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Definitions

Admin Law relationship - 1 party exercising power from state auth

- authority \rightarrow ^{incl} group, can be within org
- general/obj rel: group, non-specific, general from legis
- indiv/subs rel: personal, specific, identifiable from decisions

Organ of State:

- Any dept of state in nat/prov/loc sphere of govt
- any other functionary/dept exercising power/funct ^{prov/} its consti/legis

NOT including court/judicial officer

Admin Action: Any decision/failure by

- organ of state exercising ^{performing} power / its constit, prov consti or legis
- nat/prov exercising power/function with adverse impact

EXCEPT

DEEP
AAE

- D : Decision (incl proposed decision or failure to take decision)
- A : Administrative nature
- E : Empowering prov of consti or legis
- P : Organ of state / nat/prov/loc exercising public power / perf public function
- A : Adversely affects rights of any person
- E : Direct legal external effect
- E : Not specifically excluded by 9 ~~provisions~~ exceptions

BRANCHES
ACTS

- Exclusions:
- Executive powers & functions (highest level is exclusion)
 - Legislative functions of parl, prov legis & munic councils
 - Judicial functions of court
 - Decisions under PATA
 - Decisions under PASA

Just AA its consti: lawful, reasonable, proc fair, written reasons

overarching principle within AA, s. 17(1) - 17(2) - 17(3) - 17(4) - 17(5) - 17(6) - 17(7) - 17(8) - 17(9) - 17(10) - 17(11) - 17(12) - 17(13) - 17(14) - 17(15) - 17(16) - 17(17) - 17(18) - 17(19) - 17(20) - 17(21) - 17(22) - 17(23) - 17(24) - 17(25) - 17(26) - 17(27) - 17(28) - 17(29) - 17(30) - 17(31) - 17(32) - 17(33) - 17(34) - 17(35) - 17(36) - 17(37) - 17(38) - 17(39) - 17(40) - 17(41) - 17(42) - 17(43) - 17(44) - 17(45) - 17(46) - 17(47) - 17(48) - 17(49) - 17(50) - 17(51) - 17(52) - 17(53) - 17(54) - 17(55) - 17(56) - 17(57) - 17(58) - 17(59) - 17(60) - 17(61) - 17(62) - 17(63) - 17(64) - 17(65) - 17(66) - 17(67) - 17(68) - 17(69) - 17(70) - 17(71) - 17(72) - 17(73) - 17(74) - 17(75) - 17(76) - 17(77) - 17(78) - 17(79) - 17(80) - 17(81) - 17(82) - 17(83) - 17(84) - 17(85) - 17(86) - 17(87) - 17(88) - 17(89) - 17(90) - 17(91) - 17(92) - 17(93) - 17(94) - 17(95) - 17(96) - 17(97) - 17(98) - 17(99) - 17(100)

Just AA No Constit

LAWFUL

- within empowering prov
- person authorised (invalid otherwise)
- threshold req for any AA

Delegation

- general rule against, with exception
- constit auth to delegate
- stat auth
- must copy own mind
- MANDATE: Instr
- DECENTRALISE: - in dept, centrally - retains control
- DECENTRALISE: indep body indirect control

Abuse

- UNAUTH PURS: only obj of act - can't extend unauthor - Objective test (result) = invalid.
- UNAUTH PROC: empw option - fraudulent action, evasive.
- ULTRA PROFITE: decept law - deliberate & intentional

REASONABLE

- proper discretion, obj facts & circumst
- courts don't intervene too much
- balance sp of powers // fairness
- justifiable = based on reason, prop:
- Suitability: most empw
- Necessity: only what is needed
- Weighing: prop to empw
- Constit grants right to read AA
- PATA gives effect "So unreasonable that no reasonable auth"

PROC FAIR

AUDI ALTERAM

- Notice of int action
- Best & timely notice
- Personal appearance
- legal repres
- Evidence (cross-X)
- Public hearing

NEMO IUDEX

- Pecuniary interest
- Personal interest
- Suspicion is enough

PATA

- Rights & leg expect if empw = proc fairness
- oblig: - Adequate notice - Opp to make case - Statement of Action - Notice of right of review - Right to req reasons notice

Discret

- legal req if complex
- Presb & dispute imp
- Personal spf
- Departure of new & part
- Fair but def if empw prof
- Fair proc before decisions

WRITTEN REASONS

- lawful, irrational, unreasonable
- incls. possible
- failure: rebuttable presumption of reason
- object of refusal is not justif. limited - fair but def
- PATA = ind review if reasons aren't credible - may specify action of antom reasons (no request) - must be adequate

PUBLIC

- includes any group/clas
- admin must deliver
- Public emp
- Notice & comment proc
- allow departure of new & part

CONTROL

- Int. VS Judicial
- Senior admins
- Participatory
- Publ body & comm
- p reasons
- exc. preference, make file, order, objection
- checks & bal v sp of power
- Grounds: make manner AA
- (omb): stat appeal, pub res
- (omb): stat mandamus, dec order, objection

