Definitions

Admin Law relationship - 1 party exercising power from state auth
- authority & scope: can be within org, general/obj rel: group, non-specific, granted from legal
- indiv/sub rel: personal, specific, identifiable from decisions

Origin of State: a) any dept or state in nat/prov/loc sphere of gov?
b) any other function/ dept exercising power/func not consti/legis
- Not including court/judicial funct

Admin Action: any decision/failure by
- a) organ of state exercising power/func not consti/func not consti or legis
- b) nat/loc every organ/func with adverse impact
- DEEP AAE

Decision (not proposed decision or failure to take decision)
- Administrative nature
- Exercising power by consti or legis
- Organ of state/nat/loc exercising public power/func public function
- Adversely affects rights of any person
- Direct legal external effect
- Not specifically excluded by 9 powers except...

Exclusions: executive powers & functions (highest level is exclusion)
- Legislative functions of parl, prov (legis) & municipal councils
- Judicial functions of court
- Decisions under PALA
- Decisions now PAJA

Just AIA: no consti: lawful, reasonably, proc fair, written reasons
**LAWFUL**
- within exposing prp
- person authorized (invalid claim)
- threshold req for any AA

**Delegation**
- general rule against, with exception
- constit auth to delegate
- stat auth
- mkt apply own mind
  - MANDATE: Instr
  - DECLARATION: Indict, convey
  - DECENTRAL: Indp body

**Abuse**
- UNAUTH PWR: only obj or act
  - cant extend wealth
  - objective test (result)
  - invalid
- UNAUTH PWR: lawless option
  - fraudulent action, evasive
  - ULTRA MOTURO: defects law
  - deliberate & intentional

**REASONABLE**
- proper discretion obj feels & circumst
  - courts don't intervene too much
  - balance eq of power // fairness
  - justifiable = based on reason, prop
    - suitability: most opprop
    - necessity: only what is needed
    - weighing: prop is cum

  - constit grants right to read AA
    - PJA: goes effect
      - so unreasonable that no reasonable auth

**PROC FAIR**
- notice of int action
- legal & timely notice
- personal opp
- legal rep
- evidence (cost)
- public hearing

**NOMO IDEIA**
- pecuniary interest
- personal interest
- suspicion is enough

**PAJA**
- rights to leg expect if only proc payment
  - adequate notice
    - may to make case
    - statement of action
    - notice of right of review
    - right to req reasons notice
  - discretion: legal & complex
    - public & distinct imp
    - personal rep

**PUBLIC**
- includes any group/cls
  - admin must allow

**CONTROL**
- Sensor admin
  - Parliamentary
  - Admin body & comms
  - preelctions
  - Exec: providing, making
  - Intl:
  - Sec: mandamus, dep
  - administrative: rule making, exeq
The Crux of Administrative Law - Memorize

**Administrative Action:**

Administrative Action is by the PAJA defined as:

- Administrative action means any decision taken, or failure to take a decision by –
  - An Organ of state, when –
    1. Exercising a power in terms of the Constitution or a provincial constitution; or
    2. Exercising a public power or performing a public function in terms of any legislation; or
  - A natural or juristic person, other than an organ of state, when exercising a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

**The right to Just Administrative Action**

Section 33 of the Constitution of South Africa 108 of 1996 grants all the right to Just Administrative Action in terms of section 33. Section 33 reads as follows:

- Just Administrative Action:
  1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
  2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
  3. National legislation must be enacted to give effect to these rights, and must—
     a. Provide for review of administrative action by a court or, where appropriate, and independent and impartial tribunal.
     b. Impose duty on the state to give effect to the rights in subsections (1) and (2); and
     c. Promote an efficient administration.

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1 Includes a refusal to take a decision
2 Any decision of an administrative nature made, proposed to be made, or required to be made, under an empowering provision i.e. making, giving, suspending, revoking, restricting, retaining, demanding, refusing to act, permitting, consenting etc.
3 Organ of state – section 239 of the Constitution
   a. Any department of state or administration in the national, provincial or local sphere of government; or
   b. Any other functional or institution –
      i. Exercising a power or performing a function in terms of the Constitution or provincial constitution; or
      ii. Exercising a public power of performing a public function in terms of the Constitution or a provincial constitution.

But does not include a court or judicial officer

4 Any group or class of the public
5 Empowering provisions:
   - A law
   - A rule of common law
   - Customary law
   - An agreement
   - Instrument or other document in terms of which an administrative action was purportedly taken

6 Fair administrative action constitutes:
   - Adequate notice of the nature and the purpose of the proposed administrative action;
   - A reasonable opportunity to make representation
   - A clear statement of the administrative action
   - Adequate notice of any right of review or internal appeal, where applicable
   - Adequate notice of the right to request reasons in terms of section 5

7 These provisions are set out in the PAJA in s 5.
8 National legislation includes – Section 239 of the Constitution
   a. Subordinate legislation made in terms of an Act of Parliament
   b. Legislation that was in force when the Constitution took effect and that is administered by the national government.
This paper consists of two (2) pages

1. Answer all QUESTIONS.
2. Pay attention to the ALLOCATION OF MARKS and adapt your answer accordingly.
3. Please do NOT SEPARATE SUBSECTIONS of questions.
4. Refer to RELEVANT CASE LAW and OTHER AUTHORITY to support your answers.
5. Credit will be given for WELL-STRUCTURED, COHERENT and GRAMMATICALLY CORRECT ANSWERS.

Food-for-all (Pty) Ltd was awarded fishing rights to catch a certain quantity of pichards and anchovies ("the quota") during a particular season in terms of section 18(1) of the Marine Living Resources Act 18 of 1998 by a branch of the Department of the Environment, namely Marine and Coastal Management ("MCM"). MCM used a formula developed by a University's department of mathematics to determine the various quotas. Food-for-all (Pty) Ltd was extremely unhappy with its quota, saying that in the previous year it had been allocated a certain percentage of the "total allowable catch" ("TAC") of fish, partly because it had a canning factory that could process more than the TAC allocated. It transpired, however, that in terms of the new quota allocation Food-for-all's allocation was decreased from 5% of the TAC to 3% without informing the company or granting it a hearing. Two other companies, Penguin Fisheries ("PF") and Nemo's Sea Products ("NSP") (neither of which had canning facilities), had been given increased fishing allocations (from 0.05% to 3.5% and from 1% to 3.5%, respectively). Food-for-all argued that the MCM allocation of the fishing quotas was unreasonable since the allocation favoured some companies in an irrational and inexplicable manner.

Answer the following questions. Give reasons for all your answers & a bare Ayes or Ano or reference to a case or provision is NOT enough.

QUESTION 1

(a) The set of facts reflects an individual administrative law relationship between MCM and Food-for-all. Briefly define it.

(b) Is administrative action in evidence in the set of facts? In your answer you should give a full definition of the concept 'administrative action' with reference to the provisions of the Promotion of Administrative Justice Act (PAJA) 3 of 2000.

(c) Do the following actions constitute administrative action? Explain your answers.

