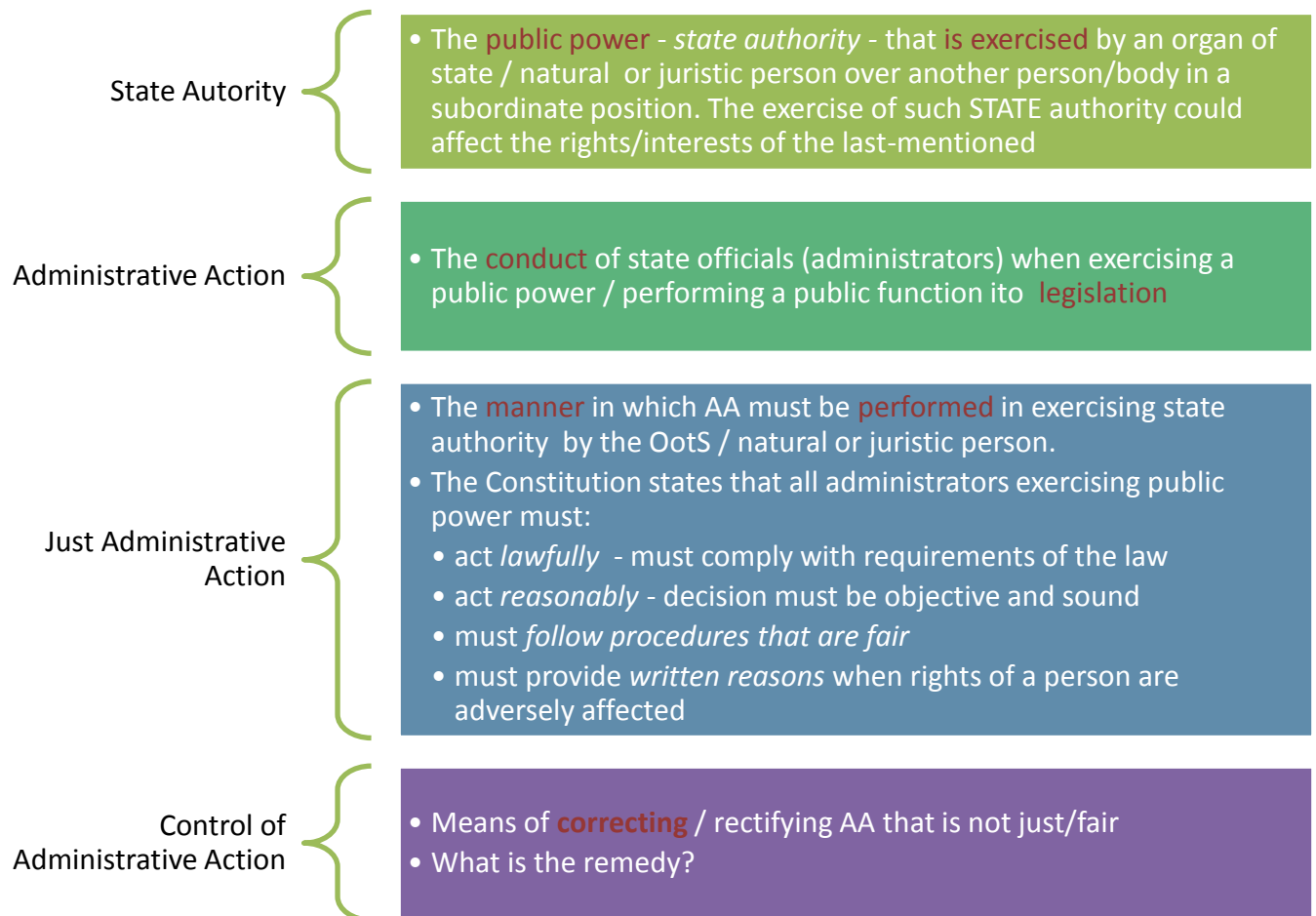


Abbreviations:

AA = Administrative Action	JA = Judge of the Supreme Court of Appeal
OotS = Organ of the State	MEC = Member of the Provincial Council
B = Supreme Court of Bophuthatswana	P = President of the Supreme Court of Appeal
CC = Constitutional Court	PAJA = Promotion of Administrative Justice Act 3 of 2000
BCLR = Butterworths Constitutional Law Reports	RA = Appeal Court of Rhodesia (now Zimbabwe)
CJ = Chief Justice	SCA = Supreme Court of Appeal
J = Judge	

4 Key features of administrative law



What is administrative law?

- ❖ Administrative law forms part of **public law**
- ❖ It **regulates the activities** of OotS and natural/juristic persons that exercise public powers / perform public functions
- ❖ Regulating the activities of OotS and natural/juristic persons include **prescribing the procedures** to be followed when public powers are exercised or public functions are performed
- ❖ Ensuring that such action is within **boundaries of the law**
- ❖ Regulating also includes **control** over such action

Exercise:

Scenario 1

The Department of Transport buys five cars from the car company, Luxury Cars. The contract of sale is concluded by Dan, the administrator at the head of the department's procurement section ± the section dealing with the buying of goods.

Scenario 2

Irene lives in an informal settlement, but her name is on the waiting list for a house. She is informed by the municipality's director of housing that a low-cost house is available for occupation. A week before she moves into her new house she is informed by the director that the house has been allocated to someone else.

Scenario 3


The director-general of health has been given medical opinions to the effect that one of the senior officials in the department has a medical condition which makes her unfit for continued government service. However, the director-general refuses to allow the official to go on early pension since he is not satisfied that, given the nature of the official's duties, a discharge on medical grounds is called for.


Scenario	Is it Admin Law?	Reasons
1	NO	Although the Department of Transport, a government department is involved ± Dan, an administrator in the Department is acting on behalf of the department ± the Department is not acting from a position of authority when it buys cars from a car dealer. The contractual parties, the Department and the car dealer act within an ordinary contractual (equal) relationship. Private law is therefore involved since none of the parties may force the other into signing the deal (the buying and selling of the cars) and they therefore contract on equal terms.
2	YES	The municipality, via its director of housing, is in a position of authority and is capable of exercising that authority. Irene is in a subordinate position. Authority must be exercised in a certain way that is within the boundaries of the law. From the facts it does not seem as if the director has acted and exercised his power in such a manner.
3	YES	She is under the authority of the director-general, the head of the department. The director-general exercises authority over the official and she is subject to the power of the director-general. However, she is not without protection and is protected by the law against the abuse of superior power.