NDRM

PPP
P
I
D
P
L

The Crux of Administrative Law -Memorize

Administrative Action:

Administrative Action is by the PAJA defined as:

- Administrative action means any **decision**² taken, or **failure**¹ to take a decision² by –
 - a. An **Organ of state**³, when –
 - i. Exercising a power in terms of the **Constitution or a provincial constitution**; or
 - ii. Exercising a **public**⁴ **power or performing a public**⁴ function in terms of any **legislation**; or
 - b. A **natural or juristic person**, other than an organ of state³, when exercising a **public**⁴ **power or performing** a public function in terms of an **empowering provision**⁵, 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**.⁶
 2. Everyone whose rights have been **adversely affected** by administrative action has the right to be given **written reasons**.⁷
 3. **National legislation**⁸ **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.

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 functionary or institution –**
 - i. **Exercising a power or performing a function in terms of the Constitution or provincial constitution; or**
 - ii. **Exercising a public power or 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.

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**ADL2601
ADL201M**

May/June 2011

ADMINISTRATIVE LAW

Duration 2 Hours

100 Marks

EXAMINERS
FIRST
SECOND

MS I SOUTHWOOD
PROF M BEUKES

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 pilchards 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 *Emp prov*

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

QUESTION 1

1 party state with subordinate indiv state public State-indiv state-gov can be with 0/1

- (a) The set of facts reflects an individual administrative law relationship between MCM and Food-for-all Briefly define it (5)
- (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 (14)
- (c) Do the following actions constitute administrative action? Explain your answers

*Decisionmaker AA
External doctrine
Emp prov
Public org state public power/funct
Admin nature
Adverse effect
Exerc 2 PAJA Act*

TURN OVER

- (i) A request for reasons by Food-for-all (Pty) Ltd (2)
 - (ii) The regulations published by the Minister of the Environment in terms of the Marine Living Resources Act (2)
 - (iii) The refusal of MCM to supply Food-for-all (Pty) Ltd with reasons (2)
- [25]**

QUESTION 2

- (a) Is MCM an organ of state? Why is the answer important? Name the organs of state in the set of facts *Des. threshold req. Organ of state is dept of govt not priv/loc* (15)
 - (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 *non-partisanship, impartiality, efficiency, economy, accountability* (5)
 - (c) Briefly explain when an administrator is *functus officio*. Confine your answer to the rules applicable to onerous/burdensome and beneficial administrative acts *Test 4 completed, we dealt with final.* (5)
- [25]**

QUESTION 3

- (a) Discuss fully whether Food-for-all has had **procedurally fair** treatment in terms of PAJA *Proc fair AA audi memo u PAJA: Necessity, proportionality, necessity* (15)
 - (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 *Necessity, proportionality, necessity* (10)
- [25]**

QUESTION 4

- (a) Who has *locus standi* in terms of section 38 of the Constitution? *any, and who cont, mfr. such as the public* (5)
 - (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? (10)
 - (c) Why should internal remedies first be exhausted? *Procedural imper. Personal int. rule's been, suspension enough of the* (5)
 - (d) Name five (5) **judicial** remedies which are available to an aggrieved person *Stat appeal, int rev, int, mandam, dipro in CV* (5)
- [25]**

TOTAL: (100)

ADL2601

October/November 2011

ADMINISTRATIVE LAW

Duration 2 Hours

100 Marks

 EXAMINERS :
 FIRST
 SECOND

 MRS I SOUTHWOOD
 PROF M BEUKES

This examination question paper remains the property of the University of South Africa 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, GRAMMATICALLY 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 (15)
- (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 (10)
- [25]**

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)
- [25]**

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)
- [25]**

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)
- [25]**

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 (ie 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.

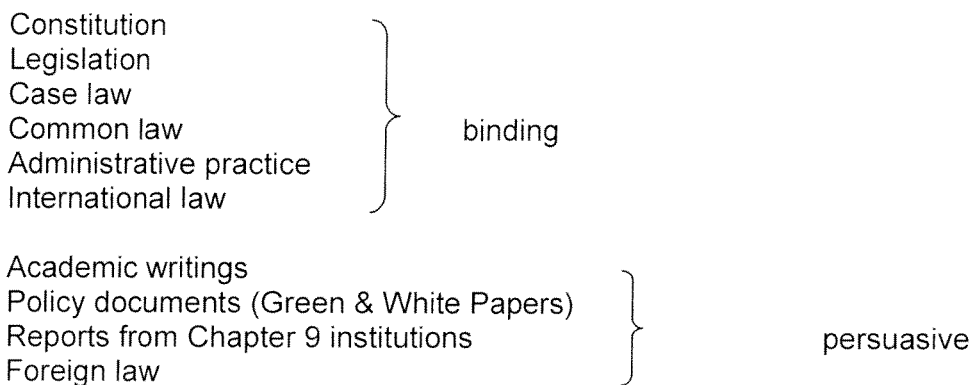
In terms of **s 239 of the Constitution**, an organ of state includes

(a) 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.