DECEASED
A.A
EXPLANATION
ENQ PROV
PUBLIC ORGANISATION PUBLIC PERSON
ADMIN NATURE
ADVERSE AFFECT
PUBLIC OR PUBLIC PERSON
(I) A request for reasons by Food-for-all (Pty) Ltd
(II) The regulations published by the Minister of the Environment in terms of the Marine Living Resources Act
(III) The refusal of MCM to supply Food-for-all (Pty) Ltd with reasons

QUESTION 2
(a) Is MCM an organ of state? Why is the answer important? Name the organs of state in the set of facts
(b) Name five (5) basic principles and values governing public administration in terms of section 195 of the Constitution of the Republic of South Africa, 1996
(c) Briefly explain when an administrator is functus officio. Confine your answer to the rules applicable to onerous/burdensome and beneficial administrative acts

QUESTION 3
(a) Discuss fully whether Food-for-all has had procedurally fair treatment in terms of PAJA
(b) Explain the concept of “proportionality” with reference to the reasonableness of the decision to reduce the fishing quota of Food-for-all (Pty) Ltd

QUESTION 4
(a) Who has locus standi in terms of section 38 of the Constitution?
(b) Suppose it transpires that the administrator who issued Food-for-all’s quota is a director of “PF”. Would Food-for-all be able to take the matter on review? On what ground?
(c) Why should internal remedies first be exhausted?
(d) Name five (5) judicial remedies which are available to an aggrieved person

TOTAL: \( \{100 \} \)
ADL2601

ADMINISTRATIVE LAW

Duration 2 Hours

EXAMINERS:
FIRST
SECOND
MRS I SOUTHWOOD
PROF M BEUKES

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and may not be removed from the examination venue.

This paper consists of two (02) pages

• Answer all QUESTIONS.
• Pay attention to the ALLOCATION OF MARKS and adapt your answer accordingly.
• Refer to relevant CASE LAW and OTHER AUTHORITY.
• Please do NOT SEPARATE SUBSECTIONS of questions.
• Credit will be given to SYSTEMATIC PRESENTATION, GRAMMATICAELY
  CORRECT LANGUAGE and reference to LEGAL AUTHORITY.

Mr J L Bird is a prisoner serving a sentence of six years imprisonment for dealing in drugs.
Assume that he qualifies for parole and that he has applied for parole. However, his
application for parole is summarily dismissed without any explanation. Vinnie Vengeance,
a member of the parole board that considered Mr Bird’s application, carries a longstanding
grudge against Mr Bird because he (Mr Bird) assaulted Vinnie Vengeance’s sister years ago.

Mr J L Bird contacts you. Advise him on the following and give well substantiated reasons
for all your answers.

QUESTION 1

(a) Identify the administrative action in the set of facts. In your answer you should give a full
definition of the concept “administrative action” with reference to the provisions of the
Promotion of Administrative Justice Act (PAJA) 3 of 2000

(b) Define “organ of state” in terms of the Constitution, 1996. Identify the organs of state in
the set of facts and show why such identification of organs of state is important.

TURN OVER
QUESTION 2

(a) Discuss whether bias is in evidence in the set of facts (10)

(b) Does the decision to refuse Mr Bird’s application constitute procedurally fair administrative action in terms of PAJA? (15)

QUESTION 3

(a) Was Mr Bird entitled to reasons? Discuss fully with reference to PAJA, including whether reasons are important and why (15)

(b) Suppose the reasons given for the refusal of Mr J Bird’s application are that he has refused to make his bed for six weeks. Discuss whether this would be considered “adequate” reasons (5)

(c) Briefly discuss the elements of the principle of proportionality as it relates to reasonableness (5)

QUESTION 4

(a) Who has locus standi in terms of section 38 of the Constitution? (5)

(b) Under which circumstances may Mr Bird approach the court directly? (7)

(c) Demonstrate the difference between statutory appeal and judicial review (6)

(d) What are the orders a court may make in terms of section 8 of PAJA should Mr Bird be successful in his application for review? (7)

TOTAL: {100}
ADMINISTRATIVE LAW (ADL2601)

AN OVERVIEW OF THE DISCUSSION CLASS

Pages 2 to 3 of the study guide set out the four key features of administrative law:

1. **State authority and the holders of such authority (study units 1 to 4).** When confronted with a problem in administrative law, the first question you need to ask is whether any person or body has **acted as an organ of state**.

2. **Administrative action (study unit 5).** Once you have determined that an organ of state is involved, you have to establish if the conduct is administrative action.

3. **Just administrative action (study units 6 to 10).** Having established that administrative action was taken, you need to determine whether such action complied with the requirements of **just administrative action**.

4. **Control and remedies (study units 11 & 12).** If the administrative action was not just (i.e. it was unlawful/unreasonable/procedurally unfair, or reasons were not given), you have to examine the means of rectifying such unjust administrative action.

NOTE: This overview is not a summary of the study guide to be studied with a view to passing the examination. It merely provides a framework of the most important features of administrative law, as set out in your study guide. It remains your responsibility to work through the study guide, summarise it and study it.

1. **STATE AUTHORITY AND THE HOLDERS OF SUCH AUTHORITY**

Remember we said that when confronted with a problem in administrative law, the first question you need to ask is whether any person or body has acted as an organ of state. In other words, you have to establish if state authority was exercised.

1.1 **ADMINISTRATIVE LAW RELATIONSHIP**

An administrative law relationship exists between two or more people, where at least one of the subjects is a person or body clothed in **state authority** who is **able to exercise that authority** over a person or body in a **subordinate position**, whose **rights are affected** by the action. It is an **unequal relationship**. These are the characteristics of an administrative law relationship.

You should also be able to distinguish between **general** and **individual** administrative law relationships.

1.2 **LEGAL SUBJECTS OF THE ADMINISTRATIVE LAW RELATIONSHIP**

From the above discussion of the administrative law relationship, it emerged that one of the subjects of this relationship is the authoritative party and the other is in a
subordinate position. You should be able to identify each of the subjects of the administrative law relationship.

**Identification of the authoritative party:** In order to identify the authoritative party, you must **know** the definition of an organ of state, as contained in section 239 of the Constitution.

In terms of **s 239 of the Constitution**, an organ of state includes

- any **department of state or administration** in the national, provincial or local sphere of government; or
- (b) any **other functionary or institution** that (i) **exercises a power or performs a function in terms of the Constitution** or a provincial constitution; or (ii) **exercises a public power or performs a public function in terms of any legislation**. A court and judicial officers are excluded.

**NOTE:** Work through study unit 3 by doing the activities. This will hone your ability to recognise the legal subjects in a given factual situation and provide a reason for your view. We recommend that you also work through the previous examination paper and its suggested answers to test your knowledge as you progress.

### 1.3 SOURCES OF ADMINISTRATIVE LAW

You should know the various sources of administrative law.

- Constitution
- Legislation
- Case law
- Common law
- Administrative practice
- International law

- Academic writings
- Policy documents (Green & White Papers)
- Reports from Chapter 9 institutions
- Foreign law

### 2. ADMINISTRATIVE ACTION

#### 2.1 WHY IS IT NECESSARY OR IMPORTANT TO ESTABLISH WHETHER ADMINISTRATIVE ACTION IS INVOLVED?

It is important because administrative action is the threshold requirement for the application of section 33 of the Constitution.

#### 2.2 HOW DO YOU DETERMINE WHETHER THE ACTION INVOLVED IS ADMINISTRATIVE ACTION?

You would test the action against the definition of administrative action as set out in section 1 of PAJA. Section 1 of PAJA provides:

> Administrative action means a **decision taken or failure to take a decision by**
(a) an organ of state in exercising a power in terms of the Constitution or a provincial constitution, or in exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person which is not an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect.

PAJA also defines ‘decision’ as being of an administrative nature under an empowering statute taken by an organ of state as defined in s 239 of the Constitution. There are a number of exceptions to the definition, such as the legislative powers of the national, provincial and municipal legislatures, as well as their respective executive powers.

‘administrator’ as an organ of state or any natural or juristic person taking administrative action

‘empowering provision’ as a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

NOTE: You must know the definition of administrative action as set out in section 1 of PAJA. When confronted with a question requiring you to determine if a certain action constitutes administrative action, you must provide the definition of administrative action. The definition contains the requirements for administrative action (underlying legal principles) that must be applied to the given facts. After applying the requirements to the given facts, you then reach a conclusion.

NOTE: We once again recommend that you work through the previous examination paper to see what is expected of you, should a question of this nature crop up in the upcoming examination. Also revise the suggested answer to Assignment 01 in this regard.

2.3 THE LEGAL FORCE OF ADMINISTRATIVE ACTION

You should also be able to distinguish between the three classes of administrative action and indicate when administrative action takes effect in each instance:

- Legislative administrative action
- Judicial administrative action
- Pure/true administrative action

2.4 TERMINATION OF THE LEGAL FORCE OF ADMINISTRATIVE ACTION

The legal force of administrative action is ended by repeal, amendment, lapse of time, withdrawal of one of the subjects to the relationship, or by court order. When
the administrator/organ of state cannot amend, repeal/revoke or vary its decision, it is said to be *functus officio*. This means that the matter has been dealt with finally and the administrator/organ of state is no longer able to change his or her mind and revoke, withdraw or revisit the decision.

Here you once again have to distinguish between the three classes of administrative action, as the *functus officio* maxim applies differently in respect of each class of administrative action.

**Pay particular attention to the application of the *functus officio* maxim in instances of (pure/true) administrative acts.**

Any invalid action may be altered/withdrawn by the administrator. After all, the administrator is rectifying action that was defective in the first place. However, the administrative action may not be changed by the administrator if the affected person has already challenged the validity of the administrative action before a court or higher domestic tribunal, or if the individual has acquired rights as a result of such invalid administrative action.

**Valid onerous** administrative action may be changed at any stage; thus an administrator/organ of state may correct *his/her/its* own mistakes.

**Valid beneficial** administrative action may be altered only where power is conferred expressly/by necessary implication; thus it is usually *functus officio*.

Where administrative acts affect the status of individuals, they may be altered only if authorised expressly/by necessary implication; thus they are usually *functus officio*.

3. **JUST ADMINISTRATIVE ACTION (STUDY UNITS 6 to 10)**

We said that once you have established that administrative action was taken, you need to determine whether such action complied with the requirements of just administrative action. The requirements of just administrative action are set out in section 33 of the Constitution. Just administrative action must be

- **lawful**
- **reasonable**
- **procedurally fair**

and

- **written reasons must be provided for administrative action that adversely affects rights**

Note that various overarching concepts are used to describe just administrative action, ie *intra vires/ultra vires*; applying one's mind to the matter; and legality.

3.1 **LAWFUL ADMINISTRATIVE ACTION (STUDY UNIT 7)**

To be 'lawful', an administrative action must comply with all the requirements of the law. This guarantees the prohibition of enacting laws that would erode judicial control over administrative action. It also means compliance with all the statutory and
common-law requirements, namely the Constitution, PAJA, the empowering legislation and common-law rules and principles, in other words, all the sources of administrative law. This entrenches the principle of legality. The concept of lawfulness is further underpinned by the Constitution in its supremacy clause and the requirement that all organs of state must comply with all law. It is also the concept of administrative justice that is the overarching requirement for the validity of all administrative action.

Administrative authority and power derive mainly from legislation. Legislation that confers administrative authority is termed empowering legislation. In such empowering legislation, you will find specific directives relating to the scope, content or nature of administrative power. An administrator must act within the powers conferred on him or her by empowering legislation. In this regard you must know the rule about delegation.

### 3.1.1 Delegation

The following is a summary of the aspects you should know. Please work through the study unit and compile your own notes on delegation.

*Delegatus delegare non potest* – the person to whom power is granted may not delegate it to another.

- **Why?** Particular qualification, status, knowledge, responsibility.
- **When permissible?** Section 238 of the Constitution – executive organ of state may delegate any power/function to legislation to any other executive organ of state if delegation is consistent with legislation into which power is exercised.
- **Rules:** Discretion – no delegation unless authorised by legislation; may take decision & instruct subordinate to implement, administrator may not accept instructions from another body, administrator may appoint fact-finding body – ultimate decision made by *delegans*.
- **Forms:** Deconcentration – internal hierarchy – division of labour. Head may withdraw delegation/prescribe. Delegate performs in place of *delegans*. *Delegans* may exercise control – report/relieve of duty/intervene if matter not concluded. If concluded, cannot undo. Authoritative functionaries in same hierarchy cannot be involved in legal disputes.
- **Decentralisation** – independent body. Administrator plays no further role in decision. Control by way of appointment, appeal/review of decisions.
- **Mandate:** Strictly speaking, not delegation – implement decision of administrator.

### 3.1.2 Abuse of power

The following are forms of abuse of power by the administrator:

- exercising power with an unauthorised or ulterior purpose
- exercising power using an unauthorised procedure
- exercising power using ulterior motives to defeat the purpose of the law
Please work through the study unit and compile your own notes on the various forms of abuse by administrators. Remember to note the applicable case law in each instance.

3.2 REASONABLE ADMINISTRATIVE ACTION (STUDY UNIT 8)

All administrative action must have a reasonable effect. Administrative action will have a reasonable effect when the administrator has exercised his or her discretion in a proper way and the decision taken by the administrator has been based on objective facts and circumstances. In short, reasonable administrative action will be any justifiable decision-making. A ‘justifiable’ decision is one based on reason and not, for example, on the subjective opinion or psychological temperament – or even convenience – of the administrator.

After studying this study unit, you must be able to answer questions such as the following:

**Why were the courts hesitant to express themselves on the reasonableness or unreasonableness of administrative action?**

We find the reason for this uncertainty in the tension between two demands: On the one hand we see the impact of separation of powers – it is not the function of the courts to substitute their decisions (the exercise of their discretionary powers) for those of the public administration. Administrative action is usually directly related to the exercise of a discretionary power by the administrator. In instances where an administrator has a discretionary power – where he or she exercises a choice between two options – we should ask whether the exercise of this discretion was reasonable or not. It was argued that this reasonableness relates to the merits or substance of the decision, an area in which the courts should not intervene. Therefore, according to this line of reasoning, when reviewing administrative action on the basis of unreasonableness, the courts are required to act as super-administrative organs and to substitute their opinions for those of the administration. In other words, reviewing administrative action on the ground of unreasonableness would be as good as ‘interfering’ with the decisions of the administration – action which is in conflict with the separation of powers.

On the other hand, the courts must ensure that the decisions of the administration are in line with the requirements of basic fairness and rationality.

The task of a reviewing court (reviewing unreasonableness) is not to determine or question administrative policy or to determine whether a decision is correct or not, or even to agree with the decision, but to apply legal norms to ensure that the procedure followed by the administrator was formally correct. In other words, it is always the task of a reviewing court to determine whether the discretion has been exercised properly within the confines of the law.

**Will a decision be reasonable (justifiable) when there is no evidence of an even balance – proportionality – between the outcome the decisionmaker wants to**
achieve and the means he or she uses to achieve the result?

In order to answer this question, you have to consider Roman v Williams. According to Van Deventer J (at 1278):

Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality, which requirements involve a test of reasonableness. Gross unreasonableness is no longer a requirement for review. The constitutional test embodies the requirement of proportionality between the means and the end.

The judge’s reference to the three requirements of suitability, necessity and proportionality relates to the question of whether reasonableness (or justifiability) includes adherence to proportionality as well.