THE ADMINISTRATIVE-LAW RELATIONSHIP (ALR)

State Authority: the public/authoritative power exercised by a person/body in authority where such power affects the rights / interests of another person (in a subservient position)

Legal Relationship: when two or more legal subjects enter into a relationship that is governed by law

Public-law relationship: created when one of the legal subjects exercises state authority / power over the other legal subject, therefore a vertical relationship 

Private-law relationship: relationship between individuals who are on an equal footing, therefore a horizontal relationship 

Characteristics of the ALR

1. At least one of the legal subjects must be in a position of power
2. The position of power must be held by a person/body with state authority and who is able to exercise that authority:
 - a. Must be able to prescribe, restrain or allow other individuals/juristic persons to act in a certain way
 - b. Thereby possibly affecting the rights and interests of the person in the subordinate position

2 Kinds of Administrative-law relationships:

The general or objective relationship

- The legal rules governing the relationship applies to all the subjects within a particular group
- Example: refugees must adhere to the Refugees Act 130 of 1998, therefore the relationship is between refugees and the Dept of Home Affairs
- This relationship is created, changed or ended by legislation

The individual or subjective relationship

- The legal rules apply personally and specifically between the parties - specifically identifiable legal subjects
- Individual relationships are created by individual admin decisions and are not affected by new or amended legislation, unless specified

THE LEGAL SUBJECTS OF THE ADMINISTRATIVE-LAW RELATIONSHIP

Identifying the authoritative party in the ALR

The Constitution provides a broad definition of the party in authority – termed an ‘organ of the state’:

Section 239 of the Constitution states:

“organ of state” means

MEMORISE THIS

- a) any department of state or administration in the national, provincial or local sphere of government; or
 - b) any other functionary or institution
 - I. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - II. exercising a public power or performing a public function in terms of any legislation,
- but does not include a court or a judicial officer.

National sphere –

“any department of state or administration” refers to departments of state or government departments such as the Departments of Communications, Education, Tourism, etc. ‘Department’ or ‘administration’ may refer to an entire department and/or to its administrators (the public servant).

“Organs of state” include the members of cabinet, deputy-ministers, the president as well as the deputy president.

Provincial sphere –

“organs of state” include provincial departments of state – the provincial public service, the Premier of the 9 provinces, and the other Members of Executive Councils (MECs) who are the executive heads of the various provincial departments of state

Local government sphere –

“organs of state” include municipalities and municipal councils vested with executive authority

To properly determine who qualifies as “organs of state” we must ask in each case whether:

- (a) The functionary exercises public power or performs public functions, and whether
- (b) The functionary is doing so i.t.o legislation

The **object** of an administrative-law relationship:

- the *reason why* the legal subjects entered into a relationship or
- the *issue* which brings about the legal bond linking the two subjects

THE SOURCES OF ADMINISTRATIVE LAW

power means “lawfully authorized power” and that “[p]ublic authorities possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act” – Baxter

Sources of Administrative law	
<i>Binding/authoritative sources</i> <ol style="list-style-type: none">1. The Constitution of the RSA, 19962. Legislation3. Case law/judicial precedent4. Common law5. Administrative practice (custom or usage)6. International law	<i>Persuasive sources</i> <ol style="list-style-type: none">1. Writings in books and journals expressing academic opinions2. Policy documents such as Green and White Papers3. Reports by “state institutions supporting constitutional democracy” such as reports of the Human Rights Commission4. Foreign law

Binding/authoritative sources

The Constitution of RSA

The 1996 Constitution, with its entrenched Bill of Rights, is the supreme law of SA – the ultimate source of law and no other law may be in contradiction/conflict to it

This is stated in Section 2 of the Constitution

The implications of this supremacy are twofold:

1. It sets the standard for the exercise of power and thus the actions of every organ of the state or functionary or institution in SA
2. It promotes and guarantees a culture of human rights – it insists on justice for the individual by commanding that all the requisites for valid admin action lawfulness, reasonableness, and

procedural fairness must be met. The Constitution therefore guarantees the right to just administration to anyone i.t.o. section 33

Legislation

- The primary source of administrative power as it adds flesh to the bones of principles, norms and values - expressed in the Constitution.
1. Original legislation:
 - Passed by parliament in the national sphere of government, such as
 - a. PAJA
 - b. The Promotion of Access to Information Act 2 of 2000 (PAIA)
 - Also passed by the 9 provincial legislatures in the provincial sphere of government i.t.o. section 104 read with Schedules 4 & 5 of the Constitution, for example
 - a. The various Schools Education Acts passed by the 9 provinces – e.g. Gauteng Schools Education Act 6 of 1995
 - Also passed by elected local governments, the municipal councils, in the local sphere of government. A local government has the power to enact by-laws that do not conflict with the Constitution, any parliamentary statute or any applicable provincial statute i.t.o. section 156(2), for example
 - a. Judgement in *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metro Council*
 2. Delegated legislation:
 - It must be enacted i.t.o. original legislation as it is subordinate and must be authorised by the original, enabling legislation
 - Such delegated legislation must not conflict with the provisions of the enabling Act
 - Regulation through delegated legislation mostly occurs when matters of a specialised or technical nature
 - Passed by functionaries who are empowered in the national governmental sphere, for example
 - a. Proclamations of the President (in his executive capacity) such as to declare the date of commencement of a particular statute
 - b. Regulations made by ministers (the members of the cabinet in the national executive) i.t.o. an enabling statute
 - Regulations are issued in the provincial sphere of government (example regulations issued i.t.o. the School Education Act 6 of 1995)
 - Regulations are issued in the local sphere of government (example regulations i.t.o. relevant by-laws for regulation of traffic in a particular municipal area)
 3. Case Law
 - Past judgements are binding on other courts in subsequent cases and may be referred to assist in controlling the exercise of public power and the performance of public functions by organs of state
 4. Common Law
 - The law not written up in South African legislation
 - Though not as important to admin law as is the above sources, it still may have influence, example
 - a. The principle of *ultra vires* and
 - b. The development of the rules of natural justice – now included in PAJA
 5. Administrative practice/custom or usage
 - Custom is made up of unwritten rules or practices, carried down through generations

- PAJA includes “customary law” in the definition of “empowering provision” in section 1
 - A custom must meet these criteria before it is recognized as such:
 - ❖ It must be reasonable
 - ❖ It must have existed over a long period
 - ❖ It must be generally recognised, accepted and observed by the community
 - ❖ The content of the custom must be certain and clear
6. International law
- Regulates the relationship between states and/or international organisations and comprises mainly treaty and international usage.
 - Rarely utilised as a source of law in admin law practice



ADMINISTRATIVE ACTION

Are the following examples of AA?