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 oust 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 to 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 decisionmaking. 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.
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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 *mala 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

Su1 Describing Administrative law

- State Authority - Public power exercised by organ of state/natural/juristic person or other in subordinate/subservient position (objects into)

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

- Just admin action: How admin action is performed (constitution: lawfully, reasonably, fair procedure & written reasons when adverse)

- Control of AA: means of correcting/rectifying AA that is not fair & just.

lawful: Comply with law (constit, comm law, civil law, court decisions)

reasonable: decision based on obj facts, sound & sensible effect/result

procedural: correct procedure, hear both sides, impartial

adversely affected rights: burden of written reasons imposed

- internal/admin control errors by senior officials, internal channels, then judicial

- Admin law part of public law, regulates ^{state & indiv} organs of state/natural/juristic that exercise public power/function. Regulation, procedures, control ensuring within boundaries of the law.

Su2 Admin law relationship

- law regulates subjects relationships between subjects. legal relationship gov by law

- public law relationship = state \leftrightarrow indiv and is a vertical relationship

- admin law rel - I is a body exercising power from state authority, able to exercise

- person in authority, \leftrightarrow priv indiv or authority \leftrightarrow lower official within dept

- general/objective rel: all subjects in a group, impersonal & non-specific. Controlled by ^{leg} general laws

- indiv/subjective rel: personal & specific & identifiable created by indiv admin decisions
not affected by new legislation (presumption against retrosp)

5th 3 loyal subjects of admin law relationship

3.1 * - Organ of state s239 (constit: "organ of state" means:

- (a) any dept of state/administration in nat/prov/loc sphere of govt or
 - (b) any other functionary/institution
 - i) exercising a power/performing a function to consti or prov consti or
 - ii) its own legislation
- but not including court/judicial officer

s239(a)

- any dept of state/administration

National sphere all departments/administrators

"organ of state" incl cabinet member (executive HoDs), deputy ministers, President & Dep President (only ex-constit power)

Provincial sphere prov depts of state, prov public service, premiers of provinces, MECs
Some also have admin vs executive functions.

Local govt. municipalities, municipal councils.

∴ s239(a) "organ of state" = administrators & state depts constituting public administration.

- s239(b) any other functionary or instit (i) exercising a power/function to consti/prov consti or (ii) by

→ broadens field of "organ of state"

- includes functionaries not part of public admin, but who exercise public power/perform public functions

- very difficult to decide if public power/function or private

- determine ① public power/functions? ② its legislation

3.2 - Role of associations, clubs & other "private" organisations

- voluntary associations, not created by legislation

- similar relationships between members and managers (inequal)

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

- However common law rules of admin law are applied (internal authority analogous)

- Courts will interpret its club constit & agreements between members.

- Sometimes PAJA is applied where there is sig public interest

- §3 - Persons (nat/jur.) whose rights & interests are affected by authority
- Subordinates may be neutral, passive; lower-ranking in same instlⁿ or compulsion
 - Subord never stripped of power, or allowed to abuse - protect by constiⁿ
- object of admin-law rel is the reason why legal subjects entered into rel)
the issue which brings about, objⁿ subjⁿ matter of Admin action

SL4 Sources of Admin Law

- Admin law power is conferred by law, not self-generating.

- Binding Sources

• Constit @ BoR supreme law & ultimate source

- Pharmaceutical Manufacturers Association of SA case = SA law \Rightarrow constitutionalism
- sets the standard for exercise of power of every organ of state
- promotes and guarantees culture of human rights
- justice for the indigent, transparency, reasonableness & good faith = just admin

• - Legislation - Primary source of admin power (modern, readily accessible & knowable)

- Admin law almost always has legisl. source. Min. comply @ constit
- Constit often instructs legislature to adopt legis to give effect, add flesh

Original legis: - passed by Parliam in national sphere (PAJA & Prom Access to Info)

- passed by Provinces in prov. sphere

- passed by local govt (municipal councils) in local sphere (bylaws & don't apply)

Delegated legis: / subord. legis.

- must be enacted by orig. legis (authorised by), & not conflict with it

- to regulate matters provided for by orig. legis, specialised/technical

^{nat. sphere} proclamations by pres / reg by min. / ^{prov. sphere} empowers to make local rules
^{local sphere} also in prov. sphere & local

• - Case law - Courts determine the meaning of a particular legal rule & how to apply

- Courts control exercise of publ. power (Pharm. Manuf. case)

- Past judgments are binding, judicial precedent (stare decisis)

• - Common Law - unwritten law, not an important source, but contrib. to legal

- ultra vires & laws of natural justice from Eng

- Admin practice - unwritten rules / fixed practices, not African continent. Must be:
 - custom/usage reasonable, extend over long period, generally accepted by comm, certain
 - exceptional, subject to const.

