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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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TEACHING TRANSPARENCY THROUGH THE LENS OF ADMINISTRATIVE JUSTICE IN SOUTH AFRICA

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Transparency is a vital constituent of the South African constitutional order. At the heart of this order lies a commitment to ensuring open, responsive and accountable governance. This is in large part achieved through the use of administrative-justice tools; including the judicial review of administrative action in the courts. In this Chapter, I illustrate how I teach 'transparency through the lens of administrative justice' in my Masters' course, 'Administrative Justice & Open Governance', by way of a thick pedagogical paradigm that gives the notion of 'transparency' greater tangibility. I begin by highlighting the interplay between openness and responsiveness as necessary ingredients of transparency which in turn foster accountability and, hence, good governance. I then explain why administrative law matters as a distinctive discipline in the good-governance endeavour. Related to this, I show how the principles of administrative law interface with other legal disciplines (such as contract and criminal justice), in a way that reveals its pervasiveness, and thereby the importance of transparency principles across the board. I then focus on the specific 'administrative justice / open governance interface' in the South African administrative-law regime. I do so by elucidating how transparency animates both the substantive review grounds for administrative action, and the procedural tools provided for in this regime's primary statute, the Promotion of Administrative Justice Act, 3 of 2000. I conclude with a cautionary note that 'transparent and accountable government' is a lodestar we should never lose sight of.

INTRODUCTION

The South African Constitutional Court recently highlighted that, '[i]t cannot be gainsaid that our Constitution places a premium on the values of accountability and transparency'.[2] Section 1(d) of the

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[2] *Sonke Gender Justice NPC v President of the Republic of South Africa* 2021 (3) BCLR 269 (CC) ('*SGJ*'), par 221.

Constitution of the Republic of South Africa[3], explicitly endorses the furtherance of 'accountability, responsiveness and openness'[4] – perhaps symbolically captured by the acronym, 'ARO', pointing us in the direction we must continue to aim. This trifecta of values animates our 'transformative Constitution'[5] from beginning to end[6]. By way of example, at the 'beginning', the Preamble sets the tone with a firm commitment to foundation-laying for 'a democratic and *open* society'[7] and in the Constitution's concluding chapter[8] the 'ARO values' are given practical bite with a requirement that '[a]ll constitutional obligations…be performed diligently and without delay'.[9] This is followed by an expansive definition of 'organ of state' which has, at its core, an appreciation of the ubiquitous nature of public powers and functions[10]. The 'public' character of these actions in turn has the potential to trigger the rigorous requirements of South Africa's administrative-law regime. Transparency is a fundamental ingredient of this system; indeed, of most such systems worth their salt. In the Romanian context, for example, Constantin has put it plainly: '[t]ransparency is a general principle in administrative law'.[11] In South Africa, we might simply use the terminology employed by our constitutional drafters such that 'openness' plus 'responsiveness' are necessary (if perhaps not sufficient[12]) ingredients of transparency.

Transparency alone is also not enough for the flourishing of a constitutional democracy committed to the rule of law[13] and human-rights realisation[14]. To have instrumental value, and hence

[3] The Constitution of the Republic of South Africa, 1996 ("the Constitution").

[4] *Ibid*, s1(d)

[5] K. KLARE, "Legal culture and transformative constitutionalism", *South African Journal on Human* Rights, 1998, p. 146.

[6] One of the Constitutional Principles (CPs) on the basis of which the South African Constitution was certified was CP IX which required "freedom of information so that there can be open and accountable administration at all levels of government' openness in government". See *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), par 82, and further see par 45, where the court noted that in ascertaining compliance with these principles it was 'necessary to identify what are indeed the basic structures and premises of a new constitutional text contemplated by the CPs', to which it answered that "fundamental to those structures and premises are…(b) a democratic system of government founded on openness, accountability and equality…".

[7] Preamble of the Constitution, *supra* note 3.

[8] *Ibid*, Chapter 14, 'General Provisions'.

[9] *Ibid*, s. 237.

[10] *Ibid*, s. 239 defines an "organ of state" to mean "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".

[11] E. CONSTANTIN, *The principle of transparency in Administrative Law*, No. 6, 2014, p. 422.

[12] R. ADAMS, *Transparency: New Trajectories in law*, 1st ed, London, Routledge, where the author speaks of transparency's promise as one "far greater than simply liberalised information…it offers a society that can be seen, understood, and even changed, by those who are not central to its construction, by the not-so-powerful. Transparency offers the promise of a simpler world in which all can participate, equally, through the shared possession of readily available information and knowledge."

[13] Section 1(c) the Constitution, *supra* note 3.

[14] *Ibid*, s 7 and Chapter 2.

practical force, the transparency-endeavour must ultimately lead to accountability[15]. Without accountability we cannot be said to have made the legal culture-shift from one of 'authority' to one of 'justification' in which 'every exercise of power is expected to be justified…a community built on *persuasion*, not on coercion'.[16] There can be no persuasion without transparency. Mureinik thus famously dubbed the twin attributes of 'participation and accountability' the hallmarks of a true constitutional democracy; namely one that is 'responsive to the people' it governs[17], such that 'good governance'[18] is the order of the day. These values cannot be appreciated in silos for they are inevitably interrelated and mutually-supporting[19]. They similarly cannot be taught in silos.

'Transparency law' may certainly be worthy of singular academic study and education[20], but *administrative justice* cannot be taught – and certainly not *transparently* – without illustrating how transparency itself weaves its way through this multifaceted legal framework. It is for this reason that the Masters' course I convene and lecture in is not simply called, 'administrative justice', wide as that concept may be. It is called 'Administrative Justice *and* Open Governance'. A 'thick teaching paradigm' is therefore adopted for the content so calibrated and lectured ('the *what*'). This is done against the backdrop of detailed course objectives and assessment criteria ('the *why*'), and where appropriate, input from external experts is facilitated to enrich the students' appreciation of this content ('the *who*'). As for 'the *how*', these remote-Covid times have enabled the adoption of a context-responsive and accessible pedagogical paradigm on the matter of process. Seminars are conducted 'Live' via 'Zoom' and I ensure an advanced division of labour on the prescribed materials among the class participants to encourage active engagement. Furthermore, we elected not to record the sessions to create a safer virtual space. This has in turn fostered robust, unhindered discussion and debate by class participants.

The subject of this paper flows from my presentation, 'Teaching Administrative Justice & Open Governance' at the 'Academic Days on Open Government and Digital Issues' Conference hosted by IMODEV and the Sorbonne, on the Panel, '"Teaching

[15] M. BOVENS, "Analysing and assessing Accountability: A conceptual framework", *European Law Journal* ,13, 2007, p. 447.

[16] E. MUREINIK, "A Bridge to Where - Introducing the Interim Bill of Rights", *South African Journal on Human Rights*, 10, 1994, p. 31, at p. 32.

[17] E. MUREINIK, "Reconsidering Review: Participation and Accountability", *Acta Juridica*, 35, 1993, p. 36.

[18] CONSTANTIN, *op. cit.* note 11, p. 423 sets-out five principles of 'good governance'; namely, 'openness, participation, accountability, effectiveness and coherence'.

[19] The Preamble of the South African 'Promotion of Administrative Justice Act 3 of 2000 ('the PAJA') enumerates the goals of, amongst others, promoting 'an efficient administration', 'good governance' and creating a 'culture of accountability, openness and transparency'.

[20] See, for example, ADAMS, *op. cit.* note 12, and also note the author's cautions regarding 'transparency' and its potentially illusory nature at p. 61.

Transparency: Thick or Thin Paradigm?" chaired by Richard Calland[21]. In this Chapter, I convey the essence of my presentation, and in turn, explain how I teach 'transparency' (or, in the nomenclature used in my course's title, 'openness') through an administrative-justice lens. In particular, I reveal the thickness of the course's paradigmatic approach to the substantive content by highlighting three legal disciplines that interface (or intersect) with administrative law. In this contribution, I focus on the intersection of administrative justice and open governance at the level of both substance (the grounds of review) and procedural tools (such as reason-giving, record ascertainment and remedies). First, however, it is necessary to summarise where these concepts fit in the bigger picture, and – in the spirit of transparency – why all this matters.

§ 1 – THE 'WHY': OF OVERLAPS, INTERFACES & THE INEVITABLE SIGNIFICANCE OF ADMINISTRATIVE LAW IN THE QUEST FOR TRANSPARENCY

Before I traverse the essence of what I teach when it comes to openness within administrative law, it is important to have an appreciation of why this legal discipline matters; especially given its inevitably broad expanse. This in turn requires a basic understanding of the areas of overlap, interplay, and distinctiveness between certain key concepts in the South African constitutional context, notably: (i) administrative law and administrative justice; (ii) administrative law and constitutional law; and (iii) administrative action and public power more broadly.

