# ASSESSING THE DUTY TO EXHAUST INTERNAL REMEDIES IN THE SOUTH AFRICAN LAW

A thesis submitted in fulfillment of the
requirements for the degree of

MASTER OF LAWS

of

RHODES UNIVERSITY

by

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January 2007

## ABSTRACT

Since the incorporation of the separation of powers doctrine into the South African Constitution, the problem has arisen that, each of the three tiers of government, the Executive, the Judiciary and the Legislature, has sought to protect exclusive jurisdiction over matters that fall within what constitutes that tier's own realm of authority. The effects of this are especially apparent in the field of dispute resolution in administrative law. The administration is predominantly the province of the Executive, and to a lesser extent, the Legislature. Thus, the acceptability of judicial review in dispute resolution and generally, the intrusion by the Judiciary in matters of the administration is perennially questioned and challenged by both the Executive and the Legislature. In this context, the duty to exhaust internal remedies assumes a pivotal role. It offers a compromise, by prescribing qualified exclusion of judicial review as a first port of call for dispute resolution while simultaneously entrusting initial dispute resolution to the administration. Often, this approach yields tangible results, but from a constitutional and fundamental rights perspective, the duty to exhaust internal remedies is problematic. Its exclusion of judicial review goes against, not only the right of access to court in section 34 of the Constitution, but also the rule of law, to the extent that the rule of law allows for the challenging, in court, of illegal administrative action as soon as it is taken. This thesis analyses the constitutionality of the duty to exhaust internal remedies in section 7(2) of the Promotion of Administrative Justice Act by assessing the consistency of section 7(2) of the Promotion of Administrative Justice Act with the right of access to court in section 34 of the Constitution. The thesis initially examines the origins and historical development of the duty to exhaust internal remedies in the English law, and the subsequent adoption of the duty to exhaust internal remedies into the South African common law for the purpose of interpreting and comprehending the duty to exhaust internal remedies as it is appears in section 7(2) of the Promotion of Administrative Justice Act. Ultimately, the study focuses on and identifies the deficiencies in the current approach to the question of the constitutionality of section 7(2) of the Promotion of Administrative Justice Act, and offers suggestions on how the law might be developed.

# CONTENTS

# DETAILED TABLE OF CONTENTS

## ACKNOWLEDGMENTS

I am grateful to Rhodes University for the opportunity, which the University has given me to grow and pursue a legal education. My gratitude extends particularly to the Registrar of Finance's Division, which has aided me financially throughout the course of my University studies.

I would also like to thank the Law Faculty, and here I refer, not to the buildings and the bureaucratic machine that is the Law Faculty, but to the people who make up the Faculty. It is a family which gave me help and assistance without ever expecting anything in return, and to all of them I am grateful. Wandisile Mandlana was my first supervisor and he supervised me for most of 2006 and offered invaluable advice. He patiently gave me a platform to express my ideas, however ludicrous! And through it all he steered me along the right path, and even lent me a kind ear in moments of distress unconnected with the thesis and for that, I am eternally grateful. And my gratitude also extends to my second supervisor, Helena Van Coller. She willingly took over the supervisory duties when it was at year's end and although it was during her vacation she kept in touch with me and gave me feedback even during the Christmas and New Year period.

I am also very grateful to Prof Midgley, not only for his efforts with regard to this thesis, but also his efforts and assistance over the course of my entire legal studies at Rhodes. My gratitude knows no bounds. And thanks are due to Sarah Driver, Graham Glover, Mrs. Davis and Sonya De Villiers, who were always patient with me and gave me a helping hand when I needed one. And, to the enigma that is Prof Kerr I am grateful, not for doing anything directly connected with this thesis, but for the looks (I cannot really describe them!) I got when I was in Zimbabwe and said Prof Kerr was part of 'my' faculty! And to the Library staff, Sylvia and Mrs Jill Otto, thank you for the time, effort and help you gave me when I was working on this thesis. Thank you so much!

Thank you to Judge Plasket for taking time out of a busy schedule, and discussing most of my thesis with me, even though it really was not much of a discussion because I lost all my nerve soon after I entered his chambers, and ended up feeling like I was back in his (then) second year Constitutional law class at Rhodes University. And true to character, I listened quietly and took notes!

Thanks are also due to the Rhodes Men's Basketball First team for giving me laughs, a brilliant season and unfortunately, a corny T-shirt! And thank you Godfrey, my friend, who was selfless, and let me grow and choose my own path in life. And to Dupes, thank you for all the little things! Much love! And thank you to my fellow LLM students, Sarvani Morgan, Maria Moutzouris and Melissa Lewis who helped me kill time when I needed a distraction from the work, or, if truth be told, when I was just feeling lazy!

And finally thank you to my family:

My sister Hazel: who gave me the opportunity to pursue this LLM, she gave me shelter and food and love and support and anything a brother could ever expect from a sister...and more! And my gratitude extends to her friends, Rufaro and Tendai who accepted me, and became my friends, and who gladly lent me their laptop a countless number of times! As my sister begins her own journey into postgraduate territory, I wish her the best and hope that I too can support her the same way she supported me. I must say however, I don't think I could out-do her even if I tried.

And, I am extremely grateful my parents, Victor and Crescentia Madebwe. Although it may sound cliché, I owe everything to them and their continued faith in me. They showed me what it was to dream and to pursue dreams, without ever forcing me to follow any particular path, which is weird, but as I sit here typing this, I think their plan worked! Maybe, just maybe, parents do know a lot more about the world than their kids! Had it not been for my parents' constant efforts, I would have never aspired to do a millionth of the things I have accomplished. And that is why this thesis is dedicated to them...with all my love!

# 'ASSESSING THE DUTY TO EXHAUST INTERNAL REMEDIES IN THE SOUTH AFRICAN LAW'

## INTRODUCTION

### 1. The general purpose of the study

The principal object of this thesis is the examination of the constitutional validity of the duty to exhaust internal remedies in South African Administrative law. The central and initial step to such discussion is the definition of the term 'duty to exhaust internal remedies.'

#### a. Definitions

The term 'duty to exhaust internal remedies' is a composite term consisting of three individual aspects read together. These three aspects are internal remedies, exhaustion of internal remedies and the correlative *duty* to exhaust internal remedies. As a prelude to this discussion, and for clarity, these terms require definition.

Internal remedies are wholly concerned with procedural aspects of review. Simply defined,[1] the term 'internal remedies' encapsulates:

> '[a]ll those forms of (internal remedies) and appeal which exist in addition to judicial control. These remedies are a means of control over administrative acts which give aggrieved parties a simple, informal and easy means of settling administrative disputes. Judicial control over administrative acts exists in addition to internal control and is in reality a form of control which is foreign to the internal structure and operation of the administration.'[2]

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1 The accuracy and veracity of this definition is a matter that will be discussed in the thesis. For purposes of introducing the discussion, the definition proffered here suffices.

2 M Wiechers *Administrative Law* (1985) 270.

The most obvious consequence of this is that in any given dispute in Administrative law, 'judicial review may not be the only available avenue of challenging a particular decision, statute may create appellate machinery to deal with appeals against decisions of public bodies.'[3] Internal remedies are usually comprehensive, providing for different stages of dispute resolution, typically in hierarchical form. In this hierarchy, dispute resolution power runs in a top-down manner. Exhausting internal remedies therefore, means exploiting all internal remedies provided for in any administrative structure. This includes following any and all appeals and reviews made available within the structure.[4]

The *duty* to exhaust internal remedies is the composite term which is the result of the amalgamation of 'internal remedies' and 'exhausting internal remedies.' As such, the term is best described as 'the obligation on an aggrieved party to explore and utilize any internal remedies available to him or her. This entails following any and all appeals and reviews made available within the administrative structure.'[5] Ideally, this process is the precursor to seeking judicial remedies.

Section 7(2) of the Promotion of Administrative Justice Act (PAJA) makes provision for the duty to exhaust internal remedies. Section 7(2) of PAJA provides:

> *(a)* Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
> *(b)* Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

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3 C Lewis *Judicial Remedies in Public Law* (2004) 408.

4 *Myers v South African Railways and Harbours* 1924 AD 85 at 93; *Re SS 'Sceptre'* 1925 EDL 267; *Gora Mohammed v Durban Town Council* 1931 NLR 598 at 613; *Nunn v Pretoria Rent Board* 1943 TPD 24, 27; *Shames v South African Railways and Harbours* 1922 AD 228 at 235-236.

5 *Ibid.* Also see Wiechers *Administrative Law* 270.

*(c)* A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.[6]

Simply stated, section 7(2) of PAJA directs that before an aggrieved party seeks the review of administrative action by a court of law, such party must first exhaust any internal remedies available to such party. There is the exception that courts may exempt aggrieved parties from the obligation to exhaust internal remedies.

**b. Scope of thesis**

The scope of the thesis can be inferred from the object of the thesis stated above but for clarity, the scope of the thesis must be expressly stated. Because section 7(2) of PAJA bears the contemporary law duty to exhaust internal remedies, the discussion in the thesis focuses primarily on the provision. But, section 7(2) of PAJA merely incorporated the common law duty to exhaust internal remedies into statute law. Consequently, the scope of the thesis is not limited strictly to section 7(2) of PAJA. In the determination of the constitutionality of section 7(2) of PAJA, the thesis necessarily explores and draws guidance from the common law roots of the duty to exhaust internal remedies.