The President appoints a commission of enquiry to examine the financial position of the South African Rugby Union.
Since the President is acting as head of state, in other words, performing constitutional functions, the appointment of a commission of inquiry is not administrative action. (You will learn more about these functions and the difference between functions as head of state and head of government in the Constitutional Law module.) This is what the Constitutional Court held in <i>President of the Republic of South Africa v South African Rugby Football Union (SARFU)</i> 1999 10 BCLR 1059 (CC), 2000 1 SA 1 (CC). This function is closely related to policy or politics and not to the implementation of legislation which is administrative action.
The transitional Metropolitan Council of Johannesburg adopts a resolution that deals with the payment of rates and taxes by the residents of the area.
The transitional metropolitan council's resolution is also not administrative action because it is a resolution taken by a democratically elected legislative body. It is an example of original legislation as decided in <i>Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council</i> 1998 12 BCLR 1458 (CC), 1999 1 SA 374 (CC).
Parliament adopts the Refugees Act.
The adoption of the Refugees Act by Parliament is not administrative action because Parliament is performing its legislative functions, that of enactment of legislation.
The Minister of Home Affairs makes regulations in terms of the Refugees Act.
When the Minister of Home Affairs makes regulations in terms of the Refugees Act, he is performing administrative action. Regulations constitute delegated/subordinate legislation and are an example of legislative administrative action.
The court issues an interdict against a company to prohibit the company from polluting a river.
A court issuing an interdict against a company is not performing administrative action since it is exercising its judicial functions.
The refugee status determination officer refuses Theodor Refugee's application for asylum on the grounds that it is unfounded.
The refugee status determination officer's refusal of Theodor Refugee's application for asylum is a typical example of administrative action.
Theodor Refugee appeals against the refusal of his application for asylum to the Refugee Appeal Board.
The appeal of Theodor Refugee to the refugee appeal board is not administrative action. Theodor Refugee is the subordinate party in the relationship (ie in the relationship between him and the administrators of the Department of Home Affairs) and Theodor's decision to appeal can never be administrative action.

READ SECTION 1 (DEFINITIONS) OF PAJA

Definition of Administrative Action:

The Constitution holds that administrative action is

- Not legislative action
- Nor is conduct by the President when he acts as head of state and exercises constitutional functions considered to be admin action
- The judiciary also does not exercise admin functions when exercising judicial functions

Subsequently the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was promulgated on 3 Feb 2000

This Act gives effect to the rights contained in section 33 of the Constitution

Steps to finding what conduct qualifies as administrative action in PAJA:

1. Look at the definition of decision
2. Look at the meaning of empowering provision
3. Look at the meaning attached to failure
4. Look at the definition of an organ of the state
5. Look at the qualification required for administrative action
6. Look at the 9 exclusions from the definition in PAJA

Therefore leading to:

1. decision, including a proposed decision, as well as the failure to take a decision
2. of an administrative nature
3. under an empowering provision
4. organ of state or natural or juristic person when exercising public power or performing a public function
5. that adversely affects the rights of any person
6. that has a direct, external legal effect
7. that is not specifically excluded by the list of nine broad categories of exclusions mentioned in subparagraphs (aa) to (ii). (Note that the wording is in actual fact, "but does not include" ...)

1. Decision

- Action will qualify as admin action when it takes the form of a decision (see PAJA for def of a decision)
- A decision will also qualify as aa when it involves the refusal to take a decision (see def of failure)

2. Of and administrative nature

- Both constitutional law and administrative law form part of public law but is distinguished as follows:

Constitutional law

- Deals with the actions of and interaction between the organs of state of the 3 branches of gov (legislature, executive and judiciary)
- It regulates the powers of the highest organs of state and the powers of the judiciary
- It controls the powers of Parliament in the national sphere, the provincial legislatures in the provincial sphere, and of municipal councils in the local sphere of government
- Areas of focus:
 - ❖ The structure of the organs of state at the highest level (e.g. Parliament, the executive and the judiciary)
 - ❖ Matters such as the formulation of policy by government (usually set out in legislation)

Administrative law

- Concerned with only one branch of the state system: the executive
- Concerned with the conduct of the bureaucracy in carrying out the daily functions of the State
- Areas of focus:
 - ❖ The day-to-day business of implementing and administering / applying policy

3. Under an empowering provision

- Defined as a law, a rule of common law, customary law, or an agreement, instrument or other document. Therefore exercise of public power or performance of a public function must have an authoritative foundation of some kind, not only legislation
- The decision must be taken i.t.o. an empowering provision

4. Organ of state or natural or juristic person when exercising public power or performing a public function

- The action of OotS (defined in sec 239 of the C) will qualify as aa when they exercise power i.t.o. the Constitution or a provincial constitution, or when they exercise public powers or perform public functions i.t.o legislation
- PAJA further allows for aa to be carried out other persons that is natural or juristic persons but only when these persons exercise public power or perform a public function i.t.o. an empowering provision

5. Adversely affects the rights of any person

- To qualify as aa the decision's effect must be to "adversely affect the rights of any person"

6. That has a direct, external legal effect

- A contentious issue that is regarded as an attempt to challenge admin decisions

Action that does NOT qualify as administrative action:

1. Executive powers and functions:

The powers & functions of the

- ❖ national executive (President & cabinet ministers),
- ❖ the provincial executives (9 premiers & their executive councils),
- ❖ local executives (municipal councils) are excluded

(In other words, those functions at the highest level which are constitutional in nature)

The President's actions as the head of state in the national sphere are also excluded as they are political/policy related and therefore fall under constitutional law.

2. Also excluded are the legislative functions of Parliament, the provincial legislatures and municipal councils as admin law deals with the implementation of legislation and NOT with the making of it
3. The judicial functions of a judicial officer of a court (judges and magistrates) as well as the judicial functions of traditional leaders and a special tribunal established are also excluded
4. Decisions under the Promotion of Access to Information Act 2 of 2000 (PAIA) are excluded since this act has its own prescriptions about review, procedures, etc.
5. Decisions i.t.o. sec 4(1) of PAJA which excludes from administrative action any decision taken, or failure to take a decision i.t.o sec 4 – this is to prevent review of the administrator's discretion to choose the particular procedure to follow before making a decision affecting the public.