In this regard, the first point to bear in mind is that administrative justice is a more far-reaching notion than administrative law and South Africa's constitutionalised administrative-justice regime pays heed to this[22]. In short, while administrative 'justice' is still largely 'done' – and 'seen to be done' – with recourse to judicial review by the courts (*via* the invocation of administrative-law principles), overall the post-apartheid landscape is a more expansive one that is illustrative of a shift from administrative *law* to administrative *justice*[23]. South African administrative lawyers are no longer 'frustrated gardeners' gazing 'wistfully' at 'an expanse of greener grass dotted with freedom-of-information legislation, public hearings, the right to reasons, notice-and-comment procedures…ombuds and reliable administrative appeal

[21] On 10 November 2021, Paris, 2021, 'Live' via 'Zoom'.

[22] L. KOHN & H. CORDER, "Administrative Justice in South Africa: An overview of our curious hybrid", Chapter 7, CORDER & MAVEDZENGE *Pursuing Good Governance: Administrative Justice in Common-law Africa*, Siberink, p. 149: "both the Constitution and the PAJA display a willingness to countenance— and arguably, encourage— non-judicial 'checks' to address maladministration and the abuse of public power more generally. Herein lies the promise of a more integrated future for the South African system of administrative *justice*."

[23] *Ibid.*

mechanisms'.[24] All these tools now exist within our constitutional and regulatory toolkit and are variably (or collectively) employed in vindicating 'accountability, responsiveness, openness', and administrative justice in particular[25].

Secondly, constitutional- and administrative law should themselves be appreciated as overlapping circles[26]; albeit not in conceptual entirety[27]. Davis remarked that 'South African administrative law is now firmly rooted within the framework of the Constitution.'[28] This must be so given, amongst others, the establishment of the 'ARO values' in section 1(d); the constitutional right to 'just administrative action'[29]; an entire constitutional chapter dedicated to the 'public administration'[30]; and the significant constitutional value of the rule of law (with its inherent principle of legality)[31] within the South African legal order. Where constitutional and administrative law overlap, these values of accountability, responsiveness, openness and legality are particularly animating. Despite this close and inevitable relation between the disciplines, constitutional law and administrative law retain some theoretical and practical distinctiveness[32].

For present purposes, it suffices to note that (South African) administrative law has as its focus the regulation of a certain kind of action or power: 'administrative action'. This is the gateway concept to which the section-33 administrative-justice rights attach. It is defined in detail – but unfortunately without much conceptual clarity – in the statute that seeks to give effect to these rights, the Promotion of Administrative Justice Act 3 of 2000

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[24] C. HOEXTER, "The future of judicial review in South African administrative law", *South African Law Journal*, 117, 2000, p. 484 at p. 486.

[25] KOHN & CORDER, *op. cit.* note 22, pp. 149-150.

[26] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 ('*Pharmaceutical Manufacturers*'), paras 44-45.

[27] C. HOEXTER, *Administrative Law in South Africa*, 2nd ed. Cape Town, Juta. p. 5.

[28] D. DAVIS, "To defer and then when? Administrative law and constitutional democracy", *Acta Juridica*, 2006, p. 23.

[29] Section 33 of the Constitution *supra* note 3 reads as follows:

> "33. Just administrative action
>
> 1. Everyone has the right to *administrative action* that is lawful, reasonable and procedurally fair.
>
> 2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> 3. National legislation must be enacted to give effect to these rights, and must -
>
> a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> c. promote an efficient administration." (Emphasis added).

[30] *Ibid*, Chapter 10, "Public Administration."

[31] *Ibid*, section 1(c), and see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 ("*Fedsure*"), par. 56, "it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law".

[32] HOEXTER, *op. cit.* note 27 pp. 5-6 and p. 113.

('PAJA')[33]. This legislative incarnation of 'administrative action' has been critiqued for 'serving not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications'.[34] For practical purposes, the touchstone of the concept is the *public nature* of the power or function in question, and when it comes to 'line-drawing'[35] of administrative – *versus*, say, executive – action, South African courts are increasingly emphasising the '*administrative* nature'[36] of the (public) powers[37]. In this way, 'administrative action' should be appreciated as a smaller, and distinctive, circle *within* the more far-reaching ambit of 'public power'.

Thus, while constitutional- and administrative-law principles and ambitions clearly overlap, the disciplines should not be collapsed entirely without more. Administrative-law precepts add a layer of detail to the sweeping rights -and governance-missions of our Constitution. The focus is the 'regulation of regulation'[38] which happens on the 'micro' plane;[39] where rights are 'affected'[40] – typically in the daily bump and grind of governing[41]. This may flow from, for example, the levying of taxes; the issuing of permits and social grants; or, more perennially in the South African space, the relevant actors' failures to act, or at least do so within a reasonable time[42]. It is in these contexts of discrete (non/)implementation of

[33] See s 1(i) of the PAJA *supra* note 19 and note the following extract: "'administrative action' means any decision taken, or any failure to take a decision, by— (a) an organ of state, when— (i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a *public power or performing a public function* in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect …" (Emphasis added).