Furthermore, the determination of the constitutional validity of section 7(2) of PAJA is a discussion which entails consideration of other corollary but critical factors. These factors include but are not limited to such issues as the efficacy of the provision, its functionality and appropriateness in the South African constitutional dispensation. Ultimately, these are all factors that influence the sources to which the discussion refers.

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6 See *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* 2005 (3) SA 156 (C) at 164H-165D.

## 2. Sources and approach

Section 7(2) of PAJA as with any aspect of Administrative law has strong ties to the Constitution. The constitutional dispensation is traceable to the introduction of the Interim Constitution of South Africa.[7] This ultimately culminated in the Constitution of the Republic of South Africa (the Constitution).[8] Critically, the Constitution spawned PAJA.[9] And section 7(2) of PAJA considered separately does not carry as much potency as it does when it is considered in the context of PAJA.

PAJA was legislation envisaged by section 33 (3) of the Constitution. The Act was enacted in order to give effect to the right to just administrative action in sections 33(1) and (2) of the Constitution. PAJA is both a statute and a legislative elaboration of a constitutional provision. Because of the link between the Constitution and PAJA, it is in the context of the Constitution particularly that PAJA must be read. PAJA is one of the post 1994 laws which are 'designed to constrain government and advance democratic governance to ensure accountability, responsiveness and openness.'[10] Since coming into operation, PAJA has become the legislative foundation of Administrative law of South Africa.[11]

The common law is as important to the discussion of the duty to exhaust internal remedies as both the Constitution and PAJA. A proper approach to discussing section 7(2) of PAJA takes cognizance not only of the contemporary law duty to exhaust internal remedies but also considers the origins and early development of the duty to exhaust internal remedies at common law. Indeed, the common law duty to exhaust

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7 The Interim Constitution of the Republic of South Africa, Act 200 of 1993.

8 The 1996 Constitution. See I Currie and J de Waal *The Bill of Rights Handbook* 5 ed (2005) 1-6.

9 In the most likelihood this is attributable to the extensive links between the Constitutional law and Administrative law.

10 See C Plasket 'The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa' (Doctoral Thesis, Rhodes University, 2002) 1-4.

11 I Currie and J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 1-2, 29-32.

internal remedies is instrumental to interpreting, understanding and addressing issues that revolve around section 7(2) of PAJA.

The determination of the constitutional validity of the duty to exhaust internal remedies in section 7(2) of PAJA must therefore be based on a primordial understanding of the cumulative impact of all the sources cited above. These are namely, the Constitution, PAJA and the common law. Inevitably, it is the Constitution that occupies the more superior role in matters of assessing constitutional validity. With regard to the duty to exhaust internal remedies, questions of constitutionality have typically centered on whether section 7(2) of PAJA is consistent with three aspects of the Constitution.[12] These are namely, the rule of law, the right of access to court and the right to just administrative action. Obviously, other constitutional issues feature in the discussion, but these three are the most critical. The determination and resolution of these issues is only possible after a thorough interpretation of section 7(2) of PAJA. Because the inquiry into the constitutional validity of the duty to exhaust internal remedies is traceable to the inception of the constitutional dispensation, the common law occupies a prominent role in this discussion.

### 3. Structure of the thesis

The thesis comprises six chapters. Chapter one is the introductory chapter. It discusses the foundational aspects of the duty to exhaust internal remedies. It discusses generally, the procedural aspects of judicial review and the concept of justiciability. Thus, the chapter addresses the preliminary and base issues that resonate throughout the entire thesis.

Chapter two focuses on the common law history of the duty to exhaust internal remedies. It focuses in particular on the English common law origins of the duty to exhaust internal remedies. Focus is drawn to the factors that shaped and affected the manner of development of the duty to exhaust internal remedies. The chapter places

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12 See section 2 of the Constitution.

particular emphasis on 'how' and 'why' the duty to exhaust internal remedies arose. There is however more marked emphasis on 'why' the duty to exhaust internal remedies was created.

In the early twentieth century the duty to exhaust internal remedies was adopted into the South African common law. Chapter three focuses on the adoption of the duty to exhaust internal remedies into the South African common law. The chapter is not limited to considering merely the adoption of the duty to exhaust internal remedies but also considers the development of the duty to exhaust internal remedies in the common law. Particular attention is paid to the changes that occurred to the duty to exhaust internal remedies and what motivated such change. This analysis of the duty to exhaust internal remedies canvasses the period from its adoption to the time of its inclusion in section 7(2) of PAJA which occurred with the enactment of PAJA in 2000.

Chapter four is an assessment of section 7(2) of PAJA. The chapter primarily interprets the provision. This interpretation of section 7(2) of PAJA is largely informed by a consideration of the constitutionally accepted mode of statutory interpretation. The chapter also features a comparison of section 7(2) of PAJA to the common law duty to exhaust internal remedies. To lend legitimacy to this interpretation, an alternative interpretation of section 7(2) of PAJA is also considered. Ultimately, the chapter cites, explains and justifies the differences in the two interpretations.

Chapter five considers the constitutionality of section 7(2) of PAJA. The discussion in the chapter is premised largely on the issues raised in the preceding chapters, particularly chapter four. In determining constitutionality, the chapter measures the consistency of section 7(2) of PAJA with specific provisions of the Constitution. However, the discussion is not limited merely to a consideration of fundamental rights, but also considers other aspects relevant to the determination of constitutionality. Thus, the discussion considers such issues as the compatibility of section 7(2) of PAJA to the context of the South African Public administration as well as the general efficacy of section 7(2) of PAJA in South African law.

Chapter six concludes the discussion. The chapter offers a final appraisal of the duty to exhaust internal remedies in section 7(2) of PAJA. The chapter also offers some recommendations as to the prescribed approach to section 7(2) of PAJA. These conclusions and accompanying recommendations are wholly motivated by the discussion in the thesis on the duty to exhaust internal remedies and section 7(2) of PAJA.

This thesis reflects the law as it was available to me at 31 December 2006.

# Chapter One

# PROCEDURAL ASPECTS OF JUDICIAL REVIEW, ADMINISTRATIVE JUSTICE AND JUSTICIABILITY

## 1.1. Introduction

Administrative law under PAJA has assumed added structure with PAJA introducing certainty and clarity to the law.[1] This is primarily attributable to the fact that PAJA has categorized Administrative law into four distinct categories.[2] These are namely, 'the definition of administrative action,' 'procedural fairness,' 'unreasonableness' and 'the procedural aspects of review.' To the extent that the duty to exhaust internal remedies in section 7(2) of PAJA provides for internal remedies, it is wholly concerned with procedural aspects of review.

Procedural aspects of review are an integral aspect of Administrative law. They dictate matters of dispute resolution in Administrative law which is a critical aspect to any discussion of the subject. Therefore, any discussion of the duty to exhaust internal remedies in section 7(2) of PAJA, like the one in this thesis, must necessarily be premised on a basic conception of the procedural aspects of review. Thus, to lay a foundation for the discussion in this thesis, this chapter gives an introductory overview of the procedural aspects of review. However, this discussion of procedural aspects of review necessarily demands consideration of factors, such as administrative justice and justiciabilty, that are not only related to procedural aspects of review but also bear relevance to and inform the discussion of the duty to exhaust internal remedies.

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1 See MH Cheadle, DM Davis and NRL Hysom *South African Constitutional Law: The Bill of Rights* (2002) 614. Also see Currie and J de Waal Waal *Handbook* 652.

2 Although this is not explicitly stated the overall effect of the structure of PAJA has yielded such categorisation.

## 1.2. Procedural aspects of review in Administrative law

Procedural aspects of review in Administrative law are concerned with the procedure followed in dispute resolution. This occurs at two levels, in judicial forums or alternatively in internal dispute resolution forums.[3] Both these forums are critical to Administrative law, because they are at the forefront of the dispute resolution function of disputes arising in the Public Administration. In any discussion of administrative dispute resolution both forums bear critical importance.

There is a co-dependency between judicial review and internal dispute resolution forums.[4] Judicial review often follows from internal review where the resolution of the dispute is not secured internally. The interaction between these two forms of dispute resolution is the driving force behind the duty to exhaust internal remedies. There is therefore, a need to consider how the two dispute resolution mechanisms relate to each other in practice.

### 1.2.1. Judicial review in Administrative law

Judicial review in Administrative law is the process by which courts of law exercise a supervisory jurisdiction over the activities of public authorities in the field of Administrative law.[5] Hoexter notes that:

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3 For more on this see JM Evans 'Administrative Appeal or Judicial Review: A Canadian Perspective' (1993) *Acta Juridica* 47.

4 *Ibid.*

5 See L Baxter *Administrative Law* (1984) 300. See further C Plasket 'Tendering for Government Contracts: Public Procurement and Judicial Review' in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 159. Also see Lewis *Judicial Remedies* 9. Judicial review must be distinguished from appeal (see JR de Ville *Judicial Review of Administrative action in South Africa* (2005) 386-387). DP Jones and AS de Villars *Principles of Administrative Law* 3 ed (1999) 6-7 argue that 'judicial review is generally limited to the power of superior courts to determine whether the administrator has acted strictly within the powers which have been statutorily delegated to him.' On the other hand, appeal is a natural consequence of constitutionality rooted in both the separation of powers and the rule of law (see SA de Smith, H Woolf and J Jowell *Principles of Judicial Review* (1999) 15.