Why these exclusions?

Most of the above mentioned actions fall in the territory of constitutional law – regulated by its rules & practices, rather than admin law. Therefore these actions are reviewable under the Constitution, not the prescriptions set out by PAJA

Examples:

The President signs the new Promotion of Administrative Justice Act on 3 February 2000.

No. The signing of new legislation into law is not administrative action in terms of the provisions of the PAJA. The reason is that this action deals with the action of the President as ceremonial head of state. In this capacity he is responsible for assenting to and signing bills in terms of section 84(2)(a) of the Constitution.

The President receives Madame Juliette as the new ambassador of France at a ceremony at the Union Buildings in Pretoria.

No. In terms of the PAJA, ceremonial functions of the President as head of state are excluded ± see section 84(2)(h). In terms of this paragraph the President is responsible for "receiving and recognising foreign diplomatic and consular representatives".

The Minister of Education issues new regulations prohibiting all politicians from addressing learners at schools.

Yes, the making of regulations is administrative action. Du Plessis (1998:2C± 19) explains as follows: "A delegated enactment, in other words, owes both its existence and its authority to an empowering original law".

The Premier of the Northern Province refers a bill back to the provincial legislature for reconsideration of its constitutionality.

No. The referral of bills is not administrative action. Like the President in the national sphere, a premier in the provincial sphere is responsible for referring a bill back to the provincial legislature for reconsideration of the bill's constitutionality ± see section 127(2)(b) of the Constitution.

The Director of Public Prosecutions refuses to institute proceeding against Lily for allegedly laundering money.

No. This is specifically excluded and thereby not administrative action ± see section 1(ff) of PAJA.

3 Classes of admin action / conduct:

- Legislative admin acts
- Judicial admin acts
- Administrative acts

Characteristics of legislative administrative acts:

- ✚ Have a specific form and is published in the *Government Gazette* (e.g. the Refugees Act)
- ✚ General relations are created, varied and/or ended by admin legislative acts
- ✚ Specific rules apply to the adoption, repeal or amendment of all legislative admin acts
- ✚ The power to delegate a legislative power exists only when there is express statutory authority
- ✚ The regulations may not be in conflict with any statute or restrict the provisions of a statute and they may not be vague or unclear

When does administrative action take effect?

Legislative admin acts

These acts affect an individual as soon as the regulation or proclamation has been promulgated and/or the stated date of commencement arrives

Judicial admin acts

These acts usually take effect as soon as the particular judicial institution (tribunal or board) gives its ruling or delivers its judgement, unless statute provides for a period to lodge an appeal

Administrative acts

The act will take effect upon the decision becoming known, either by publication or announcement of individual notification.

Termination of legal force of administrative action

The legal force of admin action is ended by repeal, amendment, lapse of time, withdrawal of one of the subjects or by court order.

Functus officio: having completed the task/duty OR no longer functioning

Legislative admin acts

These acts may be repealed/revoked or amended at any time but must not have a retrospect effect

Judicial admin acts

The administrative tribunal (such as the refugee appeal board) is *functus officio* once it has made its ruling and it cannot revoke its decision. However, these acts may be altered, rescinded or upheld by a higher judicial body – usually the High Court

Administrative acts

- Invalid administrative action may be altered/withdrawn by the administrator, unless it affects the individual retrospectively
- Valid administrative action
 - ❖ Valid onerous/burdensome admin acts may be altered by the administrator and affects an individual (such as granting a licence)
 - ❖ Valid beneficial admin acts may be altered by the authority only where power to do so has been conferred expressly or by necessary implication (eg. Once a licence is granted, it cannot simply be taken away)
 - ❖ Valid status-affecting admin acts can only be rescinded or withdrawn if it is authorised expressly or by necessary implication

JUST ADMINISTRATIVE ACTION

Administrative action is valid when the decision of the administrator/organ of the state is authorised in law and all the requirements set by the law are met

1. **Section 33** of the Constitution determines the requirements for valid admin action:

Admin action must be

- **Lawful** (the administrator must obey the prescriptions of the law)
- **Reasonable** (the administrator must exercise discretion impartially)
- **Procedurally fair** (the administrator must follow the correct procedure in taking the decision)
- And **written reasons** must be provided for any admin action that **adversely affects rights**

Just admin action is aimed at preventing organs of state, public institutions and functionaries, as well as natural and juristic persons from abusing their power in dealing with a subordinate individual, thereby guaranteeing the individual just treatment/justice, fairness and reasonableness in his/her dealings with administrators.

2. **Section 195(1)** of the Constitution lists the principles & values that the public administration must obey:

Public administration must be governed by the "democratic values and principles enshrined in the Constitution", including the following:

- a) the promotion and maintenance of a high standard of professional ethics;
- b) the promotion of efficient, economic and effective use of resources;
- c) a development-oriented public administration;
- d) the provision of services impartially, fairly, equitably and without bias;
- e) a responsiveness to people's needs and the encouragement of the public to participate in policy-making;
- f) an accountable public administration;
- g) the fostering of transparency by providing the public with timely, accessible and accurate information;
- h) the cultivation of good human-resource management and career-development practices, to maximise human potential;
- i) a public administration which is broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve such broad representation.

These provisions are aimed at creating a duty to achieve and uphold a fair and honest administration which serves the interests of the general public. In being accountable, responsive, open and transparent in the execution of its functions, administrative action will ensure

- increased participation by the public in the exercise of public functions
- that the administration will weigh up their decisions against the values enshrined in the Constitution
- administrative accountability

Therefore:

Just administrative action/justice is an over-arching requirement that relates to ALL the requirements for valid admin action.