(1) The suitability of the administrative measure: In accordance with this requirement, the administrator must, when exercising his or her powers, choose only those means (from the variety of means available) that are most appropriate for achieving the desired end. This element is more or less the same as rationality. In other words, there must be a rational connection between the end and the means.

(2) The necessity of the measure: Necessity means that the administrator must take only such steps as are necessary if any prejudice to an individual is involved. In other words, the administrator must choose the one that causes least harm to those who will be affected by the measure.

(3) Weighing up the advantages and disadvantages: This is a very important requirement in that it requires weighing up the advantages and disadvantages, and considering the injury to the general public or the individual. The method or ‘means’ must not be out of proportion to the advantages – the ‘ends’ – to the community. In short, proportionality requires the achievement of an even balance.

If these requirements are not met, the administrative action would not be reasonable (justifiable), as an even balance between the means used and the ends envisaged are not achieved.

NOTE: We once again recommend that you work through the previous examination paper to see what is expected of you, should a question of this nature crop up in the upcoming examination.

3.3 PROCEDURALLY FAIR ADMINISTRATIVE ACTION (STUDY UNIT 9)

Procedurally fair administrative action is a further requirement for the right to just administrative action, as contained in the Bill of Rights in the Constitution, 1996 (s 33).

3.3.1 The rules of natural justice

In terms of the common law, procedurally fair administrative action includes the rules of natural justice. The constitutional right is, however, not limited to – and is more
comprehensive than – the common-law rules. The rules of natural justice comprise the *audi alteram partem* rule and the *nemo iudex in sua propria causa* rule.

You should know the content of these rules and be able to identify and discuss the relevant rule of natural justice with reference to case law, if asked this in the examination. Please refer to the previous examination paper for an example of a question dealing with the rules of natural justice.

### 3.3.2 Section 3 of PAJA and the application of procedural fairness

**Section 3 of PAJA** applies to the individual administrative law relationship. Administrative action that materially and adversely affects the right or legitimate expectations of any person must be procedurally fair. The protection is extended beyond s 33 to include legitimate expectations. In *Jenkins v Government of the Republic of South Africa*, it was held that the doctrine has become part of our common law, even if it is not referred to in section 33 of the Constitution. Fair administrative practice depends on the circumstances of each case.

You must know section 3 of PAJA and must be able to apply it to a given set of facts. You must furthermore be able to reach a conclusion. Please work through the previous examination paper and familiarise yourself with the format of a suggested answer. Remember: if you know and can give the content of section 3 (the underlying legal rules) in the examination, you will earn marks, even if your application to the given facts is incorrect.

**Obligatory requirements (s 3(2)(b)):**
- adequate notice of nature and purpose of proposed action
- reasonable opportunity to make representations
- clear statement of administrative action
- adequate notice of right of review or internal appeal
- adequate notice of right to request reasons

**Discretionary requirements (s 3(3)):**
- opportunity to obtain assistance, even legal assistance in complex cases
- opportunity to present and dispute information and arguments
- opportunity to appear in person

The requirements in s 3(2) may be departed from only if it is reasonable and justifiable to do so. This is determined by taking all relevant factors into account:
- the objects of the empowering provision
- the nature and purpose of and need for the action
- the likely effect of the administrative action
- the urgency of the matter
- the need to promote efficient administration and good governance

The limitation must also comply with s 36 of the Constitution, although the above seem like a paraphrase of this section.
Section 3(5) states that the administrator may also follow a different but fair procedure if the empowering provision authorises this.

3.4 THE RIGHT TO BE GIVEN WRITTEN REASONS (STUDY UNIT 10)

The fourth requirement for just administrative action is the right to be given written reasons. In terms of s 33(2) of the Constitution, an aggrieved person is entitled to written reasons if his/her rights have been adversely affected.

3.4.1 Why is it important to give reasons for administrative action?

This requirement is a safeguard against any arbitrary or unreasonable administrative decisionmaking. Currie and Klaaren suggest that the main purpose of requiring reasons is to justify administrative action. It promotes fairness and correct administrative behaviour, since bad reasons – or no reasons – may lead to review proceedings. It also ensures openness, accountability and transparency in public administration and reflects the values of an open and democratic society. Read through the study unit and then try to substantiate your answer further.

Providing reasons is important because it demonstrates how the administrative body functioned when the decision was taken – whether it acted lawfully or unlawfully, rationally or arbitrarily, reasonably or unreasonably. If reasons are lacking, the person wishing to challenge the action would be at a great disadvantage: if no information is available to him/her, issues such as the failure of the administrator to apply his/her mind to the matter, unauthorised purpose and malice fides would be difficult to prove. It would therefore be difficult to find a basis for the appeal or review.

3.4.2 Section 5 of PAJA

Section 5 of PAJA provides for the furnishing of reasons to anyone who has requested reasons and whose rights have been materially and adversely affected. Adequate reasons must be furnished within 90 days of the request. Failure to furnish reasons leads to the presumption that the decision was taken without good reason. The Act also provides that a court may review the action if the action is itself not rationally connected with the reasons given.

3.4.3 When will reasons be adequate?

Please study pages 178 to 180 of your study guide and make a summary of the content. You have to refer to case law to substantiate your answer. After you have compiled an answer, work through the previous examination paper and compare your answer with the suggested answer.

4. CONTROL AND REMEDIES

Remember that we said that if the administrative action was not just (ie it was unlawful/unreasonable/procedurally unfair, or reasons were not given), you have to examine the means of rectifying such unjust administrative action.
4.1 INTERNAL CONTROL

Internal control is control exercised within the administration itself, that is, either by senior administrators or specially constituted bodies or institutions.

Under this heading, you have to master the following by working through study unit 11:
- the forms of internal control
- the advantages of internal control
- the precondition of exhausting internal remedies
- the exceptions to the general rule (that all internal channels be used before a court of law is approached)

4.2 JUDICIAL CONTROL

Judicial control is exercised by the courts. The judiciary, which acts as a watchdog over the legislature and the executive, must ensure that all state actions comply with the Constitution.

Under this heading, you have to master the following by working through study unit 12:
- the forms of judicial control

Statutory appeal
High Courts do not have inherent appeal jurisdiction. Appeal is possible only if the enabling legislation makes provision for it. This is the most important point. In such a case, the appeal is limited to the record of the proceedings, but may inquire into the merits of the decision. Appeals lie only against final decisions.

Review
All higher courts have inherent review jurisdiction in terms of the common law. Ouster clauses are no longer constitutional in terms of s 34 of the Constitution. Review may take place in terms of the Constitution, PAJA, specific statutes or the Supreme Court Act (if reviewing lower courts’ decisions). The grounds of review must be stated and, broadly speaking, they rest on an infringement of a fundamental right or challenge the validity of administrative action. It only decides on the validity of the decision, but may go beyond the record.

Interdict
An interdict is aimed at preventing unlawful administrative action that will prejudice the rights of the affected party.
There must be a clear legal interest, which is being threatened.
No alternative satisfactory remedy must be available.
The party will suffer irreparable damage or prejudice if the interdict is not granted.

Mandamus
This remedy is used to compel an administrator to perform a statutory duty. It may not, however, stipulate how the power should be exercised. For example, PAJA provides that ‘failure to make a decision’ is a ground for review. The court may,
however, be approached to grant a mandamus in the event of a long delay to make a decision. It is the flip side of an interdict: unauthorised action is prevented by means of an interdict, whereas compliance with a statutory duty is enforced by way of a mandamus.

**Declaratory order**
This remedy is applied for when there is a clear dispute or uncertainty about the validity or effect of administrative action, even where other remedies may also be relied on. The court will give a definitive answer to the question of what the legal position is regarding any particular person or a given state of affairs. It clarifies the ‘status’ of a matter.