- Intl law - lesser role than normal

- Persuasive Sources

- writings, journals @ academic opinions
- Policy documents (green & white papers)
- Reports by state instts supporting const'd democracy (publ protectors, AG)
- Foreign law

PART II: Administrative action

Su 5 Administrative action

~~Administrative~~ authority & holders

AA

Just control & remedy

In action admin action? 4 key features. Su 1 above (subordinate), now 2nd

- Important to know of admin action for application of right to just AA (criticism)
- Admin action: conduct of bureaucracy in daily state functions.
- Courts: excluded actions are those from 3 branches: executive, legislative & judicial

s33 Const 33(i) Everyone has right to ~~act that is lawful, reasonable & proc fair~~

(1) from with adversely affected rights has right to written reasons

(3) National Legist must be enabled to give effect to these rights & must

a) provide for review b) impose duty on state to give effect

i) provide an efficient admin

AA in PAJA

- AA is confined to decisions in PAJA. Decision expanded to its empowering decision

s1 PAJA "AA means any decision/act by

a) ~~exercising state~~ exercising power / performing its const, prov const or legist

b) natural / juristic exercising power / performing with adverse ^{direct} impacts
exclusions"

"decision" of Admin nature made / proposed with empowering provision incl

"empowering prov" to document the where AA was purportedly taken

∴ AA decision (incl proposed decision & failure to decide) (broad)

1) admin nature (conduct of bureaucracy, not legist or judicial / politics / policies)

2) empowering provision (authoritative foundation, validly exercised)

3) org of st / natural / juristic person when exercising ~~publ power~~ / funds

4) adversely affects the rights of any person (broad)

5) has a direct external legal effects (restrict, avoid challenging small issues)

6) Not specifically excluded by the 9 broad categories of exclusions



excluded from AA

- a) Executive powers & functions. - Nat exec (pres & ministers), prov exec (9 prem & councils) & local exec (municipal councils). High constn functions.
- Nat Pres actions: as head of state (referenda, recog ambassadors, ^{honours} confer, comm of c)
 - Pharmaceutical bill - Pres deciding to sign Act into force & AA (rule policy) is concerned @ interpretation of legisl, not making legisl.
- b) Legisl functions of parliament, prov legisl & munic councils exclude legislation, admin is concerned @ interpretation of legisl, not making legisl.
- c) Judicial functions of court: judges & magis, trad bodies, special tribunals.
- decision to edit/continue or prohibition
 - selecting judicial officer/s by JSC
- d) Decisions under PAIA to simplify, as PAIA has own review procedure
- e) Decisions under s(1) of JASA: procedure of AA when action affects public
- protect rev. of admin's choice of what gov is follow. Still governed by const

Classes of Administrative Acts

- roots in separation of powers

- legisl admin acts: Admin rules which are legislative in nature

- making/issuing rules as authorized by legisl

- eg Act prov minister to make regulations/delegated legisl/proclam^s/direct

Charac: easily recognizable form, published (gazette), vary general relationships, specific rules apply, power from statute, must remain in bound

- Judicial admin acts: Actions almost like courts, reviewed by administrative tribunals

eg - Film & Publ board. NOT courts, but subj to judicial control

- Admin acts: "true admin act". Day-to-day implementing & applying. Every possible govt action

Police acts: Particular admin act, authoritative

Discretionary AAs: administrator has choice to legisl. Restricted by competence

- Legal force of admin actions

- When does AA take effect

- Legisl AA - upon promulgation / date of communication

- Judicial AA - upon ruling / judgment when pending period of appeal

- AA upon decision becoming known by publ / announcement or indivis notif

- Termination of legal force

- Fructus effectus = having completed = final and irrevocable decision

- legal force of AA is ended by repeal / revocation, amendment, lapse of time, withdrawal, etc

= Legisl AA: may be amended at anytime, but only to future

= Judicial AA after ruling & can't vary. Only altered by HC

★ = AA if Invalid: altered by administrators (= rectifying defect). (not alter of indivis priv

if valid: if burdensome: at anytime opportunity to correct

if beneficial: only when power to amend is conferred

PART II/ Just Admin Action

Sub

Intro

- Part I & II discussed Admin law relationship, subjects, character & clauses
- Part II = essence: What are reqs for valid admin action
- Valid when admin's decision is authorized in law & all reqs are met. When law is obeyed
- S33 Constit: Right to just AA: lawful, reasonable, pro fair, written if adversely affected
- S33 (1) Everyone has right to AA that is lawful, reasonable & pro fair
 - a) adversely affected = written reasons
 - b) National legisl must be enacted to give effect to right.
- Prevent historical abuse of power by state organs.

(Ch to const, s 195(1)) Values to public admin must obey.

- pro ethics, effective use of resources, accountability, development oriented, impartially
- s(1) ensure accountability, responsiveness & openness.