As an over-arching requirement, just admin action determines the legal boundaries of any administrative action and ensures that admin action is performed in accordance with all the relevant rules prescribed by law

Synonyms for just administrative law:

- *ultra vires*: to act beyond or exceed one's powers
- *intra vires*: within power. a collective concept that includes all the requirements for valid admin action
- *applying one's mind to the matter*: when all the requirements of the law have or have not been met
- *legality*: requires that any admin action must be in accordance with ALL the requirements of the law. Legality should therefore be regarded as the basis of all admin law. The principle of legality states that public administration must
 - ❖ *serve and promote the public interest*
 - ❖ *protect and respect fundamental/human rights*

In a nutshell:

Just administrative action – setting the scene	The right to lawful administrative action	The right to reasonable/justifiable administrative action	The right to procedurally fair administrative action	The right to be given written reasons
Introducing the provisions of section 33	Describing the concept of lawfulness	An explanation of the idea of reasonableness	An explanation of the idea of procedural fairness	When an organ of state is required to give reasons
What just administrative action involves	Provisions dealing with the administrator of administrative action	Justifiable administrative action	The nature and content of the common-law rules of natural justice	The courts' approach to the provision of reasons
Explaining the requirements for valid administrative action	The powers of the administrator	The courts' interpretation of justifiability	A pre-condition for the application of the rules of natural justice	PAJA and the provision of reasons
Other over-arching terms used to explain just administrative action		PAJA and unreasonableness	The content of the right to procedural fairness PAJA and procedural fairness	

THE RIGHT TO LAWFUL ADMINISTRATIVE ACTION

Lawfulness as reflected in the Constitution

- Section 1: contains the list of values upon which the Constitution is based:
 - ❖ Sec 1(a) the values of human dignity, the achievement of equality and advancement of human rights and freedoms
- Section 2: the Constitution is the supreme law and all admin action inconsistent with it is invalid
- Chapter 2 The Bill of Rights: protects a persons identified rights against violation and abuse of power
- Section 36: general limitation clause which assist in identifying whether a limitation of a right is lawful
- Section 39: contains the rules for the interpretation of the Bill of Rights

Lawful admin action in PAJA

The purpose of PAJA:

- Provide for the review of admin action by a court
- Impose a duty on the state to give effect to sec 33 rights
- Promote an efficient administration and good governance
- Create a culture of accountability, openness and transparency

Lawfulness and the enabling or empowering state

- The enabling statute gives commands/directives relating to administrative power
- It may also give instructions requiring the administrator who is to exercise the power to possess specific knowledge, experience or other qualifications
- May also prescribe specific procedures to be followed
- Examples of empowering legislation/statute:
 - South African Sports Commission Act 109 of 1998
 - The Employment of Educators Act of 1998
 - The Refugees Act of 1998

Provisions dealing with the administrator

- The administrator's authority & power to take action must be authorised by law
- The administrator is the public functionary or institution performing admin action
- The administrator is always
 - ❖ Clothed with state authority
 - ❖ Has legal power of discretion
- The administrator derives the authority to take action mainly from legislation
- The empowering Act often prescribes the status, qualification, attributes, experience & knowledge required from an administrator

The rule about delegation

- The purpose of delegation of power is to facilitate the quick and efficient division of labour within the administration
- Delegation is unlawful, unless certain requirements are met

1. The general rule against delegation

- *Delegatus delegare non potest*: the person to whom a power is granted may not delegate to another
- The general rule is that the original administrator must perform the function personally
- Sub-delegation occurs when the original legislation empowers an administrator to further delegate
- The following rules apply when delegation of powers is permitted:
 - ❖ If the administrator is authorised to perform a particular action and this entails *the exercise of discretion*, the task concerned may not be delegated unless it is authorised by statute
 - ❖ An administrator who exercises a discretionary power and makes a decision is not prevented from *instructing* a subordinate administrator merely to *implement* the decision
 - ❖ An administrator must apply his/her mind to the matter when exercising discretion
 - ❖ An administrator may appoint a fact-finding committee to assist, provided the actual discretion is ultimately exercised by the administrator

2. Forms of delegation

- **Deconcentration**: type of delegation which takes place within department of state, normally utilizing an internal hierarchical system (pyramid)
- **Decentralisation**: senior functionary transfers certain powers & activities to an independent organ or body which carries out these powers & functions entirely in its own name

The powers of the administrator

The content and scope of administrative authority depend on the following:

- The statute in question and the Constitution
- The appropriate rules of statutory interpretation
- The general principles of administrative law as applied & developed by the courts

The empowering legislation / statute provide the limitations of the administrators powers to:

- Geographical area where powers may be exercised
- Time within which these powers may be exercised – may not be retrospective
- The object that is the subject matter of the action

The Constitutional Right to Reasonable Administrative Action

Unreasonable as defined in the dictionary: not guided by or based on good sense

Two points of view:

1. Since admin action is based on the discretionary power of the administrator, a review of an action on the ground of unreasonableness may be seen as interfering with the decisions of the administration, an action which is in conflict with the separation of powers
2. The courts must ensure the decisions of the administration are in line with the requirements of basic fairness and the right to just admin action as provided in section 33 of the Constitution

The task of a reviewing court, therefore must be to ensure that the correct procedure was followed and to determine whether the discretion has been exercised properly within the confines of the law.

Past judgements indicate that the court will only intervene in cases where the administrative decision is so grossly unreasonable where the authority had failed to apply its mind to the matter.

Just Administrative Action in relation to

1. The Constitution of 1996: Section 33 requires that everyone has the right to administrative action that is reasonable. Here reasonableness is a specific requirement for the validity of all admin actions, however, the meaning of the requirement of reasonable admin action is still in question
2. PAJA: gives effect to the right of reasonable admin action by giving the individual the capacity (under section 6(1)) to institute proceedings in a court or a tribunal for the judicial review of an admin action. It limits the ground for review to the requirement of action which is so unreasonable that no reasonable person could have exercised it (the reasonable person test)

The right to procedurally fair Administrative Action

Crucial features of the right to procedural fairness:

- The right to procedural fairness as a right of participation
- The right relates to procedural fairness only (not concerned with the actual decision but procedure)

The rules of natural justice

- A collective term for a number of common-law provisions applicable to administrative enquiries
- Demands that the administrator follow certain procedural requirements, such as
 - ❖ Giving the person opportunity to present his case before a decision is made
 - ❖ Allowing the person to counter adverse allegations
 - ❖ Being impartial and unbiased
- These rules are aimed at ensuring that in exercising public power the administrator takes decisions in a fair manner and that the individual is treated fairly and justly

Content of common-law rules of natural justice

- A. **The *audi alteram partem*** rule (to hear the other side)
 - a. The individual must be given an opportunity to be heard on the matter (a fair hearing)
 - i. Proper notice of intended action
 - ii. Reasonable and timely notice
 - iii. Personal appearance (not required unless specified but must be given fair opportunity)
 - iv. Legal representation (dependant on complexity of the case – enables fair representation)
 - v. Evidence / cross examination (again dependant on the case)\
 - vi. A public hearing (in balance with openness and fairness. Confidentiality and security must be taken into consideration)
 - b. The party must be informed of considerations which count against him – the essential facts must be given to the person to enable him to reply
 - c. Reasons must be given by the administrator for any decisions taken – specified in section 33 of the Constitution 1996
- B. The ***nemo iudex in sua causa*** rule (no one may be judge of his own cause) – the rule against bias
 - a. This common-law rule requires that all administrators exercise their powers in an impartial or unbiased manner
 - b. The most common examples of bias are:
 - i. The presence of pecuniary/financial interest
 - ii. The presence of personal interest