> 'In the context of Administrative law, 'judicial review' is a process allowing the courts to scrutinize the legality of administrative action and, where appropriate, to set action aside, correct it or grant some other remedy. The term correctly suggests that the review process is fairly far removed from the engine rooms of public administration. Judicial review is, of course, performed by judges rather than administrators themselves, and clearly has to do with the secondary evaluation of primary decision-making.'[6]

Lewis also describes the role of judicial review in Administrative law thus:

> 'Judicial review has been and remains principally concerned with the activities of bodies deriving their authority from statute. Where an individual seeks to challenge the exercise of a power derived from statute, or seeks to compel the performance of a statutory duty, the presumption is that such an issue raises a matter of public law for resolution by judicial review.'[7]

Judicial review therefore, 'occupies an important role in promoting proper administrative decision-making,'[8] and 'history has shown that judicial review has been the most effective way of controlling administrative action.'[9] Judicial review is 'probably the most important means of controlling illegal governmental actions.'[10] Thus, judicial review is the ultimate buffer, which protects the citizenry from any excesses of state or public power. But the purpose of judicial review is not limited to the relationship between the state and the general public, 'judicial review may also arise where there are inter-governmental disputes.'[11] To fully comprehend the prominent role that judicial review occupies in modern Administrative law, it is necessary to trace the development and growth of judicial review since the common law.

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6 C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 485.

7 Lewis *Judicial Review* 11.

8 J Jowell 'Judicial Review of the Substance of Official Decisions' (1993) *Acta Juridica* 117 at 118.

9 Y Burns *Administrative Law under the 1996 Constitution* 2 ed (2003) 202. See however, Hoexter 'Future' 488-494.

10 Jones and AS de Villars *Administrative Law* 5.

11 See section 41 of the Constitution. See further JF McEldowney *Public Law* (1998) 502-506.

#### 1.2.1.1. Judicial review in the common law Administrative law

Under the common law the political and legal systems were based on parliamentary sovereignty. As such, the parliamentary and consequently legislative function enjoyed supremacy over the judicial function.[12] Consequently, controversy surrounded the applicability of judicial review over administrative matters.[13] Administrative matters were arbitrarily deemed to fall under the province of Parliament using its legislative arm.[14] To circumvent the extensive exclusion of their review jurisdiction at the instance of Parliament using legislative means, courts adopted the approach that 'judicial review of administrative action was founded upon the premise that an inferior tribunal or administrative body was entitled to decide wrongly, but was not entitled to exceed the jurisdiction given to it by statute.'[15] Where the jurisdiction bestowed by statute was exceeded, judicial review was justifiable. In such instances, judicial review was based on the doctrines of parliamentary sovereignty, the rule of law and *ultra vires*.[16]

#### 1.2.1.2. Judicial review of administrative action under the Constitution

The Constitution has put an end to the controversy that surrounded the extent of the applicability of judicial review at common law. The Constitution has achieved this in two ways. Firstly, the Constitution expressly authorises judicial review. The basis of judicial review now originates in the Constitution itself. This was expressed by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa*.[17] The court made the point that under the constitutional regime, the doctrine of parliamentary supremacy has been expressly rejected. However, some of the common law

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12 Under parliamentary sovereignty, the powers of Parliament are absolute. Parliament in turn legislates, allowing it to manipulate legislation. See JF Garner *Administrative Law* 5 ed (1979) 3.

13 See SA de Smith, Woolf and Jowell *Administrative Action* 15. Also see Corbett CJ *Du Preez and Another v Truth and Reconcilliation Commission* 1997 (3) SA 204 (SCA) at 231H.

14 See JR de Ville *Judicial Review* 1.

15 SA de Smith, Woolf and Jowell *Principles of Judicial Review* 89. Also see JR de Ville *Judicial Review* 1 who makes the same point but discusses briefly, the inherent jurisdiction of the courts and the *ultra vires* principle as justifications for judicial review at common law.

16 See SA de Smith, Woolf and Jowell *Administrative Action* 15.

17 2000 (3) BCLR 241 (CC).

constitutional principles have been incorporated in the Constitution and unlike at common law, now find their basis in the Constitution. The court also emphasized that the basis of judicial review now lies in the doctrine of constitutional supremacy and in the principle of legality. The exercise of all public power must now comply with these doctrines and where the standard is not met, the exercises of power are subject to judicial review.[18]

Thus, the Constitution has altered the basis for judicial review. To this end, Lenta[19] makes the point that:

> 'Although the Constitution instructs the state to 'respect, promote and fulfill the rights in the Bill of Rights 'and specifies that the Bill of Rights binds 'all organs of state 'including the legislature and the executive,[20] the fact that government officials exercise discretion suggests that the investment of trust in elected representatives is to a certain extent inevitable.[21] The fact that elected representatives must be trusted to observe their commitments under the Constitution is nevertheless a source of concern to many, who worry that the government may in its negotiation of pragmatic compromises and enactment of expedient policies knowingly or unwittingly stray beyond the boundaries of what the Constitution allows. To minimize the risk inherent in trusting elected officials, constitutional democracies task judges, through the institution of judicial review, with policing legislation for its consonance with constitutional rights, for unjust discrimination and arbitrary deprivations. Judicial review expresses distrust of elected representatives and acts as a precaution against abuses of the initial investment of trust.'[22]

Secondly, the Constitution completely overhauled the role of courts in Administrative law.[23] Plasket states that:

> 'The role of the courts changed with the demise of the doctrine of parliamentary sovereignty and the creation of a constitutional state in which all public power is subject to a supreme

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18 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) at 252E-252G.

19 P Lenta 'Judicial Restraint and Overreach' 2004 (20) *SAJHR* 544 at 545.

20 Sections 7(2) and 8(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

21 See J Dunn *Interpreting Political Responsibility* (1990).

22 A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 21.

23 J Bednar 'The extent to which review for unreasonableness is meaningfully incorporated in the Promotion of Administrative Justice Act No. 3 of 200' (LLM Thesis, Rhodes University, 2006) 11.

> Constitution. The power of the judiciary increased dramatically as it was given the role of testing all exercises of public power, legislative and executive, for constitutional compatibility.'[24]

Courts under the Constitution are empowered to interfere in Administrative law matters. Burns makes the point that:

> 'In a constitutional state each and every act of the government must be authorized, either by the Constitution itself, or by the law, which obtains its validity from the Constitution. It is the task of the judiciary to protect the Constitution; to act as guardian over the potentially oppressive power of the other two branches of government and to ensure that the exercise of power complies with established law. This is a radical departure from the courts' role under the former system of government.'[25]

Despite these changes, judicial review under the constitutional dispensation occupies much the same role as it did at common law. However, there are legitimate grounds for controlling judicial review of administrative matters.[26] The extension of judicial review should not be construed to mean that the Judiciary has unfettered review jurisdiction over administrative matters.[27]

### 1.2.2. Exhaustion of Internal remedies in Administrative law

One of the ways in which the jurisdiction of the courts is controlled with regard to Administrative law is the obligation on courts to apply the principle that where internal remedies are provided, aggrieved parties are precluded from seeking judicial review unless internal remedies have been exhausted. There is an accompanying duty on courts to redirect aggrieved parties to such remedies, in all circumstances where internal remedies are overlooked. There is however, the exception that where the interests of justice are under threat, courts can exempt aggrieved parties from the obligation to exhaust internal remedies, for instance, where internal remedies are

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24 Plasket *Just Administrative Action* 81.

25 Y Burns *Administrative Law under the 1996 Constitution* 2 ed (2003) 202. Also see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC).

26 See Hoexter 'Future' 489 who gives justification as well as critique for such classification.

27 Also see Jones and AS de Villars *Administrative Law* 683-684.

inadequate. The effect of this is that internal dispute resolution mechanisms, depending on their functionality, could potentially preclude judicial review in any given matter.

In sum, the duty to exhaust internal remedies is best understood in the context of its application in juxtapose to judicial review. Where internal dispute resolution mechanisms are inappropriate, judicial review is often quickly advocated. Thus, whether internal review or judicial review to resolve a dispute is advocated, is a matter determined by the efficacy, adequacy and appropriateness of the internal forum. There is the danger however, that judicial review, being more established than internal review, could be excessively relied on, stunting the growth of internal dispute resolution mechanisms within the administration. Thus, a balance must be maintained between judicial review and internal dispute resolution mechanisms to encourage the growth of internal review. The need to maintain such a balance has, since the inception of the Constitution, been heightened, as the Constitution has advocated the need to pursue and secure administrative justice.

## 1.3. Administrative justice

Administrative justice is a far reaching concept of the law, the full scope and ambit of which, cannot possibly be discussed in the context of this thesis.[28] For current purposes, suffice it to note that administrative justice is a concept that, in contemporary South African Administrative law, finds its roots in section 33 of the Constitution, the right to just administrative action. Section 33 provides:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair

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28 For a more detailed overview of administrative justice refer to DM Davis 'Administrative Justice in a Democratic South Africa' (1993) *Acta Juridica* 21; H Corder 'Administrative Justice' in D Van Wyk, J Dugard B de Villiers and D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 390-395; E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35; G Budlender 'The Accessibility of Administrative Justice' (1993) *Acta Juridica* 128 and JM Evans 'Administrative Appeal or Judicial Review: A Canadian Perspective' (1993) *Acta Juridica* 47. Also see Plasket 'Thesis' 45-48.