- S(1), 195 & 33 create duty to uphold honest admin in interests of public.

= Just AA is overarching req relating to all reqs for valid AA. Determined legal boundaries & performance

other terms

↳ intra/ultra vires: in/outside boundaries/powers. AA is invalid/unrecognizable when beyond powers

↳ Applying one's mind: also overarching, all reqs not met

↳ Legality Comm law. All reqs needed for lawfulness. Authorized & in accordance. Basis of AA basis: public interest, protect Human Rights. Binds organs of state to law.

→ ultra vires narrow approach: compliance @ provisions is all that matters

modern broader approach: denial of objectives/juris/mala fide @ compliance is still ultra

Su 7

Right to lawful AA as req for valid AA

- Comm & can law show practical function of lawfulness before constitutionalisation
- result of these sources is that lawfulness is "over-arching" concept that covers administrative

Concept of lawfulness

- Need to include lawfulness in right to just AA? Since CL req of admin legality prescribes that all reqs of the law must be met. Looks like re-statement, superfluous
- key principle of law: power exercised must be in law = legality / lawfulness
- lawful AA is then expressly guaranteed to:
 - To prevent laws that exclude judicial control over AA (parliamentary sovereignty)
 - Entrenches legality principle. Implication @ AU Stat & CL reqs for lawful AA
- lawful AA & legality are synonyms = AA permitted by law

Commonwealth & PAJA

- Preamble to PAJA = review of AA by court (control), duty on state to give effect to rights, promote efficient admin & good governance, culture of accountability, openness & transparency
- PAJA gives effect to right to lawful AA by providing judicial review of unlawful action

Lawfulness & enabling statute

- instructions in statute @ reqs / procedures
- must act @ powers conferred by statute. Exceeding = ultra vires
- other legisl might also impact

Administrator

- organ of state / nat / jurst person authorized to exercise power / perform the function
- details in empowering statute generally, with provisions (qualific etc) & scope/reach
- when performing AA is clothed @ state authority & legal power of discretion (scope vices)
- if admin does not have prescribed attributes, cannot perform valid AA even @ other reqs = absolute min / threshold req for any admin action (admin properly appointed, qual & constituted)
- if chairman of board doesn't possess necessary qualification, board's actions are invalid

- delegation: entrust task/resp/power to another to facilitate efficiency

- deleg is unlawful (but cert reqs)

- Gen rule against deleg: "delegatus" maxim excludes delegation

- if power to person to exercise ~~own~~ discretion, can't delegate (but open pro)
(would undermine necessary attributes of a position)

- Possible when: deleg: orig legislator confer auth on state, sub-deleg empowers admin to deleg in
to effect quick & efficient division of labor
- constn contains grant auth to delegate if consistent @ legis
- ∴ mostly include in statute.

① If admin is auth & entails discretion, may not delegate (but stat auth)

② May instruct sub to implement merely, a decision taken

③ My job: accept instructions from another body, must apply own mind

④ my: appoint fact-finding committee, as long as ultimate discretion is proper

- Various forms: mandate, downcentration & decentralisation of power (degrees of transfer)

No proper deleg

① Mandate: instruction (command). Sni makes decision & hands to another to implement

② Downcentration takes place @ ^{minist} ^{DC} ^{officials} dept, power to deleg conferred

③ Decentralisation: Sr functionary (minist) transfers power to relevant independent ^{body} organ, acts in own name

eg: Minister appoints board to issue transp permits / council opt to run university

- Delegation: ~~cont~~ interpose, only indirect control (appointment & appeal/review to delegator)

② 1- Head may withdraw delegation at any time/prescribe = still retains control

2- delegat (receiver) act in the place, regarded as delegans' performance

3- Various controls - report, relief from duty, interese. ^{no functus officio & exclusion}

cannot undo execution, can only withdraw delegat

4 - Functionaries within same dept cant have delegat dispute (no exclusio)

- Powers of administrator

- Depend on statute, constn, stat interp, gen principles developed by courts

- Empowering legis will democratise govt, area, time, object of power.

no power outside

- no auth to except
- resp only

- reason/purpose of power

- Prohibition on abuse of power by admin

- Abuse always relates to misuse of discretion. Following forms: Exercise power

① Unauthorized / ulterior purpose

- should use power for object identified by Act. This is for another purpose

- may not exercise/attempt a goal not set out in act. eg revoking ^{priv} / legal on purchase

- legal force of empowering statute is extended. unauthorized = waf @ legality

- objective test: not what he thought, but what result was

- can be done in bona fides, no matter how commendable

= invalid action

② Unauthorized procedure

- usually for an easier option, so circumvents & undermines the law

- eg transfer instead of discipline

③ Ultrterior motives

- together with ① = defeating the law, in frauden legis

- deliberately & intentionally evades provisions of statute designedly

- fraudulent intention not always found in ①. ① + ③ can coexist.