[34] *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) [2005] ZASCA 142 ('*Greys Marine*'), par. 21.

[35] This terminology emerged in the seminal Constitutional Court judgment of *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 ("*SARFU*"), para 143, where the court framed the question of whether the decision of the then Head of State was executive or administrative action, as a consideration about "which side of the line a particular action falls".

[36] The s 1(i) definition of 'administrative action' in the PAJA, *supra* note 19, refers to a "decision" which is in turned defined to mean "any decision of *an administrative nature*…" (emphasis added), after which various iterations of such decisions are listed by way of example.

[37] See, for example, *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) par. 33-34.

[38] C. FARNIA, "Administrative Law as Regulation: The paradox of attempting to control and to inspire the use of public power", *SA Public Law,* 19, 2004, p. 489 at 490.

[39] This helpful boundary-drawing tool of distinguishing between broad (or macro) and narrower (or micro) decisions was employed by O'Regan J in *Permanent Secretary, Department of Education & Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) ('*Ed-U-College*'), paras 17-18.

[40] *Greys Marine supra* note 34, paras 22-23.

[41] HOEXTER, *op. cit.* note 24, p. 491.

[42] See, for example, *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 (4) SA 242 (SCA), par 43, on this dilemma of "dilatoriness in taking decisions that the administrator is supposed to take" and the ensuing efforts of affected persons having to "chivvy officialdom along".

laws, policies and the like, that the rubber really hits the road when it comes to governance. Ginsburg has therefore argued that it is administrative law – rather than constitutional law – that is worthy of scholarly appreciation better to understand what enhances the effective legal regulation of government[43]. This coheres with Mureinik's timely caution regarding South Africa's attainment of the democratic markers of "participation and accountability",[44] both of which "depend on openness of process"[45] –

> "The answer may depend as much upon routine relationships between government and subject – upon how officials treat the people they govern in daily dealings – as it does upon the vitality of the economy or the loftier aspirations of the Bill of Rights…*Whether we attain democracy will consequently depend upon administrative law*: upon the legal *forces* which pull – or fail to pull – government decision-making towards *democratic* decision-making."[46]

As noted above, for government decision-making to be 'democratic', it must at least be open, justifiable and accountable. The next question is how these 'forces' (and their related ambitions) take shape in the South-African administrative-justice regime. In my Masters' course, I illustrate this by focusing on three particular 'interfaces'. These reveal the extensive reach and importance of administrative-law prescripts and, relatedly, the 'thickness' of the course's substantive pedagogical paradigm.

The first is the 'public/private interface'. This theme requires the students to have an appreciation of when to source a cause of action in administrative law rather than in the private-law realms of, for example, contract (including employment), delict and unjustified enrichment. An important, and practically prevalent, issue here is that of so-called 'government contracts' in the terrain of public procurement[47]. A question that often arises in this complex field is whether, following a tender process and award, everything done thereafter falls within the remit of contract law – with its bounds of privity; *pacta sunt servanda* and the like – or whether administrative justice should 'frame' the contractual relationship[48]. This latter line is typically pleaded with a view to ensuring procedural fairness (in the form of a hearing) and thereby furthering the openness inherent in the notion of natural justice[49].

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[43] T. GINSBERG, "Written constitutions and the administrative state: on the constitutional character of administrative law", in: S. Rose-Ackerman, P. Lindseth & B. Emerson, *Comparative Administrative Law*, 2nd ed, Cheltensham, Edward Elgar Publishing, 2017, p. 62.

[44] MUREINIK, *op. cit.* note 17, p. 25.

[45] H. CORDER, "Administrative Justice in the Final Constitution", *South African Journal on Human Rights*, 13, 1997, p. 28 at p. 31.

[46] MUREINIK, *op. cit.* note 17, p.25 (emphasis added).

[47] R. CACHALIA, "Government Contracts in South Africa: Constructing the Framework", *Stellenbosch Law Review*, 27, 2016, p. 88.

[48] *Logbro Properties CC v Bedderson NO* 1 All SA 424 (SCA), par. 8.

[49] See, for example, *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA), & *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) ('*Joseph*').

When administrative-justice principles are engaged to frame a cause of action, the enquiry and ensuing relief have a particular focus, and thereby shine a light on greater normative concerns than those of private-law redress. As the Constitutional Court held in *Steenkamp*,

> "The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function…. Ultimately… [it] is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."[50]

The second interface we consider in the course is that of 'administrative- /criminal-justice'. This is an under-theorised legal terrain that raises a number of significant themes. For example, *policing* is a prevalent administrative activity. Openness through administrative justice can, and does, shine an invaluable light on abuses of police power. At the level of *prosecution* an important discussion is raised by virtue of the legislative exclusion from the PAJA of decisions to 'institute or continue a prosecution'.[51] The South African courts have held that the policy considerations which underlie the exclusion of these polycentric (and often politically fraught) matters, similarly extend to decisions not to prosecute or to stop prosecutions[52], which should instead be subject to the less invasive 'legality-cum-rationality review'.[53] Lastly, at the level of *incarceration*, in the course we consider how for example, the Judicial Inspectorate for Correctional Services (JICS) serves as an important oversight – and hence openness- and accountability-seeking – body tasked with scrutinising the 'treatment of incarcerated persons and the conditions in which they are held'.[54] In 2021, former Constitutional Court Justice Edwin Cameron, in his current role as Inspecting Judge of Prisons in South Africa, presented an enriching and enlightening class-seminar on this topic against the backdrop of the broader issues presented by the criminal/administrative-justice interface.

The third 'interface' we explore in my Masters' course is the main subject of this contribution; the 'administrative justice/ open governance interface'. The right of 'access to information' in section 32 of the Constitution is an important sibling right to that

[50] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), par. 29.
[51] Section 1(i)(*ff*) of the PAJA, *supra* note, 19.
[52] *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA), par. 23.
[53] L. KOHN, "Time to go back to first principles: A critical analysis of the 2017 Procurement Regulations reveals them to be short of the *legality-cum-rationality* mark", *African Public Procurement Law Journal*, 2019, p. 1.
[54] *SGJ*, *supra* note 2, par. 1.

of administrative justice[55]. They are mutually-reinforcing tools in the South African transparency and accountability toolkit. 'Open governance' (and the right of 'access to information', in particular) is given special focus in an individual module. In 2021, this was done with input on the topical fact-finding mission of the Zondo Commission of Inquiry[56] into State Capture in South Africa.[57] However, I consider it important to reveal the golden thread of openness throughout the teaching of the entire course syllabus.
These layers are elucidated through an 'un-siloed' teaching of the administrative-justice regime's overlay, or at least interplay, with other legal disciplines. This makes for a 'thicker paradigmatic approach to (teaching) transparency'. I turn now to provide some illustrative highlights of how 'openness' weaves its way through the South African administrative-justice regime; both at the level of substantive review grounds and in terms of procedural tools. I focus on the PAJA, as the 'triumphal'[58] – if, imperfect[59] – constitutionally-mandated legislation that seeks to give effect to the basket of section-33 administrative-justice rights.

§ 2 – THE 'WHAT': OPENNESS WITHIN ADMINISTRATIVE JUSTICE NECESSITATES A 'THICK PARADIGMATIC APPROACH' TO MASTERS' TEACHING

A) Openness as an Ingredient of the Substantive Review Grounds

Lawfulness – or legality, coupled, as it often is, with 'rationality'[60] – is a 'minimum requirement'[61] applicable to the exercises of all public power. This makes it significant given the separation-of-powers exclusions from the PAJA-remit of reviewable 'administrative action'. So, for example: the politicised nature of 'macro' policy-making by the executive[62]; the *sui generis* power of

[55] R. CALLAND, "Access to Information and Constitutional Accountability: Ruffling Feathers in South Africa in: Special Edition: The Right to Information" in *VRÜ Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America)*, 2017, pp. 367-389.
[56] See the case of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28.
[57] With a facilitated session by R. CALLAND on the basis of his expert testimony given before the 'Zondo Commission'. See R. CALLAND, "Parliamentary Oversight & Executive Accountability in a time of 'State Capture': Diagnosis of an Institutional Failure & Ideas for Reform", *Submission to the Commission of Inquiry into State Capture,* 2020.
[58] *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (W), par. 7.
[59] I. CURRIE, "What difference does the Promotion of Administrative Justice Act make to administrative law?", *Acta Juridica*, 2006, p. 330.
[60] L. KOHN, "The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?", *South African Law Journal*, 130, 2013, p. 810 & M. BISHOP, "Rationality is dead! Long live rationality! Saving rational basis review", *SA Public Law*, 25, 2010, p. 312.
[61] *Pharmaceutical Manufacturers*, *supra* note 26, par. 90.
[62] *Ed-U-College*, *supra* note 39.

judicial appointment by the Judicial Services Commission[63]; the deliberative, plenary law-making function of original legislative bodies[64] and so on, all need to ensure adherence to the prescripts of legality-cum-rationality despite their exclusion from PAJA-review[65].

Under legality, the three main schematic heads (which flow from common-law and are still invoked in pleading administrative-law cases today) are: authority, jurisdiction and abuse of discretion[66]. Under the umbrella of 'abuse of discretion', openness features in several substantive ways. For example, decision-makers may not consider 'irrelevant considerations' or fail to take into account 'relevant ones',[67] and they may not act 'arbitrarily'[68] which is the converse of rationality minimally conceived and thereby entails an absence of legitimate reason[69]. Therefore, *what* decision-makers do, or do *not*, consider and *how* they go about doing this, entails reflection, transparency and thus justifiability. This notion of 'justifiability' had its formal democratic roots in the administrative justice clause of the Interim Constitution[70], and it, in turn, speaks to the review ground of 'rationality'.

Under the PAJA, '*rationality*' is rather clearly and comprehensively fleshed-out as a ground of review. It entails, at least, that a decision be rationally connected to: the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator, and/or the reasons given for it by the administrator[71]. At the heart of this list lies a concern with openness and responsiveness. For public powers outside the ambit of 'administrative action' (such as executive action by the President), rationality has done a lot of the litigious legwork via legality-review in ensuring these (generally expansive powers which are often corruptly exercised) do not fall outside the accountability-net[72].

The '*reasonableness*' standard required of 'administrative-action proper' takes the justificatory exercise even further by requiring decision-makers to exercise their powers in a proportionate manner[73] that does not give undue weight (or *vice versa*) to any consideration(/s) at the expense of others[74]. Put differently – and

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[63] *Judicial Service Commission v The Cape Bar Council* 2013 (1) SA170 (SCA).
[64] *Fedsure*, *supra* note 31.
[65] C. HOEXTER, "The principle of legality in South African administrative law". *Macquarie LJ*, 3, 2004, p. 165.
[66] KOHN & CORDER *op. cit.* note 22, pp.129-132.
[67] Section 6(2)(*e*)(iii) of the PAJA, *supra* note 19.
[68] *Ibid*, s 6(2)(*e*)(vi).
[69] KOHN, *op. cit.* note 60, p. 825.
[70] Section 24 ('Administrative Justice') in the Interim Constitution (Act 200 of 1993) included in ss (d) a right to "administrative action which is *justifiable* in relation to the reasons given for it…" (Emphasis added).
[71] S 6(2)(*f*)(ii) of the PAJA, *supra* note 19.
[72] KOHN, *op. cit.* note 60.
[73] H. CORDER, 'Without deference, with respect: A response to Justice O'Regan', *South African Law Journal*, 121, 2004, 438 at 443.
[74] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA490 (CC) ('*Bato Star*'); *Bo-Kaap Civic Ratepayers Association v City of Cape Town* [2020] 2 All SA 330 (SCA).

in those apt metaphorical terms – they must not use sledge-hammers to crack nuts. At the level of reasonableness, openness matters insofar as while a reviewing court will not purport to tell a decision-maker what it should, or should not, be weighing in the balance, it may require an indication of the variables so weighed and apply a 'proportionality' assessment[75] to them in light of the empowering provisions. In this way, process follows substance – for a decision to be substantively reasonable, a decision-maker should be able to reveal *what* mattered and *why* in the process of deciding as it did.

The South African administrative-justice clause also entrenches the right to *procedurally fair* administrative action. In the PAJA-context, procedural fairness has been described as one of the more redeeming features of this often-lamented statute[76]. Fundamentally, it still comprises the common-law tenets of natural justice: the rule against bias and the right to be heard[77], which together serve as the essence of a 'fair administrative procedure'. PAJA then takes things somewhat further in two key respects. First, through its separate and detailed treatment of 'procedurally fair administrative action affecting *any person*' where their rights or legitimate expectations have been adversely affected[78]. Secondly, through the statute's interventions to foster procedural fairness for 'administrative action affecting *the public*'.[79] In the latter respect, the PAJA gives administrators food for procedural thought by fleshing-out various tools that may be used where the action in question will affect a 'wider group or class of persons'. These include, for instance, public inquiries; notice and comment procedures; a hybrid of the two; and allowance for processes which are 'fair but different', or 'appropriate' in the circumstances. The administrator's choice regarding the type of procedure is, however, explicitly excluded from the definition of reviewable 'administrative action' in section 1(b)(ii) of the PAJA, and section 4(4)(a) enables a departure from the use of such participatory instruments where it is 'reasonable and justifiable in the circumstances'.[80] These compliance caveats speak to the inherent malleability in procedural fairness as a context-responsive device[81], as well as the value of administrative efficiency – a value that remains relevant in a transformative constitutional democracy still tasked with mammoth societal reconstruction and development given its continuing inequities[82]. This development must, however,