PAJA and the right to procedurally fair administrative action

- Section 3: deals with procedurally fair admin action affecting *ANY* person
- Section 4: deals with procedurally fair admin action affecting *the PUBLIC*

SECTION 3

- ♣ Section 3(2)(a): fair administrative procedure depends on the circumstances of each case
- ♣ Section 3(2)(b): the mandatory or minimum requirements for procedural fairness
 - Adequate notice of the nature and purpose of the proposed admin action
 - Reasonable opportunity to make representations
 - A clear statement of the admin action
 - Adequate notice of any right of review or internal appeal
 - Adequate notice of the right to request reasons i.t.o. section 5
- ♣ Section 3(3): the discretionary requirements for procedural fairness (note discretion!!):
 - Obtain assistance and, in serious / complex cases, legal representation
 - Present and dispute information and arguments, and
 - Appear in person
- ♣ Section 3(4): departures from the requirements of fair procedure set out in section 3(2)
 - ★ This subsection represents a *limitation of the right to fair procedure*
 - ★ Section 3(4)(b): factors to be considered to determine whether a departure is reasonable and justifiable, they include:
 - The objects of the empowering provision
 - The nature & purpose of and the need to take administrative action
 - The likely effect of the admin action
 - The urgency of taking the admin action / urgency of the matter
 - The need to promote an efficient administration and good governance
 - Note that any limitation of the right to fair procedure must also comply with section 36 of the Constitution
 - ♣ Section 3(5): fair but different procedure
 - This section permits an administrator to follow a different procedure, subject to certain requirements:
 - The different procedure must be fair
 - There is an empowering provision that authorises the administrator to follow a different procedure

SECTION 4

Section 4 will find application when admin action has

- a) A general impact;
- b) The impact has significant public effect; and
- c) Constitutional, statutory, or common-law rights of members of the public are at issue

In these instances, where the rights of the public are involved, and administrator must decide whether

- a) To hold a public enquiry

- b) To follow a notice and comment procedure
- c) To adopt a combination of the two
- d) Where the administrator is empowered by an empowering provision to follow a procedure which is fair but different, to follow that procedure or
- e) To adopt another appropriate procedure

- ♣ Section 4(2): the holding and procedure for a public enquiry
 - The administrator must conduct the public enquiry himself / appoint a suitable person(s)
 - The administrator must determine the procedure
 - The public enquiry must then be conducted in accordance with that procedure
 - A written report must be compiled and reasons given for any admin action taken/recomm
 - A notice with concise summary of the report & particulars must be published in a *Gazette*
- ♣ Section 4(3): a Notice and comment procedure
 - Usually less formal procedurally and usually followed when the procedures will not have a onerous/arduous impact on the general public
 - The administrator must properly communicate to all affected persons and call for comments
 - Must consider comments received
 - Decide whether to take admin action, with or without changes
 - Comply with the prescribed procedures relating to notice and comment procedures
- ♣ Section 4(4): Allowing for a departure from requirement of fair admin procedure affecting the general public where it is reasonable & justifiable to do so
 - Same considerations as set out in Section 3(4) apply here

****The observance of procedural fairness must take place BEFORE any decision is taken ****

The right to be given written reasons

Deals with written reasons { Section 33(2) of the Constitution
Section 5 of PAJA

Constitution of 1996

- “ Everyone whose rights have been adversely affected by admin action has the right to be given written reasons for the decision”
- Klaaren & Penfold argue that the right to written reasons is dependent on the impact a particular decision has on the affected person

PAJA on written reasons

- ♣ Section 5(1): requires the provision of written reasons *at the request* of any person whose rights have been materially and adversely affected by any admin action & who has not been given reasons
- ♣ Section 5(2): The administrator to whom the request is made must provide the person with adequate reasons in writing within 90 days of receiving the request
- ♣ Section 5(3): failure to provide adequate reasons in writing leads to adverse inference (action without good reason)
- ♣ Section 5(4): a refusal to furnish reasons must be reasonable and justifiable

- ♣ Section 5(5): provides for a procedure which is fair but different to that of subsection (2)
- ♣ Section 5(6): promoting efficient administration, the minister may at the request of the administrator, by notice in the *Gazette*, publish a list specifying any administrative action, or a group/class of administrative actions, in respect of which the administrator will automatically furnish reasons

Summary of Section 5 in PAJA for the provision of reasons:

- | |
|---|
| 1, Reasons are furnished to persons whose rights have been <i>materially and adversely affected</i> by the action |
| 2, The Act does not provide a right to reasons, it provides the right to <i>request</i> reasons |
| 3, Once such a request is received the administrator must give adequate reasons within <i>90 days</i> |
| 4, The reasons must be <i>adequate</i> |
| 5, The reasons must be in <i>writing</i> |

EXAMPLE:

The disciplinary hearing of John Learner Mr Chips decides to hold a hearing in terms of section 9(1) of the SA Schools Act 84 of 1996 in order to have John suspended. He should follow the following course of action:

1. He should realise that John has a constitutional right to a fair hearing, as his right to receive education in terms of section 29 of the Constitution may be at stake.
2. He must schedule a hearing and must inform John (and his parents or guardian(s)) of it. Notification to them must be adequate and reasonable (s 3(2) of PAJA). In other words, it must contain all the information they need to help them prepare for the hearing, including a clear statement of the form of action that may result (eg suspension from the school), and it must also leave sufficient time for them to prepare (s 3(2) of PAJA).
3. Mr Chips should allow John and his parents (as John is a minor and should be assisted by his parents and/or guardian(s)) to appear in person at the hearing (s 3(3)). He may however, on the basis of the rather straightforward facts of the case refuse John legal representation.
4. Mr Chips may rule, if he deems it appropriate, that the hearing will take place in camera (in private), but a representative of the Learner Representative Council may be allowed to monitor events.
5. In order to prevent any accusation of bias, Mr Chips should appoint a disciplinary committee that consists of, for example, educators, parents and learners. Even an outsider who may be knowledgeable may be appointed. (But not anyone with personal interest in the matter, such as one of John's parents or his uncle, and so on.)
6. Mr Chips should definitely not make known to the committee that he plans to suspend John. In other words, there should be no suggestion that a decision has already been made and that the hearing is mere window-dressing.
7. The committee should allow evidence to be led at the hearing, but give John (or his parents or guardian(s)) the opportunity to state his case and to dispute the evidence against him (s 3(3)). He need not necessarily be allowed by Mr Chips to cross-examine any witness. In general, the proceedings should be conducted in a flexible way but badgering or harassing John or any witnesses should not be allowed.
8. If the committee decides to suspend John, (eg if he is found guilty of misconduct), the decision must be reasonable in the light of the findings and it should furnish written reasons for its decision.
9. If John and his parents are unhappy about the way in which the hearing was conducted, they should be informed that an appeal may be lodged through internal education channels and that, if unsuccessful, they may institute judicial proceedings in a court of law (s 6).
10. At the end of the hearing John and his parents/guardian(s) must be satisfied that the administrative action to suspend John was lawful, reasonable and procedurally fair, and that written reasons were given since his rights were adversely affected (ie, his rights and interests to attend school and receive education, or even to take part in cultural or sports activities).

To be lawful, action must comply with the requirements of the law (eg, the Constitution, the empowering legislation, common law, etc).

The administrative action must be reasonable: this means the discretion exercised by the committee (eg, to suspend or not) and the decision taken (to suspend John), must have a reasonable effect: it must be correct and based on objective facts and circumstances. In other words, the decision must be justifiable in that the effect must not be disproportionate to John's offence ± the disciplinary problem he has given Mr Chips.

To be procedurally fair, as indicated in the illustration, means that the correct procedures must have been followed during the hearing and both John and his parents/guardian(s) must have been given the opportunity to defend his case before a committee that is unbiased and impartial, that is a fair and objective committee.

Written reasons must be justified and not arbitrary: they must be adequate in that they are appropriate (suitable or sufficient) reasons that fit the offence committed by John. In other words, they must be real reasons in that they are properly informative, not just words.

The Constitution envisages a culture of fundamental human rights and this starts with the way in which those in authority educators, governing bodies and other administrators ± deal with persons under their authority in the many seemingly harmless administrative actions that are part of the day-to-day running of a school.

It is in the classroom, the principal's office, special committees or the governing body meetings that the ideal balance between the learner's fundamental rights and the interests of the community at large must be struck. Educators, school governors and other administrators should never lose sight of the fact that they are expected to promote a human rights culture by the example they set.

Internal control of administrative action

****To control admin action is to ensure that admin action is valid****

Two main forms of control within admin law:

- A. Control within the administration itself – internal control
- B. Judicial control

A. Internal Control

Forms of internal control:

- Control by superior/senior administrators or specially constituted bodies/institutions
 - ❖ Has the power to reconsider/review the decision and then confirm/set aside/vary the decision
 - ❖ May consider the validity, desirability or efficiency of the admin action & take policy into consid
 - ❖ Formal control is exercised by examining the manner in which the decision was reached
- Parliamentary control
 - ❖ General administrative policy and matters of public concern may be questioned by parliament
 - ❖ All cabinet members (ministers) are accountable for the way in which their departments are run
 - ❖ Parliamentary control takes place by way of tabling of reports by ministers and or parliamentary enquiries
- Control by public bodies and commissions, such as the public protector and the auditor-general
 - ❖ The bodies are independent and subject only to the Constitution and the law
 - ❖ They are impartial

- ❖ They must exercise their functions without fear, favour or prejudice
- ❖ Other examples of these bodies are the Human Rights Commission, the Electoral Commission

The Public Protector

- Created to curb administrative excesses
- Investigates citizens' complaints against the public administration and its officials
- It has the power to investigate, report and take appropriate action in respect of state affairs / public administration
- May not investigate court decisions
- The Public Protector must be accessible to all persons and communities
- Reports by the PP must be open to the public, unless classified confidential by national legislation

The Auditor General

- Auditing of and reporting on the accounts, financial statements and financial management of all
 - ❖ national and provincial state departments and administrations and all municipalities
- Must also report on any institution funded from the National Revenue Fund or who receive money for a public purpose

Advantages of internal control

- Administrative decisions are thoroughly re-evaluated
- May bring inefficient administrators to book
- Less expensive, cumbersome and time-consuming than judicial control

PAJA and the use of internal control

Section 7 of PAJA deals with the procedure for judicial review and states that:

- ★ All internal remedies must first be exhausted
- ★ In exceptional circumstances and on application the obligation to exhaust internal remedies first may be exempted

Exceptions to the rule to first exhaust internal remedies

- The case has already been prejudged by the administrator
- The decision has been made in bad faith, fraudulently or illegally – or has not been made at all
- The aggrieved party has an option whether to use the extrajudicial remedy or to proceed directly to judicial review
- The administrative authority has made an unacceptable decision as a result of an error of law
- The administrative body concerned has no authority to rectify the particular irregularity
- The internal remedy cannot provide the same protection as judicial review

Examples:

Scenario	Internal control the proper remedy?
Mr Chips told the members of the disciplinary hearing that he has decided to suspend John from school.	No. Has Mr Chips not prejudged the case?
A community council is convinced that it is empowered to evict a group of squatters from a piece of land.	No. Have you considered the possibility of a mistake of fact? What about a mistake in law?

A state department did not follow any tender procedure at all and awarded the tender to the company which gave the highest pay-off to administrators in that particular department.	Is there mala fides in this case? What is the impact of such bad faith?
The constitution of the sport club states that no girls will be allowed to be members of the club. Thandi's application is turned down.	Yes and no. On the one hand the requirement that internal remedies should be exhausted is more strictly adhered to in the case of voluntary associations. On the other hand, we may argue that internal remedies would be of no use in the light of the constitution of the club.
Jockey Blinkers and the jockey club agree that since his grievances about the conduct of the jockey club are such it will serve no purpose for him to approach the jockey club with his grievances.	No. This is an example of an agreement to proceed immediately to judicial action.