- Admin & exercise of power in bad faith

- Applying mind / good faith - over arching

- Mala fide (narrow = dishonest), wider (wrongful use of power) = No applying mind

Sus Constit Right to Reasonable admin action

- Past
- All AA should have reasonable effect = proper discretion @ obj facts & circumst
 - not guided by good sense or no evidence of balance/proportionality
- ↓
- Courts have been hesitant to pronounce on reasonableness (sep of power, don't invade but entire decisions are at rec)
 - Court shouldn't interfere too much with subst of decision (sep of powers)
 - Review is a mechanism to ensure prnt admin action
 - ↳ Not to determine/question policy/correctness, but to apply law to procedure to ensure formal correctness
 - ↳ Determine if discretion is exercised properly (in confines of law)
 - This reluctance caused courts to not hold "reasonableness" as a separate req for valid AA
 - ⇒ "Symptomatic unreasonableness" = indication that something else is wrong (req not met)
 - "Gross unreasonableness" can infer mala fide
 - Has been argued court should only interfere @ gross unreas or non-substance issues
 - Effect of this narrow approach to reasonableness is a subjective test
 - = Not effect of unreas AA, but unreasonable mindset of administrators
-
- Interim constit excl "unreasonableness", new constit expressly included "justifiability"
 - Justifiable decision is based on reason ("go along with decision")
 - Test of justifiability is objective, must be substantiated
 - AA must be "suitable, necessary & proportional" to qualify as justifiable reasons
 - ① Suitability: choose means most appropriate, end ↔ means, similar to rationality
 - ② Necessity: only what is necessary if prejudice, least harm
 - ③ Weighing-up: means proportional to ends = balance.

resent
↓

- Present position to 1996 Constit & Paqa

- Constit = simpler "s33(1) everyone has right to AA that is reasonable"
: complete judicial review of AA

- PAJA: gives effect to above right with 6(1) indiv (party) to get judicial review if A
6(2)h if so unreasonable that no reasonable person could have
- limited to Reasonable Person Test (= Wednesbury unreasonableness)
: Reasonable Authority test

Constit limit on 6(2)(h) must read with s(33)(1) of constit. Alone 1(2)h = rare unreasonable
: reasonable decision maker (circumstances), factors
: nature of decision, ID of decision maker, relevant factors, reasons

- Court reviews have substantive & procedural side, but must not usurp Admin agency
- must ensure decisions fall @ in reasonableness, @ appropriate respect/deference

sh 9 Right to proc fair AA

- Right to proc fairness is right of parties (in decision-making process that affects them) "ha"
- Not concerned with rightness/substance/merits, ~~how the other side~~ "audi alteram partem"
- s 195 constit reqs public admin "democratic values & principles"
- Procedural fairness improves quality of decision making, less resentment/anger

Origin

- Found in common law rules of nat justice (collective term for CL provisions of hearing)
- Ensure that subject to power is fair & just (applies mind) (justice done & seen to be done)
- Baxter calls them "principles of good admin"
 - ↳ fair, accurate and informed decisions
 - ↳ ensure decisions are in public interest
 - ↳ preserve important proc values

- Content - Can be condensed into 2

① Audi alteram

- Opportunity to be heard: chance to be heard, fair hearing. Applies where right/prov/exp^{are} ^{issue}
- Audi
- notice
 - Proper notice of intended action: adequate, even if not stat req, all necessary detail
 - Reas & timely notice: enable prep. depends on circumst. Not complete disavow
 - rep
 - Personal appearance: not essential, but a fair chance to present is.
 - Legal rep: No general right, except where technical/statute/req. Opp to present.
 - hearing
 - Evidence & Exam: Not interest rule, fair in circumstances?
 - Public hearing: No absolute right, respect confidentiality vs openness, transparency & fairness

- Informed of considerations against him Must know essential facts/reasonably precise

- Reasons for decisions should give, even with no duty, to address assumptions In constit

② Nemo rule below ↓

② Nemo iudex in sua causa (no-one should rule on, against bias)

- Impartiality of all administrators
- more likely to be a good decision, justice done & seen to be done.
- Pecuniary (financial) interest - chairman of licence board owns taxi company
 - reasonable person sees the bias

Personal Interest - liquor licence for brother

- reasonable ^{apprehension} suspicion bias test
- don't need to show actual bias, but no suspicion/perception/apprehension

- Constit right to proc fair AA, general:

- This constit right extends the rules of nat justice
- May be limited in rare, limitations clause
- Fairness is flexible depending on case, not a codification of pre-constit law
- Comb inter before PAJA: Denying an entitled person to a fair hearing is fatal mis:

- PAJA & right to proc fair AA

- s(3) AA materially & adversely affecting rights/leg exp of any person must be proc fair
- s(4) over right of public

- "leg exp" not mentioned in Constit ~~AA~~, but is in line @ case law & s(4)
- insistence on existing rights ≠ fair. Even no vested right
- can be from express promise from auth or from regular practice
- Reas expec = right to hearing, not necessarily to succeed.
- Recent case law confirms continued existence
- leg exp incl expec beyond enforceable legal rights if reasonable
- Any indiv, over foreigners, is entitled to benefits flowing from Constit.

-s(3) PAJA & appl of p^opc fairness

- Spec states that fair admin proc depends on circumst of case, varies in content
- must give a persn adequate notice, opportunity to make case, clear statement, notice of ^{past action} any right of review, notice of right to req reasons
- let them "know the case they meet & give opp for meaningful representations
- MAY give a persn whose rights/leg exp have been materially & adversely affected choice
 - ① legal rep if complex consideration of circumstances
 - ② Present & dispute info: make representations, comm law right to reply/counter
 - 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 AA, effect, urgency, promotion of efficient admin & good gov
- should also accord with limitations clause:
 - limited by law of gov opp, reqs & just in open & dem society based on human dig equ free, factors of limitation.

Fair but diff: allowed if req correct: fairness & authorized by provision

- s(6) PAJA & proc fairness of decisions affecting the public

- to remedy the past position, includes any group/class of public
- if general impact & sig public effect & const/stat/comm law rights are at risk
admin must, to be pro fair; decide whether

4 - hold public enq: conducted by admin / qualified person/panel, determine proc & write report @ reasons for action taken or recommended.
- Notice of summary for inspection

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

3 - Allow departure from fair admin proc affecting gen public where reas & just also a limitation, same as s 3(4) - all relevant factors (objective, nature, purpose, need, effect)

- When should proc fair be applied in decision-making process

- Should be before any decision to promote objective & informed decision.

5410 Right to be given written reasons

- Part of common law and rule, never strict. However it is very important
- Reasons show "how" function, lawful or not, rationally or not, reasonably or not
- lack of reasons is a disadvantage for indiv, not transparent
- internal appeal/judicial review made difficult, as no info to base indismissible, protective, promotes good functioning etc.

- Ito Intern & Constit

intern Right to written reasons for AA affecting any rights/int

constit Freyore @ adv affected rights by AA has right to written reasons.

- safeguard vs arbitrary/unreass. Req to justify. Prom fair & proper admin.

- Who has right

Broad: - inevitably entitled since always adverse effect by failure to give reasons
- read @ constit, openness & accountability, seems essential

preferred.

→ Narrow: above "reads out" the adverse req in constit. see indiv impact

- PAJA & reasons s(5) gives constit right a stat form

- req provision of written reasons at request of materially adversely affected & @ reasons, R in 90 days
- Admin obliged to give adv written reasons @ in 90 days
- Failure = rebuttable presumption that AA was without good reason
- Departures: if refusal is reasonable & justifiable, must inform requester also limitation, must comply with constit lim clause
- Fair but diff: provided for, if different Act gives diff fair procedure

Reasons ~~to~~ need for request

- to promote efficient admin, min may specify actions needing autom furnished.
- PAJA provides for a judicial review when reasons not connected to action
- PAJA
- Constit has right to info, s (33) right to written reasons.
 - Reasons give explain/justification for action
 - info is broader

Adequacy of Reasons

- Standard for reasons is adequacy, depending on circumst
- "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
- Receiving request = obl to furnish (in 90 days)
- must be ^{adequate} reasons & in writing

See pg 183 summary

PART IV CONTROL & REMEDIES

- control imposed to remedy
- internal = domestic = extrajudicial control vs judicial control
- value of internal control is recognized by PAJA. Req for judicial review is exhausting of remedies

Su II Internal Control of AA

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

→ Internal control is important & effective

Control by senior admins / special bodies: learner → gov body → HOD Prov Dept → MEC

- Processes
- ① Reconsider / renew decision and confirm / set aside / vary / (subst)
 - ② Consider validity / desirability of AA & take policy into question (which court can't)
 - ③ Examine the manner in which the decision was reached
 - ④ Internal appeal is not final & binding, may be raised again internally

Parliamentary control: important internal control for AA

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

Tabling of reports Minister reports when budget is discussed

Parliamentary enq "Question time", Members (esp opposition) question minister

~~Parliamentary enq~~

Public bodies & commissions: constit created bodies to assist in public awareness

= "state instit supporting democracy"

Public protector: can't curb admin excesses (also called ombud)

- inv any conduct that could be / result in impropriety, report, remedy
- no inv of court decisions, must be accessible & open

Auditor general: audit & report accounts & financial statements

- Com for gender control, HRC, Electoral Comm, Broadband

ADVANTAGES: Cost, time, effort - Deal with inefficiency, demand explanation & remedy.

