

THE PRINCIPLE OF LEGALITY IN NAMIBIAN ADMINISTRATIVE LAW  
UNDER THE SUPREMACY OF THE CONSTITUTION: A COMPARISON  
ANALYSIS WITH SOUTH AFRICAN ADMINISTRATIVE LAW

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**SCHEDULE A**

“I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my L.L.B is my own original work and that I have not used any other resources than those listed in the bibliography and quoted in the references.”

Signature: .....

Date: .....

Supervisor’s Certificate: .....

I, Mr. S.K. Amoo hereby certify that the research and writing of this dissertation was carried out under my supervision.

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**CHAPTER: I****1.1 Introduction**

The principle of legality is the legal ideal that requires all law to be clear, ascertainable and non-retrospective. It requires decision makers to resolve disputes by applying legal rules that have been declared beforehand, and not to alter the legal situation retrospectively by discretionary departures from established law. It is closely related to legal formalism and the rule of law and can be traced from the writings of Feuerbach,<sup>1</sup> Dicey<sup>2</sup> and Montesquieu.<sup>3</sup> The principle has particular relevance in criminal and administrative law. In administrative law, it can be seen as the desire for state officials to be bound by and apply the law rather than acting upon whim.

Primarily, the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards. It is thus also a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts. But in performing this important function the principle surely exposes the conceptual traps into which we have fallen, and it shows us how to go on. At one time our courts looked to the ‘duty to act fairly’ to rescue themselves from the

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<sup>1</sup> Feuerbach, A. L. (1839) *Essence of Religion*, available at <http://books.google.com/./Feuerbach.html> last accessed on 27 June 2011.

<sup>2</sup> Dicey, A.V. (1885) *An Introduction to the Study of the Law of the Constitution*, p. 107.

<sup>3</sup> Montesquieu, D. B. (1748) *Spirit of Law*, available at <http://books.mirror.org/gb.montesquieu.html> last accessed on 27 June 2011.

conceptual wilderness of the classification of function.<sup>4</sup> Similarly, we now seem to need the principle of legality to tell us that it is perverse to spend our time working out whether decisions pass the test of 'administrative action'. For one thing, it distracts the courts' attention from far more interesting questions – such as what the content of lawfulness, reasonableness and procedural fairness is in particular cases, and why it is. These questions *must* be answered if the perennial problem of overburdening the administration is ever to be solved. Furthermore, it effectively encourages courts to hide behind a screen of reasoning about 'decisions' and 'rights' instead of articulating their real concerns about the case, and quite possibly about why they feel inclined or disinclined to intervene.<sup>5</sup>

The principle of legality expressly stipulates that exercises of public power must comply with standards such as lawfulness, reasonableness and fairness. It shows up the silliness of having two parallel systems of administrative law instead of one.<sup>6</sup> It tells us not to waste our time on conceptual reasoning, and not to be fearful of opening the floodgates, but rather to apply our minds to what administrative justice requires in every case. And it tells us that it is, in fact, possible to give appropriate content to lawfulness, reasonableness and fairness in individual cases.

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<sup>4</sup> Plasket, C. (2002) *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis, Rhodes University,) 402ff.

<sup>5</sup> Plasket, C. (2002:403)

## **1.2 Statement of the problem**

This dissertation would briefly look at the pre-independence position and post-independence position for the consideration of the principle of legality in administrative law. The dissertation would then consider whether the principle of legality covers for procedural fairness as provided in terms of Article 18 of the Namibian Constitution. The paper then deals with the Namibian Court's 'principle of legality' as part of the Rule of Law and how our Court's timely recourse to a 'principle of legality' as a way to save administrative law as it is applied in the courts, and ends with a consideration of what this principle of legality offers in terms of proportionality, which is the other half of reasonableness. Thereafter the dissertation would compare the Namibian position with that of South Africa and to analyze the tendency caused by the apartheid era and the future development of the principle under the supremacy of the Namibian Constitution.

In comparing the two jurisdictions the author of the dissertation would concentrate on case studies of the two jurisdictions and the grounded theories laid down in the respective jurisdictions and come up with a logical conclusion on the development of the principle of legality in the Namibian Administrative law and the future application of the principle.



### **1.3 Methodological framework**

The primary methodology used in the compilation of this dissertation is the desktop method. My research methodology requires gathering data from the specified Legislation, Constitutions and case study. The author of the dissertation intends to compare three legal jurisdictions namely, Namibia, South Africa and England in their application of the principle of legality in administrative law and therefore, an analysis of the domestic laws would be conducted mainly the Constitution of Namibia in particular Article 18 and the relevant case study. A further analysis is made on the South African Constitution and its legislation dealing with the principle of legality in administrative law in particular Administrative Justice Act and the Access to Information Act 2 of 2000. A further analysis of the English cases and its legislation dealing with the principle of legality in administrative law would be examined together with a comparison analysis of the cases of all three jurisdictions.

### **1.5 Literature review**

This review of texts below shows that there are laws both in Namibia and South Africa as well as in England that support the principle of legality in administrative law. Authors such as Hoexter in his book: Hoexter, C. (2007) *Administrative Law in South Africa*: Juta & Co. Cape Town, the principle has been traced back to the pre-independence era in South Africa and he discusses the tendencies of parsimony and conceptualism in the pre-independent South Africa and how this two closely linked tendencies that have bedeviled judicial review in administrative matters from the start and in his book he further elaborated on the

importance of the principle of legality in administrative law to avoid parsimony and conceptualism as it was adopted in the apartheid system. These tendencies, first exhibited by the courts in their application of the common law, have unfortunately been embraced by the democratic legislature as well. It has apparently failed to appreciate that there are more subtle ways of managing the burden imposed by the principles of good administration, and Burns in their book: Burns, Y. & Buekes, M. (2006) *Administrative Law under the 1996 Constitution*: 3<sup>rd</sup> edition. LexisNexis. Durban, they wrote on the principle's application under the supremacy of the South African Constitution. Here in their book the authors discuss both the administrative justice clause enshrined in the Interim Constitution of 1994 and the Final Constitution of 1996, and how the principle of legality was adopted in both Constitutions.

In the Namibian perspective on the principle of legality, author such as Amoo in his book, Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*. Macmillan Education Press: Windhoek, he discussed the administrative clause enshrined in the Namibian Constitution, particularly Article 18 which regulates administrative action in Namibia. Here the author wrote and elaborated on the requirements that are laid down in Article 18 of the Namibia Constitution and the relevant Namibian cases pertaining to the requirements of reasonableness, fairness and the principle of natural justice and the application of discretionary powers conferred to administrators.

The Article by Judge Parker, C. (1991) 'The Administrative Justice Provision of the Constitution of the Republic of Namibia: a Constitutional Protection of Judicial Review and

Tribunal Adjudication under Administrative Law', 24 *Comparative and International Law Journal of Southern Africa*, has also been employed to give general remarks on the administrative justice in Namibia at the early development of Namibia administrative after independence. Naldi in her book: Naldi, I. (2006) *Constitutional Law*: University of Namibia, discusses the administrative clause enshrined in the Namibian Constitution, particularly Article 18 which regulates administrative action in Namibia.

English authors such as Wade and Forsyth, in their book: Wade, H.W.R. and Forsyth, C.F. (1994) *Administrative Law*. Oxford: Clarendon Press, they wrote on the principle of legality in Britain Administrative Law and how the principle differs from the rule of law. Here the authors traced the principle of legality from the writings of Dicey and how it was adopted in England which is the Leading Commonwealth country where Namibia adopts most of its laws. Hence, the tracing of the principle is important in order to ascertain where Namibia adopted this principle and how it became part of the laws of Namibia. The book of Steyn, J. (1996) *Halsburys Laws of England*, 4th ed, reissue vol. 8(2): Oxford, has been employed to give a conclusive overview of the principle in England. Additional materials, cases, articles and books that are not mentioned in this literature review may be used in this dissertation.

## **CHAPTER II: THE RELATIONSHIP BETWEEN THE RULE OF LAW AND THE PRINCIPLE OF LEGALITY**

The Constitution of Namibia is founded on the rule of law<sup>7</sup>, and administrative law is the area where the principle of legality is to be seen in its most active operation. The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law.<sup>8</sup> Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong, or which infringes a man's liberty, must be able to justify its action as authorized by law – and in nearly every case this will mean authorized by the Constitution and/ or the Act of Parliament.<sup>9</sup> Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can then safely disregard.<sup>10</sup>

That is the principle of legality. But the rule of law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law.<sup>11</sup> *Quod principi placuit legis habet vigorem* (the sovereign's will has the force of law) is a perfectly legal principle, but it

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<sup>7</sup> Article 1(1) of the Constitution of Namibia provides, 'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.'

<sup>8</sup> Wade, H.W.R. and Forsyth, C.F. (1994) *Administrative Law*. Oxford: Clarendon Press, p 21.

<sup>9</sup> Wade, H.W.R. and Forsyth, C.F. (1994:21)

<sup>10</sup> Wade, H.W.R. and Forsyth, C.F. (1994:21)

<sup>11</sup> Wade, H.W.R. and Forsyth, C.F. (1994:22)

expresses rule by arbitrary power rather than rule according to ascertainable law.<sup>12</sup> The secondary meaning of the rule of law, therefore, is that government should be conducted within a framework of recognized rules and principle which restrict discretionary power. Many of the rules of administrative law are rules for restricting the wide power which Acts of Parliament confer very freely on ministers and other authorities. Thus the local planning authority may make planning permission subject to such conditions as it thinks fit, but the courts will not allow these powers to be used in ways which Parliament is not thought to have intended. An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power. Intensive government of the modern kind cannot be carried on without a great deal of discretionary power; and since the terms of Acts of Parliament are in practice dictated by the government of the day, this power is often conferred in excessively sweeping language. The rule of law requires that the courts should prevent its abuse, and for this purpose they have performed many notable exploits, reading between the lines of the statutes and developing general doctrines for keeping executive power within proper guidelines, both as to substance and as to procedure.<sup>13</sup>

The principle of legality is a clear-cut concept, but the restrictions to be put upon discretionary power are a matter of degree. Faced with the fact that Parliament freely confers discretionary powers with little regard to the dangers of abuse, the courts must attempt to strike a balance between the needs of fair and efficient administration and the

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<sup>12</sup> Wade, H.W.R. and Forsyth, C.F. (1994:22)

<sup>13</sup> Wade, H.W.R. and Forsyth, C.F. (1994:22)

need to protect the citizen against arbitrary government. Here they must rely on their own judgment, sensing what is required by the interplay of forces in the constitution. The fact this involves questions of degree has sometimes led critics to disparage the rule of law, treating it as a merely political phenomenon which reflects one particular philosophy of government. But this is true only in the sense that every system of law must have its own standards for judging questions of abuse of discretionary power.<sup>14</sup> As will be seen from Chapter 4, the rules of law which our own system has devised for this purpose are objective and non-political, expressing indeed a particular judicial attitude but one that can be applied impartially to any kind of legislation irrespective of its political content. Without these rules all kinds of abuse would be possible and the rule of law would be replaced by the rule of arbitrary power. Their existence is therefore essential to the rule of law, and they themselves are principles of law, not politics.<sup>15</sup> A third meaning of the rule of law, though it is a corollary of the first meaning, is that disputes as to the legality of acts of government are to be decided by judges who are independent of the executive. A fourth meaning is that the law should be even-handed between government and citizen. In principle all public authorities should be subject to all normal legal duties and liabilities which are not inconsistent with their governmental functions.<sup>16</sup> A fourth meaning of the rule of law is that the law should be even-handed between government and citizen. Clearly it cannot be the same for both, since every government must necessarily have many special powers. What the rule of law requires is that the government should not enjoy unnecessary

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<sup>14</sup> Wade, H.W.R. and Forsyth, C.F. (1994) *Administrative Law*. Oxford: Clarendon Press, p 22.

<sup>15</sup> Wade, H.W.R. and Forsyth, C.F. (1994:25)

<sup>16</sup> Wade, H.W.R. and Forsyth, C.F. (1994:26)

privileges or exemptions from ordinary law. In principle all public authorities should be subject to all normal legal duties and liabilities which are not inconsistent with their governmental functions.<sup>17</sup>

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<sup>17</sup> Wade, H.W.R. and Forsyth, C.F. (1994:26)

### **CHAPTER III: NAMIBIAN POSITION UNDER THE SUPREMACY OF THE CONSTITUTION**

The independence of Namibia in 1990 was an important landmark on the development of its laws. The process towards independence brought a transformation resulting in a sovereign democratic state. This transformation also gave birth to a Constitution, which would become the Supreme law of the country.<sup>18</sup> The Constitution includes a Bill of Rights, which is based on the Universal Declaration of Human Rights and protects all the basic civil and political rights. The rule of law is one of the foundational principles of our State.<sup>19</sup> One of the incidents that follow logically and naturally from this principle is the principle of legality.<sup>20</sup> In our country, under a Constitution as its "Supreme Law",<sup>21</sup> it demands that the exercise of any public power should be authorised by law<sup>22</sup> either by the Constitution itself or by any other law recognized by or made under the Constitution. "The exercise of public power is only legitimate where lawful."<sup>23</sup> If public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp

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<sup>18</sup> Article 1(6) of the Constitution of Namibia provides that '[T]his Constitution shall be the supreme law of Namibia'.

<sup>19</sup> See: Art 1(1) of the Constitution of Namibia

<sup>20</sup> See: *Affordable Medicines Trust and Others v Minister of Health and Others*, [2005] ZACC 3; 2006 (3) SA 247 (CC) in para 49 noted with approval in *Kessl v Ministry of Lands Resettlement and Others and Two Similar Cases*, 2008 (1) NR 167 (HC) at 206D.

<sup>21</sup> See: article 1(6) of the Constitution of Namibia.

<sup>22</sup> See: *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*, [2006] ZACC 9; 2007 (1) SA 343 (CC) in para 68; See also: *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, [1998] ZACC 17; 1999 (1) SA 374 (CC) in paras [40] and [56] and *Masetlha v President of the Republic of South Africa*, [2007] ZACC 20; 2008 (1) SA 566 (CC) in para 173.

<sup>23</sup> To quote the words of Chaskalson P in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, [1998] ZACC 17; 1999 (1) SA 374 (CC) at para 56.



powers of State constitutionally entrusted to legislative authorities<sup>24</sup> and other public functionaries. The principle, as a means to determine the legality of administrative conduct, is therefore fundamental in controlling – and where necessary, in constraining - the exercise of public powers and functions in our constitutional democracy.<sup>25</sup>

Article 18 of the Namibian Constitution provides:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

#### Lawfulness as a requirement of Article 18<sup>26</sup>

Lawful administrative action is a well recognized principle of common law that individuals are entitled to lawful administrative action where their rights and interests are affected or threatened. However, since the common law principle of administrative legality was applied inconsistently in the past, the inclusion of this constitutionally protected right affords the individual a greater measure of protection from administrative abuse. In the past the requirement of lawfulness or legality was often confined to compliance with the provisions of the enabling act or empowering statute. In essence lawfulness is an umbrella concept empowering all the requirements for valid administrative action.<sup>27</sup>

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<sup>24</sup> Devenish et al., *Administrative Law and Justice in South Africa*, p. 228

<sup>25</sup> Supra

<sup>26</sup> Article 18 of the Namibian Constitution

<sup>27</sup> Burns, Y. and Beukes, M. (2006) *Administrative Law under the 1996 Constitution*, Durban: LexisNexis, p 50.

Procedural fairness as a requirement of Article 18<sup>28</sup>

At common law the rules of natural justice are aimed at achieving a minimum standard for fair administrative hearings and enquires. As such, they ensure that the administrator applies its mind to the matter by adhering to certain procedural requirements, by acting fairly and by giving the individual an opportunity to be heard. In essence the rules represent a fundamental or private justice by guaranteeing simple justice between legal subjects. The objective of the constitutional right to procedural fairness is similar to the common law objective – it is to ensure a proper hearing for aggrieved persons. The aggrieved persons must be properly informed, they must be given an opportunity to give their side of the story and they must be able to challenge adverse allegations and be provided with reasons<sup>29</sup>.

Reasonableness as a requirement of Article 18<sup>30</sup>

This constitutional right to reasonable administrative action includes the elements of rationality and justifiability as well as the element of proportionality. Objectively considered a justifiable decision is one which is based on reason and although there is a certain subjective element in every decision by virtue of the fact that the official has special expertise and qualifications, the decision must nevertheless be capable of objective substantiation. Proportionality this is a principle that requires a reasonable relation between administrative decision, its objectives and the facts and circumstances of the particular case.<sup>31</sup>

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<sup>28</sup> Article 18 of the Namibian Constitution

<sup>29</sup> Burns, Y. and Beukes, M. (2006:51).

<sup>30</sup> Article 18 of the Namibian Constitution

<sup>31</sup> Burns, Y. and Beukes, M. (2006:52).

Administrative law is part of public law and deals with the regulation of state institutions, their relationships with one another and with individuals. The major purpose of administrative law is to ensure that the activities of government are authorized by the Constitution or by provincial legislatures, and that laws are implemented and administered in a fair and reasonable manner.<sup>32</sup> Administrative law is based on the principle that government action, whatever form it takes, must (strictly speaking) be legal, and that citizens who are affected by unlawful acts of government officials must have effective remedies if the Namibian system of public administration is to be accepted and maintained. Article 18 of the Constitution of Namibia guarantees the right to administrative justice. Article 18 is thus the constitutional basis of administrative law in Namibia. Administrative legality is a central concept in administrative law. The principle of legality constitutes an unwritten principle of the Constitution. This principle requires that all State actors (whether legislative, administrative or judicial) act within a framework composed of: The express and implied provisions of the Constitution;<sup>33</sup> fundamental laws, and all other legislative enactments;<sup>34</sup> the general principles of administrative law, used to interpret and complete legislation;<sup>35</sup> regulations and other binding legal texts of a general nature,

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<sup>32</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan education press. Windhoek, p 318.

<sup>33</sup> Spigelma, J.J. (2005) *The Principle of Legality and the Clear Statement Principle*, available at [http://www.lawlink.nasw.gov.an./lawlink/Supreme Court/ll\\_sc.nsf/pages/SCO\\_index](http://www.lawlink.nasw.gov.an./lawlink/Supreme Court/ll_sc.nsf/pages/SCO_index) p. 3.

<sup>34</sup> Spigelma, J.J. (2005) *The Principle of Legality and the Clear Statement Principle*, available at [http://www.lawlink.nasw.gov.an./lawlink/Supreme Court/ll\\_sc.nsf/pages/SCO\\_index](http://www.lawlink.nasw.gov.an./lawlink/Supreme Court/ll_sc.nsf/pages/SCO_index) p. 3.

<sup>35</sup> Spigelma, J.J. (2005:4)

adopted in virtue of a legislative provision and which must conform to general principles of law.<sup>36</sup>

This doctrine of legality was further described in the case of *Affordable Medicines Trust and Others v Minister of Health and Other*<sup>37</sup> as:

The doctrine of legality, which is an incident of the rule of law, is one of the constitutional through which the exercise of public power is regulated by the Constitution. It entails that the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

The principle of legality was adopted in the United Kingdom and subsequently it has been accepted in our jurisdiction. It should be regarded, in my opinion, as a unifying concept identifying the higher purpose of a number of interpretive principles which have in the past been called canons or presumptions or maxims. The words “the principle of legality” were introduced into contemporary discourse by Lord Steyn, being a phrase he found in the 4th Edition of *Halsburys Laws of England*, where it was employed as equivalent to the traditional phrase “the rule of law” in a narrower sense than many who used that concept have adopted<sup>38</sup>.

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<sup>36</sup> Spigelma, J.J. (2005:4)

<sup>37</sup> *Affordable Medicines Trust and Others v Minister of Health and Other* 2006 (3) SA 247 (CC)

<sup>38</sup> Steyn, J. (1996) *Halsburys Laws of England*, 4th ed: reissue vol 8(2): p.376.

Lord Steyn referred to the principle in the following way:

“Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.”

In the case which established the principle of legality as a unifying principle in English law, Lord Hoffman said: “The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”<sup>39</sup>

The principle of legality is an aspect of the rule of law, a concept implicit in the Constitution and a founding value of our constitutional order in terms of Article 1(1) of the Constitution of Namibia. The fundamental idea it expresses is that the exercise of public power is only legitimate where lawful. Its detailed content has to be worked out from the

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<sup>39</sup> *R v Secretary of State to the Home Department; Ex parte Pierson* (1998) AC 539 at 587.

Constitution as a whole, and this is a continuing process that the High Court and Supreme Court embarked on in a series of cases involving administrative action and discretion.<sup>40</sup> Article 18 of the Constitution of Namibia<sup>41</sup> provides that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court of Tribunal. This article comes under the entrenched provisions of the Bill of Rights and therefore under the Namibian legal system, the jurisdiction of the courts to review administrative action and the justifiability of this right by any person aggrieved by the exercise of administrative discretion come under the regime and protection of the constitution. Judicial review of administrative action is therefore one of the constitutional mechanisms meant to protect the rights of the individual and prevent the potential abuse of discretionary power.<sup>42</sup>

The application of the provisions of Article 18 is limited to acts by administrative bodies and officials<sup>43</sup> who have been exhaustively defined to include the executive, regional and local government, the public service, the parastatals, and employees<sup>44</sup>. The provisions of the article enjoins them, inter alia, to 'act fairly and reasonably and comply with

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<sup>40</sup> The cases are discussed in more detail below.

<sup>41</sup> Act 1 of 1990

<sup>42</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan Education Press. Windhoek, p 318.

<sup>43</sup> Parker, C. (1991) 'The Administrative Justice Provision of the Constitution of the Republic of Namibia: a Constitutional Protection of Judicial Review and Tribunal Adjudication under Administrative Law', *24 Comparative and International Law Journal of Southern Africa*, pp. 90-92

<sup>44</sup> Parker, C. (1991:92).

requirements imposed upon such bodies and <sup>45</sup>officials by common law.’ in the English case of *Board of Education v. Rice*<sup>46</sup> the concept of fairness was interpreted to mean that the interpreter must comply with the principles of natural justice. In the Namibian case of *Chairperson of the Immigration Selection Board v. Frank and Another*<sup>47</sup> it was held that the article does not draw a distinction between quasi judicial and administrative acts and administrative justice whether quasi judicial or administrative in nature requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that the requirement fair procedures which are transparent.<sup>48</sup> The old common law rule that the requirements of the principle of natural justice are to be applied where an administrator acts in judicial or quasi judicial capacity has been replaced by his constitutional requirement which enjoins administrators in the exercise of their discretion to apply the principles of natural justice. Chief Justice Strydom also alluded in his judgment to the requirement that the principles of natural justice must be applied under the principle of legitimate expectation. It can be inferred from his judgment that the concept is part of the common law of Namibia. The concept of legitimate expectation, which was developed in order to mitigate the harsh effects of the categorization of administrative acts, means that “the rule of natural justice are extended to cases where the affected party has no vested right, but does have a potential right or legitimate expectation that his application will

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<sup>45</sup> *Board of Education v. Rice*, 1911 AC. 179

<sup>46</sup> *Board of Education v. Rice*, 1911 AC. 179

<sup>47</sup> *Chairperson of the Immigration Selection Board v. Frank and Another* 2001 NR 107 (SC)

<sup>48</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan education press. Windhoek, p 319-20.

succeed, and has therefore gained a right to be heard by virtue of his expectation".<sup>49</sup> In the case of *Ohlthaver & List Finance and trading Corporation Ltd and Other v Minister of Regional and Local Government and Housing and others*<sup>50</sup>, the court said that there is no doubt that where an administrative body is by statute empowered to act in its own cause, it is entitled to do so, provided that it acts fairly and keeps an open mind. Its decision cannot be assailed on the grounds that it acted in its own cause, a circumstance which, according to the rules of natural justice, would in any other instance have disqualified such body. Although it is accepted that in the case of a quasi-judicial body the same standard of impartiality cannot be required, as would be required from courts of law, the deciding authority must keep an open mind and be open to persuasion. A failure of justice, such as bias is a vitiating failure of natural justice, the results of which is that what took place before the adjudicator is not so much a defective hearing as no hearing at all: as per *Conradie J in Monning and Others v Council of Review and Others*.<sup>51</sup>

Article 18 of the Constitution also requires that administrative bodies and officials act 'reasonably'. As contrasted with the requirements of natural justice, this requirement deals with the substance of the decision itself. As Parker, C. explains, "natural justice and fairness are concerned with procedural constraints on administrative action. But the requirement that an administrative body or an administrative official should act reasonably, is

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<sup>49</sup> Hosten, W.J. et al. (1989) *Introduction to South African Law and Legal Theory*, pp. 1227-30.

<sup>50</sup> *Ohlthaver & List Finance and trading Corporation Ltd and Other v Minister of Regional and Local Government and Housing and others*<sup>50</sup> 1996 NR 213.

<sup>51</sup> *Conradie J in Monning and Others v Council of Review and Others*<sup>51</sup> 1989 (4) SA 866 (C) at 882 G.



concerned with the substance of the discretion or the act itself. That is to say, the courts reviewing an administrative action should go beyond procedural administrative authority purportedly acted in pursuance of a discretionary power". The purpose of this requirement is for the Courts to be vested with jurisdiction to ascertain whether the exercise of the discretion was tainted with abuse of power. In the *Zambian case of Chilufya v. City Council of Kitwe*<sup>52</sup> it was held that a city council which terminates a trader's license to occupy a market stall by resolution influenced by political considerations is acting unreasonably, unfairly and contrary to the principles of natural justice and therefore, ultra vires.<sup>53</sup>

The other requirement of Article 18 is that administrative bodies and administrative officials must comply with the requirements imposed by common law and any relevant legislation. The common law requirements referred to are the principles relating to application of the natural justice in the exercise of discretion, which has been discussed above. The demands of the latter requirement accord with the general objectives of the doctrine of constitutionalism. In the context of the demands of constitutionalism that the powers of government must be controlled in order to prevent abuse and arbitrariness, and need in even more so in the exercise of administrative discretion on account of the very nature of discretion. It is therefore, the general practice for limitations to be imposed by the constitution or a particular statute granting the discretion.<sup>54</sup> The Constitution or the statute that grants the discretion will normally state the scope of discretion and the procedure to

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<sup>52</sup> *Chilufya v. City Council of Kitwe*, 1967 ZR. At 166

<sup>53</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan education press. Windhoek, p 320

<sup>54</sup> Amoo, S.K. (2009:321).

be followed in the exercise of the discretion. These constitute limitation in the sense that non-compliance will be a ground for judicial review and a possible declaration by the courts that the decision is *ultra vires* and therefore void<sup>55</sup>. In the case of *Sikunda v Government of the Republic of Namibia*<sup>56</sup>, the Court set aside the deportation order issued under the hand of the Minister of Home Affairs on the ground that the Security Commission was not properly constituted when it purported to consider the Minister's request and made its recommendation. A statutory precondition for a valid decision by the Minister was not filled and consequently the Minister did not have the jurisdiction to make the deportation order in question. This was upheld on appeal by the Supreme Court.<sup>57</sup> In sum, if the administrative body or official fails to comply with the provisions of the enabling Act or the provision of the Constitution then such administrative action would be declare by a competent court as *ultra vires* and consequently void.

Under the provisions of the Constitution and common law, any person aggrieved by the exercise of discretion can bring an action for the review of the decision or administrative action for any of the remedies, certiorari, prohibition or interdict, mandamus, habeas corpus and damages. The principle of legality is an essential safeguard for action that does not qualify as administrative action: it offers at least some administrative law control over such action by doing at least some of the work that administrative law would ordinarily do.

In this sense the principle is a parallel stream of law that we cannot do without. To the

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<sup>55</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan education press. Windhoek, p 323.

<sup>56</sup> *Sikunda v Government of the Republic of Namibia* 2001 (3) NR (HC) 181.

<sup>57</sup> Amoo, S.K. (2009:323)

extent that there will always be action that does not qualify as administrative, we will always need the principle of legality or something like it.<sup>58</sup>

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<sup>58</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan education press. Windhoek, p 321.

## **CHAPTER IV: THE CONCEPT OF ADMINISTRATIVE ACTION AND DISCRETIONARY ACTION**

### **4.1. The Concept of Administrative Action**

Administrative action can broadly be described as any decision of an organ of state of an administrative nature made in terms of the prescriptions of empowering laws or any decision of private persons when they exercise public power or perform public functions in terms of empowering laws.<sup>59</sup> The concept administrative action is the key to the application of the rules of just administrative action in a given situation. At common law reference was generally made to administrative acts rather than administrative action. The use of the term “administrative acts” is mostly found in the works of commentators. For example, Wiechers<sup>60</sup> says that an administrative act means the conduct of an administrative organ. Section 1 (i) of the Promotion of Administrative Justice Act<sup>61</sup> defines administrative action as any decision taken, or any failure to take a decision by an organ of state when exercising a power in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct legal effect.<sup>62</sup>

The definition retains its broad sweep when it comes to the performers of administrative action. These include not only organs of state but also natural or juristic persons ‘when

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<sup>59</sup> Burns, Y. and Beukes, M. (2006) *Administrative Law under the 1996 Constitution*, Durban: LexisNexis, p 107.

<sup>60</sup> Wiechers, C. (1985) *Administrative Law*, translated from the Afrikaans by Carpenter, G. at 87.

<sup>61</sup> Promotion of Administrative Justice Act 3 of 2000

<sup>62</sup> Burns, Y. and Beukes, M. (2006:107)

exercising a public power or performing a public function in terms of an empowering provision'. This provides at least part of the answer to a question that continues to puzzle administrative lawyers in several jurisdictions – whether and to what extent the actions of private bodies are reviewable. It does not tell us when powers and functions are 'public' ones, of course, but it is a good start. The definition of an 'empowering provision' itself is similarly enlightened, and encompasses not only legislation and rules of common law and customary law but also 'an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. This places it beyond doubt that private bodies acting in terms of contract rather than statute are capable of performing administrative action.<sup>63</sup>

The concept "administrative action" is not defined anywhere in both the Constitutions of Namibia and South Africa, with the result that the courts have had to interpret and give meaning to the term. Before the promulgation of Promotion of Administrative Act<sup>64</sup> (hereafter referred to as PAJA) the courts interpreted the concept on a case by case basis with the result that no clear definition was forthcoming. In many cases the courts merely said what does not constitute administrative action. In others, certain actions were identified as administrative action without clearly defining the meaning of the term<sup>65</sup>. In Premier, Province of Mpumalanga v Executive Committee of the Association of Governing

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<sup>63</sup> Burns, Y. and Beukes, M. (2006) Administrative Law Under the 1996 Constitution, Durban: LexisNexis, p 108.

<sup>64</sup> Burns, Y. and Beukes, M. (2006:107)

<sup>65</sup> Burns, Y. and Beukes, M. (2009:108).

Bodies of State-Aided Schools, Eastrn Transvaal<sup>66</sup> the Constitutional Court examined whether the withdrawal of certain subsidies to state-aided schools in the province constituted administrative action. The subsidies were granted to parents of needy children to enable them to pay school fees, bus fares and hostel fees. The court held that the decision to withdraw the subsidies did indeed constitute administrative action.

The Constitutional Court's interpretation of administrative action is clearly set out in President of the Republic of South Africa v South African Rugby-Football Union<sup>67</sup>, the court said:

In section 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether the conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. Hence, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether the conduct is "administrative action" is not the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

This case dealt with the appointment of a Commission of Enquiry by the President in terms of section 84(2)(f) of the Constitution of South Africa. In deciding that the action did not constitute administrative action, the court found that the appointment of such a

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<sup>66</sup> *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastrn Transvaal* 1999 (2) BCLR 151 (CC), 1999 (2) SA 91 (CC) para 38

<sup>67</sup> *President of the Republic of South Africa v South African Rugby-Football Union* 1999 (10) BCLR 1059 (CC), 2000 1 (CC) para 141

Commission of Enquiry is closely related to policy and was not related to the implementation of legislation. The court pointed out that determining whether an action should be characterized as the implementation of legislation or the formulation of policy may be difficult. It depends primarily on the nature of the power. Further, the task of determining whether an action should be characterized as the implementation of legislation or the formulation of policy depends on the following criteria:

- i. the nature of the power;
- ii. the source of the power;
- iii. its subject matter;
- iv. whether it involved the exercise of public duty; and
- v. how closely it is related on the one hand to policy matters and on the other hand to the implementation of legislation.

This decision shifted the emphasis to the administrative function rather than the functionary as was customary under the common law.<sup>68</sup>

The case of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*<sup>69</sup> had especially interesting facts. It concerned an Act of Parliament that regulated the sale and possession of medicines. The President, apparently acting on incorrect advice from the Department of Health, had proclaimed the statute into force prematurely, before various essential schedules and

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<sup>68</sup> Burns, Y. and Beukes, M. (2006) *Administrative Law under the 1996 Constitution*, Durban: LexisNexis, p 111.

<sup>69</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)

regulations were ready. The result was that the Act was completely unworkable and unenforceable. For instance, it might purport to prohibit the possession of dangerous drugs 'listed in Schedule 3', but there was no Schedule 3 and thus no list. An urgent but unsuccessful application was launched in a High Court to have the proclamation set aside. On appeal to a full bench,<sup>70</sup> the Court found for the applicants. The Court reasoned that the President had acted beyond the scope of his powers, since the legislature could not have intended its delegated law making power to be exercised prematurely.<sup>71</sup> The matter was then referred to the Constitutional Court for confirmation.<sup>72</sup> This Court, too, found a creative way of setting aside the proclamation; but it rejected the argument that the President's decision to bring the statute into force was administrative action. The decision, the Court said, required a 'political judgment', and thus lay closer to the legislative than to the administrative process.<sup>73</sup>

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<sup>70</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 1999 (4) SA 788 (T).

<sup>71</sup> *Ibid*

<sup>72</sup> In terms of s 172(2) of the 1996 Constitution, an order of constitutional invalidity relating to an Act of Parliament has no force unless it is confirmed by the Constitutional Court.

<sup>73</sup> *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC) [79].



## **4.2 The Discretionary Action**

The exercise of a discretionary powers relates to making a choice between two or more legally valid options or possible courses of action. As was said by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Burrough Council*.<sup>74</sup>

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

In *Dawood v Minister of Home Affairs*<sup>75</sup> O'Regan J said:

Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.

It is a characteristic of modern democratic society that the legislature vests the administration with discretionary powers. In any modern democratic state the administration has the difficult task of "running the state".<sup>76</sup> The exercise of discretionary administrative powers, which was particularly associated with matters of race and security in the past, was often abused. Since these powers provided the basis for the infringement of property and personal freedom, it is understandable why administrative authoritarianism was and is often still regarded with suspicion and mistrust in this country.<sup>77</sup>

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<sup>74</sup> [1977] AC 1014 at 1064, [1976] 3 All ER HL affirmed (1976), [1977] AC 1014 at 1036.

<sup>75</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 53.

<sup>76</sup> Hoexter, C. (2007) *Administrative Law in South Africa*. Cape Town: Juta & Co. p 117.

<sup>77</sup> Hoexter, C. (2007:117).

In the case of a narrow discretionary power, certain facts which have been prescribed by statute must exist prior to the exercise of a choice, and this choice is determined by the existence of the facts and circumstances. A wide discretion presupposes a wider choice and administrator exercises this wide discretionary power in the light of issues such as government policy and the public interest. The freedom of choice which the authority exercises is determined largely by questions of efficacy or desirability.<sup>78</sup>

The nature of present day public administration is such that a certain degree of administrative discretion is indispensable for the effective and expeditious day to day running of government. It promotes flexibility by individualizing the treatment of problems and permits the adjustment of public power to varying circumstances in order to avoid the undesirable restraints from the rigid application of general standards and requirements of bureaucracy of public administration. An administrative body or official is said to have discretion in a matter when it or he has the power or liberty to choose between alternative courses of action and the correctness or incorrectness of the decision cannot be demonstrated.<sup>79</sup> The concept of discretion may be defined as “power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of discretion but the performance of a duty. To say that somebody has discretion presupposes that there is no uniquely right answer to his problem.”<sup>80</sup> Discretion may be vested in an administrative authority either by the constitution itself or a statute or in the case of the latter; the discretionary power must be

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<sup>78</sup> Hoexter, C. (2007:117)

<sup>79</sup> Hoester, C. (2007: 119).

<sup>80</sup> Hoexter, C. (2007:120).

within constitutionally permissible limits. There is no discretion vested by virtue of common law, but since it is the law courts that are the ultimate interpreters of statutes, the scope of discretionary powers is determined by the law courts.<sup>81</sup>

It is evident from the very nature of administrative discretion that it is potentially susceptible to abuse. As a general principle, discretionary power is not susceptible of external control because once the legislature has vested the necessary discretionary powers in the administrator; it has little control over the misuse and abuse of the powers.<sup>82</sup> Even judicial control, which is granted by Article 18, is limited because, as it will be explained, to the extent that an administrator may act within his discretionary powers, judiciary control is virtually non-existent. In the case of *Chairperson of the Immigration Selection Board v. Frank & Another*<sup>83</sup> Strydom CJ, in his analysis the Ministry of Home Affairs to grant permanent resident permits, held that “there is also authority for the principle that a foreign national cannot claim permanent resident as of right and that the State has an exclusive discretion as to whether it would allow such nationals in its territory.”<sup>84</sup>

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<sup>81</sup> Amoo, S.K. (2009) *Introduction to Namibian Law, Cases and Materials*: Macmillan education press. Windhoek, p. 322.

<sup>82</sup> Amoo, S. K. (2009:322).

<sup>83</sup> 2001 NR 107 (SC)

<sup>84</sup> Amoo, S. K. (2009:322).

## **CHAPTER V: THE SOUTH AFRICAN POSITION**

### **5.1 Interim Constitution of 1994**, section 24 provides that:

Every person shall have the right to – (a) lawful administrative action where any of his or her rights or interests is affected or threatened; (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

In 1994 the picture changed dramatically when South Africans acquired rights to administrative justice in terms of their first democratic and supreme Constitution. Like other rights in the interim Constitution, s 24 rights were strictly guarded by the limitation clause. Rights could only be limited by the legislature in terms of ‘law of general application’, provided that the limitation was both reasonable and justifiable ‘in an open and democratic society based on freedom and equality’ and that it did not negate ‘the essential content of the right’.<sup>85</sup> But the wording of the administrative justice clause itself revealed that the familiar fears of overburdening the administration and violating the separation of powers were as alive as ever.<sup>86</sup> The wording also suggested that the drafters’

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<sup>85</sup> Interim Constitution s 33. Limitation as to rights also had to be ‘necessary’ whenever s 24 related to ‘free and fair political activity’.

<sup>86</sup> Hoexter, C. (2009) *The Principle of Legality in South African Administrative Law*. Available at <http://www.austlii.edu.au/au/journals/MqLJ/2004/8.html#fnB1>; last accessed 20 March 2011.

faith in conceptualism was as strong as that of the courts, and apparently undimmed by years of living in an apartheid state.

Section 24 of the interim Constitution was very carefully calibrated. It gave a right to lawful administrative action to the widest possible category of people: all those whose rights or interests were affected or threatened. Similarly, the right to be given reasons in writing was extended to those whose rights or interests were affected (but not merely threatened) by administrative action. The right to procedurally fair administrative action applied where rights or legitimate expectations (but not mere interests) were affected or threatened. Finally, there was a right to administrative action that was 'justifiable in relation to the reasons given for it' – code for a right to reasonable administrative action, which had proved too rich for the drafters' blood. This particular right was extended only to those whose rights (and not legitimate expectations or mere interests) were affected or threatened.<sup>87</sup>

As is evident from this wording, the focus of administrative justice remained on concepts such as 'rights'. While s 24 of the interim Constitution was certainly more generous than the common law had ever been – particularly in allowing 'interests' to feature – the underlying philosophy remained one of essential parsimony, reflecting a determination to limit the application of these rights at all costs. The courts played along, particularly in so far as the new right to reasons was concerned. In one case the court expressed the view, obiter, that reasons would not have to be given for a decision to hold an investigative

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<sup>87</sup> Hoexter, C. (2009:18).

enquiry, since the enquiry would not affect existing rights – thus seeming to ignore altogether the word ‘interests’ in s 24(d). In another case the two applicants had respectively been refused a temporary residence permit and the extension of an existing residence permit. It seemed clear that neither had any right to remain in the country, nor any legitimate expectation of remaining: the applicants had both been warned that their permits were strictly temporary. But the court actually went so far as to say that the applicants had failed to prove any *interest* in residence or continued residence. They were not, therefore, entitled to reasons under s 24(b) of the interim Constitution.<sup>88</sup>

## **5.2 Section 33 of the 1996 Constitution**

Section 33 of the 1996 Constitution provides that:

- (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.

Section 33 of the 1996 Constitution is much simpler in its design than s 24 of the interim Constitution. Section 33(2) relies on a familiar formula, conferring the right to reasons in

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<sup>88</sup> Hoexter, C. (2009) *The Principle of Legality in South African Administrative Law*. Available at <http://www.austlii.edu.au/au/journals/MqLJ/2004/8.html#fnBl>; last accessed 20 March 2011.

writing only on those whose rights have been adversely affected by administrative action. Section 33(1), however, grasps the nettle in a most admirable fashion: it simply gives everyone rights to administrative action that is lawful, reasonable and procedurally fair. This is remarkable, even astonishing, when seen against the background of the common law and the wording of s 24. At the time it seemed a miracle. It certainly appeared to betoken the end of those twin evils, parsimony and conceptualism, at least in relation to three out of four principles of good administration. Everyone would now enjoy lawful, fair and reasonable administrative action, if not written reasons for that action; and the courts, realizing that the burden thus imposed would have to be managed cleverly, would surely begin to grapple with the variable content of these principles from case to case.<sup>89</sup>

In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*<sup>90</sup> the Court held that budgetary resolutions made by a local authority were clearly legislative and not administrative action, since the Constitution gave such resolutions the status of original legislation. In this case the Constitutional Court first identified the principle of legality and described it as part of the doctrine of the Rule of Law – but separate from the administrative justice clause itself. The principle, it said, was not written down anywhere in particular. Rather, in relation to action that did not constitute administrative action, such as legislation and executive acts, it was ‘necessarily implicit in the Constitution’. It was not necessary to consider its exact ambit, such as whether the Rule of Law had greater content than this principle of legality. The principle generally expressed the idea that ‘the exercise

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<sup>89</sup> Hoexter, C. (2009:21).

<sup>90</sup> 1999 (1) SA 374 (CC)

of public power is only legitimate where lawful'; and in this particular case it implied that the local authority had to act within the powers lawfully conferred upon it. However, the court was evenly divided on whether the local authority had in fact acted within its powers in resolving to levy a certain rate.

In *President of the Republic of South Africa v South African Rugby Football Union*<sup>91</sup> the Court found that the President's decision to appoint a commission of inquiry to investigate the administration of rugby was executive rather than administrative action.<sup>92</sup> The relevant power was political in character, akin to a prerogative power,<sup>93</sup> and it did not involve the implementation of legislation, which is the hallmark of administrative action.<sup>94</sup> In this case the content of the principle of legality was considerably developed, with two more elements being added to it. The fact that the President's conduct in this case did not constitute administrative action, the court noted, did not mean that there were no

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<sup>91</sup>*President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)

<sup>92</sup> When the President acts in terms of section 84(2)(a),(b),(c), (d), (f), (g), (h), (i) and (k) of the Constitution (the erstwhile prerogatives), these actions relate to the exercise of certain powers and/or the performance of specified functions by the President either acting alone or together with other members of Cabinet. These actions are excluded from the definition of administrative action. However, the Constitutional Court examined the nature of the President's prerogative powers, holding that regardless of whether the President acts as head of state or as head of the executive branch he acts an executive organ of state and exercise of this power is subject to review by the courts in the same way as other constitutional powers.

<sup>93</sup> See 1996 Constitution s 84(2)(f). This is the power to appoint commissions of inquiry. Section 84(2) lists other former prerogatives, such as pardoning or relieving offenders (s 84(2)(j)) and conferring honours (s 84(2)(k)).

<sup>94</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) [142].



constraints upon it.<sup>95</sup> On the contrary, there were explicit requirements in the Constitution itself – the President’s decision to appoint had to be recorded in writing and signed, for instance – and there were also requirements implicit in the Constitution. These were that the President had to act in good faith and must not misconstrue his powers.<sup>96</sup> Such ‘significant constraints’ were to be found not in the administrative justice clause but ‘throughout the Constitution’. They turned out not to have been breached, however, and the court found the President’s conduct had been perfectly lawful.<sup>97</sup>

Further development of the principle of legality took place in the *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*.<sup>98</sup> In this case, the President’s decision could not be classified as administrative action; but again, there were constraints imposed by the Constitution in general. One of these was rationality, a minimum threshold requirement applicable to the exercise of all public power. Judge Chaskalson P, giving judgment for a unanimous court, explained it thus:

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny

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<sup>95</sup> *Ibid*

<sup>96</sup> *Ibid*

<sup>97</sup> Burns, Y. and Beukes, M. (2006) *Administrative Law Under the 1996 Constitution*, Durban: LexisNexis, p 118.

<sup>98</sup> 1999 (4) SA 788 (T).

the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The judge went on to find that the President's decision to bring the statute into operation prematurely had not been objectively rational. While the courts could not interfere with a decision simply because it disagreed with it, this applied only to rational decisions; and it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational.

These three cases are by no means the only ones in which the Constitutional Court has placed reliance on the Rule of Law or some version of it. In other cases this court has decided, for instance, that the Rule of Law requires laws to be accessible, clear and general and that it prevents Parliament from acting arbitrarily or capriciously when making law. The Rule of Law also demands that judges give reasons for their decisions, and it prevents people from taking the law into their own hands.<sup>99</sup>

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<sup>99</sup> Hoexter, C. (2009) *The Principle of Legality in South African Administrative Law*. Available at <http://www.austlii.edu.au/au/journals/MqLJ/2004/8.html#fnB1>; last accessed 20 March 2011.

**CONCLUSION**

From both the Namibian cases and South African cases one can argue that the principle of legality has been well adopted in both Namibian jurisdiction and South African jurisdiction, in that it covers for lawfulness, reasonableness and procedural fairness as enshrined in article 18 of the Namibian Constitution and section 33 of the South African Constitution. It is evident that the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards. It is thus also a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts. But in performing this important function the principle surely exposes the conceptual traps into which we have fallen, and it shows us how to go on. At one time our courts looked to the duty to act fairly to rescue themselves from the conceptual wilderness of the classification of functions. Similarly, we now seem to need the principle of legality to tell us that it is perverse to spend our time working out whether decisions pass the test of administrative action and control the discretion of the administrators.

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