(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.

Having noted that administrative justice stems from section 33 of the Constitution, it becomes important to define the concept.

### 1.3.1. Definition

Administrative justice has been defined as:

> 'justice emanating from a non-judicial arm of government, namely, permanent administrative departments, including their political heads, as well as statutory tribunals, boards and para-statals. It denotes the fair and effective performance of its tasks by the administration in an age when justice is as much the province of this branch as it is of the courts.'[29]

The pursuit of administrative justice has gained momentum in the period since the inception of the Constitution.[30] Davis[31] contends that administrative justice is more in tune with and has prospered under the constitutional dispensation. Cowen[32] expands on this and makes the point that behind administrative justice is the desire to limit the power of the government and that of its officials and to direct its use to good ends. Consequently, administrative justice fosters a culture of transparency and accountability.[33]

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29 DM Davis 'Administrative Justice in a Democratic South Africa' (1993) *Acta Juridica* 21 at 30. This can even be inferred from section 24 of the interim Constitution.

30 See Plasket 'Thesis' 45-48.

31 D Davis, 'Administrative Justice in a Democratic South Africa' (1993) *Acta Juridica* 21 at 30.

32 DV Cowen *The Foundations of Freedom: With Special Reference to Southern Africa* (1961) 83.

33 See E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 21 at 35. Also see Plasket 'Thesis' 45-48. See generally *Du Preez v Truth and Reconcilliation Commission* 1997 (3) SA 204 (SCA).

It is the pursuit of administrative justice that, firstly, motivates the creation of internal remedies and secondly, forms the theoretical basis for the duty to exhaust internal remedies. It has even been said that the provision of the right to just administrative action in section 33 and consequently, administrative justice, is proof of the fact that 'the Constitution expects the administration to aid in relieving the burden on the courts by resolving its own disputes in a fair manner.'[34]

The expectation on the administration to aid in the resolution of disputes would be useless however if courts had unfettered review jurisdiction over any administrative disputes. Thus, the pursuit of administrative justice must necessarily be accompanied by a corollary duty on courts to defer their jurisdiction until internal dispute resolution mechanisms are given an opportunity to administer justice.

#### 1.3.1.1. Judicial deference[35]

Hoexter[36] in a well articulated article argues that judicial deference amounts to:

> '[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to

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34 On administrative justice also see, JR de Ville 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs'* 2004 (20) *SAJHR* 577.

35 Judicial deference, much like administrative justice, is a loaded concept, the full length of which cannot be canvassed in this discussion. Thus, only a brief overview is given. For more see Hoexter 'Future' 501-502; JR de Ville 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs'* 2004 (20) *SAJHR* 577; *Minister of Environmental Affairs v Phambili Fisheries* [2003] 2 All SA 616 (SCA) and Lenta 'Restraint and Overreach' 544ff.

36 Hoexter 'Future' 501-502.

be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'[37]

According to Jones and de Villars:

> 'The courts must exercise some self-restraint in exercising their supervisory function over administrative tribunals. This restraint has been termed 'curial deference.' Curial deference is simply an acknowledgment by the courts that administrative tribunals have their own statutory jurisdiction, and they have a legitimate right to exercise it.'[38]

However, courts exercising deference have often been criticized 'for what critics perceive as a failure of nerve –a timid reluctance to scrutinize legislation with sufficient vigor and to provide meaningful and effective protection of rights.'[39] Such critique is generally considered ill-conceived in large part because 'judicial deference does not imply judicial timidity or an un-readiness to perform the judicial function.'[40] Rather, judicial deference is an acknowledgment of 'the need for courts to treat decision-makers with appropriate deference or respect which flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers.'[41]

One of the most notable justifications for judicial deference emanates from the classical legal theorist Lon Fuller who distinguished between ordinary justiciable disputes and what he called 'polycentric' issues.[42] Fuller defined polycentric issues as 'situations of interacting points of influence' which normally, although not invariably,

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37 This was quoted with approval in *Minister of Environmental Affairs v Phambili Fisheries* [2003] 2 All SA 616 (SCA) and in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 471A-471C. Also see *Manong and Associates v Director General: Department of Public Works and Others* 2005 (10) BCLR 1017 (C) at 1027D-1029I.

38 Jones and AS de Villars *Administrative Law* 683-685. Also see Plasket *Just Administrative Action* 244.

39 Lenta 'Restraint and Overreach' 544.

40 See JR de Ville 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs'* 2004 (20) *SAJHR* 577.

41 See JR de Ville 'Deference as respect'. Also see Plasket *Just Administrative Action* 244. This understanding of deference stems from D Dyzenhaus 'The Politics of Deference: Judicial Review and Democracy 'in M Taggart (ed) *The Province of Administrative Law* (1997) 302-03.

42 JWF Allison 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *CLJ* 367.

'involve many affected parties and a somewhat fluid state of affairs.'[43] Allison describes Fuller's theory thus:

> 'Fuller's general approach to the inaptness of adjudicative procedures is to use the concept of polycentricity to delimit adjudication. He therefore opposes general legislative use of adjudicative agencies to resolve disputes which are significantly polycentric.'[44]

Fuller advocated that the problem of polycentricity could be partially remedied by judicial restraint.[45] Courts would have to entrust the resolution of polycentric issues to more specialized tribunals.[46] Such approach found endorsement in the South African case law.[47] In *Kolbatschenko v King*[48] the Cape High Court set out a number of instances in which the court should not exercise judicial review in relation to administrative decisions. In such circumstances the interests and interactions between parties is 'polycentric.' In such cases, the subject matter is not legal in nature but essentially political and is therefore non-justiciable. Examples of such are decisions involving budgetary policy and the state allocation of scarce resources among competing claims. Also included would be cases of 'high executive nature.'[49]

Regardless of whether judicial deference is justified on the basis of 'general theory'[50] or Fuller's theory, judicial deference generally advocates the entrusting of dispute resolution to internal dispute resolution mechanisms. Where remedies are effective,

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43 LL Fuller, 'The Forms and Limits of Adjudication' (unpublished paper) quoted in JWF Allison 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *CLJ* 367 at 369.

44 LL Fuller, 'The Forms and Limits of Adjudication' (unpublished paper) quoted in JWF Allison 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *CLJ* 367 at - 370.

45 Allison 'Polycentric Disputes' 371.

46 For a more detailed exposition on Fuller's theory see the elaboration and critique of Fuller's work in Allison 'Polycentric Disputes' 367.

47 See the discussion by JR de Ville *Judicial Review* 31. Also see *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A); *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA).

48 2001 (4) SA 336 (C).

49 Also see the discussion in GE Devenish *The South African Constitution* (2005) 17-18.

50 The term 'general theory' here is used to refer to the theories of commentators such as Hoexter, Davis and Jones and AS de Villars as cited above.

courts undertake to compel aggrieved parties to rely on such remedies.[51] Courts also undertake only to hear matters where aggrieved parties have exhausted viable internal remedies. Thus, in a sense, it could be said that courts undertake to hear only those matters that are 'ripe' for adjudication.

#### 1.3.1.1.1. Ripeness

Ripeness is the most common standard by which courts determine to hear a matter or alternatively, to leave a dispute for internal resolution. The most frequently used method of ascertaining ripeness is the consideration of whether an aggrieved party has exhausted the internal remedies available to him or her.[52] Thus, 'ripeness' is concerned with whether a dispute is ready for judicial adjudication or not.[53] 'Ripeness' is a question of degree. Courts defer their jurisdiction where there is the possibility of rectifying misconduct by placing reliance on extra-judicial remedies.[54] Only matters in which the internal dispute resolution process is complete, and the dispute persists, are 'ripe' for judicial adjudication. However, it is not always clear when an administrative dispute is 'ripe' for adjudication.[55] Generally however, once unlawfulness is manifest, in a manner that cannot possibly be corrected internally, there is no point insisting that the complainant continue going through the motions without taking the matter to court.[56]

While the pursuit of administrative justice and the corollary duty on courts to defer their jurisdiction until disputes are ripe for adjudication are critical factors in the determination of when disputes are taken to court, they are not the only factors

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51 See Currie and J de Waal *Handbook* 652.

52 Baxter *Administrative Law* 719.

53 Interestingly, this coincides with the constitutional doctrine of ripeness which in the present day prevents parties from approaching a court prematurely at a time when such party has not yet been subject to prejudice, or the real threat of prejudice, as a result of legislation or conduct alleged to be unconstitutional. See *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C) at 1030-1031. Also see C Loots 'Access to the Courts and Justiciability' in M Chaskalson *Constitutional Law of South Africa* (1995) 8-12.

54 *Ibid.*

55 *Ibid.*

56 Baxter *Administrative Law* 720.

considered in determining disputes which will be resolved in court. The ultimate determination of whether a dispute can be resolved in court or not is a matter based on the nature of the dispute itself and in particular, the justiciability of the dispute.

## 1.4. Justiciability

Justiciability is the element used to ascertain 'whether a particular dispute is amenable to judicial resolution.'[57] Justiciability has also been described as being concerned with 'whether a dispute can be resolved by the application of law.'[58] Loots adds that 'a determination of justiciability involves an inquiry into whether it is appropriate for a particular issue to be resolved by courts.'[59] She cites the features which may be the subject of the inquiry as being:

a. whether the plaintiff has standing;
b. whether the dispute is ripe for determination;
c. whether the issue is moot in that the dispute is resolved;
d. Whether the subject matter is appropriate for judicial action.