**Defence in criminal proceedings**
If a person is charged with a criminal offence created by legislation (failing to comply with empowering legislation), the charge may be defended by challenging the validity of the administrative decision that is the subject of the dispute.

- **The applicant must have locus standi**

In terms of s 38 of the Constitution, anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. The following persons have **locus standi**:

- anyone acting in their own interest
- anyone acting on behalf of another, who cannot act in their own name
- anyone acting as a member of, or in the interest of, a group or class of persons
- anyone acting in the public interest
- an association acting in the interest of its members

Note: you should be able to substantiate your answer in terms of section 38 if a question on **locus standi** is asked.

- **The orders that the court may make**

s 8(1)(a): the court may direct the administrator
  to give reasons, or
  to act in a required manner.
s 8(1)(b): the court may make an order prohibiting the administrator from acting in a particular manner. This paragraph thus makes provision for a prohibitory interdict.
s 8(1)(c): the court may grant orders setting aside decisions of the administrator. In the main, however, the court would set aside a decision by the administrator under the circumstances laid down in section 8(1)(c) and send it back to the original decisionmaker.
s 8(1)(d): the court is empowered to declare the rights of the parties.
s 8(1)(e): this provides for the granting of a temporary interdict or other temporary relief.
s 8(1)(f): a court may make an order as to costs.
Note: Please study section 8 of PAJA. Students tend to get tired towards the end of the study guide and leave out this important section of the work, which often features in the examination paper.

Examination

Note: Please study pages 9 to 12 of Tutorial Letter 201/1/2012.
PART 1: STATE AUTHORITY & THE HOLDERS

State Authority - Public power exercised by organ of state/natural/juridic person in subordinate/subservient position (objects to)

Admin Action - Conduct of when exercising public power (usually a decision)

Just Admin Action - How admin action is performed (constitutionally, reasonably, fairly, publicly & written reasons given)

Control of All: means of correcting/rectifying all that is not fair & just.

Lawful - Comply with law (constit, comm law, crim law, cont decisions)
Reasonable - Decision based on ob/opts, sound & sensible effect/result
Pro Fair - Correct procedure, fair & both sides impartial
Adversely affected rights: backed by written reasons imposed

Internal Admin Control: review by senior officials, internal channels, the judicial system

Admin Law: part of public law, regulates organs of state/natural/juridic that exercise public power/black. Regulating, procedures, control ensuring within boundaries of the law.

su2

Admin Law Relationship

- Law regulates subjects' relationships between subjects, legal relationship go by law
- Public Law relationship = state/individual is a relation relationship
- Admin Law: it is a body exercised power (from state, authority) to exercise
- Person in authority (power) is an authority (exercise)

General/subjective rel - all subjects in a group, impersonal & non-specific (Government)
- Index or Subjective rel - personal & specific & identifiable (created by intro admin, individuals)
- Not affected by new legislation (protection against retrosp)
3.3 Legal subjects of admin law relationship

3.1a Organ of state

5239 (const) "Organ of State" means:
(a) any dept of state/administration in nat/prov/local sphere of govt or
(b) any other functioning institution

(i) exercising a power/performing a function of const or prov const or

(ii) its any legislation

but (not) including court/judicial organs

5239(a)

Any dept of state/administration

National sphere, all departments/administrators

"organs of state" incl cabinet member (executive HoDs), deputy ministers, presidents & dep presidents (only ex const funds)

Provincial sphere, prov dept of state, prov public service, premises of providence, MEC's

Local govt, municipalities, municipal councils

5239(b) "organ of state" = administrators & state dept constituting public administration

5239(0) any other functioning or const (i) exercising a power/function to const/prov const (ii)

broader def of "organ of state"

includes functions not part of public admin, but who exercise public power/function

very difficult to decide if public power/function private

determine whether power/function? (ref legislation)

3.2 Role of associations, clubs & will "private" organizations

- voluntary associations, not created by legislation

- similar relationships between members and managers (uniquely)

- no statute, no state authority, no private non-statutory bodies.

- since common law rules of admin law are applied (inward authority analogous)

- courts will interpret its club const
gictionaries or between members.

- sometimes PAJR is applied where there is sig public interest
- Persons (natural) whose rights & interests are affected by authority
- Subordinate may be natural, pursue long-term in same institution, compulsion
- Subject may be stripped of power, or coerced to submit
- Object of admin-law rel is the reason why legal subjects entered into rel.
  4th issue which brings about obj. subj. matter of Admin action.
5.4 Sources of Admin Law

- Admin law must be conferred by law, not self-generating.

**Binding Sources**
- Constitution: Supreme law & ultimate source
  - Pharmaceutical Manufacturers Association of SA v CPE = SA law v constitutionalism
  - Sets the standard for exercise of power by every organ of state
  - Promotes and guarantees: culture of human rights
  - Justice for the individual, lawfulness, reasonableness & no prior restraint: just administration

- Legislation: Primary source of admin power (modern, readily accessible & enforceable)
  - Admin law always has legal or source. Must apply to Constit.
  - Constit often instructs legislature to adopt laws (eg. to give effect, add flesh)

Original Legislation:
- Passed by Parliament in national sphere (PAJA & Freedom of Info)
- Passed by Provincial or pres. sphere
- Passed by Local Govt. (municipal councils) in local sphere (bylaws)

Delegated Legislation:
- Subordinate legislation
  - Must be enacted to ass. legal validity
  - Not self-contained: must be in response to primary legislation
  - Regulate matter provided for by orig. legislation, specialist/technical
  - Must proclamations by pres./reg. by ministers: must provide for both
    - All, in pres./sphere & local

- Common Law: Case law links the meaning of a particular rule to its application
  - Courts control exercise of pub power (Athinam v Mantle case)
  - Past judgments are binding, judicial precedent (Stain decisions)

- Common Law: Unwritten law, not on important source, but contributory. Includes legislative
  - Interests, rules & laws of natural justice from Eng
Admin practice - unwritten rules / fixed practices must reflect African principles. Must be reasonably, extend over long period, generally accepted by all, adhered.

Exceptional, subject to constil.

In all law - lesser role than normal.

Persuasive Sources
- Writings, journals @ academic opinions
- Policy documents (govt. & White papers)
- Reports of state courts supporting constil doctrine (field protests, NL)
- Foreign law
PART II: Administrative action

Administrative action

In action. admin. action? 4 key features.
1. Subordinate (subordinate) vs. 2nd.
2. Important to know: if admin. action for application of right to perp. it (subordinate).

Concurrent with: conduct of bureaucracy is daily state (existence).

On court: excluded actions are those for 3 branches: executive, legislative, judicial.

s.33 (Constitution)
3.33 (i) Everyone has, might have, a right that is fundamental, reasonable & proper for
(a) them with adequately affected rights has right to written notice.
(b) National (legislation) must be enacted to give effect to administrative & judicial:
   (a) provide for review (b) impose duty on state to give effect
   (c) provide for efficient admin.

AA in PADA

All is confirmed to decisions in PADA. Decision considered to be expiring decision.

Ex Parte: "AA means any decision/permission by
(a) executive branch exercising power/performing its constituent or powers
(b) national/public exercising power/performing with administrative".

Exhaustion of administrative means (power) under expiring provision and
"expiring power" to reconsider the issue. AA was purportedly taken.

AA = decision (incl. proposed decision & (a) to decide (b) (bronze)
(a) administration (branch of bureaucracy, not legislation) performing/performing/powers
(b) expiring provision (administrative expenditure, orally expressed)
(c) exercise power (not legislative creation, publicly expressed)
(d) org or st. natural/public person when exercising public power/perform.
(e) adversely affects the rights of any person (bronze)
(f) has a direct external legal effect (real, and challenging small issue)
(g) not specifically, excluded by the broad categories of exclusions
Executive powers & functions:
- Not exec (pres.變得), prov. exec (prov. & councils) & local exec (municipal councils).
- High court (functions).
- Not pres. actions: as head of state (referenda, treaty ambassadors), military, etc.
- Pharmaceutical case: prov. deciding to sign act into prov. & neg. (rule policy law).

Legislative functions of parliament, prov. (legisl. & minor council) exclude legislation, admin.

Judicial functions of court: judges & magistrates, hear cases, special tribunals.
- decision to admit/continue a prosecution.
- selecting judicial officers/pers. by JSC.

Decisions under PAIA to simplify, as PAIA has own review procedure.

Decisions under s(2) of EA: processes by AA where action affects public.
- private review of admin's claim if issue for public. Still governed by acts.

Classes of Administrative Acts
- Acts in separation of powers.
- Legislative acts: Admin. rules which are legislative in nature.
  - making, issuing rules as authorised by legis.
  - eg. Act prov. minister to make regulations / delegated (regul., prov. / admin.
    Chrac: overly general, unless published (regul.), vary general relationship.
    Specific cases apply, power (from statute, moral, reason in reason).

- Administrative acts: Actions almost like courts, mostly by administrative tribunals.

  - Police acts, particular admin act, authority.
  - Directory acts: administrator has choice to legislate. Restricted by function.
Legal force & administrative

How does RA take effect?

- Legal: upon presentation to clerk of Court
- Judicial: upon ruling/decision taken pending period of appeal
- RA upon claims becoming known by publ/amendment or media

Termination of legal force

- Func. jct. = having completed = commencement
- Legal force of RA is ended by recall/revocation, amendment, lapse of time/law
  - Legal RA: may be amended at anytime, but only to restore
  - Judicial RA: only amended & can't vary. Only altered by HC

- A = RA if invalid: altered by administrative (= rectifying def.+), but only order as per valid
  - A burdensome: at any time, opportunistically to correct
  - A beneficial: only when power to amend is conferred
Part II: Just Admin Action

Intro

Part I & II discussed Admin law relationship, subjects, character & clauses.

Part III = essence: What are reqs for valid admin action

Valid = Admin's decision is in accordance w/ law & all reqs are met. When laws change:
- s533 Costit Right to just AA = lawful, reasonable, pro pars, written & addressed.
- s533 (b) everyone has right to know that it happened, needs & process.
  - (c) adversely affected = written reasons.
  - Notice to legal & exec to give effect to order.
  - Presumed historical abuse of power by state organs.

(Ch 10 estri, s 195 (i) Values: the public admin must obey)

- Pro: others; effective use of resources, accountability, development-oriented, impartially
  - d) ensure accountability, responsibility & openness.

- S(1), 195; J3 create duty to uphold basic admin in interests of public.

Just AA is overarching req relating to all reqs for valid AA. Determine legal/bounder, function

- s534 Ultra vires: inside vs. inside. Boundaries/powers, AA is invalid/misogynistic. AA, beyond power
  - Applying one's mind: also overarching. All reqs, not met
  - In general, even law. All reqs necessary for lawfulness. Autonomous. Act in accordance. Basis of AA
    - public interest, protect Human Rights. Birds' organs of state to law.

- Ultra vires narrow = ad hoc. Examination: all that is needed.
- Under vires narrow = ad hoc. Examination: denial of objections/unfair/malafide. @ compliance is still all act
Right to lawfulness AA as req for valid AA
- Common law show practical function of lawfulness before constitutional
- Role of two sources is that lawfulness a "one-thing" concept that covers admin

- Concept of lawfulness
  - Need to include lawfulness in right to port AA? Since CL req of admin legality presen
  - Key principle of law: power exercised must be by law = legality/lawfulness
  - Lawful AA is the expressly guaranteed to:
    - To prevent laws that exclude judicial control over AA (permits log san-gestion
    - Entrenches legality principle: Coplakins & All states & CL regs for lawful AA

- Lawful AA & legality are synonym - AA permitted by law

- Lawfulness & enabling statute
  - Conditions in statute @ reqs/procedures
  - Must all covered by statute. Exceeding = ultra vires
  - Other legal might also impair

- Administrator
  - organ of state/adv in trust person authorized to exercise power/perform the function
  - Details in empowering statute generally with provisions (qualic ref) & scope/term
  - When performing AA is cloaked in state authority & legal forms of discretion/contin
  - If admn does not have prescribed authorities, cannot perform valid AA even Polvere
    - absolute min/threshold req for any admin action/adm power appears qualic/hand
  - If chairman of board does not possess necessary qualification, board's action are invalid
- Delegation: a task, role, power to another to facilitate efficiency
- Deleg. a untrust full pant of the job

- General rule against deleg: "delegatus" maxim excludes delegation
  - it gives to person the exercise of discretion, not to delegate (pact express pro
    /F model underlies necessary attributes of a position)

- Possible when: deleg: e.g., legislature conveys a task or state, sub-deleg. empowers admin to delay for
  - to effect quick & efficient division of labor
  - suit containing great amount to delegate if consistent with
  - may partly include in statute

1. if admin is auth. & exerts discretion, may not delegate part of it as auth.
2. may instruct sub to implement, merely, a decision taken
3. may not accept instructions from above body, must apply own mind
4. may appoint fact-finding committee, on long or ultimate discretion is proper

- Vomem forms: mandates, concentration & decentralization of power (degrees of power)
  1. Mandate: instruction (command). Sub makes decision & hands to another to implement
  2. Concentration: takes place when dept. A gains power, then dept. B, C, D, E, etc.
  3. Decentralization: mand. function (mini) transfers power to another independent body
     - minister appoints board to issue temp. orders to run university
     - Delegator (cont. indep) can only indirect through (opposition & appeal/review in delegator)

1. Board may withdraw delegation at any time, prescribe = still retains control
2. Delegate (need) acts in the place, regarded as delegator's performance
3. Vomem controls - report, relief from board, interference (p=1)
4. (must under execution) can only withdraw delegation

- Functions within same dept. can have legal dispute @ exclusion

- Powers of administrator
  - depend on statute, custom, trust interp, gen principles developed by Court
  - Empowering legis will determine it's only area, time, object of power.
- Prohibition on abuse of power by admin.

- Abuse always relates to misuse of discretion. Following forms: Ex post

  Unauthorized / ulterior purpose
  - should use power for object identified by Act. This is for corral purposes.
  - may not use/reach a goal not set out in Act e.g. revoking ex post facto
  - Legal force of empowering statute is extended = ulterior purpose
  - Objective test: not what be thought, but what result way
  - Can be done in bona fides, no matter how commendable

  Involved action

  Unlikely procedure
  - Usually for on paper option, so circumstances undermines the law
  - eg transfer instead of discipline

  Ulterior motives
  - together with 1 = defeating the law in fraud
  - Deliberately & intentionally evades provisions of statute designedly
  - Fraudulent intention not always found in 1. 1 + 2 can co-exist.

- Admin & exercise of power in bad faith

  Applying mind / good faith - one echelon
  - Malum in se (narrow = dishonest), wider (wrongful use of power) = No applying mind
Constitutional Right to Reasonable Admin Action

- All AA should have reasonable effect - proper discretion & obj facts & circumstances
- Not guided by goodness or no evidence of balance (proportionality)

- Courts have been hesitant to pronounce on reasonableness (sep of powers)
- Court shouldn't interfere too much with substantive decision (sep of powers)
- Review is a mechanism to ensure just admin action
  - Not to determine policy correctness, but to apply law to procedure to ensure formal correctness

- Determine if discretion is exercised properly (in conformity with law)
- This reluctance caused courts to not hold "reasonableness" as a separate req for valid AA
  - "Sympathetic unreasonableness" = indication that something else is wrong (req mot
  - "Gross unreasonableness" can infer malafide
- Has been argued court should only interfere @ gross unreason or non-substance issue
- Effect of the narrow approach to reasonableness is a subjective test
- Not effect of unclear AA, but unreasonable mindset of admin/officers

- Interim constit excl "unreasonableness", new constit expressly included "justifiable" justifiable discretion is based on reason ("go along with decision")
- Test of justifiability is objective, must be substantive
- AA must be "suitable, necessary & proportional" to qualify as justifiable reason
  - Suitability: choose means most appropriate, end to means, similar to rationality
  - Necessity: only what is necessary to prevent, limit harm
  - Weighing-up: means proportional to ends, balance
Present position to 1996: Const & Raja

- Const = simpler: s 33(1) free from her right to RA that is reasonable
  - complete judicial review of RA

- Raja: gives effect to abort right with 6(1) indiv capacity to get judicial review of RA
  - if so unreasonable that no reasonable person could have
  - limited to reasonable person test (= Wednesbury unreasonable)
  - reasonable authority test

Const limit on 6(2)(b) must read with s 33(1) of Const. Alone 6(2)(b) = rare unreasonable
  - reasonable decision maker (circumstances, factors)
    - nature of decision, ID of decision maker, relevant factors, reason

- Const reviews have substantive & procedural side, but must not usurp admin agency
  - must ensure decisions fall @ in reasonable, @ appropriate respect/review
Right to proc fairness

- Right to proc fairness is right of party (individual-making person that affects them) "ha
- Not concerned with "rightness/worth/merits", hence rule "aud. alteram parte"
- 195 constit reqs public admin "democracy, values & principles".
- Procedural fairness improves quality of decision making, less rectified/long

Origin
- Found in common law rules of real justice (collective term for CL provision of hearing)
- Ensure that subject to proc is fair & just (applies mind) (justice done & seen to be done)
- Baxters called them "principles of good admin" (preserve important pub values)

Content: Can be condensed into 2:

1. ADELAIDIAN

- Opportunity to be heard: right to be heard, fair hearing. Applies use right/prerog., pub. interest
- Judicial action (judg.), legal action (regulations), admin action (permits)
- Procedural notice of intended action (adequate, even if not stat req, all reasonab. detail)
- Reasonable notice: enables prep. Depends on circumst. Not complete discovery
- Personal appearance: not essential, but a fair chance to present is
- Legal rep: not general right, except where technical/statutory/req. Opp to present
- Hearing: Evidence & exam. Not inherent rule; fair in circumstances?
- Public hearing: No absolute right; respect confidentiality vs openness/transparency/privacy

Informed of considerations against him: Must know essential facts/reasonably present

Reasons for decisions should give, even with modesty, no adverse assumptions (Constit
3. Nemo index in sua causa (no one should rule own, against bias)
   - Impartiality of all administrators
   - More likely to be a good decision, justice done & seen to be done
   - Recusal (financial interest - chairman of licence board owns taxi company)
   - Reasonable person sees the bias

Personal interest - ignores licence to differ
   - Reasonable suspicion/bias part
   - Don't need to show actual bias, but a suspicion/perception/apprehension

Constit right to proc fair AA, general:
   - This constit right extinguishes the rule of real justice
   - May be limited in rare limitations clause
   - Faireness is flexible depending on case, not a codification of pre-constit law
   - Constitutional before PAJA: Denying an entitled person to a fair hearing is fatal

PAJA & right to proc fair AA
S(3) AA materially & adversely affecting rights/leg op of any person must be proc
S(6) certes right at public

"Leg op" not mentioned in constit, but is in line w/ case law & common
Insistence on existing rights ≠ fair. Even no vested right
Can be from express provision from auth or from regular practice
Recent ex op = right to hearing, not necessarily to succeed.
Recent case law confirms continued existence
Leg op incl. ex op beyond enforceable legal rights if reasonable
Every indiv, even foreigners, is entitled to benefits flowing from constit.
S.3 (3) PADA & opp at proc fairness

Spec states that fair admin proc depends on circs of case, varies in content
- must give a person adequate notice, opportunity to make exp, written notice of any rights of review, notice of right to req reasons
- let them know the case they meet & give opp for meaningful representations
- must give a person whose rights/exp have been materially & adversely affected close to
  1 legal rep & complex consideration of circs
  2 Dispute info: make representation, comm law right to reply
  3 Personal appearance not a req unless provided (practical)

Fairness > convenience in considerations.

Departures may depart from reqs if reasonable & justifiable
- considers: objects of empowering prov, nature & purpose of need for AR, effect, urgency, promotion of eff admin & good govt.
- should also accord with limitations clause;
  - limited by law of gen opp, needs & pt in open & dem society based on human dignity, equity, factors of limitation.

Fair but disp. allowance if req unmet: fairness & authorized by provini-
3(6) PAPA & proc fairness of decisions affecting the public
- to remedy the past position, includes any group/claim of public
- a great impact & sig public effect & const/inst/stmt/comm is right & at this
- admin must, to be fair, decide whether
- hold public enq; conducted by admin/qualified perso/person, determine proc
- with report & reasons for action taken or recommended.
- notice of summary for inspection.

4 - Notice & comment proc: less proc formal, normally when less onerous
- communicate to affected, call for comments, consider, decide, apply.

5 - Allow departure from fair proc affecting the public where necessary
- also a limitation, same as § 5(4) - all relevant factors
  (objective, nature, purpose, real, effect)
- Men should proc fair be applied in decision-making process
- Should be before any decision to promote objective & informed decision.
Right to be given written reasons

- Act as Comm law audi illi rule, never strict. However it is req minor.
- Reasons show "how" function, lawful or not, rational or not, reasonably or not.
- Lack of reasons is a disadv to indiv., not transparent.
- Internal appeal /judicial review made difficult, no info to base indispensible, protect, promote good functioning etc.

It to Intern & Consti:

Intern: Right to written reasons for AA affecting any rights/inst.

Consti: For rep & adv affected rights by AA has right to written reasons.

Safeguard vs arbitrary bares req to justify from fair & proper admin.

Who has right:

Broad: Inevitably entitled since always adverse effect by failure to give reasons.

Read @ consti, openness & accountability, seems essential.

Narrow: Above "reads out" the adverse req in consti. See indir impact.

PAAJ & Reasons: s(5) gives consti right a stat form.

- Req provision of written reasons at request of materially adversely affected & reasons, in 90 days.
- Admin objected to give adv written reasons in 90 days.
- Failure = rebuttable pres. that AA was without good reason.

- Departures: if refusal is reasonable & justifiable, must inform requester also limitation, must comply w/ consti lim clause.