- PAJA & internal control

- recognised, 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

- however s36 grants right to dispute in court, however this could be a s36 limitation
- gov speaking, should exhaust all internal

- s7(2) says no court/tribunal shall hear if internal aren't exhausted, but may sometimes exempt (int of justice & on application)

exceptions:

recognized:

- case already prejudiced by administrator

- decision mala fide, fraudulent or illegal, ~~is~~ not at all

- aggrieved party has an option

- admin authority's error/mistake of law = unacceptable decision

- admin body agrees to judicial review

- admin body has no auth to rectify that irregularity

- int remedy can't provide same protection as jud review

= any practical solution when int control is not proper remedy

Rule of int first is more strictly applied to voluntary assoc @ such an agreement

SR 12: Judicial Control of AA & remedies in judicial review proceedings

- Principle of checks & balances is NB aspect of separation of powers = each govt branch is sub to some influence & control by others = NB
- Judicial control is biggest check (can challenge validity of any AA/legis) = judiciary is watchdog over exec & legis = cornerstone.
- even before 1974 HC had inherent power of jud review of AA
- Appl must prove 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 const.
- Pharm Manuf: CC merged @ const. CC powers subsumed/incorp'd into const. review

Grounds for jud review in PAJA

- Any person whose rights have been directly affected may
- 6(2) 720 ground to found objections follow stage
 - ① Decision Maker - ultra vires (lacks qual, exceed geog, not accord @ prov, exceeded obj)
 - unauthorised deleg
 - nemo iudex (biased)
 - ② Manner: - Non-corp @ formal reqs
 - mandat & material proc/cond not complied (form & procedure)
 - Reasonable, justifiable, rational, proc-fair, action taken

So grounds when: proc unfair, mat infl by error of law or action was taken: unalt reason/purpose, @ irrelevant or @ relevant, mala fides, arbitrary
 - ③ AA itself: grounds present when ① action contravenes law or not rationally connected to:
 - (4 prong imm't test) purpose, purpose of exp st, info before admin, reasons.
 - rationality test closely linked to right to reasonableness
 - ② Failure to decide (unres delay → mandamus) ③ Unres actions ④ Oblique unconst/unlawful.

- Various forms of judicial control

① Stat appeal No court has inherent appeal jurisdiction, only here when provided in Act

- Delegated legis may not provide for stat appeals unless authorized by enabling act
- Appeal only against final decision/order, not prov/intellectual (during process)
- Provisions laid down in empowering statute & nature & extent of appeal
- Appeal is a rehearing restricted to the record, may examine merit.

② Judicial Review: Courts have inherent review jurisdiction in CA (also to voluntary appeal)

- "Ouster clause" excl courts jurisdiction in act not allowed anymore
- review into: constit, s6 PAJA, Sup CA (for lower courts), specific statutes.
- grounds: infringement/threat of fundamental right in BoR
 - challenge validity of AA (failure to comply & req for valid AA in PAJA)
- Review = legality/validity of decisions, was it defective Review of merits
 - = may go beyond record to look for irregularities, but not into merits/rights

③ Interdict impending action by admin will produce harm, may apply for restraining int

- aimed at preventing threatened unlawful AA
- interim/final. Must be supported by:
 - ① App'l has clear right being threatened
 - ② No other remedy
 - ③ Urgent, to prevent irreparable damage

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, order to determine if actual/pending AA is ^{statutory}

- court gives definitive & authoritative answer to what legal pos is = clarification

⑥ Defence in crim proc CA \Rightarrow validity of AA can be challenged by raising invalidity as a ^{statutory} defence

- if charged @ crim offence from legis (failure to comply strict ly criminal), may defend by challenging validity of that AA

Prerequisites before turning to judicial control

- Reasonable period, final decisions

App must have locus standi

- = capacity of a person to bring a matter to court
- gen rule: needs indefeasible interest in outcome / sustained loss/damage
- actio popularis (anyone can bring public interest to court) ≠ salar
- Bezae constit, needed personal/direct interest

s38 Const

- Broadened, more people may now approach.

- "Anyone listed ^{anyone:} can approach competent court alleging the right in Bork Harbouring"
 - (a) own interest (b) behalf of another who can't act (c) member of group/class
 - (d) in public interest (e) association in interest of members

Procedure for Judicial Review under PAJA

Which court may review AA

- HC has inherent powers of review, PAJA includes CC on behalf ^{when} interests of justice
- Certain mag courts also now empowered = important department, ^{→ not yet} if designated by min

Proc for review of AA

- must be instt @in 180 days, @ unreasonable delay, after exhausting dom remedies
- internal remedies must be exhausted, unless de rushed, rules instituted to help
- Prov made for extension of time by agreement/application (int of just)

Orders made by court as prescribed by s18/PAJA

- may grant any just & equitable order
- If a mag court was designated, it couldn't enquire into ^{delegated either} constt of leg. or Pro's conduct
- s18(1)(a): may req min to give reasons or act in a certain manner (mandamus/mand int)
- s18(1)(b): may make order prohibiting (prohib int)
- s18(1)(c): may set aside admin's decision, not lightly, normally refer back for reconsideration
may declare rights of parties.