Evidently, justiciability is concerned with whether the judicial process is suitable for the resolution of the type of dispute in question.[60] It follows therefore that justiciability by its very nature implicitly limits the applicability of judicial review.[61] Justiciability is rooted in and was developed under the common law.

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57 Plasket *Just Administrative Action* 244. Also see P Craig *Administrative Law* 4 ed (1999) 479. See too C Loots 'Access to Court and Justiciability' in M Chaskalson *et al Constitutional Law of South Africa* (1996) 8-2. See further P Cane 'The Function of Standing Rules in Administrative Law' (1980) *PL* 303 at 309-310.

58 *Ibid.*

59 C Loots 'Access to Court and Justiciability' in M Chaskalson *et al Constitutional Law of South Africa* (1996) 8-3.

60 P Craig *Administrative Law* 4 ed (1999) 479.

61 Currie and J de Waal *Handbook* 79.

### 1.4.1. Justiciability at common law

Under the common law, justiciability at any one time was determined by one of two factors. These were namely, 'institutional factors' and 'attitudinal factors.'[62] Institutional factors were concerned with:

> '...matters, or issues within matters, involving a high degree of policy (referred to as discretion in some cases) have been said to be non-justiciable. They are sometimes regarded as unsuitable for judicial resolution because, for example, they may involve issues of 'statecraft or national policy,'[63] or a court may believe that the issue may be dealt with more effectively in ways other than through the judicial process...these two reasons for non-justiciability often tend to coalesce: that 'issues of national security may be non-justiciable, partly because such matters just are better left to the ministers of the Crown, and partly because the kinds of decisions in issue are analytically unsuited to adjudication.'[64] Factors such as these represent institutional restraints on judicial decision-making, crimping the scope of judicial review.'[65]

Attitudinal factors on the other hand:

> 'Play the same role as institutional factors but in a less obvious or measurable way: these factors are the views and attitudes of judges themselves to the nature and boundaries of their roles. Baxter says that the 'breadth of the matters that are considered to be justiciable is heavily dependent on judicial *activism* or *restraint*', the former expanding jurisdiction and the latter contracting it.'[66]

Often, and depending on the context, both factors worked together to determine the extent of justiciability.[67] Alternatively, these factors worked together to cumulatively serve as restraints on justiciability.

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62 See Plasket *Just Administrative Action* 245.
63 *Liversidge v Anderson* [1942] AC 206 at 261-262.
64 DJ Galligan *Discretionary Powers* (1986) 241.
65 See Plasket *Just Administrative Action* 245.
66 *Ibid.* Also see Baxter *Administrative Law* 320.
67 Baxter *Administrative Law* 320.

### 1.4.2. Justiciability under the Constitution

Justiciability, as the concept was applied at common law, has permeated into the constitutional dispensation. Critically, the Constitution has extended the scope of justiciability. The constitutional dispensation has revolutionized the traditional common law approach to justiciability.[68] In spite of this, a theme that has persisted from the common law is that 'justiciability is the name given to the concept which recognizes that the capabilities of courts of law are limited.'[69] However, a new innovation stemming from the Constitution is express provision to courts of 'tools' with which the judiciary can control all exercises of public power. There are two prominent such tools: firstly, the rule of law and secondly, the Bill of Rights.[70]

#### 1.4.2.1. The rule of law

The rule of law is a foundational value of the Constitution. It has been said of the rule of law that 'the idea of constitutionalism is bolstered by the specific entrenchment of the rule of law in the founding provisions.'[71] Section 1 of the Constitution provides:

> 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> *(c) Supremacy of the constitution and the rule of law.*[72]
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

Cowling,[73] quoting Dicey describes the rule of law as such:

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68 Plasket *Just Administrative Action* 255.
69 P Cane *An Introduction to Administrative Law* 3 ed (2001) 34-39.
70 *Ibid.*
71 Currie and J de Waal *Handbook* 10.
72 Italics added for emphasis.

> 'The classical meaning of the rule of law, as expounded by A Dicey, was very much a product of its times. It is based on three separate but interrelated principles. The first of these principles incorporates the notion of predominance of law by reason of the fact that members of a particular society may be lawfully punished only by an independent and judicial body which has objectively established that such members breached a clear, existing law. The second principle refers to the concept of equality in the sense that the law should be applied in an equal and general manner by an impartial judicial body. The third principle is concerned with the question of remedies and holds that fundamental human rights and liberties are most effectively protected by an impartial judicial body applying the ordinary law of the land.'

The entrenchment of the rule of law in the South African Constitution both directly and indirectly extended the concept of justiciability.[74] Direct extension is attributable to the fact that the rule of law is directly enforceable. This extends the basis on which courts may review administrative action. *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council*[75] offers a practical example of the direct impact of the rule of law on justiciability. In *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* the Constitutional Court held that the rule of law means that 'no body or person may exercise public power or perform public functions unless the authority to do so has been conferred by law.'[76] It requires that when public functionaries exercise public power or perform their functions they must do so in good faith and they should not misconstrue their powers;[77] that they are required to exercise powers rationally;[78] that, to protect

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73 MG Cowling 'Judges and Human Rights in South Africa: Articulating the Inarticulate Premise' (2004) 3 *SAJHR* 177 at 178. Also see HWR Wade and CF Forsyth *Administrative Law* (2000) 20-25.

74 See JR de Ville *Judicial Review* 6 who cites that the rule of law plays a critical role in determining the extent to which courts should interfere in action taken by other branches of government. Also see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of the Republic of South Africa* 2000 (3) BCLR 241 (CC).

75 1998 (12) BCLR 1458 (CC) at 1483D-1483E.

76 This has drawn comparisons to the common law *ultra vires* principle. The rule of law is considered to have extended on that principle of the common law.

77 *President of the Republic of South Africa v South African Rugby Football Union*, 2000 (1) SA 1 (CC) at 70F-71B.

78 *Pharmaceutical Manufacturers Association of South Africa; in re: Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at 709B-709D and 709D-709H.

fundamental rights, laws should be 'pre-announced, general, durable and reasonably precise rules administered by regular courts or similar independent tribunals according to fair procedures';[79] and the rules must be stated in a 'clear and accessible manner.'[80] Simply put, 'a vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened.'[81] Thus, the overall effect of the rule of law other than imbuing in the law values of legality and justification is that it has extended the jurisdiction of courts to resolve justiciable disputes.[82]

Indirectly, the rule of law has extended justiciability by imbuing in the law values of legality and justification.[83] Legality is not a new feature of the law borne of the Constitution. Legality has characterised the South African law since the common law.[84] According to Baxter:

> 'Legality may be either a *minimalist* or a *normative* concept. The former is not concerned with what the rules of law actually say but only with whether they are valid in terms of their legal pedigree. Value judgment is almost totally excluded, and the requirement of legality is satisfied if administrative action is legally *authorized* in the manner described above. The normative concept, on the other hand, requires that these legal rules express certain minimum principles of justice. Legality in this sense connotes much more than a mere technique of government: it is a principle of *just* government. As a basic principle of the legal system, it requires fairness, equality before the law and freedom from arbitrary administrative action.'[85]

Legality under the Constitution extends justiciability primarily by empowering courts to adjudicate over disputes based on considerations which were not recognized at

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79 *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) at 800D-800E, quoting the formulation of the rule of law of AS Mathews *Freedom, State Security and the Rule of Law* (1986) 20.

80 *Dawood v Minister of Home Affairs* 2000 (8) *BCLR* 837 (CC) at 865F-866A.

81 Wade and Forsyth *Administrative Law* 691.

82 See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC). Also see Plasket *Just Administrative Action* 297.

83 See Currie and J de Waal *Handbook* 10.

84 L Boulle, B Harris and C Hoexter *Constitutional and Administrative Law* (1989) 255-256. Also see Baxter *Administrative Law* 299, 76.

85 Baxter *Administrative Law* 299.

common law. But, the impact which the rule of law has had on justiciability, is not limited to the entrenchment of legality.

The rule of law, read with the section 1 of the Constitution has also spawned a culture of justification in the Administration.[86] In *Carephone (Pty) Ltd v Marcus NO*[87] Froneman DJP held:

> 'The particular conception of the State and the democratic system of government as expressed in the Constitution determines the power to review administrative action and the extent thereof. Of importance in this regard, for present purposes, is the constitutional separation of the executive, legislative and judicial *authority* of the State administration, as well as the foundational values of accountability, responsiveness and openness in a democratic system of government (section 1(d) of the Constitution). The former provides legitimacy for the judicial review of administrative action (but nor for judicial exercise of executive or administrative authority), whilst the latter provides the broad conceptual framework within which the executive and public administration must do its work and be assessed on review. When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness.'[88]

The development of this culture of justification also extends justiciability by imposing the obligation that all administrative action must be justifiable. Where administrative action is unjustifiable, such action is susceptible to judicial review. This is in stark contrast to the common law where justiciability was significantly limited by the dominant culture of secrecy in most state matters.

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86 See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

87 *Carephone (Pty) Ltd v Marcus NO* at 1336I-1337C. *Also see Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E) at 1328H-1329B.

88 Also see P Craig *Administrative Law* 3-40.

#### 1.4.2.2. The Bill of Rights

The rights entrenched in the Bill of Rights have been used by courts to not only determine the ambit of justiciability but also to extend such ambit. The Bill of Rights creates the foundational premise that whenever disputes involving fundamental rights issues arise, such disputes are justiciable. This applies irrespective of the degree of discretion vested in the functionary against whom proceedings are brought or irrespective of the policy content of the decision.[89] Simply stated, this has extended justiciability. This is apparent when that position is contrasted to the common law position where interference with fundamental rights was not a guarantee of justiciability. With regard to Administrative law, two rights bear particular relevance: the right of access to court and the right to just administrative action.

##### 1.4.2.2.1. The right of access to court[90]

The right of access to court is provided for in section 34 of the Constitution which reads:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Currie and de Waal[91] hold that section 34 guarantees three rights for a person involved in a dispute that can be resolved by the application of law. First, it creates a right of access to a court or where appropriate, another tribunal or forum. Secondly, it requires tribunals or forums to be independent and impartial. Thirdly, it requires the dispute to be decided in a fair and public hearing. Thus, the threshold enquiry is whether a dispute can be resolved by law. If it can, the three components[92] of section 34 are triggered. The importance of the right of access to court was captured in

89 Plasket *Just Administrative Action* 255-256.
90 *Ibid.*
91 I Currie and J de Waal *The New Constitutional and Administrative Law* vol. 1 (2001) 406.
92 Access, independence and impartiality and fairness.

*Beinash and another v Young and others*[93] where Mokgoro J held that the right is 'of cardinal importance for the adjudication of justiciable disputes' and is 'by nature a right that requires active protection.'[94] In *Lesapo v North West Agricultural Bank and Another*[95] Mokgoro J again held that the right of access to court 'represents a deeper principle, one that underlies our democratic order.' Similarly, Budlender argues that there are a number of aspects to the right of access to court:[96]

> 'At one end the right contains a Hohfeldian 'liberty.' Therefore, a law which prevents access to court, such as an unjustifiable expiry period for claims, an ouster clause, or unreasonable demand that internal remedies be exhausted is inconsistent with the Constitution, because it prevents access to justice...the right of access to court also encapsulates a guarantee of the institution of an independent court or tribunal which is possessed of the necessary jurisdiction to deal with the substance of the matter.'

By its very nature, the right of access to court protects and extends the boundaries of justiciability. The right of access to court ensures that justiciability cannot be constricted unreasonably and unjustifiably by the Legislature.[97]

#### 1.4.2.2.2. The right to just administrative action

As noted above, section 33 of the Constitution is the right that gives the constitutional basis to the concept of administrative justice.[98] Read with the constitutional

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93 1999 (2) BCLR 125 (CC).

94 *Beinash v Young* at 132H-133A.

95 1999 (12) BCLR 1420 (CC) at 1429A-1430A.

96 G Budlender 'Access to Courts' (2004) 121 *SALJ* 339.

97 See Plasket *Just Administrative Action* 297.

98 See H Corder and L du Plessis *Understanding South Africa's Transitional Bill of Rights* (1994) 170 who argue that while administrative justice is attributable in large part to section 33, it would be remiss not to mention two things, firstly that, in constitutional terms, this concept found its roots in sections 24 of the Interim Constitution and this was subsequently improved to emerge as section 33 of the 1996 Constitution. The interim constitution in section 24 required that there be lawful administrative action. This left the further development of the grounds of review to the courts and their interpretation of the common law. Also see E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 31-38 where he argues that section 24 of the Interim Constitution, served well as part of the bridge from an authoritarian past to a democratic future. Also see *Roman v Williams NO* 1998 (1) SA 270 (C) at 281E-F. Also see J Klaaren 'Administrative Justice' in M Chaskalson *Constitutional Law of South Africa* (1996) 25-1 who contends that 'section 33 of the Constitution is not the single

supremacy clause and the rule of law,[99] section 33 grants to courts authority to preside over all justiciable disputes in Administrative law thus extending justiciability.

Critically, section 33 of the Constitution has formalised the grounds of review.[100] In *President of the Republic of South Africa v South African Rugby Football Union*[101] the court held that the right to just administrative action 'was entrenched in our Constitution in recognition of the importance of the common law governing administrative review' but that it was not correct to view section 33 'as a mere codification of common-law principles.'[102] The court also held that:

> '[The] principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common-law principles developed over decades.'[103]

### 1.4.3. Restricting justiciability

As was the case under common law, the extension of justiciability has created a correlative need to avoid judicial over activity in the administration. There are legitimate justifications for courts not to hear all disputes that arise in the administration. Thus, restricting or at the very least, controlling justiciability has become as important, a consideration, as the extension of justiciability.

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fount of administrative justice. The work performed in comparable constitutional instruments by a single all-embracing due process clause has been divided and allocated to several distinct sections of the South African Constitution: the limitations clause, the right of access to information, and the right of access to court as well as the right to freedom and security of the person. Thus the right of administrative justice must be considered in relation to these other provisions.'

99 See section 2 and section 1(c) of the Constitution respectively.

100 See PAJA which gives effect to section 33 of the Constitution.

101 1999 (10) BCLR 1059 (CC).

102 *President of the Republic of South Africa v South African Rugby Football Union* at 1117D.

103 *President of the Republic of South Africa v South African Rugby Football Union* at 1117E-1117F.

Under the Constitution, unlike at common law, restricting justiciability is no longer dependant on either 'institutional' or 'attitudinal' factors.[104] The restriction of justiciability is now a constitutional matter.[105] Despite this, two common law restraints on justiciability still form part of contemporary administrative law.

#### 1.4.3.1. Ouster clauses

The first restraint on justiciability, originating from the common law which is still in force today, is the ouster clause.[106] However, the constitutionality of ouster clauses is a debatable matter.[107] Plasket argues that:

> Ouster clauses in South African law will now be extremely difficult for the legislature to justify against the Constitution. Various provisions of the Constitution have, for all practical purposes, spelt the end of such devices: first, the founding provisions of the Constitution speak of the democratic South African state being founded, inter alia, on the values of constitutional supremacy and the rule of law; secondly, section 2 gives concrete expression to this value by providing that the Constitution is the supreme law and that law or conduct inconsistent with it is invalid; thirdly, section 7(2) places obligations, both positive and negative, on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'; fourthly, section 8(1) provides that the Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. In addition, two fundamental rights have the effect of entrenching the power of the courts to review the acts or decisions of the administration and protecting the courts from the unreasonable and unjustified ousting of their jurisdiction. They are the right to just administrative action contained in section 33(1), and section 34 which provides that everyone 'has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum'[108]

Thus, while ouster clauses remain a part of the law, it is unlikely that they can ever be justified.

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104 Plasket *Just Administrative Action* 244ff.
105 See JR de Ville *Judicial Review* 23-24.
106 See Plasket 'Thesis' 257ff.
107 See Plasket 'Thesis' 256-257.
108 *Ibid.*

#### 1.4.3.2. The duty to exhaust internal remedies

The second restraint on justiciability, which is rooted in the common law, is the duty to exhaust internal remedies. However, the restriction on justiciability posed by the duty to exhaust internal remedies is premised on varying qualifications and conditions. Thus, the constitutionality of the duty to exhaust internal remedies is often questioned, to the extent that it restricts justiciability, which the Constitution has extended. It is this enquiry into the constitutional validity of the duty to exhaust internal remedies that informs the discussion in this thesis.

## 1.5. Conclusion

The duty to exhaust internal remedies is wholly concerned with the procedural aspects of review. To illustrate this: section 7(2) of PAJA imposes an obligation on courts to defer their jurisdiction while simultaneously advocating reliance on internal remedies. In essence, the duty to exhaust internal remedies restricts justiciability. The basis for such restriction is the 'ripeness' of the dispute. Thus, the discussion of the duty to exhaust internal remedies is invariably premised on the basic appreciation of the issues discussed in this chapter, namely the position of judicial review in the administration, the question of justiciability, judicial deference and 'ripeness.'

The issues raised in this chapter form the foundation upon which the discussion in this thesis is based. Consequently, these issues recur and inform the discussion in this thesis in different respects. Therefore, they will consistently be referred to whenever necessary. Having so established the foundational base of this thesis, the discussion shifts now to the actual substantive issues. Prior to detailed discussion of the contemporary law duty to exhaust internal remedies, it is pertinent to first consider the origins and development of the principle. This necessarily entails discussion of the common law, and in particular the English common law.

# Chapter Two

# ENGLISH COMMON LAW ORIGINS OF THE DUTY TO EXHAUST INTERNAL REMEDIES

## 2.1. Introduction

The roots of the duty to exhaust internal remedies lie in the English common law.[1] This chapter discusses the origins and early development of the duty to exhaust internal remedies in the English common law. The determination of the origins of the requirement to exhaust internal remedies is crucial to the full comprehension of the common law duty to exhaust internal remedies. Such discussion also lays a foundation and solid basis for a discussion of the duty to exhaust internal remedies as it is framed in section 7(2) of PAJA. Put differently, the need to trace the origins of the principle is premised on the following reasons: firstly, the need to know 'how' the principle was formed and subsequently developed, and secondly, the desire to know 'why' the requirement arose. The chapter therefore offers insightful discussion of the history of the duty to exhaust internal remedies.

## 2.2. General note on the English law origins of the provision

Prior to discussing the origins of the duty to exhaust internal remedies, it is imperative to note two pertinent points. Firstly, the duty to exhaust internal remedies in its formative stages was not a principle of Administrative law. Instead it was a tool used in statutory interpretation.[2] However, for purposes of retaining the shape of this thesis, the requirement will be considered only from the time it became a part of English

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1 For general authority see P Cane *An Introduction to Administrative Law* 3 ed (2001); SA de Smith, H Woolf and J Jowell *Judicial Review of Administrative Action* (1995); HWR Wade and CF Forsyth *Administrative Law* 8 ed (2000); GW Paton *A Textbook of Jurisprudence* 4 ed (1972).

2 See *Stevens v Evans* [1761] 2 Burr 1152.

Administrative law. Secondly, the duty to exhaust internal remedies evolved from statutory provisions which excluded judicial review (ouster clauses). Therefore, in tracing the origins and development of the duty to exhaust internal remedies it is imperative to premise the discussion on an initial acknowledgment of the true origins of the principle.

## 2.3. Ouster clauses and the duty to exhaust internal remedies

The English case of *Doe DEM. Murray, Lord Bishop of Rochester v Bridges*[3] is the case credited with bearing the first formulation of the judicial approach to the application of ouster clauses. Because of the ties that exist between ouster clauses and the duty to the exhaust internal remedies, the case bears relevance to any discussion of this nature, which traces the historical development of the duty to the exhaust internal remedies in Administrative law. Thus, as a starting point, this discussion turns directly to the case of *Doe v Bridges*.

### 2.3.1. *Doe v Bridges*

The facts of *Doe v Bridges* were that Walker Lord Bishop of Rochester had leased land in terms of the Land-Tax Redemption Act[4] to the Lord of Romney. Upon the death of the Lord of Romney, the lease was cancelled. A new lease was then drafted which was taken over by the successor to the Lord of Romney, the Earl of Romney. For the length of its duration, the terms of the new lease had not been strictly enforced in terms of the Act. Upon the death of the Bishop, an action was brought to court by his successor. In that action, the new Bishop challenged the validity of the lease on the basis that such lease did not conform to the provisions of the Land-Tax Redemption Act. This action was brought in terms of the provisions of the Land-Tax Redemption Act. That Act made express provision for the resolution of disputes where

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3 *Doe DEM Murray, Lord Bishop of Rochester v Bridges* [1831] 1 B. & Ad. 847 (*Doe v Bridges*).

4 Act 42 G. 3, c.116, s. 88.

the validity of leases was challenged. The Act being clear, the applicant sought only for the court to strictly enforce the provisions of the Act.

Lord Tenterden presiding over the case accepted, in terms of the Act that the previous lease had been binding on the late Bishop and valid during his incumbency. The learned judge also expressed the sentiment that under the Act, the new lease had been voidable by the Bishop's successor.[5] As the new Bishop had exercised his right to discontinue the lease, the court found that new lease was void.[6] In his *ratio decidendi*, the learned judge held:

> 'Where an Act creates a new obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing it is ordained, the common law may in general find a mode suited to the particular nature of the case.'[7]

This was what grew to become the now famous phrase which lies at the root of the judicial approach to ouster clauses. The cases which succeeded *Doe v Bridges* quoted from it and approved it.[8] Thus, the case, to this day, is quoted as being the *case* which prescribed the correct approach to ouster clauses.

#### 2.3.1.1. The rule in *Doe v Bridges*

The precedent set by *Doe v Bridges* was that, where Legislation prescribed particular remedies, courts were precluded from extending their jurisdiction over the disputes.[9] In most instances, such remedies were provided for in statute. However, even in instances where statute did not provide an explicit remedy and there were legislative remedies provided for by a statutory body, an aggrieved party was still obligated to

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5 *Doe v Bridges* at 858.
6 *Doe v Bridges* at 859.
7 *Ibid.*
8 See, the following cases: *Lamplugh v Norton* [1889] 22 Q.B.D. 456; *Clegg v Earby Gas Company* [1896] 1 Q.B.D. 595; *Pasmore v Oswaldtwistle Urban District Council* [1898] A.C. 394; *Johnston v Consumers' Gas Company of Toronto* [1898] A.C. 454; *Devonport Corporation v Tozer* [1902] 2 Ch. 193; [1903] 1 Ch. 759.
9 *Doe v Bridges* at 859.

exhaust those legislative remedies.[10] The rule excluded an aggrieved party's right of access to the court where any statutory remedies were provided. Courts were bound to strictly apply this rule and there was a presumption against courts interfering in matters where the intention of the Legislature was clearly the exclusion of judicial review.[11]

### 2.3.2. Beyond *Doe v Bridges*: the development of the duty to exhaust internal remedies in the English case law

Cases that came after *Doe v Bridges* followed the precedent set by Lord Tenterden and took a strict approach to the application of ouster clauses. However, with the progression of time, courts took markedly different approaches to the application of the requirement in *Doe v Bridges*. For ease of reference and based on the different approaches taken by the courts, it can validly be said that cases which followed *Doe v Bridges* fell into two distinct categories. Firstly, there were, what shall be termed, the 'early cases,' which adopted an unyielding approach to the rule in *Doe v Bridges* and applied it strictly. Secondly, there came cases which adopted a milder approach to the application of the rule in *Doe v Bridges*. Such cases focused on developing exceptions and qualifying the rule enunciated in *Doe v Bridges*. The ensuing discussion discusses both sets of cases, focusing primarily on the important cases.

#### 2.3.2.1. The early cases: Strict application of *Doe v Bridges*

In *Stevens v Jeacocke*[12] the court was called upon to resolve a matter which arose as a result of a fishing dispute. The Saint Ives Bay Pilchard Fisheries Act which was the statute at issue in the case provided that where a party in one boat took up a particular fishing station, such party had the right to fish in that area undisturbed. As a

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10 *Ibid.* Naturally, the extent of the obligation differed depending on whether the duty was expressly stated in statute or whether such duty was implied.

11 See any of the following English texts on exclusion of judicial review: P Cane *An Introduction to Administrative Law* 3 ed (2001); SA de Smith, H Woolf and J Jowell *Judicial Review of Administrative Action* (1995); HWR Wade and CF Forsyth *Administrative Law* 8 ed (2000); GW Paton *A Textbook of Jurisprudence* 4 ed (1972).

12 [1848] 11 Q.B. 731.

remedy, the Act provided that in cases of interference by another boat, the fish taken by the party interfering would be forfeited to the party interfered with. The plaintiff alleged that the defendant had violated statute when such defendant interfered with the plaintiffs fishing activities. The plaintiff therefore sought damages in the manner prescribed by the Act. The court recognized that the issues raised were extensively provided for by the statute and so were the remedies. Basing its judgment on the precedent of *Doe v Bridges*, the court held:

> 'If any infringement of a right was shown, it was one in respect of which a specified remedy had been given: and that it was a rule of law that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute.'[13]

A similar approach was taken in *Marshall and Another v Nicholls*[14] where the court dealt with another matter involving fishermen. In *Marshall and Another v Nicholls*, the issue revolved around the articles of a Convention between France and England. The Convention, to which the court ascribed the status of a statute, made provision for the fishing laws governing fishermen of the two countries in their interaction with each other. In terms of articles 69, 70, 71, and 75 of the Convention all transgressions of the regulations and all disputes between the fishermen of the two countries were to be submitted to the exclusive jurisdiction of particular tribunals established for the purpose of dispute resolution. Marshall contended that he had suffered harm occasioned on him by the actions of Nicholls, which actions contravened the Convention. However, Marshall contrary to the dictates of the Convention had sought relief from the ordinary courts and not the remedies prescribed by the Convention. The court held that 'no action could be maintained for the breach of the Convention in the ordinary courts. The remedies provided by the statute were exclusive.'[15]

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13 *Stevens v Jeacocke* at 741.
14 [1852] 18 Q.B. 882.
15 *Marshall and Another v Nicholls* at 887.

From the two cases cited above, it is evident that, in the early cases, courts strictly applied the restriction of access to court stemming from ouster clauses. Where any statutory remedy was provided, courts would refuse to hear the matter, basing such refusal on the precedent in *Doe v Bridges*. The case of *Barraclough v Brown*[16] is an extreme example of a case where the court strictly applied the rule in *Doe v Bridges*. Lord Herschell in *Barraclough v Brown* held that:

> 'It would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover-the very matter relegated to the inferior court-determined. Such a position is not supported by authority and is unsound in principle.'[17]

The severity of these sentiments is better understood when the sentiments are read in the context of the entire judgment. In particular, the judgment of Lord Watson concurring with his colleague sheds light on such severity insofar as Lord Watson held:

> 'It cannot be the duty of any court to pronounce an order when it plainly appears that, in so doing, the court would be using a jurisdiction which the Legislature has forbidden it to exercise.'[18]

Read together, these two quotes aptly convey the prevailing attitude of courts at the time toward ouster clauses. Where statutes carried a remedy, an aggrieved party was precluded from seeking judicial redress. Courts worked under the presumption that they were bound to apply the legislation strictly. This was exemplified by the quickness with which courts declined to extend their jurisdiction to aggrieved parties, choosing instead to direct parties to the statutory remedies provided.