B. Judicial Control

- ★ The power of judicial review allows the validity of legislation and/or administrative action to be challenged in a court
- ★ The judiciary acts as a watchdog over the legislature and the executive and must ensure that all state actions comply with the Constitution
- ★ It is the most important aspect of administrative law
- ★ In order to succeed in a claim for judicial review i.t.o. the common law, the applicant will have to prove the illegality, irregularity or invalidity of the administrative action in question

PAJA Section 6: Grounds for judicial review

- ♣ Section 6(1): gives the general provision and sets the scene for the institution of judicial review
 - Any person may institute proceedings in a court or a tribunal for the review of an admin action
- ♣ Section 6(2): statutory grounds of judicial review. There are 20 separate grounds which are further grouped into 9 categories of grounds of review covering the various stages of decision-making:
 - the *authorisation of the decision* (relating to the decision-maker or administrator)
 - the *manner in which the decision was taken* (relating to noncompliance with formal requirements)
 - the *administrative action itself* (impact on the affected person)

The decision-maker (administrator):

Grounds for review include:

- ❖ Action known as *ultra vires* action – when the administrator was not authorised to take the action
 - ★ The administrator lacked specified qualifications
 - ★ The administrator exceeded the geographical limits of the powers conferred
 - ★ The administrator did not act in accordance with provisions relating to time
 - ★ Administrative actions exceed the objectives / purpose of the empowering provisions
- ❖ Unauthorised delegation of power
- ❖ *Nemo iudex in sua causa* (the rule against bias) – when an administrator was bias

The manner in which the decision was taken

Grounds relating to the manner in which the decision was take:

- ❖ Non-compliance with formal requirements relating to administrative action
- ❖ The mandatory and material procedure or condition prescribed by an empowering body was not

complied with

- ❖ The manner on which the action was taken/not been taken: was it fair, reasonable, justifiable
Consequently, grounds for review are present when:
- ❖ The action was procedurally unfair
- ❖ The action was materially influenced by an error of law
- ❖ The action was taken
 - For unauthorised reasons
 - For unauthorised purposes (ulterior motive)
 - Taking into account irrelevant considerations, or not considering
 - Because the unwarranted/unauthorised dictates of another person/body
 - In bad faith
 - Arbitrarily or capriciously (erratic)

The Administrative Action itself

Grounds for review are present when

- ❖ The action itself
 - contravenes the law or is unauthorised by the empowering provision; or
 - Is not rationally connected to
 - The purpose for which it was taken
 - The purpose of the empowering provision
 - The information before the administrator
 - The reasons given for it by the administrator
- ❖ Failure to take a decision (or unreasonable delay) – person may apply for *mandamus*
- ❖ Unreasonable action
- ❖ Action otherwise unconstitutional or unlawful

An order of court compelling an administrative organ to act



Various forms of judicial control to challenge administrative decisions:

1) Statutory appeal

An appeal is a rehearing of the matter which is restricted to the record of the proceedings.

It may examine the merit of the decision (whether the admin action was right or wrong)

Courts may hear appeals only where there this is provided for by statute/legislation

An appeal may only be lodged against a final decision

The enabling statute may provide:

- ❖ The requirements for appeal
- ❖ The time within which the appeal must be noted
- ❖ Determine the nature and extent of the appeal

2) Judicial review

While the courts may not have inherent appeal jurisdiction, they do have inherent review jurisdiction i.t.o. common law

ALL administrative actions are subject to judicial review

A review scrutinises the legality/validity of the decision – not the merits of the decision

We encounter judicial review in various contexts:

- ❖ A review of administrative action i.t.o. the Constitution
- ❖ Review of administrative action i.t.o. the provisions of section 6 of PAJA

- ❖ Review of the proceedings in/decisions of lower courts i.t.o. the Supreme Court Act of 1959
- ❖ Review i.t.o. the provisions of specific statutes

The grounds for review of the legality of administrative action:

- ❖ The infringement or threatened infringement of fundamental rights listed in the Bill of Rights
- ❖ Any challenge to the validity of administrative action (failure to comply with any of the requirements for valid administrative action)

3) Interdict

Aimed at preventing unlawful administrative action or threatened unlawful administrative action

Two kinds of interdicts:

Interim: provisionally decides the rights of parties while legal proceedings are pending

Final: May be altered only on appeal

An application for an interdict must be supported by the following:

- The applicant has a clear legal interest (right) which is being threatened
- No other satisfactory remedy is available
- The matter is so urgent that the applicant will suffer irreparable damage or prejudice if the interdict is not granted

4) *Mandamus*

Aimed at compelling an administrator to perform some or other statutory function

Cannot stipulate HOW the power should be exercised, only demands compliance with a duty

5) Declaratory order

Used where there is a clear legal dispute / legal uncertainty regarding administrative action

Also used to determine whether actual or pending administrative action is lawful

The court gives a definite and authoritative answer to the question of what the legal position is regarding any particular person or given state of affairs

6) Defence in criminal proceedings

If a person is charged with a criminal offence, the person may defend the charge by challenging the validity of the particular administrative action that is the subject of the dispute

A defence may only be raised once all domestic and internal remedies are exhausted

Most important precondition before turning to judicial control:

The affected person must have *locus standi* (legal standing)

The capacity of a person to bring a matter to court.

The Constitution lists the persons who may approach the court:

- Anyone acting in their own interest
- Anyone acting o.b.o. another person who cannot act in their own name
- Anyone acting as a member of, or in the interest of, a group/class of persons
- Anyone acting in the public interest
- An association acting in the interest of its members

Procedure for judicial review under PAJA

A. Which court may review administrative action?

The Constitutional Court

a High Court or another court of similar status, also specifically designated magistrates' courts

B. The procedure prescribed for the review of administrative action

Section 7(1) of PAJA stipulates that review proceedings are required to be instituted without unreasonable delay and no later than 180 days after domestic remedies have been exhausted

Section 9(1)(b) provides for the extension of the period by agreement btw parties or on application

The orders made by the court as prescribed by section 8 of PAJA

This section is in line with the Constitution in that, where the High Court, the Supreme Court of Appeal or the Constitutional Court declares administrative action unconstitutional, such court may make an order that is just and equitable and call for a suspension until the defect is corrected

- + Section 8(1)(a): the court may direct the administrator to give reasons or to act in a required manner
- + Section 8 (1)(b): the court may make an order prohibiting the administrator from acting in a particular manner
- + Section 8(1)(c): the court may grant orders setting aside decisions of the administrator and send it back to the original decision-maker
- + Section 8(1)(d): the court is empowered to declare the rights of the parties (to ensure that the rights of the affected person and the administrator are clearly set out)
- + Section 8(1)(e): provides for the granting of a temporary interdict or other temp relief
- + Section 8(1)(f): a court may make an order as to costs
- + Section 8(2): relates to orders when an administrator failed to make a decision

The 4 Key features of administrative law again:

