer.[91] The ZAJA avoids this problem almost entirely by determining that any action taken by an administrative authority is potentially the subject of determination in terms of the Act. By providing for any other individuals using administrative powers or exercising administrative functions, ZAJA quite easily captures the

[87] Section 2 (2) of the ZAJA reads "The provisions of this Act shall be construed as being in addition to, and not as limiting, any other right to appeal against, bring on review or apply for any other form of relief in respect of any administrative action to which this Act applies."
[88] Preamble of ZAJA.
[89] ZAJA s2.
[90] See Hoexter (note 65 above) 138, 139 and D Davis 'To Defer and When? Administrative Law and Constitutional Democracy' 2006 *Acta Juridica* 23, 32 & 34.
[91] The closest the courts have come in trying to resolve this is seen in *Motau v Minister of Defence* 2014 (8) BCLR 390 (CC) but even the court there concluded the decision is determined by looking at the number of factors pointing towards a particular function.

private sector sphere of administrative law which has become a phenomenon in most countries.[92]

ZAJA holds administrative authorities to high standards. There are over ten key thresholds that citizens can use to hold administrative authorities accountable and a few of them will be discussed in this part.

The first duty is that all administrative authorities must act lawfully, reasonably, and in a fair manner.[93] The first duty is almost a cardinal principle of administrative law and consequently, most jurisdictions provide for the same.

This duty can be found for instance in the South African constitutional right to administrative justice, which guarantees everyone a right to lawful, reasonable, and procedurally fair administrative action.[94] In the Kenyan Constitution, the same is found in Article 47, which creates a right to 'expeditious, efficient, lawful, reasonable, and procedurally fair' administrative action.[95] In Namibia, Article 18 of the Constitution, creates a duty on administrative bodies and officials to 'act fairly, reasonably, and comply with the requirements imposed by the common law and other relevant legislation'.[96] In a similar fashion, s23 of the Ghanaian Constitution holds that 'administrative bodies and officials shall act fairly and reasonably and shall comply with the requirements imposed by law.[97] Article 43 of the Malawian Constitution states that 'every person has the right to lawful and procedurally fair administrative action which is justifiable in relation to reasons given.[98]

The second duty set out in the ZAJA is that administrative authorities must act within a specified period, which is determined by the governing legislation and in the absence of such specified

[92] Countries like the United States, South Africa and Namibia amongst others, allow for the reviewability of the administrative action by private bodies. Also see JF Handler *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (1996) 3 where the general trend towards privatization in administration is discussed.
[93] ZAJA s1(a).
[94] Constitution of South Africa, 1996 s33.
[95] Constitution of the Republic of Kenya, 2010.
[96] Constitution of the Republic of Namibia, 1990.
[97] Constitution of the Republic of Ghana, 1992.
[98] Constitution of the Republic of Malawi, 2006.

periods, authorities must act within a reasonable period after being requested to do so by the person concerned.[99]

The final duty imposed on administrative authorities is a duty to supply written reasons for action taken within a stipulated or reasonable period after being requested to provide such reasons.[100]

ZAJA goes on to list some considerations of procedural fairness envisaged in the Act. These include adequate notice of intended or proposed action,[101] affording a reasonable opportunity to make representations,[102] and adequate notice of any right of review or appeal. There is, however, no indication whether these considerations are the only criteria in determining fairness, and the case law, in this regard, provides no easy solutions as there are conflicting judgments, which will be discussed in this thesis.

A departure from the grounds of fairness above is set out in s (3) (iii) of the Act which is indicative of fairness being case specific and flexible as a concept. The courts are empowered to make a wide range of remedies for litigants. These include setting aside,[103] referring the matter back to the administrative authority,[104] setting a relevant period for the administrative authority to act when directed by the court to do so,[105] directing that reasons be given where administrative authority failed to do so[106], and finally, courts may direct other actions necessary to achieve compliance.[107] The last power given to courts gives enormous powers to ensure compliance with the Act.

There are also several grounds of review available to litigants in terms of the Act. These are set out in section 5 of ZAJA and include lack of jurisdiction, unlawful conduct, material errors of law and of fact, ulterior motives, fraud, corruption, irrationality, and bad faith and abuse of discretion because of other parties. In addition to this, a decision can be reviewed on the grounds of abuse

[99] ZAJA s 1(b).
[100] ZAJA s 1(c).
[101] ZAJA s 3(2) (a).
[102] ZAJA s 3(2) (b).
[103] Ibid s 4(a).
[104] Ibid s 4(b).
[105] Ibid s 4(c).
[106] Ibid s 4(d).
[107] ZAJA s 4(e).

of power, irrelevant considerations, relevant considerations not being considered, breach of rules of natural justice and procedural flaws.[108]

Section 7 of the Act also provides for a duty to exhaust internal remedies within the administrative body itself before reliance on the Act is possible. Despite all the above, it must also then be noted that the ZAJA cannot, in its present form, accommodate the constitutional right to administrative justice because it is not as expansive as the right envisages its derivative Act to be. These flaws and weaknesses of the ZAJA will be explored in more detail at the end of this chapter.

2.5 An Overview of the Zimbabwean administrative justice under the common law

Before engaging the content of the common law, it is worth setting out some general precepts underlying the common law for a sound understanding of the substantive content which will be dealt with later in the chapter.

Zimbabwean common law is based on two strands – judicial precedent and Roman Dutch-Law.[109] Madhuku further notes that South African and English law heavily influences the nature of Zimbabwean common law and thus judicial precedent from the two countries is highly persuasive.[110] The common law of administrative law in Zimbabwe was premised on the concepts of lawfulness, procedural fairness, and reasonableness.[111] Lawfulness was secured through the concept of the ultra vires doctrine while natural justice encapsulated the procedural fairness elements.[112] Reasonableness, for its part, was determined largely through the lens of rationality.[113] The Supreme Court in *Secretary for Transport and Anor v Makwarara,*[114] pointed out that these were the only three grounds on which courts would be entitled to review administrative conduct.[115] The courts were extremely mindful of usurping the authority of the

[108] Ibid s 5.
[109] L Madhuku *Introduction to Law* (2010) 17.
[110] Ibid 23.
[111] Feltoe (note 2 above) 2.
[112] Ibid.
[113] Ibid. See also S Hofisi 'The right to administrative justice in Zimbabwe' *Herald Newspaper* June 7, 2017.
[114] *Secretary for Transport and Anor v Makwavarara* 1991 (1) ZLR 18 (S).
[115] Ibid 20A.

administration as seen in the *Affretair (Pvt) Ltd and Anor v MK Airlines* case where the court reiterated confined instances of judicial intervention.[116] In subsequent cases like *Davies and Others v Minister of Lands, Agriculture and Water Development*, the Supreme Court had occasion to reiterate its unwillingness to usurp the authority of the Executive.[117] Under the common law, therefore, one would have to ensure that the claim fell into one of the three grounds discussed above before administrative conduct could be reviewed.[118] The reluctance of the courts in interfering with the conduct of the Executive branch is amplified in cases like *Tsvangirai and Anor v Registrar General and Ors.*[119] In this case, the applicants sought to have the election voting period extended because the Registrar General had excluded some citizens from voting in the Presidential election by amending the Voters' Roll contrary to the Electoral Act [Chapter 2:13] and without informing the parties.[120] Arguably, due to the highly political nature of the case, the court avoided venturing into the merits of the matter even though a glaring unlawful act was present. This is an example of cases I would term 'politically sensitive cases' because of the political nature of these cases and how the courts find technicalities to avoid getting entangled in the case. I will deal with these and other matters of avoidance in Chapter Four of the study. At this stage, it is sufficient to note that courts did not hastily enter into the fray of the administrative law terrain, especially where cases were of a political nature and the statute as will be seen in the next section replicated this common law position.

The courts' review powers were further curtailed by statutory ouster clauses, which prohibited the courts from reviewing certain conduct by administrative authorities.[121] Ouster clauses were to be found both in the common law and in the ZAJA. The promise of a constitutional right to

[116] *Affretair (Pvt) Ltd and Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) 24F. The courts' limited intervention grounds were similarly stated in cases like *Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S); *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S); *PF -ZAPU v Min of Justice* (2) 1985 (1) ZLR 305 (S) and W*atchtower Bible and Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd & Anor* 1993 (2) ZLR 67(S)..
[117] *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZS).
[118] Ibid.
[119] *Tsvangirai and Anor v Registrar General and Ors* 2002 (1) ZLR 251 (H).
[120] Ibid.
[121] *Mugugu v Police Service Commission and Another* 2010 (2) ZLR 185 (H) 189A.

administrative justice changes this position but it is worth considering the effect of such clauses prior to the creation of s68.[122]

The section below gives a holistic and general overview of administrative law under the ZAJA. This will place into context, the grounds of review and remedies that will be examined later.

2.6 Development of administrative justice under the ZAJA

At this juncture, it is appropriate to also consider the development of administrative law under the ZAJA to have a complete picture of the Zimbabwean administrative law framework. The Act was created to codify the common law around administrative law in Zimbabwe even though no constitutional imperative necessitated its adoption.[123] This is very important in understanding the role of the Act – it was not designed to completely overhaul the common law but rather to statutorily capture the common law, which, as noted previously, had been inconsistent in most of its application and principles.

The preamble of the Act reflects the thinking of the legislature in enacting the Act. It reads:

> *AN ACT to provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions; to provide for relief by a competent court against administrative action or decisions contrary to the provisions of this Act; and to provide for matters connected with or incidental to the foregoing.'*

There is one last important background concept to explore and that is the definition of administrative action which is the key entry to the Act.

2.6.1 Administrative Action Defined

The Act only applies to conduct deemed to be administrative action or decisions.[124] ZAJA defines administrative action as ***any*** (my emphasis) action taken or a decision made by an administrative

[122] A more detailed discussion of this follows at the end of this chapter.
[123] *Zindoga & Others v Minister of Public Service* (2006) 2 ZLR 10 (H) 13D-E.
[124] ZAJA, s2.

authority.[125]Although seemingly simplistic, the definition is intertwined in definitions that can only be determined by looking at further definitions thus making it circular. For example, the Act describes administrative conduct by referring to an administrative authority, and thus, to understand what administrative action is, one must understand what an administrative authority is. Despite this hurdle and inconvenience, this superficial definition has avoided a multitude of difficulties other jurisdictions face and this will be discussed in the study in more detail. Essentially, by using a shortened definition of administrative action, the Act avoids the trap of the 'classification exercise' that courts in other jurisdictions spend a great deal of time working on. In South Africa, for example, one of the greatest hurdles to be overcome by any administrative lawyer is the classification of functions, which in part, determines if actions fall under the ambit of the PAJA (which is the South African equivalent of the ZAJA).[126] This does not mean that the definition is without its own problems but at least it avoids the time-consuming exercise of classifying functions and ticking off requirements before determining whether the offending conduct constitutes administrative conduct. It must, however, be noted that the ambit of the ZAJA is indeed very wide because it regulates 'any action taken, or decision taken by an administrative authority' which would imply that it is irrelevant what kind of exercise or decision making the administrator is involved in. It is thus clear that in ZAJA, the focal lens is on the actors and functionaries rather than the functions concerned.

Quite logically, the next question is what constitutes an administrative authority. The Act stipulates that an administrative authority is any person who is an officer, employee, member, board of State, local authority or parastatal, Minister, Deputy Minister or indeed any other person authorized to perform an administrative duty or exercise an administrative power.[127] The Act envisages conduct by State actors, which in any event are the default actors in terms of traditional administrative law theories.[128] Briefly then, state functionaries will almost always fall

[125] Ibid.
[126] See Hoexter (note 65 above) 138, 139 and D Davis 'To Defer and When? Administrative Law and Constitutional Democracy' 2006 *Acta Juridica* 23, 32 & 34.
[127] ZAJA, s2.
[128] M Taggart 'Reinvented government, traffic lights and the convergence of public and private law. Review of Harlow and Rawlings *Law and Administration'* (1999) *Public Law* 124.

under the ambit of the ZAJA provided that their conduct constitutes administrative action in terms of s2.

The question that then arises is whether the Act covers non-State actors who are increasingly becoming leading figures and parties in administrative law in a number of jurisdictions.[129] This is due to the privatization of State functions, thus blurring the distinction commonly upheld by the traditional theories of administrative law, which held that administrative law was the interaction between the State and its citizens.[130] ZAJA seems to have ably accommodated and responded to this by providing that administrative authority can be exercised by 'any other individuals using administrative powers or exercising administrative functions' thereby making them administrative authorities in terms of the Act.[131] ZAJA, therefore, quite easily captures the private sector sphere of administrative law as well as the public.[132]

The Act presents another hurdle in understanding administrative action because it refers to persons exercising administrative powers and administrative functions but does not detail what constitutes administrative powers nor does it detail administrative functions. The ordinary definition of administrative functions, powers, and duties seems to be applied in Zimbabwe and has not been the subject of debate nor has it proved to be a controversial ground.[133] Feltoe describes the administration of the state as the '…detailed and practical implementation of the policies of the central government aimed at the running of the State.'[134] It must be assumed from the case law and the authorities that the administrative functions, powers, and duties relate to those aspects concerning the detailed and practical implementation of the State's policies, which are used to run the State.[135] In my opinion, there is, however, a need for clarity on these aspects.

[129] Hoexter (note 25 above) 147.
[130] HB Jacobini *An Introduction to Comparative Administrative Law* (1991) 3.
[131] ZAJA, s2.
[132] Countries like the United States, South Africa and Namibia amongst others, allow for the reviewability of the administrative action by private bodies. Also see JF Handler *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (1996) 3 where the general trend towards privatization in administration is discussed.
[133] *U-Tow Trailers* (note 126 above).
[134] Feltoe (note 2 above)2.
[135] Ibid.

The third requirement for administrative action in terms of the ZAJA is that the administrator or functionary concerned, must be lawfully empowered to act.[136] The mandate to act stems from multiple sources but broadly speaking, this would be 'any enactment'.[137] This would, according to Feltoe, include all forms of legal instruments, contracts, legislation and the common law.[138]

Administrative conduct can be reviewed by courts on various grounds. These grounds, which for sake of conformity with accepted administrative law practice, will be referred to as grounds of review.[139] The common law and the ZAJA largely share the same grounds of review and the variations lie in the scope of the grounds of review, and in some cases, the types of review grounds. The statutory framework provides more grounds of review than the common law despite the assertion that the ZAJA merely codifies the common law. The different grounds of review will now be explored in detail below. For ease of reference, each ground of review will first be examined under the common law and then under the ZAJA.

2.7 THE PRINCIPLES OF NATURAL JUSTICE

2.7.1 Common law position

One of the most basic principles of the common law administrative justice right in Zimbabwe is the principle of natural justice, which falls under a broader categorization of procedural fairness. Feltoe notes that Zimbabwean courts have recognised that natural justice entails two strands: the right to be heard (*audi alteram*) and the impartial, unbiased decision making of administrators (*nemo judex in sua causa*).[140] The determined approach with these concepts is that natural justice is a flexible concept that must take into account the needs of each case and the evolution of legal principles.[141] Feltoe describes natural justice as a fusion of procedural fairness and justice which when applied, results in fair, equitable, outcomes and processes.[142] He further notes that it creates a sense of justice being done and reaches 'substantively correct

[136] ZAJA, s2.
[137] Ibid.
[138] Feltoe (note 2 above) 22.
[139] See for example P Cane *Administrative Law* 4ed (2004) 6, 12 and L Baxter *Administrative Law* (1984) 2, 3.
[140] Feltoe (note 2 above) 58.
[141] *Crow v Detained Mental Patients State Board* 1985 (1) ZLR 202 (H).
[142] Feltoe (note 2 above) 23.

decisions'.[143] In the *Crow* case, the court held that the application of natural justice should be considered on a case by case basis and that courts should be flexible in applying the principles.[144] Natural justice is, therefore, a context-specific determination, which varies with each situation.[145]

Under the common law, the legislature was entitled to modify, extend, or limit the application of the principles of natural justice. If the legislature determined that civil servants were not entitled to certain principles of natural justice, the courts were not entitled to review the excluded aspect. It was, therefore, not up to the courts to extend principles of natural justice beyond what the legislature intended. This position was reflected articulately in *Austin & Anor v Chairman Detainees' Review Tribunal*.[146] *Austin* concerned the limitation of natural justice principles in respect of detainees detained under Emergency Regulations.[147] In terms of the Regulations, detainees had limited entitlements as part of the natural justice principles. The excluded aspects included the right to review and verify documentation used as evidence and provision of full details of the charges and offences. The then Chief Justice held:

> *'But fairness is seen in the context of s 31 of the Regulations and in terms of those rights afforded to the detainee under the provisions of the Second Schedule. Section 31, governing the proceedings of the Tribunal, must have been drafted in the knowledge that some elements of the rules of natural justice were to be excluded because considerations of national security override the private rights of detainees*.'[148]

A slight shift in attitude by the courts was apparent in the *Zimbabwe Teachers' Association v Minister of Education and Culture*.[149] In this case, the court suggested that the legislature may not unreasonably limit principles of natural justice, especially where these are supported by the Constitution.[150]

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[143] Ibid.
[144] *Crow* (note 132 above).
[145] Ibid. See also Feltoe (note 2 above) 23.
[146] *Austin & Anor v Chairman, Detainees' Review Tribunal* 1986 (4) SA 281 (ZS) 283.
[147] Ibid.
[148] Ibid 343.
[149] *Zimbabwe Teachers' Association v Minister of Education and Culture* 1990 (2) ZLR 48 (H) 52.
[150] Ibid (note 35 above) 64.

The next logical question then is when the principles of natural justice apply. As already set out, the principles will apply where the legislature has not expressly limited the application of the natural justice principles. For decades, Zimbabwean courts applied the administrative functions test, which essentially first qualified the nature of the body and then the corresponding action it performed i.e. quasi-judicial, administrative, or judicial functions.[151] The test was also used in South African courts and the Zimbabwean courts seemed to have expressly relied on the findings of the court in the *Hack v Ventersport Municipality* case.[152] In 1990, however, the Zimbabwean courts moved away from this classification of functions test and replaced it with the legitimate expectation doctrine in *Logan v Morris NO & Anor*.[153] This was again in keeping with the change in South African Law, which in the case of *Administrator v Traub,*[154] had already imported the English doctrine of legitimate expectations to replace the classification of functions test.[155] When using the test, the question posed was '*whether there was a legitimate expectation of natural justice applicable to the facts.'* If the answer was in the affirmative, courts would then apply the principles of natural justice but, conversely, if no legitimate expectation of natural justice was applicable on the facts, the courts would not impose the requirements nor expect these to be applied by administrators.[156]

I will now discuss the first leg of the natural justice principles: the *audi alteram partem* rule (hereafter, the *audi* rule)

(a) The Audi Rule

At its most simplistic level, the rule entails the right to be heard.[157]*Rwodzi* was effectively the first judgment to flesh out the content of the *audi alteram* rule in Zimbabwe.[158] *Rwodzi* concerned a hearing that was scheduled 14 hours after notice of the hearing was given. The facts of the case are that Mr. Rwodzi was served with a notice to attend a disciplinary meeting. Charges were,

[151] *Crow* (note 132 above).
[152] *Hack v Ventersport Municipality* 1950 (1) SA 172 (W).
[153] *Logan v Morris NO & Anor* 1990 (2) ZLR 65 (S) 66.
[154] *Administrator v Traub* 1989 (4) SA 731 (A).
[155] Feltoe (note 2 above), Hoexter *Administrative Law in South Africa* 3rd ed (2012) 51.
[156] Ibid.
[157] See Feltoe (note 2 above) & Hofisi (note 6 above).
[158] *Rwodzi v Chegutu Municipality* 2003 (1) ZLR 601 (H).

however, not indicated in the charge letter thus Mr. Rwodzi was unaware of the subject of the meeting nor what he had been summoned for. After receiving the letter, his legal representatives wrote to the employer requesting an extension to enable them to prepare for the hearing. The request was ignored, and the hearing proceeded without him, fourteen hours after he had been served with the notice.[159] The panel found him guilty of the charges and opted to dismiss him in his absence. He was only informed of the charges in the letter that purported to dismiss him.[160] The applicant was denied legal representation and was not afforded a chance to be heard before the decision was taken. The court concluded that the lack of legal representation when asked for, was a violation of the *audi* rule and so was the short notice, which the court regarded as unreasonable.[161] From the reasoning of the court, it would seem that the common law *audi* rule consisted of the following requirements:

1. A proper and fair hearing prior to a decision being made (hearing must precede the decision making);
2. A timeously held hearing;[162]
3. Adequate preparation for the hearing which includes being informed of the charges;[163]
4. Impartial decision taking and processes;[164]
5. The applicant's attendance at a hearing that directly affects him or her;
6. The right to legal representation.[165]

The requirements of the *audi* rule as set out in *Rwodzi* will now be explored in greater detail individually.

[159] Ibid.
[160] Ibid.
[161] Ibid 602E-F.
[162] Ibid.
[163] Ibid 604F-H. The court relied on the Rhodesian case of *Ford v Law Society* 1977 (2) RLR 40 (A) 55.
[164] Ibid.
[165] Ibid.

i. The right to make representations prior to a decision being made

In *Rwodzi,* one of the issues the court had to determine was whether the denial of a chance to make representations before a decision was taken, would be a violation of the *audi* rule.[166] The court held that taking a decision without the affected party being afforded a chance to respond to allegations made, violated the *audi* rule.[167] In its reasoning, the court noted that without the other party's version of events, no reasonable decision maker could come to a substantively correct or fair decision.[168] The logic is clear – to have an impartial and objective outcome, the decision maker must be provided with all the necessary details and information required to come to a decision. To ignore this would have detrimental effects on the fairness of a hearing.[169] The Supreme Court in *AG v Mudisi & Others* described the right as a 'fundamental part of natural justice' and located it as part of a broader principle that administrative action must be lawful, just, and fair.[170] In the court's view, the absence of this would render action unlawful, unjust, and unfair.[171] While the decision was ultimately based on the ZAJA, the court acknowledged the right as an important aspect of the common law administrative justice rules.[172]

There are, however, a string of cases that suggest that legislation, both primary and secondary, can derogate from the right to make representations before a decision is taken. In *Zimbabwe Teachers' Association v Minister of Education*, the court found that there were no regulations in place that specifically ousted the right to a hearing and on that basis, the court held that the right to make representations would apply.[173] The court seemed to imply that if there was an express provision limiting the application of the right to a hearing or other variations of the natural justice principle, the right would not apply to the applicant.

[166] Ibid.
[167] Ibid.
[168] Rwodzi (note 149 above).
[169] Ibid. See also later cases of *Mabuto v Women's University in Zimbabwe* where the court found that it is a trite principle of administrative law that where a decision adversely affects the rights of the party concerned, the individual concerned has a right to be heard before the decision is taken.
[170] *AG v Mudisi &Others* [2015] ZWSC 48.
[171] Ibid.
[172] Ibid.
[173] *Zimbabwe Teachers' Association v Minister of Education and Other* 1990 (2) ZLR 48.

Similarly, in *Health Professionals Council v McGown*,[174] the court first set out to interpret the requisite legislation to determine if there was an express provision limiting the right to make representations before taking a decision. [175]The court was unable to locate an express provision in terms of the Medical, Dental, and Allied Professions Act, and thus found the right to make a representation, would apply in the absence of a barring provision.[176] Again, one can infer that the right to make representations would only apply, at least in terms of the common law, where no express legislative provision excluding it existed.

In *Dube v Chairman, Public Service Commission*, the court was bolder in the conclusion that legislation can limit the application of the *audi* rule.[177] In this case, the Public Service Commission of Zimbabwe sanctioned and suspended several public servants without granting them the right to make representations before the decision to suspend them was taken.[178] The court found that the applicant was not entitled to be heard before the decision was taken and premised its reasoning on the fact that the (Lancaster) Constitution permitted for a derogation of the *audi* rule in as far as the Public Service Commission and civil servants in general, were concerned.[179] The rationale for this can be said to be two-fold. The first is to give effect to the intentions and wishes of Parliament and the second, the courts' reluctance to unnecessarily intervene in the domain of the Executive in the administration of the State. It would thus appear that while the right to be heard before decision making existed, such right could be limited at the whim of the legislature. The courts readily accepted that where such an express limitation clause existed, it had no business imposing a duty to be heard if the legislature intended otherwise.

The position in these cases can, however, be contrasted to that of *AG v Mudisi* where prosecutors who were regarded as part of the civil service, had their prosecutorial certificates and permissions withdrawn by the Attorney General without being granted a chance to make representations.[180] In that decision, which was post the 2013 Constitution, the court held that

[174] *Health Professionals Council v McGown* 1994 (2) ZLR 329 (S).
[175] Ibid.
[176] Ibid.
[177] *Dube v Chairman, Public Service Commission and Another* 1990 (2) ZLR 181 (H).
[178] Ibid.
[179] Ibid.
[180] *Mudisi* (note 161 above).

'everyone is entitled to make representations before a decision that adversely affects their rights is made'.[181] It is interesting to note that Justice Patel gave judgment in both *Mudisi* and *Zimbabwe Teachers Association* and came to different conclusions regarding the right to be heard. This reflects the shift brought about by s68 of the Constitution and will be discussed in greater detail in Chapter Three of this study.

ii. The right to an oral hearing before a decision is taken

The right to an oral hearing prior to the making of a decision is made, is an offshoot of the right to a hearing as discussed above and the jurisprudence on this seems quite clear. There was no general right to an oral hearing before a decision was taken. What was simply required was that a hearing was conducted. In *Crow* for example, the court suggested that the right to an oral hearing was at the discretion of the decision maker.[182] The court held that the decision maker need not be saddled with formalities as to the type of hearing required and only had to satisfy that there was a hearing before the decision making. It held that while oral hearings are preferable in efficacy and transparency, these are not always required.[183] It further held that the absence of an oral hearing would not automatically lead to a conclusion of unfairness.[184]

Feltoe further notes that an oral hearing is not a mandatory requirement but may be required in specific instances where some form of irregularity has already transpired such as inadequate notice for the hearing.[185] Feltoe's argument is that where one has not been given enough time to prepare written submissions, the interests of justice and fairness would require an oral hearing where the individual concerned may express themselves fully in lieu of the written submissions.[186]

iii. The right to adequate notice before a hearing

[181] Ibid.
[182] *Crow* (note 132 above).
[183] Ibid.
[184] Ibid.
[185] Feltoe (note 2 above) 33.
[186] Ibid.

An extension of the *audi* rule is that adequate notice is required before a hearing.[187] Feltoe notes that the rationale behind this principle is that it enables one to properly prepare for charges raised or allegations made and thus gives effect to the concept of fairness both procedurally and substantively, indirectly.[188] There is no issue when the period required for an adequate notice of a hearing is set out in the relevant legislation or contract. The challenge arises with where no time period is set out. The position from the Zimbabwean jurisprudence seems to suggest that the courts used the reasonableness test. In terms of this test, the question asked is whether given the facts of the case and other pertinent factors such as the complexity of the case and severity of it, the period given was reasonable.[189] There is, therefore, no fixed period at common law that determines whether adequate notice of a hearing has been given.

The concept of reasonableness used to determine the adequacy of time periods was first given meaning in the Rhodesian case of *Ford v Law Society of Rhodesia*.[190] The court held that reasonableness of the purposes of the *audi* rule generally cannot be determined without regard to the facts, the parties, the nature of the dispute, the seriousness of the outcome of the process, as well as the literacy or education of the parties relying on the *audi* rule.[191] Using this understanding, it is then likely that the courts may find a longer period of time for an uneducated party to prepare for a hearing whilst giving an educated party a shorter period of time to prepare. Since the Zimbabwean courts follow a flexible approach of natural justice as noted earlier, various competing factors will be used by the court in determining whether a party has been given sufficient time to prepare for a hearing.

Another consideration that the courts include in the reasonableness analysis, is whether there is a need to call witnesses since these may well strengthen or weaken a case.[192]

[187] *Lake* v *Law Society of Zimbabwe* HH-392-86.
[188] Feltoe (note 2 above) 33.
[189] See for example *Rwodzi* (note 149 above).
[190] *Ford v Law Society* 1977 (2) RLR 40 (A) 55.
[191] Ibid.
[192] *Rwodzi* (note 149 above).

iv. The right to have adequate information before a hearing

As the court in *Rwodzi* noted, it is impossible for one to adequately prepare for a hearing if insufficient information is placed before the individual concerned.[193] In the absence of sufficient information, the submissions made by the concerned party would be inadequate and incomplete as he or she responds to a matter where facts and details are unknown. A comprehensive dossier is not required for this requirement, the information must simply allow for a logical yet 'meaningful' reply to the matter.[194] In other words, the information provided must enable the individual concerned to formulate a considered and informed response. The failure to observe this principle would result in a logically unfair process that can be reviewed as an irregularity.[195]

v. The right to have hearings held timeously

Where one is required to appear before a body or tribunal, the common law position in Zimbabwe, is that this must be done without delay but the courts must strike a necessary balance between proceeding with a hearing timeously and affording the parties sufficient time to respond.[196] This was expressed in *Rwodzi* where the court held that it would be unfair to have a hearing under short notice but it would also be unfair to have one after a long period of time.[197] The justification, it would seem, is that evidentiary material and facts may be misconstrued or forgotten with the passage of time.[198] Beyond this, however, there is a logical desire to want to have a matter dealt with timeously for the parties to continue with their lives without the thought of impending actions that could occur at any given time.

vi. The right to legal representation

The right to legal representation as an extension of the *audi alteram* rule was expressed in the case of *Chirenga v Delta Distribution*,[199] where the court unequivocally noted that legal

[193] Ibid.
[194] *Chairman, PTC & Anor v Marumahoko* 1992 (1) ZLR 304 (S) 314.
[195] Ibid. See also Feltoe (note 2 above) 76.
[196] Feltoe (note 2 above)75.
[197] *Rwodz*i (note 149 above).
[198] Feltoe (note 2 above) 76.
[199] *Chirenga v Delta Distribution* 2003 (1) ZLR 517 (H).

representation, when requested, is inextricably linked to the *audi* rule and when a party is denied legal representation then the rule is ostensibly violated.[200]

The jurisprudence from the courts is not entirely clear, with courts proffering different views on whether this is an essential ingredient for the *audi* rule. In *Rwodzi*, the court found that it was an integral part of natural justice but the court in *Vice-Chancellor, University of Zimbabwe & Anor* did not decisively deal with this question, preferring instead to discuss the possibility of its application in cases of dismissals.[201] Similarly, the Supreme Court in *City of Mutare* v *Mlambo* preferred to avoid the question altogether although the High Court in *Mlambo v City of Mutare* felt that it was an obvious violation of the *audi* rule.[202] In *Minerals Marketing Corp of Zimbabwe v Mazvimavi*, the court held that there was no general right to legal representation but it was prepared to accept its existence if the company's policies specifically provided for the right.[203] In the absence of such a clause, the court seemingly suggested that there would be no general right to legal representation.[204] What appears from the cases, is a common theme of the reasonableness test yet again with each set of facts being determined on the merits of the case rather than a blanket approach. This would imply that the right is dependent on the intricacies of each case.

vii. The right to personally attend a hearing

It is a trite principle of the common law that one is entitled to attend a hearing concerning oneself.[205] There seems to be a consistent theme in Zimbabwean case law on the subject, which indicates this is an essential, if not mandatory part of the *audi* rule. There are of course, permissible derogations where a hearing can take place without the presence of the concerned party. For instance, in *Silver Trucks (Pvt) Ltd & Anor* v *Director of Customs and Excise (2),*[206] the court held that where an individual is informed of charges or allegations and is given all material

[200] Ibid.
[201] *Vice-Chancellor, University of Zimbabwe & Anor v Mutasa & Anor* 1993 (1) ZLR 162 (S)
[202] *City of Mutare* v *Mlambo* S-229-91. See also Feltoe (note 2 above) 43.
[203] *Minerals Marketing Corp of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S).
[204] Ibid.
[205] Feltoe (note 2 above) 76.
[206] *Silver Trucks (Pvt) Ltd & Anor* v *Director of Customs and Excise (2)* 1999 (2) ZLR 88 (H).

information necessary to mount a successful challenge to the allegations and yet without just cause or lawful reasons, decides not to attend to the hearing, the proceedings should be allowed to proceed.[207] The court found such wilful absence from proceedings as a form of contempt that should be frowned upon.[208] The court in *Chitzanga v Chairman PSC & Anor* similarly reasoned that where the decision to abscond from proceedings was wilful or intentional, then the party must accept the consequences that attaches to the conduct.[209]

The seven requirements set out in *Rwodzi,* therefore, characterized and effectively constituted the content of the *audi alteram* rule in terms of the Zimbabwean common law.[210] Courts often reviewed decisions by administrative authorities and bodies on the grounds set out above.

There is still one more pertinent layer of natural justice to be discussed in terms of the common law – the rule against bias.

(b) The Rule Against Bias (Nemo Iudex Causa)

As noted above, this rule boils down to an impartial, unbiased determination by a decision maker.[211] The common law suggests that there are three grounds or tests that are used in determining whether bias has been displayed. These include where there is actual bias, a reasonable likelihood of bias[212] and a reasonable suspicion of bias.[213]

Ultimately, one must consider the degree of familiarity or association by means of a connecting nexus as Feltoe notes.[214] An example of bias in this regard would be where a decision maker is related to an applicant or where the decision maker stands to suffer some prejudice if the applicant's application is rejected. In these instances, there is a clear nexus between the party affected by the decision of the administrator and the decision maker. This nexus test is displayed

[207] Ibid 92.
[208] Ibid.
[209] *Chitzanga v Chairman PSC & Anor* 2000 (1) ZLR 201 (H).
[210] Some of these concepts featured in the *Ford v Law Soc, Rhodesia* 1977 (2) RLR 40 (A) judgment. See also *Machiya v BP Shell Marketing Service (Pvt) Ltd* 1997 (2) ZLR 473 (H).
[211] Feltoe (note 2 above) 91.
[212] *Mukarati* v *Director of Housing & Community Services* HH-281-90.
[213] *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co (Pvt) Ltd* HH-58-01.
[214] Feltoe (note 2 above) 92.

in the *Crow* case where the court held that mere interest would not satisfy this test as it would result in absurd results because it is a low standard that would not be able to filter out negligible instances of bias.[215] A practical example of the absurdity of a mere interest test is that members of the public who sit on a tender board, for example, can easily be found to be biased because they have an interest in the way their money is spent on government tenders.

I now turn to consider procedural fairness/ natural justice principles in terms of the ZAJA.

2.7.2 Natural Justice under the ZAJA

While the above section dealt with the natural justice principles in terms of the Zimbabwean common law, what follows is the ZAJA's approach to natural justice /procedural fairness.

Administrative authorities are required to act in a procedurally fair manner.[216] Section 3(2) of ZAJA sets out the factors that must be satisfied for procedural fairness to be met in terms of the Act. Conduct is deemed fair if there is:

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

(b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable, is given

A literal reading of this section suggests that these are to be read conjunctively – indicative that all are required for fairness to exist (though deviations are possible).[217] Stated differently, conduct is procedurally fair if all three requirements listed above, are satisfied.

As evident from the above, the requirement of adequacy, features in all three factors. Feltoe notes that the use of the word adequate is key and suggests that this should be read as requiring the administrator or authority to provide sufficient information and time, where applicable.[218] From the reading of this section, one would think that these are the only factors for fairness but

[215] *Crow* (note 132 above).
[216] ZAJA, s3.
[217] This will be discussed separately in the next section.
[218] Feltoe (note 2 above) 26.

this section has to be read in line with the rest of the Act.[219] Section 5 of the Act for example, states that courts can consider various factors in determining non-compliance with s3 (which covers procedural fairness along with the other grounds of review). Additionally, the Act cites a breach of natural justice as a further basis for procedural fairness to be determined. It would seem that when engaging this requirement in s5, the courts will have regard to the common law principles relating to natural justice which were set out earlier.[220]

In *BMG Mining (Pvt) Ltd v Mining Commissioner, Bulawayo & Ors,*[221] the court held that the failure to adhere to basic processes and requirements of fairness laid out in legislation would result in conduct being seen as *void ab initio*.[222] The court did, however, stress that fairness would have to be considered on a case-by-case – as per the common law principles, which show that it is a flexible and evolving concept.[223] In *Guild v Minister Of Lands & Ors*,[224] the court stressed the importance of administrative authorities giving adequate notice of the nature and purpose of the proposed action as required by s3(2) and held that a failure to do so would result in a court setting aside the decision.[225] In *Attorney General v Mudisi & Ors*, the Supreme Court held that the requirements of fairness are more stringent when the administrative authority is well-versed in law and is expected to know the law and comply with it.[226] Additionally, in the context of the case, the court held that where there was a legitimate expectation, and an administrative authority was required to comply with the requirements of fairness, which would entail informing affected parties of proposed adverse action before taking a decision as required by the Act.[227]

A departure from the grounds of fairness above is set out in s(3)(iii) of the Act which is also indicative of fairness being case specific and flexible as a concept. In terms of the departure grounds, an administrative authority can be exempted from the duty to act fairly if:

[219] ZAJA, s 3(2) (b).
[220] ZAJA, s5.
[221] *BMG Mining* (note 78 above).
[222] Ibid.
[223] Ibid.
[224] *Guild v Minister of Lands & Ors* 2015 (2) ZLR 815 (H**)**
[225] Ibid 823.
[226] *Mudisi* (note 161 above).
[227]Ibid.

'(a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or

(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.'[228]

2.7.3 The duty to act within a specified or reasonable period

While the common law did not create the duty to act timeously, the ZAJA expressly does.[229] In terms of the Act, administrative authorities must act within a specified period which is determined by the governing legislation or a reasonable period where there is no specific period given. In the absence of such specified periods, authorities must act within a reasonable period after being requested to do so by the person concerned.[230] By providing for this duty, the Act creates a right for affected individuals to have administrative decisions made or taken timeously. This will become relevant because s68 envisages timeous administrative conduct. ZAJA, therefore, deviates and goes beyond the common law by introducing this duty. In terms of the duty, the courts have recognized that there are policy, financial, and societal interests at play that necessitate the need for the duty to be observed and upheld by the courts.[231]

[228] ZAJA s3(3)
[229] ZAJA, s 1(b)
[230] ZAJA, s 1(b).
[231] An example of this is in the *N & B Ventures (Pvt) Ltd* v *Minister of Home Affairs & Anor* 2005 (1) ZLR 27 (H), a peculiar judgment in which the administrator sought to penalise the applicant for delaying when in fact the delay was chiefly caused by the delay of the administrator in issuing the licence. The administrator then sought to took possession of the alcohol owned by the applicant as penalties for the late registration. The court reversed this decision on the basis that it had acted unreasonably and had delayed in performing as required by legislation.

The next consideration is the requirement to act lawfully which will be discussed below.

2.8 LAWFUL ADMINISTRATIVE CONDUCT (LAWFULNESS)

As with the previous section, I will set out the common law position on lawfulness and then turn to the ZAJA.

2.8.1 Common law position

As the court in *Fikini v Attorney General* [232] noted, administrative power is to be exercised lawfully and where administrators exceed their authority, courts will be entitled to intervene. Administrative power must, therefore, be exercised within the confines of the enabling law and using the means set out in the said law. [233] Both the actions and the actor of administrative power must be lawfully and duly authorized. The jurisdictional basis to intervene with is that the administrator exceeded their authority and therefore lacked the ability to make the decision in a lawful manner.[234] In other words, unlawful conduct by administrators is a justifiable basis upon which the courts can enter the seemingly sacred terrain of the administrators. Unlawfulness seems to have been so intolerable that courts expressly displayed a reluctance to condone such actions and the processes that followed the unlawful actions of the administrator. [235] In *Foroma v Minister of Public Construction & National Housing & Anor*[236] the court had to consider whether the Minister had exceeded his powers in terms of the legislation governing municipal authorities. The court held there that as part of the rule of law, no power may be exercised unless it has been granted to the person exercising that power.[237] The actions flowing from an administrator who exercises authority unlawfully are consequently viewed as null and void.[238]

Where legislation provides peremptory or mandatory instructions to be followed, courts have held that non-compliance with these provisions would be considered invalid and unlawful

[232] *Fikini v Attorney General* 1990 (1) ZLR 165 (S).
[233] *Fikini* (note 223 above).
[234] Ibid.
[235] In this regard see *Mugugu* (note 13 above).
[236] *Foroma v Minister of Public Construction & National Housing & Anor* 1997 (1) ZLR 447 (H).
[237] Ibid.
[238] Ibid 456.

administrative conduct. This would then provide the courts with a jurisdictional basis to review the conduct of the administrator.[239] This was the case in *BMG Mining (Pvt) Ltd v Mining Commissioner, Bulawayo & Ors*[240] where the court found that non-compliance with statutory provisions or requirements would render the entire process unlawful and *valid ab initio*.[241]

When faced with the defence of estoppel, wherein a representation made by an administrative authority is relied on to the detriment of the person relying on the representation, Zimbabwean common law did not allow the defence of estoppel to succeed in the face of illegality or unlawful conduct.[242] The courts' strict approach to lawful administrative conduct is commendable and impressively consistent.[243]

Where the administrator makes a mistake of law that has the effect of giving the administrator more power than he or she ought to have or of preventing the administrator from understanding the nature of powers given to him or her, the courts intervened cautiously. In line with the desire not to step into the terrain of the administrative branch of the State, the court in *Kambasha Bros & Anor v Thompson* recognized only three instances where mistakes of law could be reviewed in terms of lawfulness.[244] These grounds were:

i. Where the mistake leads the administrator or decision maker to avoid or deny the jurisdiction they possess (where the administrator believes mistakenly that he or she cannot carry out a certain function but does possess such powers),[245];

[239] See for *example Union Carbide Management Services (Pvt) Ltd & Anor v Cluff Mineral Exploration (Zimbabwe) Ltd & Ors* 1989 (1) ZLR 224 (H).
[240] *BMG Mining (Pvt) Ltd v Mining Commissioner, Bulawayo & Ors* 2011 (1) ZLR 74 (H).
[241] Ibid.
[242] *Foroma* (note 227 above) 465, 467.
[243] See for example the case of *Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors* 1991 (1) ZLR 323 (S) where the court went to great lengths to explain that courts cannot rubber stamp illegal conduct and the only question that arises after determining illegality is what remedy or recourse exists to remedy it. See also *Tregers Industries (Pvt) Ltd v Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H).
[244] *Kambasha Bros & Anor v Thompson* 1970 (2) RLR 97.
[245] Ibid.

ii. Where the mistake of an administrator has the effect of the administrator completely failing to understand the powers given to him or her and thus making the administrator unable to exercise the discretion afforded to them;[246] and

iii. Where the mistake of law leads to the granting of non-existing powers by the administrator (this is where an administrator mistakenly believes he or she has lawful authority to exercise a certain power based on a wrong interpretation of the law).[247]

In the absence of these three grounds, Zimbabwean courts did not review mistakes of law, which were sometimes referred to as a misdirection of law.[248]

When it came to the prerogative powers of the President, the courts brazenly held that they could review these if the conduct was unlawful. This seems to be the only ground that was applicable to reviewing the conduct and powers of the President, but the review was qualified and limited.[249]

Linnington noted specific instances where conduct by the President would be reviewed for lack of lawfulness despite being part of the prerogative powers.[250] One key feature was where such action had the effect of depriving, minimizing, or violating the rights, interests, legitimate expectations, and liberties of citizens unjustifiably or contrary to the Constitution.[251]

In the *PF ZAPU* case , the court specifically found that to limit one's rights without affording them a chance to be heard would be an instance of reviewable unlawful conduct by the President.[252] This particular case concerned the President's constitutional prerogative power to proclaim the

[246] Ibid.
[247] Ibid.
[248] The term was first used in *Patriotic Front-Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC) by Dumbutshena CJ, as he then was. The Supreme Court judgment of Patel J in *Telecel Zimbabwe v Attorney-General Zimbabwe NO* also repeats the term and uses it interchangeably with mistakes of law.
[249] Feltoe (not 2 above)116.
[250] G Linington *The Constitutional Law of Zimbabwe* (2001) 84, 94.
[251] See *PF ZAPU* (note 85 above) 307.
[252] Ibid.

sitting date of the nomination court for electoral purposes.[253] The President's conduct resulted in a shorter period for the nomination court, which in turn led to some candidates failing to be duly nominated. [254]While the court was quite scathing of the conduct of the Executive and treaded carefully in delineating when the conduct of the President could be reviewed using the lawfulness degree, subsequent courts avoided the issue altogether and preferred not to invoke this ground of review. This is best understood against the backdrop of an all too powerful Executive that subsequently had contempt for the courts.[255] An instance of such contempt was when President Mugabe attacked the judiciary for overreaching its authority and dispensing what he termed 'white law'.[256] In that specific instance, he was referring to a decision by the court that allowed an incarcerated member of the opposition to contest elections.[257] After this criticism, the judge reversed his own decision.[258] It is, therefore, understandable why the courts confined the instances of review of the President's prerogative powers to defined aspects of lawfulness. It may well be argued that the finding of unlawful conduct was in itself not the issue for the courts but the resulting remedy which in most cases had to be the setting aside of the decision.[259] Perhaps it would be unconscionable to tell an 'all-powerful' Executive that its decision had been set aside especially because the Executive demonstrated on numerous occasions that it could not be dictated to.[260]

The most common way of reviewing the conduct of administrative authorities, however, was the use of the *ultra vires* doctrine in terms of which, conduct that exceeded the lawfully demarcated bounds given to the administrator, would be set aside on the basis that the administrator lacked the lawful authority to act.[261] This aspect of lawfulness seems to be quite straightforward and

[253] Ibid 538.
[254] Ibid.
[255] H Mushonga 'Mugabe Moulds Pliant Judges' (2006) *Institute of War and Peace Reporting* 4.
[256] Ibid.
[257] Ibid.
[258] Justice Uchena ruled in favour of former MDC T Treasurer, Roy Bennett but subsequently reversed his decision after his judgment was referred to as 'stupid' by President Mugabe – see *Human Rights Watch Report* of November 2008.
[259] In *PF ZAPU*, the court categorically stated that a finding of unlawfulness cannot escape a declaration of invalidity and therefore invite the remedy of setting aside since to leave the offending conduct unchecked would mean a condonation of illegality by the courts as addressed earlier in this chapter.
[260] See R Martin 'The Rule of Zimbabwe' (2006) 95 The *Round Table* 384, 243.
[261] *S v Delta Consolidated (Pvt) Ltd and Others* 1991 (2) ZLR (S). See also *S v Dube* 1977 (2) RLR 108 (A).

relatively uncontroversial in the common law jurisprudence. As Feltoe notes, it is a trite principle of legality that actions taken must be taken by an administrator duly empowered and properly mandated to do so.[262] Therefore, the administrator who exceeds the powers given to him or her by legislation, will have such action set aside on the basis that it was *ultra vires* or that the administrator was not lawfully entitled to exercises those powers.[263]

The classical cases on this in Zimbabwe largely relate to the instances of delegated legislation, where the delegated individual (the delegatee), exceeds the powers given by the delegating authority (the delegator).[264] In S *v Dube*, the court held that where a delegated administrator exceeds the bounds of power given to him or her, then such an administrator acts unlawfully in that they never had the mandate to act in the manner that they did and this in itself creates a bolster right for the courts to intervene in what ordinarily seems like the terrain of the administrator.[265] This logic though stemming from Rhodesian administrative law was endorsed in post-independent Zimbabwe in the case of *S v Delta Consolidated (Pvt) Ltd and Others*.[266]The Supreme Court in this case held explicitly that it had 'inherent jurisdiction' to nullify subsidiary legislation where the delegate or delegatee acted outside its mandate and that the appropriate test is whether the actions of the delegate were 'reasonably necessary' to further the intentions and mandate of the delegating authority.[267] It, thus, seems that the courts would assess whether the action taken outside the mandate given would constitute an incidental act to the powers given without which the delegated administrator would be unable to complete the task satisfactorily or accurately. The courts would thus make use of the 'incidental mandate' test, as this is how the courts have approached it albeit using different terminology. [268] The Zimbabwean courts fused the *ultra vires* concept with the ground of gross unreasonableness, although it

[262] Feltoe (note 2 above) 102.
[263] Ibid.
[264] Feltoe (note 2 above) 9.
[265] *Dube* (note 252 above).
[266] *Delta* (note 252 above)
[267] Ibid.
[268] See Feltoe (note 2 above) 9 and *S v Nyamapfukudza* 1983 (2) ZLR 43 (S).

formed a separate ground of review and was often the result of a declaration of conduct being *ultra vires*.[269]

In the next section, I consider lawfulness in terms of the ZAJA.

2.8.2 Lawfulness under the ZAJA

ZAJA requires all administrative authorities to act lawfully.[270] This is a cardinal principle of administrative law and consequently, most jurisdictions provide for the same. This duty can be found for instance, in the South African constitutional right to administrative justice, which guarantees everyone a right to 'lawful, reasonable and procedurally fair administrative action.'[271] In the Kenyan Constitution, the same is found in Article 47, which creates a right to 'expeditious, efficient, *lawful*, reasonable, and procedurally fair' administrative action.[272] In Namibia, Article 18 of the Constitution creates a duty on administrative bodies and officials to 'act fairly, reasonably, and *comply with the requirements imposed by the common law and other relevant legislation'*.[273] In a similar fashion, s23 of the Ghanaian Constitution holds that 'administrative bodies and officials shall act fairly and reasonably and shall comply with the requirements imposed by law.[274] Article 43 of the Malawian Constitution states that 'every person has the right to *lawful* and procedurally fair administrative action which is justifiable in relation to reasons given.[275]

In terms of the ZAJA, this duty will apply to all administrative authorities whose powers or actions can affect the 'rights, interests or legitimate expectations of any person.'[276] Illegality or unlawfulness was dealt with by the Supreme Court in the *Telecel v Attorney General of Zimbabwe*[277] case. The case concerned the decision of the Attorney General to withhold a private

[269] Reasonableness as a ground of review will be discussed in more detail in subsequent chapters.
[270] ZAJA, s1(a).
[271] Constitution of South Africa, 1996 s33.
[272] Constitution of the Republic of Kenya, 2010.
[273] Constitution of the Republic of Namibia, 1990.
[274] Constitution of the Republic of Ghana, 1992.
[275] Constitution of the Republic of Malawi, 2006.
[276] ZAJA, s3(1).
[277] *Telecel v Postal Telecommunications Regulatory Authority of Zimbabwe (Portraz*.) 2015 (1) ZLR 651.

prosecution certificate from a private company.[278] The applicant in the matter sought to have the decision of the Attorney General nullified on the grounds of unlawfulness. The court in this case held that where a decision by an administrator frustrates the right to appeal, then that conduct is not only irrational but 'borders on unlawfulness'.[279] The court defined the requirement of lawfulness as being satisfied when a decision is taken pursuant to 'statute, prerogative, or the Constitution.'[280]

In *Foroma v Minister of Public Housing*, the court found that a scheme concocted by the Minister and his Permanent Secretary that, although reduced to contract, flouted the Constitution's requirements regarding use of public funds, was invalid due to its unlawfulness.[281] The court further found that the contract could not be allowed to stand because it contradicted the Constitution and the defence of estoppel could similarly not apply as it would have the effect of sanctioning unlawful conduct. This reasoning was amplified under the ZAJA in part through the *Telecel* case and reflects the thinking of the courts in this regard. The courts thus require adherence to empowering enactments and where this is absent, the conduct will be invalidated on this basis. This was echoed in the *Marufu v Minister of Transport, Communications and Infrastructural Development* case that dealt with toll gates that were established in terms of subsidiary legislation. The court held that the subsidiary legislation drafted by the Minister, ran contrary to the objectives and presumed intentions of the primary legislation and was therefore unlawful.[282] The court further held that the conduct of the responsible Minister was *ultra vires* the mandate accorded to him and that he had frustrated the intentions of the legislature by placing the toll gates in an unreasonable place.[283] The court found this conduct to be unlawful. It would seem then that the unreasonableness and unlawfulness co-relation that existed under the common law, still finds application in the ZAJA.

[278]Ibid.
[279] Ibid 662, 663.
[280] Ibid 663.
[281] *Foroma* (note 75 above) 465.
[282] *Marufu v Minister of Transport, Communications and Infrastructural Development* 2009 (2) ZLR 458 (H).
[283] Ibid 462.

The courts also viewed the failure to comply with internal disciplinary codes and processes as a form of illegality in that the administrators acted outside the intended processes thus lacking requisite authority for their actions.[284]

The ZAJA cites the following as bases of review in terms of the duty to act lawfully:

(a) the administrative authority has jurisdiction in the matter;

(b) the enactment under which the action has been taken authorises the action;

(c) a material error of law or fact has occurred;

(d) a power has been exercised for a purpose other than that for which the power was conferred;

(e) fraud, corruption, or favour or disfavour was shown to any person on irrational grounds;

(f) bad faith has been exercised;

(g) a discretionary power has been improperly exercised at the direction, behest, or request of another person;

(h) a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question;

(i) a power has been exercised in a manner which constitutes an abuse of that power;

(l) an irrelevant matter has been taken into account;

(m) a relevant matter has not been taken into account;

(o) the procedures specified by law have been followed;[285]

As Feltoe notes, these grounds were simply a codification of the existing common law grounds discussed above.[286] Interestingly, there is not much case law on the lawfulness elements of the

[284] See for instance the judgment of the Supreme Court in *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 (S).
[285] ZAJA s5.
[286] Feltoe (note 2 above) 100.

ZAJA. In part, this is due to lawfulness being tested directly against the relevant legislation and not the ZAJA.[287] It is also due to lawfulness being tested against the common law sense of lawfulness which as noted earlier, is not prohibited because the ZAJA and the common law seem to be complementary sources of administrative justice with no hierarchy determining which of the two is preferred.

I will now consider the ground of reasonableness as used both under the common law and under the ZAJA

2.9 REASONABLENESS

2.9.1 Common law position

In terms of the common law, the review based on reasonableness was a high threshold test and mere unreasonableness was not a basis of review.[288] It appeared that much more was needed and this reasoning as Feltoe notes, was adopted from the English decision of *Kruse v Johnson*[289] decided in 1898.[290] In that case which concerned bylaws made in terms of an Act of Parliament, Lord Russell held:

> *'where subsidiary laws were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."* [291]

This reasoning seems to suggest then that where one of the facets listed above are present then the conclusion is that not only is the action unreasonable but also *ultra vires*. The court in *PF* -

[287] This was the case in *Gumbo & Anor v Zimbabwe Stock Exchange* 2004 (2) ZLR 42 (H) for example, which was decided in terms of the Zimbabwe Stock Exchange Act and *Shumba v Minister of Justice & Ors* 2014 (1) ZLR 715 (H) decided in terms of the Labour Act.
[288] Feltoe (note 2 above) 9.
[289] *Kruse v Johnson* [1898] 2 QB 91.
[290] Feltoe (note 2 above) 103.
[291] *Kruse* (note 280 above).

ZAPU v Minister of Justice, Legal and Parliamentary Affairs seemed to agree with this reasoning and effectively imported this into Zimbabwean law.[292] In *S v Delta*, the court linked the reasonableness test to the ultra vires conclusion by formulating the test as follows:

> '*where the reasonable legislature could not have intended to reach the determination reach (by the administrator exercising delegated powers) then, such conduct would be both unreasonable and ultra vires*.'[293] Feltoe notes some of the factors that constitute gross unreasonableness include discrimination, disproportionate, vagueness, and uncertainty.[294]

A glaring weakness of the concept of unreasonableness under the common law was that it was confined to gross unreasonableness and not mere unreasonableness.[295] The standard of gross unreasonableness seems to be a higher threshold than mere reasonableness thus making it almost impossible for a litigant to rely on this ground alone. There are very few instances where one can envisage grossly unreasonable conduct by an administrator as opposed to mere unreasonableness. An additional weakness, however, is that even gross unreasonableness was not entirely reviewable. Some cases of gross unreasonableness would still not be reviewable. An example of this is set out in *Chairman of the PSC and Others v Zimbabwe Teachers' Association and Others*.[296] In this case, the court found that where a body exercises power directly derived from the Constitution, any regulations or subsidiary legislation made by this body cannot be reviewed based on gross unreasonableness. The court viewed reviews of this nature as contrary to the separation of powers doctrine- although it is questionable why it reached that conclusion.[297] As will be discussed later, it should not matter where the source of power stems from, the ultimate question should be whether such conduct is indeed within the confines of the

[292] *PF-ZAPU* (note 85 above).
[293] *S v Delta* (note 252 above), see also commentary by Feltoe on the same case (note 2 above) 103.
[294] Feltoe (note 2 above) 103.
[295] In addition to previous notes, see *African Tribune Newspapers (Pvt) Ltd and Others v Media and others v Media and Information Commission and Another* 2004 (2) ZLR 7 (H) where the court suggested that the review ground of mere reasonableness was never part of the Zimbabwean administrative law and was possibly insufficient as a stand- alone ground of review.
[296] *Chairman of PSC and Others v Zimbabwe Teachers' Association and Others* 1996(1) ZLR 91 (S).
[297] Ibid.

law and where it falls into the categories of unreasonableness discussed above, the courts should be able to review such conduct. This reasoning seemingly follows the line of thinking that exists in a parliamentary supremacy where only the procedures of Parliament can be scrutinized and not the substantive elements of it as Parliament is not answerable to the judiciary for substantive elements.[298] This would, however, be inappropriate because Zimbabwe is not a parliamentary supremacy and has, since 1980, always been a constitutional supremacy. The argument proffered by the court, however, is that this kind of review would only appear to actors whose source of power is not the Constitution but rather statute or the common law.[299]

2.9.2 The ZAJA position

The common law position seems to have been transplanted into the understanding of reasonableness in the ZAJA. While the Act simply requires that conduct is reasonable, the courts have interpreted this provision to entail gross unreasonableness as per the English *Kruse* case discussed earlier. The court in *Rukuni* reformulated the applicable test and held that when determining unreasonableness for purposes of the ZAJA, the question asked should be 'whether the action taken is so unreasonable that no reasonable person would have taken it'. In this regard, the court relied on the *Wednesbury* test choosing to ignore the *obiter* remarks of a previous domestic case that suggested that mere reasonableness would suffice for purposes of the ZAJA. The test reviews conduct that is so unreasonable that the reasonable decision maker would not have arrived at that decision. Patel J in *Rukuni* reasoned that in the absence of clear authority to displace the common law principles of gross unreasonableness, the standard applied in terms of the ZAJA would be pegged at gross unreasonableness and not mere unreasonableness. The court went on to discuss factors that would point to unreasonableness such as failure to apply the mind, evidence of mala fides and ulterior motives. It would seem then that the test for unreasonableness is still in terms of the common law, and an applicant would have to show *mala fides*, ulterior motives, or failure to apply the mind for a court to entertain a review based on unreasonableness in terms of the Act. It will be submitted that this approach

[298] Ibid 92E.
[299] Ibid 94.

adopted by Zimbabwean courts, will have the effect of limiting the constitutional right to administrative justice because it raises the threshold too high. Patel J as he was then, noted that while the *Dombodzvuku & Anor* v *Sithole NO & Anor* case might be cited as proposition for mere unreasonableness as the appropriate standard for review, the pronouncements were *obiter* remarks, and were not canvassed thoroughly enough to be seen as precedent.[300]

Because the common law constitutes an independent source of administrative justice that can solely be used to review administrative conduct, it is worth examining the shortfalls of the common law first before engaging the ZAJA. It will be noted that some of the shortfalls of the common law were remedied in the ZAJA, but many were not and, therefore, remain problematic particularly in light of s68.

2.10 Right to Reasons

2.10.1 Common law position

The Zimbabwean common law did not expressly include a right to be given reasons, but inferences were drawn from a failure to do so.[301] Reasons were viewed as important for creating an impression of fairness, improving the texture and quality of administrative decision making, as well as assisting with appeals.[302] Beyond this, the court in *Affretair* held that reasons were important for purposes of establishing whether administrative conduct can be reviewable.[303] The court likened reasons to the concept of justification which entails that holders of public power should be able to justify and account for their decisions and actions.[304]

It would seem that while there was no general right to reasons under the common law, there were three instances where courts would expect reasons to be furnished to affected parties. These three grounds were where legislation specifically provided for the entitlement to

[300] *Dombodzvuku & Anor* v *Sithole NO & Anor* 2004 (2) ZLR 242 (H) at 247.
[301] See Feltoe (note 2 above)76. See also *Mutare City Council* v *Mafuya* 1984 (2) SA 124 (ZH) where an inference of improper conduct was made based on the failure to give reasons.
[302] Feltoe (note 2 above) 77.
[303] *Affretair* 22.
[304] Ibid.

reasons,[305]where a right of appeal existed[306] and where a contract stipulated such entitlement.[307] Feltoe notes that in the absence of these grounds, there was no general entitlement to reasons, but courts would determine whether a specific matter warranted the furnishing of reasons.[308] In determining whether a matter warranted reasons, the test developed by the courts was to establish if principles of natural justice required reasons to be given based on the specific facts of a matter.[309]

2.10.2 The ZAJA position

ZAJA explicitly creates a right to be given reasons and the period for these is either determined by the legislative enactment or if no period is given, after a request is made, the administrative authority must provide the reasons within a reasonable period.[310] It is submitted that the requirement of a reasonable period is not only vague but problematically wide and should be amended.[311] It would appear that everyone is entitled to ask for written reasons for any administrative decision taken provided the trigger grounds are met. To trigger the right to reasons, one must show that he or she has rights, interests, or legitimate expectations that are materially and adversely affected by any administrative action.[312] Should the request not be granted, s6 of the Act allows applicants to approach the High Court to compel an administrative authority to supply reasons for the conduct. The concept of legitimate expectations had already been used in Zimbabwean administrative law since the case of *Minister of Information v PTC Managerial Employees Workers' Committee,* thus nothing new has been added by this provision as discussed earlier.[313] There does not seem to be a lot of case law dealing with the meanings of

[305] Feltoe (note 2 above) 79.
[306] The rationale for this was that a party would be unable to determine if a right of appeal existed without being given reasons for the decision.
[307] Feltoe (note 2 above) 79.
[308] Ibid.
[309] Ibid.
[310] ZAJA, s3(1).
[311] This will receive further attention in Chapter Six under the suggested recommendations and guidelines.
[312] ZAJA, s6(1).
[313] *Minister of Information v PTC Managerial Employees Workers' Committee* 1999 (1) ZLR 128 (S).

'materially' and 'adversely affected' as used in the ZAJA and it would seem these concepts are relatively well understood or not controversial thus warranting no further discussion herein.

If one does not have rights, interests, or legitimate expectations affected, then they would still be entitled to approach the court for relief in terms of s4.[314] The applicant must further prove that he or she is 'aggrieved by the failure of an administrative authority to supply written reasons for the action concerned within— either the period specified in the relevant enactment or in the absence of any such specified period, a reasonable period after a request for such reasons has been made.'[315] It can be seen that this is indeed a very complex and technical process to request reasons and this should be simplified in the new formulation envisaged by s68(3) of the Constitution. If the court is satisfied that there was a duty to give reasons and that the requirements set out above have been satisfied, it will compel the administrative authority to supply the said reasons and specify the time period for the reasons to be furnished.[316] If the administrative authority fails to comply with the order compelling it to provide reasons, a statutory presumption of improper exercise of power (unlawfulness) in taking the decision arises.[317] This means that an applicant can challenge the decision on unlawfulness where there is non-compliance with the order to supply reasons.

An administrative authority can, however, be relieved from the duty to give reasons in terms of s8 of the Act. The court can allow for partial or complete non-disclosure of the reasons pertaining to administrative action if it believes that it would be contrary to the public interest for such reasons to be disclosed or that the failure to supply reasons by the administrative authority was reasonable and justifiable in the circumstances.[318]

In exercising its discretion in terms of s8(1), the court has several options available to it and these are set out in s8(2). It can, for instance, 'direct that the reasons concerned be disclosed privately to the High Court for its consideration' or 'after examination of reasons which have been privately

[314] Section 4 of the ZAJA deals with the various remedies available to litigants and will be discussed in the next section.
[315] ZAJA s6 (1) (b).
[316] ZAJA, s6(2).
[317] ZAJA, s6(3).
[318] ZAJA, s8(1).

disclosed to it, edit the reasons in such manner or to such extent as the High Court considers best suited to preserve the public interest and to serve the interests of the applicant concerned' or it can determine whether the disclosure of reasons should be confined in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04].[319]

Public interest is defined in broad terms in s8(3) of the Act. While not exhaustive, the definition extends to matters concerning the security or defence of the State, the functioning of government, maintenance of international relations, confidential sources of information pertaining to the enforcement or administration of the law, the prevention or detection of offences or contraventions of the law.[320]This broad understanding of public interest is constitutionally untenable as it undermines the s68 right and other rights as the discussion in subsequent chapters will reveal. The definition thus stands in the way of the duty to give reasons as it can arguably be used by the State to easily deny an applicant reasons. Its protection of the Executive defeats the purpose of accountability and the very principles the Act sets out to achieve. This current provision tramples on the incidences of good governance in the Constitution such as accountability, equality, transparency, and justice.[321]Furthermore, the definition is open-ended leaving room for the inclusion of further 'public interest' meanings that could be used to deny an applicant reasons that he or she would ordinarily be entitled to.[322]

Section 11 of the Act further limits the scope of the duty to give reasons and excludes the duty in the following situations:

1. *Any exercise or performance of the executive powers or functions of the President or Cabinet;*
2. *Decisions to institute or continue or discontinue criminal proceedings and prosecutions and*
3. *Decisions relating to the appointment of judicial officers.*

[319] The constitutionality of this Act is still debatable but will not be discussed in the scope of the study. It will be presumed that the Act is still lawful and remains law until set aside or repealed.
[320] ZAJA, s8(3).
[321] Constitution of Zimbabwe, s9(2).
[322] Section 8(3) of ZAJA states 'or the purpose of subsection (1) but **without limiting its meaning** (*my emphasis*), "public interest" includes matters that relate to…'. It is submitted that the use of the term without limiting its meaning is indicative of the open-ended nature of the definition.

It is submitted that this blanket exclusion allows for 'Executive impunity' - a state of affairs that allows the Executive to go unchecked and thus creating, or further perpetuating, lawlessness, especially given the historical narrative of Zimbabwe's governance. In *Foreman*, the court drew inferences of irrationality and poor decision making from the failure to provide reasons for the administrative conduct. If the reasoning in *Foreman*[323] is applied, then excluding all executive powers and functions of the President or Cabinet from the duty to provide reasons, gives rise to presumably irrational decisions. This also creates the potential for abuse in that the office holders will make decisions that could well be unlawful but that cannot be determined, if no reasons are provided.

In the section below, I consider the various remedies available both at common law and in terms of the ZAJA.

2.11 Remedies

2.11.1 Common law position

A number of remedies were available under the common law for the review of administrative conduct. These include interdicts, declaratory orders, and referral back to the administrator, substitution, and declaration of invalidity.

The default remedy seemed to be a referral back to the original administrator or decision maker.[324] Feltoe notes that the remedy depended on the nature of the violation. For instance, where there were violations of the natural justice principles, an order requiring the authority to remedy this before making a decision.[325] Where there was no hearing, courts required administrators to hold a hearing first before making a new decision.[326] Lastly, where there was a defective or improper hearing, the courts would remit the matter back for rehearing.[327] This was often coupled with specific instructions of how to remedy the defect in the first hearing.[328] If for

[323] *Foreman & Anor v KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H).
[324] Feltoe (note 2 above) 127.
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Ibid.

example, there was inadequate time for preparation for a hearing, the courts would remit the matter back to the administrator with instructions to give the affected party more time to prepare for the hearing.

In terms of a declaratory order, the courts have always had an inherent power to make such orders,[329]which as Feltoe notes, serve the purpose of getting clarity on matters of uncertainty for either the administrator or the affected party.[330]

An interdict could also be granted to prohibit certain conduct or compel the administrative authority to perform.[331] An 'annulment' or declaration of invalidity for ultra vires conduct was almost always automatic, and resultantly the conduct would be viewed as null and void.[332]

Lastly and almost rarely, the courts used the remedy of substitution where the court itself would make the determination without referring the matter to the administrative authority. The remedy was used rarely as there was reluctance to interfere with the realm of the administrators.[333] While rare, the courts would consider this exceptional remedy in four instances as Feltoe notes.[334] These factors were: where there was bias by the decision maker, where further delay would prejudice the affected party unduly, where the court is as qualified or competent to make the decision, and where the result is a foregone conclusion[335] (so obviously clear that the administrator and court would reach the same decision).[336]

2.11.2 The ZAJA position

Remedies are provided for in the ZAJA in terms of s4. Section 4 of the Act sets out possible relief available to applicants who are aggrieved by the failure of an administrative authority to comply with s3 of ZAJA. [337] The remedies include confirming or setting aside the decision, remittal to the

[329] *MDC v President Republic of Zimbabwe & Ors* 2007 (1) ZLR 257 (H).
[330] Feltoe (note 2 above) 127.
[331] Ibid.
[332] Ibid.
[333] *Mugugu* (note 27 above). The court here relied heavily on the reasoning of the English case of *Chief Constable v Evans* [1982] 3 All ER 141, 154,
[334] This also appears in the case of Director *of Civil Aviation v Hall* (note 103 above).
[335] Baxter (note above) 687
[336] Feltoe (note 2 above) 126.
[337] ZAJA, s4.

administrative authority to reconsider the matter and directing the administrative authority to take administrative action within the relevant period (as specified by law) or if no such period is specified, within a period to be determined by the court.[338] The courts can also direct the administrative authority to supply reasons for its administrative action as required by law or as determined by the court.[339] The court may also issue instructions and directives that it may consider 'necessary or desirable to achieve compliance by the administrative authority' with the duties imposed in s3. [340] One might be tempted to think that this includes the ability to possibly substitute the judgment of the administrative authority with that of the court, but this is possible in terms of the ZAJA. Feltoe however, notes, the remedy of substitution has been used albeit rarely and only as an exceptional remedy.[341] Feltoe justifies this by relying on the pre-ZAJA judgment of *Affretair*.[342]

I submit that this position may not be reflective of the correct position as will be seen through the lens of the five cases that have dealt with substitution as a remedy. In the case of *Djordjevic v Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe*[343], a case involving the rejection of an application for a medical registration certificate, the substitution remedy was dismissed as one that the courts are not competent to make.[344] Effectively, the applicant sought a declaratory order stating that the applicant was entitled to be issued with a certificate.[345] The court reasoned that this would entail replacing the decision of the administrator with that of the court – thus effectively usurping the powers of the administrator.[346] The court further reasoned that it was not in a position to 'interfere with the sphere of practical administration' and that the administrator was best suited to deal with this

[338] ZAJA, s4(2).
[339] Ibid.
[340] Ibid.
[341] Feltoe (note 2 above) 97.
[342] Ibid.
[343] *Djordjevic V Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe* 2009 (2) ZLR 221 (H).
[344] Ibid.
[345] Ibid.
[346] Ibid.

matter.[347]In its reasoning , the court relied on the case of *Director of Civil Aviation v Hall*[348] which reflects the common law held position as will be seen below.[349]

In the pre-ZAJA case of *Affretair (Pvt) Ltd & Anor V M K Airlines (Pvt) Ltd* which Feltoe refers to,[350] the Supreme Court had occasion to discuss the role of the courts in reviewing administrative conduct. McNally JA, as he was then, stated that the role of the court was to be 'an umpire of fairness' and not to take over or subsume the authority of the administrator.[351] He reasoned that the courts would rarely be justified in usurping the authority of the administrators, but this might be the case where there is an appeal rather than a review.[352] He held that even where the conduct is so unreasonable that the conclusion was 'hopelessly wrong', it would be appropriate to identify what flaws existed – thus pointing to correction rather than substitution.[353] Despite setting out theoretic instances where substitution may occur, the court itself avoided substitution thus the remedy found no application in the case.[354]

In *Mugugu v Police Service Commission & Anor*, the court found that substitution was not an appropriate remedy for review in administrative law as it effectively 'usurps the authority of the administrator in the guise of preventing abuse.'[355] Although the ZAJA was not applicable in that case, it reinforces the generally held view that substitution is not an available remedy in terms of Zimbabwean administrative law.

In the 2014 case of *CJ Petrow & Company (Pty) Ltd v Gwaradzimba NO*, the court was faced with a question premised partially on the existence or possibility of the remedy of substitution in terms of the ZAJA.[356] While the court explored the existence of the remedy broadly and confirmed it as an exceptional circumstance, the decision was effectively based on the

[347] Ibid.
[348] *Director of Civil Aviation* (note 103 above) 361E.
[349] Ibid 361E.
[350] Feltoe (note 2 above) 96.
[351] *Affretair* (note 10 above) 21C.
[352] Ibid 24.
[353] Ibid 21E.
[354] Ibid 22A, D.
[355] *Mugugu* (note 13 above).
[356] *CJ Petrow & Company (Pty) Ltd v Gwaradzimba NO* 2014 (1) ZLR 487 (H) 2014 (1) ZLR 487.

Reconstructive Act and not the ZAJA.[357] The court was unable to locate the remedy of substitution within the ZAJA despite finding that there was a failure to adhere to the duties in s3 of the Act.[358] Instead, the court argued that since the relief in s4 of ZAJA was not exclusive and recourse could be found in terms of any other law, it would be possible to rely on the Reconstruction of State Indebted Insolvent Companies Act to substitute the decision of the administrator, as the court did.[359] Critically then, this judgment confirms that ZAJA does not, in itself, empower courts to substitute the decision of administrators and that litigants are not entitled to rely on it as relief in terms of s4 of the Act.

The second case that Feltoe relies on is the *Associated Newspapers* case, which was decided using both the Access to Information and Protection of Privacy Act (AIPPA) and the ZAJA.[360]While the court went through the requirements set out in *Affretair* and highlighted that substitution is a remedy available to applicants, the court did not apply it, nor did it suggest that s4 of ZAJA gives credence to the proposition of the existence of the remedy. Instead, the court avoided the issue based on a technicality that was not met in terms of the AIPPA. The question of the existence of the remedy was, therefore, not discussed and cannot, with respect, be used as authority that ZAJA envisages substitution.

In *Mhanyami Fishing & Transport Co-Operative Society Ltd & Ors v Director-General, Parks and Wildlife Management Authority & Ors*, however, the ZAJA was applicable.[361] Makoni J held that the applicants had expressly relied on s 4 (2) of the ZAJA for an order that effectively would substitute the decision of the administrative authority with that of the court which would not be permissible.[362] The reason for its inapplicable nature is that it simply is not referred to in the ZAJA.[363] She went further to find that the remedy may have been available had reliance on the ZAJA not been made. This, it seemed, was fatal to the remedy sought. In my view, this is the

[357] Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27) Act 27/2004.
[358] Ibid 499D.
[359] Ibid.
[360] *Associated Newspapers of Zimbabwe v Media & Information Commission &* Anor 2007 (1) ZLR 272 (H).
[361] *Mhanyami Fishing and Transport Co-Operative Society Limited and Others v General Parks and Wildlife Management Authority N.O and Others* [2011] ZWHHC 92.
[362] Ibid.
[363] Ibid 559F.

correct position in terms of the ZAJA. The ZAJA does not permit substitution which in part explains why where parties have sought to raise it, it has only been successful in terms of other laws. No party has successfully raised the remedy in terms of the ZAJA and while some cases decided prior to its enactment suggest its application, no express provision currently exists that suggests that the High Court is entitled to substitute the decision of an administrative authority with its own and this is a fatal flaw of the Act.

In my view, Feltoe is mistaken in suggesting that ZAJA encompasses substitution as a remedy - a concession he makes in discussing the shortfalls of the ZAJA. [364] There is, thus, a need for this to be revisited when drafting a new Act to give effect to s68 (3).

The last aspect to be considered under remedies is the duty to exhaust internal remedies.

Section 7 of the Act seemingly provides for a duty to exhaust internal remedies within the administrative body itself before reliance on the Act is possible. Section 7 grants the court a discretion in entertaining applications and it will determine whether a party had a duty to exhaust internal remedies. While the wording of the Act seems to suggest that this is not a mandatory duty, the courts have interpreted it to mean that it is a mandatory requirement.[365] In the *African Consol* case, the court went as far as suggesting that it would be 'improper' and a disregard of judicial deference not to enforce the requirement for parties to exhaust their internal remedies.[366]

I will now consider the shortfalls and weaknesses of the common law in general.

2.12 Shortfalls and weaknesses of the Zimbabwean Common Law

Two things should be clear from the jurisprudential survey of Zimbabwean administrative law conducted thus far in this study. Firstly, there was a system of administrative law that was generally existent and secondly, although existent, the common law administrative law

[364] Feltoe (note 2 above) 30.
[365] *African Consol Resources PLC & Ors v Minister of Mines & Ors* 2010 (1) ZLR 208 (H). See also *Mhanyami Fishing* (note 352 above).
[366] Ibid 211.

framework was imperfect and had loopholes that were exploited. The ensuing discussion intends to explore these defects and flaws.

a) The absence of an express duty to act expeditiously

The common law did not cover unreasonable delays in making decisions.

Delays by decision makers in making decisions were generally permissible by virtue of the absence of a rule stating otherwise. If legislation was silent on the time to be taken by the administrator before making a decision, then the period considered to be a delay would be determined on a case-by-case basis.[367] The common law position has, however, since been remedied, at least in part. ZAJA contains a duty to act within a reasonable period and the inclusion of the duty has been attributed to the recommendations made by the Law Development Commission of Zimbabwe.[368]

b) Ouster Clauses

Ouster clauses effectively removed judicial review for certain conduct by administrators. As noted in the earlier discussion, the legislature could expressly or impliedly oust the jurisdiction of the courts in determining the reviewability of a matter. Examples of this include where the courts held that natural justice did not apply in respect of investigations carried into alleged corruption acts by a company.[369] Arguably, ouster clauses run contrary to a country whose Constitution determines that the Constitution is the only supreme law and that the courts are the upper guardians and custodians of the law.[370] The reviewability of all exercise of public power is a new feature of the 2013 Constitution and an effect of the good governance and rule of law principles enshrined in it as it shall be seen later on.

[367] Feltoe (note 2 above) 104, 105.
[368] This was then dealt with in terms of s 4 (2) (c) of ZAJA and will be discussed in some detail below. Also see Feltoe in this regard (note 2 above) 105.
[369] See for example in this regard, *Motsi v A-G and Others* 1995 (2) ZLR 278 (H) which dealt with the Prevention of Corruption Act in Zimbabwe. This was, however, a decision that stemmed from the Appellate Division case of *Rent Control Board v SA Breweries Ltd* 1943 AFD 456.
[370] Constitution of Zimbabwe, s2 and 3.

c) Non-reviewability of some mistakes of law

The desire not to interfere in the terrain of the administrator led to several courts adopting the stance that effectively limited which mistakes of law could be reviewed.[371] The only recognized reviewable mistakes of law in terms of the common law were: where the mistakes led to the official denying the jurisdiction they possessed, where the administrator failed to recognize the nature of the discretion given to the administrator, and where the mistakes led to the administrator assuming jurisdictional authority they did not possess.[372] This meant that if a mistake of law did not fit into one of the three categories, the courts would not entertain review applications, thus allowing for unlawful conduct to remain operative. This is repugnant to any society that believes in the rule of law and the lawfulness of administrative conduct. It is desirable instead that all mistakes of law be reviewable as they ultimately mean that the administrator acted outside lawful boundaries or misunderstood the legal basis to act on.

d) Limited review of the prerogative powers of the President

As noted previously, there were limits to the reviewability of the prerogative powers. The only ground in terms of which a review could take place is where the actions of the President resulted in a deprivation of rights and interests of the individual concerned.[373] The overarching ground was, therefore, that of lawfulness. It was, thus, not possible for one to review the conduct of the President on grounds of unreasonableness or natural justice unless that conduct resulted in a deprivation of rights, interests, or legitimate expectations. [374] The President could thus act with impunity and aggrieved parties would have no recourse if the conduct did not fall into the listed categories identified in *PF- ZAPU.*[375]

[371] Feltoe (note 2 above) 106.
[372] *Kambasha* (note 81 above).
[373] *PF-ZAPU* (note 85 above).
[374] *PF ZAPU* (note 85 above).
[375] Ibid.

e) The absence of the remedy of substitution

The default remedy in terms of the common law was to send back the matter for the administrator to make a decision afresh, and where this was not practical, it would be sent to another administrator.[376] Substitution was, therefore, not a remedy relied on in terms of the common law generally, since as the court reasoned in *Mhanyami Fishing & Transport Co-Operative Society Ltd and Others v Director General Parks and Wildlife Management*, to do so would be to step into the party's domain and effectively blur the separation of powers doctrine.[377] The courts have not been consistent with their position and in a few cases, the courts held that it is an available remedy but this position is debatable, which is why there needs to be a clear position articulated by the courts as far as the availability of the remedy is concerned.[378] As will be reasoned later in this study, such a remedy is important although the courts must use it cautiously. In instances of bias at both an individual level and at an institutional level, it may well be appropriate to encompass this remedy in the new understanding of Zimbabwean administrative law since it is clear that in such a situation, the applicant may not receive fair treatment. In the context of substantive fairness which at its core is a review of the merits of the decision, the remedy of substitution will almost always be used.[379]

f) Gross unreasonableness vs mere reasonableness

The standard set by gross unreasonableness is so high that it would be practically impossible to raise it as a basis of review, which means many litigants would find themselves without a remedy if their conduct was lawful, procedurally unfair, and not grossly unreasonable but just merely unreasonable.[380] It is submitted that this high threshold leaves a gap that can be exploited and should be plugged by the introduction of s68 of the Constitution.

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[376] *Affretair* (note 10 above) 21.
[377] *Mhanyami Fishing & Transport Co-Operative Society Ltd and Others v Director General Parks and Wildlife Management N.O and Others* [2011] ZWHHC 92.
[378] Ibid. A more detailed analysis of the cases discussing the remedy will can be found in the section dealing with relief in terms of the ZAJA below.
[379] This will be discussed in Chapters 3 and 5 in greater detail.
[380] *Rukuni v Minister of Finance* 2012 (2) ZLE 205 (H).

g) Deviations from the audi alteram partem principles

As noted earlier, courts previously found that there are instances where the *audi* rule need not be applied or certain classes of people who were not entitled to enjoy the protection and benefits of the rule. These cases were instances of suspensions of public servants or imposition of punishment on public servants by their employer, the Public Services Commission.[381] Ostensibly from the cases surveyed thus far, it would seem that civil servants were generally deprived of the protection of the rule. This anomaly must be rectified because s68 grants everyone the right to lawful and substantially and procedurally fair administrative conduct which, therefore, includes civil servants. The common law deviation is consequently in direct contradiction with s68 of the Constitution.

h) Refusal to review on the basis of gross unreasonableness grounds where a delegated administrator is directly empowered by the Constitution

In the *Chairman of PSC* case already examined, the court found that the judiciary is precluded from reviewing matters on the grounds of unreasonableness where delegated functionaries or administrators are directly empowered by the Constitution.[382] As argued previously, this position is inconsistent with the dictates of the rule of law because it suggests that as long as a delegated administrator is empowered directly by the Constitution, they are not accountable for their conduct regardless of how unreasonable their conduct is. This position must be aligned to the Constitution.

While I have already surveyed parts of the ZAJA, the next section is dedicated to a holistic overview of the Act which in part remedies some of the flaws of the common law. It will also be seen that while it codified the common law, it also seemingly codified some of its deficiencies, thus hindering it from fully giving effect to s68[383].

[381] See discussion of *Dube v Chairman, Public Service Commission and Another* 1990 (2) ZLR 181 (H).
[382] Ibid.
[383] This is the basis of the discussion in chapters three and five which consider the necessary additions that need to be made to the ZAJA for it to be constitutionally compliant with s68(3).

2.13 Shortfalls and weaknesses of the ZAJA

Generally, it must again be noted that while the Act attempts to codify the common law, in some cases, it has covered the loopholes identified in the previous section, however, in other instances, it in fact creates more gaps. The analysis that follows is based on the points raised above cumulatively and suggests what remains to be done for the Act to be able to fully give effect to s68 of the Constitution. These gaps present threats to the realization of the right and will receive significant attention in the remainder of the study.

a. Exclusions of the Executive from duties in s3 and s6

As noted earlier, s11 of ZAJA exempts the President and Cabinet from s3(1)(c), s3(2) and s6, which encapsulate the duty to give reasons and the duty to act in a procedurally fair manner when exercising executive powers and functions. Feltoe finds fault in this in that it undermines the rule of law and places the Executive in a place where it can abuse its authority. In the Zimbabwean context, this is not a mere theoretic possibility but an experienced reality.[384] This weakness ostensibly frustrates the realization of the s68 right, which does not in itself provide exemptions. In this sense, such a flaw is undesirable and should be remedied to give effect to the enjoyment and realization of the s68 right.

b. Deviation from the duties set out in the Act

It is possible for an administrator to be exempted from any or all the duties set out in s3 of the Act, which include the duty to act lawfully, reasonably, and in a procedurally fair manner.[385] This will be discussed as a fatal flaw of the Act in detail in the next section. In terms of the deviation principle, which allows authorities to deviate from the duties set out in s3, the High Court *may* (my emphasis), consider the following factors in determining whether there has been a violation or breach of the duties set out in s 3:

(a) the administrative authority has jurisdiction in the matter;

[384] Feltoe "Giving with one hand and taking back with the other: the exemptions and exclusions in the Administrative Justice Act" 2004 Issue No 11 *Zimbabwe Human Rights Bulletin* 106.
[385] ZAJA, s3(3).

(b) the enactment under which the action has been taken authorises the action;

(c) a material error of law or fact has occurred;

(d) a power has been exercised for a purpose other than that for which the power was conferred;

(e) fraud, corruption, or favour or disfavour was shown to any person on irrational grounds;

(f) bad faith has been exercised;

(g) a discretionary power has been improperly exercised at the direction, behest, or request of another person;

(h) a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question;

(i) a power has been exercised in a manner which constitutes an abuse of that power; (j) the action taken is so unreasonable that no reasonable person would have taken it;

(k) there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken;

(l) an irrelevant matter has been considered;

(m) a relevant matter has not been considered;

(n) a breach of the rules of natural justice, where applicable, has occurred;

(o) the procedures specified by law have been followed;

(p) any departure from the requirements of section three is in the circumstances reasonable and justifiable.

It is important to note that the above are mere guidelines for consideration by the court although they should in fact be independent grounds of review as will be argued in Chapter Five of the study. They are taken into account only when considering a possible violation of section 3 of the Act, which captures lawful, reasonable, timeous, and procedurally fair conduct. It does not apply

to other duties in the Act. There is no indication what conclusion should be drawn from the presence of the factors or how they should be used, but it would seem that the courts have a wide discretion in using these grounds. Not only are there no indications of how these guidelines must be considered or weighed against each other, but the wording in s5 suggests that considering the guidelines is in itself a discretion that the High Court has. This is so because of the presence of the word 'may' in s 5. This then implies that a court may allow a deviation without referring to any of the factors or guidelines in s5 of the Act.

The only guidelines set out that are mandatory for the courts to consider before condoning a deviation are set out principally in s 3 (3) of the Act. In terms of this section, courts **must** consider the following factors:

(a) whether the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections to vary or exclude any of their requirements; or

(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall consider all relevant matters, including—

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.

There are two ways of successfully deviating from the requirements in s3. The first is if there is an enactment expressly providing a similar duty, which the administrative authority wants to deviate from and the second is where there is no express duty in an enactment, but the deviation is seen as reasonable and justifiable in the context of the circumstances of that present case. The deviation in both instances can take place by means of a variance (merely varying the duty) or

completely excluding it.[386] A deviation from the duties of s 3 will not take place if the enactment under which the decision is made does not expressly provide for a similar duty.[387] The limitation in the deviation seems to serve the purpose of ensuring that administrative authorities are held accountable for their actions and to prevent the loopholes seen in the common law. Therefore, where there is doubt as to the existence of a similar duty in an enactment, the wording of s3(3) suggests that a deviation will not be permitted.

Using the second route of deviation, the existence of an express provision is dispensed with and a deviation will be permitted if it is reasonable and justifiable. In determining this, the courts must engage some factors which include but are not limited to the objects of the applicable enactment or rule of common law, the likely effect of the action, the urgency of the matter or the urgency of acting thereon, the need to promote efficient administration and good governance and the need to promote the public interest.[388] If the court is satisfied that the deviation is reasonable and justifiable on the facts, then an administrative authority may well be exempted from the duties in s 3 of ZAJA. Not much guidance is provided on how the courts need to engage in this exercise. The lack of guidance is problematic and likely to give rise to an avoidance of the duties in s3 since an administrative authority can easily establish some of the requirements set out. The second route to deviation is even more problematic because an authority can be released from the duty completely thus allowing for unlawful, unreasonable, or procedurally unfair administrative conduct.

In terms of s3, a deviation from the requirement of lawfulness is possible if the requirements set out for the deviation are adhered to. It is repugnant to a society based on the rule of law, to permit any form of deviation for administrators to act unlawfully. Though the legislature purported to create a deviation, it is submitted that this deviation is not constitutionally tenable because the Constitution requires lawful administrative conduct in s68. Beyond this, the values of the Constitution, as discussed previously, are clear that Zimbabwe is a society based on the

[386] ZAJA, s3 (3).
[387] Ibid.
[388] Ibid.

rule of law and upholding of constitutionalism.[389] The fact that the Act still contains a deviation from lawful conduct is indicative of the need to remedy this before s68 can fully be given effect to. To leave this deviation as is, is to encourage a culture of lawlessness and allow administrative authorities to be exempt from lawfulness. [390]

Section 3 not only allows a deviation from lawful administrative conduct but also permits a deviation from the duty to act reasonably. [391] Again, such a deviation allows for unreasonable administrative conduct to be considered legitimate and otherwise lawful. This defeats the purpose of the Act and further limits the right in s68. While s68 guarantees everyone reasonable administrative conduct, the Act permits unreasonable administrative conduct in certain situations detailed above. There is thus a *prima facie* contradiction with the constitutional right and instead of complementing the right, the Act seemingly defies the right. It is submitted that the Act cannot limit a right the Constitution creates unless such limitation is in line with any internal limitations within the section or in terms of the limitation of rights as per s86 of the Constitution. [392] The practical effect of this defect is that many administrators may be able to circumvent legislation and avoid accountability.[393]

c. Gross unreasonableness as the standard for reasonableness

The arguments set out earlier in respect of the common law approach bear relevance in reference to the ZAJA. Since the constitutional right simply refers to reasonable administrative conduct, it is submitted that adding gross unreasonableness to the equation creates a different standard not envisaged by the drafters. Surely if they intended to have this standard, specific reference to it would be made in the constitutional text. Requiring this high threshold limits the instances of the right available in terms of s68 as courts will only look for instances of gross unreasonableness – a standard which is difficult to determine and prove.[394] Feltoe further notes that the ZAJA's

[389] Constitution of Zimbabwe, s3.
[390] Feltoe (note 2 above)31, 32.
[391] ZAJA, s3(3).
[392] The limitation clause states that rights may only be limited in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
[393] Feltoe (note 2 above)31.
[394] See *Rukuni* (note 371 above) for instance and Feltoe (note 2 above) 31.

counterpart, the PAJA, does not contain similar provisions allowing a deviation from the duty to act reasonably.[395]

d. The absence of an explicit remedy of substitution

While the Supreme Court in *Affretair* [396]and *Hall*[397] was willing to accept the existence of the remedy of substitution generally as part of the common law, there is general acceptance by the courts that the ZAJA does not include the remedy of substitution as illustrated earlier. In *Affretair*, the court formulated the applicable test of when the remedy would be used as was formulated in previous cases and other jurisdictions.[398] In particular, the court found that where one of the following situations is present then the remedy may be applicable:

> '*where the end result is a foregone conclusion and a referral back to the tribunal or official would be a waste of time; where further delay would cause unjustifiable prejudice to the applicant , where the tribunal or official has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again or where the court is in as good a position as the tribunal or official to make the decision itself.'*[399]

As discussed previously, where the administrator and tribunal have clearly displayed bias then the default remedies of remittal would be inappropriate as there is no guarantee that the administrative authority will apply its mind without being biased again. In such a case, it would seem appropriate to have the remedy of substitution. While it is undesirable to cross into the terrain of the administrators, the courts are ultimately empowered by the 2013 Constitution to ensure the rights, freedoms, and interests of all. This impliedly means that they have the authority to step into the terrains of the administrative branch of the State to ensure that these rights and freedoms are protected.[400]

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[395] Feltoe (note 2 above) 31.
[396] *Affretair* (note 10 above).
[397] *Director of Civil Aviation* (note 103 above).
[398] *Affretair* (note 10 above).
[399] Ibid.
[400] Constitution of Zimbabwe, s165(1).

e. Lack of clarity of definitional elements

The definition of administrative action is slightly problematic in that some of its elements are defined by referring to undefined terms.[401] The absence of clarity in such key terms as 'adversely affects', 'materiality', and 'administrative functions', create not only uncertainty but also the potential for confusion and contradictory standards applied by different courts. It would certainly also be useful for litigants and prospective litigants to know whether the conduct they are seeking recourse for is indeed covered by the Act before approaching the High Court for relief. In the absence of this, the courts will find themselves spending more time determining what constitutes executive action or administrative action instead of dealing with the merits of the matter before it. Removing this barrier will enhance the 'accessibility' of the Act and avoid litigants using other enactments for recourse that could have been provided through the ZAJA.

2.14 Conclusion

The overall aim of this chapter, as set out in the introductory pages, is to examine Zimbabwe's administrative law in terms of the common law and the ZAJA as it was before the introduction of s68.

Section 68 confers on every person a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial, and both substantively and procedurally fair. ZAJA on the other hand, only secures the right to administrative conduct that is lawful, prompt, reasonable, and procedurally fair, although even these aspects are not without their own defects. There remains a gap in terms of administrative conduct that is efficient, proportionate, impartial, and substantively fair. The Act cannot be said to fully embody the protections set out in s68 as it only covers half of those protections and still needs amendments to be done for those that it does cover to achieve full compliance with the s68 right.

There is a challenge in determining the meaning of substantively fair administrative conduct in Zimbabwe and this is because this concept has been rejected consistently by Zimbabwean courts. The cases reviewed thus far indicate that the courts themselves are not willing to entertain

[401] See above discussion on the *Concept of Administrative Action in terms of the ZAJA.*

substantive issues in administrative law review. This is also because other jurisdictions only go as far as securing procedural fairness. An enquiry into substantive fairness entails the judiciary placing itself in the position of the administrator and assessing the merits of a matter that would ordinarily be the preserve of the administrator.[402]This, in turn, would then allow courts to substitute the judgment of the administrative authorities with their own and this is most undesirable in the field of administrative law. As Hoexter puts it '…the administrative-law notion of fairness is not substantive in nature'.[403]

South African law has always been clear on the reviewability of decisions on the premise of substantive fairness. In *Du Preez & Another v Truth & Reconciliation Commission*, the then South African Chief Justice noted that the duty to act fairly is concerned only with the 'manner in which a decision was taken 'and not the fairness of such a decision.[404] The South African Constitutional Court had occasion to discuss the existence of substantive fairness in administrative law in the case of *Bel Porto School Governing Body v Premier, Western Cape.* [405] The Court held that unfairness of a decision itself has never been a ground of review and that what is reviewable is the process leading to the decision. [406] The main reason that substantive fairness is not a feature of administrative law in most jurisdictions is captured succinctly by the court, which reasoned that investigating substantive fairness would usurp the functions of the administrators unjustifiably.[407] Substantive fairness is more suited to the 'political and administrative level and not the judicial level' in keeping with the separation of powers doctrine. [408]

As discussed previously, Zimbabwean administrative law has similarly shied away from recognizing the power of courts to step in the shoes of the administrator and make substantive decisions in place of the administrator. Enunciating this position more clearly, Prof Feltoe noted

[402] See previous cases discussed such as *Mhanyami Fishing* (note 119 above).
[403] Hoexter (note 65 above) 361.
[404] *Du Preez & Another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A) 231G.
[405] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC).
[406] Ibid par 86.
[407] Ibid par 87.
[408] Ibid par 88, 89.

'…the function of the court is not to delve into the substantive correctness of administrative decisions, but only to ascertain whether there have been any procedural irregularities or action of an ultra vires nature, it would seem to follow that on review the court has no power to overturn a decision simply because it considers it to be unreasonable. If it was to do so, it would in effect be substituting its own decision in place of the decision of the body empowered to make this decision.'[409]

The Zimbabwean judiciary has, in many cases, made it clear that it would not venture into substantive fairness discussions or indeed the correctness or merits of the decisions.[410] The attitude by Zimbabwean courts in this regard is not novel and certainly rings true in other jurisdictions.

Countries that have attempted to introduce a substantive fairness 'flavour' to their concept of administrative law, have done so unintentionally, in a piecemeal fashion, and by judicial interpretation.[411] This makes the Zimbabwean position unique because it specifically frames substantive fairness as part of the bundle of rights encompassed in the administrative justice right. Unlike other jurisdictions that have stumbled upon substantive fairness while giving effect to procedural fairness, Zimbabwe specifically gives citizens the right to review administrative action when such action is substantively unfair. This will require an in-depth discussion because of its novelty. The ZAJA is, therefore, unable to provide any guidance on this matter because it deals with procedural fairness only. This again, proves that the constitutional alignment process would be inappropriate for the ZAJA.

From the above considerations and the analysis of the content of Zimbabwe's pre-2013 administrative law, it is submitted that there is a need for the gaps discussed above to be covered

[409] Feltoe (note 2 above) 31.
[410] In this regard see *Zambezi Proteins (Pvt) Ltd & Others v Minister of Environmental and Tourism & Another* 1996 (1) ZLR 378 (H) where Garwe J, as he was then, held that the role of the courts is not to second guess the administrative authorities and that doing so would be a violation of the separation of powers doctrine unjustifiably so. Further see *Jonga v Zambezi River Authority CEO & Another* ZWHHC 126, a judgment of Mtshiya J who similarly refused to enter the domain of the administrative authority in substantive matters.
[411] In this regard see DJ Mullan 'Development in Administrative Law: The 1983-84 Term' (1985) *The Supreme Court Law Review* 16,19.

in the coming chapters to serve as guidelines for the judiciary in interpreting the right. It is also necessary to highlight how these loopholes can be closed to ensure the realization of s68.

Chapter Three: Significance of s68 and the constitutionalisation of the right to administrative justice

3.1 Introduction and Outline of Chapter

This study is premised on the rationale that when correctly interpreted, s68 of the Constitution has the effect of bringing about good governance in the Zimbabwean context. It would be overreaching to suggest that administrative law in general can result in good governance. At best, it can result in better administration but given the context specific nature of good governance in the Zimbabwean Constitution, this chapter will show that when read together with s68, the constitutional right to administrative justice has the potential to impact and improve good governance in Zimbabwe. This chapter will also show the importance of s68 and its constitutionalisation. The overall effect of s68 on administrative law in Zimbabwe will also form part of the focus of this chapter.

One of the core concerns of this study is to consider the implications of the right to administrative justice in the Constitution and what it really translates to for the Zimbabwean people. This chapter will, therefore, look at the new concepts introduced by s68 such as substantive fairness and efficient administrative justice and consider what these elements add to the concept of good governance and good administration. In addition to this, the chapter will consider the meaning and scope of good governance in Zimbabwe and establish a link between good governance and the content of s68, which further enhances or cements the concepts of good governance in the Zimbabwean context.

Structurally, this chapter will begin by examining the significance of the constitutionalisation of the right to administrative justice and the new concepts that s68 introduces in Zimbabwean Administrative law context, will be examined. Lastly, the chapter will examine the link between the overall net effects of s68 in advancing the good governance envisaged in the Zimbabwean Constitution.

3.2 Good governance

Good governance is central to this study and it is, therefore, worth examining the content and meaning of the concept generally and with specific reference to Zimbabwe.

3.2.1 Good governance in general

It must be clear from the onset that there is no universal definition of what good governance entails and different institutions define it in a manner relative to their purposes and objectives.[1] To be specific, it has been stated that good governance and its ideals will ultimately turn on what these will be used for and to what end.[2] Good governance can then be split into two main realms, namely the economic and political.[3] In the economic sense, the definition tends to be moulded and crafted through the lens of global financial institutions, chief of which is the World Bank. Usually, it is concerned with how economic changes can be made.[4] In the political world, the definition is anchored in constitutionalism and the realm of human rights ideals. It is therefore clear that good governance is context specific - another important point to note since this study confines itself to the understanding of good governance in the Zimbabwean context. There are of course, some general factors that stand out regardless of the context good governance is discussed and these will be set out and briefly discussed in this section.

Governance as a concept can be described as 'the manner in which power is exercised in the management of a country's economic and social resources for development.'[5] Good governance on the other hand, can refer to effective and efficient decision making to address shared problems and/or challenges facing a country.[6] The World Bank further defines good governance by looking at three factors: a good and effective political regime, an efficient process by which authority is exercised and the capacity of governments to design, formulate, and complement

[1] J Corkery 'Introductory Report' in J Corkery (ed) *Governance: Concepts and Applications* (1999) 5.
[2] S De La Harpe, C Rijken, R Roos 'Good Governance in Public Administration: A South African Case Study' (2008) 11 (2) *PER/PELJ* 125, 126.
[3] Ibid. See also J Wouters & C Ryngaert 'Good Governance: Lessons from International Organizations' in D Curtin D & R Wessel (eds) *Good Governance and the European Union* (2004*)* 69-70.
[4] De La Harpe (note 2 above).
[5] Ibid.
[6] Ibid.

policies and discharge functions.[7] Good governance further entails an accountable government at all levels, competency of such governments to formulate and deliver services and observance of the rule of law doctrine.[8] It would, therefore, seem that some common attributes of good governance are accountability, transparency, access to information, and efficient delivery of goods and services, which in essence, are the crux of the realm of administrative law.[9]

The United Nations backed Commission for Global Governance, defines good governance in more detail as '[g]overnance is the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.'[10]

The pillars of good governance according to the United Nations, would seemingly entail 'accountability, participation, legitimacy, the rule of law and respect for human rights.'[11] One can therefore not talk about good governance without a respect for human rights and accountability. Administrative law, as already noted, dovetails these concepts by encapsulating a right to administrative justice which in the Zimbabwean Constitution is a human right and accountability both of which are underlying prerequisites of administrative law. In terms of the traditional theories of administrative law, one of the key functions performed is to create accountability of state actors or actors who exercise public power.[12]

Of significance is the connection between good governance and administration. As Putnam notes, good governance is central to an administration and an effective administration reflects a society with a streak of good governance.[13] The concepts of good governance and administration are, therefore, inextricably linked. Good governance in turn promotes social harmony, political

[7] O Bandyopabhyay Administration, Decentralisation and good governance' Vol 31 No. 48 (1996) *Economic and Political Weekly* 3109, 3109.
[8] Ibid 3109.
[9] Ibid 3113.
[10] Report of The Commission on Global Governance *Our Global Neighbourhood* (1995) 4.
[11] De la Harpe (note 2 above).
[12] HB Jacobini *An Introduction to Comparative Administrative Law* (1991) 3.
[13] RD Putnam *Making Democracy Work -Civic Traditions in Modern Italy* (1993) 15.

stability, respect for human rights, and economic development.[14] These three elements as this study will show, are pivotal points required for a better Zimbabwe. Consequently, if administrative law can enhance good governance and good governance can bring about change in the three spheres highlighted above, then it can be seen that administrative law is indeed a catalyst for the much-needed transformation and reform in the Zimbabwean context.

Corkery notes that reforming the public administration of a country promotes good governance and this process of transformation and reform must take into account a country's history.[15] Donor agencies and the international development community generally believe that good governance in countries like Zimbabwe or indeed other developing countries is tied to political, economic, social, legal, and administrative reforms.[16] At a time at which the Zimbabwean government is tirelessly trying to shed-off the legacy of the Mugabe led administration, it will be noted that for such donor agencies, s68's realisation and full utilization can achieve these reforms and also yield some economic development. The Zimbabwean government would thus be well advised to ensure that good governance is promoted and generally cemented. This study will make the proposition that such reforms, particularly in the administrative law sphere, will go a long way in achieving these desired goals.

Good governance is also linked to the rule of law – a fundamental premise of administrative law which will receive further attention as a suggested principle and theory of interpretation and reform in the remaining chapters of the study.[17] Good governance may be seen from or judged by the outcomes of an administration process.[18] The failure of administrative process must, therefore, be seen as a failure of governance and a symptom of bad governance.[19]

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[14] SN Sangita 'Administrative reforms for good governance' Vol.63 No.4 (2002) *Indian Journal of Political Science* 325, 327.
[15] Corkery (note 1 above).
[16] D Osborne 'Governance, Partnership and Development' in J Corkery (ed) *Governance: Concepts and Applications* (1999). See further M Kaul 'Issues in Governance: A Common Wealth Perspective' in J Corkery(ed*) Governance : Concepts and Applications* (1999), K Konig 'Good Governance-as a Steering and Value Concept for the Modern Administrative State' in J Corkery (ed) *Governance : Concepts and Applications* (1999) and a World Bank Group 'Corruption and Good Governance' Annual Meetings Brief (1999).
[17] Sangita (note 14 above).
[18] Ibid 325.
[19] Ibid 326.

Administrative law and good governance are intertwined since administrative law zones in on the public administration or bureaucracy, which Hoexter refers to as the hub of governance and administration.[20] Public administration itself is defined as being concerned with the 'day-to-day business of government and implementation of law and policy'.[21] In the Zimbabwean context, s199 of the Constitution stipulates that the civil service is responsible for the public administration of Zimbabwe.[22] Therefore, administrative law in Zimbabwe has as its main focus or thrust, the civil service which implements policies and administration matters, which are the subject of the good governance requirements discussed below. This connection reflects the need for a functional administrative law system to achieve good governance expected of the civil service and other parties who have constitutional mandates in this regard.

In their article 'Good governance – An Elusive Deal', Mafunisa and Khalo note that any 'lapse in the politics and the administration of the state is attributed to a lack of good governance.'[23] Once again, the link between good governance and the administration of the state is underscored with the inference being that good governance improves both the politics and the administration of the State. They go on further to note that while good governance remains an ideal, which many states fail to achieve, it is worth pursuing as it enhances the livelihoods and wellbeing of citizens in a country.[24] The link between good governance and human rights cannot be brushed aside and the two must be seen as 'supplementary' and perhaps complementary to each other.[25] Furthermore, it has been suggested that good governance is an enabling environment for the enjoyment, realisation, and fulfilment of rights, which by extension, includes the right to administrative justice. [26] The above illustrates the general proposition that good governance and

[20] C Hoexter *Administrative law in South Africa* 2 ed (2012) 6.
[21] TC Daintith 'The Legal Analysis of Public Policy' (1982) *Journal of Law and Society* 191.
[22] See s 199 of the Constitution.
[23] MJ Mafunisa & T Khalo 'Good governance-An elusive ideal?' (2014) 49 (4) *Journal of Public Administration* 960, 960.
[24] Ibid 960, 961.
[25] M Kjoer M & K Kinnerup 'How Does Good Governance Relate to Human Rights?' in H Sano H & G Alfredsson (eds) *Human Rights and Good Governance* (2002) 18.
[26] De La Harpe (note 2 above) 10, 15.

administrative justice are complementary and linked concepts. This would be the case even without the constitutional premise of good governance.

I will now consider good governance in terms of the Zimbabwean Constitution, which incorporates it as part of the transformation agenda and new constitutional dispensation. The Zimbabwean Constitution sets out principles that are indicative of good governance and because good governance is context specific, these principles will form the basis of the thesis and its arguments. In other words, the indicator of good governance in Zimbabwe will be determined by the goals and indicators set out in the Constitution below.

3.2.2 Good governance in Zimbabwe

Perhaps owing to the legacy of poor governance in the country[27], the drafters thought it wise to constitutionalise the concept of good governance and thus make it justiciable. It is worth noting that many countries do not have an express good governance section in their constitutions.[28]

It should be noted that in Zimbabwe, good governance is both a founding principle and a national objective in the Constitution. Consequently, two very detailed sections in the Constitution are dedicated to discussing good governance.[29] One section deals with the factors and or guidelines that constitute good governance[30] and the other deals with the requirements of good governance as applicable to various arms of the State.[31] The elements of good governance envisaged by the Constitution can be grouped into four broad categories: political participation, transparency and accountability, protection of human rights, and social coercion. These

[27] For a more detailed discussion of the indicators of bad governance in Zimbabwe, see for example G Cain 'Bad Governance in Zimbabwe and Its Negative Consequences' (2016) 2 (1) *The Downtown Review*. In this article, Cain cites the breakdown of law and order, the disregard for the rule of law, arbitrary extinction of property rights, politically motivated violence and arrests as some indicators of poor governance in Zimbabwe which he in turn blames for the collapse of the economy and reduced investor confidence in the country.

[28] This is true of countries like Algeria, Namibia, Zambia, Mozambique, Nigeria and South Africa for example. In most of these countries, the concept is either expressly or tacitly alluded to but the content of what it entails is not discussed unlike the Zimbabwean Constitution.

[29] Good governance is discussed both in s 3(2) and s 9 of the Constitution.

[30] These are found in s3 (2) of the Constitution.

[31] These are set out in s 9 of the Constitution.

classifications align themselves to the categories of general good governance discussed earlier in this section.

As already noted, good governance is set out in Chapter 1 of the Constitution as part of the founding principles.[32] The principles of good governance as set out in Chapter 1 are:

1. *a multi-party democratic political system;*
2. *an electoral system based on--*

   -universal adult suffrage and equality of votes;

   -free, fair, and regular elections; and

   -adequate representation of the electorate;
3. *the orderly transfer of power following elections;*
4. *respect for the rights of all political parties;*
5. *observance of the principle of separation of powers;*
6. *respect for the people of Zimbabwe, from whom the authority to govern is derived;*
7. *transparency, justice, accountability, and responsiveness;*
8. *the fostering of national unity, peace, and stability, with due regard to diversity of languages, customary practices, and traditions;*
9. *recognition of the rights of-*

   -ethnic, racial, cultural, linguistic, and religious groups;

   -persons with disabilities;

   -women, the elderly, youths and children;

[32] In particular, these are set out in s9 of the Constitution.

-veterans of the liberation struggle;

10. the equitable sharing of national resources, including land;

11. due respect for vested rights; and

12. the devolution and decentralisation of governmental power and functions.

All organs of state and government departments are bound by these principles.[33] It becomes quite evident that many of these principles or factors are tied to administration and, therefore, to achieve good governance in the Zimbabwean context, the law governing the administration of the State must be transformed. For example, the principle of due respect for vested rights requires by implication, that rights such as that of administrative justice are given effect to. An independent electoral system that gives effect to the ideals of the Constitution is no doubt reliant on administrative law for relief since the electoral system involves the implementation of policy and/or legislation, which are hallmarks of administrative law.[34] Devolution and decentralisation of governmental power and functions is inherently linked to administrative law since administrative law as a field, originated as a matter of regulation of state power and functions.[35] In the Zimbabwean context itself, Feltoe describes administrative law as a field where public authority and power is regulated to ensure that it is exercised lawfully and that loopholes for abuse are minimised or removed completely.[36] Another principle of good governance set out in s3(2) of the Constitution is found in the existence of transparency, justice, accountability, and responsiveness.[37] These are already core aims of administrative law as discussed earlier and it would be impossible to achieve these goals without the aid of an effective administrative law system. The connection between good governance and administrative law is therefore quite explicit in the Zimbabwe context as most of the principles that reflect or dictate good governance

[33] Constitution of Zimbabwe, s3(2).
[34]See *President of RSA v SARFU* 2000 (1) SA 1 (CC) and also G Napolitano 'Conflicts and Strategies in Administrative Law' (2014) Vol.12 *International Journal of Constitutional Law* 357, 359-361.
[35] See for example the commentary by Baxter, Baxter *Administrative Law* 2 and the South African Constitutional Court case of *Pharmaceutical Manufacturers of SA and Another in Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).
[36] G Feltoe *Guide to Zimbabwean Administrative Law* (2013) 3, 4.
[37] Constitution of Zimbabwe, s 3 (2).

are inextricably linked to administrative law. It follows then, that the reform of administrative law in Zimbabwe would have the effect of enhancing and heightening good governance.

Because of the infancy of the Constitution, the jurisprudence discussing the import of the good governance concepts in the Constitution is limited. The courts have, to date, only dealt with one case involving good governance under the 2013 Constitution. This was in the disappointingly 'pro-Executive' judgment *of Zibani v Judicial Services Commission of Zimbabwe*, a case in which the High Court declared that a constitutional provision setting out a well-structured and transparent selection of the Chief Justice was unconstitutional.[38] This was eventually overturned by the Supreme Court.[39] Previously, the High Court judgment was criticised for inventing a right to good governance, which cannot be found in the Constitution.[40] On appeal, the Supreme Court did not comment on the High Court's creation of the right to good governance but it should be noted that good governance finds no legal basis as a right in Zimbabwe and remains a founding principle and a normative value in the Constitution. Notwithstanding the High Court's elevation of the concepts of good governance to a constitutional right, the Supreme Court held that courts are bound to take into account the 'relevant historical, economic, social, cultural, and political context and interpret the Constitution in a manner that advances the rule of law and contributes to good governance'.[41] It would appear then that good governance is not just a principle to be observed in Zimbabwe but is also an interpretive tool for courts to consider when adjudicating disputes. Essentially, courts must ask if the judgments they hand down contribute to or weaken good governance. By implication, when courts are faced with a dispute concerning the right to administrative justice, courts must in addition to any other relevant applicable principles, ask whether their judgment contributes to or weakens the concept of good governance as set out in the Constitution. If this test is used as a tool by judges in interpreting the s68 right, the good governance envisaged by the Constitution can be realised and become a lived reality.

[38] *Zibani v JSC & Others* HH 797/16.
[39] *Judicial Services Commission of Zimbabwe v Zibani & Others* 68/2017.
[40] See P Kaseke 'Of Unconstitutional Constitutions and Supreme Cabinet Memos' *Newsday Zimbabwe* available on https://www.newsday.co.zw/2016/12/unconstitutional-constitutions-supreme-cabinet-memos/.
[41] *Judicial Services Commission of Zimbabwe v Zibani & Others* [2017] ZWSC 68.

The Constitution is the first catalyst for the transformation agenda tacitly set out in the Constitution.[42] This thesis is anchored on the belief that when s68 is correctly interpreted it can result in the realisation of good governance as set out in the Constitution and by so doing, it will transform Zimbabwe, at least in some respects.

In the next section, I consider the constitutionalisation of rights generally and then more specifically, in the context of the right to administrative justice.

3.3 Constitutionalisation of Rights

3.3.1 Constitutionalisation of Rights Generally

In this study, reference to constitutionalisation of rights must be understood simply as the transformation of a statutory or common law right into one found in the Constitution. The right to administrative justice in Zimbabwe, for example, could be located in the ZAJA and in the common law but not in the Constitution prior to 2013. Its inclusion as part of the rights available in the Constitution is thus a constitutionalisation of the right to administrative justice because it has evolved from being an ordinary statutory enactment to a part of the supreme law of the country.

Burns notes that the constitutionalisation of rights should be seen as the elevation of such a right and a shift in the approach taken to matters concerning the right.[43] She further notes that including a right in the constitution allows for greater impact of the right, but such impact is not in the right itself but in the text it finds itself located in.[44] Put differently, the right's importance is not in the content of the right but in its context – the constitution. This is especially true of a constitutional text where the constitution is supreme. By extension, any right in the constitution is also a 'supreme' right and its impact is greater than a right that only exists in statute. There are a number of reasons for this but one of the most obvious is that constitutionally entrenched rights are far less likely to be changed easily, whereas a statutory right can be repealed with the

[42] This is discussed in more detail in Chapter One of this study.
[43] Burns *Administrative Law* (2013) 53.
[44] Ibid.

Act it is located in. The right to administrative justice in a constitutional text is thus far more impactful and serious than the right found in an Administrative Justice Act. The violation of a constitutional right to administrative justice would, for example, allow one to claim constitutional remedies since violation of constitutional rights generally allows one to access the remedies in the Constitution for this.[45] An example of a uniquely constitutional remedy is that of constitutional damages. A litigant relying on a statutory right is only entitled to the remedies set out in the relevant Act (assuming the Act has remedies for violations) but a litigant relying on a constitutional right is entitled to far more remedies and the violation is viewed in a more serious light because of the importance placed on constitutional rights in general.[46]

Devenish and Govender echo the sentiments above but go further to conclude that constitutionalisation of rights gives rise to 'a rights-based approach' to litigation and more so to fields like administrative law.[47] It has been noted that constitutionalisation of rights provides a 'shield to the defenceless' and in so doing, creates a greater scope for protection.[48]To understand this analogy, if the Constitution is seen as the supreme law that is to be upheld by everyone including the State, then it does act as a shield to aggrieved parties whose rights have been violated because it trumps all other sources of law or conduct. Where statute and the common law fail to provide protection, the Constitution, as the ultimate source of protection, provides the defenceless-aggrieved parties with protection of a superior nature than that which they could have secured under the common law or through a statutory enactment. Perhaps more importantly, a constitutional right is non-negotiable in the sense that it is not easily open to abuse or manipulation and its enforcement is not at the discretion of the State or any other actor.[49] By being elevated above statutes and the common law, rights that acquire constitutional status are free from 'political bargaining' as they are firmly entrenched in a supreme law that binds all

[45] PW Hogg *Constitutional Law of Canada* (2014) 35.
[46] Ibid.
[47] GE Devenish, K Govender and D Huime *Administrative Law* (2001) 6.
[48] H Shue *Basic Rights* 2ed (1996) 18.
[49] C Fabre *Social Rights Under the Constitution* (2000) 14.

parties and actors indiscriminately.[50] A constitutionalised right also enhances personal autonomy and in so doing, further protects the wellbeing of the governed.[51]

A constitutionalised right is thus pegged at the highest and strongest of 'enforcement' levels possible.[52] The constitutionalisation, therefore, promises greater levels of realisation of the protected right.[53] The idea of a hierarchy of rights is further emphasised by Hogg who notes that when a right is constitutionalised it forms a part of a structured and hierarchical system of rights that the State must observe, protect, and enforce.[54] He goes on further to explain that in so doing, there is a basis upon which protection of individual rights and concomitant governmental action in helping realise those rights, can be measured and judged against.[55]In other words, the constitutionalisation of rights creates a standard that must be respected by the State and a country's respect for that particular right can be determined in the application and enforcement of the right in question. Using this understanding, a country that violates the right to equality, for example, can be inferred to have very little regard for the right to equality and, in turn, can be classified as a state where equality is yet to be fully realised. This is so because the constitutionalised right of equality is a standard by which equality can be measured.

The constitutionalisation of a right is not only a measurement of protection but expresses the highest possible commitment to the defence and observance of the right by the State and the country as a whole.[56] It is a country's expression of the values and norms it holds dearest that is signified by the inclusion in a country's most supreme law – its constitution. Depending on the phrasing and wording of the constitutional text, the constitutionalisation of a right further creates an obligation on both State and non-State actors alike to 'respect, promote, and fulfil rights'.[57]

[50] Ibid.
[51] V Manrouvalon & C Gearly 'The Case for Social Rights in Debating Social Rights' (2010) *Georgetown Public Law Research Paper* 10.
[52] Ibid.
[53] J Nickel 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights (2008) 30 *Human Rights Quarterly* 984.
[54] Hogg (note 45 above).
[55] Ibid.
[56] Hogg (note 45 above).
[57] Ibid 414.

The right becomes an additional term of the governance mandate the State has with its citizens which it is expected to deliver and act on.

The above are generally effects and consequences of the constitutionalisation of a right. I now consider the specific effects of the constitutionalisation of the administrative justice right in Kenya and Zimbabwe. Perhaps before engaging the Kenyan jurisprudence, it is worth considering the similarities between the two countries and why Kenya is a worthy comparator. Firstly, both Kenya and Zimbabwe share the same political and legal history as far as the transition from colonialism to independence is concerned. While the two countries obtained independence years apart from each other, both waged bitter and bloody liberation wars to obtain independence. Their first constitutions were independence constitutions designed to ease transition from colonialism to independence. Both countries struggled to adjust from liberation politics to democracy and thus endured some tyrannical rule from their respective governments. Additionally, both countries share the same history as far as political violence and violent elections are concerned. Interestingly, both countries experienced this unprecedented violence in 2008. A similar reconciliatory policy was followed by a coalition government/power sharing agreement in both countries, which led to a constitution making process. Lastly, the content of the two countries' constitutions are remarkably similar in most places and both arose from a need to prevent government excesses and autocracy.

The most pertinent reason for using Kenya as a comparator jurisdiction, however, lies in the fact that the right to administrative justice in the Kenyan Constitution has very similar facets to the Zimbabwean right. While there is no literature to support this, it seems that the Zimbabwean drafters may have been inspired by the Kenyan formulation of the right because they drafted aspects of the administrative justice right that seem to only be found in the Kenyan Constitution. The Kenyan Constitution contains elements such as expeditious and efficient administrative action, which are also found in s68 of the Zimbabwean Constitution.[58] In my view, the above reasons make a compelling argument to justify reliance on Kenya as a comparator jurisdiction.

[58] Constitution of Kenya, 2010 Article 47.

3.3.2 Constitutionalisation of the Administrative Justice Right in Kenya

Kenya adopted a new Constitution in 2010.[59] Like Zimbabwe, it too had no prior constitutional right to administrative justice.[60] The right to administrative justice is found in Article 47 of the Constitution. The right is almost identical to the Zimbabwean right. It states:

1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall--

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

(b) promote efficient administration.

Scholars like Ogeka have noted that the constitutionalisation of the administrative justice right in Kenya has created a duty to protect the right at a stricter level.[61] Due to the inclusion of a duty to give reasons, the constitutionalisation of the right in the Kenyan context means that decision makers and those exercising administrative power must provide both legal and factual grounds for the decision taken.[62] The constitutionalisation of the right to reasons for administrative conduct translates to better governance and administration.[63] The constitutionalisation also presents the opportunity for greater judicial control and oversight of the administrative realm by

[59] Constitution of Kenya, 2010.
[60] See generally E Ongoya 'The Changing Character of Judicial Review Under the Constitutional and Statutory Order in Kenya' (2014) *Law Society of Kenya Report* 3.
[61] Z Ogeka ' The Constitutionalisation of Kenyan Administrative law' 2016 accessible from https://ogekazacharia.blogspot.com/2016/10/constitutionalisation-of-administrative.html
[62] Ibid.
[63] Ibid. Although commenting on the South African context, a similar discussion on the importance of the constitutionalisation of the right to reasons for administrative conduct can be found in L J Kotze's piece 'The Application of Just Administrative Action in The South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence 2004 *PER* 7.

making it subject to the Constitution, which in turn, is interpreted and given meaning to by the judiciary.[64] Although writing on the South African context, Beukes notes that placing the right to administrative justice under the lens of the Constitution makes any challenge to unlawful administrative conduct, a potential subject of constitutional litigation as a result of the inclusion of the right in the text.[65] Ogeka describes the constitutionalisation of the right as a shift towards greater competence by the administrative realm of the State.[66] More interestingly, there is consensus that the constitutionalisation of the right to administrative justice prevents the use of ouster clauses, which were often included in legislation, thus minimising the possibilities of abuse and further strengthening the availability of the right.[67] There is thus an evident significant change effected by the Constitution in Kenya.

3.3.3 Constitutionalisation of Rights in Zimbabwe

Before dealing with the significance of the constitutionalisation of the administrative justice right in Zimbabwe, it is important to discuss the significance of constitutional rights in Zimbabwe with specific reference to the constitutional text to determine what additional meanings or benefits accrue to a right located in the Constitution over and above the general aspects discussed in the previous section.

As a starting point, s45 of the Constitution states that rights in the Constitution bind the State at all levels and where applicable, natural and juristic persons are also bound.[68] For the purposes of the present study, this entails that the right to administrative justice binds the State at all levels. Thus, the constitutionalisation of rights entails that rights bind the State at all levels in Zimbabwe.

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[64] Ogeka (note 61 above).
[65] M Beukes 'The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice' in C Lange & J Wessels (eds) *The Right to Know - South Africa's Promotion of Administrative Justice and Access to Information Acts* (2009) 12.
[66] Ogeka (note 61 above)
[67] Ogeka (note 61 above) but see also Beukes (note 65 above) 13, DJ Brynard 'Reasons for Administrative Action: What are the implications For Public Officials' (2005) 44 *Journal of Public Administration* 639 and M Asimow 'Administrative Law under South Africa's Interim Constitution' (1996) 44: 3 T*he American Journal of Comparative Law* 393, 395.
[68] Constitution of Zimbabwe, s 45.

Section 46 contains specific interpretation tools to assist the courts in interpreting rights in the Constitution. In terms of s 46(1), courts and tribunals are required to give full effect to the rights contained in the Constitution and must pay regard to all provisions of the Constitution when interpreting rights.[69] This means that the right to administrative justice must be given full effect by the courts and further that other provisions of the Constitution must be read alongside the right to ensure that it is interpreted consistently with the rest of the Constitution. Additionally, courts and tribunals are enjoined to promote values and principles underlying a democratic society based on justice, openness, dignity, equality, and freedom when interpreting a right.[70] These interpretation tools would not apply to rights outside the Constitution hence the constitutionalisation of rights such as the administrative justice right can be said to strengthen and promote a stronger democracy. Rights may also be interpreted by referring to foreign law where applicable.[71] These benefits are almost exclusive to constitutional rights and generally would not apply to statutory rights.

An additional consequence of constitutionalisation of rights in the Zimbabwean context is that there are several Independent Commissions Supporting Democracy (ICSD) that help protect those rights.[72] The objectives of these commissions are:

a. to support and entrench human rights and democracy;

b. to protect the sovereignty and interests of the people;

c. to promote constitutionalism;

d. to promote transparency and accountability in public institutions;

e. to secure the observance of democratic values and principles by the State and all institutions and agencies of government, and government-controlled entities; and

[69] Ibid 46(1) (a).
[70] Ibid 46(1) (b).
[71] Constitution of Zimbabwe, s46 (1) (e).
[72] Ibid s231.

f. to ensure that injustices are remedied[73]

These Commissions include the Anti-Corruption Commission and the Zimbabwe Human Rights Commission. The Anti-Corruption Commission's functions are set out in s255 of the Constitution. The Commission can investigate abuses of power and 'other inappropriate conduct' in the public and private sector.[74] Because the right to administrative justice also considers abuses of power and conduct that is otherwise inappropriate, the right is one that the Commission can help realise. The importance of constitutionalisation thus means that the right can be protected by the Anti-Corruption Commission in part.

A more significant body for the protection of constitutional rights is the Zimbabwe Human Rights Commission established through s242 of the Constitution. The duties of the Commission are specifically:

a. to promote awareness of and respect for human rights and freedoms at all levels of society;

b. to promote the protection, development, and attainment of human rights and freedoms;

c. to monitor, assess, and ensure observance of human rights and freedoms;

d. to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;

e. to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;

f. to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;

g. to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated;

[73] Ibid s233.
[74] Ibid s255.

h. to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigation;

i. to recommend to Parliament effective measures to promote human rights and freedoms;

j. to conduct research into issues relating to human rights and freedoms and social justice;

The broad mandate of the Commission is important because it allows for greater protection of rights due to its wide mandate. The Commission, therefore, has an enforcement and remedial jurisdiction for violation of human rights. No right is outside their jurisdiction thus, the ordinary citizen can approach the Human Rights Commission to enforce their rights. As with any other Independent Commission in s231, the Commission does not charge a fee for complaints brought before it, making it a cheaper more practical way of enforcing rights without the need to litigate.[75] The work of the Commission further entrenches and strengthens the rights by allowing quick and free redress. The mandate of the Commission does not extend to statutory rights nor common law rights as its core function is rights based on the Constitution where it derives its mandate from. If the drafters of the Constitution omitted the right to administrative justice from the Declaration of Rights, arguably the Commission would not have a mandate to consider complaints solely based on the common law or the Act. It is the inclusion in the Constitution that further strengthens the right because it automatically falls within the jurisdiction of the Human Rights Commission. It must also be noted that the Commission took over the functions of the Public Protector, thus giving it more powers to act.[76]

The Commission has wide-sweeping powers accorded to it, which it can use to enforce rights and remedy any violation of rights.[77] The powers are set out in the Constitution and the enabling legislation, the Zimbabwe Human Rights Commission Act.[78] In terms of the Constitution, the Commission may direct the Commissioner General of Police to conduct an investigation into

[75] http://www.zhrc.org.zw/complaints-handling-investigations/
[76] Constitution of Zimbabwe, Schedule 6 s16(2).
[77] Ibid s243 (1).
[78] Zimbabwe Human Rights Commission Act.

human rights violation after which the Commissioner must send his/her findings to the Commission.[79] The Commission may also take any action it believes to be appropriate when dealing with an infringement of rights.[80] Without defining the scope and meaning of the remedy, the Constitution empowers the Commission to 'secure appropriate address' where rights have been violated.[81] The Commission may also recommend prosecution of the offenders as part of its remedial powers.[82] The Commission may also make recommendations to Parliament to ensure rights are realised.[83] The constitutionalisation of rights, therefore, gives rise to the above remedies offered by the Commission.

The Zimbabwe Human Rights Commission Act gives additional powers to the Commission in executing its mandate.[84] The Commission may 'pursue any action in a court of competent jurisdiction' after completing its investigation.[85] In these proceedings, it may sue in its own name or in the name of the complainants.[86] These wide powers given to the Commission further entrench the importance of constitutional rights and sets them apart from rights found in either statutes or the common law.

The significance of constitutionalisation of rights is further demonstrated in s3(1) of the Constitution which states that human rights are part of founding values of Zimbabwe and the State must take 'all practical measures to protect fundamental rights and freedoms.[87] By constitutionalising a right in Zimbabwe, the right becomes part of the foundational values the country is premised on. This is the elevation of rights in the Zimbabwean sense. Statutory laws and the common law do not enjoy the same status and are not specifically discussed as the founding values of the country. More importantly, the right to administrative justice in s68 is now a fundamental human right and a founding value of the country which the State must take all

[79] Constitution of Zimbabwe, s243 (1)(h).
[80] Ibid s243(1) (d).
[81] Ibid 243 (1) (g).
[82] Ibid.
[83] Ibid 243 (1) (i).
[84] These are set out in s15 of the Act.
[85] ZAJA s15 (1)
[86] Ibid.
[87] Constitution of Zimbabwe, s3(1).

practical measures to protect. This duty on the State was not present in the ZAJA or the common law nor was the right a founding value of Zimbabwe.

Section 44 of the Constitution binds the State and both natural and juristic persons to respect, protect and fulfil rights. Whereas the common law and statutes may limit the application of rights and whom rights apply to, the constitutionalisation of a right in Zimbabwe, transforms such rights into binding rights that apply to the State and natural and juristic persons alike. Legislation often tends to narrow down who may rely on it,[88] but the Constitution clearly binds all organs of the State, and natural and juristic persons. [89]

In *Mudzuru v Minister of Justice*[90], the court described the role of the State in respect of constitutional obligations and rights as follows:

> *'Like a shepherd who cannot escape liability for a lost sheep by claiming ignorance of what happened to it, the State is expected to know what is happening to fundamental rights and freedoms enshrined in Chapter 4. It is under an obligation to account, in the public interest, for any infringement of a fundamental right even by a private person. The scheme of fundamental human rights and freedoms enshrined in Chapter 4 is based on the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights and freedoms to ensure that they are enjoyed in practice*.'[91]

The Constitutional Court in this case impliedly shows the significance of the constitutional right to administrative justice. Relying on this reasoning, it seems that the State will have a duty to account for violations of the right to administrative justice and cannot escape obligations set out in s68. This of course is a change from the common law and statutory position. The right is clearly

[88] For example, the ZAJA applies only to administrative authorities and aggrieved parties who have a right or legitimate expectation. Its application does not apply beyond these parties.
[89] See section 45 of the Constitution where the Constitution binds the State at all levels and where applicable, Natural and juristic persons will also be bound.
[90] *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* (Const. Application [2015] ZWCC 12.
[91] Ibid.

elevated to one imposing several obligations on government and a duty of accountability for the right.

The Court in *Mudzuru* further dealt with the issue of *locus standi* in constitutional litigation.[92] Malaba DCJ as he was then, noted that the traditional approach to *locus standi* when enforcing rights in legislation or the common law, was for the person affected to personally raise the matter with the courts and in the absence of any incapacity or physical detention, no one else could approach the courts for protection from the conduct complaint.[93] Section 85 of the Constitution extends this traditional scope to include:

1. *Any person acting on behalf of another person who cannot act for themselves;*
2. *Any person acting as a member, or in the interests, of a group or class of persons;*
3. *Any person acting in the public interest;*
4. *Any association acting in the interests of its members*[94]

From *Mudzuru*, it is apparent that the courts adopt a broad meaning to the concepts of public interest and the need to be immediately affected by the infringement of rights before approaching the courts.[95] The persons bringing the matter to court under public interest grounds need not be directly affected by the infringement.[96] It will be sufficient for the parties to show that should the law or offending conduct not be remedied, he or she or a group of persons will suffer a degree of injustice and prejudice in the future.[97] The importance of constitutionalisation of rights in Zimbabwe is thus also seen in the broad categories of persons who may challenge the infringement of a right. The ZAJA, for example, extends locus standi to the party adversely affected by administrative conduct but using s68, challenges to administrative conduct can be

[92] Ibid.
[93] Ibid
[94] Ibid 5 and Section 85 (1) of the Constitution.
[95] *Mudzuru* (note 90 above).
[96] Ibid.
[97] Ibid.

brought by a group of persons or more broadly, in the public interest. This too enhances the protection of the right by its inclusion in the Constitution.

One of the more important consequences of constitutionalisation of rights in Zimbabwe is seen through s2 of the Constitution where the supremacy of the Constitution is set out.[98] Any laws, practices, and conduct inconsistent with the Constitution are invalid to the extent of the inconsistency.[99] The obligations placed by the Constitution are binding on both natural and juristic persons as well as the State.[100] The supremacy clause thus elevates the rights in the Constitution above all other rights because conduct and laws that are inconsistent with the Constitution are invalid. By way of example, if ZAJA limits the administrative justice right to only cover procedural fairness despite s68 extending to the right to substantive fairness, the statutory provision is invalid to the extent that it does not include substantive fairness. The omission creates an inconsistency with the Constitution. All other laws and practices must yield to the Constitution and be aligned to it in terms of the supremacy clause. In this sense, a constitutional right is important because it supersedes other rights that may be found in statutes or the common law.

Access to constitutional remedies is another significant result of constitutionalisation. In terms of s175, the courts are accorded powers to declare conduct inconsistent with the Constitution invalid.[101] Courts may also grant temporary interdicts or any other temporary relief pending the Constitutional Court's confirmation of the unconstitutionality of a law or a conduct.[102] The broadest power that the courts possess is to make any order deemed 'just and equitable', concepts which the Constitution does not define.[103] It follows then that the s68 right entitles a litigant to the remedies discussed above and the courts will be able to fashion a remedy to suit

[98] Constitution of Zimbabwe, s2(1).
[99] Ibid.
[100] Ibid s2(2).
[101] Ibid s175 (1) read with s175(6)(a).
[102] Ibid s175 (2).
[103] Ibid s175(6).

the facts of each case placed before it. Courts are additionally empowered to grant compensation or a declaration of rights where rights have been infringed.[104]

The enforcement of constitutional rights is a further significant effect of constitutionalisation of rights in the Zimbabwean context. This is set out in s85 of the Constitution. The court in *Mudzuru* again had occasion to deal with the enforcement of rights in terms of s85.[105] The court held that a generous interpretation must be adopted to ensure that the most vulnerable of citizens are protected.[106]The court further held that a mechanical and technical approach to the enforcement of rights is undesirable as this limits the application and realisation of rights.[107] Courts are, therefore, obliged to follow the interpretation that would result in a greater protection of rights. In enforcing these rights, the courts are empowered to award the appropriate relief that remedies the infringement.[108] The infringement need not be a present one, it will suffice if the infringement could arise in the future.[109] In this regard the court in *Mudzuru* relied on an earlier judgment of Chidyausiku in *Mawarire v Mugabe* where the court affirmed that even a litigant who has not suffered actual prejudice or harm but foresees the prospects of impending harm, is entitled to approach the court in the same way as a litigant who has faced actual harm.[110]

Finally, the constitutionalisation of rights is important because it subjects rights to restrictions in terms of the Constitution only, whereas statutory rights may be limited by the legislature as and when it pleases.[111] The limitation of rights in the Zimbabwean context is outlined in s86 of the Constitution.[112] Rights may only be limited 'in terms of a law of general application and to the extent that it is fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, dignity, equality, freedom with all the relevant factors.'[113] The test is designed

[104] Constitution of Zimbabwe, s85.
[105] *Mudzuru* (note 90 above).
[106] Ibid.
[107] Ibid.
[108]Constitution of Zimbabwe, s85(1).
[109] Ibid s 85 (1) The litigant can approach the courts on the basis that an infringement of a right has taken place or 'is likely to take place'.
[110] *Mawarire v Mugabe NO and Others* CCZ 1 (2013) ZWCC 8.
[111] Hogg 414.
[112] Constitution of Zimbabwe, s86.
[113] Ibid s86(3)

to ensure that rights are not easily limited, and that due process is followed before limiting a right. This enhances the protection and realisation of rights by ensuring that rights are only restricted in very limited circumstances. The right to administrative justice in s68 will, therefore, only be limited when tested against the tests laid out in s86.

The connection between administrative justice and good governance is important in understanding the constitutionalisation of the right to administrative justice. As noted earlier, part of this importance is tied to the supremacy of the Constitution, which, in turn, makes the right to administrative justice a significantly important right. The importance lies in the weight the right now carries and the ramifications of violating it since it enjoys the superiority standing of the Constitution as other human rights do. There cannot be a greater elevation of the right to administrative justice than to be constitutionally protected.[114] By placing it in the Constitution, the people of Zimbabwe, through their enactment of the Constitution, agreed to entrench the right as part of the new order that brings a culture of accountability and measured justifications for the use of public power. Corder notes that constitutionalisation of the administrative justice right is the elevation of the rules of natural justice wherein such rules acquire constitutional status and power.[115] Speaking on the South African framework, Corder further noted that the effect of constitutionalizing the right to administrative justice is that any form of administrative conduct could, therefore, be the subject of constitutional scrutiny and subsequent litigation.[116] The review power of courts, as Hoexter notes, now flows from a supreme law, which is the Constitution and not the common law or the legislation.[117] It, therefore, holds true that what the Zimbabwean people now have is a right to administrative justice that is no longer subject to the whims of the legislature or the limits of the common law but is instead the focus of a constitutional challenge. Infringement of the right is now dealt with as one would deal with a limitation to the right to dignity or equality for example. The threshold is thus upped in favour of the citizenry because of this constitutionalisation.

[114] H Corder 'Administrative Justice in The Final Constitution' (1997) 13 *SAJHR* 28.
[115] Ibid 28.
[116] Ibid 90.
[117] Hoexter (note 21 above)27.

Because the courts are the final arbiters as far as the law is concerned, constitutionalisation places the judiciary at the heart of the administration of the State even though such placement is in an overseeing capacity. It has been said that constitutionalisation further extends the powers courts have over the entire administrative process in an 'extravagant manner'.[118]

While the common law generally develops because of the judiciary, rights created by statutes are generally at the mercy of the legislature, which can decide to limit the application of the statutory right as it sees fit. This situation does not occur when a right is constitutionalized because unlike an ordinary statute, rights may only be limited in specific processes that are designed to prevent wanton disregard or violation of the right. Logically, the grounds of review in administrative law now flow from the Constitution and not the ZAJA. Equally, the ambit and scope of administrative law is now set out in s68 and not the ZAJA. The implication is, therefore, that minimum standards for administrative justice in Zimbabwe now flow from the Constitution itself and because of the doctrine of constitutional supremacy, the right receives a wider degree of protection than any statutory right could have. Greater legitimacy of the right to administrative justice is also achieved through constitutionalisation of the right by being placed in the country's most supreme law. The foregoing discussion considers the general significance of constitutionalisation of rights in Zimbabwe but is befitting for me to end this section with a discussion of the significance of the constitutionalisation of the right to administrative justice.

3.4 The significance of constitutionalisation of the right to administrative justice: Business as usual or evolution in progress?

It makes little sense to have rights that exist in theory but cannot be used in practice, thus, it is important to determine what the significance of the constitutionalisation of the right to administrative justice is. This study is premised on the idea that the right does present a real chance for change in Zimbabwe, or at least in parts of its governance and administration, but this is a prospect that relevant stakeholders should also note and take advantage of for this potential to become a lived reality. If the courts, for example, see the right as nothing out of the ordinary

[118] JM Evans 'Administrative Appeal or Judicial Review: A Canadian Perspective' (1993) *Acta Juridica* 47.

and as business as usual, then there is little hope that the right presents the opportunity for change. While the argument this study makes is that the right *should* be seen as a revolutionary and evolutionary chance for Zimbabwean administrative law and governance, the Zimbabwean courts have not fully embraced this reasoning. In fact, as it will be seen in Chapter 4, the courts have often ignored or avoided the right altogether thus missing a chance to engage on the effect of the right.

Despite most of the decisions that ignored or avoided engagement with the right, some judgments have boldly highlighted the changes brought about by the right. One notable case, *Mabuto v Women's University in Africa & Others,* shows the change the right brings about.[119] In this case, the Women's University had wrongfully admitted the litigant to a specific degree programme and later withdrew their decision before the litigant could sit for her exams. This was after a letter of admission was signed, a payment plan made, and assignments submitted. Logically, the claimant, Ms. Mabuto, contended that the decision was irrational and adverse particularly because of the expectation created and the lack of an opportunity to make representations. The judge held that the constitutionalisation of the right to administrative justice was the evolution of administrative law.[120] She further held that the right had by implication received constitutional recognition and impliedly, accorded constitutional supremacy status along with other rights.

In a subsequent judgment involving a different university, which had indefinitely suspended students who had been charged with misconduct but had not been brought before a tribunal timeously, Mathonsi J had another opportunity to clarify the importance of s68.[121] Whilst relying on her earlier judgment in *Mabuto*, in the *Maqele* case, she went further to find that the constitutionalisation of the right entailed a 'seismic shift in administrative law' and that the elements of the right in s68 were not merely guidelines or factors to be considered but constitutional imperatives that had to be given effect to and complied with.[122] The learned judge

[119] *Mabuto v Women's University in Africa & Others* ZWHHC 698.
[120]Ibid 2.
[121] *Maqele & Others v Vice Chancellor Professor NM Bhebhe (N.O.)* [2016] ZWBHC 129.
[122] Ibid.

was scathing of the conduct of the University authorities that had violated the constitutional rights of the students. Interestingly, the judgment described the right as a fundamental right, which again underscores the effect and significance of s68.[123] Unfortunately, both Judge Mathonsi's rulings are High Court judgments and the views of the Constitutional Court in cases *like Zinyemba v Minister of Lands*, overshadows them. In *Zinyemba*, a judgment of Malaba DCJ, as he was then, the applicant made direct reliance on s68, which should have drawn the court's attention to the importance of the right. The Court's view of s68 can be summed up neatly by the words of Malaba as follows:

> *'Once an Act of Parliament which gives effect to all the rights to just administrative conduct set out in subss (1), (2) and (3) is enacted, s 68 of the Constitution takes a back seat. The question whether any administrative conduct meets the requirements of administrative justice must be determined in accordance with the provisions of the Administrative Justice Act. Unless there is no Administrative Justice Act, or the complaint is that the provisions of the Act do not give effect to the fundamental rights guaranteed under s 68(1) of the Constitution in the terms required by subs (3), s 68 cannot found a complaint of its violation in terms of the Constitution*.'[124]

In my view, the mistake the Court makes here is to assume that the Administrative Justice Act referred to in s68 already encompasses the provisions and thus there is no need to engage s68. By implication, the Constitutional Court was and seemingly is of the view that there is nothing new that s68 adds to Zimbabwean administrative law that is not already captured in the ZAJA and anyone who wishes to claim the contrary has to show that the Act does not give effect to the rights in s68, even though this is already evident from a cursory reading of the Act.[125] The Constitutional Court, therefore, does not see s68 in the same way Mathonsi J does because whereas Mathonsi believes there is a 'seismic shift' in administrative law, the Court impliedly believes it is business as usual and nothing new has come about from the creation of s68. The court's view that nothing new needs to be added to ZAJA impliedly also suggests that it is ZAJA

[123] Ibid.
[124] *Margaret Zinyemba v Minister of Lands and Rural Settlement* (2016) ZWCC.
[125] Ibid.

that gives effect to s68 when in fact ZAJA predates s68. As noted in Chapter One, ZAJA's enactment was not because of a constitutional imperative but a desire to codify the common law. The spirit of s68 is, therefore, not captured in the ZAJA. The new additions in s68 are indicative of the need for a new act that gives effect to the intention, spirit, and purpose of s68. The changes that need to be brought about to give effect to s68 warrant a new Administrative Justice Act and not an amendment to ZAJA. In my view, the Constitutional Court should not have readily assumed constitutional compliance by indicating ZAJA gives effect to s68. It should have started on the premise that the laws predating the 2013 Constitution are not in sync with the Constitution. The Executive has readily accepted this fact and embarked on a 'harmonisation of laws' exercise to ensure Acts are compliant with the Constitution. The Court, as custodian of the Constitution, should not have placed the burden on the applicant to show lack of compliance when it is common cause that the 2013 Constitution constitutes a break from the past and its accompanying laws in most cases. The starting premise ought to have been whether the rights the applicant alleged could be located in the ZAJA, and if not, then direct reliance on the Constitution should have been permitted. To place the burden of proving unconstitutionality on applicants, is a chilling effect on the enjoyment of the rights enshrined not just in s68, but in the Constitution as a whole. One might argue that in the ordinary course of events, the applicant must specifically plead unconstitutionality for the Court to investigate the constitutionality of ZAJA as the Chief Justice noted, but that does not take into account the constitutional imperative placed on the courts. The first is a constitutional imperative to interpret laws in accordance with the Constitution in s46. Specifically, courts must give full effect of the rights and freedoms in the Constitution.[126]

Additionally, the courts must 'pay due regard to all the provisions of this Constitution' and they are further required to develop the law while interpreting constitutional rights.[127] Requiring applicants to specifically point to the gaps in the law shifts these constitutional duties to the citizenry, when the courts are in fact tasked with making sure there is alignment between the Constitution and other laws. In my opinion, it seems that the courts are required to be proactive

[126] Constitution of Zimbabwe, s46 (1)(a).
[127] Ibid s 46 (3).

and not merely decide a matter on what the parties have pleaded in their founding papers. The Constitution creates a proactive rather than a reactive judiciary that should jealously guard the Constitution and ensure that its supremacy is reflected in other enactments. It is up to the judiciary to provide guidance on constitutional interpretation even where parties have not specifically raised matters. The courts have in previous instances raised issues *mero motu*, therefore, there is nothing stopping them from raising concerns on alignment of laws.

Before invoking the principle of subsidiarity, it is important, particularly in the infancy of the Constitution that the courts ascertain for themselves that the subsidiary law is not only constitutionally compliant but also provides competent and valid relief before closing the door on constitutional relief. In this way, the courts can fulfill their obligations under s46 of the Constitution. In terms of the ZAJA or any other legislation, the courts should first establish whether there is a viable remedy in the law they are relying on. If the court in *Zinyemba* did this, it would have realized that while the applicant did not specifically raise the unconstitutionality of the ZAJA, the Act was in fact unconstitutional to the extent that it did not cover aspects covered in s68. In South Africa, the position is clear: courts must raise constitutional issues even where the parties do not.[128] The rationale for this is that if courts were to merely confine themselves to the pleaded arguments of the parties and no further, they may in essence give effect to unconstitutional or redundant laws, which would be akin to violating the rule of law and principle of legality theories.[129] To avoid this, the Zimbabwean courts should be proactive rather than reactive in their interpretation of constitutional rights, and s68 in particular, especially while the jurisprudence is still in its infancy. This can be changed at a later stage.

While writing on the context of socio-economic rights, Kondo notes that constitutionalisation of rights generally results in the right being elevated in importance and places the State in a position

[128] *Potgieter v Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en andere* 2001 (11) BCLR 1175.
[129] *Van Dyk v National Commissioner, South African Police Service and Another* 2004 (4) SA 587 (T) 589.

where it must necessarily, protect and respect the right in question if a duty is imposed to do so.[130]

Like other fundamental rights, the constitutionalisation of rights would result in the right to administrative justice being justiciable.[131] Although difficult to define and for the purposes of this study, a justiciable right is a right that can be brought to a court for adjudication and thus one where the courts have jurisdiction to resolve the matter brought before them.[132]In constitutionalising the right to administrative justice, the drafters of the Constitution, created the possibility of judicial redress for anyone who believes any part of s68 is violated. The gateways for judicial resolution of such a breach are therefore made open to the public to rely directly on the constitutional text to protect themselves.

As evident from the discussion above, there are many reasons why the constitutionalisation of rights is to be celebrated generally but more so when viewed in the Zimbabwean context. The inclusion of the administrative justice right is, therefore, a turning point for administrative justice in Zimbabwe. The foregoing discussion has shown that the right has acquired a status it previously did not enjoy under the common law or the ZAJA and will have a profound impact by mere virtue of its inclusion in the Constitution. The inclusion of the administrative justice right in the Constitution is therefore significant, but its significance can be further realised only when it is given effect to. Section 68 is an important introduction to the administrative law framework in Zimbabwe for several reasons including the constitutionalisation of the right and the new additions it adds which enhance and shape good governance. The constitutionalisation of the right means that it is accorded the same degree of importance other constitutional rights enjoy. The constitutionalisation additionally means that the right may not be ignored or violated easily without constitutional remedies being invoked to protect it. The right receives additional enforcement avenues from bodies like the Zimbabwe Human Rights Commission and the Anti-Corruption Commission which is a shift from the pre-2013 position where only the Administrative

[130] T Kondo 'Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence' 2017 (1) *African Human Rights Law Journal* 163, 169.
[131] Ibid.
[132] EA Jelf 'Justiciable Disputes' *Transactions of the Grotius Society* 7 (1921) 59-72.

Court and the High Courts could adjudicate disputes arising from a violation of the statutory and common law administrative justice right.

It is evident from this chapter that s68 is a disruptor not just in administrative law but also in governance, and that it cannot be "business as usual". The introduction of s68 will therefore be a direct or indirect improvement in the lives of Zimbabweans if it is given effect to. In the next chapter, I will consider what s68 introduces to Zimbabwean administrative justice and how significant these changes are as part of the post-2013 Zimbabwean administrative law framework.

Chapter Four: Post- 2013 Zimbabwean Administrative Law

4. New Concepts brought about by s68

In the previous section, the importance of the inclusion of s68 was outlined, however, the next important question that flows from it is what s68 will add to Zimbabwe's administrative law framework. The right to administrative justice in s68 is phrased as follows:

1. Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.[1]

2. Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.[2]

ZAJA, on the other hand, was intended to 'provide for the right to administrative action and decisions that are lawful, reasonable, and procedurally fair and to provide for the entitlement to written reasons for administrative action or decisions.'[3]

It is apparent that ZAJA does not cover many of the additions in s68 (1) and adds the concepts of prompt, efficient, proportionate, impartial, and substantively fair administrative conduct to the administrative law framework.

While s68 (2) entitles one to request reasons when a right, freedom, interest, or legitimate expectation has been adversely affected, ZAJA confines the right to reasons to instances where rights, interests, or legitimate expectations are materially and adversely affected by any administrative action.[4] Section 68(2) introduces three new considerations that are not found in the ZAJA. The first new aspect is to trigger the right to reasons, one can use a freedom instead of a right, interest, or legitimate expectation which makes it much easier to request reasons. The second aspect is that the requirement of materiality is no longer required because s68 omits the word material in qualifying how the aggrieved party must be affected. The word material would

[1] Constitution of Zimbabwe, s68(1).
[2] Ibid s68(2).
[3] ZAJA preamble.
[4] Ibid s6(1) (a).

thus have to be removed from the current ZAJA formulation as it unduly burdens a litigant to prove materiality, which the constitutional right does not use. Lastly, s68 requires that reasons be given promptly. ZAJA uses two timeframes: either the deadline given in the relevant statutory enactment[5] or within a reasonable period.[6]

Section 68 is significant not only because of the consequences of constitutionalisation that attach to it as discussed in the previous section but more importantly because of the new concepts it introduces to the Zimbabwean administrative law framework. These will now be discussed and examined closely to understand their import into the Zimbabwean administrative law regime and the significance thereof.

4.1 The concept of substantive fairness

4.1.1 Background

One of the novel rights introduced by s68 is substantively fair administrative conduct.[7] The constitutionalisation of this standard is important for two reasons: firstly, it does not feature in the current ZAJA framework and secondly, it does not exist in any other jurisdiction.[8] Countries that have attempted to introduce a substantive fairness angle to their administrative law have generally done so unintentionally, in a piecemeal fashion, and by judicial interpretation.[9] In these jurisdictions that have developed it in a piecemeal fashion, there has been subsequent rejection of the doctrine as will be seen in countries like New Zealand. This makes the Zimbabwean position unique because it specifically frames substantive fairness as part of the bundle of rights encompassed in the administrative justice right. Unlike jurisdictions that have stumbled upon substantive fairness while giving effect to procedural fairness, Zimbabwe specifically gives

[5] Ibid s6(1) (b) (i).
[6] Ibid s6(1) (b) (ii).
[7] Ibid 68(1).
[8] C Hoexter *Administrative Law of South Africa* (2012) 361.
[9] In this regard see DD Mullan 'Development in Administrative Law: The 1983-84 Term' (1985) *The Supreme Court Law Review* 16,19.

citizens the right to review administrative action when such action is substantively unfair.[10] This is of course not without controversy and challenges from a broader understanding of administrative law. For example, Hoexter notes that 'the administrative-law notion of fairness is not substantive in nature'.[11] In supporting her view, she relied on the South African Constitutional Court judgment of *Bel Porto School Governing Body v Premier, Western Cape.* [12] In this judgment, the Court specifically distinguished between procedural fairness and fairness in general. The latter encompasses substantive and procedural fairness, but the former only looks at procedural fairness.[13] In the case in question, the court engaged with the right to administrative justice as per the Constitution at the time, which only set out procedural fairness as part of the grounds of review.[14] The court unequivocally stated that unfairness on its own is not a ground of review in administrative law generally – it has to be coupled with the procedural aspect for it to be viewed as a ground of review.[15] The court went further to hold that its role was limited to the fairness of the process leading to the outcome rather than the merits of the outcome itself as that would be unfamiliar territory and it would also be a direct attack on the competency of the administrators.[16]

In its view, substantive fairness raises matters best dealt with at an administrative or political level and is, therefore, generally unsuitable for adjudication by the courts. Furthermore, in the earlier case of *Du Preez v Truth and Reconciliation Commission,* the court noted that when referring to matters of fairness in administrative law, the courts examine the 'way a decision was taken' and not the actual fairness of the matter as to do this would violate the separation of powers doctrine. [17] The Supreme Court of South Africa has consistently articulated the same position in judgments like *Associated Institutions Pension Fund v Van Zyl* where the court held

[10] South Africa is an example of a jurisdiction where substantive protection in the context of procedural fairness was incidentally given effect to because of procedural protection. See *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC*)* in this regard.
[11] Ibid.
[12] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) par 88, 89.
[13] Ibid.
[14] It is important to note that the case was determined based on the Interim Constitution of South Africa, 1993 but the wording is similar to the Final Constitution adopted in 1996.
[15] *Bel Porto* (note 12 above) par 86.
[16] Ibid 87.
[17] *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231G.

that courts are confined to looking at the rationality of the decision and whether the decision was taken lawfully and in accordance with the proper processes.[18]

At this stage, I must pause to deal with an incidental question that arises from rationality review. Rationality review cannot be said to be similar to substantive fairness in that while substantive fairness looks at the correctness and fairness of the outcome, rationality considers whether there is a logical and rational connection between the outcome and the information used to reach the outcome. Rationality does not check whether the outcome is correct or fair but whether it is rationally connected to the purpose of the power. The courts have warned that the review is confined to the nexus test and does not interrogate whether the decision reached was the best or most appropriate in the circumstances. In this enquiry the courts are not concerned with whether they would have reached the same outcome or decision but rather that there is a basis to support the decision taken.[19] The Supreme Court in *Trinity Broadcasting* qualified this further by requiring that there should be a rational objective basis that supports the conclusion reached.[20] While rationality review seems to consider the substantive aspects of an administrative decision, the boundaries delineated by the courts ensure that these are confined to a superficial review that only seeks to establish whether a nexus exists between a decision taken and the reasons for the decision. No enquiry into the accuracy of fairness of the decision is reached using the rationality test, therefore, this cannot be described as substantive fairness. Quite clearly then, South African administrative law does not include the concept of substantive fairness. The concept does not feature in s33 of the South African Constitution, which contains the right to administrative justice, nor does it appear in the legislative framework giving effect to the right – the Promotion of Administrative Justice Act (PAJA). Elsewhere, however, substantive fairness is becoming increasingly popular and proponents for its existence and use in administrative law have been advocating for this since the early 80s.[21]

[18] *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA).
[19] M Asimow 'Towards a South African Administrative Justice Act' (1997) 3 *Michigan Journal of Race and Law* 1, 13.
[20] *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* [2003] 4 All SA 589 (SCA).
[21] See for example DD Mullan 'Natural Justice and Fairness - Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?' (1982) 27 *McGill Law Journal* 250, 269-71.

4.1.2 Administrative law substantive fairness in African jurisdictions

It would seem that no African country has broadened the administrative law fairness to include substantive fairness. Kenya's Constitution which bears similar aspects as far as the right to administrative justice is concerned, does not include a similar right to substantively fair administrative conduct.[22] Kenyan administrative law does not include substantive fairness at all.

South Africa does not provide for substantively fair administrative conduct as evidenced by the discussion in the preceding section.[23] The following sections focus on Australia and Canada solely on the basis that there are some traces of substantive fairness in their administrative law jurisprudence and though they do not fully embrace the concept, they are one of few jurisdictions that have come close to adopting it.

4.1.3 Administrative law substantive fairness in Australia

Australia distinguishes between judicial review and merits review and does not have the common problem faced by other jurisdictions, which prevents them from engaging in substantive fairness enquiries.[24] Notwithstanding this, however, Australia does not have an established concept of substantive fairness and only gets substantially close to it when applying a strict approach to unreasonableness. [25] There is, therefore, no explicit ground of review based on substantive fairness in the country.

4.1.4 Administrative law substantive fairness in Canada

Canada adopts a very strict approach to fairness and has in several cases resisted attempts to create substantive benefits in procedural fairness.[26] There have been some isolated suggestions

[22] The terms expeditious and efficient are found in s43 of the Kenyan Constitution as will be discussed in Chapters 5 and 6 later.
[23] *Du Preez* (note 17 above).
[24] See for example B Lane 'The "No Evidence" Rule' in M Groves and HP Lee (eds) *Australian Administrative law: Fundamentals, Principles and Doctrines* (2007) 233, 241–2
[25] M Groves 'Substantive legitimate expectations in Australian administrative law' 32 *Melbourne University Law Review* (2008) 470, 511.
[26] See *Baker v Canada* (Minister for Citizenship and Immigration) [1999] 2 SCR 817.

that substantive fairness should find expression in Canadian administrative law, but this remains an academic debate.[27]

4.1.5 Administrative law substantive fairness in New Zealand

It must be pointed out from the outset that New Zealand is the only jurisdiction that has come close to a full implementation and realisation of substantive fairness and for this reason, a significant portion of this section is dedicated to understanding its development.

Taggart suggests that fairness in New Zealand expressly includes procedural review but also tacitly includes substantive review even if under a different name.[28] Mullan endorses this view and notes that fairness entails more than procedural review and at its 'most expansive it entails review of the merits.'[29] The most outspoken proponent of substantive fairness in New Zealand was Lord Cooke, former President of the New Zealand Supreme Court.

In *Thames Valley Electric Power Board v NZFP Pulp and Paper* case, Lord Cooke set out one of the most detailed and useful explanations of substantive fairness.[30] The case is proposition that there was some explicit recognition of substantive fairness as a basis for judicial review in New Zealand.[31] In it, Lord Cooke noted that substantive fairness is not the same concept as reasonableness 'but shades into it'. [32] It looks at the 'substance and quality of the decision taken'. Whereas procedural fairness is concerned with how the decision was arrived at and the processes around the decision, substantive fairness allows the courts to interrogate the very substance of the decision and thus, its merits. He noted further that the courts are empowered and mandated to prevent 'abuses' that arise in the administrative process which can sometimes be overlooked and skipped by a review process that is based on procedural fairness only. [33] In this sense,

[27] Ibid. See also *Knight v Indian Head School Division No 19* [1990] 1 SCR 653.
[28] M Taggart 'Administrative Law' (2006) *New Zealand Law Review* 75, 83.
[29] D Mullan 'Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?' (1982) 27 *Mc Gill Law Journal* 250,309.
[30] *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641.
[31] Ibid 652.
[32] Ibid 652.
[33] Ibid s653.

substantive fairness acts like a safety net that catches the residue of unfairness and irregularities that procedural fairness fails to stamp out and prevent.

Interestingly, Lord Cooke also referred to substantive fairness as 'an umbrella term for various grounds of review.' [34]In furtherance of this assertion, he concluded that substantive fairness can include 'improper motive, departure from given assurances, misrepresentation and mistake.'[35] Knight summarises the net effect of Lord Cooke's judgment and noted that substantive fairness was not determined in isolation but as a sum of numerous considerations.[36] From the judgment, Knight notes that unfairness must be shown by the plaintiff.[37] The burden of proof rests with the plaintiff to prove that there is substantive unfairness. It seems, therefore, that a court does not raise substantive fairness *sua sponte* or *ex mero motu,* that is, on its own accord. It is up to the party claiming it to raise it specifically for the court to be drawn to it. Beyond this, the party must not only raise it but prove it as the court will not do either of the two for a litigant. Knight further notes that the unfairness must be real and significant as opposed to being far-fetched and of no significance.[38] Lord Cooke highlighted the relevance of substantive fairness in correcting irregularities and it follows that such irregularities must be of a significant nature before the courts intervene. The unfairness should not be in the eyes of the applicant only but should be determinable in an objective sense.[39] To grasp the intricacy of the matters involved, Lord Cooke suggested that the full context of a matter be brought to the attention of the court as it is vitally important in placing the court in a position where it can determine the fairness of a process it is detached from.[40]

Perhaps most importantly, Lord Cooke cautioned that while the courts can consider and look into the substantive fairness of conduct by administrative authorities, they may not unreasonably usurp the powers of authorities and replace their views with that of the court.[41] In addition to

[34] Ibid 654.
[35] Ibid 654.
[36] D Knight 'Simple, Fair and Discretionary Administrative Law' (2008) 39 *VUWLR* 99.
[37] Ibid 101.
[38] Ibid 102.
[39] Ibid.
[40] Knight (note 36 above).
[41] Ibid.

this, Lord Cooke added that the differences between appeals and reviews still existed notwithstanding the presence of the substantive enquiry into fairness.[42]

Knight points out that for Lord Cooke, substantive fairness was 'an attempt to escape the *Wednesbury* formulation and provide increased scrutiny.'[43] The scope and precise boundaries of the ground have not been set and probably should not be set.[44] In my view, Lord Cooke's qualification on the extent of the review is perhaps the perfect balance required to achieve appropriate deference. He went on to find that it is insufficient for a court to find mere unfairness and that this would not warrant a declaration of invalidity.[45] Alternatively stated, if a court determines that there was a slight instance of unfairness, this will not translate to an immediate declaration of invalidity. The courts will require much more than mere unfairness before declaring administrative conduct invalid during a review based on substantive unfairness. By so doing, Lord Cooke was drawing boundary lines that are necessary to accord administrative authorities the space to exercise their duties without unnecessary court intervention. A key theme of Lord Cooke's reasoning in approaching substantive fairness is preventing irregularities and this theme comes across strongly in requiring that the fairness be of a significant nature before a declaration of invalidity. This is clearly enunciated in another seminal judgment by Lord Cooke, *R v Panel on Take Overs and Mergers Ex Parte Guinness*. In the case, he noted that the applicable standard is 'whether something had gone wrong of a nature and degree which required the intervention of the court.'[46]

The use of a substantive fairness review in administrative law opens three possibilities according to Knight. These are an addition of a new ground of review, expansion of the concept of fairness and a heightened ground of review that comes with much more scrutiny. While Lord Cooke advocated for the use of substantive fairness as a ground of review, Knight notes that the ground has fallen out of use and has been substituted by other grounds such as 'mistake of fact,

[42] Ibid 103.
[43] Ibid.
[44] Ibid.
[45] Ibid
[46] *R v Panel on Take Overs Ex Parte Guiness* plc (1990) 1 Q.B 146 160.

adequacy of evidence, and relevance.'[47] The reason for the abandonment of the ground is that its outcomes can be realised by using existing or alternative grounds without the need to create an additional ground.[48] While the ground is no longer in use directly, the legacy of Lord Cooke's advocacy for substantive fairness can be seen in the fact that that New Zealand Courts now 'aggressively scrutinise the fact-finding process' of administrative authorities.[49]

A word of caution from Justice Fisher is important to note - without the necessary guidelines and principles it is easy for the distinction between review and appeal to be distorted when applying substantive fairness and it is perhaps for this reason that the ground is no longer a part of New Zealand administrative law.

Many scholars have outrightly rejected the idea of substantive fairness being part of New Zealand's administrative law and the most critical of these is Melissa Poole. In her article, 'Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Property'[50], Poole criticises courts that have used the doctrine of legitimate expectation to introduce the concepts of substantive fairness.[51] She argues that courts that extend substantive benefits using a procedural based review like the doctrine of legitimate expectations, essentially engage in substantive fairness adjudication albeit under a different name as the two amount to the same in as far as outcomes are concerned.[52] She bases this assertion on the *Northern Roller Milling Co Ltd v Commerce Commission*[53] case where the court explicitly held that legitimate expectations and substantive fairness should be seen as 'one and the same thing'.[54] Poole further contends that one of the major reasons why substantive fairness should not be a part of New Zealand

[47] Knight (note 36 above).
[48] Ibid 111.
[49] Ibid.
[50] M Poole 'Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" (1995) *N.Z. Law Rev.* 426,431
[51] Ibid 426.
[52] Ibid 433.
[53] *Northern Roller Milling Co Ltd v Commerce Commission* (1994) 2 *NZLR* 747.
[54] Poole (note 50 above) 428.

administrative law is the traditional understanding of judicial reviews which holds that reviews are only confined to process and not substance.[55]

Substantive fairness, therefore, entails the awarding of a substantive benefit in respect of legitimate expectations. While legitimate expectations traditionally award procedural benefits to applicants, which generally extend to a duty to be heard and to be treated fairly, they do not entitle the holder to a substantive benefit. It is clear that when courts venture into the awarding of substantive benefits for legitimate expectations, they essentially engage in substantive fairness, particularly where the substantive benefit is not tied to a procedural benefit.[56] In the South African case of *Premier Mpumalanga*, the court awarded a substantive benefit to the applicants but this was an indirect result of awarding a procedural benefit.[57] In other words, the court did not actively seek to award a substantive benefit to the applicants but by giving effect to a procedural benefit, the substantive benefit which was so closed tied to the procedural aspect, was given effect to. This is, therefore, a substantive fairness result stemming from a procedural fairness enquiry. Poole distinguishes between those types of scenarios and those where a court expressly gives effect to substantive fairness from legitimate expectations on the basis that it feels a sense of injustice will arise if it fails to do so.[58] If procedural fairness gives rise to legitimate expectations to produce procedural outcomes and benefits, substantive fairness must also be seen as giving rise to legitimate expectations that produce substantive benefits or outcomes. If there is anything certain about substantive fairness, then this surely must be it.

Amongst other criticisms that she levels against the introduction of substantive fairness, she takes issue with the vague nature of the concept. Even Lord Cooke acknowledged that the scope of the concept is broad[59] and undefined, which Poole flags as a problem.[60] Finally, Poole notes that the reason why substantive fairness cannot be defined is that it changes both the procedural

[55] Ibid 43. See also G Taylor *Judicial Review – A New Zealand Perspective* (1991) 259.
[56] M Poole 'Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" (1995) *N.Z. Law Rev.* 426 ,434.
[57] *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91.
[58] Poole (note 56 above).
[59] Lord Cooke in *Thames* (note 30 above).
[60] Poole (note 56 above) 443.

aspects and the outcome of a matter and it is in its very nature that the challenge of broadness arises.[61]

While Lord Cooke punted for the introduction and use of substantive fairness, the reasons militating against its introduction will serve as important considerations for the development of the concept in Zimbabwe. The Zimbabwean position is, however, different to that of New Zealand in one key respect: for Zimbabwe, there is no discussion about whether substantive fairness should be introduced or not, it is a constitutional imperative and it must be applied by the courts. The guidelines by Lord Cooke will, therefore, be a much needed and useful basis for the development of the doctrine of substantive fairness regardless of its disuse in New Zealand where it first found acceptance.

Substantive fairness should be seen as requiring the courts to engage in value judgments rather than nit picking. The courts should still grant a degree of deference to the administrative authorities even if they are required to review both process and substance. The use of the doctrine of substantive fairness is as highlighted earlier, to act as a safety net to prevent glaring irregularities and abuses that may otherwise go unchecked, to be corrected and remedied. Notwithstanding the use of substantive and merit-based conclusions, the concepts of appeal and review still exist. The courts will not automatically void conduct on a mere determination that the conduct seems substantively unfair, much more is required before such an order is made by the courts.

One of the emergent grounds from the substantive fairness ground is the 'anxious scrutiny test' which involves a balancing exercise between the providence of administrative law review and human rights.[62] The test suggests that in reviewing the conduct of an administrator, the scales of justice must be tipped in favour of human rights that stand to be violated.[63] In this regard, the traditional grounds of review seemingly cave in favour of the contending human rights.[64] This seems to suggest that when dealing with substantive fairness, courts faced with human rights

[61] Ibid.
[62] *Ye v Minister of Immigration* [2008] NZCA 291 (CA).
[63] Ibid.
[64] *Wright v Attorney-General* [2006] NZAR 66, 78.

violations caused by administrative conduct must view the considerations of rights as paramount. The rights will therefore override any other concerns. Thus, if the outcome violates a fundamental right, the decision will be set aside for violating a right and thus be seen as substantively unfair. The court in *Bugdaycay* explained the test this way:

'[T]he Court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'[65]

From the test, it is apparent that one of the grounds to be considered in a substantive fairness enquiry is the weighing of rights or alternatively stated, whether fundamental rights have been violated, as this automatically points to unfairness of a substantive nature.

One of the biggest challenges that New Zealand courts identified with formulating the substantive fairness ground of review is that it is a culmination of various factors and it is case-specific.[66] What is substantively fair will also depend on the specifics of the case before the courts but more importantly, it depends on the various rights and considerations at play.[67] It almost seems that the ground is invokable where there is a sense of abuse of power that cannot be categorised into other existing grounds of review or where courts feel there is injustice that would otherwise be unremedied through other prisms or grounds of review. It is clear, however, that while there are various shades of substantive fairness, it is an elevated, heightened ground of review, which is more invasive in nature than its traditional administrative law counterparts.[68] The lack of a definition for substantive fairness further complicates this ground of review and

[65] *Bugdaycay v. Secretary of State for the Home Department; Nelidow Santis v. Secretary of State for the Home Department; Norman v. Secretary of State for the Home Department; In re Musisi*, [1987] 1 AC 514.
[66] *Pharmaceutical Management Agency Ltd v Rousse Uclaf Australia Pty* Ltd [1998] NZAR 58, 66 (CA)
[67] Ibid.
[68] Justice S Glazebrook 'To the Lighthouse: Judicial Review and Immigration in New Zealand' Paper for the Supreme Court and Federal Court Judges' Conference held in Hobart from (24 to 28 January 2009) 37

perhaps this is a blessing in disguise as it will allow Zimbabwean courts to fashion a uniquely Zimbabwean understanding of the ground.[69]

As for the content of substantive fairness, the jurisprudence as indicated earlier in the chapter, only points to some examples of conduct that would amount to substantive unfairness. These, as Mullan notes, include failures by administrative authorities to act on previous undertakings, breaches of duties, deviation from expected expectations and inconsistencies in decision making by administrative authorities.[70] Lord Cooke envisaged fairness arising from a situation necessitating judicial scrutiny:

'*where the procedure and the decision of an administrative body, although possibly just surviving challenge if viewed separately, were in combination so questionable as to impel the conclusion that... something had gone wrong of a nature and degree that required the intervention of the court...*'[71]

In *In re Preston*, substantive fairness was extended to cover situations where there is an abuse of power, which could stem from improper motives or a breach of contract or a 'breach of representation' by the administrator.[72]

Since procedural fairness deals with the correctness of processes and procedures then it stands to reason that substantive fairness relates to the correctness and fairness of the substantive outcomes or decisions of administrative conduct. Using this formulation, substantive fairness seems quite capable of picking up and remedying conduct that is either discriminatory in nature or prejudicial in form. For instance, a decision that is premised on xenophobia or racism can pass the procedural fairness test but will not pass a substantive fairness test. Equally true is the fact that racism and xenophobia can quite often escape the other grounds of review that exist in administrative law because of their subtle nature that only becomes evident in the final result which traditional grounds of review do not curtail. As mentioned previously, this is how

[69] PA Joseph *Constitutional and Administrative Law in New Zealand* (2001) 840.
[70] H Wade MacLauchlan 'Some Problems with Judicial Review of Administrative Inconsistency' (1984) 8 *Dalhousie Law Review* 435.
[71] *Thames Valley* (note 30 above) 653.
[72] *In Re Preston* (1985) AC 864.

substantive fairness can be seen as a safety net catching the residual prejudicial conduct that would otherwise have been left open. Only a court or tribunal reviewing the merits of a decision will be able to tell that a final outcome was premised on discriminatory, prejudicial, or incorrect criteria. The other avenues of administrative law would only be able to sift out flawed processes, and in some cases, very obvious forms of bias and bad faith, but the final outcome would be left out from judicial purview due to the deference afforded to administrators. Substantive fairness does not extend the same degree of deference in as far as the outcome or merits are concerned. If anything, it permits courts to interrogate the outcome and merits to determine if, given the facts and peculiarity of the matter, they can be described as fair and just.

Substantive fairness differs from procedural fairness in its focus or scope. While procedural fairness looks at a review of the process and the fairness thereof, substantive fairness is as Taggart noted, a review on the merits.[73] Substantive fairness thus considers the fairness of the outcome and its merits. Impliedly, substantive fairness permits the courts to venture into what is traditionally viewed as the terrain of the administrator and places the courts in a position to determine the correctness and fairness of the conclusions reached by the administrators.[74] It is as Lord Cooke noted, a ground of review used with constraint as a means to check the abuse of power by administrators.[75] As previously noted, it is similar to the principle of legality, which acts as a safety net to ensure that all exercises of public power are subject to judicial review and checks.

Hutchinson notes that the underlying rationale for substantive fairness can be described as follows: *'While the emphasis upon process and form may result in the protection of individual interests in the occasional dispute, individual interests cannot be effectively protected without resort to substantive precepts.'*[76]

[73] M Taggart 'Administrative Law' (2006) *New Zealand Law Review* 75, 83
[74] D Mullan 'Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?' (1982) 27 *Mc Gill Law Journal* 250,309
[75] *Thames Valley* (note 30 above) 652.
[76] AC. Hutchinson 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 *Modern Law Review* 293, 320.

From this it is clear that substantive fairness adds an additional layer of protection of individual interests in the administrative process. Substantive fairness does what administrators failed to do in being 'meticulous and faithful in their duties.'[77] Where reasons are provided by the administrator, but the reasons are deficient, inadequate or simply illogical, these reasons and the decision itself can also be reviewed albeit using substantive review or substantive fairness.[78]

As a point of departure, it must also be noted that the substantive fairness ground in New Zealand has since been replaced by other grounds of review, which seem to encapsulate the features identified by Lord Cooke and other proponents of the ground.[79] It has therefore almost completely disappeared from New Zealand jurisprudence and has been relegated to an academic debate.[80]

4.1.6 Administrative law substantive fairness in Zimbabwe

Prior to the adoption of the Constitution in 2013, the Zimbabwean judiciary made it clear that it would not venture into substantive fairness discussions or indeed the correctness or merits of the decisions.[81] In the *Zambezi Proteins* case, Garwe J, as he was then, held that the role of the courts is not to second guess the administrative authorities and that doing so would be a violation of the separation of powers doctrine unjustifiably so.[82] Interestingly, at the time of this judgment, the separation of powers doctrine was implied and not an express doctrine in Zimbabwe. The 2013 Constitution specifically and clearly sets out the doctrine as a fundamental value to be followed, which makes the inclusion of the substantive fairness standard more intriguing. The attitude by Zimbabwean courts in this regard is not novel and certainly rings true in other jurisdictions.

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[77] IM Christie 'The Nature of the Lawyer's Role in the Administrative Process' (1971) *Law Society of Upper Canada Special Lecture Series* 1. See also D Mullan 'Substantive Fairness Review: Heed the Amber Light' 18 (1988) *Victoria University Wellington Law Review* 293, 300

[78] *Dunsmuir v New Brunswick* 2008 SCC 9 (SCR) 190. See also NG Wilson 'Adequacy of Reasons - From Procedural Fairness to Substantive Review' 90 (2011) *Canada Bar Review* 509.

[79] See for example GDS Taylor *Judicial Review: A New Zealand Perspective* (1991) 349.

[80] M Fordham *Judicial Review Handbook* (2004) 841.

[81] In this regard see *Zambezi Proteins (Pvt) Ltd & Others v Minister of Environmental and Tourism & Another* 1996 (1) ZLR 378 (H). Also see *Jonga v Zambezi River Authority CEO & Another* ZWHHC 126.

[82] Ibid.

In *Zambezi River Authority*, a judgment of Mtshiya J, the court refused to 'enter the domain of the administrative authority in substantive matters' and found that to do so would have the unfortunate and unintended consequence of usurping the authority of the administrator in a manner inconsistent with constitutional values and the separation of powers doctrine.[83]

While there is no case law dealing with the concept of substantive fairness in s68, Feltoe believes that the courts will take this to mean that 'substantive outcomes must be fair and that their effect must not be unfair.'[84] While he concedes that there is no clarity or indication of what meaning could be attributed to it, he notes that the courts will now be engaged in substantive aspects of the administration of the State and will no longer be confined to observe procedural aspects only.[85] The courts will now be placed in a position where they have to examine and scrutinise the outcome of processes, the nature of the decision, how the decision was arrived at, and whether the decision can be considered fair.[86] More importantly, however, Feltoe points out that the concept of substantive fairness overlaps with the grounds of reasonableness and proportionality.[87] Therefore, lessons can be drawn from the existing grounds to flesh out the possible meaning of substantive fairness.

Because the jurisprudence on substantive fairness in administrative law is thin, some guidelines and principles can be transplanted from the labour law field where the concept of substantive fairness has been used extensively for many years.

(i) Substantive fairness in Zimbabwean labour law

Labour law in Zimbabwe is drawn from legislation, the common law, international law and academic writings. The Labour Act is the principal vehicle of labour law regulation in the country but does not expressly deal with the concept of substantive fairness.[88] Instead, it is in the Conduct Regulating Labour (National Employment Code of Conduct) Regulations of 2006.[89] The objectives

[83] *Zambezi River Authority* (note 185 above).
[84] G Feltoe *Guide to Zimbabwean Administrative Law* (2017) 16, 17.
[85] Ibid
[86] Ibid 18.
[87] Ibid.
[88] Labour Act, Zimbabwe.
[89] Hereafter referred to as the Code.

of the Code in terms of Regulation 3(d) are to 'provide guidelines on the procedural and substantive fairness in handling disciplinary matters at the workplace.'[90]

The concept of substantive fairness, therefore, arises in the context of dismissals and related disciplinary outcomes. Its most common usage is the arena of dismissals. Madhuku notes that a substantively unfair dismissal has two aspects: a reason for dismissal and reasonableness of the reason. [91] It is, therefore, a two-staged enquiry. The reason proffered for the dismissal must be one valid or permissible in terms of the Labour Act and any other law.[92] There is a presumption that the failure to provide reasons for dismissal indicates a substantially unfair dismissal.[93] A lack of reasons that are genuine or lawful also creates the presumption that there were no reasons given at all.[94] A rationality test is implied in that the reasons for dismissal must be factually linked to the dismissal. Where this is not the case, then the dismissal is substantively unfair.[95] Reasons must be given with the dismissal and not after as the presumption is that dismissal is in bad faith where the reasons are not immediately available.[96] The reason for this is that the employer would have had these reasons prior to dismissing the employee. In other words, the employer cannot determine whether the employee should be dismissed without the reasons in the first place. Where reasons are given after the dismissal, the presumption is that no valid grounds existed to dismiss the employee.[97]

The second stage is only relevant where there is a valid reason for the dismissal.[98] As indicated above, if there is no reason, the enquiry does not proceed because it is deemed to be substantively unfair. The next consideration in terms of stage two is whether the decision to dismiss is reasonable. [99] The enquiry is a factual enquiry and is fact specific.[100]

[90] Labour Act, Regulation 3 (d).
[91] L Madhuku *Labour Law in Zimbabwe* (2015) 104.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid 105.
[96] Ibid.
[97] Ibid.
[98] Ibid 106.
[99] Ibid.
[100] Ibid.

In determining a substantively fair hearing, the courts consider if the reason to dismiss was serious enough to justify the dismissal.[101] This is an implied proportionality test that seeks to connect the reason to the sanction meted out. It follows, therefore, that a petty transgression of workplace rules or policies will not warrant a dismissal, at least not on the first transgression. An enquiry must be conducted into determining the violation of a rule or policy and this is a combination of questions of law and of fact.[102] One would have to find the relevant policy that has supposedly been breached and determine whether the facts satisfy the prohibited conduct described in the relevant policy or empowering enactment. The next consideration is whether the employee was aware of the transgressed rule or whether the employee could have been reasonably expected to know of the rule.[103] If the employer did not take steps to alert the employee to the policy or rule, dismissal based on violating the said rule would be viewed as substantively unfair. The application of the rule is also considered as it must have been done consistently for other employees.[104] If the employer uses a policy or rule to target the employee singularly while exempting others from the same rule, the dismissal is deemed substantively unfair based on selective application of rules. In the same vein, previous cases will be considered to determine whether the rules were applied similarly in those cases. [105] It is also worth noting that unreasonably long suspension periods are further considered to be substantively unfair.[106] A lengthy delay in bringing charges will be considered as substantively unfair.[107]

Based on the above, the crux of substantive fairness in Zimbabwean labour law can be said to be based on four broad principles: equity, proportionality, rationality and transparency. One might also add that substantive fairness in the labour context is aimed at preventing arbitrary decisions. If these principles were transplanted into administrative law, courts would focus on the overarching considerations of equity, transparency, and rationality. Substantive fairness in

[101] Taurai Musakaruka Herald 'What Constitutes a fair hearing' https://www.herald.co.zw/what-constitutes-a-fair-hearing/
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid
[107] Ibid.

administrative law can similarly focus on a two staged approach – what is the reason or basis for the action and the reasonableness of the decision or action taken. If there is no reason for the administrative decision, I submit that similarly, the decision by an administrative authority, which has no reasons for it should immediately be viewed as substantively unfair. It is important to note that this should be different from the right to request written reasons, which requires that reasons be provided upon request and in writing.[108] The requirement for reasons in substantive fairness should not be seen as requiring these to be formally done in writing but merely that reasons exist for the administrative decision taken. As the courts refine these concepts, it may become necessary to require the reasons to be formally tendered in writing, but this would unnecessarily burden administrative authorities at this stage. I submit that the courts should only enquire into the factual existence of these reasons rather than the form in which they exist, to satisfy the first stage of the transplanted test for substantive fairness.

In determining the second stage of the proposed test, the courts should consider various factors to evaluate whether the reason contemplated in the first stage is reasonable. Some factors to be considered include whether the reasons and decision taken are proportional to the harm remedied, whether there are unreasonable delays and equal treatment of applicants in the same position. These considerations place the court in a position to examine the outcomes of administrative conduct and scrutinise same to ensure a fair outcome.

There are indeed many useful considerations that can be developed and transplanted from labour law in understanding substantive fairness.

(ii) Substantive fairness in South African labour law

In South Africa, substantive fairness is determined through s188(1) (a) of the Labour Relations Act.[109] In terms of the Act , the reasons for dismissal must be fair and related to either capacity or conduct.[110] The traditional approach to substantive fairness was discussed in *SACTWU v*

[108] Constitution of Zimbabwe, s68 (2)
[109] Labour Relations Act of South Africa, 1995.
[110] *Luwaca and GMT South Africa* 25 ILJ (2004) 1540.

Discreto.[111] A degree of deference must be exercised by the courts when determining fairness despite provisions permitting the courts to intervene. [112] The court held that the role of the courts in determining substantive fairness is limited to identifying the reason for dismissal and that the reason is an operational requirement. Once the court is satisfied that this is the case, it should not go beyond this. [113] This position was changed in the *BMD Knitting Mills v SACTWU* case.[114] In this matter, the court held that when determining substantive fairness, courts are required to scrutinise the decision and whether this decision is fair to both parties affected by the decision.[115] The court must then consider whether there is a reasonable basis on which the decision is made. [116] The substantive fairness enquiry must necessarily engage the reasons given.[117] Lastly, the test as phrased by the court is 'not whether the reasons are similar /identical to one the court would give but whether it is fair as the courts are concerned with fairness and not correctness.'[118]

From the South African labour law framework, some valuable lessons for the development of the substantive fairness doctrine include reasons that must be fair and must be linked to the objectives set out. Courts must appreciate that there must still be a degree of deference accorded to the administrative authority and that the widening of the scope to include a review on the merits does not entail usurping the functions of the administrative authorities. Wherever possible, courts must balance the need to enquire into fairness of outcomes and respect for the terrain of the administrative authorities. It will not be an easy exercise and it seems easier said than done. However, for substantive fairness to be accepted fully, the balance must be observed and applied wherever necessary. Courts must also seek to examine whether the outcome is fair to both parties. I submit that fairness cannot be determined in favour of an applicant only – it must be fair in an objective sense to all parties involved in the matter. While parties will naturally

[111] *SACTWU v Discreto* 1998) 19 ILJ 1451 (LAC) 8
[112] Ibid.
[113] Ibid
[114] *BMD Knitting Mills v Sa Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC) par 17.
[115] Ibid par 19.
[116] Ibid.
[117] Ibid.
[118] Ibid par 19, 20.

not agree on the outcome reached by a court, the parties involved must be able to walk away and agree that notwithstanding the outcome, the decision arrived at was generally fair.

While the focus of the preceding content has been to flesh out the various lessons and guidelines from different jurisdictions and fields of law, the next section considers what I propose substantive fairness in terms of s 68 should entail and some examples where it could be warranted.

4.1.7 Suggested theory of substantive fairness in s68

To begin with and with regard to the above, substantive fairness in my view, should be taken to mean a ground of review of administrative conduct that is premised on increased scrutiny of both process and the outcomes of the administrative process with a specific focus on the correctness and fairness of the outcome or decision. Substantive fairness is a multi-faceted ground of review that is focussed on minimising and remedying abuse of power generally. In determining what constitutes substantive fairness, one must have regard to the specific facts of the case in question and a range of factors before reaching a determination of unfairness. The applicability of the factors in each case will depend, in turn, on the facts of the dispute and, therefore, no single test can create hard and fast rules for this determination. It should also be borne in mind that the unfairness should be both significant and objective in nature. Equally important is the reduction of the scope of deference in respect of the administrative authorities by the courts. While traditional administrative law regards a review of the merits of administrative conduct as improper and undesirable, substantive fairness ushers in a change of that position by permitting courts to review the merits of the decisions by administrative authorities.

The constitutional imperative to review fairness in a substantive sense, impliedly reduces the applicability of the deference theory discussed earlier in this study. This should not be mistaken as a proposal for the complete disregard of the doctrine when considering substantive fairness, as this would be at odds with the separation of powers value that is explicit in the Constitution. It must also be noted that separation of powers is in fact a principle of good governance in the

Constitution and thus must be read into the interpretation of s68.[119] The courts will have to balance the constitutional imperative to review fairness substantively against the constitutional imperative to observe the principle of separation of powers. In my view, the correct way to do this is to regard substantive fairness as a permissible permeation of the separation of powers doctrine that calls for less deference to the administrative authorities. It should not be seen as a licence to disregard deference and perhaps this is the usefulness of the caveat that courts must only invalidate conduct on this ground where the unfairness is both objective and significant. This provides a safeguard against excessive intrusion of the terrain of the administrative authorities. The qualifiers, therefore, serve as filters to prevent abuse of the ground while still observing a certain degree of respect for the separation of powers principles.

I submit that substantive fairness should be seen as a review basis, where the merits are scrutinised to check abuse of power by administrative authorities. This abuse of power can take many forms, and these can be termed factors relevant in determining substantive unfairness. This is in keeping with Lord Cooke's assertions that the ground is an 'umbrella term from various grounds of review'. The factors that point to substantive unfairness include a breach of duties, estoppel, and breach of contracts, bad faith, improper motives, motivation, substantive legitimate expectations, inequality, fraud, and invalid reasons.

(a) Estoppel

While many of these concepts have been discussed in the preceding discussion, it is worth expanding some of these to carve a clearer understanding of substantive fairness. Estoppel has already been discussed under the lawfulness ground of review and the general position is that if estoppel gives rise to unlawful conduct by the administrator, the courts will not uphold the defence.[120] Administrators are, therefore, shielded from the consequences of their representations where the defence of estoppel is not applied. This, in turn, leaves parties that relied on representations by the administrators, vulnerable and without immediate recourse in

[119] Constitution of Zimbabwe, s3(2).
[120] See for example *Foroma v Minister of Public Construction & National Housing & Anor* 1997 (1) ZLR 447 (H) 465, 467.

administrative law. By including this as an aspect of substantive fairness, applicants may potentially have recourse against negligent administrators. Substantive fairness review would thus be an equitable ground that holds administrators accountable for their representations. By holding them accountable for representations made, the constitutional principles of accountable administration and good governance will also be realised. I submit that while some matters may clearly be problematic for the defence of estoppel to succeed, the review should yield some restorative administrative justice for the parties concerned. Stated differently, including estoppel as a factor for substantive fairness does not mean the courts have to now give effect to unlawful conduct by administrators but will provide applicants with equitable redress to remedy the misrepresentations made by the administrative authorities. Previously, where the defence of estoppel failed, applicants would have no further remedies in terms of administrative law and the matter was dismissed on that basis.[121] I propose that the inclusion of estoppel as part of substantive fairness would then require courts to make a determination that allows the defence to succeed albeit with different remedies apart from compelling the administrator to abide by its representation. By creating alternative remedies and outcomes, the challenge of validating unlawful conduct is eliminated.

(b) Improper Motive

Substantive fairness can additionally include improper motive, which are also a form of abuse of power and discretion. Improper motive can also be termed ulterior motive and refers to 'hidden, subjective and possibly sinister aims', as Hoexter notes.[122] It speaks to conduct by an administrator that is fuelled by an improper agenda, which detracts from the intended aims of the powers accorded to the administrator. Zimbabwean administrative law has always concerned itself with ulterior purpose but not improper motive.[123] If substantive fairness is developed to include improper motives, this will eliminate potential abuse of power by administrators and strengthen the principles of good governance. An example of improper motive is seen in the

[121] Hoexter (note 8 above) 39
[122] Ibid 309.
[123] Feltoe (note 84 above)109.

South African case of *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*.[124] In the matter, the Minister interfered with the approval of an application and did so on the basis that she was under pressure from her political party to decide the matter in favour of the applicant despite the rejection of the application by a committee. This is clearly an abuse of power that needs to be prevented which is why substantive fairness can as an overarching basis of review, be used to remedy such acts.

(c) Corruption

Similarly linked to improper motive is corruption. I propose that corruption be considered as a factor under substantive fairness. There may be cases where a party to the administrative process meets all the requirements and checks all the boxes to be granted a licence but ultimately gets it on the basis of corruption. This kind of abuse is not only rampant but goes against the grain of the Constitution, which requires honesty and transparency by those in the public administration of the State. Including this as a factor under substantive fairness will further strengthen the fight against corruption and bolster the administrative integrity of the State.

(d) Legitimate Expectations

As noted earlier, substantive fairness necessarily encompasses substantive legitimate expectations. While South Africa has outrightly rejected the concept of substantive fairness, there seems to be a move towards the acceptance and adoption of substantive legitimate expectations.[125] There have been some cases where the courts awarded substantive benefits for the substantive expectation although most of these were decided in terms of alternative grounds outside the realm of the PAJA.[126] Although the courts have given effect to substantive expectations, they have often shied away from using the terminology expressly, and for this reason there is no judgment that expressly endorses substantive legitimate expectations as part

[124] *MEC for Health, Eastern Cape and Another v Kirland* Investments (Pty) Ltd 2014 (3) SA 481 (CC).
[125] G Quinot 'The Developing Doctrine of Substantive Legitimate Expectations in South African Administrative Law' *SA Public Law* 548, 558. See also *Durban Add-Ventures Ltd v Premier KwaZulu* (No 2) 2001 (1) SA 389 (N).
[126] In this regard, see cases like *Quinella Trading (Pty) Ltd v Minister of Rural Development* 2010 4 SA 308 (LCC) and *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 2 SA 215 (T).

of South African law.[127] Murcott further notes that courts have developed parallel remedies outside the realm of administrative law to protect substantive expectations which further clouds the existence of substantive expectations in South Africa.[128] There are cases such as *Meyer v Iscor Pension Funds* where the courts have neither accepted nor rejected the incorporation of substantive legitimate expectations thus adding more uncertainty on the position of this concept.[129] In theory, however, it seems quite clear that where a legitimate expectation gives rise to a substantive benefit and protection, it escapes the confines of procedural fairness and morphs into substantive fairness. In the Zimbabwean context, the courts have confined the legitimate expectation doctrine to procedural benefits and protections.[130] Indeed the courts have held that where a substantive benefit is awarded such as a promotion, this would amount to an interference with the terrain of the administrators.[131] The current position is, therefore, that legitimate expectations do not give rise to substantive benefits nor do they offer substantive protection.[132] The introduction of the substantive fairness element in s68 changes this position drastically and as a result, it will be expected the doctrine will be developed to include substantive legitimate expectations. Consequently, substantive fairness will permit applicants who, on the basis of a previous practice or policy directive, have been prejudiced by their reliance on it, to claim a substantive benefit or protection emanating from their legitimate expectation.

(e) Breach of Contract

Perhaps one of the more interesting additions to the substantive fairness ground would be the breach of contract factor. Traditionally, it seems that litigants have limited recourse against administrative authorities where authorities breach the contract and the reasons for the breach

[127] M Murcott 'A future for the doctrine of substantive legitimate expectation? The implications of *Kwazulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu Natal*' (2015) 18 *PER* 3133.
[128] Ibid.
[129] *Meyer v Iscor Pension Funds* (2003) 1 All SA 40 (SCA).
[130] See for example *Movement For Democratic Change v The President Of Zimbabwe & Ors* 2007 (1) ZLR 257 (H), *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) and *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H).
[131] See *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S) in this regard as well as *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S).
[132] Feltoe (note 84 above) 68.

can be supported by the duty to act lawfully.[133] As Craig notes, the traditional premise of contract adherence by administrative authorities is that contracts will not be held against the authorities if they have the effect of binding the State to perform ultra vires acts or fetter the discretion to act in the best interests of the public.[134] Seemingly, administrative authorities would not be held to the usual breach of contract standards. The lingering question then is what happens to the innocent party since it has limited rights of recourse in these situations? As a solution to this, I submit that substantive fairness is capable of providing such a basis to review the decision. Again, like the estoppel doctrine, I do not suggest that illegal contracts be allowed to stand but rather that courts enquire into the fairness of the merits of the outcomes of such processes and create remedies based on equity. If the State is provided with an exemption to perform in terms of these contracts where its future decision-making discretion is fettered, then surely a deviation from normal contractual remedies for the innocent party is warranted. The rule against fettering of public authorities is recognised in several jurisdictions including England[135], Namibia[136], and South Africa.[137] It is possible, in my view, for courts to find the conduct of administrative authorities to be substantively unfair without fettering the discretion of the administrators in future matters.

If substantive fairness is understood, as I have argued, to be a review ground based on equity and prevention of abuses of power by administrative authorities, then corresponding remedies can be fashioned by the courts that balance the need to uphold lawfulness on the one hand and holding administrators to account on the other.

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[133] See for example *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR) which reflects the Zimbabwean common law position. For a more general discussion, see Wade & Forsyth *Administrative Law* 8th ed (2000) 366.

[134] PP Craig Administrative Law 6ed (2008) 521.

[135] See cases such as *Rederiaktiebolaget 'Amphitrite' v The King* [1921] 3 KB 500; *Birkdale District Electric Supply Co v Southport Corporation* [1926] AC 355 and *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 2 All ER 277.

[136] See for example *Wlotzkasbaken Home Owners and Another v Erongo Regional Council and Others* (2007) NAHC 95.

[137] P Bolton 'Government Contracts and the Fettering of Discretion- A Question of Validity' (2004) *SA Public Law* 90,92. See also *Rapholo v State President and Others* 1993 (1) SA 680 TPD and *Sachs v Donges NO* 1950 (2) SA 265 (A).

(f) Vagueness and arbitrary conduct

Substantive fairness can also include concepts such as vagueness or uncertainty as Hoexter refers to it.[138] Vagueness is sometimes seen as an extension of reasonableness but in Zimbabwe the common law approach was to treat it as a stand-alone ground on which review could take place.[139] It must be noted that this is not a feature of the current ZAJA framework. Another factor that could point to unfairness in a substantive sense is arbitrary decision making. Adding this to the Zimbabwean framework would certainly improve the quality of administrative decision-making and promote a culture of justification and accountability. Arbitrary decision-making exists where no grounds supporting its merits can be found.[140] It can be described as random decision-making lacking justification. I must hasten to point that this kind of decision making may not become apparent until one assesses the reasons of a decision which goes beyond the traditional scope of administrative law. A conclusion that the decision is indeed arbitrary can be made when one interrogates the outcome and the reasons for the outcome in a substantive sense, even though some arbitrary decisions are more readily apparent without such interrogation. The introduction of arbitrary decision making as an incident of substantive fairness will allow Zimbabwean courts to assess the validity and legitimacy of the reasoning supporting administrative decisions. Ultimately, this too will prevent an abuse of power which is, in my view, the underlying premise of substantive fairness.

(g) Inequality and discrimination

The last factor that can be considered as forming part of the substantive fairness ground is inequality. To be more specific, this would be unequal treatment between applicants or parties in the same position. This factor would, therefore, subject decision-making processes that treat applicants in the same position differently, to judicial scrutiny. At the heart of this inclusion is the need to eliminate overt oppressive practices like racism, xenophobia, or sexism from the administrative process. Where two applicants possess the same experience, qualifications and

[138] Hoexter (note 8 above) 332.
[139] *PF ZAPU v Minister of Justice (1)* 1985(1) ZLR 261 (H) and *Natural Stone Export Co (Pvt) Ltd & Anor v Director of National Parks and Wildlife Management & Ors* 1997 (2) ZLR 215 (H).
[140] Hoexter (note 8 above) 325.

standing, an administrative process that treats the two differently should be reviewed on the basis that it is substantively unfair. Usually, administrative authorities can hide behind the veil of 'discretion' to cover up for unequal treatment of parties. While other aspects of administrative law such as lawfulness and procedural fairness may fail to remedy or identify the unequal treatment, the substantive fairness ground would be able to interrogate the basis of unequal treatment and determine whether the unequal treatment can be justified in terms of the Constitution. In a country with a history of selective treatment of citizens and preferential treatment in favour of government aligned individuals or entities, the addition of inequality as a factor pointing to substantive unfairness will promote the constitutional principle of equality before the law and increase public confidence in the administration of the State.

In my view, substantive fairness should be construed at generally remedying traces of unfairness in the administrative process that may evade the lens of other grounds in administrative law. This is so because of its invasive nature, which as pointed out earlier, allows the courts to justifiably usurp a significant portion of the administrator's powers by reviewing and determining the correctness of the outcomes reached. To mitigate its evidently invasive nature, I propose that it only be used as a last resort ground. In other words, while it is constitutionally guaranteed by s68, litigants and courts must preferably have regard to grounds such as lawfulness and reasonableness, and only consider substantive fairness where those grounds have no recourse or protection for the parties concerned. This is to avoid an undesirable position where the terrain of administrative authorities is watered down and to continue to uphold the separation of powers doctrine.

To contextualise the theoretic framework above, some working examples where the doctrine of substantive fairness could be applied are given below.

Example 1: ***Reliance on written directive of Tax Commissioner***

In *Delta Corp Ltd* v *ZRA,* the doctrine of estoppel was raised against the Tax Commissioner of Zimbabwe for a written directive issued in 1996. [141] The directive stemmed from a written

[141] *Delta Corp Ltd* v *ZRA* HH-621-15.

request by a firm of accountants on whether share bonuses and other profits by shareholders could be taxed at the time of distribution. The intention of the accountants was to get clarity for purposes of assisting their clients with the tax assessments and filing of returns. The Tax Commissioner wrote back to them and advised that they need not tax the said profits and share bonuses further than they already had. Since 1996, the firm relied on this advice and advised their clients of this. The Tax Commissioner later claimed tax for the share bonuses and other profits, contrary to what the directive issued decades ago had indicated. In addition to that, the Commissioner demanded arrears tax for the previous three years. The firm challenged this decision on the basis that a written directive had been issued by the office of the Commissioner, which they relied on and thus it would be unfair for them to be penalised for an issue they sought clarity on. The court in determining this matter had more regard to the nature of the directive issued in terms of the Tax Act. It found that the directive was a 'private opinion' that could not be relied on and that the doctrine of estoppel would not be applicable as it would deprive the Tax Revenue Authority from collecting on the tax.

In this situation, it can easily be seen that although the law seems to be on the side of the Tax authorities, it is undoubtedly unfair for the accountants who had done their due diligence and sought counsel from the tax authorities for the very purpose of avoiding a violation of the tax laws. That the doctrine of estoppel's requirements was present is not in dispute as the court itself conceded to this. The only reasoning the court used not to apply the doctrine was a policy concern where it held that allowing the doctrine would allow for illegality to take place.

Lord Cooke noted that there are simply some cases where one gets a sense that there has been a grave injustice that cannot be remedied through existing grounds.[142] This is possibly one of the cases he had in mind.

[142] *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641.

Example 2- ***Incorrect/Unlawful reasons for rejecting an applicant***

The following is another situation that may warrant the use of substantive fairness as a ground of review. An employee who has worked for a state entity for three years applies for a renewal of his employment contract, which as a matter of past practice, is automatic. For the last fifteen years, the short-term contracts have been automatically renewed for those employed by the state entity. The interviews were, therefore, a formality, but the practice was to retain all previous employees until they reach a five-year cap of service, after which they cease to be employed with that specific department. In the fifteen years, no individual who was within the five-year limit was dropped from the entity regardless of their performance.

Employee X is a national from the Democratic Republic of Congo and has been with the State entity for two years with an expectation of an additional three years of service, per past practice. In 2017 he applies for an extra year, as per the expected practice and is shortlisted with the rest of his colleagues. After the interviews, he is the only returning employee whose contract is not extended. When he asks for reasons, he is advised that there were better candidates and he failed to meet the standard expected. He later discovers that less qualified and experienced individuals are chosen ahead of him. The only distinguishing traits between himself and the selected candidates seem to be his nationality, but this was not disclosed as one of the reasons for the decision not to reappoint him.

While the past practice creates a legitimate expectation to be shortlisted or at least given a chance to apply for the position, traditional boundaries of legitimate expectations do not extend to an entitlement to a substantive benefit[143] which in this case is the job. He is entitled, at least in the traditional framing of legitimate expectations, to procedural fairness but nothing more. [144] This doctrine would have been fulfilled simply by granting him a hearing which was the case herein. Lord's Cooke's words ring true yet again: should this be the end of the matter and is this decision fair and just or does it warrant the intervention of the courts beyond this? Clearly the

[143] *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) 155 where the court held that the entitlement created by a legitimate expectation is one of a fair hearing before a decision is taken that affects them. See also *Taylor* v *Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S).
[144] *PF-ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S).

process cannot be faulted but it is the outcome where the difficulty lies. The reasons given for the decision have been furnished but do not make sense when one looks at the calibre of the candidates. The reason given thus does not correspond to the merits of the matter. Substantive fairness would allow the courts to consider the calibre and quality of applicants and determine whether the decision not to appoint was just. In considering whether the conduct is substantively unfair, I propose that the courts consider whether there are reasons, if those reasons are lawful, if the reasons are reasonably connected to the decision, if the reasons are incomplete or contradictory, and if the conduct was taken in bad faith. In my view and similar to labour law, these should be seen as instances of automatically substantively unfair conduct.[145] Additionally, the courts may well consider if there was differential treatment between applicants faced with the same experience and qualifications. If there is, then an enquiry into the reasons for differential treatment must be given by the employer failing which a conclusion that the conduct was substantively unfair can be made. A further consideration from the *Thames Valley* judgment was whether the decision of an administrator amounted to some sort of an abuse of power.[146] In this scenario, the conclusion is inescapable, there was indeed an abuse of power.

Since the employee relied on past practices, courts may also consider if a deviation from same would be fair in an objective sense and that any unfairness is not prejudicial or significant. In the scenario, the deviation is not accounted for and instead is couched in ambiguous or hidden terms which point to a sinister agenda. A court faced with such a scenario may well indeed conclude that this is substantively unfair on this basis.

Example 3: *University Enrolment*

Another example is a situation where a South African university takes considerable time in approving the application of a foreign national student who intends on being enrolled for the forthcoming academic year. In this hypothetical situation, the university sends this acceptance in December, three months before the academic year begins. The immigration officials who process

[145] A more detailed discussion on the import of the labour law principles and the concepts of automatically substantively unfair conduct follows in Chapter Five.
[146] *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641.

the permits take a minimum of three months to approve and issue permits. In this case, they issue the permit in May of the next year, four months after the academic year has begun. The University issues a notice to the student indicating that he has missed the deadline for enrolment despite the student having been assured that his place would be reserved for him notwithstanding the delays with his permit. They go on further to revoke the offer for studies and tell him to apply for the next academic year.

This complex case raises a number of issues. The first is the role of the immigration officials whose delay is the factual reason why the student forfeited his place. The second is the role of the university, which issued an acceptance letter late and made an undertaking to accept the student regardless of the delays with the permit. The outcome of the decision by both parties is that the student will have to start the application process for a new permit and reapply for a place at the university for no fault of his own. Ordinary grounds of review would consider the process leading to the decision but not the fairness of the outcome or decision. In this regard, substantive fairness would be able to determine the correctness of the outcome itself and subject it to judicial scrutiny.

Example 4: ***Free and Fair Elections***

In this example, the disputed 2018 Zimbabwean elections will be used. Substantive fairness can be used in the instance where the electoral body meets the procedural processes required of it but where the election itself is marred with instances of biased media coverage and claims of abuse of state resources to favour the ruling party. Using state resources for political campaigns may well give the ruling party an unfair advantage and the result will be seen in the outcome of the elections. If the entire process and the outcome is subjected to the various tests of fairness described above, it will become clear that the election may be declared substantively fair despite meeting procedural yardsticks. While there might not be literature to support this, the insertion of a substantive fairness element into s68 may have been done with elections in mind given that the previous elections suffered the same fate. If the outcome is prejudiced by conduct of the State in various subtle ways such as distributing food aid to win votes or controlling media

coverage, then only an invasive review basis such as substantive fairness would be able to determine the ultimate correctness of the outcome.

As can be seen, the content of substantive fairness is variable in nature. This is similar to the content of procedural fairness. No precise measure of what it entails can be fixed as it is case specific and fact-dependent but beyond this, the concepts of justice and fairness, which underpin it have not been fully settled.[147] As already noted, in judgments where arguments for substantive fairness were advanced, there was no attempt to confine or define its meaning or scope. This is with reason. Fairness is variable, flexible, relative to the facts, and dependant on the specific matters at hand so any attempt to confine it to a set of fixed rules or factors will simply stifle the development of the ground.[148] The Zimbabwean legislature intentionally included the substantive fairness ground for a reason and it is submitted that the failure to define the scope or meaning of the ground should be construed as a deliberate act intended to leave courts to fashion the ground with time.

At this stage and in its infancy, it is submitted that the various factors considered in this chapter suffice as a starting point for courts to develop the meaning of substantive fairness. As frustrating as the lack of certainty is for lawyers, one must at least celebrate that this lack of certainty presents a hidden blessing in that the lack of jurisprudence leaves room for Zimbabwean courts and the legislature to carve a unique understanding of substantive fairness best suited to the needs of Zimbabwean administrative law. This study does not claim to present all the answers for this new phenomenon but certainly sets out some useful starting points that can be used to shape and develop and ground.

[147] KS Shrader-Frechette *Risk and Rationality: Philosophical Foundations for Populist Reforms* (1991). See also
[148] *Ford* v *Law Society of Rhodesia* 1977 (2) ZLR 40 (A) 55. See also Feltoe Guide to Zimbabwean Administrative Law (2013) 58. See also *Crow v Detained Mental Patients Special Board* 1985 (1) ZLR 202 (H) where the court ventured into the flexible variable nature of procedural fairness. Some of the guidelines provided by the court are set out in subsequent cases and indeed form the basis of Zimbabwean law in respect of procedural fairness.

4.2 Proportional Administrative Conduct

The second new feature introduced by s68 is a right to proportional administrative conduct.[149] ZAJA does not include a right to proportional administrative conduct, thus s68 introduces a new angle in Zimbabwean administrative law. To gain an understanding into the concept of proportional administrative conduct, it is necessary to explore the concept in other jurisdictions.

Proportionality has been hailed as the 'most important doctrinal tool in constitutional rights law around the world for decades.'[150] In explaining its application, it has been said that proportionality is premised on the idea that one 'may not use a sledgehammer to crack a nut.'[151] The former President of the Supreme Court of Israel defined proportionality as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected'.[152]

Scholars trace back the origins of proportional administrative conduct to Prussian administrative law in the 19th Century.[153] One of the famous foundational cases that show the use of proportionality is one where the court ruled that when dealing with licences, cancellation of a shop's licence would not be proportional if the offending conduct was just one of many aspects of the business conduct and not its sole business. [154] The reasoning from the court seems to have formed the basis of proportionality as a standard and basis of review in that correction of prohibited or unlawful conduct must be done by employing measures of correction that will adequately and appropriately deal with the harm posed-but nothing more.[155]

[149] ZAJA s68 (1).
[150] K Moller 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 710.
[151] J Jowell & A Lester QC 'Proportionality: Neither Novel nor Dangerous' in J Jowell & D Oliver (eds) *New Directions in Judicial Review* (1988) 51.
[152] A Barak *Proportionality: Constitutional Rights and Their Limitations (*2012) 3.
[153] Ibid.
[154] Preußisches Oberverwaltungsgericht, 13 PrOVG 424, 425 cited and discussed in J Church, C Schulze & H Strydom *Human Rights from a Comparative and International Law Perspective* (2007) 111.
[155] Ibid.

Fleiner described it more colourfully by stating that 'police should not shoot at sparrows with cannons.'[156] Proportionality seems to be gaining popularity as an independent ground of review across the world.[157] Waard notes specifically that the ground plays a major role in European administrative law.[158] The majority of the initial cases based on proportionality review were police measures and the ground seemed to have been used to prevent excesses by the security sector in executing its duties.[159] Inquiries into the appropriate measure of force applied by security agents is an exercise in proportionality testing.

The ground has found acceptance in jurisdictions such as India, Sri Lanka, South Korea, Germany and France.[160] In Germany, it must be noted that the ground is recognised as a last ground of resort after an attempt to rely on other grounds of review has failed. [161] The test adopted by the courts in Germany has three stages to it: suitability, necessity, and pure proportionality which is satisfied when the measure appropriately meets the intensity of the objective sought.[162] Impliedly, proportionality raises the principle of necessity, which considers whether the action taken is necessary to effectively deal with the situation presented. If an extreme measure is not necessary, the doctrine of necessity requires that a less restrictive and more suitable measure is employed to the exclusion of the offending conduct.[163] An alternative question asked to

[156] F Fleiner *Institutionen Des Deutschen Verwaltungsrechts* (1928) 404 as cited and discussed in J Matthews 'Proportionality in Administrative Law' in S *Rose-Ackerman, PL Lindseth & B Emerson* (eds*)* C*omparative Administrative Law,* 2nd ed (2017*)* 34.
[157] A Sweet & J Matthews 'Proportionality Balancing and Global Constitutionalism' (2007) 47 *Columbia Journal of Transnational Law* 68, 74-76.
[158] B Waard 'Proportionality in Dutch Administrative Law' in S Ranchordás & Waard(eds) *The Judge and the Proportionate Use of Discretion: A Comparative Study* 2016
[159] Sweet & Matthews (note 157 above).
[160] CY Huang, DS Law 'Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China Research Handbook' in F Bignami, D Zaring (eds) *Comparative Law and Regulation* (2014) 13. See also F Shivaji 'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka' (2006) *Acta Juridica* 95.
[161] H Jarass & B Pienoth *Grundgesetz für die Bundesrepublik Deutschland* (2012) 529.
[162] Matthews (note 157 above).
[163] Ibid. See also Y Sanchez 'Proportionality in French Administrative Law' in S Ranchordás & Waard B (eds) *The Judge and the Proportionate Use of Discretion: A Comparative Study* (2016) 43, 44.

determine proportionality is that 'measures must not exceed in intensity what is required by the objective.'[164]

Hoexter identified a three-stage test based on 'balance, necessity, and suitability'.[165] Webber and Miller articulated the test to be applied when dealing with proportionality as follows:

i. Does the legislation (or other government action) pursue a legitimate objective of sufficient importance to warrant action taken?

ii. Are the means in service of the objective rationally connected (suitable) to the objective?

iii. Are the means in service of the objective necessary, taking into account alternative means of achieving the same objective?

iv. Do the beneficial effects of the action outweigh the deleterious effects of the action?[166]

While the Zimbabwean courts have not had occasion to deal with the meaning of proportionate administrative conduct in terms of s 68, Feltoe has posited some guidelines that may be useful for the courts in this regard. Feltoe describes proportionality as a ground of review that ensures that the 'effects of administrative action do not outweigh its beneficial effects'.[167] He equates the applicable test to the same test used to limit rights wherein the question is whether there are less 'drastic or oppressive' means to achieve a desired end.[168] Feltoe suggests a hybrid test to be used in determining proportionality which is a combination of the traditional German test and the test put forward by Webber et al as discussed earlier.[169] In this test, Feltoe notes that there are four key concerns that courts need to determine:

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[164] Matthews J (note 157 above). See also M Cohn 'Legal Transplant Chronicles: The evolution of unreasonableness and proportionality of Administration in the United Kingdom' (2010) 58 *American Journal of Comparative Law* 583, 608.
[165] Hoexter (note 8 above) 344.
[166] G Huscroft, B Miller and G Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014).
[167] Feltoe (note 84 above).
[168] Ibid.
[169] G Webber 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179, 181.

1. Importance of end sought;
2. Suitability of intended measures in relation to the desired goal;
3. Whether an alternative exists (an extension of the necessity doctrine);
4. Whether the measures create an unreasonable and excessive burden on the party concerned which does not count in favour of the public interest.[170]

Feltoe seems to suggest that the public interest is of importance in determining proportionality.[171]

The addition of this new ground, however, is a welcome addition to Zimbabwe administrative law. In the South African case of *New Clicks*, the court linked proportionality to the already established ground of reasonableness.[172] Hoexter points out that it is the second leg of reasonable administrative action.[173] The benefit of the ground is twofold. Firstly, it forces administrative authorities to consider the necessity of the intended action while encouraging minimal intervention or 'less drastic means to accomplish the desired end'.[174] The second benefit is that it creates a balance between the 'adverse and beneficial effects' of a particular action that has been taken.[175] In this sense, proportionality creates a compromise that balances various rights and considerations. Practically, proportionality is a ground that can prevent an abuse of power and minimise excesses by administrative authorities. The inclusion of this ground of review means that Zimbabwean administrators will seemingly have to consider and interrogate whether their intended route of execution or action is the best, less drastic, and appropriate option.

[170] Feltoe (note 84 above).
[171] Ibid.
[172] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 637
[173] Hoexter (note 21 above) 343.
[174] C Hoexter 'Standards of Review of Administrative Action: Review for Reasonableness' in J Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 61, 64.
[175] Ibid.

The concept of proportionality is likely to be relevant in the Motlanthe Commission of Inquiry into the killing of civilians during the 2018 Zimbabwean elections in determining whether soldiers acted lawfully in using live ammunition to disperse protestors.[176]

4.3 Prompt administrative conduct

The significance of the s68 right is also seen in the introduction of the right to prompt administrative conduct.[177] The ZAJA did not embody such a right nor did the common law. Therefore, this requires an investigation into its possible meaning and how this will affect the administrative law framework.

Generally, as Wade and Forsyth note, prompt administrative conduct is required for specific administrative acts that are time-dependant and time-specific.[178] The failure to observe this rule has practical effects that will be detrimental to an applicant seeking to rely on this principle and such detrimental effects may not be reversed or remedied even if an administrative authority is compelled to act timeously by a court.[179] A good example of this is the delay by an immigration authority to grant a study permit to a foreign national seeking to study in the country. Such delay may have the effect of the student forfeiting a place at the learning institution and even if the authority is compelled to release a permit, this will not change the fact that the student may be forced to stay at home for a year and reapply for the following academic year. No amount of compensation or apology can remedy the prejudice suffered by such a student. These are situations that underscore the need and importance of prompt administrative conduct.

Kenya embodies a similar right in Article 47 of its Constitution albeit under the guise of expeditious administrative conduct.[180] The Collins dictionary cites expeditious as a synonym for promptness, thus it is appropriate to glean from lessons in the Kenyan context as the two terms amount to the same thing.[181] Kenyan courts have dealt with the concept of expeditious

[176] See https://citizen.co.za/news/news-africa/2011768/motlanthe-commission-on-zim-election-violence-sworn-in/
[177] Constitution of Zimbabwe s68 (1).
[178] W Wade and C Forsyth *Administrative Law* (2014) 450.
[179] Ibid.
[180] Constitution of Kenya, Article 47.
[181] Collins Dictionary 2016.

administrative conduct in 3 key cases which will now be discussed. In *Republic v Principal Registrar of Persons and Another*, the Kenyan High Court held that the word expeditious must be understood to mean timeous and within good time.[182] Administrative authorities thus violate the right to expeditious administrative conduct when they fail to act within good time and timeously. The court further held that the right means that in review proceedings, courts will be mandated and expected to determine whether the administrative authority has, on the basis of the facts of the case, acted timeously as each case will be determined on a case-by-case basis.[183] It is clear that this is not a procedural investigation but a factual and substantive determination that the courts are expected to engage in by determining what constitutes timeous conduct. Impliedly, a delay triggers a discussion of whether there has been expeditious or prompt administrative conduct. It would seem that the question is thus on the unreasonableness of a delay by an administrative authority rather than mere delays which are inevitable in any administrative system, regardless of how efficient it is. This is inferred from the dictum of the court in *Republic v Principal Registrar of Persons* where the court found that 'an unreasonable delay is an implied unjustifiable limitation of rights.[184]

Determining timeous conduct is a question of time and logically, the next question that arises is what constitutes an unreasonable period of delay or alternatively, what length of time is required to lapse before a court can determine that it is an unreasonable delay and thus a violation of the right to prompt or expeditious conduct. In dealing with the time frames of what would constitute unreasonable delays that violate Article 47, the court in *Ex Parte Suada* had this to say:

'*Prima facie a delay of 6 months in processing an application for Citizenship, in my view amounts to inordinate delay. It must always be remembered that the delay in processing such an application deprives the applicant from the enjoyment of certain rights conferred upon Citizens hence there ought not to be an undue delay in processing such applications. To state that since*

[182] *Republic v Principal Registrar of Persons & another Ex-Parte Suada Dahir Hussein* [2016] eKLR.
[183] Ibid par 17.
[184] Ibid par 25.

there is no time frame for considering the application no amount of delay can be termed as inordinate in my view is irrational.'[185]

From the above, one can conclude that the question of time is subject to three considerations. The first is the nature of the administrative conduct as this determines the urgency with which it must be dealt with. In the judgment above, the court placed a considerable importance on the type of application considered.[186] Secondly, a court will consider the connection to other rights, enjoyments, and benefits. The connection of the application to the enjoyment of constitutional rights will be construed as requiring the administrative authorities to act more timeously. The third consideration is that the determination of time depends on the facts of each case and there is no blanket determination of what time frame is considered as an unreasonable delay.

In the *Republic vs. Cabinet Secretary for Ministry of Interior and Coordination of National Government & Ors* case, where the delay in adjudication of the application was more than six months, the court held that such a delay was the kind of delay envisaged by Article 47 and the conduct was therefore not expeditious.[187] It must be noted that in the *Ex Parte Suada* case, the delay therein was 3 years.[188]

Possibly the most detailed account of the right to expeditious conduct is set out in *Amos.*[189] In this case, the court held that expeditious and efficiency must be understood and applied together because the underlying notion behind the requirement of expeditious is to prevent unreasonable delays and to ensure efficient administrative conduct.[190] The court also reiterated that context and circumstances are significant considerations in determining whether the conduct of the administrative authorities has been expeditious or prompt.[191] The court went further to find that

[185] *Republic v Principal Registrar of Persons & another Ex-Parte Suada Dahir Hussein* [2016] eKLR.
[186] Ibid.
[187] *Republic vs. Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 Ors Ex Parte Patricia Olga Howson, Miscellaneous Application* No. 324 of 2013
[188] Republic v Principal Registrar of Persons & another Ex-Parte Suada Dahir Hussein [2016] eKLR
[189] *Republic v Amos ole Tiren & another Ex-parte James Momanyi Nyaberi* [2018] eKLR
[190] Ibid 28.
[191] Ibid par 112.

one must consider the type, complexity of action or conduct, the diligence of all parties, and the adverse effects the delay has on persons involved.[192]

Kenyan courts have frequently invoked the right to expeditious administrative conduct, particularly in matters involving the issuing of identity documents and permits. In *Kulraj Singh Bhangra v Director General*, the court held that a delay of 18 months was a violation of Article 47 and specifically relied on the importance of the documents in question in determining what was expeditious. This supports the earlier assertion that the nature of the application or administrative conduct is a consideration in determining the reasonableness of a delay.[193] There is some authority to suggest that there is a scale of importance that courts consider when determining whether the delay constitutes a violation of the right to expeditious administrative conduct.[194] Six months may, therefore, be considered a reasonable delay for the granting of a permanent residence permit while the same six months may not be reasonable in granting a replacement identity card document or driver's licence, for example.

The Kenyan situation is made easier by the existence of s259 (8) of the Constitution, an interpretive provision that clarifies the meaning attributed to time.[195] In terms of the provision, where a time is not prescribed by the Constitution, as is the case with Article 47 which does not stipulate what constitutes expeditious conduct, the section must be taken to mean 'without unreasonable delay'.[196] Zimbabwe's Constitution does not embody a similar provision.

In the Zimbabwean context, there has been only one case to date that dealt with the meaning of prompt conduct in terms of s68. In the case of *Mabuto*, Mathonsi J found that a 2-month delay in giving reasons was a violation of the right to prompt written reasons.[197] In this case, the applicant was advised that she would not be able to sit for a final exam because she was not correctly registered for the course. The University had erred with the registration of the applicant

[192] Ibid par 129.
[193] *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR.
[194] See for example *Joseph Mbalu Mutava v Attorney General & another* [2014] eKLR.
[195] Constitution of Kenya s259 (8).
[196] Ibid.
[197] *Mabuto v Women's University in Africa &* Ors 2015 (2) ZLR 355 (H)

and decided to withdraw her from the course at the last minute.[198] Mathonsi J found that the applicant's request for reasons a day after notice of the administrative conduct was prompt and inversely that the administrative authority should have displayed the same urgency.[199] The nature of the administrative decision and the connection it had to the right to education amongst other rights, weighed heavily in favour of the applicant. The court underscored the need for the University to have acted timeously given the consequences the decision would have had on the applicant.[200] From the judgment, it is apparent that prompt administrative conduct is determined by looking at the nature of the decision, its connection to other rights and the merits of each case. In this regard, the test seems no different from the Kenyan jurisprudence surveyed earlier.

Zimbabwean courts have also given meaning to unreasonable delays, which as noted in the previous section, is an extension of the requirement for prompt administrative conduct. In *N & B Ventures (Pvt) Ltd v Minister of Home Affairs and Anor*, the court found that the renewal of a licence 18 months after the application was first lodged, constituted an unreasonable delay.[201] In its reasoning, the court placed emphasis on the importance of the administrative conduct in relation to the business it affected.[202] The court also considered the lack of communication and the punitive conduct the administrative authority meted out against the applicant when the authority itself was at fault for the delay. Like the Kenyan approach, the importance of the administrative conduct is important in determining the unreasonableness of a delay, but a further consideration is the conduct of the administrative authority in the delay. In other words, one must consider if the authority took any steps to mitigate the delay or cushion the applicant from resulting harsh effects of the delays. If the authority makes no attempt to respond to the applicant or at the very least communicate with the applicant, the courts are less likely to be sympathetic when reviewing a matter involving a claim of unreasonable delay. The court frowned on the conduct of the authority which seemed not to be concerned by the adverse effects to the applicant's business. It did not explain the delay but instead proceeded to fine the applicant for

[198] Ibid.
[199] Ibid
[200] Ibid.
[201] *N & B Ventures (Pvt) Ltd v Minister of Home Affairs and Anor* 2005(1) ZLR 27 (H).
[202] Ibid

not complying with the relevant legislation.[203] Had the authority communicated reasons for the delay during the 18 months and made some effort to minimize the effects of the delay for the applicant, it is likely that the court would have arrived at a different decision.

Section 194 of the Zimbabwean Constitution re-emphasises the importance of prompt conduct by the administrative branch of the State by requiring that 'people's needs be responded to within a reasonable time'.[204] This guiding principle for administrative authorities will probably be used in interpreting the right to prompt administrative conduct as well.

The right to prompt administrative conduct is a significant addition to the administrative law framework in Zimbabwe and underlying its importance is the desire to prevent undue prejudice. In addition to this, the right is desirable because it increases and encourages efficiency in administration.

Having surveyed the various jurisprudence, I propose that the courts adopt a three-stage approach to an enquiry of whether there has been a violation of the right to prompt administrative conduct. In this approach, courts should ask the following:

1. Has there been a delay? If so;
2. Is such delay unreasonable? If so;
3. Are there any policy reasons why the unreasonable delay should be condoned by the court?

If the answer to stage three is in the affirmative, then courts should not make a determination that the administrative conduct was not prompt. If the answer is in the negative, the court must conclude that the administrative authority has indeed violated the right to prompt administrative conduct.

Courts faced with a determination on the sole basis of prompt administrative conduct can consider a litany of factors before concluding that there has been a breach of this principle. The

[203] Ibid.
[204] Constitution of Zimbabwe, s194(1) (e)

first I would argue, is to consider whether there has in fact been a delay and whether such delay is unreasonable. Logically, there can be no reliance on the right to prompt administrative conduct where there has been no delay. Administrative authorities should be given a degree of leeway which considers that often, resources may not permit a perfect adherence to timeous conduct. This would be the case where the State has no resources or has insufficient resources that result in less people being tasked to carry out administrative tasks etc. From the jurisprudence surveyed above, it is important for courts to consider only conduct that amount to an unreasonable delay and not a mere delay. For instance, if legislation requires that the authority be given six weeks to act, a delay of an additional week depending on the other factors that will be discussed below, should not attract an immediate conclusion that the authority failed to act timeously. It is submitted that to expect perfect compliance with timelines is expecting too much from administrative authorities and does not consider the complexities of the work involved. Courts should instead look at situations where the delays are unreasonable.

Courts should also approach each case on the merits of the case as there is no one -size- fits-all approach to determinations of prompt conduct. Each inquiry will depend on the facts unique to that situation and the position of the parties involved. In determining what is an unreasonable delay, courts can be guided by considering what applicants in similar processes go through. For example, the benchmark may be determined by an authority's own admission of how matters of a similar nature are handled and the time frames that are applicable. This can be illustrated further using the following scenario: If the average number of days taken before the release of a clearance certificate is two weeks then a delay of three weeks ought to be a relevant consideration since the authority previously dealt with matters in a shorter period. A further consideration of importance would be the authority's reasons for the delay. If the delay is due to reasons beyond the control of the administrative authority, then this should count in favour of the authority. This entails an enquiry into fault on the part of the authority as evident in the cases of *Mabuto* and *N & B Ventures* discussed earlier.

Courts must further determine and consider the type, complexity, and importance of the administrative conduct in question. If the conduct is linked to a wider enjoyment of rights,

freedoms, or benefits then a higher duty of urgency should be expected from the administrative authority. The warning of the Kenyan courts that unreasonable delays effectively deny applicants of access to other rights is noteworthy in this regard.[205]

The introduction of a prompt administrative conduct element is commendable as it will provide Zimbabweans with timely administrative conduct thus further entrenching aspects of good governance espoused in the Constitution.

4.4 Efficient Administrative Conduct

Section 68 further introduces the right to efficient administrative conduct. [206] No similar provision exists in the current ZAJA framework nor in the common law. Kenya, however, has a similar right in Article 47 of its Constitution and as such, it will be useful to glean through the jurisprudence that has emerged to assist in the interpretation of the right.

In the case of *Republic v Amos*, the Kenyan High Court held that efficiency reflects a degree of dependency that the public has in the system. [207] Put differently, the public must be able to depend on the administrative system for it to be efficient. This denotes the faith the public has in the system. If the administrative system is viewed negatively and citizens opt not to rely or depend on it, then an inference of inefficiency can be drawn. This is of course not sufficient on its own. As such, the court further held that efficiency is context specific and constitutes a substantive element of the right to fair administrative conduct.[208] A court will have to consider the specific facts it is faced with before deciding that there was a lack of efficiency on the administrative authority. It requires a court to step into the shoes of the administrative authority and objectively and subjectively consider, whether the conduct can be deemed to be efficient with regard to the specific circumstances. By requiring efficiency, there is an increased degree of accountability for those exercising administrative authority because the quality of their conduct is now subject to review.

[205] *Cabinet Secretary* (note 187 above).
[206] Constitution of Zimbabwe, s68.
[207] *Amos* (note 189 above).
[208] Ibid.

In addition to the above, where an administrative authority displays a reluctance to pursue a matter and there is an unjustifiable delay on the part of the administrative authority, courts can draw an inference of inefficiency. [209] Kenyan courts have suggested that efficiency can be likened to and equated to dependency and reliability. [210] It can and should be tested against the circumstances and it is context specific.[211] The requirement of expeditious or prompt administrative conduct seems to be coupled with that of efficient administrative conduct in the Kenyan context.[212]

In an election petition, the Kenyan High Court concluded that where numerous breaches of law and regulations exist, the process preceding a declaration of results by the Independent Electoral Commission cannot be said to be efficient.[213] It would, thus, seem that efficiency has an extended meaning that includes abiding by relevant provisions of the law. An administrative action cannot be efficient if it violates the laws meant to govern the processes around it. In the same case, the court also concluded that administrative errors by the accountable body violate the right to efficient administrative conduct, as these errors are prima facie proof of inefficiency and maladministration that the right seeks to guard against.[214]

Finally, it must be noted that it is the applicant that must bring to the attention of the courts, the administrative authority's breach of the right to efficient administrative conduct.[215] The courts will not readily seek out breaches by an administrative authority in this regard and where the applicant does not point out the lack of efficiency, the courts will not adjudicate on same.[216]

The concept of efficiency does not generally feature in the Zimbabwean framework but there are isolated hints of its existence. For instance, s194 of the Constitution sets out some basic values and principles governing public administration in the country and these collectively help achieve

[209] Ibid.
[210] *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5* others [2014] eKLR par 404.
[211] *Amos* (note 189 above).
[212] Amongst a long line of judgments, see *Joseph Mbalu Mutava v Attorney General & another* [2014] eKLR par 94.
[213] *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR par 67.
[214] Ibid par 67.
[215] *Geoffrey Oduor Sijeny v Kenyatta University* [2018] eKLR.
[216] Ibid 35.

efficiency. These are a high standard of ethics, [217] efficient use of resources,[218] responding to people's needs within a reasonable period[219], and that employment should be based on merit and ability. [220]

It is important to note that while ZAJA does not contain a similar right, s68 (3) (b) of the Zimbabwean Constitution underscores the importance of promoting an efficient administration and to this end, an Act of parliament must be enacted which aims to achieve this efficiency.[221] Feltoe speculates that this ground may be taken to mean 'diligent performance of tasks which overlaps with prompt administrative conduct.'[222]

Efficiency can be viewed in two contexts – economics and governance. In the economics concept of efficiency criteria, Simon notes efficiency to mean 'a choice of alternatives which produce the largest result against the given application of resources.'[223] This supports the view that courts must step into the shoes of the administrative authority in determining efficiency. This is so because when a court considers efficiency, it must weigh this against the available resources. If, for example, an administrative authority cannot process applications quickly because of a lack of funds and resources, then it should not be penalised for a situation it has no control over. Simon further notes that in determining efficiency, one must consider the organisation objectives, specific goals set for the administrative authority or organisation, and timely responsive service.[224] Efficiency must then be judged against the set standards and internal policies of the entity. To illustrate this, if a government department processes an application in 4 weeks and has a policy to this effect, it must be judged against these 4 weeks it set for itself. I submit that this test should be respected by the courts to avoid courts unduly usurping functions of the administrative authority. If the court set standards, this would be a complete disregard on the jurisdiction of administrators. The administrative authorities are better placed to come up with

[217] Constitution of Zimbabwe, s194(1) (a).
[218] Ibid s194(1) (b).
[219] Ibid s194(1) (e).
[220] Ibid s194(1) (k).
[221] Section 68 (3) (b)
[222]Feltoe (note 84 above) 45.
[223] H Simon *Administrative Behaviour: A Study of Decision-making processes in Administration* (1947) 250.
[224] Ibid 251.

policies that detail time factors and efficiency standards in executing their various tasks. If the department takes longer than the four weeks to process the application, then on its own standards, the department can be said to be inefficient, but this would not be the case if one wants to have applications processed in a week.

From the above considerations, I would submit that the question of efficient administrative conduct should be interpreted against a sum of factors. Efficiency is a substantive angle to administrative law that will extend judicial oversight to the most intimate part of the administration of the State. Its importance is that it enhances accountability of administrative bodies and will possibly enrich the quality of the administrative decisions reached by authorities. The latter consequence can be attributed to the realisation that the courts will now go beyond technical and procedural enquiries and as such, the quality of their decisions can be interrogated.

The first factor and perhaps the most instructive for courts interpreting the right to efficient administrative conduct is that each matter is to be dealt with regard to the specific facts of the case. It is undesirable for a universal test to be applied in determining efficiency and as such, no time frame can be indicative of efficiency nor should the outcome. The second is that the conduct of the administrative authorities must be devoid of errors for it to pass the threshold of efficiency. I would further qualify this by stating that a margin of error should be used in this aspect of the enquiry as no administrative authority can be 'error-free'. The question should, therefore, be whether the errors are negligible. If the errors are minor, then a determination of inefficiency may not be warranted.

A third factor for courts to consider in interpreting efficiency is whether there is a sense of urgency and a timeous response from the administrative authority as the presence of same must be an indication of efficiency. In my view, if an authority does not process an application timeously but communicates with the applicant frequently throughout the process, then this should not be viewed as inefficiency on the basis that there is constant communication and timeous response. Courts can further interrogate whether any delays by the administrative authority are in good faith and not due to any malicious intent or gross negligence. Whether the

authority or body has adhered to internal policies and legislation is a further consideration that may point to efficient conduct.

Administrative authorities must display a willingness to act efficiently and decisions should be based on merit to satisfy the requirement of efficiency. It follows that where an administrative authority is swayed by factors not related to the merits of the matter before it, that is indicative of inefficient conduct by the authority. Drawing on the practical aspect of administration, authorities must ably demonstrate an efficient and effective use of resources to further point to efficiency. I propose that the courts adopt a hybrid test that considers objective and subjective factors in determining efficiency. The question should ultimately be phrased as whether the reasonable administrative authority confronted with the specific facts of the applicant's case could be said to have acted efficiently when viewed against the measures taken. It is a balancing exercise that seeks to consider the specific nature of the complainant's circumstances and the circumstances facing the administrative authority.

Adding the requirement of efficiency to the administrative law right in s68 is a welcome addition that if used properly, will compel administrative authorities to act with heightened effectiveness and will allow courts to step into the once hallowed terrain of the administrative authority. The added layer of accountability is indeed much needed for a country that has suffered from a lack of accountability and efficient administration.

4.5 Impartial administrative conduct

This new feature is perhaps overstating an implied aspect of the law. Impartiality has always been a feature of Zimbabwean law and is required at various levels. It is referred to at least 18 times in the Constitution. It is a requirement of the office of the Auditor General, [225] the National Prosecuting Authority,[226] the Prosecutor-General,[227] the judiciary,[228] the Civil-Service

[225] Constitution of Zimbabwe, s314.
[226] Constitution of Zimbabwe, s259 (10 (c).
[227] Ibid s260 (1).
[228] Ibid s69(1) and s164.

Commission,[229] all Independent Commissions Supporting Democracies,[230] and all public officials.[231] In *Election Resources v Charumbira*, a 2018 High Court of Zimbabwe judgment, the court held that the involvement of chiefs in campaigning for the ruling party, violated the constitutional requirement which states that they remain impartial and non-partisan.[232] The reasoning of the court was that by actively siding with one of the contending parties in the election, the chiefs lost their objectivity and required neutrality. It is thus clear that impartiality is violated when siding with one of the parties takes place as it diminishes the ability of the authority to make a decision that is objective.

In *Telecel Zimbabwe v PORTRAZ*, Mathonsi J intimated that impartiality requires one to have regard to all stakeholders and parties without any bias by applying one's mind to the facts without a preconceived mindset.[233] Decisions must therefore be taken in good faith.

Re-emphasising the applicability of impartiality is, as stated earlier, an unnecessary addition to the right as it has always been part of the jurisprudence although not explicitly so. It is, therefore, unlikely to add much to the administrative law framework in Zimbabwe.

4.6 Conclusion

Section 68 is an important introduction to the administrative law framework in Zimbabwe for several reasons including the constitutionalisation of the right and the new additions it adds which enhance and shape good governance. The importance of the right is further seen in the concept of substantive fairness, which empowers courts to review a decision on its merits rather than procedural fairness grounds only. This novel ground of review makes Zimbabwe the first country to expressly provide for substantive fairness in administrative law and further enhances the quality of administrative decisions taken. The concepts of prompt and efficient administrative conduct which are also introduced by s68, promote a more effective administration in general and this, in turn, improves national governance. Evidently, there are some new aspects that the

[229] Ibid s203.
[230] Ibid s235 (2).
[231] Ibid s196.
[232] *Election Resource Centre v Charumbira & 2 Others* [2018] ZWHHC 270
[233] *Telecel Zimbabwe v PORTRAZ* [2015] ZWHHC 446.

courts and the legislature need to define and develop if these are to be of any use. These reforms are discussed in more detail in chapter six of the study. In the next section however, I will explore the various reasons for the avoidance of the right by the courts.

Chapter Five: Judicial Avoidance of the right to Administrative Justice

5. Introduction and Outline of Chapter

The previous chapter set out a detailed outline of the new concepts introduced into Zimbabwean administrative law through the right to administrative action in s68. As ground-breaking and novel as some of the concepts are, many of them are yet to be fully realized for various reasons, chief of which is what can be termed judicial avoidance of substantive analysis and engagement (hereafter judicial avoidance). The jurisprudence on s68 could be richer and more comprehensive since the enactment of the 2013 Constitution, however, five years later, there is very little substantive engagement of the right by the courts. The limited jurisprudence on the right is not because there are no matters brought before the courts where s68 has been raised but rather, in those cases where s68 could have been applied, the courts have largely avoided engagement, interpretation, and analysis of the right itself. In this context, this act of avoidance will be referred to as judicial avoidance. While it is easy to blame the judiciary and find fault with their avoidance of the right, there are various reasons why judicial avoidance takes place. It is the focus of this chapter to examine these reasons and where possible, suggest how these can be mitigated to give full effect to the rights in s68. The continued avoidance of s68 will render it a 'theoretical right', that is, a right that exists only in theory but has no practical effect.

Perhaps it is appropriate to put a caveat at this stage. The concept of judicial avoidance as discussed in this chapter does not imply any incompetence by the judiciary and certainly does not mean that all courts in the country have avoided engaging s68. As will be shown, there are indeed many judges who have engaged s68, but the underlying argument is that there are more cases where s68 has not been engaged directly or indirectly than those where it has been engaged. Lawyers themselves are also complicit in this avoidance by failing to challenge the constitutionality and it can also be presumed that they too engage in a form of constitutional avoidance. This can be attributed to either ignorance or fear that the courts simply will not consider arguments made based on s68 of the Constitution.

This chapter will start by examining the instances of avoidance by the judiciary in Zimbabwe by analyzing various cases where s68 was raised. In so doing, it will become clear that there is a pattern of avoidance by the judiciary. The focus will then shift to explore the various reasons for

judicial avoidance. These reasons include the doctrine of constitutional avoidance, strategic or deliberate avoidance, textual difficulties, and fear of repression or historical reasons. This chapter will then conclude by considering the cost and undesirability of continued judicial avoidance of s68 and how this can be minimized.

As noted in the previous chapter, s68 is a disruptor in Zimbabwean administrative law and can bring about a direct or indirect improvement on the lives of Zimbabweans if it is given effect to. The challenge is, however, to ensure that the courts do give effect to it by applying s68.

5.1 Judicial Avoidance of s68 in Zimbabwe

This section discusses various instances where the Zimbabwean courts had occasion to engage s68 but either declined to or failed to engage the right substantively. The following survey of judgments involving administrative justice in Zimbabwe post 2013 reveals that most courts avoid reliance on the constitutional right or seemingly ignore its existence.

It is not uncommon for Zimbabwean judges to avoid clashing with the executive and produce legally questionable judgments in the process.[1] In some cases, the courts confine themselves to the ZAJA and wrongfully assume that ZAJA is the statute envisaged in s 68 (3) of the Constitution.[2] This is despite the fact that ZAJA does not deal with key features of the constitutional provision and was passed before the 2013 Constitution.[3] This mistaken assumption has been made by even the highest court in Zimbabwe.

[1] See for example Cyril Zenda's article where he discusses the judiciary's avoidance of the Executive http://www.financialgazette.co.zw/judiciary-weak-on-enforcing-rule-of-law/ . See also the judgment of Malaba CJ in *Liberal Democrats & 4 Others v President of the Republic of Zimbabwe E.D. Mnangagwa N.O & 4 Others* (CCZ 7/18, Constitutional Application No. CCZ10/18) [2018] ZWCC 7. The High Court cases of S*ibanda & Anor v President of the Republic of Zimbabwe N.O. & Ors* HC 1082/17 and *Emmerson Dambudzo Mnangagwa v The Acting President of the Republic of Zimbabwe and Attorney General of Zimbabwe* HC 940/17 are also instructive.

[2] Constitution of Zimbabwe ,s68(3) reads : 'An Act of Parliament must give effect to these rights, and must-- a. provide for the review of administrative conduct by a court or, where appropriate, by 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.'

[3] As noted in the previous chapter, ZAJA does not include concepts of substantive fairness, prompt, efficient and impartial administrative conduct.

A prime example of this is the Constitutional Court judgment, *Makoni v Prisons Commissioner & Another.*[4] The Court went straight to the provisions of the ZAJA and assumed that it fully covers the constitutional right to administrative justice without directly relying on the right. Patel JCC held '… the exercise of their functions and powers under these provisions, unlike the presidential prerogative of mercy, is ordinarily reviewable on the established grounds of irrationality, illegality or procedural irregularity, either under the common law or in terms of section 3 of the Administrative Justice Act'.[5] Strangely, the court was of the view that an applicant would be entitled to relief in terms of the common law or the statute but no mention of the constitutional protection of the same grounds was made.

In the Supreme Court decision of *Attorney General v Mudisi & Others*[6], Patel JA again made no mention of s 68 in a matter where substantive fairness was certainly at play. The matter revolved around the decision of the Attorney General to dismiss prosecutors without an opportunity to be heard and without substantive basis for doing so.[7] Patel JA held for the court that courts cannot usurp the functioning of the administrative authority and must therefore limit their powers of review and appeal to ensuring that authorities like the Attorney General, conduct themselves in a lawful, rational, and procedurally fair manner.[8] In so doing, the Court completely ignored the fact that the face of administrative justice had gone through a radical cosmetic makeover. It cannot, therefore, be 'business as usual' and for the courts to assume otherwise is a travesty of justice and an obstacle to the transformational agenda. It must also be noted that substantive fairness as discussed in Chapter three, necessarily requires the courts to be more critical of administrative processes and is therefore more invasive than the traditional standards of procedural fairness. The court avoided engaging this angle completely and relied solely on ZAJA and the common law precepts of fairness.

Mafusire J held in *B v Minister of Primary and Secondary Education* that ZAJA was compatible with s 68 and further held that there is nothing new that s68 brings to the concept of

[4] *Makoni v Prisons Commissioner & Another* [2016] ZWCC 8.
[5] Ibid.
[6] *AG v Mudisi & Others* (SC 62/12) [2015] ZWSC 48.
[7] Ibid 13.
[8] Ibid 5

administrative law, particularly in fairness and the intertwined *audi alteram* principle.[9] While acknowledging that ZAJA predates the Constitution , Mafusire J held that 'it(ZAJA) is one such Act of Parliament that seeks to give effect to the rights and freedoms enshrined in the Constitution.'[10]

Most judgments continue to ignore the constitutional right to administrative justice and confine themselves to the ZAJA almost as if s 68 does not exist. This was the case in *Kennedy Mangenje v TBIC Investments* where Mafusire J again, made no mention of s 68 but went on to hold that ZAJA was a complete codification of the rules of justice.[11] In a sense, that statement seems to justify why the court did not investigate or refer to s 68. The case arose from the withdrawal of an offer letter for property.[12] The matter itself was riddled in a streak of errors as the court noted. In Mafusire J's words, '*there have been errors in just about everything surrounding it, including even in the spelling of the name of the original owner in some official documents; errors on whether or not it was in fact the property that had been acquired for resettlement purposes and allocated to the applicant; errors in deciding whether or not some crime or crimes had been committed in relation to the property; errors in respect of certain legal advices proffered by certain government functionaries, including the Attorney-General, and so on.'* [13] The case easily rendered itself as one where rules of substantive fairness, efficient, and proportional administrative conduct would be applicable. These concepts as already noted, are absent from the ZAJA but present in s68. Similarly, in the case of *Jonga v Zambezi River Authority CEO & Another*, the court ignored s 68 despite the circumstances pointing to elements of s 68 that are absent from the ZAJA.[14] The court simply concluded that the actions of the River Authority were rational and reasonable without formulating any specific test and without reference to s68 where these elements find expression. Mtshiya J quoted with approval, the dictum of Garwe J in *Zambezi Proteins (Pvt) Ltd & Others* v *Minister of Environment & Tourism & Anor* where he held that courts should not question the substantive correctness of decisions by administrative

[9] *B (A Juvenile) v Minister of Primary and Secondary Education* 2014 (2) ZLR 341 (H) at 352.
[10] Ibid 353.
[11] *Mangenje v TBIC Investments (Pvt) Ltd & Ors; Mangenje v Min of Lands & Ors* 2013 (2) ZLR 534 (H).
[12] Ibid 558.
[13] Ibid 553, 554.
[14] *Jonga v Zambezi River Authority CEO & Another* ZWHHC 126.

authorities.[15] This position no longer holds true considering the introduction of substantive fairness and efficient administrative conduct, which entail an investigation into substantive correctness.

In *James v City of Mutare*,[16] the applicant challenged the decision of the Mutare municipality to increase the municipal rates without affording ratepayers the opportunity to contest these. There was a failure to publicize these rates in the local paper as required by the Municipal by-laws.[17] The municipality was obliged to publish such notices in a manner with specified dimensions for these notices.[18] The municipality in one instance, failed to publish the notice and in the other, it did not meet the dimensions. The reasons for both decisions were that the municipality wanted to cut costs.[19] The court did not make a determination on merits of the matter because it found that the matter was improperly before the court and thus the court lacked jurisdiction to hear the matter.[20] More importantly, Chigumba J held for the court that the ZAJA covered substantive fairness and thus on this assumption, s 68 was not discussed.[21] In *Sgt Chibaya v Board President*, Ndewere J similarly did not engage in the merits of a s68 argument because the matter was wrongly before the court.[22]

Unfortunately, the principle of *stare decisis* has forced courts to align themselves with incorrect judgments of the superior Courts. One example of this is the extension of the 'dirty hands' doctrine first extended in the field of constitutional litigation by the late former Chief Justice, Godfrey Chidyausiku in the *Associated Newspapers of Zimbabwe v Minister of State for Information*. [23] The doctrine essentially prohibits litigants who have failed to comply with the law in one way or the other from approaching the courts.[24] The principle was then extended to the

[15] *Zambezi Proteins (Pvt) Ltd & Others* v *Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H).
[16] *James v City of Mutare & Others* 2015 (1) ZLR 519 (H).
[17] Ibid at 522.
[18] Ibid at 523.
[19] Ibid.
[20] Ibid 524.
[21] Ibid 527.
[22] *Sgt Chibaya v Board President* ZWHHC 46-16
[23] *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity* 2004(1) ZLR 538 S at 548B-D.
[24] Ibid.

field of administrative law in the High Court decision of *Econet Wireless v Minister Public Service, Labour and Social Welfare*.[25] In this case, the relevant communications bargaining council ignored submissions by the applicant (Econet Wireless) on matters that directly and adversely affected it.[26] The applicant had not undertaken action recommended by the relevant regulatory body because it was taking the decision on review.[27] Bhunu JA refused to enter into the merits of the case and like the court a quo, applied the 'dirty hands' doctrine essentially finding that the applicant's failure to abide by the law disentitled it from approaching the court for relief against the bargaining council.[28] The court, therefore, found no need to refer to the constitutional right nor discuss its contents despite it being of obvious relevance in this matter.[29] This approach is however, flawed and contradictory to s85 (2) of the Constitution which guarantees right of access to courts notwithstanding non-compliance with other laws by the litigant.[30]

Some hope flickered in the s 68 jurisprudence thanks to a high court judgment by Mathonsi J in *Mabuto v Women's University in Africa & Others*.[31] In this case, the Women's University had wrongfully admitted the litigant to a specific degree programme and later withdrew their decision before the litigant could sit for her exams. This was after a letter of admission was signed, a payment plan made, and assignments submitted. Logically, the claimant, Ms. Mabuto, contended that the decision was irrational and adverse particularly because of the impression created and the lack of an opportunity to make representations. Mathonsi J held that the constitutionalisation of the right to administrative justice was the evolution of administrative law.[32] She went on further to find that the right in s68 includes an inherent 'requirement that official power affecting individuals must be exercised fairly in that decisions should be arrived at fairly and impartially, which in turn entails that affected persons should be given a chance to be

[25] *Econet Wireless (Pvt) Ltd v Minister of Public Service & Ors* 2016 (1) ZLR 1066 (S).
[26] *I*bid 1068.
[27] Ibid.
[28] Ibid at 353. Makoni J similarly applied the doctrine in *Econet Wireless* v *Min of Public Service & Ors* HH-350-15.
[29] *Econet Wireless* (note 28 above) 1070.
[30] Section 85 (2) reads 'The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).'
[31] *Mabuto v Women's University in Africa & Others* ZWHHC 698.
[32]Ibid.

heard'.[33] Although the judge decided the matter on the basis of the *audi alteram* principle which is already well established in ZAJA, she championed the constitutional administrative justice right as a tool to advance social order – a very important aspect that this thesis will develop as a theme. It must be noted that her remarks point to the transformative power of the s68 right and its effect on good governance in general.

In a subsequent matter, Mathonsi J again had occasion to emphasise the importance of the s68 right.[34] She held that s68 made the concepts of prompt, efficient, and fair administrative conduct, constitutional imperatives that had to be complied with.[35] She further noted that the inclusion of the concepts in s68 meant that these were fundamental rights that attracted the full protection of the courts.[36]

Sadly, however, the Constitutional Court has not embraced s68 in the same way. The Constitutional Court has to date, avoided any direct engagement with s 68 of the Constitution and has shied away from interpreting its content. The reasoning behind its continued avoidance is partially evident in *Margaret Zinyemba v Minister of Lands.*[37] In this case, the litigant, a beneficiary of the land reform programme, was issued with a 'withdrawal of offer letter' which revoked ownership of a part of the land she was resettled on.[38] Ms. Zinyemba framed her arguments around the newly created right to administrative justice and rightfully argued that the conduct of the Minister who at that stage had not consulted with her nor had he given reasons for his action, was in direct violation of s 68 of the Constitution. There were various other grounds that triggered usage of the right namely, the delay in communication by the Minister, the substantively unfair withdrawal and the arbitrary nature in which her land was repossessed by the State. These are by and large, matters that could not have been covered by the ZAJA which is probably why the arguments were directly based on the administrative justice right. Nevertheless, Malaba DCJ as he was then, was unimpressed and clearly agitated by the direct

[33] Ibid.
[34] *Maqele & Ors v Vice-Chancellor, Midlands State University & Anor* 2016 (1) ZLR 873 (H).
[35] Ibid 880.
[36] Ibid.
[37] *Margaret Zinyemba v Minister of Lands and Rural Settlement* 2016 (1) ZLR 1073 (C).
[38] Ibid 1075.

reliance on the constitutional right.[39] Justice Malaba held that s 68 is only permissible when there is no administrative justice Act.[40] Without any detailed analysis, the DCJ was of the view that ZAJA is the Act that s 68(3) refers to. He went further to hold that where an administrative justice Act envisaged in s 68(3) is present, direct reliance on the constitutional right would only be permitted if the claimant contends that the Act does not give effect to s68.[41] In the present case, Ms. Zinyemba did not argue that the Act fails to give effect to s68, which would have triggered the exception set out by the court for direct reliance. The Court regrettably failed to investigate the exceptions *mere motu,* which would have given protection to the litigant. The Court seems to have placed an undue burden on the litigant in requiring the applicant to aver that ZAJA falls short of s 68. The burden is an undue burden because it was, in fact, the Court that should have noticed that s 68 and ZAJA are not complementary, particularly because ZAJA predates s68 and s 68 itself are a novel right. That much should have been very apparent to the Court without requiring the litigant to aver so. In essence, the Court asked the litigant to undertake one of its core functions, which is to interpret the law. In my view, the court should have taken judicial notice that the Act required in s68 (3) does not exist currently and in the absence of such an Act, direct reliance on s68 should be permitted.

The Constitutional Court in *Zinyemba* reasoned that direct reliance would be undesirable because it would be an avoidance of legislation and because of the principle of subsidiarity that requires that norms of greater detail be given effect to before going to the more general norms.[42] The Court's reasoning here is unassailable but the tragedy here is the assumption that ZAJA gives effect to s68. If ZAJA fully gave effect to s 68, then indeed it would be undesirable to rely on s68 directly and a litigant would have to use the exceptions to do so. As a result of the *stare decisis* doctrine and its subservient principles of court hierarchy as applied in the Zimbabwean legal system, the high courts and lower courts are bound to follow this line of reasoning.[43] Indeed, even the Constitutional Court itself will apply its own reasoning to future claimants much to the

[39] Ibid 1077.
[40] Ibid.
[41] Ibid.
[42] *Zinyemba* (note 40 above) 1079.
[43] AS Gaibie 'The Stare Decisis Doctrine: The Beginning Of The End For Zimbabwe?' (2006) 47 *Codicillus*, 66 ,68.

detriment of administrative justice and the development of the jurisprudence in this regard. It, therefore, seems that future reliance on the right directly will only be possible if the exceptions are claimed. The Zinyemba judgment is crucial in explaining and understanding why s68 has remained stagnant and why the superior courts deny direct reliance on it. The only way that s68 will be given effect to now is if Parliament repeals or amends ZAJA as required by s 68(3) of the Constitution.

In what follows, I consider the various possible reasons for the avoidance of s68 by the Zimbabwean judiciary.

5.2 The Doctrine of Constitutional Avoidance

One doctrine that can be used to avoid engaging a constitutional provision is the doctrine of constitutional avoidance. The doctrine has been used in various jurisdictions including the United States of America, Kenya, and Trinidad and Tobago. An overview of the use of the doctrine and its development in these jurisdictions will be discussed briefly below. It will be seen that the original framing and use of the doctrine as applied in the surveyed jurisdictions differs greatly from the Zimbabwean usage. This explains some of the difficulties encountered in the usage of the doctrine in Zimbabwe.

5.2.1 Constitutional Avoidance in Other Jurisdictions

One of the reasons why the Zimbabwean courts avoid engaging the s68 right can be traced to the doctrine of constitutional avoidance. The discussion of constitutional avoidance axiomatically begins with the United States of America where the doctrine was developed.[44] The doctrine was first suggested by the then Chief Justice John Marshall in *Ex Parte Randolph*.[45] He noted that constitutional cases are the most important types of cases a court can adjudicate and if the Constitution is always relied on directly at the expense of statutory enactments, this would amount to ignoring or bypassing the laws made by the legislature.[46] He further noted that

[44] AM Bickel *The Least Dangerous Branch: The Supreme Court at The Bar of Politics* (1962) 129, 130.
[45] *Ex parte Randolph* 20 Fed. Case. No. 11,558, at 254 (C.C.D. Va. 1833).
[46] Ibid.

statutory enactments are designed to deal with subject matters in more detail than a constitutional provision and, therefore, it is parliament's presumed intention that laws are used before the Constitution.[47] The Chief Justice then set out the basis for the doctrine as follows: where a matter is raised on two grounds, one constitutional and the other non-constitutional, the desirable and preferred route is to determine it as a non-constitutional issue.[48] Put another way, 'the courts should not pass on questions of constitutionality unless such adjudication is unavoidable'.[49]The doctrine functions on the premise that all statutory enactments are passed in accordance with the Constitution and the onus thus rests on a litigant to show otherwise.[50] If this presumption is not rebutted, the courts will not permit reliance on a direct constitutional provision.[51]

The doctrine is also referred to as the *Ashwander* doctrine because it was developed extensively in the *Ashwander v Tennessee Valley Authority* case, a judgment of Justice Brandeis.[52] Justice Brandeis carved out seven rules that flesh out the content of the doctrine of avoidance as applied in the case.

These are they:

1. 'The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.[53]'

[47] Ibid.
[48] Ibid. Also see *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) which will be discussed below.
[49] *Spector Motor Service Inc. v Mclaughlin Tax Commissioner* 323 U.S. 101 and also *In re Central R. Co. of New Jersey*, 3 Cir., 136 F.2d 633.
[50] See *Reno v Condon* 328 US 141, 148 (2000).
[51] Ibid. See also *Ex Parte Randolph* (note 47 above).
[52] *Ashwander* (note 48 above).
[53] Ibid 346.

2. 'The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.'[54]

3. 'The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'[55]

4. 'The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.'[56]

5. 'The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.'[57]

6. 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'[58]

7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'[59]

The doctrine generally is viewed as a tool of restraint, but its critics have noted that it has the reverse effect and creates judicial activism instead.[60] In *Ashwander*, Justice Brandeis highlighted that the use of the doctrine prevents judicial overreach.[61]

The doctrine effectively arises as a question of a choice of laws where a court is faced with two legal grounds – one constitutional and the other non-constitutional. In the case of where a court is faced with a constitutional right to administrative justice and a statutory right to same, the doctrine suggests that the matter must be decided purely on a statutory basis.

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[54] Ibid 347.
[55] Ibid.
[56] Ibid.
[57] Ibid 334.
[58] *Ashwander* (note 48 above) 348.
[59] Ibid 333.
[60] MR Slack 'Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence - A Response to Lisa Kloppenberg.' (2006) 56(4) *Case Western Reserve Law Review* 1057.
[61] *Ashwander* (note 48 above) 3334.

It must also be noted, however, that the doctrine's use accords well with both the legal system and the governance framework of the USA. Its adoption by other jurisdictions should, therefore, be done carefully as this may have unintended consequences as will be seen throughout this chapter.

The doctrine is also used in Kenya, which has already been used in this study as a comparator jurisdiction based on similarities in the constitutional framework and history leading up to the drafting of a new constitution. A brief survey of the application of the doctrine is, therefore, worth considering. While it will be seen that the Kenyan courts use the doctrine consistently, it will also be noted from the previous chapter, that the courts have also applied the right to administrative action extensively while developing a solid jurisprudential base of the rights.[62]

In the *CNM v WMG* case, the Kenyan High Court stressed the need for the application of the doctrine of avoidance and further held that constitutional litigation should not be an option where other avenues of resolving the matter exist.[63] The Kenyan Court of Appeal in *Gabriel Mutava v Managing Director Kenya Ports Authority and Another* held that constitutional litigation should be viewed as a different category of litigation to be used only where the circumstances warrant it and only as a last resort.[64] This position is similar to the reasoning in *SA Naptosa v Minister of Education, Western Cape,* which the court had relied on. [65]Kenyan courts have frequently held that relying on a constitutional right directly instead of the statutory embodiment of the right effectively bypasses the statute and if allowed to continue, the practice would render statutes redundant.[66]

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[62] See for example cases like *Republic v Principal Registrar of Persons & another Ex-Parte Suada Dahir Hussein* [2016] eKLR, *Republic v Amos ole Tiren & another Ex-parte James Momanyi Nyaberi* [2018] eKLR; *Republic vs. Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 Ors Ex Parte Patricia Olga Howson, Miscellaneous Application* No. 324 of 2013 and *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR.

[63] *CNM v WMG* [2018] eKLR.

[64] *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority and Another* [2016] eKLR. See also *Attorney General & 2 others v Kenya Section of International Commission of Jurists* [2018] eKLR.

[65] *SA Naptosa v Minister of Education, Western Cape* [2001] BLLR 338. In this South African judgment, Conradie J held that the use of a corresponding constitutional right would only be permissible where an act requires to give effect to the right, failed to provide an efficient remedy.

[66] *Mutav*a (note 67 above).

An important concern which seems to be shared by Zimbabwean courts is that superior courts might end up being inundated with constitutional cases, because the Constitution confers jurisdiction of constitutional disputes on the superior courts.[67] It must be noted that Zimbabwe and Kenya share a similar framework, which delineates superior courts as courts of exclusive constitutional jurisdiction as discussed in the previous chapter, thus the concerns shared by Kenyan courts find application in Zimbabwe as well. Equally attractive is the argument by Kenyan courts that invoking constitutional jurisdiction over every matter is tantamount to usurping the jurisdiction of lower courts.[68]

In determining whether a litigant should use a constitutional right or a statutory provision, the Kenyan courts use various tests such as the applicability and efficiency of the remedy.[69] A narrower test used to determine whether courts should invoke the doctrine is a requirement that litigants show that the law they would ordinarily have to rely on is unconstitutional.[70] In the absence of such a challenge, some courts are unwilling to deviate from the avoidance doctrine.[71] This test is also similar to one set out by the Zimbabwean courts in Zinyemba which will be discussed in detail later in this chapter.

The Kenyan courts have defined a constitutional matter by considering its substance over form.[72] Furthermore, a constitutional matter has been defined as one that warrants an interpretation and engagement of the Constitution.[73] A constitutional matter can further be viewed as a matter wherein rights in the declaration of rights or bill of rights have been violated and there are no statutory enactments to give effect to the right or, if they do exist, such remedies are either inadequate or inappropriate to rely on in the matter.[74] Lastly and equally similar to the

[67] *Daniel Mugendi v Kenyatta University and 3 Others* [2013] eKLR.
[68] Ibid. See also *Revital Healthcare (EPZ) Limited v Minister of Health and Others* [2015] eKLR.
[69] *Johnstone Ewoi v Jeremiah Ekamais Lomorukai* 4 others [2017] eKLR
[70] *Leonard Jefwa Kaloma v Consolidated Bank of Kenya and 3 Others* [2014] eKLR
[71] Ibid.
[72] See *Bernard Murage v Fineserve Africa Limited & 3 others* [2015] eKLR and *Isaac Ngugi v Nairobi Hospital & 3 Others* (2012) e KLR. See also *Four Farms Ltd v Agricultural Finance Corporation* (2014) e KLR.
[73] *Peter Nganga Muiruri v Credit Bank Limited & 2 others* [2008] eKLR.
[74] *Maggie Mwauki Mtalaki v Housing Finance Company of Kenya* [2015] eKLR. See also *Johnstone* (note 163 above).

Zimbabwean courts' formulation, a constitutional issue is also defined as one where there is a challenge to the constitutionality of a statute or any other law.[75]

While Kenyan courts have applied the avoidance doctrine and equally determined matters based on the Constitution, the Zimbabwean Constitutional Court, which is the apex court in constitutional matters, has not decided a single matter solely premised on s68 to date.

In other jurisdictions, courts are of the view that a constitutional trigger is required before one can invoke the Constitution and where there is a lack of such triggers, pursuing constitutional litigation is an 'abuse of process.'[76] It would, thus, seem constitutional relief will be granted where the statutory remedy is inappropriate, inadequate and otherwise unsuitable for the matter presented.[77]

From the above survey, that constitutional avoidance is a valid theory of adjudication is not in dispute but there are various underlying reasons for its use and parameters courts must observe when invoking the doctrine. It is submitted that these are lessons that the Zimbabwean courts can draw on in shaping the avoidance doctrine that it has implored over the years. The following discussion focusses on the use of the doctrine in Zimbabwe.

5.2.2 Constitutional Avoidance in Zimbabwe

Hofisi notes that the constitutional avoidance doctrines as applied by the courts is alive and well in Zimbabwe and is applied extensively. He also points out that the jurisprudence of the courts mitigates the 'potential transformative Constitution.'[78] He describes the doctrine as a political doctrine that is masqueraded as a legal doctrine.[79] While American courts are explicit when they invoke the doctrine, Zimbabwean courts are less forthcoming with their reasoning when the doctrine is applied.[80] Indeed, in many of the instances, the application and reasons around the

[75] *Leonard Jefwa Kaloma v Consolidated Bank of Kenya and 3 Others* [2014] eKLR. The Zimbabwean formulation is discussed below in 3.2
[76] *Damian Belfonte v Attorney General of Trinidad and Tobago* Cv. A. No. 84 of 2004. 13
[77] *Attorney General of Trinidad and Tobago v Ramanoop* Privy Council Appeal No. 13 of 2004.
[78] S Hofisi 'The Doctrine of Constitutional Avoidance as A Nemesis to Public Interest and Strategic Impact Litigation in Zimbabwe: Thesis, Antithesis and Synthesis' *Unpublished Thesis* (2017) 15.
[79] Ibid.
[80] Ibid 9.

application of the doctrine in the Zimbabwean judgments need to be inferred. There are only four cases where the courts have expressly referred to the use of the constitutional avoidance doctrine post-2013.[81]The doctrine seems more readily applied in the Constitutional Court which also doubles as the Supreme Court than it is in the High Court.[82]

Hofisi further notes that the current Chief Justice, Malaba CJ is the most vocal and influential proponent of the doctrine and has consistently applied it even before his appointment as Chief Justice. It will be noted from the foregoing discussion, that most of the judgments where the doctrine was applied, were penned by the Chief Justice. [83] The practice of the courts has been to treat the Constitution as special legislation rather than as part of a hierarchical system of law that works alongside other legislative enactments.[84] The type of avoidance identified in the Zimbabwean context is where the courts do not engage the merits of a constitutional matter after determining that another legal route is possible, regardless of its effectiveness or lack thereof.[85]

In *Majome v ZBC*, the Constitutional Court refused to entertain any reliance on the Constitution on the basis of the principle of supremacy and 'one system of law' which in its interpretation, the court found required parties to engage a general law of application before relying directly on a constitutional provision.[86] In this case, the applicant had refused to pay her TV licence to the state broadcaster which she accused of politically biased reporting. She argued that the conduct of the broadcaster was a violation of the Constitution and was therefore unconstitutional.[87]

The Chief Justice held that 'where a law of general application prohibits conduct, the commission of such prohibited conduct does not give rise to a constitutional question'. The Electoral Act contained prohibitions on biased reporting and as the court reasoned, there was sufficient recourse in the Act to deal with the alleged bias without turning the matter into a constitutional

[81] These are the *Majome*, *Zinyemba*, *Katsande* and *Chawira* judgments that will be discussed in detail below.
[82] Hofisi (note 78 above).
[83] Ibid 7.
[84] S Hofisi 'The Constitutional Court and the Avoidance Doctrine' (11 October 2017) *The Herald.*
[85] Ibid.
[86] *Majome v ZBC & Others* (CCZ 14/2016 Const. Application No. CCZ 67/13) [2016] ZWCC 14.
[87] Ibid 6.

matter. The applicable test for legality was, therefore, to be determined through the lens of the Electoral Act, and not the Constitution, save for instances where the Act itself is the subject of a constitutional attack.[88]

This case is noteworthy because it is one of few cases where the courts have specifically referred to the doctrine of avoidance in the judgment. In other cases, the use of the doctrine is tacit and inferred. Malaba DCJ, as he was then, made specific reference the doctrine of subsidiarity and described it as a subcategory of the avoidance doctrine.[89] In applying the subsidiarity principle, the court held that the principle requires that constitutional violations be dealt with using the legislation contemplated in the Constitution and not the underlying constitutional provision itself. This is the case with the s68 right which creates a duty on parliament to enact legislation to give effect to the right. The rationale is that the enacted legislation is a more detailed law than the skeletal overarching provision found in the Constitution. The subsidiarity principle will, however, not apply in cases where there is no enactment giving effect to the constitutional right. Logically, to prohibit a litigant from direct reliance on the constitutional right in cases where there is no enactment would leave the litigant without recourse. By extension, where a statutory enactment is either inadequate or contradictory to the Constitution, direct reliance must be permissible for litigants. In my view, ZAJA is both inadequate and contradictory to the Constitution as discussed in previous chapters. Therefore, the courts should permit litigants to approach the courts based on a constitutional infringement without the doctrine of avoidance being applied. In *Majome*, however, the subsidiary principle and the avoidance doctrine may have been appropriate because the Electoral Act provided enough grounds to cover the applicant's contentions. More importantly, however, the constitutional attack by the applicant lacked precision and specificity. It was not abundantly clear what the premise of the constitutional claim was and why same could not be dealt with by the Electoral Act which could easily have dealt with the challenge. While an averment of unconstitutionality of the compulsory collection of fees for licences was made by the applicant, she failed to make the

[88] Ibid 8.
[89] Ibid.

unconstitutionality apparent to the court. As the court noted, she merely argued that it was unconstitutional without detail on the infringement. [90]

In *Chawira*, the Constitutional Court explicitly referred to the doctrine of avoidance and once again, refused to consider the constitutional merits raised by the case.[91] The case involved prisoners on death row who had been awaiting execution for between two and eighteen years.[92] The executions had been halted because there was no replacement for the hangman after the death of the previous hangman.[93] The government conceded that it was not sure when a replacement would be found as there had been no willing applicants in previous recruitment processes.[94] Counsel for the prisoners argued that the delay in finalizing the executions amounted to an infringement of the right to dignity and freedom from torture amongst other rights.[95]

The prisoners would have been entitled to judicial review in the high court based on the ZAJA, but they sought to rely on the constitutional rights directly. It must be noted that ZAJA does not contain any provisions relating to the right to dignity or freedom from torture and cruel treatment. The Constitutional Court, however, contended that the matter should have been addressed through the ZAJA despite the Act not possessing the desired remedies.[96] In this regard, one can aptly classify the approach by the court in applying the doctrine, as mechanical and rigid. If the applicants sought a remedy found in ZAJA, then the principle of avoidance may have been justified, but because it was not found in any other legislation, save for the Constitution, the Constitutional Court deprived the applicants of the only basis for their desired relief. The court further noted that because it has exclusive jurisdiction in most constitutional matters, it would be undesirable to classify each matter as a constitutional issue as this would mean that the court

[90] *Majome* (note 89 above).
[91] *Chawira & 13 Others v Minister, Justice Legal & Parliamentary Affairs & Others* (CCZ 3/2017 Const. Application No. CCZ 47/15 Const. Application No. CCZ 50/15) [2017] ZWCC 03.
[92] Ibid 8.
[93] Ibid 5.
[94] Ibid 9.
[95] Ibid.
[96] *Chawira* (note 93 above).

would have an influx of cases to deal with.[97] Interestingly, Bhunu JCC held that in the presence of other remedies, the Constitutional Court may 'withhold its jurisdiction' as the failure to do so would amount to a procedural 'injustice'.[98] The doctrine of avoidance and its role was described aptly as follows: '*As we have already seen in the normal run of things , courts are generally loathe to determine a constitutional issue in the face of alternative remedies …this is the doctrine of constitutional avoidance.*'[99] Like the American framing of the doctrine, the courts will not consider the constitutional dimensions of a matter that can be resolved using alternative remedies which can be just as effective.[100] The court relied on the 2001 Supreme Court judgment in *Sports and Recreation Commission v Sagittarius Wrestling Club* which will be dealt with separately in this study.[101] Interpretation of the Constitution should be done in tandem with other legal enactments and the courts view the preferable route of interpretation as one which does not lead to constitutional litigation.[102]

Justice Bhunu further noted that where a court gives effect to a constitutional matter before exhausting other remedies, then such a court usurps the powers of other functionaries prematurely and effectively undermines them.[103] The court in this regard seems to have introduced a duty to exhaust remedies before one can rely on constitutional rights. This is naturally a problematic test to introduce as it suggests a litigant may never approach a court on constitutional grounds unless he or she has attempted to exhaust all other possible remedies and avenues. The test is further problematic in that the Court presupposes that the other remedies that a litigant is seemingly required to exhaust first, are adequate, accessible, effective, or indeed appropriate. In the case of the ZAJA, several features are missing from it that are found in the Constitution and it is, therefore, an inadequate remedy. Requiring a litigant to exhaust remedies within the Act when the Act itself is not aligned to the Constitution, is regressive and prejudicial to litigants attempting to exercise their constitutional rights. The Constitution specifically affords

[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] *Sports and Recreation Commission v Sagittarius Wrestling Club* 2001 (2) ZLR 501 (S) at 505G.
[102] *Chawira* (note 93 above).
[103] Ibid.

any person acting in their own interests or acting on behalf of another to approach the court alleging that a violation of a constitutional right or freedom has taken place or will take place.[104] There is no additional qualifier in the text to suggest that one may only raise the violation of freedoms and rights after exhausting other remedies. If it was the intention of the legislature for this to be a barrier, then the constitutional text would be clear. In the absence of such a provision, the Constitutional Court, in my view, unduly and unreasonably limits the application of the declaration of rights by introducing a duty to exhaust other remedies at law prior to reliance on the Declaration of Rights. Due to the application of the principle of avoidance, the Constitutional Court dismissed the challenge and referred the matter back to the High Court for determination. A golden opportunity to define and flesh out the right to dignity and freedom from torture was unfortunately missed because of the application of the principle of avoidance in this case.

In the *Sports and Recreation Commission* case referred to in *Chawira*, Ebrahim JA as he was then, pointed out that where there are two possible avenues for a matter to be decided on – one constitutional and the other non-constitutional, the proper course for a court is to consider the non-constitutional angle unless the remedy depends on the use of the Constitution.[105] Where the Constitution can be severed from a remedy, the appropriate course for a court would be to sever the Constitution from the matter and deal with the case based on alternative legal grounds.[106]

Ebrahim JA further noted that designated legislation that deals with the matters raised must, as a matter of procedure, be utilized first, as an avoidance of this would undermine the legislature's intentions. [107] A constitutional issue was defined by the court as one in terms of which a direct challenge of the law is made rather than a challenge of a decision taken in terms of the Act in question.[108] In the absence of an attack of the Act, the court viewed the matter as a non-constitutional matter that could be resolved without reliance on the Constitution. The court also relied on the requirement to exhaust remedies first introduced in the case of *Mandirwhe v*

[104] Constitution of Zimbabwe, s85 (1).
[105] *SRC* (note 104 above).
[106] Ibid.
[107] Ibid.
[108] Ibid 505.

Minister of State, where the court held that a litigant is compelled to follow ordinary legislation before considering the application of the Constitution.[109] The court reasoned that litigants faced with a similar predicament do not have a choice of law and are obliged to follow statutory provisions exhaustively before reliance on constitutional rights.[110] Interestingly, in both *Mandirwhe* and *SRC*, the courts make no specific reference to the avoidance doctrine.

Perhaps most notably, Ebrahim JA, applied the presumption of constitutionality which he regarded as important for future courts to also consider.[111] In terms of this presumption, all statutory enactments are considered to be constitutionally sound and valid until a court declares otherwise.[112] The application of this presumption is, therefore, that courts are not obliged to investigate whether a statute is constitutionally compliant as it is presumed Parliament could not have passed a law that is unconstitutional. The presumption is problematic because it essentially leaves litigants with the task of identifying unconstitutional enactments and convincing a court of the unconstitutionality of these enactments instead of the courts playing a proactive role as custodians of the Constitution. It is also problematic where legislation pre-dates the Constitution. In the case of the ZAJA which pre-dates the Constitution, the presumption that Parliament could not have intended a violation of the Constitution when drafting the Act falls away. The presumption would not be applicable because when ZAJA was drafted, the constitutional right to administrative justice did not exist. Parliament could, therefore, not have foreseen the creation of a constitutional right as broad as s68, nor could it be expected to.

While the presumption attempts to strike a balance between the role of the courts and that of the legislature, it has unintended consequences that could lead to unconstitutional statutes remaining valid many years after the passing of the Constitution. This is the case with legislation such as ZAJA and the notorious Public Order and Security Act, which was passed in 2000 to replace the Law and Order Maintenance Act enacted by the Ian Smith government in 1965. [113] Portions of POSA have recently been declared unconstitutional after a constitutional

[109] *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (A).
[110] Ibid.
[111] *SRC* (note 104 above).
[112] Ibid.
[113] Law and Order (Maintenance) Act 53 of 1960 (Chapter 11:07)

challenge.[114] Other provisions remain in place despite a clear contradiction with the Constitution. For instance, POSA allows the army to be deployed to assist with policing when required to do so by the Police Commissioner and the Minister of Defence without the consent or oversight of the President whereas s213 of the Constitution confines the power to deploy the army internally to the President only.[115] The contradiction has been ignored in recent judgments that can be linked to the presumption of constitutionality referred to in the *SRC* judgment. [116] The presumption of constitutionality, therefore, remains a problematic doctrine to use in the Zimbabwean context and should, in my view, be discarded at least in the infancy of the Constitution.

In *Mujuru v President of the Republic of Zimbabwe*, an application challenging the constitutionality of the President's decision to use subsidiary legislation to amend primary legislation without parliamentary oversight, the doctrine of avoidance manifested itself under the concept of 'ripeness' and the presumption of constitutional validity.[117] According to the Court, a matter is deemed to be ripe for adjudication once the underpinning law is operative and the remedies contained in it have been exhausted.[118] The implication of this framing of the doctrine is that in the absence of litigant exhausting statutory remedies available to them, any constitutional issues cannot be determined by a court due to a lack of ripeness. [119] The court also focused on the presumption of validity which it held, prohibited it from assuming the conduct of the President was unconstitutional because the applicant failed to raise a violation of her rights first. This is despite the fact that the applicant's challenge was premised squarely on the invalidity of the Temporary Presidential Powers Act used by the President to amend primary legislation without the oversight of Parliament.[120] It must be noted that the Presidential Powers Act[121] was

[114] For example, see *Democratic Assembly for Restoration and Empowerment & 3 Others v Saunyama N.O & 3 Others* (CCZ 9/18, Civil Appeal No. CCZ 5/18) [2018] ZWCC 9 where s27 of POSA which permitted police bans on protests.
[115] See for example, P Kaseke ' Deployment of Army Ultra Vires Constitution' in *Zimbabwe Situation* https://www.zimbabwesituation.com/news/august-1-army-deployment-ultra-vires-zim-constitution/
[116] See for example *Allison Charles & Counselling Services Unit v President & Others* HH/2018 where Justice David Mangota relied on POSA exclusively.
[117] *Mujuru v President of the Republic of Zimbabwe and Others* CCZ 8/18
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Presidential Powers (Temporary Measures) Act 1 of 1986 [Chapter 10:20]

introduced under the Lancaster House Constitution where the President enjoyed legislative powers together with Parliament.[122] Under the 2013 Constitution, the President does not share legislative authority with Parliament.[123] Furthermore, the Constitution is specific that only Parliament can amend primary legislation and it may not delegate its primary law making duties.[124] The Presidential Powers Act is, therefore, unconstitutional to the extent that it delegates law making powers to the President contrary to the Constitution. The Constitutional Court was, however, not swayed by this reasoning and refused to entertain the dispute because the applicant failed to base her constitutional attack on a constitutional right. The applicant contended, rightfully so in my view, that there was no need to base her claim on a violation of rights because her challenge was on the conduct of the President and the violation of provisions relating to his office and that of Parliament. Notwithstanding the above, the Court dismissed the case, with costs.[125]

In *Katsande v IDBZ*, the Constitutional Court expressly referred to the avoidance doctrine and again linked it to the concept of ripeness.[126] In this matter, the litigant brought an application to the Constitutional Court alleging a violation of his right to join a trade union whilst the matter was still being heard by the Labour Court in term of the Labour Act. There were thus two matters before two different courts stemming from the same issue. Gwaunza JCC as she was then, held for the Court that the proper course for the litigant was to finalise proceedings in the lower courts before proceeding to raise the same matter with the Constitutional Court. She further noted that the remedies sought by the litigant in the Constitutional Court could be granted using the Labour Act in a lower court.[127] The Court went on to endorse the test for a constitutional issue as one that involves the direct use and application of the declaration of rights in the Constitution.[128] In the case, the court found that there was no direct use and application of the declaration of rights in the Constitution and as such the matter should be decided solely on the basis of the Labour

[122] Constitution of Zimbabwe, 1979 s32 Lancaster.
[123] Constitution of Zimbabwe, s117.
[124] Ibid s134(a).
[125] *Mujuru* (note 120 above).
[126] *Katsande and Another v Infrastructure Development Bank of Zimbabwe* CCZ 113/17.
[127] Ibid 8.
[128] Ibid 9.

Act without any reliance on the Constitution. Sadly, the Court missed a golden opportunity to carve labour rights as constitutional rights, especially in the wake of the much criticized *Zuva Petroleum* judgment where the Supreme Court ignored both the constitutional and statutory right to fair labour practices in favour of a common law rule.[129] The finding in the *Zuva* judgment was that employers were permitted to terminate permanent employment contracts at will by giving notice.[130] This judgment resulted in thousands of employees losing their jobs.[131] Hofisi argues that the avoidance in *Katsande* effectively downplays the importance of labour rights as set out in s65 of the Constitution.[132]

As can be seen, the application of the avoidance doctrine in Zimbabwe has stifled the development of constitutional rights thus there have been few strides made in developing key constitutional rights. The courts have neither been clear on when the doctrine will be invoked, nor have they considered the failure of the Legislature to align acts to the Constitution. The transplant of the avoidance doctrine as applied in the USA is inappropriate considering that most acts passed by Congress in America were passed after the Constitution was drafted.[133] One of the operative presumptions as already stated, is that the legislature did not intend to violate the Constitution, but that presumption cannot be used in the Zimbabwean context where the Constitution was drafted after the enactment of the statutes. By applying the avoidance doctrine strictly and injudiciously the courts wrongly assume constitutional compliance and neglect several key constitutional provisions. The first offended provision is s85 which entitles individuals and bodies with standing to 'to *approach a court, alleging that a fundamental right or freedom enshrined in this Chapter (Chapter 4 of the Constitution) has been, is being, or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.*' It can be argued that the use of the doctrine of avoidance deprives

[129] *Don Nyamande and Another v Zuva Petroleum (Private) Limited* SC 43/1.
[130] Ibid.
[131] <https://www.theindependent.co.zw/2018/04/13/tm-labour-case-zuva-ghost/>. See also F Madzingira 'Terminating Employee Rights: A Discussion of Nyamande and another v Zuva Petroleum' (11th August 2015) *OxHRH Blog.*
[132] Hofisi (note 81 above) 20.
[133] The American Constitution was passed on September 17, 1787. See GS Wood *The Creation of the American Republic* 1776–1787 (1972).

litigants of the constitutional entitlement to approach a court based on a violation of rights in the Constitution. It can also be argued that by actively and intentionally avoiding constitutional matters, the courts violate the duty set out in s44 of the Constitution which obliges the courts and other entities to 'respect, protect, promote and fulfil the rights and freedoms' in the Constitution.[134]

Lastly, by applying the doctrine of avoidance, the courts renege on the duties in s46 of the Constitution. The section requires courts faced with the task of interpreting and adjudicating disputes in relation to the Declaration of Rights, to give 'full effect to the rights and freedoms in it, promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in the Constitution.' [135]

5.3 Executive Evasion- Avoidance of Politically Sensitive matters

Another plausible reason for the avoidance of s68 by Zimbabwean courts is historical and is tied to previous repressive conduct towards the judiciary in judgments where the courts clashed with the Executive. Zenda highlights this and notes that since the early 2000s where the Executive clamped down on the judiciary, the courts have turned a blind eye to violations of rights by the Executive.[136] In my view, it is the fear of the interference of the Executive or of clashing with the Executive that may, in some cases, result in courts avoiding constitutional issues. This fear is, however, not without merit, as will be seen below. The Judicial Crisis, a term I use to describe attacks on the Zimbabwean judiciary between 2000 and 2002, has had what can be termed as a 'chilling effect on the judiciary'. This chilling effect has resulted in many judges avoiding direct confrontations with the Executive in their judgments.[137] This is evident in politically motivated cases as discussed in Chapter one of the study. It is this fear that I believe results in a deliberate attempt to avoid constitutional matters, particularly where the State is likely going to be held

[134] Constitution of Zimbabwe, s44.
[135] Ibid s46.
[136] C Zenda ' Judiciary Weak on Enforcing the Rule of Law' in *Financial Gazette Zimbabwe* <http://www.financialgazette.co.zw/judiciary-weak-on-enforcing-rule-of-law/>
[137] This is discussed in greater detail below.

accountable for violating rights. It will be argued that due to the chilling effect of the judicial crisis, there is a possible avoidance intended to prevent recurrence of previous repressive conduct directed towards the judiciary. This is perhaps the most logical reason for the avoidance seen in the superior courts' jurisprudence. While the constitutional avoidance doctrine can be viewed as the main cause for avoidance, it should be noted that the tests as adopted by the American courts are hardly applied in the Zimbabwean context which creates a reasonable belief that while the doctrine has been expressly mentioned in some judgements, it may not be the biggest reason for the avoidance by the courts. In fact, it may be possible that the doctrine of constitutional avoidance is used as a smokescreen to hide the fears of the judiciary.

To understand this chilling effect, one must understand the history of repression and oppression in Zimbabwe. As highlighted in previous chapters, post-independent Zimbabwe has been characterized by wanton disregard for fundamental human rights and violent suppression of dissent.[138] In the Human Rights Watch Report of 2006, Former President Mugabe was quoted as saying '… *Some are crying that they were beaten. Yes, you will be thoroughly beaten. When the police say move you move. If you don't move, you invite the police to use force*. 'in response to a question on the violent suppression of a trade union protest.[139]

The judicial crisis can be traced back to the land reform period which started with farm invasions in the year 2000.[140] The farm invasions were at odds with the Constitution and were challenged in several cases that declared the invasions unlawful. [141] The clash between the judiciary and the Executive intensified with a sustained government-backed attack on the judiciary in the press. In 2001, the then Vice President of Zimbabwe, Dr Muzenda, castigated the judiciary for what he termed 'favouring of whites and ruling against blacks' in land reform matters. [142] In the same

[138] *Human Rights Watch Report* November 2006. See also B Kagoro 'Zimbabwe's turmoil: problems and Prospects' (2003) 87 *Institute for Security Studies Monographs* 8 and R Smiles 'Zimbabwe's Political Third way Debate' (2006) 31 *Journal for Contemporary History* 17, 18.
[139] *Human Rights Watch Report* November 2006
[140] K Malleson & PH Russell *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006).
[141]*Commercial Farmers Union v Minister of Lands* 2001 (2) SA 925 (ZSC). See also the judgment of Garwe J as he then was, who declared that farm invasions were in all instances, unlawful and repugnant to the rule of law and the ideals of the Constitution in *Commercial Farmers Union v Commissioner of Police* 2000.
[142] As quoted in the *Star Newspaper* 12 January 2001.

year, the Minister of Justice publicly stated that government intended to push out any dissenting voices from the bench that stood in the way of government land reform policies. [143] A few weeks after his speech, the leader of the War Veterans' Association, Dr Hunzvi, told Parliament 'I am telling you what the comrades want, not what the law wants – the judges must resign, their days are numbered.'[144] The judiciary was denigrated in the press for ruling against land invasions and against the government more generally. [145] Dr. Hunzvi would go on to demand the resignation of the entire Supreme Court bench, which he accused of dispensing 'colonial justice designed to further oppress black people'.[146] The attacks were heightened by Professor Jonathan Moyo, who was in charge of the Ministry of Information, a propaganda tool for State.[147] Professor Moyo specifically targeted Judge Blackie who found the Attorney General guilty of contempt of court.[148] This prompted Mr. Blackie's resignation before he was subsequently arrested for one of the cases he presided over.[149] During his arrest, Mr Blackie was denied medical treatment and was starved before being released from police custody.[150] This was intended to send a strong message to judges tempted to rule against the State.[151]

Where courts rule against the State, a large degree of contempt of those orders takes place and the courts rarely pursue the matters against the errant government officials – again, for fear of victimization and retaliation by authorities.[152] These cases show why there is a reluctance by the judiciary in ruling against the executive. The reluctance is premised on a real fear of victimization

[143] *Daily News* 6 February 2001.
[144] Malleson & Russell (note 140 above) 339.
[145] Ibid.
[146] Ibid. See also *Parliamentary Debates Hansard of Zimbabwe* 27, 26:2686
[147] P Kaseke https://www.newsday.co.zw/2018/05/chamisa-reaction-to-high-court-ruling-treading-on-contemptuous-ground/ .
[148] Ibid.
[149] Ibid.
[150] Legal Resources Foundation *Justice in Zimbabwe Report* (September 2002) 12 hereafter referred to as LRF.
[151] Ibid.
[152] In 2000, for example, a court order was issued ordering police to evict unlawful occupiers from a farm. That order was ignored both by the Zimbabwe Republic Police and the parent ministry cited in the judgment. This was a particularly brave judgment by the court given that the evictions were in the twilight period of the land reform programme. Nevertheless, no attempts were made by the judiciary to hold the Police Commissioner and responsible Minister in contempt of court. These facts readily appear in a subsequent case relating to the enforcement of that court order, *Commissioner of Police vs. Commercial Farmers Union* (HC 3985/2000).

and harassment, which may explain why the right to administrative justice (and other constitutional rights) have not been fully given effect to, nor properly construed by the courts.

Former Chief Justice Anthony Gubbay was threatened and attacked in the press on several occasions by both the government and the war veterans.[153] The Chief Justice came under further scrutiny after he declared regulations passed by the President unconstitutional just before the 2002 elections. [154]The regulations would have given the government and ruling party, an added advantage to the detriment of the opposition parties.[155] The Chief Justice held that the President had acted ultra vires the Constitution. [156] The carefully planned attacks that followed were meant to pressure him into retiring prematurely.[157] The war veterans invaded the Supreme Court and camped there demanding the resignation of the Chief Justice in November 2000.[158] After attending a meeting with the Acting President to discuss the continued attacks on the judiciary, the Chief Justice and Supreme Court Justices were told in no uncertain terms that they would be pushed out.[159] The government proceeded to announce the resignation of the Chief Justice and refused to accept any further decisions made by him.[160] It is common cause that the Chief Justice had not tendered his resignation at that time but the government was determined to appoint another Chief Justice who would not challenge its decisions in the manner that the Gubbay-led Supreme Court did.[161]

The war veterans continued to apply pressure on the other judges of the Supreme and High Court by issuing threats of invasion and deportation.[162] There was a legitimate fear by the judges that

[153] International Bar Association *Report of Zimbabwe Mission* (2000) 98.
[154] Malleson & Russell (note 143 above).
[155] Ibid.
[156] LRF (note 150 above) 10.
[157] Ibid.
[158] Malleson & Russell (note 143 above) 342.
[159] D Harold- Barry *Zimbabwe: The Past is the* Future*: Rethinking Land, State and Nation in the context of crisis* (2004) 205. While this is a matter of public knowledge, the commentary by Barry is useful in setting out the events leading up to the forced resignation of the Chief Justice. Justice Gubbay personally gave a first-hand account of his forced resignation and trouble with the Executive in a lecture given in 2009 titled *The progressive Erosion of the Rule of Law in Zimbabwe* at the 3rd International Rule of Law Lecture held at Inner Temple in England.
[160] Malleson & Russell (note 143 above) 341.
[161] Ibid.
[162] Ibid.

their lives were not safe if they ruled against the State.[163] Justice Michael Gillespie was also forced to leave office after a damning judgment against the executive.[164] Justices Ishmael Chatikobo, Sandra Mungwira, Nick McNally, Ahmed Ibrahim, and Michael Majuru all left the bench after delivering verdicts that were unfavourable to the State. [165]

President Mugabe once described a judgment by Justice Uchena that allowed the late Roy Bennett to contest elections while imprisoned, as "plainly stupid", which then forced the judge to reverse his own decision and prohibit Bennett from contesting the elections.[166] President Mugabe took strong exception to criticism from the judiciary and publicly rebuked judges. He infamously stated that "the judiciary should stay out of politics and refrain from instructing the President". After the attacks on the judiciary, other judges similarly resigned from office.[167]

In less than two years, the government had managed to push out the Gubbay Supreme Court and other judges considered critical of the government. Chief Justice Godfrey Chidyausiku took over from Gubbay and rearranged the allocation of cases to ensure that politically sensitive matters were allocated to judges more sympathetic to the government.[168] It must be noted that the allocation of cases is an administrative task left to the administrative staff of the courts, but this changed as part of the plans to control the judiciary.[169] Rapid appointments were made to replace the Gubbay Supreme Court.[170] A 'compliant' Supreme Court immediately reversed the declarations of constitutional invalidity of the land reform in cases like *Minister of Lands v Commercial Farmers' Union*.[171]

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[163] *Daily News* 'Retired Chief Justice Gubbay Living in Fear' (23 February 2001).
[164] H Mushonga 'Mugabe Moulds Pliant Judges' (2006) *Institute of War and Peace Reporting* 4.
[165] Ibid. See also, *Human Rights Watch Report Our hands are tied: Erosion of the Rule of Law in Zimbabwe* (November 2008) and R Martin 'Rule of Law in Zimbabwe' 2006 *The Round Table* 95 (384) 247-252.
[166] Justice Uchena ruled in favour of former MDC T Treasurer, Roy Bennett but subsequently reversed his decision after his judgment was referred to as 'stupid' by President Mugabe – see *Human Rights Watch Report* of November 2008.
[167] Kaseke (note 147 above). See also D Mavhunga's Human Rights Watch article on the threats to judicial independence https://www.hrw.org/news/2016/09/06/zimbabwes-judges-under-fire.
[168] Malleson & Russell (note 143 above).
[169] Ibid.
[170] Ibid.
[171] *Minister of Lands, Agriculture and Rural Resettlement and Others vs. Commercial Farmers' Union* Judgment No. SC111/2001.

During the same period, attacks on the lower courts escalated with ruling party supporters and war veterans interfering with the administration of justice in matters where they had a vested interest. [172] Throughout the various acts of intimidation and harassment of the judiciary, the government refused to come to the aid of judicial officers and instead seemed to encourage continued lawlessness.[173] There were threats to close the courts down indefinitely as a sign of displeasure with the anti-land grab decisions made by the courts.[174] A magistrate's decision to release farmworkers who had resisted the unlawful invasion of a farm, was met with violent protests and intimidation[175], while disruptions of similar court proceedings took place in Chinhoyi.[176] In some cases, the government supporters would protest and camp outside the private residence of magistrates whilst singing liberation songs.[177]

Forced closures of courts became a striking feature of the Judicial Crisis period, where protestors would lock magistrates in the courts and call for their resignation because of judgments perceived to be pro-opposition.[178]

Perhaps the final straw in the Judicial Crisis was the physical assault of members of the judiciary. A magistrate in Chipinge was physically removed from the court and dragged at the back of a lorry in town while police officers looked on.[179] Magistrate Chikwekwe was also assaulted over a judgment that was against a ruling party supporter.[180]

The Executive's culture of repressive conduct and retribution towards the judiciary as seen above can explain a culture of judicial deference to the Executive that is dressed as avoidance. The fear of being hounded from office and attacked like their predecessors, may well be enough for courts to avoid engaging constitutional rights directly, since most of the action is directed towards the

[172] Malleson & Russell (note 143 above).
[173] IBA (note 204 above).
[174] *Star Newspaper* 4 December 2000.
[175] *Daily News* 28th August 2001
[176] LRF (note 201 above) 12.
[177] Malleson & Russell (note 143 above) 344.
[178] *Daily News* 16 January 2002. See also Zimbabwe Human Rights NGO Forum *Political Violence Report* 1-18 (January 2002) 11.
[179] https://allafrica.com/stories/200211060346.html . See also *Herald* 21 August 2002.
[180] *Cape Times* 12 November 2001

government. It should be noted that in all the cases surveyed in this chapter, the application of the Constitution was vertical in that it challenged governmental conduct. The State is, therefore, the common factor in all these cases of avoidance which only serves to strengthen my proposition that avoidance may in fact be an attempt to avoid confronting the Executive.

There is another way to view this kind of avoidance which is pro-executive judicial decision making. This kind of decision making by judges takes a position that champions the executive and not the group of individuals that litigate against the State. Justice Edwin Cameron put it better when he termed it 'executive-mindedness'.[181] To be more succinct, Justice Cameron defined executive-mindedness as follows:

'*This allegation when made of a judge imputes to him an excess of ardour in countenancing government power when its exercise is challenged before him. It suggests an attenuated commitment to protecting the rights and entitlements of individual citizens when these are infringed by government action. It may also, rather more broadly, imply that the judge concerned tends to lean towards the side of a government or public body when its interests are in dispute before him.*'[182]

He further notes that the label does not impliedly link to a conclusion of bias or corruption on the part of the judge(s) concerned but rather the disposition of the judicial officer and their judicial decision-making 'posture'.[183] In the context of the subject matter at hand, one can possibly argue that the Zimbabwean courts, particularly the Constitutional Court, may have developed a culture of evading constitutional challenges that affect the executive in order to protect the executive. By avoiding an engagement with s68, which inherently involves the executive branch of the State in most cases, the courts may be said to be leaning towards the executive. Using Justice Cameron's reasoning, this need not imply any form of impropriety on the part of the judiciary but an adjudication flaw. It is possible to reconcile the first part of my proffered argument of executive-evasion with Justice Cameron's view of executive-mindedness

[181] E Cameron 'Legal Chauvinism, Executive-Mindedness and Justice - L. C. Steyn's Impact on South African Law.' (1982) 99(1) *SALJ* 38, 52
[182] Ibid.
[183] Ibid.

by arguing that the fear arising from the Judicial Crisis has led to executive -mindedness decision making, which results in the avoidance of s68 and other politically sensitive constitutional rights. Whether one looks at the pattern from the superior courts as executive-mindedness or executive evasion, the net result is the same: avoidance of politically sensitive matters where there are potential clashes with the Executive.

These two concepts, however, speak to issues around judicial independence and impartiality. The 2013 Constitution expressly guarantees the protection of both judicial independence and impartiality. Section 164(1) specifically states that the courts are independent and subject to the Constitution only,[184] while s164 (2) courts are required to be independent and impartial which is pivotal to good governance.[185] Government is further prohibited from interfering with the functioning of the courts.[186] Courts are required to dispense justice to all fairly and equally in terms of s165 of the Constitution.[187] More importantly, judicial officers should make decisions 'free from interference and undue influence'.[188] While easier said than done, courts should, therefore, discontinue with either executive-mindedness or executive evasion when dealing with any matters, especially constitutional matters. It has been stated that judicial independence is a pillar of democracy but also encourages the public to have more faith in the judicial system.[189] This in turn will lead to more applicants turning to the courts to find redress for violations of the right to administrative justice in the Constitution. Mapfumo notes that under former Chief Justice Antony Gubbay, judicial independence of the bench was respected and protected fiercely but the Chidyausiku Court has downplayed and eroded its own independence.[190] Despite the safeguards in the 2013 Constitution, the independence and impartiality of the judiciary has been under constant attack and has in the eyes of some commentators, waned.[191] The problem lies in the

[184] Constitution of Zimbabwe, s164(1).
[185] Constitution of Zimbabwe, s164(2).
[186] Constitution of Zimbabwe, s164(2)(a).
[187] Constitution of Zimbabwe, s165(1)(a) specifically notes that 'justice must be done to all'.
[188] Ibid s165(3).
[189] https://www.theindependent.co.zw/2018/08/17/zim-judiciary-under-scrutiny/
[190] T Mapfumo 'Whither to, the judiciary in Zimbabwe? A critical analysis of the human rights jurisprudence of the Gubbay and Chidyausiku Supreme Court benches in Zimbabwe and comparative experiences from Uganda' *LLM Thesis* (2005)
[191] H Chitimira 'A Conspectus of the Functions of the Judiciary under the Zimbabwe Constitution 2013' (2017) 25 *AJICL* 221, 223.

application and enforcement of the provisions.[192] Once these are tightened and enforced, it can be argued that this form of avoidance can be reduced if not limited completely.

5.4 Strategic Avoidance

In some cases, the use of the avoidance doctrine can be traced back to strategic avoidance. In this context, strategic avoidance refers to a deliberate and intentional reluctance to engage with constitutional rights in the hope that such avoidance will yield a strategic result.[193] Delaney contends that this is also the case where courts delay rulings on substance to allow the parties to engage in dialogue with the belief that with enough time, parties will withdraw the matter and resolve the dispute.[194] In the Zimbabwean context, it must be noted that there has been no express use of Delaney's formulation of strategic avoidance, but it was a visible characteristic of former Chief Justice Chidyausiku' s court and it is still a feature in the Malaba Court. This was particularly true in election petitions and applications declaring government policy to be unconstitutional. In the *National Pledge* case – a case where the constitutionality of the decision to impose a national pledge on all school pupils without consultation with the parents and in violation of religious freedoms was challenged, the Constitutional Court reserved judgment.[195] Almost three years later, there is still no judgment on the matter. In a challenge that sought to declare the wide sweeping regulatory powers of government in the media industry unconstitutional, the Supreme Court withheld judgment for several months with no reason for the delay.[196] In the *Capital Talk Radio* case which challenged government monopoly over media broadcasting licences, the Supreme Court delayed judgment for over 18 months. [197]As Bourbon notes 'whatever the explanation for the delays, they are perceived to be a deliberate attempt to avoid making findings against the government on issues relating to human rights.'[198]

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[192] Ibid.
[193] Delaney (note 71 above).
[194] Ibid.
[195] https://www.dailynews.co.zw/articles/2017/02/02/con-court-reserves-ruling-on-dokora-s-national-pledge
[196] https://www.theindependent.co.zw/2005/01/21/court-still-to-rule-on-aippa-challenge/
[197] *Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe and Others* (162/2001) ((Pvt)) [2003] ZWSC 65 (24 September 2003) See also A De Bourbon 'Human rights litigation in Zimbabwe: Past, present and future' (2003) 2 *AHRLJ* 195-221.
[198] A De Bourbon 'Human rights litigation in Zimbabwe: Past, present and future' (2003) 2 *AHRLJ* 195, 221.

This type of avoidance is problematic because justice should never be delayed especially on grounds that are not clear and for reasons that seem to circumvent the point of judicial recourse. These delays are prohibited in s165 of the Constitution, which requires that judicial officers exercise their duties expeditiously.[199] The use of strategic avoidance, is however, not as widespread as the general constitutional avoidance doctrine but does account for some of the avoidance cases raised in this study.

5.5 Textual Difficulties

A further plausible reason for avoidance is the textual difficulties that s68 presents. As noted in Chapter three of the study, there are several new features of the constitutional right to administrative justice, which the courts will have to engage. The concepts of substantive fairness and prompt administrative conduct are difficult concepts that the courts will have to formulate tests for. In the case of substantive fairness, the fact that this is the first jurisdiction to expressly use substantive fairness in administrative law, may well be intimidating and daunting for any judge faced with a matter that requires engagement with the right. It, therefore, comes as no surprise that in cases like *James v City of Mutare*,[200] Chigumba J hastily concluded that ZAJA already contained provisions that covered aspects of substantive fairness without specifically dealing with the claim.[201] In *Sgt Chibaya v Board President*, where substantive fairness could also have been applied, the constitutional right was avoided on the grounds of *locus standi*.[202] It would appear that when Zimbabwean courts are confronted with engaging new terrain introduced by features of s68, technicalities are raised to avoid dealing with the matter altogether. For example, *in Sgt Chibaya*, Ndewere J found no need to engage in s68 because the matter was improperly before the court. [203] This type of avoidance can also be described as avoidance by technicalities where the courts filter a case on technical grounds to avoid dealing with a complex or controversial constitutional matter. In *Veritas v ZEC, the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General*, where the conduct of the country's electoral

[199]Constitution of Zimbabwe, s165 (1) (b).
[200] *James* (note 19 above).
[201] Ibid 7.
[202] *Sgt Chibaya v Board President* ZWHHC 46-16
[203] Ibid.

body was argued to be unconstitutional, the High Court dismissed the matter on a technicality by finding that Veritas had no legal standing to challenge the conduct.[204] This is despite the fact that Veritas is a public interest body that serves as a watchdog over both the Executive and Legislature.[205] Interestingly, Veritas had successfully brought other constitutional applications prior to the judgment and the question of legal standing was not raised previously. [206]

In my view, the textual difficulties that arise from trying to interpret s68 of the Constitution may, in part, be the reason that courts avoid engaging the content of the right and instead retreat to the familiar ZAJA text or raise technical grounds to avoid dealing with the matter.

5.6 The Cost of Avoidance

So far, this chapter has considered the instances of avoidance and the reasons for it, but the most important question is what the effect of such avoidance is and what bearing it has on the realisation of the constitutional right to administrative justice. By applying the doctrine of avoidance, courts unintentionally stunt the development of constitutionalism and the 'constitutional doctrine'.[207] This explains why five years after the enactment of the Constitution, there has been very little development of constitutional doctrine in Zimbabwe. In many respects, it can be argued that it has been 'business as usual' and not much has changed from the pre-2013 era.

As Kloppenberg notes, the use of the doctrine results in a failure to give effect to and to protect constitutional rights.[208] For rights to be realised and protected, the courts must necessarily engage with the rights, but this is not the case where the doctrine is invoked. The vulnerable in society suffer more when the doctrine is invoked as the wide constitutional net that is provided by constitutional rights is removed leaving them susceptible to more injustices.[209] The doctrine has been said to operate selectively in cases of extreme social, economic, or political sensitivity

[204] *Veritas v ZEC, the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General* HC 4391/18
[205] http://www.cfuzim.org/~cfuzimb/index.php/newspaper-articles-2/the-courts/7794-parliament-veritas-sign-mou
[206] Ibid.
[207] KG Young 'The avoidance of substance in constitutional rights' (2014) 5 *Constitutional Court Review* 223.
[208] LA Kloppenberg 'Avoiding Constitutional Questions' 35 BCL Rev 1003 (1994).
[209] Ibid.

which not only speaks to selective judicial treatment but suggests that not everyone is equal before the law.[210] The growth of jurisprudence on constitutional law is further hindered by the application of the avoidance doctrine, which is a logical consequence of courts shying away from engaging with constitutional texts in favour of ordinary statutes. Conversely, it is statutory enactments that will receive more attention and develop more substantially when the doctrine is used.

A further argument that has been raised is that the avoidance doctrine unduly blurs the distinction between Parliament and the judiciary because it allows the judiciary to shape the law and become policy makers.[211] Mashaw goes further to note that the doctrine allows judges to make legislative decisions. [212] The doctrine disregards the intentions of the drafters of the Constitution by determining which matters are worth constitutional protection and which ones are not. By reading in caveats that qualify when a right can be relied on or invoked, the courts also seemingly amend the Constitution and restrict access to constitutional rights. For example, in the *Zinyemba* case where an application was made in terms of s68, the courts denied the applicant access to her rights to prompt and substantively fair administrative conduct.[213] *Zinyemba* is also a good example of how the doctrine of avoidance can leave litigants without recourse. ZAJA does not embody a duty for administrative authorities to act promptly nor does it have grounds of review for substantively unfair administrative conduct. The court's insistence that the applicant should have relied on the ZAJA and not s68, therefore, denied her the desired relief which is not located in the ZAJA or indeed any other related statutory enactment.

Friendly wittily remarked that the doctrine of avoidance '*…is one of those rules that courts apply when they want and conveniently forget when they don't*.'[214] This exposes another fatal consequence of the doctrine: legal uncertainty. Due to the lack of consistency and clarity that allow litigants and legal practitioners to know whether a matter will be determined in terms of the Constitution or another law, there is legal uncertainty. This uncertainty will continue to

[210] Ibid.
[211] Ibid.
[212] JL Mashaw *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (1997) 105.
[213] *Zinyemba* (note 40 above).
[214] HJ Friendly *Benchmarks* (1967) 211.

plague the country because the statutory enactments that litigants are forced to rely on are not aligned to the Constitution. The subjective nature of the determination by courts invoking the doctrine further complicates the understanding of judicial enforcement of rights in Zimbabwe.

The use of the doctrine of avoidance can lead to 'poor interpretation of statutes' as courts find themselves trying to bring a specific issue into a statutory text to avoid dealing with constitutional issues.[215] In cases where the statutory text does not embody a specific matter or concept, it is not improbable that the courts may widen the ambit of a statute to avoid engaging with constitutional rights. In the case of ZAJA for example, Justice Chigumba held that ZAJA covers substantive fairness.[216] This approach to the interpretation of statutes is problematic but it is an inevitable outcome of a rigorous application of the doctrine of avoidance. Not only can it lead to questionable interpretation of statutes, the doctrine can equally lead to 'sloppy and cursory constitutional reasoning.'[217]

The effect of the doctrine of avoidance is further amplified by the doctrine of precedence, which binds lower courts to the decisions of higher courts. This is what Katyal and Smidt refer to as the 'precedential effect'.[218] In the Zimbabwean context, the doctrine of avoidance enjoys support largely from the Constitutional Court, which is an apex court. This, therefore, means that lower courts will have to reconcile themselves to any precedent set by the Court regardless of the correctness or lack thereof. This only exacerbates the problems highlighted in this section.

Hofisi notes that the doctrine 'deprives of a chance to be heard on the merits of the case'.[219] This is because courts seemingly perform a tick box exercise and once satisfied that there is a statutory enactment that can be used, they proceed to dismiss the matter on the basis that the applicant or litigant relied on the wrong law. This is particularly true of the Zimbabwean courts, especially

[215] Kloppenberg (note 211 above).
[216] *James* (note 19 above).
[217] Kloppenberg (note 211 above).
[218] NK Katyal & T Schmidt 'Active Avoidance: The Modern Supreme Court and Legal Change' 128 (2015) *Harvard Law Review* 331.
[219] Hofisi (note 83 above) 60.

in cases like *Mujuru* where the court refused to consider the clear unconstitutionality of the conduct of the President. [220]

Hofisi further notes that the avoidance doctrine has the effect of transforming or reducing constitutional rights to legislative ones, which in turn defeats the point of a Constitution.[221] Had the drafters of the Constitution believed that the existing enactments were sufficient to protect rights, there would be no need to specifically include the rights in the Constitution. The inclusion of the rights must be taken to signify Parliament's intention for the highest protection possible.

Excessive use of the doctrine tends to have a delayed effect in litigation resulting in cases dragging on longer than they should.[222] This is because after the Constitutional Court determines that a matter is not a constitutional matter, it sends the matter back to a competent court to deal with and this can take several months.

5.7 Conclusion

For the full effect of s 68 to be realised, the courts must engage the right and not avoid it. If the use of the avoidance doctrine is not properly delineated and minimised by the courts, the right may amount to nothing more than a façade or a theoretic right that has no practical application. The transformative effect of s68 and other provisions of the Constitution, depend heavily on the willingness by the courts to engage and interpret it. Equally important is the role of lawyers in utilising the right, and thus compelling the courts to engage the right.

[220] See *Mujuru* discussion in fn 120 above.
[221] Hofisi (note 81 above) 32.
[222] Ibid.

Chapter Six: Realising the Right to Administrative Justice – Recommendations and Proposed Guidelines

6.1 Introduction and Outline of Chapter

The preceding chapters have sought to discuss the new features of s68 and the challenge in realizing the right. Pointing out challenges without proffering solutions and recommendations does little to produce needed change. This study would, consequently, be of little value if it merely stated the obvious. It is, therefore, befitting that this study ends with recommendations and suggestions of how s68 can come to life and be realized.

There are only two aspects that I will confine the recommendations to - the reform and strengthening of bodies responsible for the realization of the right and the development of legislation that gives effect to s68. The first part considers the various bodies that are directly or indirectly responsible for the realization of s68 and how these can be reformed or strengthened to ensure that they play their respective roles efficiently. Such bodies include the Zimbabwe Human Rights Commission, the Anti-Corruption Commission, administrative tribunals, and the Administrative Court.

The second part recommends aspects to be included in a new administrative justice law to give effect to the rights in s68. Lastly, this chapter concludes with general comments on the effect of the administrative justice right and its link to good governance.

6.2 Reform and Strengthening of Institutions Giving Effect to s68

There are arguably several institutions which have either a direct or indirect effect on the realisation of s68 such as the Administrative Court, Human Rights Commission, Parliament, the police, and government and political parties.[1] For practical reasons, only a few key institutions will be discussed in this section.

As noted in Chapter Three, the strength of the right to administrative justice can only be realised with effective structures to support its existence. It must be reiterated that the right is only as strong as the institutions responsible for its usage and protection. One of these vital institutions

[1] G Feltoe *Guide to Zimbabwean Administrative Law* (2017) 16.

is the Zimbabwe Human Rights Commission which is an Independent Institution Supporting Democracy in terms of s232 of the Constitution.[2]

6.2.1 The Zimbabwe Human Rights Commission

(a) General Overview

The Zimbabwe Human Rights Commission was established in terms of s 242 of the Constitution.[3] Human Rights Commissions have been recognised as vehicles of promotion and protection of human rights.[4] The Commission, therefore, plays a vital role in the realisation, promotion and protection of the right to administrative justice. Feltoe points out that it is 'probably the best agency to deal with the violations of s68 since it is a fundamental right'.[5] The primary legislative enactment governing the Commission is the Human Rights Commission Act.[6] It must be noted that the Act was enacted in 2012 before the 2013 Constitution was drafted. The Act, therefore, still refers to the previous Constitution and has not been amended or aligned to the 2013 Constitution despite numerous requests from the Commission for this to be done.[7]

In terms of the Human Rights Commission Act, the functions of the Commission include conducting investigations and providing 'appropriate redress for violations of human rights and for injustice'.[8] The Constitution, however, envisages a wider role for the Commission. The duties include:

> *a. to promote awareness of and respect for human rights and freedoms at all levels of society;*[9]

[2] Constitution of Zimbabwe, s232. See Chapter Three of this study for a more general discussion of Institutions Supporting Democracy in Zimbabwe and their role in giving effect to constitutional rights.
[3] Constitution of Zimbabwe, s243.
[4] LC Reif 'Building democratic institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1, 2.
[5] Feltoe (note 1 above) 17.
[6] Zimbabwe Human Rights Commission Act [Chapter 10:30].
[7] See for example, Zimbabwe Human Rights Commission *Annual Report* (2016) 4.
[8] Human Rights Commissions Act (note 6 above) s4(a) and (e).
[9] Constitution of Zimbabwe, s243(1) (a).

b. to promote the protection, development, and attainment of human rights and freedoms;[10]

c. to monitor, assess, and ensure observance of human rights and freedoms;[11]

d. to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;[12]

e. to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;[13]

f. to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;[14]

g. to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated;[15]

h. to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigations;[16]

i. to recommend to Parliament effective measures to promote human rights and freedoms;[17]

j. to conduct research into issues relating to human rights and freedoms and social justice.[18]

[10] Ibid s243(1) (b).
[11] Ibid s243 (1) (c).
[12] Ibid s243 (1) (d).
[13] Constitution of Zimbabwe, s243(1) (e).
[14] Ibid s243(1) (f).
[15] Ibid s243 (1) (g).
[16] Ibid s243(1) (h).
[17] Ibid s243 (1) (i).
[18] Ibid s243 (1) (j).

Of importance to this study is the function of the Commission to protect the public against maladministration.[19] This mandate previously rested with the now defunct Office of the Public Protector.[20] Section 107 of the Lancaster Constitution created the Office of the Public Protector whose duties included the 'investigation of action taken by any officer, person or authority … in the exercise of the administrative functions of that officer, person or authority in any case where it is alleged that a person has suffered injustice in consequence of that action and it does not appear that there is any remedy reasonably available by way of proceedings in a court or on appeal from a court.'[21]The 2013 Constitution repealed the Public Protector Act and simultaneously abolished the Office of the Public Protector.[22] The Constitution further transferred the work of the Public Protector to the Human Rights Commission and this has two significant implications.[23] The first is that any open investigation that was being investigated by the Public Protector's Office was transferred to the Human Rights Commission and, secondly, future matters that would have ordinarily been dealt with by the Public Protector, now fall within the jurisdiction of the Human Rights Commission. The Human Rights Commission, therefore, now receives complaints relating to maladministration and ostensibly, violations of the constitutional right to administrative justice.

As an Ombudsman institution, the Human Rights Commission now plays an important role in resolving disputes arising from maladministration and, in turn, ensures that rights such as the right to administrative justice, are realised and enjoyed by all.[24] The Commission itself readily admits its role in resolving disputes arising from the right to administrative justice.[25]The Commission has made great strides since its creation in 2012 but still faces several challenges that hamper its effectiveness.[26] The government of Zimbabwe previously displayed no political will in empowering the Commission, which is evident in that while the Lancaster Constitution

[19] Constitution of Zimbabwe, s243(1) (e).
[20] See s100R of the Constitution of Zimbabwe, 1980.
[21] Ibid s107.
[22] Constitution of Zimbabwe, VI Schedule, s16.
[23] Ibid.
[24] L Chidudza 'The Zimbabwe Human Rights Commission: Prospects and challenges for the protection of human rights' 19 (2015) *Law, Democracy and Development Journal* 148, 151.
[25] See for example Zimbabwe Human Rights Commission *Annual Report* (2015) 15.
[26] Ibid 15, 18.

mandated the creation of the Commission, it was only fully functional almost three decades later.[27]

I now turn to consider a general outline of the ZAJA to understand why it needs to be aligned to the Constitution.

The Act limits the jurisdiction of the Commission which does not extend to the exercise of the prerogative power of mercy for example.[28] However, this limitation is not found in the constitutional mandate of the Commission and seemingly contradicts the Constitution in this regard. The Act gives the Commission powers to summon any individual or body to assist with an investigation.[29] A statutory offence of contempt is created by the Act for anyone who fails to assist the Commission or appear before it when asked to do so and the penalties range from a fine to an imprisonment term of one year, or both.[30] The Act further empowers the Commission to pursue any legal action for the redress of human rights violations in a competent court.[31]In doing so, the Commission may act in its own name or be joined to proceedings.[32] The Act places the Commission under the control of the Minister of Justice and Legal Affairs who is responsible for its budget approval,[33] perusing statements of account,[34] approval of any regulations it passes,[35] approval of donations,[36] approval of administration of funds and use of financial reserves[37] and decisions to invest funds.[38] Copies of all the Commission's reports must be sent to the Minister[39] and any minutes of an organ of the Commission may also be sent to the Minister.[40] The Commission also reports to the Minister on its operations,[41] which extends to decisions to

[27] Chidudza (note 24 above) 151.
[28] Human Rights Commission Act (note 6 above) s9(9).
[29] Ibid s12(8).
[30] Ibid.
[31] Ibid s15(1).
[32] Ibid.
[33] Ibid s18.
[34] Ibid s18(2).
[35] Ibid s23.
[36] Ibid s17(1)(c).
[37] Ibid Second Schedule para 6.
[38] Ibid s17(3).
[39] Ibid Second Schedule para 4.
[40] Ibid First Schedule para 8.
[41] Ibid s8(1) and s8(2)(a).

engage extra staff or consultants.[42] The Minister may at any stage of an investigation, issue a certificate, which precludes evidence from being disclosed in public on grounds of 'defence, external relations, internal security, or economic interests'.[43] Once this certificate is issued, the Commission is prohibited from disclosing the evidence 'for any purpose' unless permission is granted by the Minister.[44] The Act further states that copies of all reports completed after investigations must be sent to the Minister.[45]

The background above is important to understand and see that the Act places a considerable degree of power in the hands of the Minister of Justice. This is an untenable situation as it compromises the integrity of the Commission but more so, contradicts the Constitution as shall be seen in the discussion below. An unintended consequence of the failure to align the Act to the Constitution is that the new jurisdiction of maladministration, which was inherited from the Public Protector, is not expressly dealt with. The Commission is placed in a compromising position where it is unable to fully and independently investigate complaints relating to maladministration as a result of the failure to align the Act to the Constitution. For example, if the Commission is faced with complaints relating to the Minister of Justice in terms of s68 of the Constitution, it will have to investigate its 'parent ministry' yet this is the same ministry that is expected to approve its budgets, operational arrangements, and receive copies of internal information related to investigations including the names of complainants. This is evidently a glaring conflict of interest that threatens the effectiveness and impartiality of the Commission.

The Constitution extends both an enforcement and remedial jurisdiction for violation of human rights which tacitly includes the right to administrative justice. The Human Rights Commission does not charge a fee for complaints brought before it. The Commission, therefore, affords complainants with affordable redress for violations of rights.[46] As noted earlier, the Commission

[42] Ibid s6(1).
[43] Ibid s12(6).
[44] Ibid s12(7).
[45] Ibid s14(1)(f).
[46] <http://www.zhrc.org.zw/complaints-handling-investigations/>

took over the functions of the Public Protector and thus is the primary non-judicial medium for the resolution of disputes arising from s68 and other constitutional rights.[47]

In terms of the Regulations of the Act, the Commission has powers to institute hearings after which reports are made, negotiate, mediate, and conciliate in trying to resolve a dispute.[48] The Commission has more powers accorded to it under the Constitution in contrast to the Act which means that it has greater enforcement and remedial action to assist complainants.[49] For instance, the Commission, may direct the Commissioner General of Police to conduct an investigation into a human rights violation, after which the Commissioner General must send his/her findings to the Commission.[50] The Commission is empowered to take any action it believes to be appropriate when dealing with violation of rights or maladministration matters.[51] The broad powers of the Commission when dealing with a violation of rights are defined more generally as 'securing appropriate address'.[52] The Commission may recommend prosecution of the offenders as part of its remedial powers.[53] The Commission may also make recommendations to Parliament to ensure rights are realised. [54]

According to the 2015 Human Rights Commission's Report, 204 cases were transferred from the Public Protector's Office for completion.[55] Of those cases, 187 were maladministration matters.[56] A total of 278 cases were received by the Commission and 101 of these were maladministration matters.[57] The maladministration matters thus constituted 36.3% of the Commission's case load in 2015. In 2016, the Commission received 515 cases of which 134 were maladministration cases.[58] Despite a sizeable number of maladministration matters investigated by the Commission that were decided against the government, the government has continued to ignore the

[47] Constitution of Zimbabwe, Schedule 6 s16(2). See also Feltoe (note 1 above).
[48] Zimbabwe Human Rights Commission Regulations 2016, Part IV.
[49] Human Rights Commission Act (note 6 above) s243 (1).
[50] Constitution of Zimbabwe, s243 (1)(h).
[51] Ibid s243(1) (d).
[52] Ibid 243 (1) (g).
[53] Ibid.
[54] Ibid 243 (1) (i).
[55] ZHRC Report (note 25 above) 15.
[56] Ibid.
[57] Ibid.
[58] ZHCR Report (note 11 above) 14.

recommendations of the Commission.[59] From 2015, appointments to the Commission were frozen as part of a government-wide directive to freeze posts.[60] This has impacted the efficiency and hampered the work of the Commission.[61]The Commission has no publicly available reports on maladministration matters and there is no indication of the extent of maladministration, nor the remedial action pursued by the Commission. It is important to flag that this is a major flaw that needs to be remedied for the Commission to be effective. The Commission makes use of thematic working groups which include those for children, political rights, gender, equality, and women.[62] The groups are meant to foster greater discussion and research on the focus areas.[63] To date, the civil and political rights thematic working group has not yet been operationalised due to a lack of funds.[64] This means that the Commission is currently not expanding its research and discussion on rights such as the right to administrative justice due to a lack of funds.

The Commission has cited a lack of enforcement powers in terms of the Act.[65] It believes that its powers and recommendations have no binding effect and can, therefore, be ignored. While admitting that the government does not generally respond to maladministration matters,[66] the Commission claims that the government supports its work - a claim that cannot be objectively verified.[67] There is unfortunately, no information to support the claims made as the reports of cases handled are not disclosed to the public. The view that its decisions are not binding, seems to be at odds with the Constitution, which gives the Commission power to take appropriate action to ensure redress and the observance of rights.[68] Arguably, if its recommendations are not binding, then it cannot fulfil the mandate of ensuring redress and observance of rights since these recommendations can simply be ignored. More importantly, since the Commission took over the functions of the defunct Public Protector's Office, the remedial powers of the Commission need

[59] Ibid 18, 46.
[60] Ibid 14.
[61] Ibid.
[62] Ibid 21.
[63] Ibid.
[64] Ibid.
[65] ZHRC Report (note 25 above) 34.
[66] Ibid 50.
[67] Ibid.
[68] Constitution of Zimbabwe, s243(1).

to match those that the Public Protector's Office enjoyed, at least in respect of maladministration matters that it will have to deal with.

The s68 right can, in part, be given effect to, by a fully-fledged and functional Human Rights Commission. In the following section, I set out possible reforms that will strengthen the Commission and enable it to fulfil its constitutional mandate, thereby giving effect to the s68 right.

(b) Suggested Reforms of the Human Rights Commission

In the above section, it was noted that the Minister of Justice is overly involved in the operation of the Commission in terms of the Human Rights Commission Act. This affects the independence and autonomy of the Commission[69] which, in turn, hampers its impartiality. The Commission's first Chairperson, Prof Reg Austin resigned from his post for these very reasons.[70]To remedy this, the Commission must be allowed to operate independently as required by the Constitution. Section 235 (1) (a) of the Constitution requires a Commission such as the ZHRC, to be independent and not subject to the control of anyone.[71] The Constitution further prohibits anyone from interfering with the functions and operations of the Commission.[72] The Minister should, accordingly, not be able to control the direction or affairs of the Commission. The Human Rights Commission Act is thus at odds with this constitutional requirement by vesting unfettered power in the Minister and should be amended to reflect the correct constitutional position.

The thematic group on civil and political rights should also be functional to allow for further discussion, research, and consideration of rights like the administrative justice right. This will, in the long run, promote awareness and observance of the right to administrative justice. The Commission should also engage government departments and offer training on the tenets of good administrative justice in line with s68. In doing so, the Commission will avert playing the

[69] Chidudza (note 24 above) 154.
[70] < https://africasustainableconservation.com/2012/12/30/zimbabwe-law-specialist-professor-austin-leaves-human-rights-commission/ > More specifically, Prof Austin cited fundamental interferences from the Minister of Justice and his office as well as under funding and lack of supporting legislation.
[71] Constitution of Zimbabwe, s235(1(a).
[72] Constitution of Zimbabwe, s235(3).

remedial role it currently plays and encourage a more pro-active approach to observance of the right to administrative justice. It is said that prevention is better than cure and, in this case, by training administrators who often are the subject of administrative justice complaints (or maladministration cases generally), the Commission encourages good governance and a higher standard of conduct by administrators. Some of the indicators of good governance in the Constitution are accountability, efficiency and responsiveness, which can be enhanced by a pro-active Human Rights Commission.[73]

In 2015 and 2016, the Commission lamented the lack of funding and failure to recruit staff to complement its work.[74] Currently, the Human Rights Commission Act places the ultimate power to employ in the hands of the Minister.[75] In terms of the Constitution, however, all Independent Commissions Supporting Democracy which include the Human Rights Commission[76], should independently employ staff and regulate their own conditions of service.[77] The statutory position is, therefore, unconstitutional to the extent that it strips the Commission to independently make employment determinations. It is submitted that if the Commission is allowed to exercise its constitutional prerogative to make decisions related to employment, it will be able to effectively execute its mandate and resolve disputes arising from s68, more efficiently. The current staff-deficit has an impact on the effectiveness and capacity to resolve disputes promptly. This further frustrates the realisation of s68, since the Commission is a key institution in securing redress for the violations of the right.

The Human Rights Commission Act requires the Commission to send reports of ongoing and completed investigations to the Minister of Justice.[78] This position is undesirable because it compromises the integrity of the investigation process and again places the Commission under the purview of the Minister, when in fact, the Commission should account only to Parliament. The Act must be amended in this regard, as the current provisions affect the perceived

[73] Constitution of Zimbabwe, s3(2).
[74] See the 2015 and 2016 Human Rights Commission Reports highlighted earlier in note 25 and 7 above respectively.
[75] Human Rights Act (note 6 above) s6(1) b).
[76] Constitution of Zimbabwe, s232(b).
[77] Ibid s234.
[78] Human Rights Commission Act (note 6 above) s8.

independence of the investigation process and may deter some complainants from approaching the Commission.[79]

Lastly, the Human Rights Commission Act must be amended to give effect to the letter and spirit of the Constitution. Vital amendments to the Act alluded already to earlier, include the removal of powers from the Minister of Justice, independence of the Commission[80], securing funding directly from Parliament as required by the Constitution[81] and independent reporting mechanisms free from interference. In addition to this, the Act must provide for the Commission's powers to summon and require any person to provide it with a report on measures taken to give effect to the rights in the Constitution.[82] This constitutional provision places government and other persons in a position to account to the Commission, but it has not yet been given effect to. Further transparency in reporting and dealing with violations should also be part of the amendment Act as this will improve the public's confidence in the Commission. Currently, the Commission does not make all of its findings public and these are only sent to the complainant and the Minister of Justice if he or she so requires.

Wider enforcement powers are required for the Commission to fully exercise its mandate. The admission by the Commission that its recommendations have no binding effect is worrying.[83] With no binding effect, the recommendations can be ignored. Practice seems to suggest that this has been the case.[84] To improve its remedial powers and for its recommendations to be taken seriously, the Commission should be empowered to make recommendations that have a binding effect similar to the South African Public Protector's powers.[85] The combined dual role played by the Commission, as alluded to earlier, necessitates that it be empowered to resolve disputes and make recommendations to remedy maladministration concerns adequately.

[79] Chidudza (note 24 above) 154.
[80] Constitution of Zimbabwe, s235.
[81] Ibid s322.
[82] Ibid s244(1)(a).
[83] Human Rights World Watch *Country Report: Zimbabwe* (2017).
[84] ZHRC Annual Report (note 7 above) 46.
[85] See for example *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 and *Economic Freedom Fighters v Speaker, National Assembly & Others* 2016 (3) SA 580 (CC)

Feltoe argues that the abolition of the Public Protector's Office was not a desirable move given the specific nature of maladministration matters.[86] It may, therefore, be argued that an amendment of the Constitution to rectify this is worth considering. This is, however, an unlikely scenario and in any event, frequent amendments to the Constitution are not desirable.[87] A more practical solution is to work within the existing framework and simply strengthen the functions of the Human Rights Commission. A more effective Human Rights Commission will enhance the realisation and protection of the right to administrative justice.

6.2.2 The Administrative Court of Zimbabwe

(a) Overview and background

The Administrative Court was set up in 1979.[88] It is governed by the Administrative Court Act [Chapter 7:01].[89] The court is headed by the President of the Court and disputes are presided over by judges who, in turn, are assisted by assessors whose role extends to questions of fact and not questions of law.[90] Generally, the court deals with matters of an administrative nature and largely deals with appeals from decisions made by public authorities.[91] The court has no criminal jurisdiction and hears matters arising from several Acts of Parliament. Some of these include the Estate Agents Act,[92] Hazardous Substances and Articles Act,[93] Land Acquisition Act,[94] Mines Act,[95] Liquor Act[96], and Procurement Act.[97]

Currently, the Court is limited to appeals and reviews in terms of statutes where specific reference to the Court is made.[98] The Court does not, therefore, have inherent jurisdiction and

[86] Feltoe (note 1 above).
[87] The Constitution has already been amended less than four years after its enactment as noted in the discussion of the independence of the judiciary above.
[88] Feltoe (note 1 above) 34.
[89] Administrative Court Act [Chapter 7:01].
[90] Ibid.
[91] Feltoe (note 1 above) 34.
[92] Estate Agents Act, s31.
[93] Hazardous Substances and Articles Act, s27.
[94] Land Acquisition Act [Chapter 20:10], s29D.
[95] Mines and Minerals Act [Chapter 21:05], s227.
[96] Liquor Act [Chapter 14:12], s19.
[97] Public Procurement and Disposal of Public Assets Act [Chapter 22:23].
[98] Feltoe (note 1 above) 34, 35.

will only be competent to adjudicate a matter if it has been accorded such powers in terms of statute. Without a statutory enactment permitting it to do so, the Court cannot receive general review and appeal applications in terms of s68 or indeed the ZAJA.

(b) Reimagining the function and the role of the Administrative Court

Both Feltoe and Mavedzenge are of the view that the function of the Administrative Court should be restructured to allow it to play a central role in the adjudication of disputes arising from s68 and the envisaged Act giving effect to it.[99] I agree that this is a viable and efficient solution. As noted earlier, the current framework limits the role of the Court to matters where appeal and review powers have been set out in legislation. In the absence of express jurisdiction in legislation, the Court lacks the necessary jurisdiction to entertain disputes.

Feltoe believes that the current structure of the court is not intended to develop administrative law *per se* but that this should be changed to make it more pliable to enforcing the administrative justice right.[100] To this end, he advocates for the court to have exclusive jurisdiction over review and appeal administrative justice matters without being confined to specific legislation.[101] This would remove the current primary and exclusive jurisdiction powers from the High Court which, in terms of the ZAJA, is the designated primary control for judicial review in administrative justice matters. This would expedite matters brought before the Court and unclog the High Court which is already dealing with a backlog of cases.[102] The added advantage of using the Administrative Court in this way is it would create a specialist court of sorts that is tasked solely with determining matters related to administrative justice, unlike the High Court, which deals with a wide array of issues due to its inherent jurisdiction.[103] It may possibly have the effect of reducing questionable judgments that have emerged from the superior courts. The specialist nature of the court would

[99] See for example J Mavedzenge 'Reviewing the constitutionality of the Administrative Justice Act (Chapter 10:28) of Zimbabwe' *Unpublished Thesis* (2015) 12,13 & Feltoe (note 1 above) 35.
[100] Feltoe ibid.
[101] Ibid.
[102] <https://www.herald.co.zw/courts-saddled-with-14-576-case-backlog/>.
[103] Feltoe (note 1 above) 38.

mean that the court is better placed to deal with administrative justice matters and this would result in a richer jurisprudence on administrative justice in Zimbabwe.

By expanding the Court's jurisdiction, s68 can become a lived reality with practical, inexpensive, and efficient dispute resolution mechanisms that do not depend on approaching the High Court as a court of first instance. There is, therefore, a need to amend the Administrative Court Act to give it more jurisdiction and use it as a primary vehicle for the realisation of the administrative justice right. Section 68(3) of the Constitution already envisages the creation of independent and impartial tribunals, which together with the High Court, can review administrative conduct.[104] The legislature, therefore, merely has to create legislation to give effect to s68(3), which, in this case, can effectively be done by amending the current Administrative Court Act.

6.2.3 Setting up of Administrative Tribunals

As noted above, s68 (3) creates a duty on Parliament to enact, where appropriate, an Act that provides for the review of administrative conduct by an impartial and independent tribunal.[105] Zimbabwe has already introduced various tribunals that operate as specialist tribunals.[106] Some of these include the Intellectual Property Tribunal, Liquor Licencing Board, and the Industry and Trade Competition Commission Tribunal.[107] Feltoe notes that the advantages of tribunals are that they decongest the courts, incur less costs because of the simplicity of processes used and they are generally flexible in their procedures and operations.[108] One of the most attractive features of the tribunals is they are generally staffed by technical experts in the jurisdictional field of the tribunal.[109] For instance, the Competition Tribunal is staffed by individuals who are not only familiar with the field of anti-trusts and competition law, but are experienced in the practical and theoretical aspects of the field. The same benefits can be realised for an administrative law tribunal.

[104] Constitution of Zimbabwe, s68(3).
[105] Ibid.
[106] Feltoe (note 1 above 38).
[107] Ibid.
[108] Ibid.
[109] Ibid.

Writing on the South African context, Hoexter notes that adjudication by such tribunals differs from the adjudication by courts in that they not only resolve disputes of an administrative nature but 'regulate the administrative conduct for the future.'[110] The tribunals offer expeditious dispute resolution and have been said to resolve matters at a faster and cheaper rate than the courts.[111] This can be attributed to the specialist nature of these tribunals unlike courts, which adjudicate a wide array of matters. The tribunals are less formal than courts thus making it easier and more accessible for aggrieved parties to bring matters before the tribunals. In some cases, tribunals may allow for direct access to aggrieved parties without the need for legal representation, making it cheaper and less complex than the courts, which require legal representation.[112] She also notes that the courts can act as checks and balances by providing for review and appeal mechanisms of decisions from the tribunals.[113] In doing so, there is a sufficient safeguard to ensure proper redress.

The abolition of the office of the Public Protector and the transfer of its functions to the Human Rights Commission, can be argued to place an undue burden on the Commission. The net effect of this is that the Commission will struggle to effectively deal with maladministration matters. It would, therefore, be appropriate to create Administrative Justice Tribunals, which have a seat in every province of the country to ensure speedy redress of violations of the right to administrative justice. This will not only decongest the courts but allow the Human Rights Commission to deal with other matters more effectively and timeously. The tribunals can be given much more power to ensure proper redress and together with the Administrative Court, they can act as primary vehicles for the realisation of the administrative justice right. Since most tribunals are enacted by statute, it would be beneficial for the legislature to create administrative courts in the ZAJA which creates such jurisdiction.

[110] C Hoexter *Administrative Law of South Africa* (2012) 54.
[111] Ibid.
[112] Ibid.
[113] Ibid.

6.3 Creation of an Act giving effect to s68

Section 68(3)(a) places a duty on Parliament to enact legislation to give effect to the constitutional right to administrative justice.[114] Some commentators are of the view that the Act envisaged by s68(3) is the ZAJA in its current formulation and thus there is no need for an additional Act to give effect to s68(3).[115] The Constitutional Court itself has assumed that ZAJA gives effect to s68 in *Zinyemba v Minister of Justice*.[116] DCJ Malaba, as he then was, held that:

> *'There cannot be an allegation in terms of s 85(1) of the Constitution of administrative conduct violating the fundamental right to administrative justice enshrined in s 68 of the Constitution when there is an Act of Parliament which validly gives full effect to the requirements for the protection of the fundamental right against the provision of which the legality of the administrative conduct must be tested'*[117]

The dictum above cannot, with respect, be considered accurate in light of the shortcomings of ZAJA explored in Chapter Two and Three of this study. The fact that ZAJA predates the Constitution further complicates the assertion of the Court in *Zinyemba*. Previous chapters of this study have already argued that the addition of new features in s68 necessitates several amendments required to the ZAJA which make it unsuitable for the purposes of s68 (3). In its current state, the Act cannot be said to give effect to s68 or indeed qualify as legislation contemplated in s68(3). Logically, the question is what becomes of the ZAJA - should it be amended to satisfy the requirements of s68, or should a new Act be drafted for this purpose? The latter suggests the repeal of the ZAJA and the former, an amendment of same.

Public law think-tank, Veritas Zimbabwe, notes that both amendments and repeals are part of the alignment of laws to the Constitution.[118] The alignment of laws is to ensure that the existing laws that pre-date the Constitution are constitutionally compliant and consistent. This is in line

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[114] Constitution of Zimbabwe, s68(3) (a).
[115] See for example T Chinopfukutwa 'House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective (2017) *Zimbabwe Human Rights Journal* 145.
[116] *Margaret Zinyemba v Minister of Lands and Rural Settlement* (2016) ZWCC.
[117] Ibid.
[118] Veritas 'Alignment of Laws with Constitution' (29 May 2017) *Constitution Watch 5/2017.*
. See also <https://www.thezimbabwean.co/2017/05/laws-aligned-constitution/>

with s2(1) of the Constitution which requires, in part, that all laws are consistent with the Constitution and that any laws that are inconsistent with it are invalid to the extent of the inconsistency.[119] Alignment serves three key functions, according to Veritas and these are to implement the Constitution, to create legal certainty, and usher in and cement a constitutional democracy. [120] The realisation of the Constitution would not be possible if some laws undermine the Constitution or contradict its provisions. Where a clash between the Constitution and ordinary statutes exist, it is difficult to ascertain which of the two should be followed, at least to non-legal minds. While constitutionalists and legal scholars will easily determine which law prevails, the same cannot be said of the rest of society and in this regard, this poses a great impediment to the enjoyment of constitutional rights. Veritas cites an example of a clash between the Prisons Act and the right to life in the Constitution to indicate the uncertainty that the public may face.[121] Veritas further notes that in terms of s30 of the Prisons Act, it is permissible to shoot prisoners in certain instances and this is seemingly contrary to the right to life.[122] This contradiction is easy to resolve if one has a good grasp of constitutional law or indeed conflict of laws doctrines, but not necessarily for a prison official who needs to determine which law to abide by. The confusion caused by contradictory laws is compounded by the status of validity derived from the Constitution which states that all laws predating the Constitution remain valid and in force.[123] This amplifies the need for clarity and certainty, which can be brought about by the harmonisation and alignment of laws to the Constitution.

The Constitution requires that existing laws be construed in conformity with it.[124] This means that existing laws must not only conform to the Constitution but impliedly, these must be transformed to give effect to the Constitution. Alignment can, therefore, refer to an amendment or a repeal of laws for this purpose.[125] In determining which of the two routes the legislature should take,

[119] Constitution of Zimbabwe, s2(1).
[120] Veritas (note 118 above).
[121] Ibid.
[122] Ibid. While Veritas argues that this interferes with the right to life, it must be noted that the Act specifically refers to minimal force for purposes of disarming a prisoner rather than killing them. The Act does not therefore does not speak directly to a shoot-to-kill approach as suggested.
[123] Constitution of Zimbabwe, Schedule VI par 10.
[124] Ibid.
[125] Veritas (note 118 above) 7.

Veritas suggests that a repeal is appropriate where there are numerous amendments to be made to an existing Act or where amendments made to an existing Act make it difficult to understand what the actual provisions of the Act are.[126] In some cases, it would seem that a repeal is more appropriate where the foundational premise of an Act is irrelevant, outdated, ultra vires, inconsistent with or superseded by the Constitution.[127] Veritas is of the view that repeals are appropriate for legislation such as the Electoral Act, Exchange Control Act, and the Official Secrets Act.[128]Mavedzenge is of the view that the ZAJA is in need of extensive amendments and his views are shared by Veritas.[129] In my view, however, ZAJA is almost completely incompatible with the spirit and letter of s68 and the Constitution in general as noted in Chapter Two and Three of this study. I, therefore, take the view that ZAJA should not simply be amended as this would be so extensive that the original law will be difficult to recognise. In such a case, repeal will be a better solution to the alignment. The new law should start from the premise that administrative justice is not a gift from the State to the citizens which can be withdrawn as and when the legislature or Executive decides to, but it is instead, a guaranteed constitutional right.

The task of aligning laws to the Constitution primarily rests with the Inter-Ministerial Task on Alignment to the Constitution (IMT), which was created by the Ministry of Justice, Legal and Parliamentary Affairs in 2015 to coordinate the process of alignment of all legislation pertaining to the government of Zimbabwe.[130] The IMT estimates that 63 Acts need to be aligned to the Constitution and Veritas believes the number should in fact be 74. Both the IMT and Veritas agree that the ZAJA needs to be aligned to the Constitution.[131] Veritas and IMT also agree that ZAJA needs to be amended rather than repealed.[132]

[126] Ibid 8.
[127] This seems to have been the motivation behind the suggested repeal of the Parliamentary Services Act [Chap 2:03] as mooted by Veritas. See Veritas 'Statutes Requiring Constitutional Alignment' (April 2017).
[128] Ibid 4.
[129] Mavedzenge (note 99 above).
[130] Inter-Ministerial Taskforce 1 (31 March 2017) *The IMT Newsletter* 1.
[131] Ibid Newsletter (2) 2017 3, Veritas (note 127 above).
[132] IMT (note 130 above).

Veritas is of the view that ZAJA should be amended in respect of the following:

a. Changing the definition of administrative action and administrative conduct in s2 of the ZAJA to the meaning of administrative conduct in s68 and s332 of the Constitution;[133]

b. Amending s3 of the ZAJA to include proportionality, impartiality and substantive fairness;[134]

c. Repeal of s3(3) of the ZAJA which allows *ultra vires* and unlawful decisions to be made and be exempt from judicial scrutiny,[135]

d. Incorporate time limits within which courts and tribunals must deliver judgments,[136] and

e. Amendment of list in Schedule to prevent ouster of jurisdiction clauses.[137]

The IMT has not released any information pertaining to the scope of the possible amendments to the ZAJA to date. The intention of government in this regard, remains a closely guarded secret. Mavedzenge has, on the other hand, identified the following as necessary amendments to the ZAJA:

a. Removal of materiality from the requirement on the right to request reasons in the ZAJA;[138]

b. A wider ambit of locus standi in the ZAJA as the current formulation is narrower than the constitutional guarantee;[139]

c. Removal of ouster clauses that prevent matters from being heard by the courts[140] and

[133] Veritas (note 127 above) 2.
[134] Ibid.
[135] Veritas (note 127 above) 2.
[136] Ibid.
[137] Ibid.
[138] Mavedzenge (note 99 above) 6,7.
[139] Ibid 7.
[140] Ibid 9.

d. Removing the reverse onus created in s11(2) of the ZAJA which requires a litigant to show there is no public interest served by withholding written reasons before same can be furnished to the litigant.[141]

On the basis of the number of amendments required for the ZAJA to be compliant with s68 and the Constitution generally, I submit that a repeal is necessary to avoid excessive 'patchwork'. Whether the distinction between amendment and repeals is significant herein, is a matter of academic debate, but the net effect seems to be the same. Ultimately, whether Parliament decides to repeal ZAJA or amend it, the features introduced by s68 should be given effect to. In the discussion below, I set out some considerations for the new Act as envisaged in s68 (3) of the Constitution. These guidelines and recommendations can equally be applied to an amended ZAJA.

6.3.1 A New Introductory Section and Purpose Reflecting the Constitutional Premise of the Act

Currently, ZAJA's introductory section and purpose read as follows:

> *'AN ACT to provide for the right to administrative action and decisions that are lawful, reasonable, and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions; to provide for relief by a competent court against administrative action or decisions contrary to the provisions of this Act; and to provide for matters connected with or incidental to the foregoing.'*[142]

As discussed in chapters One and Two of this study, ZAJA codified the common law but was not created to give effect to any constitutional administrative justice right. It was, therefore, premised on the common law. In light of s68, the new Act envisaged in s68 (3) should replace the introductory section and purpose of the Act to include the elements of promptness, efficiency, proportionality, impartiality, and substantive fairness, which are, as argued previously, absent

[141] Ibid 11.
[142] ZAJA, Preamble.

from the existing administrative law framework.[143] The Introduction section should additionally highlight that the Act gives effect to s68 of the Constitution since the current Act is premised on the common law and as such does not base its existence on the Constitution.

6.3.2 A New Preamble

Currently, there is no preamble for the ZAJA. Preambles play an increasingly important role in the interpretation of constitutional provisions and enactments that give effect to constitutional rights.[144] A preamble further demonstrates the intentions of the drafters of the legislation and the history behind the legislation, which might assist a court in interpreting the enactment.[145] Preambles can furthermore set out the intended objectives, which underpin the enactment.[146] On the basis of the foregoing, it is desirable for the introduction of a preamble in the new Act. In the preamble, the objectives of s68 which as previously discussed include promotion of good governance, creation of a culture of accountability, justification for exercises of power, openness, and transparency by giving effect to the right to administrative justice.[147]

The preamble would essentially be drawn from the wording of s68 of the Constitution with incorporated values from the underlying values and guiding principles of the Constitution. It is important to note that the preamble should refer to the principle of good governance, which is both a constitutional value and principle through which rights must be interpreted.[148] Good governance is specifically referred to as one of the objectives of s68.[149] A restatement of the content of s68 might be useful to include in the preamble to serve as guidance on the background of the creation of the enactment.

[143] See Chapter Three of the study in this regard.
[144] L Orgad 'The preamble in constitutional interpretation' 8 (2010) *International Journal of Constitutional Law* 714, 715. See further H Kelsen 'The Preamble of the Charter—a Critical Analysis' 8 (1946) 2 *Journal of Politics* 134
[145] Orgad ibid.
[146] Ibid.
[147] See discussion of same in Chapter Three.
[148] Constitution of Zimbabwe, s3(2) and s9.
[149] Constitution of Zimbabwe s68(3).

6.3.3 Definitions

The ZAJA has several definitions that either need to be tweaked or removed entirely to complement the definitions in the Constitution. In addition, new definitions need to be inserted into the Act. These are:

i. **'Administrative Action'**- ZAJA defines administrative action as 'any action taken, or decision made by an administrative authority'. The Constitution makes no reference to administrative action and instead refers to administrative conduct both in s68 and s332. The term administrative conduct is defined in s332 as '… any decision, act, or omission of a public officer or of a person performing a function of a public nature, and a failure or refusal of such a person to reach such a decision or to perform such an act.' It is submitted that the definition in the Act be discarded to reflect the definition in s332. Any references to administrative action must, therefore, be removed in favour of administrative conduct with the definition in s332 applied. From this definition, it must be noted that in terms of the new Act, one would be able to invoke the provisions of the Act if the 'ingredients' or prerequisites are satisfied. These are

    i. a decision, act or omission

    ii. of a public officer or person performing a public function or

    iii. a failure or refusal of a public officer or person performing a public function to reach a decision or perform a public function or duty

In formulating a new Act and definition of administrative conduct, the legislature must ensure that these prerequisites highlighted in the Constitution are replicated. It is also important that the new Act does not make the definition more cumbersome because that would effectively mean that the Act places additional restrictions on the enjoyment of the right to administrative

justice. Additional formulations may, in turn, complicate the Act as has been the case with South Africa's PAJA.[150]

ii. **'Administrative authority'** – ZAJA referred to administrative authorities in its definition of administrative action as discussed in Chapter Two of this study. By virtue of the proposed removal of the administrative action definition discussed above, it stands to reason that the accompanying administrative authority definition must necessarily be removed from the new Act as it has become redundant on account of s332 of the Constitution.

iii. **'Constitution'** – At present, ZAJA makes no reference to the Constitution which is understandable because its foundation was the common law. The new Act should, however, refer to the Constitution and in doing so, should define the Constitution as the 'Constitution of Zimbabwe, 2013.'

iv. **'Court'** – ZAJA refers to the High Court exclusively as the primal court for review. A new Act should define court in the broadest terms possible. This, in part, is due to the fact that the Constitution now regards the right to administrative justice as a constitutional right thus making it a potential subject for a constitutional challenge which may be heard by the Constitutional Court.[151] In giving a broad meaning to 'court', the new Act should also consider covering the Administrative Court and other courts contemplated in s174 of the Constitution as noted in earlier sections of this chapter.

This study has argued in previous chapters, that the devolution of exclusive jurisdiction from the High Court in administrative justice matters will allow more disputes to be resolved and thus, a broad definition of courts will facilitate this as and when the Legislature expands the jurisdictional bases of the courts. To this end, the opportunity to extend the jurisdiction of the courts awaits the drafters of the new Act to remedy this.

[150] In this regard, see commentary by Hoexter (note 110 above) 196 & 247 wherein she argues that the complexity of the definition in the PAJA has led to increased avoidance of the Act and the growth of an alternative pathway of review -the principle of legality which is simpler and less cumbersome on applicants to rely on.
[151] Constitution of Zimbabwe, s167(1) and (2).

v. **'Decision'** – As noted in the definition of administrative conduct above, the Constitution refers to a decision in its definition, but no further meaning is given to the term 'decision'. Although ZAJA uses the term, it does not define it or provide guidance on its meaning. The Kenyan Fair Administrative Action Act of 2015 defines a decision as 'any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be'.[152] Zimbabwe can adopt the same definition but tailor it such that the definition is not a close-ended definition and allows the courts to give further meaning to the term.[153]

vi. **'Failure'** – ZAJA refers to the failure to act but does not refer to a failure to decide nor does it define what a failure is. The Kenyan Administrative Action Act defines a failure, however, as including the refusal to make a decision but leaves it open-ended.[154] This position is identical to the South African definition of failure in the PAJA.[155] There is no reason why the definition should not be adopted as is. By leaving the definition open-ended, the courts have room to craft further meanings as the jurisprudence develops.

vii. **'Public Nature'** – Section 332 of the Constitution refers to a person performing a function of a public nature. There is no definition of a public nature function either in the ZAJA or the Constitution. It is submitted that the phrase be read instead as a person performing a public function since these terms are quintessentially the same.

This position is similarly held in jurisdictions like South Africa.[156] While the concept of public function has been challenged in several cases, there seems to be consensus on the factors that courts will consider in determining the existence of a public function. In the Supreme Court of Appeal case of *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road*

[152] Kenya Fair Administrative Action Act, 2015.
[153] Hoexter (note 110 above) 203 notes that the determination of what constitutes a decision often is a factual based enquiry and thus much depends on the facts of the case. In this regard, it is therefore desirable for the definition to be broad enough to allow unimagined scenarios that may come before the courts.
[154] Kenya Administrative Action Act (note 147 above).
[155] Promotion of Administrative Justice Act, s1 (hereafter, the PAJA).
[156] PAJA (note 150 above) s1.

Freight Industry, the Court held that the determination must be done on a case-by-case basis.[157] Nugent JA held for the court, that there must be a connection to the government in some way, shape, or form including government funding, governmental control, or governmental regulation.[158] In the Constitutional Court case of *AAA Investments*, the court identified the exercise of delegated regulatory functions that should ordinarily be performed by government as key indicators of a public function.[159] The Court further noted that additional considerations include whether the entity in question is controlled by government and whether the person or entities involved play a complementary role in regulation of a sector.[160]

As with other definitions, it is important to leave the definition open to cater for unforeseen or overlooked scenarios that can be captured in this definition.

viii. **'Public Officer'** – ZAJA makes no reference to public officers but s332 of the Constitution defines public officers as 'a person holding or acting in a public office'.[161] A public office is, in turn, defined as 'a paid office in the service of the State'.[162] It is, thus, submitted that the new Act inserts the definition of public officers as it forms part of the definition of administrative conduct as highlighted above.

ix. **'Tribunal'**– No reference to a tribunal is made in ZAJA. It is suggested that a definition of the same be included. Earlier in this chapter, it was noted that the creation of administrative tribunals would serve as catalysts and buffers for the protection and realisation of the right to administrative justice. It is, therefore, important that these be established in terms of the new Act. As highlighted in Chapter Four, tribunals must be independent and impartial in line with s68(3) of the Constitution and this must be included in the definition. In this regard, the definition of tribunal in the South African PAJA which defines it as '*any independent and impartial tribunal established by national*

[157] *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA).
[158] Ibid par 40-43.
[159] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC).
[160] Ibid par78, 79.
[161] Constitution of Zimbabwe, s332.
[162] Constitution of Zimbabwe, s332.

legislation for the purpose of judicially reviewing an administrative action in terms of this Act', can be instructive.[163]

6.3.4 Grounds of Review

Due to the additions in the constitutional formulation of the right to administrative justice, there is need to incorporate and, in some cases, refine the grounds of review in the new Act. In the overview of the ZAJA, it was noted that s3 of ZAJA currently confines the grounds of review to lawfulness, reasonableness, procedural fairness, unreasonable delays and reasons. Section 68 on the other hand, creates grounds of review premised on:

- Lawfulness;
- Promptness;
- Efficiency;
- Reasonableness;
- Proportionality;
- Impartiality;
- Substantive fairness;
- Procedural fairness and
- Prompt and written reasons.

The Zimbabwean grounds of review or prisms of protection for administrative justice can, therefore, be captured under these nine broad categories which will, in turn, give rise to more specific grounds under them. These grounds need to be reflected in the new Act. The possible content of the grounds of review is explored in greater detail below.

[163] PAJA (note 150 above), s1.

i. Lawfulness

The lawfulness ground of review in the ZAJA is not specific in that it merely prohibits unlawful administrative action.[164] Hoexter notes that lawfulness entails authorised administrative conduct or action which complies with any 'requirements or preconditions that attach to the exercise of the power'.[165] Administrative conduct is, therefore, unlawful where there is no legal basis for it or if it was not properly authorised. Where the administrator exceeds the powers given to him or her, a declaration that the conduct was *ultra vires* follows.[166] Section 5(b) of the ZAJA contains a corresponding ground, as Feltoe notes.[167]

It must be noted that the grounds of review in s5 of the ZAJA are generally vague and ambiguous while potentially suggesting that conduct stipulated in the grounds of review, can be waived in some cases.[168] Section 5 of ZAJA is prefaced with the following: 'for the purposes of determining whether or not an administrative authority has failed to comply with section three (the grounds of review) the High Court **may** (*my emphasis*) have regard to whether or not…' The inclusion of the words 'may' and 'have regard' potentially suggest that courts have a discretion to disregard the grounds contained thereunder. This is an undesirable position and should be amended to clearly set out that the grounds of review must be engaged as a matter of course rather than a judicial discretion. This is so because s68 creates a right to lawfulness which ZAJA or any other Act cannot limit or deprive litigants of at will. Lessons can be drawn from South Africa's PAJA, which in part reads '*A court or tribunal has the power to review an administrative conduct if …*'[169] This phrasing seemingly removes the ambiguous discretion afforded to judicial officers in ZAJA.

The ZAJA lists factors that a court can consider in determining lawfulness. These include:

i. 'Whether there is a material error of law or fact;'[170]

[164] ZAJA, s3.
[165] Hoexter (note 110 above) 252.
[166] *B-Sky Energy (Pvt) Ltd* v *Minister of Energy & Anor* 2009 (2) ZLR 241 (H). See also Hoexter (note 110 above) 255,256.
[167] Feltoe (note 1 above) 27. See also *B-Sky Energy (Pvt) Ltd v Minister of Energy & Anor* 2009 (2) ZLR 241 (H).
[168] See also s5(p) which permits a waiver of lawfulness where such departure is reasonable and justifiable.
[169] Phrasing derived in part from PAJA s6(2).
[170] ZAJA s5(c).

ii. *Whether the administrative authority has jurisdiction in the matter;*[171]

iii. *Whether a power has been exercised for a purpose other than that for which the power was conferred;* [172]

iv. *Whether fraud, corruption, favour, or disfavour was shown to any person on irrational grounds;*[173]

v. *Whether bad faith has been exercised;*[174]

vi. *Whether a discretionary power has been improperly exercised at the direction, behest or request of another person;*[175]

vii. *Whether a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question;*[176]

viii. *Whether a power has been exercised in a manner which constitutes an abuse of that power;*[177]

ix. *Whether an irrelevant matter has been taken into account;*[178]

x. *Whether a relevant matter has not been taken into account;*[179] *and*

xi. *Where the procedures specified by law have been followed.'*[180]

These factors are actual grounds of review in the South African PAJA.[181] I submit that, in drafting a new Act, the legislature should clearly set out that these are not mere factors that bring about

[171] Ibid s5(a).
[172] Ibid s5(d).
[173] Ibid s5(e).
[174] Ibid s5(f).
[175] Ibid s5(g).
[176] Ibid s5(h).
[177] Ibid s56(i).
[178] Ibid s5(l).
[179] Ibid s5(m).
[180] ZAJA s5(o).
[181] See for example PAJA s6.

a value judgment but are independent grounds that can be the basis of judicial review. In addition to reformulating these, a few comments are worth making:

(a) A specific ground of review dealing with unlawful referral where an administrator empowered to take a decision, relies heavily on the opinion of another person such that the opinion overrides the discretion of the administrator, should be created. This ground is distinct to the ground of unlawful dictation which is expressed in s5 of ZAJA as 'where a discretionary power has been improperly exercised at the direction, behest, or request of another person'.[182] The distinction is that with an unlawful referral there is no request, dictation, or directive but there is instead an over reliance on the advice of another individual or body.[183] This over-reliance deprives the official or administrator of the discretionary power given to them, hence it is referred to as 'passing the buck'.[184] In both instances, however, Hoexter notes that they amount to an abdication of power and violate the intention of the legislature which intended that discretion be exercised by the appointed or designated officials.[185] There is, therefore, a need to introduce a specific ground in the new Act to prevent unlawful referrals, which as noted in previous chapters, were not interrogated under the guise of deference.

(b) An additional ground of failure to apply the mind should be introduced. In terms of this ground, the decision by an official or administrator is unlawful on the basis that he or she failed to apply their mind to the facts of the matter.[186] While the ZAJA has specific instances of such failure,[187] it is submitted that a more general ground be introduced to prevent instances where the existing grounds fail to cover conduct that should be prohibited. As part of the principles of good governance and administration discussed in this study, decision makers must be held accountable and required to show that they have

[182] ZAJA, s5
[183] L Baxter *Administrative Law* (1984) 444, Hoexter (note 110 above) 273.
[184] Ibid Hoexter 274.
[185] Ibid 273.
[186] Ibid 313.
[187] For example, s5 of the ZAJA creates a ground of review where 'a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question.'

taken decisions that are premised on valid, lawful grounds, which have been well considered.

(c) A ground for arbitrary or capricious decision-making is conspicuously absent from the ZAJA. This ground has been described as being present where a decision lacks basis or purpose.[188] While it can be linked to grounds like reasonableness, it can also be seen as a stand-alone ground and will, in the long run, improve the quality of decision making while preventing abuse of authority.[189] The South African PAJA has an express ground for administrative action that is arbitrary or capricious.[190] The new Act should similarly create a ground that adequately covers this. Good governance is enhanced by the addition of this ground because it furthers accountability and transparency.[191]

(d) A ground for the failure to decide or consider should also be created. This ground, as Hoexter notes, implies that holders of power may not simply withhold the powers given to them and fail to exercise their powers when called upon to do so.[192] Interestingly, ZAJA currently does not include a failure to act as per its definition of administrative action.[193] Section 332 of the Constitution, however, specifically states that administrative conduct includes '…an omission of a public officer or of a person performing a function of a public nature, and a failure or refusal of such a person to reach such a decision or to perform such an act'.[194] The failure to decide or consider is, therefore, integral to the constitutional definition of administrative conduct and must find expression in the new Act.

(e) Lastly, a 'safety-net' ground of lawfulness is required to ensure that other instances of unlawful conduct that are not captured or covered by the grounds mentioned above can be justiciable. In South Africa, the PAJA includes a ground of review where 'the action is otherwise unconstitutional or unlawful'. As Hoexter notes, the purpose of such a ground

[188] Hoexter (note 110 above) 325.
[189] Baxter (note 183 above) 521.
[190] PAJA s 6(2)(e)(vi).
[191] Constitution of Zimbabwe, s9(1).
[192] Hoexter (note 110 above) 313.
[193] ZAJA, s2(1)
[194] Constitution of Zimbabwe, s332.

is to include any common law grounds that may have been left out from the legislative enactment.[195] It is submitted that a similar 'catch-all ground' be adopted in the new Act.

ii. Promptness

As noted in Chapter Three of this study, ZAJA does not contain an express ground of review for prompt administrative conduct. The closest the Act gets to this, is a ground wherein administrative authorities should 'act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned.'[196] Administrators are, as part of good governance, required to act speedily in addressing matters before them as set out in s9(2) of the Constitution.[197]In considering whether a delay, where there is no time period specified, is unreasonable, it is submitted that a second specific proviso dealing with this. In this proviso, the factors discussed in chapter three can be included. These could be used to arrive at a value judgment on a case-by-case basis as already suggested. Additionally, the threefold test mooted earlier can be used.[198] In this test, which is loosely based on the factors raised by Kenyan courts, the question should be whether there has been a delay, and if so, if such a delay was unreasonable, and in such circumstances, if there are any policy reasons for condoning the unreasonable delay.

In considering whether a delay where there is no time period specified is unreasonable, I propose a second specific proviso dealing with this. In this regard, the draft ground could be worded as follows:

'Where there is no specified time period set out in legislation, a court or tribunal determining whether administrative conduct is prompt will consider:

a. Whether there has been a delay and if so;

[195] Hoexter (note 110 above) 325.
[196] ZAJA, s3
[197] Constitution of Zimbabwe, s9(2).
[198] This test is based on the considerations of the various concessions by the courts in determining reasonable delays in the Kenyan context. The factors are discussed in more detail in chapter three of this study.

b. Whether such delay is unreasonable and if so;

c. If there any policy reasons why the unreasonable delay should be condoned in the circumstances.'

iii. Efficiency

In Chapter Three of this study it was noted that the ground of efficiency is coupled with that of promptness and it is, thus, likely that courts will determine one through the other or cumulatively. Crafting a specific ground of review for efficiency will thus not be an easy task. Lessons can be drawn from the jurisprudence on Article 47 of the Kenyan Constitution. Features of possible traits of efficiency as already noted, may be of use in this regard. In drafting a new Act, the ground for efficiency can include the discussed concepts of diligence, adherence to the law, ethics and dependability, which have already been identified in various cases, as elements pointing to efficiency.[199] The new Act must emphasise that this is a very case specific and policy laden ground and the drafting must reflect this with the necessary flexibility required. It has already been noted that as part of the principles of good governance and administration in the Zimbabwean Constitution, efficiency is required at all levels of the State.[200] The new Act should therefore be drafted against this backdrop.

A ground of review based on the above can be drafted as follows:

> *'A court or tribunal has the power to judicially review administrative conduct if the conduct was/is inefficient. In considering whether such conduct was/is inefficient, courts or tribunals may have regard to the following factors:*
>
> *a) the reliability of the conduct;*

[199] See for instance cases like *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5* others [2014] eKLR; *Joseph Mbalu Mutava v Attorney General & another* [2014] and *Geoffrey Oduor Sijeny v Kenyatta University* [2018] eKLR.
[200] See Constitution of Zimbabwe, s194.

b) the dependability of the conduct;

c) circumstances surrounding the conduct;

d) past conduct of the administrator in similar matters;

e) any breaches of law;

f) any ethical considerations;

g) diligent performance of the conduct or

h) any other consideration that in the court or tribunal's view is relevant in determining efficiency'

iv. Reasonableness

Hoexter notes that reasonableness is a difficult concept to define and is instead the culmination of various factors such as rationality and proportionality.[201] Rationality entails that there is a link between the decision reached and the reasons for it.[202] The PAJA captures rationality in s6(2)(f)(ii) in terms of which a decision can be reviewed if it is not rationally connected to–

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;[203]

ZAJA captures elements of reasonableness in s 5(j) and (k) of the ZAJA where conduct can be reviewed 'if the action taken is so unreasonable that no reasonable person would have taken it'[204] and if 'there is any evidence or other material which provides a reasonable or rational

[201] Hoexter (note 110 above) 340.
[202] Ibid. See also T W Bennett et al (eds) *Administrative Law Reform* (1993) 35 ,41.
[203] PAJA s6(2)(f)(ii).
[204] ZAJA s5(j).

foundation to justify the action taken'.[205] The first ground is a restatement of the *Wednesbury* test.[206] This standard of reasonableness requires gross unreasonableness before a court can intervene.[207] It has been adopted in Zimbabwe in a series of cases, most notably in *Rukuni v Minister of Finance*.[208] Hoexter notes, however, that the *Wednesbur*y test can also be read as requiring mere unreasonableness.[209] Chapter Two of this study highlighted that Zimbabwean courts have seemingly adopted the gross unreasonableness understanding of the *Wednesbury* test, but there is also support for mere reasonableness as the threshold required by the ZAJA.[210]The danger with a gross unreasonableness understanding, however, is that the threshold for reasonableness is heightened and often impractical such that administrators may seldomly be found to have made unreasonable decisions.[211] Hoexter is of the view that the correct standard should not be gross unreasonableness but mere unreasonableness.[212] Her reasoning found expression in the *Dombodzvuku* case, which found that the standard required in ZAJA is mere unreasonableness.[213] I am inclined to agree with this reasoning. If at all the drafters of the Constitution wanted gross unreasonableness to be the standard, they would have expressly indicated this. The omission of this from s68 is, in my view, indicative that the correct test should be whether conduct was unreasonable and not grossly unreasonable. When drafting the new Act, the legislature will have the perfect opportunity to refine this aspect of the law and should expressly indicate the standard to be applied to avoid continued uncertainty and to avoid the courts being entrusted with determining the standard. This will end the seemingly never-ending debate that has consumed the courts.

In my view, the South African PAJA's formulation on rationality[214] must be adopted as a ground of review in the new Act. In addition to this, the *Wednesbury* Test in s5(j) of the ZAJA must be

[205] Ibid 5(k).
[206] The test is derived from *Associated Provincial Picture Houses Ltd V Wednesbury Corporation* [1947] 2 All ER 680 (CA) 683E.
[207] Ibid.
[208] *Rukuni v Minister of Finance & Anor* 2012 (2) ZLR 205 (H).
[209] Hoexter (note 110 above) 348.
[210] *Dombodzvuku & Anor* v *Sithole NO & Anor* 2004 (2) ZLR 242 (H) at 247.
[211] P Craig *Administrative Law* 6ed (2008) 617.
[212] Hoexter (note 110 above) 348, 349.
[213] *Dombodzvuku* (note 202 above).
[214] PAJA s6(2)(f)(ii)

replaced with a rephrased ground that considers reasonableness as a culmination of various factors. In the South African case of *Bato Star v Minister of Environmental Affairs*, the Constitutional Court set out several factors it believed were useful in a determination of reasonableness. [215] These include a consideration of the 'identity of the decision maker, relevant factors used for the decision, reasons given for the decision, nature of competing interests, impact of decision on interested and affected parties expertise of the decision marker, and nature of the decision'.[216] To add to this, the Zimbabwean Court in *Rukuni* considered the factors of rationality, justification of the decision, and the objective considerations of a decision maker in the same situation as the administrator.[217] An example of the reasonableness ground of review could thus read as follows:

It is important to include that reasonableness is adduced on a case-by-case basis, hence the need to include a caveat that it must be determined with regard to the circumstances of the case. [218] Lastly, it is appropriate to remove the exemption from the duty to act reasonably in the ZAJA, which will be discussed under the section dealing with exemptions and ouster clauses below.[219]

An example of the reasonableness ground of review could thus read as follows:

'*A court or tribunal may review administrative conduct that is unreasonable. In determining unreasonableness, the following factors may be relevant in the determination:*

a) a rational connection with the purpose for which the decision was taken;

b) a rational connection with the purpose of the empowering provision;

c) a rational connection with the information before the administrator; or

[215] *Bato Star v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 49, 51 &53.
[216] Ibid 45.
[217] *Rukuni* (note 208 above).
[218] See for example a string of cases where the courts have consistently underscored the case specific nature of reasonableness *Silver Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* (2)1999 (2) ZLR 88 (H) *; City of Harare v Parsons* 1985 (2) ZLR 293 (S); *Chapfika v RBZ* 2007 (2) ZLR 337 (H); *Dombodzvuku & Anor v Sithole NO & Anor* 2004 (2) ZLR 242 (H); *Masiyiwa v TM Supermarkets* 1990 (1) ZLR 166 (S) *; Tenesi v PSC* 1996 (1) ZLR 196 (H) *Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H).
[219] ZAJA s11(2).

d) a rational connection with the reasons given for the decision by the administrator;

e) whether a decision maker or administrator acting with due appreciation of its responsibilities would have decided to adopt the same decision;[220]

f) whether the decision can be soundly justified when viewed against the relevant factors applicable;

g) the identity of the decision maker;

h) reasons given for the decision;

i) the nature of competing interests, if any;

j) the impact of the decision on interested and affected parties;

k) the expertise and experience of the decision maker;

l) *the nature of the decision and*

m) the circumstances of the case'

v. Proportionality

The ZAJA has no corresponding ground for proportionality yet this is one of the new grounds introduced by s68. As noted in Chapter Three, a five-stage pronged test which considers the importance of the ends sought, the suitability of the action in relation to the designed goal, the necessity of the actions taken, the reasonableness of the measures taken and whether the action taken is in the public interest, is desirable.[221] It is imperative for the new ground to reflect that proportionality is by its very nature, a balancing exercise[222] and that courts must engage in a

[220] This is a paraphrased understanding of the Wednesbury test adopted by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] UKHL 6.
[221] Feltoe (note 1 above) 45.
[222] M Cohn 'Legal Transplant Chronicles: The evolution of unreasonableness and proportionality of Administration in the United Kingdom' (2010) 58 *American Journal of Comparative Law* 583, 608.

context-specific balancing exercise that produces a value judgment. The jurisprudence surveyed in this study lends support to this view.

An ideal ground for proportionality in the new Act could be drafted as follows:

> *'Every person is entitled to proportionate administrative conduct. In determining whether conduct is proportionate, an administrator must weigh competing interests and take into account all relevant factors including:*
>
> *(i) The importance of the administrative conduct and the ends sought;*
>
> *(ii) The suitability of measures in relation to the desired goal of the administrative conduct;*
>
> *(iii) Whether the measures are necessary;*
>
> *(iv) Whether there is an alternative, less drastic measure in place of the intended administrative conduct that would still achieve the same object and purpose;*
>
> *(v) The consequences of the administrative conduct on the public interest and*
>
> *(vi) Whether the intended administrative conduct and its accompanying measures pose an undue burden on the parties or can be described as unreasonable'*

vi. Impartiality

As noted in Chapter Three of this study, the concept of impartiality is replicated in almost every facet of public administration in the Constitution and is a salient feature of administrative law in general. It is also a tacit feature of good governance in the Constitution. Feltoe notes that the ground is expressed in the common law rule against bias.[223] The ZAJA captures the elements of bias and favouritism in s5(e) wherein conduct can be reviewed if 'fraud, corruption, favour, or disfavour was shown to any person on irrational grounds. It is, however, hard to imagine how fraud or corruption can ever be shown on rational grounds. In my view then, the added

[223] Feltoe (note 1 above) 45.

qualification of irrational grounds in the current formulation of the ZAJA must be removed. Good governance as envisaged in s9 of the Constitution includes amongst other things, 'accountability, transparency, personal integrity and financial probity in all institutions and agencies of government.'[224] It would, therefore, be contrary to the principles of good governance to permit corruption or fraud on any grounds, which the ZAJA seemingly does. To improve and realise the goal of good governance, there must be unequivocal prohibitions on fraud or corruption of any sort or form. The intention of the drafters of the Constitution in specifically including impartiality as a ground of review must, therefore, be understood to reinforce this and make it explicit in the new Act. Therefore, the new Act must include a specific ground of review relating to impartial administrative conduct, which everyone is guaranteed in the Constitution.

As further noted in Chapter Three of this study, impartiality includes a number of considerations such as taking decisions in good faith, the absence of a pre-conceived mindset,[225] detachment from a conflict of interest, non-partisanship,[226] unusual inclination towards one party [227], fairness, and balance.[228] In *Telecel v Portraz*, the court went further to find that one of the key facets of impartiality is the opportunity to be heard as this would indicate that the decision-maker is open-minded[229] and has not reached a conclusion before being apprised of the relevant facts from interested or affected parties.[230]

In drafting a new ground of review based on impartiality, the legislature would do well to incorporate the aspects above which have already found acceptance with Zimbabwean courts.

A proposed ground of review for impartiality could be phrased as follows:

[224] Constitution of Zimbabwe, s9
[225] *Telecel Zimbabwe v PORTRAZ* [2015] ZWHHC 446.
[226] G Feltoe *Judges' Handbook for Criminal Cases* 1st ed (2012) 1.
[227] *S v Magoge* 1988 (1) ZLR 163 (SC) in this case, the presiding officer tended to ask one of the parties more questions than the other from which an inference of partial conduct was drawn. In essence what is required is equal or similar treatment of the parties which the Supreme Court found to be absent in the court a quo.
[228] G Feltoe *Administrative Law of Zimbabwe* (2013) 58.
[229] *S v Musindo* 1997 (1) ZLR 395 (H) in this case the court preferred to use the term 'even-handed' in relation to the treatment of the parties by presiding officers.
[230] *Telecel* (note 217 above).

'*A court or tribunal may review administrative conduct that appears in fact or appearance, to be impartial. While taking into account the merits and facts of each case, the following are instances of prohibited impartial administrative conduct:*

a. *Decisions taken in bad faith;*

b. *Perceived or real bias arising from institutional, financial, personal, or other recognised forms of conflict of interest;*

c. *Decision making by an administrator with familial ties to any of the interested parties*

d. *Fraud, corruption, favour, or disfavour to any of the interested parties;*

e. *Any other act that would in the eyes of a reasonable person, be seen as compromising the administrator in favour of either of the interested or affected parties*.

The last suggested point is a 'safety-net' broadly designed to capture any other conduct that could be viewed as giving rise to impartial administrative conduct.

vii. Substantive Fairness

Perhaps the most challenging of the new grounds, is the ground relating to substantive fairness due to its novelty to administrative law as a whole. As previously noted, developing this ground will be a result of 'patch-work' and a combination of factors taken from not only different jurisdictions but different fields of law. There is no need to engage the theoretic underpinnings of the concept and what it entails as this has been set out in Chapter Three in extensive detail. However, it is imperative to set out the various considerations that can be used in developing a ground of review for the new Act. I propose that the new Act divides substantive fairness into two aspects: automatically substantively unfair conduct, and substantively unfair conduct that is concluded after weighing of various factors. In this way, courts will not necessarily have to engage in a litany of factors for every matter that relates to substantive unfairness. Litigants will, similarly, be able to identify with ease, where they stand with regards to the ground of review. The rationale behind this proposal of automatically unfair grounds is that there are some actions that can never be justified regardless of the context and these should be speedily dealt with in

that regard. Such examples include failure to give reasons, giving reasons not reasonably connected to the decision, taking decisions in bad faith, unlawful reasons, and reasons that are incomplete or detached from merits. This proposed approach is similar to labour law as surveyed in this study, where some matters are classified as automatically unfair.[231] The other instances of unfairness in labour law are determined by considering a range of factors which place an onus on the employer to prove that the conduct does not amount to an unfair dismissal.[232]

In respect of automatically unfair dismissals, the Labour Relations Act includes the following as acts deemed to be automatically unfair: dismissals whose reasons are premised on prohibited discrimination, dismissals for participation in protected strikes, dismissals for refusal of an employee to agree to demands made by management which require the consent of the employee, dismissals for the employee exercising any right conferred by the Act, dismissals based on pregnancy and whistle-blowing.[233]

An example of the first leg of substantive fairness that could be used by the drafters is as follows:

'Administrative conduct is deemed to be automatically substantively unfair if with regard to the specific facts:

i. No reasons are provided for the administrative conduct or

ii. The reasons given for the administrative conduct are not reasonably connected to the decision or

iii. The reasons advanced for the decision or conduct are motivated by an ulterior motive or

iv. Administrative conduct is taken in bad faith or

v. Reasons for the administrative conduct are unlawful or

[231] While the concept has no basis in Zimbabwean labour law, it is a feature of South African labour law as set out in the Labour Relations Act, s 187(1)(f).
[232] Labour Relations Act, s188 (hereafter, the LRA).
[233] LRA s187 (1).

vi. *Reasons for the administrative conduct are inconsistent, incomplete, and contradictory.'*[234]

In respect of the second leg of the proposed ground for substantively unfair considerations, the ground of review could include situations where the administrator is unable to prove lawful reasonable grounds for unequal or fair treatment of parties[235] , lawfulness and fairness of reasons given or that unfairness is immaterial and insignificant. In respect of this last factor, it must be recalled that Lord Cooke warned that courts should only concern themselves with material or significant instances of unfairness and not 'every small detail related to fairness'.[236] The study further highlighted that abuses of power tend to point to substantive unfairness and as such this too must be included in the new Act. The drafters can additionally include departures from given assurances, misrepresentations and the general fairness of the outcome of a process which as identified previously, find support as indicators of substantively unfair conduct.[237] It is proposed that the clause on substantive fairness be drafted as follows:

'*Administrative conduct that is not automatically substantively unfair is unfair if the administrator is unable to prove –*

i. *A lawful and reasonable basis for unequal treatment of parties faced with a similar set of facts or seeking a similar decision from the administrator or*

ii. *That the administrative conduct is fair to both parties in an objective sense or*

iii. *That the reasons for administrative conduct are lawful and objectively fair or*

iv. *That the administrative conduct does not amount to an abuse of power*

v. *That the departure from given assurances is fair with regard to the facts of each case*

[234] It must be noted that these three should all be present for the conduct to be automatically unfair.
[235] Chapter three noted specifically that this was one of the considerations of substantive fairness- treating applicants in the same position equally.
[236] See discussion in chapter three but more specifically, Knight's summary of Lord Cooke's remarks D Knight 'Simple, Fair and Discretionary Administrative Law' (2008) 39 *VUWLR* 99.
[237] See Chapter Three of this study.

vi. That a misrepresentation is not prejudicial, intentional, or material or;

vii. That the unfairness is otherwise immaterial or insignificant and thus not prejudicial or

viii. That the outcome of a process or administrative conduct is in general, objectively fair'

viii. Procedural Fairness

ZAJA already contains grounds relating to procedural fairness.[238] In terms of the Act, an administrative authority must provide:

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

(b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable.'[239]

One can regard the above as the core essentials for fairness as they set a minimum threshold for procedural fairness that administrative authorities are expected to observe.

To these already existing requirements of procedural fairness, some necessary additions should be included in the new Act. The first is an explicit statement that courts will determine procedural fairness on a case-by-case basis. This reasoning is similar to the South African PAJA formulation which outlines this clearly.[240] While the courts have frequently underscored the context specific nature of procedural fairness,[241] a clear statement in the legislative enactment would be a welcome addition for the sake of clarity and certainty.

Another necessary addition is requiring the administrator to provide a clear statement of the intended administrative conduct. Without this, the affected person is unable to adequately prepare for a hearing or to make representations. The PAJA contains an express requirement to

[238] ZAJA s3 (2).
[239] Ibid.
[240] PAJA s3.
[241] See for example cases such as *Chiura v PSC & Anor* 2002 (2) ZLR 562 (H); *Austin & Anor v Chairman, Detainees' Review Tribunal* 1986 (4) SA 281 (ZS) and *Sigugu v Minister of Lands & Anor* 2013 (1) ZLR 48 (H)

this effect in s3(2)(b) (iii). Hoexter notes that in the case of reviews or appeals, the lack of a clear statement on the administrative conduct in question would render the exercise a nullity.[242]

Lastly, another essential consideration that should be included in the new Act is a notification of the right or entitlement to request reasons. This notice has been associated with and linked to procedural fairness.[243]

In terms of the ZAJA, these core essentials of fairness can, however, be departed from if the administrative authority can show that:

'(*a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or*

(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.'[244]

The exemptions from the duty to act procedurally fairly take into account the 'variable nature' of procedural fairness.[245] Zimbabwean common law has always accepted that fairness is not a rigid concept and must be determined with specific reference to the facts of the case.[246] The basis of

[242] Hoexter (note 110 above) 376.
[243] P Craig Administrative Law 6ed (2008) 45.
[244] ZAJA s3.
[245] Feltoe (note 220 above) 58. See also Hoexter (note 110 above) 364.
[246] See for example cases pre-ZAJA cases like *Crow v Detained Mental Patients Special Board* 1985 (1) ZLR 202 (H); *Chairman, PSC & Anor v Marumahoko* 1992 (1) ZLR 304 (S) and *Bailey v Health Professions Council* 1993 (2) ZLR 17 (S).

the exemptions are identical to those in the PAJA and warrant no further discussion in this regard.[247]

The last aspect that warrants consideration, is whether the new Act should include a right to obtain legal assistance or representation and to appear in person to present and dispute information.[248] In South Africa, these are considered discretionary rather than mandatory requirements and can, depending on the circumstance, be excluded completely.[249]The Zimbabwean legislature should consider what status to give to these factors, that is, whether they should be viewed as core essentials of fairness or as discretionary factors. Either way, it is submitted that they need to be included in the new Act to further protect individuals.

ix. The right to prompt and written reasons

Section 68(3) introduces this right to the administrative law framework. ZAJA contains a similar right but phrases it differently as will be seen below. Section 6 of the Act provides that:

> *'… any person—*
>
> *(a) whose rights, interests, or legitimate expectations are materially and adversely affected by any administrative action; or*
>
> *(b) who is entitled to apply for relief in terms of section four;*
>
> *and who is aggrieved by the failure of an administrative authority to supply written reasons for the action concerned within—*
>
> *(i) the period specified in the relevant enactment; or*
>
> *(ii) in the absence of any such specified period, a reasonable period after a request for such reasons has been made; may apply to the High Court for an order compelling the administrative authority to supply reasons.*

[247] ZAJA s3(4)(b).
[248] These exist in s3(3) of the PAJA which Hoexter refers to as discretionary contents of fairness.
[249] See Hoexter (note 110 above)366.

(2) Upon an application being made to it in terms of subsection (1) the High Court may, if it is satisfied that there has been a failure by the administrative authority concerned to supply any or adequate reasons for an administrative action, issue an order directing the administrative authority to supply written reasons to the applicant within such period as may be specified by the High Court.

(3) Where an administrative authority fails to comply with an order in terms of subsection (2), it shall be presumed, in the absence of proof to the contrary, that the administrative action concerned constituted an improper exercise of the power conferred by the relevant law or empowering provision.

(4) The High Court may at any time vary or revoke an order made in terms of subsection (2).

The first necessary change with respect to the ZAJA formulation, is *who* is entitled to reasons. The qualifying or trigger factors in terms of the ZAJA are persons whose 'rights, interests, or legitimate expectations are materially and adversely affected by an administrative action.'[250] Section 68(2) of the Constitution, however, avails the right to any persons whose 'rights, freedoms, interests or legitimate expectations have been adversely affected by administrative conduct.' The Constitution adds a new category of persons who are entitled to reasons and these are people whose 'freedoms' have been adversely affected. While the courts will have to work out the meaning of the term 'freedoms' as used in s68(2), it suffices to note that the new Act must include the new category of persons envisaged by the Constitution.

In addition to the inclusion of freedoms, s68 (2) does away with the requirement of materiality in explaining the effect of the administrative conduct. ZAJA requires litigants to be materially and adversely affected, but s68 (2) requires litigants to simply be adversely affected. As Mavedzenge notes, the additional burden of materiality is at odds with the constitutional provision and must therefore be removed from the formulation of the right.[251] The legislature will also have to

[250] ZAJA s5(a).
[251] Mavedzenge (note 99 above).

replace administrative action in the ZAJA administrative conduct as discussed earlier in this chapter.

Interestingly, ZAJA currently does not provide a period for an aggrieved party to make a formal request for reasons to the administrator before lodging an application with the High Court for an order compelling the administrator to provide reasons.[252] Both Kenya and South Africa have provisions that essentially compel an aggrieved party to formally request reasons from the administrator within a specific period before approaching the court. The Kenyan Administrative Justice Act specifically states that: '*The administrator to whom a request is made under subsection (the right to be given reasons for administrative conduct) shall, within thirty days after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.*'[253] The PAJA on the other hand states '*Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action*.'[254]

In my view, it seems that the requirement to put the administrator on notice serves to give the administrator a chance to remedy its own mistakes before judicial proceedings are instituted and avoid overburdening the courts with matters that can easily be resolved by the administrator. In some cases, administrators neglect to furnish reasons due to being overburdened by other work or because of scarce resources. If they receive a formal request, however, they are likely to address the matter speedily to avert legal action. It is these types of matters that requires formal requests to be sent to the administrator before approaching the courts. In this sense, it is a form of a duty to exhaust internal processes prior to litigation. In light of the deficiency of the current ZAJA framework in this regard, it is proposed that the new Act creates a similar requirement compelling aggrieved parties to first afford the administrator an opportunity to furnish reasons within a specified period before being permitted to launch review proceedings. In respect of the

[252] ZAJA s6(2).
[253] Kenya Fair Administrative Action Act (note 147) s7(3).
[254] PAJA s5 (1).

period, the Kenyan Administrative Justice Act refers to 30 days, and the PAJA refers to 90 days. In drafting the new Act, the legislature should consider a period that complements and gives effect to the overarching requirement of efficiency which is one of the precepts of good governance in the Constitution.[255]

Section 6(3) of the ZAJA creates a presumption where an administrator fails to comply with a court order compelling the administrator to furnish reasons. In terms of this presumption, an inference of improper exercise of power is drawn from the failure to comply with the court order. In the PAJA, the presumption is offset by the failure to respond to the request made to the administrator by the aggrieved party.[256] That is, in my view, the appropriate stage for the presumption. A failure to comply with a court directive should not create a rebuttable presumption but should instead be seen for what it is - contempt of court. In this regard, the new Act should possibly rephrase the presumption to cover the failure to respond to the aggrieved party's request for reasons. Section 6(3) of ZAJA gives judicial officers a discretion to compel a party to provide reasons. The courts 'may' compel an administrator to provide reasons if it is satisfied that the reasons supplied are inadequate or were not furnished at all. This discretion seemingly deprives litigants of the right to reasons by creating this discretion. Upon a determination that inadequate reasons or no reasons were provided to the aggrieved party, an order compelling the administrator to provide the reasons should automatically follow in compliance with s68(2) which creates a right to be given reasons.

Hoexter notes that the PAJA allows for a 'fair but different' procedure in s5(5) wherein the process laid out in the PAJA is relaxed in favour of a different reason-giving process stipulated in other legislation.[257] It is submitted that the new Act creates a similar 'fair but different' provision for instances where legislation stipulates a different process for requesting and giving reasons.

More worryingly, however, the ZAJA provides absolute prohibitions and instances where reasons may be withheld. These include whether the court considers it to be in the public interest or

[255] Constitution of Zimbabwe, s9(1).
[256] PAJA s5(3).
[257] Hoexter (note 110 above) 482.

where it is reasonable and justifiable in the circumstances.[258] Public interest takes a broad meaning in the Act and includes 'the security or defence of the State; the proper functioning of the Government; the maintenance of international relations; confidential sources of information pertaining to the enforcement or administration of the law or the prevention or detection of offences or contraventions of the law.'[259] There are no factors for the courts to consider what constitutes reasonable and justifiable, and thus, this ground is open to abuse. The PAJA which contains a similar exemption on the grounds that the exemption is reasonable and justifiable creates a string of requirements to prevent abuse.[260] An administrator using s5(5) to avoid the PAJA's scheme must determine whether it is justifiable and reasonable in light of the set factors.[261] PAJA does not allow exemptions on the grounds of public interest unlike the ZAJA. The new Act must desirably limit the exemptions to a bare minimum and remove the exemptions relating to the public interest. A similar set of factors to check and prevent abuse of the exemptions must similarly be included.

The right to reasons must be protected and given effect to in the new Act because it furthers the principles of accountability and transparency, which are elements of good governance in the Constitution as discussed in this study.[262]

6.3.5 Removal of Ouster Clauses and Exemptions

ZAJA contains a number of ouster clauses and exemptions which render the constitutional right to administrative justice nugatory.[263] One of these exemptions is s3(3) which allows an administrator to depart from the requirements of lawful, reasonable, timeous decisions and reasons. The requirements for the departures are if:

> *(a) the enactment under which the decision is made expressly provides for any of the matters referred to so as to vary or exclude any of their requirements; or*

[258] ZAJA s8.
[259] Ibid s8(3).
[260] Hoexter (note 110 above) 482. See PAJA s5(5).
[261] Ibid.
[262] Constitution of Zimbabwe, s9(1).
[263] Feltoe (note 1 above).

(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.

As Veritas correctly points out, there should never be an exemption for lawful conduct as this undermines the rule of law on which the Constitution is founded.[264] Good governance in the Zimbabwean Constitution requires an adherence to the prescripts of the law and justice.[265] The departure from the requirement of lawfulness is, therefore, unconstitutional to the extent that it subverts the constitutional prisms of legality.[266] The same argument holds true for the requirement of reasonableness which is a guaranteed right in terms of s 68(1). The departures must, therefore, not be permissible. The new Act should thus remove lawfulness, reasonableness and prompt conduct from permissible departures. The departures in respect of reasons are permissible but as noted earlier, should be closely regulated to prevent abuse.