[75] *Ibid.*
[76] HOEXTER, *op cit* note 27, p. 364, "[p]rocedural fairness has, in fact, become one of the most interesting and vibrant areas of South African administrative law".
[77] Sections 6(2)(*a*)(iii) & s 6(2)(*c*) of the PAJA, *supra* note 19.
[78] Section 3 of the PAJA, *supra* note 19, read with *Joseph*, *supra* note 49, par. 57.
[79] Section 4 of the PAJA, *supra* note 19, read with the definition of 'public' in s 1(xi).
[80] *Ibid.*
[81] *Joseph*, *supra* note 49.
[82] *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91, par. 41, '[a]s a young

take place with adherence to those founding 'ARO-values' and the rule of law. This brings me to my final point in this Part.

We should not forget that the requirements of certainty, predictability and accessibility are constituents of the rule of law aside from legality.[83] Regulation-making is a power that patently affects the public at the level of everyday human-activity – something that the Covid19-era has starkly revealed; particularity when it comes to legal predictability. A recent development in this murky field of 'the regulation of regulation-making' therefore bears reference. In *Esau*[84], the Supreme Court of Appeal confirmed that the process of making of regulations is 'administrative action' within the meaning of section 1 of the PAJA. This is now the authoritative precedent on this polarising issue[85], as South Africa's apex Constitutional Court has to-date not decided the matter. Practically, the outcome of *Esau* means that the regulation-making *process itself* can be challenged on the full-throttle administrative-law review grounds of lawfulness, reasonableness and procedural fairness. Given how much governing today happens by way of ministerial regulation, ultimately, what this precedent should do is render the light of transparency even brighter and farther-reaching, thereby enhancing accountability overall.

B) Openness Necessitated by Procedural Safeguards Within the Administrative-Justice Regime

In 1943, Felix Frankfurter asserted that, '[t]he history of liberty has largely been the history of the observance of procedural safeguards."[86] This caution still rings true today. South Africa's model of democracy as encapsulated in the Constitution is a rich, substantive one with a focus not only on multi-party governance, but also on the voice of the minorities[87]. It contains elements that are participatory, representative, and direct in nature[88]. When it comes to participatory democracy - and the related agency and instrumentalised rationality that flows from enabling people to engage on decision-making that affects them[89]– the administrative-

democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly'.

[83] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), par 102, "[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law."

[84] *Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA), from para 76.

[85] HOEXTER, *op. cit.* note 27, p. 182 on the infamous Constitutional Court divide on this matter in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).

[86] *McNabb v United States* 318 US 332 at 347 (1943).

[87] *Oriani-Ambrosini, MP v Sisulu MP, Speaker of the National Assembly* 2012 (6) SA 588 (CC), par. 43, "[o]urs is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless, listen".

[88] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

[89] *Ibid*, par. 115.

justice framework plays a crucial role. There are a few key attributes to note in this regard.

The first is that section 33 of the Constitution grants 'everyone whose rights have been adversely affected by administrative action' the right 'to be given written reasons'. This reason-giving regime operates within the realm of administrative law, but may inform supplementary requests for information under the section 32 access to information right. Like under the PAIA, reason-giving in the PAJA for administrative actions is request-driven. It is fleshed-out in section 5 which makes 'adequacy' the touchstone such that the reasons should clearly explain the basis upon which the decision was reached[90]. The section makes it clear, however, that this is not a free for all given the legitimate need to reduce 'administrative paralysis'.[91] Section 5 of the PAJA thus qualifies the reasons-right with a time-frame within which to request them[92]. Dilatoriness is thereby discouraged. Furthermore, under section 5(4)(a), 'an administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances', provided the person affected is 'informed' of this departure. Again, transparency is the order of the day. Importantly, section 5(3) contains a rebuttable presumption to the effect that where an administrator fails to provide reasons, it will be 'presumed' in judicial review proceedings that the action was 'taken without good reason'. The scales are thus tilted in favour of openness, responsiveness and hence, accountability.