Fair but diff.: Provided for, if diff. Act gives diff. fair procedure.
- **Reasons for request**
  - to promote efficient admin, min may specify actions needing action
  - PAJA provides for a prejudicial review when reasons not articulated to action
  - Constitutes right to info, s (33) right to written reasons.
  - Reasons give explanation/justification for action
  - Info is broader

- **Adequacy of Reasons**
  - Standard of reasons is adequacy, depending on circumstance
  - "Box-ticking" inadequate as no disclosure, must explain "why"
  - Must inform of appeal possibilities
  - Must = "may not agree, but understand"
  - More drastic steps = more detailed reasons

- **s (1) & (2) PAJA**
  - Reasons are furnished to those materially adversely affected by AA
  - Act doesn't provide for reasons, but right to request reasons
  - Recovery request = obl to furnish per 90 days
  - Must be reasonable & in writing

See pg 183 summary
PART IV CONTROL & REMEDIES

- Control expected to remedy
- Internal = domestic = extra-judicial (control) vs judicial control
- Value of internal control is recognized by PSA. Req for judicial review is exhausting

S4 11 Internal Control of AA

- Control = limit / supervise / regulate
- Remedy = cures defects / improves conditions
- Important to distinguish between reviewing legality & granting appropriate order

- Internal control is important & effective

<table>
<thead>
<tr>
<th>Control by senior admins / special bodies: lanes</th>
<th>govt body</th>
<th>HOO Prov Dept</th>
<th>MEC</th>
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<td>Proes</td>
<td>Reconsider / renew decision or conform / set aside / vary / substitute</td>
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<tr>
<td>1. Consider validity / desirability of AA &amp; take policy into question</td>
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<td>2. Examine the manner in which the decision was reached</td>
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<td>3. Internal appeal is not final &amp; binding; may be raised again timely</td>
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Parliamentary control: important internal control for AA

- gen admin policy & matters of public concern may be questioned in parliament as every member of plt is accountable to parliament

- tabling of reports: Minis / reports when budget is discussed
- Parliamentary req "Question-time": members (esp opposition) question minister

Public bodies & committees: consult relevant bodies to assist in public awareness

"State instil supporting culture"

- Public protector: ombud to curb admin excesses (also called ombuds) in any conduct that could lead to improper / report, reach
- No inv of court decisions, must be accountable
- Auditor General: audit & report accounts & financial statements
- Govt & public control, HRC, Electoral Comm, Broadcasting

ADVANTAGES: cost, time, effort. Deal with inefficiency, denials, explain as required.
PAJA & internal control
- recognized, precondition for judicial review
  - with org, simple, straightforward, informal
  - controls excess of power & merits & efficacy
  - unreasonable to go to court first; prevent overload of courts

S36 grants right to dispute merit, hence this could be a s36 limitation
- get speaking, should exhaust all internal

S7(2) says court/tribunal shall hear if internal aren't delayed, but
  may sometime except (in q justice & on application)

Exceptions:
- case already prejudiced by administrator
  - delin melt fixture, fraudulent or illegal, must not at all
  - aggrieved party has no option
  - admin authority's error/mistake of law = unacceptable decision
  - admin body agrees to judicial review
  - admin body has no auth to remedy that irregularity
- int remedy can provide some protection of judicial review
  - no practical solution w/o int control is not proper remedy

Rule of int first is more strictly applied to voluntary assoc. @ such an agreement
Judicial control of AA & remedies in judicial review proceedings

- Principle of checks & balances is no aspect of separation of powers
  - Each govt branch is subject to some influence & control by others

- Judicial control is biggest check (in challenge validity of any AA/legislation)
  - judiciary is watchdog over executive
  - even before 1744 HC had inherent powers of judicial review of AA

- Appellate probe illegality/irregularity or invalidity of AA in question
  - rely on CC grounds of invalidity (not justice / failure of procedure)
  - lots of case law

Constitutionalisation of AA & judicial review

- CC rules now entrenched in conskt.
- Pram Mantri & merged to constit. A paras subsumed into conskt revew

- Grounds for judicial review in past

- Any person whose rights have been directly affected may

  - 6(2) 20 ground to point objections falsh stage
    - Decision maker - Ultra virens (lacks qual, exceed georg, not accord power, exceeded obj)
      - unauthorized delay
    - nono index (biased)

  - Manner:
    - Non-corp & formal reg
      - mandat & material proc/conf not complied (form & procedure)
      - Reasonable, justifiable, rational, proc, action taken

      - So grounds ther: proc unfair, material by error of law or action can taken:
        - unauth reason/purpose, @relevent or @relevant, malafide, arbitral

  - AA itself:
    - grand via @action contravenes law or not rationally connected to
      - @proy ment ten prpose, purpose of exp of into keep admin, reason
      - rationally govt daily linked to right to ronmbire
    - Failure to decide @ten delay,madam
    - Unrea action
      - unauth/unlawful
- Jurisdiction of judicial review

1. Statutory Appeal:
   - No con't has inherent appeal prsld; only few when provided in Act
   - Delegated legis'l may not provide for statutory appeals under anv'n by rule or regulation
   - Appeal only against final decision/ordr, not prov/interim order (major paradox)
   - Provision in aid of enforcing statute & nature & extent of appeal
   - Appeal is a rehearing restricted to the record, may examine record

2. Judicial Review:
   - Courts have inherent review prsld in Act (also to vol'tory ass't)
   - "Quasi-litigation" excl courts prsld in Act not allowed anymore
   - review to const': ss PABA, Sup LA (pol'icewords), specific statutes.
   - go to 4: infringement or threat of constitutional right in B/c &
     - challenge validity of AA (alone to apply Req'g or valid AA in PABA)
     - Revers: legality/validity of decision, was it depective? Review by manner
     - may go beyond record to look for irregularity, but not into merits/rights

3. Injunction:
   - pending/act by admin will produce harm may apply for restraining
     - aimed at preventing threatened unlawful AA
     - interpm/final. Must be supported by:
       - App'g has clear right to remedy threatened
       - no other remedy
       - urgent, to prevent irreparable harm

4. Mandamus:
   - Remedy to compel Admin to perform stat duty. Not how; just do
     - interdict prohibits unlawful action, mandamus demands duty

5. Declaratory Order:
   - Clear legal dispute/uncertainty re AA, or determ if act/perm AA
     - cont'g goes definitive & authoritative onsite to what legal pov is - Conjurist

   - validity of AA can be challenged by raising invalidity or remedy
     - if charged w/ crim offense from leg'sl (failure to apply, strict is invalid); may defend
       by challenging validity of that AA
- Precondition before turning to judicial control
  - Reasonable period, final decisions
  - Appeal must have locus standi
  - Capacity of a person to bring a matter to court
  - General rule: needs irreparable interest in outcome / sustained loss/damage
  - Actio popularis (anyone can bring public interest to court) + delay
  - Before consent, needed personal/direct interest

- S38 (content)
  - Broadened, more people may now approach.
  - "Anyone listed can approach competent court alleging the right in both hands."
  - (a) own interest (b) behalf of another who can't act (c) member of group/class
  - (d) in public interest (e) annunciation in interest of minors

- Procedure for Judicial Review under PAJR
  - Which court may review AA
    - HC has inherent powers of review, PAJR includes CC or rule
    - Certain may courts also now reported = important departure, is designated by Min

- Proc for review of AA
  - Must be instn within 180 days, unreasonable delay, cyber exhausting dom remedies
  - Internal remedies must be exhausted, must be real, rules institution no key
  - Pray made for extension of time by agreement/application (ini of mt)

- Orders made by court as provided by s(8) PAJR
  - May grant any just equitable order
  - If a may cont was designated, it couldn't enquire into cont of legal/provender
  - S8(1)(a): may req min to give reasons or act in a certain manner (mandamus/mandant)
  - S8(1)(b): may make order prohibiting (prohib int)
  - S8(1)(c): may set aside admin's decision, not lightly, normally refs back to reconsideration
  - may declare rights of parties