THE CONUNDRUM OF SELF-REVIEW – SANCTIONING PARALLEL SYSTEMS OF ADMINISTRATIVE LAW

*Geo Quinot**

INTRODUCTION

The adoption of a supreme constitution in South Africa, following the demise of apartheid in 1994, held profound implications for administrative law. The advent of constitutionalism in South Africa shifted South African administrative law from its common-law basis, largely premised on English administrative law, to a central feature of the new constitutional democracy.[1] This transition was explicitly premised on a justiciable right to administrative justice in the bill of rights.[2] Along with this constitutionalization came the partial legislative codification of South African administrative law, primarily the mechanism of judicial review of administrative action, by way of the adoption of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). As

* BA(Law) LLB (Stellenbosch) LLM (UVA) MA (UFS) MPA (Birmingham) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University, gquinot@sun.ac.za. This paper is a continuation of work started in earlier publications, found primarily in Geo Quinot & Elsabé van der Sijde, *Reflections on the Single System of Law Principle with Reference to the Regulation of Property and the Right to Just Administrative Action, in* TRANSFORMATIVE PROPERTY LAW – FESTSCHRIFT IN HONOUR OF AJ VAN DER WALT 447 (Gustav Muller et al. eds., 2018) and Geo Quinot & Elsabé van der Sijde, *Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review Its Own Decisions?*, JOURNAL OF SOUTH AFRICAN LAW REVIEW 324 (2019). I gratefully acknowledge the contributions made by my co-author on those papers, Elsabé van der Sijde, to the development of the arguments and ongoing engagement on this theme. An earlier version of this paper was presented at the *Administrative Law Forum*, held in Lyon, France on 26-27 June 2019. My thanks to the participants at the Forum for insightful discussion and to the Stellenbosch Faculty of Law for financial assistance in support of this research.

1. Hugh Corder, *The Development of Administrative Law in South Africa*, *in* ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION 1, 6-8 (Geo Quinot ed., 2015).

2. *See* S. AFR. CONST., 1996 § 33.

these fundamental shifts took hold, a number of challenges, both theoretical and practical, have emerged in the development of administrative justice as a tool of constitutional governance. These challenges raise questions about the role of administrative law within a system of administrative justice as part of constitutionalism that are of interest beyond the strict confines of South African administrative law. One of the most pressing of these challenges is the conceptualization of administrative justice vis-à-vis other forms of constitutional controls. This challenge forms part of larger debates across different legal systems regarding the true nature, basis, and legitimacy of judicial review of administrative action and with it the nature and purpose of administrative law.[3] Most recently, this challenge has emerged in South Africa in the context of self-review and its relationship with the constitutional principle of legality. An analysis of the issues around self-review in relation to legality review provides an opportunity to reflect on fundamental questions about administrative law within a newly established constitutional setting.

In a number of judgments from especially the South African Constitutional Court,[4] the notion of self-review has emerged as a particularly problematic issue.[5] Self-review refers to instances where an administrative agency seeks to have its own administrative decision set aside upon review by a court.[6] Whereas the possibility, at times even the necessity, of seeking self-review has long been established in South African administrative law, the basis upon which such review is to proceed in terms of South Africa's constitutionalized administrative law has recently become a matter of debate.

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3. For treatment of these debates in the context of the UK, *see* JUDICIAL REVIEW AND THE CONSTITUTION (Christopher Forsyth ed., 2000) and more generally, including in the U.S., *see generally* EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE (Christopher Forsyth et al. eds., 1st ed. 2010); COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman et al. eds., 2d ed. 2017).

4. The Constitutional Court is South Africa's highest court. S. AFR. CONST., 1996 § 167(3).

5. Department of Transport v Tasima (Pty) Ltd. 2017 (2) SA 622 (CC); Khumalo v Member of the Executive Council for Education, KwaZulu Natal 2014 (5) SA 579 (CC); Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd. t/a Eye and Lazer Institute 2014 (3) SA 481 (CC); City of Cape Town v Aurecon South Africa (Pty) Ltd. 2017 (4) SA 223 (CC); State Info. Tech. Agency Soc Ltd. v. Gijima Holdings (Pty) Ltd. 2018 (2) BCLR 240 (CC); Buffalo City Metro. Municipality v. Asla Constr. (Pty) Ltd. 2019 (6) BCLR 661 (CC).

6. Buffalo City Metro. Municipality v. Asla Constr. (Pty) Ltd. 2019 (6) BCLR 661 (CC) para. 38.

Another significant development in South Africa's post-constitutional administrative law has been the emergence of the principle of legality as a form of constitutional control over public decision-making distinct from administrative law.[7] Legality has become a near-parallel system of administrative law and applies in instances where administrative law seemingly does not.[8] A court can thus review a public decision on the basis of legality where administrative law is not applicable, the prime example being decisions of a non-administrative executive nature (previously known as the prerogative powers).[9]

These two developments have now become intertwined, especially following the Constitutional Court judgment in *State Information Technology Agency SOC Limited v. Gijima Holdings (Pty) Limited*[10] and its confirmation in the 2019-judgment in *Buffalo City Metropolitan Municipality v. Asla Construction (Pty) Ltd*.[11] This contribution deals with these developments within the particular context of South African administrative law. In doing so, this paper engages with broader questions regarding a shift from a common-law based system of administrative law, premised on parliamentary sovereignty, to a constitutionalized system of administrative law, premised on constitutionalism. This paper explores the implications of that shift for the nature and legitimacy of judicial review of administrative action and the institutional arrangements behind such review.

Part II of this paper provides a background of the development of administrative law in South Africa under a new supreme Constitution and the parallel development of the constitutional principle of legality as a basis for controlling all public power. Part III explores the notion of self-review, starting with its common-law heritage and moving on to its emergence in constitutional jurisprudence. Part IV discusses the issue of parallel sys-

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7. Cora Hoexter, *The Principle of Legality in South African Administrative Law,* 4 MACQUARIE L. J. 181 (2004).

8. Cora Hoexter, *The Principal of Legality in South African Administrative Law*, 4 MACQUARIE L. J. 183 (2004).

9. Hugh Corder, *The Development of Administrative Law in South Africa*, *in* ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION 1, 13 (Geo Quinot ed., 2015).

10. *See* State Info. Tech. Agency Soc Ltd. v. Gijima Holdings (Pty) Ltd. 2018 (2) BCLR 240 (CC) at para. 1.

11. *See* Buffalo City Metro. Municipality v. Asla Constr. (Pty) Ltd. 2019 (6) BCLR 661 (CC) at paras. 46-9.

tems of control of administrative action that flows from the development of legality review and the conceptualization of self-review. Finally, Part V notes these developments as symptomatic of a tension between an incumbent common-law institutional tradition and a newly introduced constitutionalized, rights-based conceptualization of administrative justice.

II. ADMINISTRATIVE JUSTICE AND LEGALITY IN SOUTH AFRICA

South African administrative law emerged from English common law and exhibited all the main characteristics of that administrative-law system.[12] It was largely uncodified and subjected administrative decision-making to the oversight of the ordinary courts, as opposed to a specialized branch of administrative courts.[13] Moreover, the field was dominated by the remedy of judicial review of individualised administrative decisions, largely premised on the *ultra vires* doctrine.[14] Unlike the British system, however, administrative law in South Africa existed within the context of a written constitution.[15] However, prior to 1994, those constitutions were not supreme and the system was characterised by parliamentary supremacy in the Westminster parliamentary style of government.[16] The courts' oversight powers, premised on a declared inherent power rather than statutory basis,[17] were restricted to review of administrative action on fairly narrow grounds[18] and there was no general or constitutional judicial re-

12. *See* JACQUES DE VILLE, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN SOUTH AFRICA 6-9 (2005).

13. Hugh Corder, *The Development of Administrative Law in South Africa*, *in* ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION 1, 6-8 (Geo Quinot ed., 2015).

14. *Id.*

15. LAWRENCE BAXTER, ADMINISTRATIVE LAW 30-34 (1984).

16. Hugh Corder, *The Development of Administrative Law in South Africa*, *in* ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION 1, 7 (Geo Quinot ed., 2015).

17. *See* Johannesburg Consolidated Investment Co v. Johannesburg Town Council 1903 TS 111.

18. In terms of the classic formulation of judicial review, the High Courts could review an administrative decision if the decision-maker "had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute." *Shidiack v. Union Government* 1912 AD 642 at 651-52. To these grounds should be added interference on the basis of a failure to comply with the *audi alteram partem* principle.

view that allowed for legislation to be tested by the courts.[19] Furthermore, the colonial and apartheid systems, including their constitutions, were not democratic prior to 1994.

While administrative law was considered part of South African constitutional law, even prior to democratization, the context in which it existed was very different from that following the introduction of democracy in 1994. The Constitutional Court explained this fundamental shift in a key passage in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* as follows,

> The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. . . . Prior to the coming into force of the interim Constitution, the common law was the main crucible for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. . . . [T]here has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed.[20]

A. A RIGHT TO ADMINISTRATIVE JUSTICE

South Africa's common-law based administrative law remained uncodified and largely untouched by statutory intervention until 1994 with the adoption of the democratic, transitional

19. *See generally* DANIE BRAND ET AL., SOUTH AFRICAN CONSTITUTIONAL LAW IN CONTEXT 5-15 (Pierre de Vos & Warren Freedman eds., 2014).

20. Pharm. Mfrs. Ass'n of S. Afr. & Another: In Re Ex parte President of the Republic of S. Afr. & Others 2000 (2) SA 674 (CC) at paras. 33, 45.

Constitution.[21] This paved the way to the constitutionalization of administrative law[22] in the form of a justiciable right to administrative justice in section 33 of the final Constitution of 1996.[23]

Section 33 reads as follows:

> **33Just administrative action**
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> (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;
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> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
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> (c) promote an efficient administration.[24]

The national legislation required in section 33(3) was passed in the form of PAJA.[25] The conceptualization of "administrative action" as the subject matter of both section 33 of the Constitu-

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21. S. AFR. (INTERIM) CONST., 1993. The Interim Constitution governed the transitional period following the end of apartheid with the first democratic elections in 1994 until the drafting and adoption of a final, democratic constitution in 1997.

22. The S. AFR. (INTERIM) CONST., 1993. § 24 provided, as part of the Bill of Rights, for a right to administrative justice in the following terms:

> **24 Administrative justice**
> 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.
> S. Afr. (Interim) Const., 1993 § 24.

23. The Constitution came into operation in February 1997. S. AFR. CONST., 1996.

24. S. Afr. Const., 1996 § 33.

25. *See* Promotion of Administrative Justice Act 3 of 2000 (S. Afr.).

tion and PAJA,[26] has kept the newly constitutionalized administrative law in South Africa close to the English-law tradition of focusing on individual administrative decision-making as the preoccupation of administrative law as opposed to rule-making, which has become a hallmark of American administrative law.[27] Thus, the paradigm decision that is subjected to administrative-law rules in South Africa is that of an individual enforcement or adjudication and not rule-making.[28]

While PAJA is not a codification of administrative law in South Africa, it does codify the grounds for judicial review of administrative action (and does very little more than that).[29] As the Constitutional Court stated in the *Bato Star*[30] case:

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26. PAJA contains an extensive definition of "administrative action" in section 1, which states, in part, that "'**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. . ."

Promotion of Administrative Justice Act 3 of 2000 (S. Afr.) § 1.

27. *See* Lawrence G. Baxter, *Rule-Making and Policy Formulation in South African Administrative-Law Reform*, 1993 ACTA JURIDICA 176, 180, 182 (1993).

28. It remains a somewhat controversial question in South African law whether administrative rule-making is subject to PAJA and judicial review in terms of PAJA. In the leading case on this point, Minister of Health v. New Clicks South Africa (Pty) Ltd, the members of the Constitutional Court were divided and there was no majority view on whether rule-making is subject to PAJA. Minister of Health v. New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) at para. 12. The Supreme Court of Appeal (the intermediate appellate court) has since held that rule-making is subject to PAJA, but with minimal reasoning. City of Tshwane Metro. Mun. v. Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) at para. 10; Mobile Telephone Networks (Pty) Ltd v. Chairperson of the Independent Communications Authority of South Africa, In Re: Vodacom (Pty) Ltd v. Chairperson of the Independent Communications Authority of South Africa 2014 (3) All SA 171 (GJ) at para. 71; *see* Geo Quinot & Petrus Maree, *Administrative Action, in* ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION 65, 80-82 (Geo Quinot ed., 2015).

29. Bato Star Fishing (Pty) Ltd. v. Minister of Envtl. Affairs 2004 (4) SA 490 (CC) at para. 25.

30. Bato Star Fishing (Pty) Ltd. v. Minister of Envtl. Affairs 2004 (4) SA 490 (CC) at paras. 25-26.

> The provisions of section 6 [of PAJA] divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution . . . . In these circumstances, it is clear that PAJA is of application to this case and the case cannot be decided without reference to it.

The clear import of this judgment was that PAJA cannot be avoided (in favor of the common law) because this would undermine the single-system-of-law principle. This principle was set out by the Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa,*[31]as follows: "There is only one system of law. It is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[32]

The Constitutional Court thus clarified the relationship between the provisions of PAJA and the pre-existing administrative law under common law early on in the development of South Africa's new constitutional order. However, the relationship between review in terms of section 33 of the Constitution via PAJA and review under the emerging principle of legality has not been clarified to the same extent and continues to hold consequences for the development of administrative law.

B. THE CONSTITUTIONAL PRINCIPLE OF LEGALITY

The constitutional principle of legality emerged in South Africa's post-1994 legal landscape, partly as the courts started grappling with the implications of constitutionalism introduced into a common-law system premised on parliamentary sovereignty and highly limited judicial review powers.[33] In the judgment of

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31. Pharm. Mfrs. Ass'n of South Africa and Another: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at para. 44.

32. *See* Geo Quinot & Elsabé van der Sijde, *Reflections on the single-system-of-law principle with reference to the regulation of property and the right to just administrative action*, *in* TRANSFORMATIVE PROPERTY LAW – FESTSCHRIFT IN HONOUR OF PROF AJ VAN DER WALT 447 (Gustav Muller et al. eds., 2018) (exploring the implications of this principle for the development of administrative law).

33. Cora Hoexter, *The Principal of Legality in South African Administrative Law*, 4 MACQUARIE L. J. 181 (2004).

Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council,[34] the Constitutional Court held that all exercises of public power are subject to judicial scrutiny under the Constitution, regardless of the type of power exercised.[35] The Court held that this was simply an implication of the introduction of the rule of the law by way of a supreme constitution.[36] The Court, relying extensively on foreign jurisprudence from countries such as Canada and Germany, stated:

> government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - 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.[37]

The Court explicitly recognized that the right to administrative justice is one expression of the legality principle.[38] This is primarily evident in the administrative-justice requirement that administrative actions must be lawful. Thus, according to the *Fedsure* court, in the context of administrative actions, legality exists in the form of the right to lawful administrative action, whereas in "relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution."[39]

Since its formulation in *Fedsure* , legality has come to serve two distinct purposes in South African law.[40] Firstly, legality is viewed as an overarching and informing value that influences the interpretation and application of law.[41] In this function, legality is closely related to the rule of law, which is explicitly listed as a

34. Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metro. Council, 1998 (1) SA 374 (CC).

35. *Id.* at para. 58.

36. *Id.* at para. 56.

37. *Id.* at para. 56 (footnote omitted).

38. *Id.* at para. 59.

39. *Id.* at para. 59.

40. *See* Geo Quinot & Elsabé Van der Sijde, *Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review Its Own Decisions?,* 2019 JOURNAL OF SOUTH AFRICAN LAW 324, 330-1 (2019).

41. *Id.* at 330

founding value of the Constitution.[42] Legality has thus been used to hold that laws must be interpreted as only having prospective effect rather than retrospective effect and that "law must be certain, clear and stable."[43]

Secondly, legality has come to serve as a free-floating basis to assess or review public conduct.[44] It is this second purpose that is of prime interest here. In this respect, it has become a common practice to rely directly on the principle of legality to determine the constitutionality of public conduct in judicial proceedings. In fact, the formulation of the legality principle had its origins in this function in *Fedsure*.. There, the Court grappled with the question whether the determination of property rates (taxes) by way of a local authority resolution amounted to an administrative action subject to administrative-law review.[45] The Court concluded that local authorities had original constitutional powers under the new dispensation, with the result that their decisions on property rates constituted an exercise of original legislative power as opposed to administrative action.[46] The result was that such decisions could not be reviewed on administrative-law grounds.[47] However, the Court ruled that since the local authority's decision amounted to public conduct, it was still subject to review directly under the Constitution and, in particular, against the constitutional principle of legality.[48]

In a series of subsequent judgments, the courts, including the Constitutional Court, have, with reliance on the principle of legality, reviewed and set aside a range of public actions, which did not amount to administrative action. These include the deci-

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42. S. AFR. CONST., 1996 § 1(c); Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 11-1, 11-3 (Stuart Woolman et al. eds., 2d ed. 2005).

43. Phaahla v. Minister of Justice and Correctional Services 2019 (7) BCLR 795 (CC) at paras. 49, 56; Veldman v. Director of Public Prosecutions, Witwatersrand Local Division 2007 (3) SA 210 (CC) at para. 26.

44. Geo Quinot & Elsabé Van der Sijde, *Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review Its Own Decisions?,* 2019 JOURNAL OF SOUTH AFRICAN LAW 324, 330-1 (2019).

45. Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metro. Council 1999 (1) SA 374 (CC) at para. 43.

46. *Id.* at para. 45.

47. *Id.* at para. 59.

48. *See* Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metro. Council 1999 (1) SA 374 (CC) at para. 58.

sion by the President to remove the head of the National Intelligence Agency,[49] the President's appointment of a National Director of Public Prosecutions,[50] the President's signing of the 2014 Protocol on the Tribunal in the Southern African Development Community,[51] the Cabinet's decision to issue and deliver to the United Nations Secretary-General a notice of withdrawal from the Rome Statute of the International Criminal Court,[52] the National Prosecuting Authority's decision to discontinue the criminal prosecution of the President,[53] the Independent Electoral Commission's failure to record all available voters' addresses on the national common voters' roll,[54] the Minister of Justice and Constitutional Development's policy regulating appointment of trustees under the Insolvency Act,[55] the recommendation of the Judicial Service Commission[56] to the President on the appointment of judges[57] and the findings of a judicial commission of inquiry into defense procurement.[58]

Legality as a justiciable claim, i.e. in this second function, is not uncontroversial. When the Constitutional Court first recognized legality as a distinct ground for a claim in *Fedsure*, it was adjudicating on the basis of the Interim Constitution.[59] That Constitution did not explicitly provide for the rule of law as a consti-

49. Masetlha v. President of the Republic of South Africa 2008 (1) SA 566 (CC).

50. Democratic Alliance v. President of South Africa 2013 (1) SA 248 (CC).

51. Law Society of South Africa v. President of the Republic of South Africa 2019 (3) SA 30 (CC).

52. Democratic Alliance v. Minister of International Relations and Cooperation 2017 (3) SA 212 (GP).

53. Zuma v. Democratic Alliance; Acting National Director of Public Prosecutions v. Democratic Alliance 2018 (1) SA 200 (SCA).

54. Electoral Commission v. Mhlope 2016 (5) SA 1 (CC).

55. Minister of Constitutional Development v. South African Restructuring and Insolvency Practitioners Association 2018 (5) SA 349 (CC).

56. The Judicial Service Commission is a body created by the Constitution consisting of between 23 and 25 members from a range of sectors including the judiciary, legal profession and Parliament, under chairmanship of the Chief Justice, and mainly tasked with managing the process of and recommending candidates to the President for judicial appointment. S. AFR. CONST., 1996 § 178.

57. Judicial Service Commission v. Cape Bar Council 2012 (11) BCLR 1239 (SCA).

58. Corruption Watch v. The Arms Procurement Commission [2019] ZAGPPHC 351.

59. Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metro. Council 1999 (1) SA 374 (CC) at paras. 3, 26, 32, 54, 56, 58.

tutional value as such.[60] In contrast, the Constitution now does explicitly include the rule of law as a constitutional value.[61] However, in *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*[62] the Constitutional Court declared that the values in section 1 of the Constitution "do not, however, give rise to discrete and enforceable rights." Furthermore, no other constitutional provision has been identified on which the claim to legality can be based.[63] As a result, it is far from clear what the exact constitutional basis is for a justiciable claim premised on legality.

Despite these criticisms, the claim to legality is now entrenched in South African constitutional jurisprudence. It is not merely a left-over part of the common law that was carried over to the new constitutional dispensation.[64] The emergence of legality has been welcomed by some as "a wonderfully useful and flexible device" that "acts as a kind of safety net, catching exercises of public power that do not qualify as administrative action."[65] Thus, legality would apply and provide for judicial review of public action where PAJA is not applicable, since all public power is subject to the rule of law.[66]

Recent case law and literature suggest, however, that litigants and judges are tempted to avoid PAJA, even where the impugned action amounts to administrative action and PAJA is ac-

60. Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 11-1, 11-3 (Stuart Woolman et al. eds., 2d ed. 2005).

61. S. AFR. CONST., 1996 § 1(c).

62. Minster of Home Affs. v. Nat'l Inst. for Crime Prevention and the Re-Integration of Offenders (NICRO) (3) SA 280 (CC) at paras. 21, 23.

63. *See* Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 11-1, 11-3 (Stuart Woolman et al. eds., 2d ed. 2005); Alistar Price, *The Content and Justification of Rationality Review, in* 25 S. AFR. PUB. L. 346, 370-372 (2010) (regarding the question whether the rule of law is the appropriate constitutional basis for legality, at least for the rationality element of legality).

64. Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 11-1, 11-3 (Stuart Woolman et al. eds., 2d ed. 2005).

65. Cora Hoexter, *The Principal of Legality in South African Administrative Law*, 4 MACQUARIE L. J. 165, 183 (2004).

66. CORA HOEXTER, ADMINISTRATIVE LAW IN SOUTH AFRICA 132, 137, 418 (2d ed. 2012).

cordingly applicable, in favor of the seemingly more flexible principle of legality.[67] As Hoexter stated:

> there is increasingly little reason today to bring one's review application under the PAJA. The principle of legality often offers the same relief without all the disadvantages of the PAJA . . . It should come as no surprise, therefore, that practitioners and litigants favour the principle of legality because it is more user-friendly than the PAJA, and that the courts favour it because it is so general and flexible. These advantages, in turn, have led to widespread avoidance of the PAJA on the part of litigants, as they sidestep the statute and bring a challenge under the principle of legality.[68]

A striking example of this tendency in case law can be found in *Malema v. Chairman of the National Council of Provinces*[69] where a high-profile opposition member of Parliament challenged in judicial review proceedings the rulings made by the Speaker during a joint sitting of both Houses of Parliament for the debate on the President's State of the Nation address. These rulings included that the applicant's statements during the debate were "unparliamentary and do not accord with the decorum of this House," that the applicant must withdraw his statements and that the applicant must leave the House.[70] In considering the review, the High Court noted that the parties disagreed on whether the Speaker's actions amounted to administrative action and were thus subject to review under PAJA.[71] The debate on this point turned on two aspects of the definition of administrative action in PAJA, namely the exclusion from the definition of "the legislative functions of Parliament," and the requirement that administrative action, as defined, must have "a direct external legal effect."[72] The High Court, however, avoided engaging with these difficult interpretative questions with their significant implications for the

67. *See* State Info. Tech. Agency SOC Ltd v. Gijima Holdings Ltd. 2017 (2) SA 63 (SCA) at para. 27, which preceded the Constitutional Court judgment in State Info. Tech. Agency SOC Ltd. v. Gijima Holdings Ltd 2018 (2) SA 23 (CC).

68. Cora Hoexter, *Administrative Justice in Kenya: Learning from South Africa's Mistakes*, 62 J. AFR. L. 105, 124 (2018).

69. Malema v. Chairman Nat'l Council of Provinces 2015 (4) SA 145 (WCC) at para. 5.

70. *Id.* at para. 5.

71. *Id.* at para. 47.

72. *Id.* at para. 47.

scope of application of administrative law.[73] These implications are most pertinent in relation to functionaries that do not institutionally form part of the state administration, such as the Speaker of Parliament in this case. The court simply stated: "In the view that I take of this matter, however, I consider that it is unnecessary to determine the applicability of PAJA since it was common cause that first respondent's rulings were, at the very least, subject to review under the principle of legality."[74] Proceeding on this basis, the High Court reviewed and set aside the Speaker's rulings.[75]

There are a number of important differences between legality review and PAJA review. PAJA contains more strict procedural requirements for bringing a review than legality. For example, PAJA has a very strict duty to exhaust internal remedies prior to launching the review and strict time limits, which, as we shall see, have become a key driver in the PAJA-legality debate.[76] The standard of review also differs in important respects between the two. Under PAJA, full reasonableness review is possible, including, under certain circumstances, review on the basis of proportionality, whereas legality only allows rationality review.[77] Most significantly, legality does not include procedural fairness as a ground of review, whereas PAJA does, an issue which I shall discuss below. Most recently, legality has started to develop its own requirements distinct from administrative-law review and which are only available in legality review and not PAJA review. The main example is the emergence of "procedural rationality" as a

73. *Id.* at para. 47.

74. *Id.*' at para. 47. *See also* Melanie Murcott, *Procedural Fairness as a Component of Legality: Is a Reconciliation Between Albut and Masetlha Possible?*, 130 S. AFRICAN L. J. 260, 268-270 (2013) (criticizing the approach of the Constitutional Court in Albut v. Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC)); Cora Hoexter, *The Principal of Legality in South African Administrative Law*, 4 MACQUARIE L. J. 165, 181-85 (2004) (arguing that continued conceptualism in the constitutional era is at least partly responsible for the judicial extension of and reliance on the principle of legality).

75. Malema v. Chairman Nat'l Council of Provinces 2015 (4) SA 145 (WCC) at para. 65.

76. *See* Promotion of Administrative Justice Act 3 of 2000 § 7.

77. *See* Promotion of Administrative Justice Act 3 of 2000 § 6(2)(h), Cora Hoexter, *A Rainbow of One Colour? Judicial Review on Substantive Grounds in South African Law, in* THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW: TRAVERSING TAGGART'S RAINBOW 163 (H Wilberg and M Elliott eds, 2015).

ground of review under legality, but not PAJA.[78] As a ground of review, "procedural rationality" postulates that "if the process followed when making a decision is tainted by irrationality, a decision taken as a result of such process would itself be irrational."[79] As Justice Jafta noted in his concurring minority opinion in *National Energy Regulator of South Africa v. PG Group (Pty) Limited*, this ground of review has not yet been extended to PAJA review, i.e. to review of administrative action.[80]

It is within this context that the question as to the appropriate basis for self-review emerged. The wording of section 33 and PAJA does not clearly indicate whether PAJA is the regulatory framework that should be used by an agency when seeking to review its own decision(s). This led to the unnecessary and cumbersome practice of using both PAJA and the principle of legality (pleaded in the alternative) in many cases, and leaving it to the judge in the matter to "choose" between the two regulatory frameworks.[81] Before discussing the Constitutional Court's treatment of this issue in *Gijima*, a brief analysis regarding the development of the notion of self-review is needed.

III. SELF-REVIEW IN SOUTH AFRICAN ADMINISTRATIVE LAW

While the label of self-review is fairly new in South African administrative law,[82] the notion is not. In particular circumstances, common law recognizes that agencies can have *locus standi* to request that a court review its own decisions.[83] However, in the constitutional dispensation the possibility of self-review was significantly enhanced and expanded in a line of judgments from the Supreme Court of Appeal, starting with the judgment in *Pepcor*

78. Nat'l Energy Regulator of South Africa v. PG Group (Pty) Ltd. [2019] ZACC 28.

79. *Id.* (Jafta, J., concurring in judgement, but dissenting regarding the Maximum Price Decision).

80. *Id.* at paras. 113, 116 (Jafta, J., concurring in judgement, but dissenting regarding the Maximum Price Decision).

81. Cora Hoexter, *Administrative Justice in Kenya: Learning from South Africa's Mistakes*, 62 J. AFR. L. 105, 124 (2018).

82. The term was introduced by Justice Theron in her majority judgment for the Constitutional Court in Buffalo City Metro. Mun. v. Asla Constr. (Pty) Ltd. 2019 (6) BCLR 661 (CC) at para. 111.

83. *See* Rajah & Rajah (Pty) Ltd. v. Ventersdorp Mun. 1961 (4) SA 402 (A Transair (Pty) Ltd. v. Nat'l Transp. Comm'n. 1977 (3) SA 784 (A); Fin. Serv. Bd. v. De Wet NO 2002 (3) SA 525 (C).

Retirement Fund v. Financial Services Board.[84] Already in this early judgment there is a suggestion that an agency may not only be *able* to seek such a review, but indeed is *obliged* to do so.[85] This was explicitly recognised in *Qaukeni Local Municipality v. F V General Trading,*[86] where the court declared, "[t]his court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act."

In these judgments, the courts have reasoned that it is the agency's general duty to act in the public interest or more specifically, the duty to take the relevant decision in the public interest, that obliges it to approach a court for the review of that decision when it emerges that the relevant decision was flawed.[87] The public interest resides in lawful administrative actions and when an agency fails to take such action, it remains duty bound in the public interest to correct its mistake.[88] However, due to the operation of the common-law *functus officio* doctrine, an agency would generally not be able to simply correct its own mistake by revisiting the relevant decision.[89] The *functus officio* doctrine, as an expression of the principle of finality, holds that a decision is final once taken and cannot, without explicit statutory authority, be revised by the decision-maker.[90] This only applies in relation to individual administrative decision-making, specifically individual enforcement or adjudication, and not rule-making.[91] In relation to rule-making, the Interpretation Act 33 of 1957 determines that where agencies have been granted the power to make rules, "the power shall . . . be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-

84. Pepcor Ret. Fund v. Fin. Serv. Bd. 2003 (6) SA 38 (SCA).

85. Pepcor Ret. Fund v. Fin. Serv. Bd. 2003 (6) SA 38 (SCA) at paras. 10, 14.

86. Qaukeni Local Mun. v. F V Gen. Trading [2009] ZASCA 66 at para. 23.

87. Pepcor Ret. Fund v. Fin. Serv. Bd. 2003 (6) SA 38 (SCA) at paras. 10, 14; Qaukeni Local Mun. v. F V Gen. Trading [2009] ZASCA 66 at para. 23.

88. Pepcor Ret. Fund v. Fin. Serv. Bd. 2003 (6) SA 38 (SCA) at paras. 10, 14; Qaukeni Local Mun. v. F V Gen. Trading [2009] ZASCA 66 at para. 23.

89. Daniel Malan Pretorius, *The Origins of the Functus Officio Doctrine, with Specific Reference to its Application in Administrative Law*, 122 S. AFRICAN L. J. 832, 833 (2005).

90. *Id.*

91. LAWRENCE BAXTER, ADMINISTRATIVE LAW 372 (1984).

laws."[92] The effect is that the *functus officio* doctrine is statutorily excluded from rule-making powers.

Whether the *functus officio* doctrine also extends to an application for judicial review, i.e. bars an agency from seeking self-review on the basis that such application would still amount to the agency impermissibly revisiting its final decision, was a somewhat contested question at common law. Early decisions, such as that in *Osterloh v. Civil Commissioner of Caledon,*[93] held, in relation to an agency head, that:

> having done these things . . . he has exhausted all the powers . . . given him by the Act, and is entirely *functus* . . . If there were any ground of nullity . . . the Civil Commissioner had no power to amend the election or to take other proceedings in the matter. It lay with the unsuccessful candidates or the voters to move in the matter, and the place for them to have obtained relief was in this Court.[94]

However, later judgments, such as *Financial Services Board v. De Wet NO,*[95] questioned the earlier decisions and distinguished between the *functus officio* doctrine and standing to pursue self-review. In the *Financial Services Board* matter, the court stated: "It needs to be emphasised, however, that the *functus* rule is concerned with the official's own power to alter or reverse his decisions without the intervention of the Court."[96] The court confirmed that the operation of the *functus officio* doctrine may in fact give rise to the need for standing in self-review.[97]

This (later) common-law approach was confirmed in the constitutional era by the Constitutional Court in *MEC for Health, Eastern Cape v. Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute.*[98] In this matter, the concurrence held:

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92. Interpretation Act (S. Afr.) §10(3).

93. (1856) 2 Searle 240.

94. *See also* Mining Comm. of Johannesburg v. Getz 1915 TPD 323; Bronkhorstspruit Liquor Licensing Bd. v. Rayton Bottle Store (Pty) Ltd. 1950 (3) SA 598 (T).

95. Financial Servs. Bd. v. De Wet NO 2002 (3) SA 525 (C).

96. *Id.* at para. 147.

97. *Id.* at para. 153 ("*Locus standi* becomes important where (and precisely because) the official is *functus officio.*").

98. MEC for Health, Eastern Cape v. Kirland Investments (Pty) Ltd. 2014 (3) SA 481 (CC).

> Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it . . . The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision.[99]

Since the *Pepkor* decision, it has been generally accepted that a self-review proceeds under general administrative law and specifically PAJA.[100] In other words, in self-review the courts have followed the same rules of procedure and decided applications on the same grounds of review as in all other administrative-law review applications.[101] This changed with the Constitutional Court's 2017 decision in *Gijima*.

A. THE *GIJIMA* MATTER

The question as to the basis upon which an agency should seek review of its own decisions has been brewing in the Constitutional Court for some time and was arguably underlying the various opinions expressed in a number of its judgments.[102] This came to a head in the *Gijima* matter, where the Court introduced its judgment by stating that the key question is: "By what means may an organ of state seek the review and setting aside of its own decision?"[103]

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99. *Id.* at paras. 64-65 (footnotes omitted).

100. *See* Buffalo City Metro. Mun. v. Asla Constr. (Pty) Ltd. 2019 (4) SA 331 (CC) at para. 44.

101. *See Id.* at para. 44.

102. MEC for Health, Eastern Cape v. Kirland Investments (Pty) Ltd., 2014 (3) SA 481 (CC); Merafong City v. AngloGold Ashanti Ltd. 2017 (2) SA 211 (CC); Dep't of Transp. v. Tasima 2017 (2) SA 622 (CC); City of Cape Town v. Aurecon South Africa (Pty) Ltd. 2017 (4) SA 223 (CC).

103. State Info. Tech. Agency SOC Ltd. v. Gijima Holdings (Pty) Ltd., 2018 (2) SA 23 (CC) at para. 1.

Briefly stated, the case dealt with a particularly bad case of irregular public procurement. Since public procurement decisions are viewed as subject to general administrative law in South Africa,[104] this was accordingly a mainstream administrative-law case. The applicant, the State Information Technology Agency SOC Limited (SITA), is an agency with the statutory mandate to provide all ICT services required by state departments.[105] SITA typically procures such services from private suppliers of which the respondent, Gijima Holdings (Pty) Ltd, was one.[106] Following a dispute in one such procurement agreement between SITA and Gijima, the parties entered into a settlement agreement under which Gijima would render certain services to SITA.[107] Gijima was concerned about whether SITA could lawfully enter into a procurement agreement through settlement negotiations and without any public tender process as prescribed by relevant procurement statutes.[108] Gijima repeatedly raised its concern with SITA but was repeatedly assured that all is well.[109] A clause was even added to the procurement contract in which SITA guaranteed that all required procedures were followed to ensure compliance with statutory prescripts and render the contract valid.[110] In 2013, a dispute arose between the parties under the new contract relating to payment.[111] When Gijima sought to have the dispute submitted to arbitration, SITA took the view that the contract was invalid on the basis that no public procurement process was followed in concluding it as SITA was statutorily obliged to do.[112] SITA consequently applied to the High Court to review its own decision to enter into the contract, i.e., to have the contract set aside.[113] The High Court dismissed the application on the basis that the review had to be dealt with in terms of PAJA and that the time limit for instituting review proceedings under PAJA,

104. *See* Geo Quinot, *Enforcement of Procurement Law from a South African Perspective*, 20 PUB. PROCUREMENT L. REV. 193, 195 (2011); Allpay Consol. Inv. Holdings (Pty) Ltd v. Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC).

105. State Information Technology Agency Act 88 of 1998 (S. Afr.).

106. State Info. Tech. Agency SOC Ltd. v. Gijima Holdings (Pty) Ltd., 2018 (2) SA 23 (CC) at para. 3.

107. *Id.* at para. 5.

108. *Id.* at para. 6.

109. *Id.*

110. *Id.*

111. *Id.* at para. 9.

112. *Id.*

113. *Id.* at para. 10.

which is a reasonable time, but no later than 180 days after the decision, had long passed.[114] Additionally, SITA did not make out a case for the condonation of the delay; thus SITA was non-suited because of delay.[115]

On appeal, to the Supreme Court of Appeal, a narrow majority of the judges (three against two) held that since the award of the public contract was an administrative action, the matter had to be decided in terms of PAJA.[116] This meant that the time limit under PAJA applied, and the applicant was out of time.[117] The minority, in contrast, held that the review could proceed on the basis of the legality principle, which did not involve similarly strict time limits.[118] At the heart of the minority's dissenting opinion was the view that the constitutional validity of administrative action cannot be subjected to procedural formalities.[119] In this regard, the minority stated that "it is antithetical to the supremacy of the Constitution and the rule of law to compel SITA to comply with an invalid contract, solely because of a procedural technicality."[120]

When the matter came before the Constitutional Court, the Court reached a very surprising, unanimous decision that legality was not only a possible basis for self-review, but in fact, the only basis.[121] The Court concluded that an agency cannot rely on section 33 of the Constitution and PAJA.[122]

The Court's reasoning starts by pointing out that the "axiomatic" original intention of the Bill of Rights was "to protect warm-bodied human beings" against state power.[123] This set the stage for the conclusion that SITA, as an agency, is not entitled to the right to just administrative action in terms of section 33(1) of

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114. *Id.*

115. State Info. Tech. Agency SOC Ltd. v. Gijima Holdings (Pty) Ltd., [2015] ZAGPPHC 1079 at para. 31.

116. State Info. Tech. Agency SOC Ltd. v. Gijima Holdings (Pty) Ltd. 2017 (2) SA 63 (SCA) at paras. 16, 33.

117. *Id.* at para. 22.

118. *Id.* at para. 58.

119. *Id.*

120. *Id.* at para. 61.

121. State Info. Tech. Agency SOC Ltd. v. Gijima Holdings (Pty) Ltd. 2018 (2) SA 23 (CC) at para. 38.

122. *Id.* at para. 37.

123. *Id.* at para. 18.

the Constitution.[124] This is, of course, a very narrow point of departure and not wholly unproblematic. There is significant scholarship on the question of whether fundamental rights, enshrined in a bill of rights, are conceptually linked to the protection of human beings,[125] a debate which is beyond the scope of this contribution. At least in the context of a constitutional right to administrative justice, it seems arguable that the protection of the individual person is not the sole purpose of fundamental rights and that broader aims of good governance are equally at stake. The Court's point of departure already raises serious questions about the implications of the constitutionalization of administrative law through a right to administrative justice and contains the seeds for the almost inevitable resultant bifurcation of administrative law.

The Court continues to point to section 33(3), which states that national legislation had to be enacted to give effect to the rights in section 33.[126] The Court concludes that "[i]t seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights."[127] Therefore, the Court finds that only private persons can enjoy the rights created by section 33 of the Constitution, i.e., administrative justice, with the state bearing the relevant obligations in terms of the section.[128] It follows, according to the Court, that only private persons can rely on PAJA to bring a review.[129] While section 6 of PAJA states that "[a]ny

124. *Id.* at para. 29.

125. *See e.g.* Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability, in* MORAL ISSUES IN GLOBAL PERSPECTIVE: MORAL AND POLITICAL THEORY 60 (Christine M. Koggel ed., 2006); Jürgen Habermas, *The concept of human dignity and the realistic utopia of human rights, in* METAPHILOSOPHY 465 (2010); NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN (Jeremy Waldon ed., 1987); Moeen Cheema & Adeel Kamran*, The Fundamentalism of Liberal Rights: Decoding the Freedom of Expression Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*, LOY. U. CHI. INT'L L. REV. 79 (2014); and specifically in the South African context, *see* ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA (1990); Dennis M. Davis*, Deconstructing and Reconstructing the Argument for a Bill of Rights Within the Context of South African Nationalism, in* THE POST-APARTHEID CONSTITUTIONS (Penelope Andrews & Stephen Ellmann eds., 2001).

126. State Info. Tech. Agency SOC Ltd. v. Gijima Holdings (Pty) Ltd. 2018 (2) SA 23 (CC) at para. 31.

127. *Id.* at para. 27.

128. *Id.* at para. 29.

129. *Id.* at para. 34.

person may institute proceedings in a court or tribunal for the judicial review of an administrative action," the Court held that this must be read in line with its interpretation of section 33 so that "person" only refers to private persons and not agencies.[130] Strangely absent from the Court's reasoning is any mention of the fact that section 33(3) also requires the PAJA to promote an efficient administration. Simply put, section 33(3) does not only contemplate the legislation to protect private persons interacting with the state.

In light of its finding that PAJA is not available to agencies, the Court concluded that an agency seeking to review its own decisions may only do so on the basis of legality, that is outside of administrative law proper.[131]

B. THE *BUFFALO CITY* MATTER

Subsequent to the *Gijima* judgment, the Court returned to this issue in April 2019 in *Buffalo City Metropolitan Municipality v. Asla Construction (Pty) Ltd.*[132] In this matter, again in the context of public procurement, the majority of the Court confirmed the approach in *Gijima* and applied it to the case at hand.[133] Briefly put, the municipality attempted to extend an existing infrastructure development contract with the respondent to include an additional area to be developed after multiple rounds of public tenders for development of the additional area failed.[134] A year after the municipality informed the respondent of the extension of its contract, during which period the respondent had already performed under the extended contract, the municipality adopted the view that the extension was unlawful and consequently refused payment.[135] In 2016, the municipality applied to the High Court to have the extended contract set aside for a failure to adhere to statutory prescripts in awarding public tenders, i.e., to have its own decision in extending the original contract invalidated.[136] This application, however, was out of time in terms of the 180-day

130. *Id.* at para. 31.

131. *Id.* at para. 38.

132. Buffalo City Metro. Mun. v. Asla Constr. (Pty) Ltd.. 2019 (4) SA 331 (CC) at para. 45.

133. *Id.* at para. 65.

134. *Id.* at para. 8.

135. *Id.* at paras. 9-10.

136. *Id.* at para. 11.

time limit for instituting review proceedings under PAJA.[137] The High Court condoned the delay and found the municipality's decision to extend the original contract unlawful and set it aside.[138] On appeal, the Supreme Court of Appeal held that the delay in launching the review could not be condoned and overturned the High Court decision.[139] The result was that the extended contract remained valid and binding. Between the Supreme Court of Appeal judgment and the hearing of the matter before the Constitutional Court, the latter handed down judgment in *Gijima*.[140]

The Constitutional Court held that the matter now had to be dealt with in terms of legality review and not PAJA as a result of the *Gijima* judgment.[141] Justice Theron, writing for the majority, noted that the case was important because it afforded the Court "the opportunity to provide guidance to organs of state who may wish to bring similar applications in the future and to lower courts dealing with these cases," that is in self-review cases.[142] The Court confirmed the change in law introduced by the *Gijima* judgment – noting, with reference to its own jurisprudence, that agencies had to approach a court in terms of PAJA for self-review prior to the *Gijima* judgment.[143] The *Gijima* judgment changed that, so that agencies were now obliged to approach the court on the basis of legality and could not rely on PAJA for self-review.[144] This had the important implication in the present matter that the delay in instituting the review application had to be considered within the ostensibly broader discretion of the courts to overlook unreasonable delay in legality reviews. Such an approach closely mirrors the common-law approach to delay, rather than the stricter statutory framework for dealing with delay in PAJA.[145]

Despite the Court's explicit confirmation and application of *Gijima* in this matter, it is significant to note the dissenting minority judgment of three of the justices that concurred in the *Gijima* judgment. In their dissenting opinion, Justices Cameron and

137. *Id.*

138. Buffalo City Metro. Mun. v. Asla Constr. (Pty) Ltd. 2016 (4) All SA 60 (ECG).

139. Asla Constr. (Pty) Ltd. v. Buffalo City Metro. Mun. 2017 (6) SA 360 (SCA)

140. Buffalo City Metro. Mun. v. Asla Constr. (Pty) Ltd. 2019 (4) SA 331(CC) at para. 13.

141. *Id.* at para. 45.

142. *Id.* at para. 37.

143. *Id.* at para. 44.

144. *Id.* at para. 45.

145. Promotion of Administrative Justice Act 3 of 2000 (S. Afr.) §7.

Froneman, with Justice Khampepe concurring, noted the academic criticism of the approach in *Gijima* and stated, "[i]t may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time."[146] The minority acknowledged one of the main points of criticism against the *Gijima* approach, namely that it exacerbates the parallelism that has emerged between PAJA and legality review, which undermines unity and coherence in administrative law.[147]

IV. SANCTIONING PARALLEL SYSTEMS OF ADMINISTRATIVE LAW

One of the main effects of the *Gijima* approach to self-review is to formally sanction parallel systems of administrative law in South Africa. It must be remembered that prior to this development, the general understanding was that legality applied in instances when PAJA did not, i.e. when the decision sought to be impugned did not amount to administrative action and thus fell outside the scope of administrative-law controls.[148] *Gijima* changed this approach by insisting that under certain circumstances, administrative action must be reviewed under legality and not PAJA. The distinction between legality and PAJA is thus no longer premised on the existence of administrative action. Put differently, the distinction is no longer at the conceptual level on whether the decision at hand falls within the scope of administrative law.

In adopting this approach, the Court has condoned the notion that there can be two subsystems of administrative law: one regulatory review framework for persons seeking to review administrative action, and one for agencies seeking to review their own decisions, even when these two sets of impugned decisions are the very same decisions. The former system is based on constitutionally-mandated legislation that, while not perfect, is built on the progressive and transformative vision of administrative justice. The latter is based on a judicially-created cause of action with a dynamic content, but increasingly drawing on common-law

146. Buffalo City Metro. Mun. v. Asla Constr. (Pty) Ltd. 2019 (4) SA 331(CC) at para. 113.

147. *Id.* at para. 113.

148. Hugh Corder, *The Development of Administrative Law in South Africa*, *in* ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION 1, 13 (Geo Quinot ed., 2015).

approaches as is clear in the case of delay as explicated in *Buffalo City*.

The Court has adopted a very narrow interpretation of section 33 of the Constitution in support of its approach. The key question is whether the constitutionalization of administrative law in the form of administrative justice can only mean protection of citizens (a typical rights-as-shield argument), which is the view the Court seems to adopt, or whether it goes beyond that narrow interpretation to embrace a more facilitative role for administrative law as part of administrative justice. Briefly put, should a constitutional right to administrative justice only be about reviewing administrative decisions for irregularities upon established administrative-law grounds of review to protect citizens or should it (also) steer administrative decision-makers in taking decisions in an administratively just manner.

There are also very puzzling practical implications of this parallelism sanctioned by the *Gijima* approach. One of these relates to the already highly convoluted definition of administrative action in section 1 of PAJA.[149] As an expression of the legisla-

149. PAJA § 1(i) defines "administrative action" as

> 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, but does not include—
>
> (*aa*) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (*a*), (*b*), (*c*), (*d*), (*f*), (*g*), (*h*), (*i*) and (*k*), 85 (2) (*b*), (*c*), (*d*) and (*e*), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;
>
> (*bb*) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (*d*), (*e*) and (*f*), 126, 127 (2), 132 (2), 133 (3) (*b*), 137, 138, 139 and 145 (1) of the Constitution;
>
> (*cc*) the executive powers or functions of a municipal council;
>
> (*dd*) the legislative functions of Parliament, a provincial legislature or a municipal council;
>
> (*ee*) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
>
> (*ff*) a decision to institute or continue a prosecution;

ture's (constitutionally mandated) interpretation of what type of public action should be subjected to administrative-law scrutiny flowing from section 33 of the Constitution, the definition of administrative action identified the limited category of public decisions where a higher level of scrutiny would be justified.[150] This approach is justified on democracy grounds, among others, in that this particular type of public action largely falls outside typical constitutional democratic (political) controls over executive decision-making, e.g. because these decision-makers are not elected officials. For these types of decisions, comprehensive procedural fairness and reasonableness requirements would be appropriate. In contrast, those decisions that do not qualify as administrative action (as defined) are largely subject to other constitutional, democratic (political) controls, such as elections, so that high levels of judicial scrutiny are more difficult to justify. The balance between these two main types of public conduct and their control was mediated by the concept of administrative action under PAJA prior to *Gijima.* The Constitution itself created the framework for this approach by establishing the main standards of lawfulness, reasonableness and procedural fairness, tied to a particular type of action, i.e. administrative action, and giving the power to the legislature to determine the scope of application of these standards.

Gijima fundamentally changed this approach. Now, the standard against which a particular action should be tested does not necessarily depend on what type of action it is, but rather on *who* is instituting the review application. Consequently, an action can be found regular despite procedural flaws if the agency seeks the review, since procedural fairness is not a requirement of legality, but only under PAJA.[151] Or, an action can be found regular on the "lighter" test of rationality that applies under legality as opposed to the potentially more stringent test of reasonableness under PAJA, should the agency seek the review.

> (*gg*) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;
>
> (*hh*) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(*ii*) any decision taken, or failure to take a decision, in terms of section 4 (1).

Promotion of Administrative Justice Act 3 of 2000 §1.

150. *Id.*

151. Masetlha v. President of the Republic of South Africa 2008 (1) SA 566 (CC) at para. 77.

The role of procedural fairness in this bifurcation of administrative law is particularly troubling. The concept of procedural fairness does not technically form part of the principle of legality. In *Masetlha v. President of the Republic of South Africa*[152] the majority of the Constitutional Court explicitly declined to extend the principle of legality to include a procedural fairness component. However, while the Court has never overruled *Masetlha*, it has subsequently developed the notion of procedural rationality as described above. This requirement, which only exists as part of legality, not PAJA, was first formulated in *Albutt v. Centre for the Study of Violence and Reconciliation*[153] and introduced a narrow form of procedural requirements to decisions subject to legality review. It states that "if the process followed when making a decision is tainted by irrationality, a decision taken as a result of such process would itself be irrational."[154]

The approach in *Gijima* now begs the question whether an agency is prohibited from raising procedural fairness arguments proper in seeking review of their own actions on review, simply because procedural fairness does not form part of legality, but that private parties challenging the very same action may still challenge procedural failures when bringing the very same action under PAJA review. This seems a highly anomalous position and does nothing to provide a decision-maker with clarity on the appropriate procedural standard to meet when taking the decision in the first place. If this bifurcated approach indeed flows from *Gijima,* the further question emerges of what the effect of *res judicata* will be in such circumstances. If the agency launches the review on legality grounds and the administrative action survives, can the private party still subsequently succeed with a PAJA review on procedural fairness grounds? One suspects that this will not be the case despite the fact that there are, technically speaking, two different causes of action. . If there was any alleged or suspected procedural issue, it will most likely be raised as part of the legality review and will be reviewed under the very low standard of review as meeting the standard for procedural rationality, which would effectively close the door to a full procedural fairness challenge under PAJA. This will be an unfortunate

152. *Id.*

153. Albutt v. Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC).

154. Nat'l Energy Regulator of South Africa v. PG Group (Pty) Ltd. [2019] ZACC 28 at para. 116 (J. Jafta, concurring).

legal development, since PAJA seeks to introduce a more expansive, more robust right to procedural fairness.

Apart from the practical difficulties, the possibility of shielding procedurally unfair administrative action from review would greatly undermine the pursuit of administrative justice. This shows the risk of the Court's narrow interpretation of administrative justice under section 33 of the Constitution, particularly in denying agencies the capacity to rely on the rights in that section in order to review their own decisions. Unwittingly, the Court may have created a perverse incentive on the part of agencies to seek self-review in order to insulate their decisions from administrative-justice scrutiny. Or, at the very least and on the most favorable interpretation, the *Gijima* approach has ostensibly made it impossible for agencies to bring administrative justice to bear on their own decisions, especially where administrative-justice standards do apply to agency action. This effect seems contrary to the constitutional obligations on agencies contained, for example, in section 2, stating that the obligations imposed by the Constitution must be fulfilled, in section 7, stating that the "state must respect, protect, promote and fulfill the rights in the Bill of Rights," including the right to administrative justice, and section 237, stating that "all constitutional obligations must be performed diligently." When viewed from this angle, it does not seem problematic to allow, even oblige, agencies to seek to have administrative-justice standards applied to their own decisions by way of an application for self-review. In such a case, an agency is not claiming protection under the right to administrative justice, but is seeking to adhere to constitutional obligations where is has failed to do so in its decision-making.

Of course, all of this could simply be viewed as a storm in a teacup when regarding the expansive standing provisions in section 38 of the Constitution.[155] The *Gijima* approach only applies

155. § 38 of the S. AFR. CONST., 1996 contains the standing provisions for enforcement of the Bill of Rights and states:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
>
> *(a)* anyone acting in their own interest;
>
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
>
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;

to instances where an agency acts in its own interest, for it is only under those circumstances that it would be barred, according to the Court's reasoning, from relying on section 33. However, an agency could simply approach a court on one of the other standing provisions, such as acting in the public interest, when seeking self-review. In such cases, the logic of *Gijima* would not bar the agency from relying on section 33, or put differently, from seeking to apply administrative-justice standards to its own actions.[156] This would effectively negate the impact of *Gijima* and raise the question: what is the point of the entire *Gijima / Buffalo City* debacle? But this technical "solution" to the problems raised by *Gijima* in the context of self-review does not address the underlying issue of denying agencies the power to enforce administrative justice upon their own actions. It seems axiomatic that it is in every agency's own interest to take action in line with the Constitution, including administrative justice.

CONCLUSION

The development of the notion of self-review in South African administrative law has highlighted some of the puzzling, unintended consequences of the constitutionalization of administrative justice in South Africa. Instead of bringing coherence to administrative law, premised on the animating value of administrative justice, we are seeing an increasing fragmentation of administrative law. Instead of strengthening the demands of administrative justice in respect of administrative decision-making, we are seeing key requirements such as procedural fairness being undermined.

Despite all the rhetoric in *Gijima* and *Buffalo City* pointing to the Constitution requiring reliance on legality review in self-review cases, it seems that what is really at play here, is a tension between a constitutionalized, rights-based approach to administrative justice and a common-law approach. It seems that the courts are effectively resisting an approach to administrative justice that is more structured within the constitutional framework and in particular a rights framework, in favor of a more

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(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

S. AFR. CONST., 1996.

156. *See* Compcare Wellness Medical Scheme v. Registrar of Medical Schemes [2020] ZASCA 91 at para. 18.

open-ended, largely judicially-driven approach, that is reminiscent of the common-law approach to administrative law.

Part of this story is of course the fact that South Africa is still a young democracy and that the introduction of the Constitution in 1994, which represented a decisive break with the preceding legal system, was always bound to result in significant challenges in aligning the pre-existing law (mostly in the form of common law) with new constitutional provisions. The interaction between self-review and legality review is certainly one of the most difficult challenges that South African administrative law is currently facing. These difficulties are closely related to the tension between an established common-law institutional architecture and a newly introduced civil-law conceptualization of administrative justice. At a more general level, these developments raise interesting questions about the desirability of a constitutionalized, rights-based approach to administrative justice and about the close linkages between a system's institutional framework and the conceptual framework of administrative law.