Another point to note when it comes to process-furthering-openness within the rubric of South African administrative-law is that High Court Rule 53[93] regulates the judicial review process and, amongst other things, it requires a respondent decision-maker to file 'the *record* of [the] proceedings sought to be corrected or set aside'. In simple terms, the record refers to all the documents that were before the decision-maker (and may thus be broader than 'mere' reasons if those were so requested under section 5 of the PAJA)[94]. In terms of Rule 53, after the record is furnished, the applicant may amend, vary or supplement its case.[95] This ode to openness in turn creates the potential for strengthening the substantive claims made. For example, the record may reveal that a decision was taken unlawfully under an incorrect empowering provision, or that certain procedural formalities were not complied with, and so on. Of course, an effective review-process is pointless

[90] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC), par 64.
[91] *Joseph*, *supra* note 49, par 29.
[92] Section 5(1) of the PAJA, *supra* note 19, requires a request "90 days after the date on which the person became aware of the action or might reasonably have been expected to have become [so] aware…".
[93] Entitled, 'Reviews':
[https://www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009].pdf.]
[94] *Turnbull-Jackson v Hibiscus Court Municipality* 2014 (6) SA 592 (CC), par 37.
[95] *Ibid*, Rule 53(4).

without an appropriate remedial toolkit. This brings me to the final point.

Section 8(1) of the PAJA echoes the Constitution's imprimatur to the courts in section 172[96] to award relief that is 'just and equitable' in nature[97]. Justice and equity cannot be achieved without openness. The remedial orders in section 8 of the PAJA include those which clearly demand greater transparency, and thus accountability. For example, under section 8(1)(a), the court may direct an administrator to 'give reasons for the action' or 'act in the manner the court or tribunal requires'. A court may also 'prohibit'[98] a course of action and 'direct the taking of a decision'[99]. It is noteworthy that many macro socio-economic-rights decisions ultimately affect people at the level of individualised 'administrative actions'; for example, failures timeously to award social grants[100]. At this intersection, the South African courts have shown particular ingenuity[101] in the spirit of transparency and accountability in crafting their remedial orders, which range from structural interdicts, to personal cost orders against the recalcitrant government agents, to the device of 'meaningful engagement'.[102]

CONCLUSION

'Teaching transparency' is no mean feat. Like public power itself, transparency is a nebulous notion that needs greater tangibility, to have real practical force. In my Masters' course, 'Administrative Justice & Open Governance', the substantive content is curated in a way to achieve this level of tangibility *within* the administrative-justice context *and* at points of its intersection with other legal disciplines. The right to administrative justice fosters openness and responsiveness (as minimal ingredients of transparency), and in turn makes those that wield public powers accountable to the people on whose behalf they are meant to act. Administrative justice does this in various contexts; for example, where public-law prescripts frame ostensibly private relations; in the criminal-justice space; and within the realm of administrative action itself. Given this pervasiveness of public-law principles, the teaching paradigm for the course is substantively 'thick'. Having said this, these

96 Section 172 of the Constitution, *supra* note 3, 'Powers of courts in constitutional matters' empowers courts to 'make any order that is just and equitable'.

97 R. CACHALIA, L. KOHN, "The quest for 'reasonable certainty': Refining the justice and equity remedial framework in public procurement cases", *South African Law Journal*, 137, 2020, p. 559.

98 Section 8(1)(*c*) of the PAJA, *supra* note 19.

99 *Ibid*, s 8(2)(*a*).

100 See, for example, *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC), as the first installment in this social-grants saga, and one which highlights this intersection between the social rights and administrative-justice guarantees.

101 H. TAYLOR, "Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation", *Constitutional Court Review*, No. 9, 2019, p. 247.

102 L. CHENWI "'Meaningful engagement' in the realisation of socio-economic rights: The South African experience", *SA Public Law*, No. 26, 2011, p. 126.

principles cannot be understated. They are the *sine qua non* for democracy properly understood and practiced for if 'open and transparent government and the free flow of information' are the 'lifeblood of democracy',[103] then the administrative-justice regime helps keep this lifeblood flowing in 'quotidian reality'.[104] In this chapter I have sought to provide an illustrative snapshot of how transparency (conceived of, at a minimum, as 'openness plus responsiveness') plays a key role in this regard. I have done so with particular focus on the substantive review grounds and procedural tools under the PAJA as the intended[105] primary legal mechanism for regulating administrative action. While there are many other important roadways to 'justification' within the South African constitutional order, judicial review remains 'an important means to the attainment of *transparent and accountable government*'[106] – a lodestar we should never lose sight of.

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[103] *President of RSA v M & G Media* [2010] ZASCA 177, par. 1.
[104] HOEXTER *op. cit.* note 24, p. 49.
[105] *Bato Star*, *supra* note. 74, par. 25.
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