Section 11(1)(a) of the ZAJA provides for exemptions from the right to reasons[267] and procedural fairness[268] for the following conduct:

1. *Any exercise or performance of the executive powers or functions of the President or Cabinet;*

[264] Veritas (note 118 above).
[265] Constitution of Zimbabwe s3(g).
[266] Mavedzenge (note 99 above) 5. Feltoe (note 1 above) 27.
[267] ZAJA s3 (1) (c) and s6.
[268] ZAJA s3 (2).

2. *Decisions to institute or continue or discontinue criminal proceedings and prosecutions and*

3. *Decisions relating to the appointment of judicial officers.*[269]

It is, therefore, apparent that in terms of the exemption, the rest of the ZAJA is applicable to the functions listed but excludes the right to reasons and procedural fairness. No rationale has ever been given for the exemption. Unlike the PAJA which exempts certain functions from the application of the Act in its entirety,[270] the ZAJA tacitly allows for certain duties to apply to the functions whilst excluding others. It is submitted that one cannot cherry-pick which duties from the Act will apply – at least not without a rational basis. In the absence of this, these exemptions must be removed from the new Act. Should Parliament wish to exclude the appointment of judicial officers from the application of the Act, then it must do so expressly and wholly without selectively identifying aspects of the Act that apply to the conduct. As Mavedzenge notes, such exclusions have the effect of violating the right to equality and unjustifiably so.[271] To remedy this, the new Act must dispense of such exemptions or ouster clauses.

Section 11(2) provides another exemption which applies to 'any disciplinary action taken in terms of the Defence Act [Chapter 11:02], the Police Act [Chapter11:10], and the Prisons Act [Chapter 7:11].'[272] In terms of this exemption, there is no duty to give reasons in the envisaged disciplinary conduct. Mavedzenge notes that such an exemption borders on unequal treatment and possibly discrimination. [273] There is no apparent reason for the differential treatment in this regard and, therefore, the exemption seems to serve no lawful purpose and appears to be arbitrary in nature. It is submitted that this exemption be removed from the new Act.

Section 11(3) of ZAJA creates what Mavedzenge aptly describes as a 'reverse-onus' in terms of which, the litigant or aggrieved party must first prove to the court that there is no 'apparent public interest' served by withholding written reasons before these can be provided on request.

[269] ZAJA, Part 1.
[270] PAJA s1.
[271] Mavedzenge (note 99 above) 11.
[272] ZAJA Part II of the Schedule.
[273] Mavedzenge (note 99 above) 11.

The onus, therefore, means that an aggrieved party will only be given reasons after making a compelling case to the court that there is no harm done to the public interest in making reasons for administrative action available. Without doing this, no reasons may be given. In my view, s11(3) creates an additional trigger before the issuing of reasons. In addition to the already established entitlement bases which dictate that reasons are given to 'any person whose rights, interests, or legitimate expectations are materially and adversely affected by any administrative action', the additional trigger created by the section is that the issuing of reasons must not be contrary to the public interest. After an applicant successfully proves the first trigger, that is, that he or she has rights, interests or legitimate expectations that are materially and adversely affected, he or she must then prove to the court that the issuing of reasons is not against the public interest. Only after meeting both triggers, is a party entitled to be given reasons on request. The correct position post the enactment of the 2013 Constitution, however, is that the additional trigger, is the Constitution itself. In other words, apart from satisfying the entitlement trigger, it is the Constitution that confers the applicant with a legal basis to be given reasons. The applicant need not prove anything else. In this respect, the current onus in s11 (3) is unconstitutional by requiring litigants to prove that the issuing of reasons is not contrary to the public interest. The constitutional guarantee of reasons for administrative conduct is not affected or limited by a public interest claim. Reasons should be given regardless of whether or not these are in the public interest. The new Act must, therefore, do away with s11 (3) entirely as it is repugnant to the spirit and letter of s68 as well as the good governance values of transparency, accountability, and responsiveness.[274]

Section 11(5) of the ZAJA prohibits a court from compelling an administrative authority to provide reasons for administrative conduct if the responsible Minister produces a certificate, which confirms that the provision of reasons will be contrary to the public interest.[275] Not only is there no safeguard to prevent abuse of this prohibition, but it disregards the importance of the constitutional right to administrative justice.[276] As noted in previous chapters, one of the main

[274] Constitution of Zimbabwe, s3(g).
[275] ZAJA s 11(5).
[276] Mavedzenge (note 99 above) 13.

reasons for the creation of a constitutional right to administrative justice was to prevent arbitrary decisions by the Executive that circumvent due process and other legal requirements. Allowing a Minister to dictate when reasons can be withheld defeats this reasoning. Furthermore, the good governance principles of transparency, accountability, and justice are undermined by such executive interference with constitutional rights.[277] It is submitted that a new Act giving effect to s 68 (1) and (2) should remove this ouster clause, which ousts the jurisdiction and authority of the courts.[278]

Lastly, s11(6) of the ZAJA allows the Minister to make exemptions to duties in the Act by amending the schedules. In theory, therefore, s11 (6) gives the Minister the power to exempt any organ of state from any duty within the ZAJA. Mavedzenge notes that this circumvents the Constitution and places the Minister in a position where he or she can principally amend the Act without parliamentary oversight and certainly without regard to the Constitution.[279]It is submitted that these legislative powers given to the Minister are contrary to the Constitution which requires Parliament to make primary legislation.[280] By allowing the Minister to amend the Act, the Minister is given powers that are intended to be exercised by the Legislature.

Evidently, in order for s68 to be fully realised, the Legislature needs to enact a new Act that encompasses all the requirements set out in the constitutional right. Section 68(3) clearly enjoins Parliament to give effect to the right and this can be done by either repealing the current Act and replacing it with a new constitutionally compliant Act, as set out in this chapter, or alternatively, amend the current ZAJA extensively. Whatever method Parliament chooses for this purpose, the requirements and elements of s68 must be given effect to provide legal certainty and constitutional compliance. Failure to do so will not only result in s68 not being a lived reality but it will also significantly hamper the constitutional imperatives of efficient administration and good governance.

[277] Constitution of Zimbabwe, s3 (2)(g)
[278] See also Mavedzenge (note 99 above) 13.
[279] Ibid.
[280] Constitution of Zimbabwe, s117.

Chapter Seven: Conclusion

The 2013 Constitution ushered a new era for Zimbabwe – one specifically built on the advancement of constitutionalism and the increased constitutional protection offered by the broadening of rights in the Declaration of Rights. One such right is the right to administrative justice in s68 of the Constitution. The Lancaster Constitution that preceded it did not contain such a right and, therefore, the judiciary is faced with the challenge of protecting the constitutional right by appropriately interpreting it and applying it. This study was premised on the interpretation and realisation of s68, which is arguably the broadest constitutional right to administrative justice globally. It was submitted that such an interpretation requires a progressive interpretation that will not only ensure that it is realised and given effect to but also ensures that the founding values of good governance as set out in the Constitution, materialise. Principally, when interpreted correctly and progressively, the thrust of this study is that s68 has the potential and capacity to improve good governance in Zimbabwe as defined by the Constitution. Good governance is both a national objective and a founding principle of the Republic. It includes spheres of social transformation, economic advancement, respect for the rule of law and of people's rights, as well as political stability. Good governance in the Zimbabwean context is, therefore, context specific and determined primarily by the Constitution. Administrative law for its part, dovetails neatly with the principles of good governance but this is further buttressed by the unique scope and nature of the right in s68 which covers key pillars of good governance such as efficiency, responsiveness, accountability, and respect for due process.

Interestingly, using the principles of good governance as interpretational tools to s68, further enhances administrative justice but also improves good governance. The definition of good governance in the Constitution as already noted, includes five basic spheres: a culture of human rights, efficient people-centric government, social coercion, political stability, and a realisation of the Constitution. Each of those spheres involves an aspect of administrative justice. For example, a culture of human rights and a realisation of the Constitution include transparency, justice, and accountability[1], which in turn manifest themselves in concepts of the right to prompt and written reasons for administrative conduct.[2] An efficient people-centric government can similarly be

[1] These elements of good governance can be found in s2(g) of the Constitution.
[2] Constitution of Zimbabwe, s68 (2).

found in concepts such as the right to substantively fair administrative conduct and efficient administrative conduct.[3] The right to administrative justice in s68 embeds features that resonate with the elements of good governance in s3 and s9 of the Constitution. The correlation between good governance and the right to administrative justice in the Constitution is inescapable and explicit. Giving effect to the right to administrative justice, therefore, fulfils, at least in part, the features of good governance. Ordinarily, the link between good governance and administrative justice is not an easily drawn nor visible conclusion. In its Constitution-specific meaning in Zimbabwe, good governance and s68 are complementary and not incidental. By giving effect to good governance, s68, therefore, has the potential to transform Zimbabwe, again, at least in some respects.

The Constitution requires that every agency or branch of the State adheres to the principles of good governance.[4] This tacitly then requires that administrators or holders of public power give effect to these principles. In interpreting constitutional rights, the Constitution requires courts to consider the objectives of good governance.[5] Because good governance is both a foundational principle of the Republic and a value, courts are doubly obliged to interpret the right to administrative justice in a way that gives effect to it.[6] It is clear then that good governance is not just an end result of a proper, progressive interpretation of 68 but it is in fact an interpretational tool. Whether one views good governance as an interpretational tool or an end result of the realisation of s68, the administrative justice right has a transformational effect. It, therefore, cannot be 'business as usual' post the enactment of the Constitution. The introduction of the concept of substantive fairness is the clearest indication that there is a new dawn for Zimbabwean administrative law, and this may well be followed by other jurisdictions. The drafters of the Constitution, in my view, intended the right to administrative justice to be an enabling tool for a new chapter in Zimbabwe. While one right alone cannot bring about the kind of change that is necessary in Zimbabwe, the administrative justice right, if given effect to, comes close to doing so. If it does not, then it certainly creates an enabling environment for a new

[3] Constitution of Zimbabwe s 68(1).
[4] Constitution of Zimbabwe s3(2).
[5] Constitution of Zimbabwe s8(2).
[6] Constitution of Zimbabwe s46(1) (b) and (d).

Zimbabwe. The administrative justice right forces government to account to its people – something that it has avoided doing for over two decades.[7] As with a baby that is attempting to walk for the first time, some downfalls and fails are expected in the first few years of s68's existence. As an advocate for its usefulness and importance, the difficulty of the long road ahead is not lost on me. It cannot be expected that s68 achieves its fullest potential in the first few years but if utilised and explored by courts and litigants gradually, its potential will become a lived reality. What is important is that some strides are taken by the courts and the legislature in giving effect to the right.

The courts for their part, need to engage s68 fully, especially before the legislature amends the ZAJA or enacts a new Act to repeal it. The current avoidance of the right by the Constitutional Court has stifled the development and transformative effect of the right. As it has been noted, the Constitutional Court has avoided any substantive engagement with the constitutional right and has in the process, created regressive precedents for the lower courts to similarly shy away from s68. As long as the country's apex court avoids engaging the right, s68 will remain a theoretic right with unrealised potential. If the practice continues unabated, litigants and their practitioners will cease any engagement with the constitutional right and unintentionally relegate it to the side-lines of Zimbabwean law. The judgment in *Zinyemba* which categorically held that ZAJA is the contemplated legislation that gives effect to s68 is most regrettable as its effect is that lower courts and litigants will be expected to rely on the ZAJA notwithstanding its deficiencies and potential unconstitutionality discussed in this study.[8] It would be progressive for the Constitutional Court to exercise its prerogative to reverse its own judgment when faced with an appropriate case in future. For the transformational power and effect of s68 to be realised, the Constitutional Court must recognise this power as well as provide guidance by interpreting the right progressively.

The legislature, on the other hand, has the power to create legislation that gives effect to s68 as envisaged in s68 (3). The legislature need not wait for the Constitutional Court to declare portions

[7] J Smith-Höhn 'Unpacking the Zimbabwean Crisis: A Situation Report' *Institute for Security Studies* (2009).
[8] *Margaret Zinyemba v Minister of Lands and Rural Settlement* (2016) ZWCC.

of the ZAJA unconstitutional or to instruct a new law to be enacted. The mandate already exists in the Constitution and the legislature simply needs to act in terms of the constitutional prerogative it has in making appropriate laws to give effect to constitutional rights like the right to administrative justice. The work of the IMT which is tasked with the alignment of laws to the Constitution is commendable but there is need to finish the process speedily, so these can be referred to the National Assembly urgently. To avoid some of the issues identified in this study, the IMT and the Legislature are advised to consider best practices globally and provide clarity for aspects that the courts have either failed to deal with or where the position of the current law is unclear. There is, therefore, need for clear, precise and express drafting that will avert the need for courts to fill in the gaps left by the legislature.

Without belabouring the point, this study's sole concern is how Zimbabwean courts should approach and consider the s68 in a pro-good governance manner, which enhances the administration of the State. It has been submitted that s68 has a transformational effect, which is due to both the textual and practical impact of the right. This transformation effect, however, can only be realized once the right is given effect to and interpreted in a progressive, liberal way. This, therefore, formed the core research question of this study. Without such guidelines the right may well be nothing more than a textbook right existing only on paper with no real impact.

Summary of Study

In Chapter one, I set out the background for this study by examining the constitution-making process that gave rise to the 2013 Constitution. The Constitution's uniqueness is seen in its creation of an administrative justice right, which presents a transformational window for Zimbabwe. Good governance now forms part of the Constitution as both a founding principle and value, which must be used to interpret rights and laws. Section 68 contains expansive rights such as the right to efficient, impartial, proportional, reasonable, procedurally fair, substantively fair, lawful, and prompt administrative conduct, which collectively should be seen as creating a transformational shift in administrative law in Zimbabwe. This background is important in that it provides the necessary context to properly interpret s68.

Chapter two examined the structural weakness of pre-2013 Zimbabwean administrative law which consisted of the common law and the ZAJA. The importance of surveying the pre-2013 framework is to determine what gaps need to be filled post the 2013 Constitution in developing a compatible legislative enactment for s68. It was noted that despite the existence of the statutory codification of the common law, the common law worked alongside the ZAJA and applicants could rely on either of the two to secure relief. Both the common law and ZAJA were confined to three principal boundaries: procedural fairness, lawfulness, and reasonableness. Ouster clauses that ousted the jurisdiction of the courts in reviewing administrative conduct were prevalent in both streams of Zimbabwean administrative law. It was confined to specific categories and instances with the courts adopting a very cautious approach to extending the boundaries of administrative justice. Quite often, the courts proffered arguments around the need to respect the domain of the administrators as a bar to expanding grounds of review. This strict approach to deference was highlighted as a hinderance to the advancement and development of administrative justice in Zimbabwe.

Legislation it was noted, could limit the scope of natural justice by dictating for instance, that certain categories of people were not entitled to hearings before decisions were taken. The ZAJA was, however, wider than the common law in terms of the grounds of review and the protection it offered. It will also be noted that the ZAJA offered additional duties that were absent in the common law such as a duty to act timeously. Lawfulness under both the ZAJA and the common law was most commonly tested against the ultra vires doctrine. The common law had several shortfalls identified which included the absence of a duty to act expeditiously, the presence of ouster clauses, the non-reviewability of some mistakes of law, limited review of presidential powers, the use of gross unreasonableness and not mere reasonableness as the basis of review and the absence of a remedy of substitution. Additionally, the common law was deficient because it did not permit the reviewability of delegated power where the source of the power could be located in the Constitution. Lastly, the common law permitted a deviation from the natural justice principles for certain categories of persons and therefore, such individuals were deprived of these protections.

The ZAJA's weaknesses, on the other hand, included the possible deviation from all duties in the Act including the duty to act lawfully and the exemption of the Executive from duties to give reasons and to act in a procedurally fair manner.[9] Like the common law, the ZAJA required gross unreasonableness as the basis of review and there was no substitution remedy for litigants. The Act's textual difficulties and ambiguity in definitional elements has posed challenges for the courts that will need to be addressed when the Act is repealed or amended.

Chapter three considered the significance and importance of constitutionalisation generally and of the right to administrative justice in particular. One of the foundational pillars of this study is good governance, which as argued, is both an interpretational tool and an outcome of s68. It has been argued that the reform of administrative law in Zimbabwe would have a ripple effect on good governance. The constitutionalisation of rights in general, creates obligations on the State to respect rights and binds the State to uphold these rights and ensure they are realised.[10] An additional significant effect of constitutionalisation of rights is that the courts are required to give full effect to rights such as s68. Independent institutions supporting democracy such as the Zimbabwe Human Rights Commission are also tasked with the protection, promotion, and realisation of rights in the Declaration of Rights. Consequently, rights included in the Zimbabwean Constitution are protected at a higher level than non-constitutional rights. All rights in the Constitution are also seen as fundamental valuers in terms of s3 (1) of the Constitution which further elevates constitutional rights such as the administrative justice right to a higher status. More significantly, an additional effect of the constitutionalisation of the right to administrative justice is that it is now regarded as a fundamental human right and any violations will be treated in the same way as rights to life, dignity etc. As a result of the supremacy clause in s2 of the Constitution, constitutional rights may not be contradicted or undermined by any other laws or conduct and in the event that there is conduct inconsistent with the rights or the Constitution in general, then the conduct falls away. This, therefore, means that the right to administrative justice enjoys the same protection on the basis of the supremacy clause.

[9] ZAJA ss3 and6.
[10] Constitution of Zimbabwe, s45.

The administrative justice right is now justiciable and may not be limited at the bidding of parliament because of the protection and status conferred on it by the Constitution. The above simply goes to show the strength of the right to administrative justice and the shift brought on by the constitutionalisation of the right. It further shows that Zimbabwean administrative law has entered a new era which requires all three arms of government to respond accordingly to these changes.

Chapter four focussed on the post-2013 Zimbabwean administrative law framework and more specifically, the new concepts brought about by s68. It was noted that s68 introduced the concepts of prompt, efficient, proportionate, impartial, and substantively fair administrative conduct. The right removes the concept of materiality which is currently a requirement for requesting of reasons in terms of the ZAJA. Section 68 requires that reasons must be given promptly which is a new addition to the Zimbabwean administrative law framework. It was noted that the concept of prompt administrative conduct should be construed as a fact-specific determination that is coupled with efficiency and it is intended to prevent undue delays. Courts in other jurisdictions have considered the nature of the conduct and the connection to other rights in determining whether conduct is prompt. It was submitted that the Zimbabwe legislature formulates a test that is three-fold in determining whether there has been a violation of this right. In terms of the proposed test, the first consideration should be whether there is a delay and, if so, whether the delay is reasonable and if there are any policy reasons why the delay should be condoned.

Proportional administrative conduct is another new feature to Zimbabwean administrative law. Essentially, this basis of review prevents abuse of power by requiring administrators to ensure that the conduct equals the threat or harm posed. This will prevent overbroad and irregular decision making. Impartial conduct was defined as conduct that was objective, neutral, taken in good faith, and without bias.

The requirement of efficient administrative conduct is similar to the Kenyan right and if the jurisprudence is to be relied on, it suggests that efficiency is a substantive enquiry that is fact specific and twinned with the requirement of prompt administrative conduct. It was submitted

that the legislature adopts a test that is based on a range of factors which the courts would use in reaching a value judgment. These factors include being free from errors or at least having a low margin of error, a sense of urgency, a decision that is merit-based and the absence of malicious intent and gross negligence.

Chapter five dealt with the concept of judicial avoidance which was defined as an avoidance of engagement or interpretation of s68 by the courts. Four major reasons for such avoidance were advanced. These include the doctrine of constitutional avoidance, strategic avoidance, textual difficulties, and fear of the Executive. It was noted that while the constitutional avoidance doctrine is a valid interpretational tool used in other jurisdictions, its import into Zimbabwean law was problematic not only because it hindered the realisation of rights, but it was often applied without strict adherence to the requirements of the doctrine. The fear of repression was cited as a more probable reason for the evasion and avoidance of s68 by the courts given the intolerant nature of the previous regime. The continued use of avoidance techniques by the courts have had the effect of stunting constitutionalism, fuelling and perpetuating injustice, limiting the constitutional jurisprudence on the subject matter, hindering good governance, and prolonging litigation unnecessarily. It is submitted that for the right to administrative justice to be fully enjoyed and realised, the courts need to readily engage the constitutional right.

In the final chapter, recommendations of how the right can be realised and given effect to were provided. These were divided into institutional and legislative reforms. In terms of the legislative reforms suggested, a repeal or amendment of the ZAJA is unavoidable. While the preferred route suggested was the repeal route to give rise to a new Act, it was also noted that amendments would still achieve the desired result. The new Act needs to address the weakness highlighted in chapter two of the study such as the removal of ouster clauses and exemptions from the duty to act fairly. The grounds of review incorporated in Chapter Four which bring to the fore the new concepts such as substantive fairness, prompt, efficient, and impartial conduct need to be factored into the new legislative enactment to ensure compliance with s68(3).

At an institutional level, there needs to be strengthening of the Zimbabwe Human Rights Commission which took over the functions of the Public Protector and, therefore, assumes a

primary redress and enforcement role under the Constitution. The Act underpinning the operations of the Commission needs to be aligned to the Constitution to ensure the guarantees of independence and accountability are ensured. The issues relating to funding and reporting mechanisms need to also be addressed to prevent interference from the Minister of Justice's Office which currently oversees the functions of the Commission. The remedial powers in the Act need to be aligned to the Constitution which accords the Commission wider powers of enforcement. The Commission should also assume a more proactive role in educating the citizenry on the importance of rights such as the administrative justice right. This will result in more members of the public reporting any maladministration they encounter.

The Administrative Court needs to be recalibrated so that it is able to consider all matters arising from the administrative justice right. It was noted that the Court currently derives its jurisdiction in a piece meal fashion through various Acts which specifically refer disputes to the Court. In the absence of express provisions awarding it jurisdiction, the Court is unable to consider other matters brought before it. The jurisdiction of the Court should ideally be amended to include reviews and appeals stemming from the ZAJA or the new Act. This will, in turn, ensure that it is seen as the primary court of redress and as a specialist court for purposes of the Act. This will reduce the backlog of matters at the High Court which is the court of first instance in terms of the ZAJA. By conferring such powers to the Administrative Court, a richer jurisprudence on s68 and administrative justice in general is likely to emerge since the court will only consider matters of an administrative justice nature. It is also likely to be cheaper than having matters heard by the High Court.

Additional specialist tribunals can be created to deal with maladministration concerns or disputes arising from s68. The importance of specialist tribunals cannot be underscored, particularly in a jurisdiction such as Zimbabwe where the administrative justice right is still novel. Such tribunals tend to adjudicate matters in a speedy and more cost-effective manner. Finally, it was submitted that magistrates' courts be conferred with jurisdiction in terms of the ZAJA or the new administrative justice Act. The jurisdiction need not be exclusive or indeed extensive but by delineating some matters to be heard in magistrates' courts, more litigants are likely to seek

recourse in terms of the Act as these courts are more readily accessible and tend to resolve matters more speedily than the superior courts would. By pursuing both institutional and legislative reforms, Zimbabwean can fully enjoy the benefits of the administrative justice right and transform it from being a theoretic right with no practical application to a right that is an enabler of good governance.

While this study attempted to traverse the more pertinent matters around the new right, it in no way claims to be exhaustive in dealing with the right. There is much more to be unpacked and discussed about the right, but one can only hope that this modest contribution sets the tone for such discussions and that the proposed guidelines and suggestions provide some clarity in utilising the right to pursue a transformative agenda for the country premised on the values of good governance. The right to administrative justice is indeed a 'game changer', but this can only be if it is fully implemented and properly interpreted with the intention of giving effect to good governance as set out in the Constitution. Whatever shortcomings the right may have, it is quite evident that it has the effect of creating a new dawn for Zimbabwe and proffering hope for a better future anchored on values of constitutionalism, accountability, transparency and good governance.

BIBLIOGRAPHY

1. Cases

AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC)

Administrator v Traub 1989 (4) SA 731 (A)

Affretair (Pvt) Ltd and Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

African Consol Resources PLC & Ors v Minister of Mines & Ors 2010 (1) ZLR 208 (H)

African Tribune Newspapers (Pvt) Ltd and Others v Media and others v Media and Information Commission and Another 2004 (2) ZLR 7 (H)

AG v Mudisi & Others (SC 62/12) [2015] ZWSC 48

Allison Charles & Counselling Services Unit v President & Others HH/2018

Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province 2002 2 SA 215 (T)

Ashwander v. Tennessee Valley Authority 297 U.S. 288 (1936)

Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA)

Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity 2004(1) ZLR 538 (S)

Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H)

Associated Provincial Picture Houses Ltd V Wednesbury Corporation [1947] 2 All ER 680 (CA)

Attorney General & 2 others v Kenya Section of International Commission of Jurists [2018] eKLR.

Attorney General of Trinidad and Tobago v Ramanoop Privy Council Appeal No. 13 of 2004

Attorney General v Mudisi & Ors 2015 (2) ZLR 262 (S)

Austin & Anor v Chairman, Detainees' Review Tribunal 1986 (4) SA 281 (ZS)

B (A Juvenile) v Minister of Primary and Secondary Education 2014 (2) ZLR 341 (H)

Bahadur [1986] LRC Const 97.

Baker v Canada (Minister for Citizenship and Immigration) [1999] 2 SCR 817

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)

Bato Star v Minister of Environmental Affairs 2004 (4) SA 490 (CC)

Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC)

Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR

Birkdale District Electric Supply Co v Southport Corporation [1926] AC 355

Blodgett v Holden 275 U.S 142, 148 (1927)

Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S)

BMD Knitting Mills v Sa Clothing & Textile Workers Union (2001) 22 ILJ 2264 (LAC)

B-Sky Energy (Pvt) Ltd v Minister of Energy & Anor 2009 (2) ZLR 241 (H)

Bugdaycay v. Secretary of State for the Home Department; Nelidow Santis v. Secretary of State for the Home Department; Norman v. Secretary of State for the Home Department; In re Musisi, [1987] 1 AC 514

Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 (5) SA 457 (SCA)

Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe and Others (162/2001) ((Pvt)) [2003] ZWSC 65 (24 September 2003)

Chairman of PSC and Others v Zimbabwe Teachers' Association and Others 1996(1) ZLR 91 (S).

Chairman, PTC & Anor v Marumahoko 1992 (1) ZLR 304 (S) 314

Chapfika v RBZ 2007 (2) ZLR 337 (H)

Chawira & 13 Others v Minister, Justice Legal & Parliamentary Affairs & Others (CCZ 3/2017 Const. Application No. CCZ 47/15 Const. Application No. CCZ 50/15) [2017] ZWCC 03

Chief Constable v Evans [1982] 3 All ER 141

Chirenga v Delta Distribution 2003 (1) ZLR 517 (H)

Chitzanga v Chairman PSC & Anor 2000 (1) ZLR 201 (H)

City of Harare v Parsons 1985 (2) ZLR 293 (S)

City of Mutare v *Mlambo* S-229-91

CJ Petrow & Company (Pty) Ltd v Gwaradzimba NO 2014 (1) ZLR 487 (H) 2014 (1) ZLR

CNM v WMG [2018] eKLR

Commercial Farmers Union v Commissioner of Police 2000 (H).

Commercial Farmers Union v Minister of Lands 2001 (2) SA 925 (ZSC).

Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR

Crow v Detained Mental Patients Board 1985 (1) ZLR 202 (H)

Damian Belfonte v Attorney General of Trinidad and Tobago Cv. A. No. 84 of 2004. 13

Daniel Mugendi v Kenyatta University and 3 Others [2013] eKLR.

Davies and Others v Minister of Lands, Agriculture and Water Development 1997 (1) SA 228 (ZS)

DD Mullan 'Development in Administrative Law: The 1983-84 Term' (1985) *The Supreme Court Law Review* 16

Delta Corp Ltd v *ZRA* HH-621-15

Democratic Assembly for Restoration and Empowerment & 3 Others v Saunyama N.O & 3 Others (CCZ 9/18, Civil Appeal No. CCZ 5/18) [2018] ZWCC 9

Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S)

Djordjevic V Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe 2009 (2) ZLR 221 (H)

Dombodzvuku & Anor v Sithole NO & Anor 2004 (2) ZLR 242 (H)

Don Nyamande and Another v Zuva Petroleum (Private) Limited SC 43/15

Dowty Boulton Paul Ltd v Wolverhampton Corporation [1971] 2 All ER 277

Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A)

Dube v Chairman, Public Service Commission and Another 1990 (2) ZLR 181 (H).

Dunsmuir v New Brunswick 2008 SCC 9 (SCR) 190

Durban Add-Ventures Ltd v Premier KwaZulu (No 2) 2001 (1) SA 389 (N)

Econet Wireless (Pvt) Ltd v Minister of Public Service & Ors 2016 (1) ZLR 1066 (S)

Econet Wireless v *Min of Public Service & Ors* HH-350-15

Economic Freedom Fighters v Speaker, National Assembly & Others 2016 (3) SA 580 (CC)

Election Resource Centre v Charumbira & 2 Others [2018] ZWHHC 270

Emmerson Dambudzo Mnangagwa v The Acting President of the Republic of Zimbabwe and Attorney General of Zimbabwe HC 940/17

Ex parte Randolph 20 Fed. Case. No. 11,558, at 254 (C.C.D. Va. 1833)

Fikini v Attorney General 1990 (1) ZLR 165 (S)

Ford v Law Soc, Rhodesia 1977 (2) RLR 40 (A)

Foreman & Anor v KLM Royal Dutch Airlines 2001 (1) ZLR 108 (H)

Foroma v Minister of Public Construction & National Housing & Anor 1997 (1) ZLR 447 (H).

Four Farms Ltd v Agricultural Finance Corporation (2014) e KLR.

Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority and Another [2016] eKLR

Geoffrey Oduor Sijeny v Kenyatta University [2018] eKLR

Guild v Minister of Lands & Ors 2015 (2) ZLR 815 (H)

Gumbo & Anor v Zimbabwe Stock Exchange 2004 (2) ZLR 42 (H)

Hack v Ventersport Municipality 1950 (1) SA 172 (W)

Harrikson v Attorney General [1980] AC 265.

Health Professions Council v McGown 1994 (2) ZLR 329 (S)

In re Central R. Co. of New Jersey, 3 Cir., 136 F.2d 633

In Re Preston (1985) AC 864

Isaac Ngugi v Nairobi Hospital & 3 Others (2012) eKLR.

James v City of Mutare & Others HH-280-15.

Johnstone Ewoi v Jeremiah Ekamais Lomorukai 4 others [2017] eKLR

Jonga v Zambezi River Authority CEO & Another ZWHHC 126

Joseph Mbalu Mutava v Attorney General & another [2014] eKLR

Judicial Services Commission of Zimbabwe v Zibani & Others [2017] ZWSC 68

Kambasha Bros & Anor v Thompson 1970 (2) RLR 97

Kanonhuwa v Cotton Co of Zimbabwe 1998 (1) ZLR 68 (H)

Katsande and Another v Infrastructure Development Bank of Zimbabwe CCZ 113/17.

Knight v Indian Head School Division No 19 [1990] 1 SCR 653

Kruse v Johnson [1898] 2 QB 91

Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service [2014] eKLR.

KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC)

Lake v *Law Society of Zimbabwe* HH-392-86

Leonard Jefwa Kaloma v Consolidated Bank of Kenya and 3 Others [2014] eKLR.

Logan v Morris NO & Anor 1990 (2) ZLR 65 (S)

Luwaca v GMT South Africa 25 ILJ (2004)

Mabuto v Women's University in Africa & Others ZWHHC 698

Machiya v BP Shell Marketing Service (Pvt) Ltd 1997 (2) ZLR 473 (H).

Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR

Majome v ZBC & Others (CCZ 14/2016 Const. Application No. CCZ 67/13) [2016] ZWCC 14

Makoni v Prisons Commissioner & Another [2016] ZWCC 8

Mandirwhe v Minister of State 1986 (1) ZLR 1 (A)

Mangenje v TBIC Investments (Pvt) Ltd & Ors; Mangenje v Min of Lands & Ors 2013 (2) ZLR 534 (H)

Maqele & Ors v Vice-Chancellor, Midlands State University & Anor 2016 (1) ZLR 873 (H)

Margaret Zinyemba v Minister of Lands and Rural Settlement (2016) ZWCC

Marufu v Minister of Transport, Communications and Infrastructural Development 2009 (2) ZLR 458 (H)

Masiyiwa v TM Supermarkets 1990 (1) ZLR 166 (S)

Mawarire v Mugabe NO and Others CCZ 1 (2013) ZWCC

MDC v President Republic of Zimbabwe & Ors 2007 (1) ZLR 257 (H)

MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC)

Metsola v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) 155

Meyer v Iscor Pension Funds (2003) 1 All SA 40 (SCA)

Mhanyami Fishing and Transport Co-Operative Society Limited and Others v General Parks and Wildlife Management Authority N.O and Others [2011] ZWHHC 92

Minerals Marketing Corp of Zimbabwe v Mazvimavi 1995 (2) ZLR 353 (S)

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)

Minister of Information v PTC Managerial Employees Workers' Committee 1999 (1) ZLR 128 (S).

Minister of Lands, Agriculture and Rural Resettlement and Others vs. Commercial Farmers' Union Judgment No. SC111/2001

Motau v Minister of Defence 2014 (8) BCLR 390 (CC)

Movement for Democratic Change v The President of Zimbabwe & Ors 2007 (1) ZLR 257 (H)

Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others (Const. Application [2015] ZWCC 12

Mugugu v Police Service Commission and Another 2010 (2) ZLR 185 (H

Mujuru v President of the Republic of Zimbabwe and Others CCZ 8/18

Mukarati v *Director of Housing & Community Services* HH-281-90

Mutare City Council v *Mafuya* 1984 (2) SA 124 (ZH)

N & B Ventures (Pvt) Ltd v Minister of Home Affairs and Anor 2005(1) ZLR 27 (H)

Natural Stone Export Co (Pvt) Ltd & Anor v Director of National Parks and Wildlife Management & Ors 1997 (2) ZLR 215 (H

NG Wilson 'Adequacy of Reasons - From Procedural Fairness to Substantive Review' 90 (2011) *Canada Bar Review* 509

Northern Roller Milling Co Ltd v Commerce Commission (1994) 2 *NZLR* 747

Nyahuma v Barclays Bank (Pvt) Ltd 2005 (2) ZLR 435 (S)

Patriotic Front-Zimbabwe African People's Union v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC)

Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR

Peter Nganga Muiruri v Credit Bank Limited & 2 others [2008] eKLR.

PF ZAPU v Minister of Justice (1) 1985(1) ZLR 261 (H)

PF-ZAPU v *Minister of Justice (2)* 1985 (1) ZLR 305 (S)

Pharmaceutical Management Agency Ltd v Rousse Uclaf Australia Pty Ltd [1998] NZAR 58, 66 (CA)

Pharmaceutical Manufacturers of SA and Another in Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Potgieter v Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en andere 2001 (11) BCLR 1175.

President of RSA v SARFU 2000 (1) SA 1 (CC)

Quinella Trading (Pty) Ltd v Minister of Rural Development 2010 4 SA 308 (LCC)

R v Panel on Take Overs Ex Parte Guiness plc (1990) 1 Q.B 146

Rapholo v State President and Others 1993 (1) SA 680 TPD

Rederiaktiebolaget 'Amphitrite' v The King [1921] 3 KB 500

Reno v Condon 328 US 141, 148 (2000)

Republic v Amos ole Tiren & another Ex-parte James Momanyi Nyaberi [2018] eKLR.

Republic v Principal Registrar of Persons & another Ex-Parte Suada Dahir Hussein [2016] eKLR.

Republic vs. Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 Ors Ex Parte Patricia Olga Howson, Miscellaneous Application No. 324 of 2013.

Revital Healthcare (EPZ) Limited v Minister of Health and Others [2015] eKLR.

Rukuni v Minister of Finance & Anor 2012 (2) ZLR 205 (H)

S v Magoge 1988 (1) ZLR 163 (SC)

S v Nyamapfukudza 1983 (2) ZLR 43 (S)

SA Naptosa v Minister of Education, Western Cape [2001] BLLR 338.

Sachs v Donges NO 1950 (2) SA 265 (A)

SACTWU v Discreto 1998) 19 ILJ 1451 (LAC) 8

Secretary for Transport and Anor v Makwavarara 1991 (1) ZLR 18 (S)

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1976] UKHL

Sgt Chibaya v Board President ZWHHC 46-16

Shumba v Minister of Justice & Ors 2014 (1) ZLR 715 (H)

S*ibanda & Anor v President of the Republic of Zimbabwe N.O. & Ors* HC 1082/17

Silver Trucks (Pvt) Ltd & Anor v Director of Customs & Excise (2)1999 (2) ZLR 88 (H)

South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others 2016 (2) SA 522

Speaker of the National Assembly v James Njenga Karume [1992] eKCR.

Spector Motor Service Inc. v Mclaughlin Tax Commissioner 323 U.S. 101

Sports and Recreation Commission v Sagittarius Wrestling Club 2001 (2) ZLR 501 (S)

Taylor v *Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S).

Telecel v Postal Telecommunications Regulatory Authority of Zimbabwe (Portraz.) 2015 (1) ZLR 651

Telecel Zimbabwe v PORTRAZ [2015] ZWHHC 446

Tenesi v PSC 1996 (1) ZLR 196 (H)

Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd [1994] 2 NZLR 641.

Tregers Industries (Pvt) Ltd v Zimbabwe Revenue Authority 2006 (2) ZLR 62 (H).

Trinity Broadcasting, Ciskei v Independent Communications Authority of SA [2003] 4 All SA 589 (SCA)

Union Carbide Management Services (Pvt) Ltd & Anor v Cluff Mineral Exploration (Zimbabwe) Ltd & Ors 1989 (1) ZLR 224 (H)

U-Tow Trailers (Pvt) Ltd v City of Harare and Another 2009 (2) ZLR 259 (H)

Van Dyk v National Commissioner, South African Police Service and Another 2004 (4) SA 587 (T)

Veritas v ZEC, the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General HC 4391/18

Vice-Chancellor, University of Zimbabwe & Anor v Mutasa & Anor 1993 (1) ZLR 162 (S)

Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors 1991 (1) ZLR 323 (S)

W*atchtower Bible and Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd & Anor* 1993 (2) ZLR 67(S)

Waterfalls Town Management Board v Minister of Housing 1957 (1) SA 336 (SR)

Wlotzkasbaken Homeowners and Another v Erongo Regional Council and Others (2007) NAHC 95

Wright v Attorney-General [2006] NZAR 66

Ye v Minister of Immigration [2008] NZCA 291 (CA)

Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor 1996 (1) ZLR 378 (H)

Zibani v JSC & Others HH 797/16

Zimbabwe Teachers' Association v Minister of Education and Other 1990 (2) ZLR 48.

Zindoga & Others v Minister of Public Service (2006) 2 ZLR 10 (H)

2. Articles

Alexander J & J McGregor 39 :4 (2013) 'Introduction: Politics, Patronage and Violence in Zimbabwe' Journal of Southern African Studies 749

Asimow M 'Administrative Law under South Africa's Interim Constitution' (1996) 44 (3) The American Journal of Comparative Law 393

Asimow M 'Towards a South African Administrative Justice Act' (1997) 3 Michigan Journal of Race and Law 1

Badamasiny J & M Bello 'An appraisal of administrative justice and good governance in Nigeria' (2013) 6 (2) Journal of Politics and Law 216

Bandyopabhyay O Administration, Decentralisation and good governance' (1996) 31 (48) Economic and Political Weekly 3109

Bolton P 'Government Contracts and the Fettering of Discretion- A Question of Validity' (2004) SA Public Law 90

Cain G 'Bad Governance in Zimbabwe and Its Negative Consequences' (2016) 2 (1) The Downtown Review

Cameron E ' Legal Chauvinism, Executive-Mindedness and Justice - L. C. Steyn's Impact on South African Law.' (1982) 99(1) SALJ 38

Chidudza L 'The Zimbabwe Human Rights Commission: Prospects and challenges for the protection of human rights' 19 (2015) Law, Democracy and Development Journal 148

Chinopfukutwa T 'House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective (2017) Zimbabwe Human Rights Journal 145

Chitimira H 'A Conspectus of the Functions of the Judiciary under the Zimbabwe Constitution 2013' (2017) 25 AJICL 221.

Chowdhury N & Skarstedt CE 'Principles of Good Governance' (2005) Montreal: Centre for International Sustainable Development Law 4

Christie IM 'The Nature of the Lawyer's Role in the Administrative Process' (1971) Law Society of Upper Canada Special Lecture Series 1

Coglianese C 'Administrative Law: The US and Beyond' (2016) University of Pennsylvania Faculty Scholarship Paper 1656

Cohn M 'Legal Transplant Chronicles: The evolution of unreasonableness and proportionality of Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583

Corder H 'Administrative Justice in The Final Constitution' (1997) 13 SAJHR 28

Daintith TC 'The Legal Analysis of Public Policy' (1982) Journal of Law and Society 191

Davis D 'To Defer and When? Administrative Law and Constitutional Democracy' 2006 Acta Juridica 23,

De Bourbon A ‘Human rights litigation in Zimbabwe: Past, present and future’ (2003) 2 AHRLJ 195

De La Harpe S, C Rijken C, R Roos R ‘Good Governance in Public Administration: A South African Case Study’ (2008) 11 (2) PER/PELJ 125

Dean WHB ‘Our Administrative Law –A dismal science?’ (1986) 2 SAJHR 164

Delaney EF 'Analysing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66(1) Duke Law Journal 1

Evans JM ‘Administrative Appeal or Judicial Review: A Canadian Perspective’ (1993) Acta Juridica 47

Feltoe G “Giving with one hand and taking back with the other: the exemptions and exclusions in the Administrative Justice Act” 2004 Issue No 11 Zimbabwe Human Rights Bulletin 106

Fish ES ‘Constitutional Avoidance as Interpretation and as Remedy: Commentary on American Chief Justice Roberts’ (2016) 114 Michigan Law Review 1275

Gaibie AS ‘The Stare Decisis Doctrine: The Beginning of The End for Zimbabwe?’ (2006) 47 Codicillus, 66.

Groves M ‘Substantive legitimate expectations in Australian administrative law’ 32 Melbourne University Law Review (2008) 470

Hutchinson AC ‘The Rise and Ruse of Administrative Law and Scholarship’ (1985) 48 Modern Law Review 293

Jowell J & A Lester QC ‘Proportionality: Neither Novel nor Dangerous’ in J Jowell & D Oliver (eds) New Directions in Judicial Review (1988) 514

Kagoro B ‘Zimbabwe’s turmoil: problems and Prospects’ (2003) 87 Institute for Security Studies Monographs 8.

Katyal NK & Schmidt T ‘Active Avoidance: The Modern Supreme Court and Legal Change’ 128 Harvard Law Review (2015)

Kelsen H ‘The Preamble of the Charter—a Critical Analysis’ 8 (1946) 2 Journal of Politics 134

Kloppenberg LA ‘Avoiding Constitutional Questions’ 35 BCL Rev 1003 (1994)

Knight D ‘Simple, Fair and Discretionary Administrative Law’ (2008) 39 VUWLR 99

Kondo T 'Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence' 2017 (1) African Human Rights Law Journal 163

Kotze LJ 'The Application of Just Administrative Action in The South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 2004 PER 7.

Mafunisa MJ & T Khalo T 'Good governance-An elusive ideal?' (2014) 49 (4) Journal of Public Administration 960

Manrouvalon V & C Gearly 'The Case for Social Rights in Debating Social Rights' (2010) Georgetown Public Law Research Paper 10

Manyeruke C & S Hamauswa 'Rethinking the Concept of a 'People-driven constitution in Zimbabwe: The Case of COPAC's constitution Making Process' (2013) 2 Southern Peace Review Journal 175

Martin R 'Rule of Law in Zimbabwe' 2006 The Round Table 95 (384)

Moller K 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709

Mullan D 'Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?' (1982) 27 Mc Gill Law Journal 250

Mullan D 'Substantive Fairness Review: Heed the Amber Light' 18 (1988) Victoria University Wellington Law Review 293

Mullan DD 'Development in Administrative Law: The 1983-84 Term' (1985) The Supreme Court Law Review 16

Murcott M 'A future for the doctrine of substantive legitimate expectation? The implications of Kwazulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu Natal' (2015) 18 PER 3133

Mushonga H 'Mugabe Moulds Pliant Judges' (2006) Institute of War and Peace Reporting

Napolitano G 'Conflicts and Strategies in Administrative Law' (2014) Vol.12 International Journal of Constitutional Law 357

Nickel J 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights (2008) 30 Human Rights Quarterly 984

Orgad L 'The preamble in constitutional interpretation' 8 (2010) International Journal of Constitutional Law 714.

Poole M 'Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" (1995) N.Z. Law Rev. 426

Quinot G 'The Developing Doctrine of Substantive Legitimate Expectations in South African Administrative Law' SA Public Law 548

Reif LC 'Building democratic institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 Harvard Human Rights Journal 1.

Sangita SN 'Administrative reforms for good governance' 63: 4 (2002) Indian Journal of Political Science 325

Shivaji S 'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka' (2006) Acta Juridica 95.

Slack MR 'Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence - A Response to Lisa Kloppenberg.' (2006) 56(4) Case Western Reserve Law Review 1057

Smiles R 'Zimbabwe's Political Third way Debate' (2006) 31 Journal for Contemporary History 17, 18.

Smith-Höhn J 'Unpacking the Zimbabwean Crisis: A Situation Report' Institute for Security Studies (2009).

Sweet A & J Matthews 'Proportionality Balancing and Global Constitutionalism' (2007) 47 Columbia Journal of Transnational Law 68

Taggart M 'Administrative Law' (2006) New Zealand Law Review 75

Taggart M 'Reinvented government, traffic lights and the convergence of public and private law. Review of Harlow and Rawlings Law and Administration' (1999) Public Law 124

Veritas 'Statutes Requiring Constitutional Alignment' (April 2017)

Wade H MacLauchlan 'Some Problems with Judicial Review of Administrative Inconsistency' (1984) 8 Dalhousie Law Review 435

Webber W 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law and Jurisprudence 179

Young KG 'The avoidance of substance in constitutional rights' (2014) 5 Constitutional Court Review 223

3. Books

Barak A *Proportionality: Constitutional Rights and Their Limitations (*2012)

Baxter L *Administrative Law* (1984)

Bennett TW et al (eds) *Administrative Law Reform* (1993)

Bickel AM *The Least Dangerous Branch: The Supreme Court at The Bar of Politics* (1962)

Burns Y *Administrative Law* (2013)

Cane P *Administrative Law* 4ed (2004)

Church J, C Schulze & H Strydom *Human Rights from a Comparative and International Law Perspective* (2007)

Craig P *Administrative Law* 6ed (2008)

Currie I & De Waal in I Currie & J De Waal *Bill of Rights Handbook* 6ed (2017)

Devenish GE, K Govender and D Huime *Administrative Law* (2001)

Feltoe G *Administrative Law of Zimbabwe* (2013)

Feltoe G *Guide to Zimbabwean Administrative Law* (2017)

Feltoe G *Judges' Handbook for Criminal Cases* 1st ed (2012)

Fleiner F *Institutionen Des Deutschen Verwaltungsrechts* (1928)

Fordham M *Judicial Review Handbook* (2004)

Friendly HJ *Benchmarks* (1967)

Handler GJ *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (1996)

Harold- Barry D *Zimbabwe: The Past is the* Future*: Rethinking Land, State and Nation in the context of crisis* (2004)

Herbert S *Administrative Behaviour: A Study of Decision-making processes in Administration* (1947)

Hoexter C *Administrative Law of South Africa* (2012)

Hogg PW *Constitutional Law of Canada* (2014)

Huscroft G, B Miller and G Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014)

Jacobini HB *An Introduction to Comparative Administrative Law* (1991)

Jarass H & B Pienoth *Grundgesetz für die Bundesrepublik Deutschland* (2012)

Jelf EA 'Justiciable Disputes' *Transactions of the Grotius Society* 7 (1921

Joseph PA *Constitutional and Administrative Law in New Zealand* (2001)

K Malleson K & PH Russell *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006)

Linington G *The Constitutional Law of Zimbabwe* (2001)

Madhuku L *An Introduction to Zimbabwean Law* (2010)

Madhuku L *Labour Law in Zimbabwe* (2015)

Martin D & P Johnson *The struggle for Zimbabwe- The Chimurenga* (1981)

Mashaw JL Greed, Chaos and Governance: Using Public Choice to Improve Public Law (1997)

Putnam RD *Making Democracy Work -Civic Traditions in Modern Italy* (1993)

Shrader-Frechette KS *Risk and Rationality: Philosophical Foundations for Populist Reforms* (1991)

Shue H *Basic Rights* 2ed (1996)

Sunstein C *Designing Democracy: What Constitutions Do* (2001)

Taylor GDS *Judicial Review: A New Zealand Perspective* (1991)

Tushnet M *Taking the Constitution Away from the Courts* (2000).

Wade W and C Forsyth *Administrative Law* (2014)

Wood GS The *Creation of the American Republic* 1776–1787 (1972)

4. Chapters in Books

Beukes M 'The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice' in C Lange & J Wessels (eds) *The Right to Know - South Africa's Promotion of Administrative Justice and Access to Information Acts* (2009)

Corkery J 'Introductory Report' in J Corkery (ed) *Governance: Concepts and Applications* (1999)

Hoexter C 'Standards of Review of Administrative Action: Review for Reasonableness' in J Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006)

Huang CY, DS Law 'Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China Research Handbook' in F Bignami, D Zaring (eds) *Comparative Law and Regulation* (2014)

Kaul M 'Issues in Governance: A Commonwealth Perspective' in J Corkery(ed*) Governance: Concepts and Applications* (1999)

Kjoer M & K Kinnerup 'How Does Good Governance Relate to Human Rights?' in H Sano H & G Alfredsson (eds) *Human Rights and Good Governance* (2002) 18

Konig K 'Good Governance-as a Steering and Value Concept for the Modern Administrative State' in J Corkery (ed) *Governance: Concepts and Applications* (1999)

Lane B 'The No Evidence Rule' in M Groves and HP Lee (eds) *Australian Administrative law: Fundamentals, Principles and Doctrines* (2007)

Matthews J 'Proportionality in Administrative Law' in S *Rose-Ackerman, PL Lindseth & B Emerson* (eds*)* C*omparative Administrative Law,* 2nd ed (2017)

Osborne D 'Governance, Partnership and Development' in J Corkery (ed) *Governance: Concepts and Applications* (1999)

Sanchez Y 'Proportionality in French Administrative Law' in RS Waard B (eds) *The Judge and the Proportionate Use of Discretion: A Comparative Study* (2016)

Waard B 'Proportionality in Dutch Administrative Law' in S Ranchordás & Waard(eds) *The Judge and the Proportionate Use of Discretion: A Comparative Study* (2016)

Wouters J & C Ryngaert 'Good Governance: Lessons from International Organizations' in D Curtin D & R Wessel (eds) *Good Governance and the European Union* (2004*)*

5. Zimbabwean Legislation

Administrative Court Act [Chapter 7:01]

Defence Forces Act, Act 27 1982

Education Act, Act 5 1987

Estate Agents Act

Hazardous Substances and Articles Act

Human Rights Commission Act

Labour Act, Act 16 1985

Land Acquisition Act [Chapter 20:10]

Law and Order (Maintenance) Act 53 of 1960 (Chapter 11:07)

Liquor Act [Chapter 14:12]

Mines and Minerals Act [Chapter 21:05]

Parliamentary Services Act [Chap 2:03]

Presidential Powers (Temporary Measures) Act 1 of 1986 [Chapter 10:20]

Procurement Act [Chapter 22:14]

Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27)

6. Foreign Legislation

Kenya Administrative Action Act 4, 2014

Labour Relations Act of South Africa, 1995.

South Africa Promotion of Administrative Justice Act3, 2000.

7. Theses

J Mavedzenge 'Reviewing the constitutionality of the Administrative Justice Act (Chapter 10:28) of Zimbabwe' *Unpublished Thesis* (2015)

S Hofisi 'The Doctrine of Constitutional Avoidance as A Nemesis to Public Interest and Strategic Impact Litigation in Zimbabwe: Thesis, Antithesis and Synthesis' *Unpublished Thesis* (2017)

T Mapfumo 'Whither to, the judiciary in Zimbabwe? A critical analysis of the human rights jurisprudence of the Gubbay and Chidyausiku Supreme Court benches in Zimbabwe and comparative experiences from Uganda' *LLM Thesis* (2005)

8. Constitutions

Constitution of Kenya, 2010

Constitution of South Africa, 1996

Constitution of the Republic of Ghana, 1992.

Constitution of the Republic of Malawi, 2006.

Constitution of the Republic of Namibia, 1990.

Constitution of Zimbabwe, 1979

Constitution of Zimbabwe, 2013

9. Reports

A Migai 'Institutional Reform in the New Constitution of Kenya' *International Centre of Transitional Justice Report* (2010)

E Ongoya 'The Changing Character of Judicial Review Under the Constitutional and Statutory Order in Kenya' (2014) *Law Society of Kenya Report* 3

Human Rights Watch Report *Our hands are tied: Erosion of the Rule of Law in Zimbabwe* (November 2008)

Human Rights World Watch *Country Report: Zimbabwe* (2017)

Inter-Ministerial Taskforce 1 (31 March 2017) *The IMT Newsletter* 1

International Bar Association *Report of Zimbabwe Mission* (2000)

Legal Resources Foundation *Justice in Zimbabwe Report* (September 2002)

NCA 'Shortcomings of the Kariba Draft Constitution' *National Constitutional Assembly Report* 2009 1

Report of The Commission on Global Governance *Our Global Neighbourhood* (1995)

T Nyabeze 'Progressive reform in The New Constitution' (2015) *Konrad-Adenauer-Stiftung e.V. Country Report*

World Bank Group 'Corruption and Good Governance' Annual Meetings Brief (1999)

Zimbabwe Human Rights Commission *Annual Report* (2015)

Zimbabwe Human Rights Commission *Annual Report* (2016)

Zimbabwe Human Rights NGO Forum *Political Violence Report* 1-18 (January 2002)

10. Newspaper and Online Articles

C Zenda ' Judiciary Weak on Enforcing the Rule of Law' in *Financial Gazette Zimbabwe* <http://www.financialgazette.co.zw/judiciary-weak-on-enforcing-rule-of-law/>

Daily News 'Retired Chief Justice Gubbay Living in Fear' (23 February 2001).

Discussion of Zuva Judgment <https://www.theindependent.co.zw/2018/04/13/tm-labour-case-zuva-ghost/>.

F Madzingira 'Terminating Employee Rights: A Discussion of Nyamande and another v Zuva Petroleum' (OxHRH Blog, 11th August 2015)

P Kaseke ' Deployment of Army Ultra Vires Constitution' in *Zimbabwe Situation* https://www.zimbabwesituation.com/news/august-1-army-deployment-ultra-vires-zim-constitution/

S Hofisi 'The Constitutional Court and the Avoidance Doctrine' (11 October 2017) *The Herald.*

T Musakaruka Herald 'What Constitutes a fair hearing' https://www.herald.co.zw/what-constitutes-a-fair-hearing/

Z Ogeka 'The Constitutionalisation of Kenyan Administrative law' https://ogekazacharia.blogspot.com/2016/10/constitutionalisation-of-administrative.html

S Hofisi 'The right to administrative justice in Zimbabwe' *Herald Newspaper* June 7, 2017

Andrew Kunambura 'Government renders Constitution a paper tiger' http://www.financialgazette.co.zw/government-renders-constitution-a-paper-tiger/

B Pongo 'Constitution: Change for the sake of it' New Zimbabwe Article available on http://www.newzimbabwe.com/news/printVersion.aspx?newsID=9112

Star Newspaper 12 January 2001.

Daily News 6 February 2001.

https://www.theindependent.co.zw/2005/01/21/court-still-to-rule-on-aippa-challenge/

D Mavhunga *Human Rights Watch* https://www.hrw.org/news/2016/09/06/zimbabwes-judges-under-fire.

Veritas 'Alignment of Laws with Constitution' (29 May 2017) *Constitution Watch 5/2017.*

P Kaseke https://www.newsday.co.zw/2018/05/chamisa-reaction-to-high-court-ruling-treading-on-contemptuous-ground/

11. Public Lectures

A Gubbay 'The progressive Erosion of the Rule of Law in Zimbabwe' *3rd International Rule of Law Lecture* (2009)

12. Conference Papers

Justice S Glazebrook 'To the Lighthouse: Judicial Review and Immigration in New Zealand' Paper for the Supreme Court and Federal Court Judges' Conference held in Hobart from (24 to 28 January 2009)