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16 1897 A.C. 615. Also see the discussion of this case in JF Garner *Administrative Law* 5 ed (1979) 191.

17 *Barraclough v Brown* at 620.

18 *Barraclough v Brown* at 622.

The Legislature, based on the passivity displayed by the courts, used ouster clauses to exclude judicial review.[19] Often, this was done *mala fide* as the Legislature would enact provisions for the express purpose of excluding judicial review ensuring that injustice went unchallenged.[20] However, it soon became apparent that the strict application of the rule in *Doe v Bridges* left the citizenry exposed to the nuances of the Administration. Courts could not protect the citizenry because they were bound by the precedent set by *Doe v Bridges*. In fact, courts were bound to direct aggrieved parties toward what at times were evidently unjust statutory remedies. This culminated in the realization that there had been a glaring oversight in the justice system.[21] This inspired courts to adapt ouster clauses into a more malleable principle, which would allow for judicial review. This adapted form of ouster clauses was what grew to be the duty to exhaust internal remedies.

#### 2.3.2.2. Qualification of the rule in *Doe v Bridges*

The qualification of the rule in *Doe v Bridges* was motivated by the desire to advance the tenets of justice. It was from these efforts to protect the interests of justice that the duty to exhaust internal remedies evolved. Courts were reluctant to hold that common law remedies could be excluded and dispute resolution left solely to administrative bodies.[22] But, to qualify the rule in *Doe v Bridges*, courts had to find a manner in which to override the precedent that bound them. Courts got over this hurdle in two ways. Firstly, courts approved the binding force of *Doe v Bridges*. Secondly, courts ascribed to the rule the status of a general rule which would allow for exceptions. The progression of this qualification is best illustrated in the case law.

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19 These developments occurred at a time when the Judicial arm of government was largely emasculated and subservient to the Legislature which was in essence Parliament. On the inactivity of the English judiciary see, Lewis *Judicial Remedies*.

20 *Ibid.*

21 This coincided with the rise of classical Diceyan rule of law theory which proposed that courts were the governmental arm that had to protect the citizenry from abuse of state power.

22 Wade and Forsyth *Administrative Law* 697.

*Lamplugh v Norton*[23] was an example of a case where the court drew authority directly from the binding precedent set by Lord Tenterden in *Doe v Bridges* and proceeded to directly qualify *Doe v Bridges*. The facts of *Lamplugh v Norton* were that the plaintiff was the owner of a tithe-rent charge in respect of which he had been assessed the poor-rate. The rate had not been paid and the overseers had obtained a warrant and seized the plaintiff's goods in order to levy the amount of the rate. The plaintiff had brought an action challenging such seizure. The issue before the court was extensively provided for in statute, including the remedies in a dispute of this nature. Lord Esher presiding over the case adopted an innovative approach in dealing with the matter. The learned judge first acknowledged the precedent set in *Doe v Bridges*. However he also noted that a strict application of that requirement would lead to gross injustice. In a monumental judgment on the application of the duty to exhaust internal remedies, Lord Esher interpreted the requirement expressed by Lord Tenterden in *Doe v Bridges* as being akin to a 'general rule' and not one which was absolutely rigid. Thus, he held that the requirement would admit of special exceptions.[24] Until the judgment in *Lamplugh v Norton* the duty to exhaust internal remedies as portrayed in *Doe v Bridges* had not been interpreted in a manner that qualified it. Lord Esher's judgment in *Lamplugh v Norton* therefore departed from the former strict approach and opened the door to establishing a new precedent, which would form the basis of the duty to exhaust internal remedies. This was soon evident from the cases that followed.

A similar approach to the one in *Lamplugh v Norton* was adopted by Jessel MR in *Cooper v Whittingham*.[25] The court dealt with whether the provision of internal remedies or a statutory directive to exhaust such remedies excluded judicial review. Jessel MR like Lord Esher in *Lamplugh v Norton* before him held that the rule in *Doe v Bridges* was a general rule and not a strict rule as had been earlier thought. He proceeded to give two examples of possible exceptions to the rule. Only one of the two exceptions is relevant:

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23 [1889] 22 Q.B.D. 452.
24 *Lamplugh v Norton* at 456.
25 15 Ch. 501.

> 'The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the court will interfere and prevent the act being done-and as regards the mode of granting an injunction the court will grant it either when the illegal act is threatened but has not been actually done or when it has seemingly been done and seemingly is intended to be repeated.'[26]

The resultant effect of this qualification of the rule in *Doe v Bridges* was the complete acceptance of the duty to exhaust internal remedies as a part of the law.

## 2.4. The evolution into the duty to exhaust internal remedies

The qualification of ouster clauses in the manner outlined above is what ultimately spawned the evolution of the duty to exhaust internal remedies. However to fully understand the relationship that subsisted between ouster clauses, it is necessary firstly, to distinguish between ouster clauses and the duty to exhaust internal remedies and secondly, to consider the ambit of the duty to exhaust internal remedies.

### 2.4.1. Ouster clauses and the duty to exhaust internal remedies distinguished

The distinction between the two principles is of cardinal importance and despite their shared origins, that similarity should not be construed to imply that the principles are one and the same. Wade and Forsyth[27] cite the differences between the principles thus:

> 'In the first place, the duty to exhaust internal remedies deals with remedies which exist for different purposes, either merits or legality, whereas the presumption that the provision of express statutory remedies excludes other remedies deals with remedies which exist for the same purpose. In the second place, the exhaustion of internal remedies may not preclude a later application for judicial review, if grounds for it can be shown and any necessary extension

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26 *Cooper v Whittingham* at 506-507.

27 Wade and Forsyth *Administrative Law* 697.

of time obtained. With the presumption that the provision of express statutory remedies excludes other remedies on the other hand, the question is whether the statutory remedy is exclusive.'

Maintaining the distinction between ouster clauses and the duty to exhaust internal remedies is critical to comprehending the evolution of the duty to exhaust internal remedies from ouster clauses. This is largely because the two concepts maintained a separate juxtaposed existence which persists even to this day.

### 2.4.2. Duty to exhaust internal remedies: scope and ambit

The duty to exhaust internal remedies worked in two stages. Firstly, an aggrieved party was bound to exhaust internal remedies. Secondly, courts, where necessary could exempt an aggrieved party from the obligation to exhaust internal remedies. Where an aggrieved party could establish that his or her interest was violated, such party could seek the intervention of the courts even without having exhausted internal remedies. This position of the law was further clarified in *Pasmore v Oswaldtwistle Urban District Council*.[28] The case dealt with a dispute focusing on a local authority which had the statutorily imposed obligation to make sewers for draining their district.[29] Lord Macnaghten presiding over the dispute tacitly accepted that the requirement in *Doe v Bridges* was not strict in its application. It would admit exceptions, thus he held:

'The law is stated nowhere more clearly or, I think, more accurately than by Lord Tenterden in the passage *often cited that where an obligation is created it shall not be enforced in any other way than by statute*. Whether the general rule is to prevail, or an exception is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience.'[30]

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28 1898 A.C. 387.

29 For notes on the case see Lewis *Judicial Remedies* 425-426.

30 *Pasmore v Oswaldtwistle Urban Council* at 397-398.

Ultimately, courts moved away from the strict application of all ouster clauses. Instead, courts would determine whether to exempt an aggrieved party from the obligation to pursue only the statutory remedies. This novel approach to ouster clauses was fuelled by a growing desire to safeguard the interests of justice.[31] Critically, the desire to attain justice was not pursued in a manner that totally ignored the ruling in *Doe v Bridges*. However, courts endorsed the view that, in the pursuit of justice, they would adopt a flexible approach to the application of ouster clauses. Consequently, where strict application of ouster clauses would lead to injustice, aggrieved parties would not be obliged to rely on just statutory remedies. No more was this evident than in *Devonport Corporation v Tozer*.[32]

*Devonport Corporation v Tozer* dealt with an appeal in which the defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways with the borough. The defendants, in pursuance of a building scheme, commenced erecting houses on their land fronting the highways. The plaintiffs alleged that the defendants by so-doing were laying out the highways as new 'streets.' The matter fell within the ambit of Municipal by-laws which were framed in terms of the Public Health Act of 1875. These by-laws prescribed a penalty for infringement, and directed that any damages falling in terms of the Act were to be recovered by summary proceedings. The by-laws provided that the plaintiffs could remove, alter or pull down any work begun or done, in contravention of by-laws. The respondents had argued that the actions of the plaintiffs were contrary to the borough by-laws as to width and the plaintiffs sought firstly, an injunction and secondly, a declaration that the plaintiffs could pull down the buildings erected in contravention of the by-laws. The court dismissed the appeal, declining to let the plaintiff pull down the buildings. The court did so for an array of reasons, most notably that it had not been proven that there was creation of a street, therefore, there could not be said to be infringement of the by-law in the strict sense.[33]

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31 See further, Lewis *Judicial Remedies* 426.

32 [1903] 1 Ch. 759.

33 *Devonport Corporation v Tozer* at 761-765. Interestingly, the court in *Devonport Corporation v*

*Devonport Corporation v Tozer* aptly captured the developments that had occurred with regard to the judicial approach to ouster clauses culminating in the duty to exhaust internal remedies. Firstly, courts would no longer strictly enforce ouster clauses if such approach would lead to injustice. Protecting the interests of justice took precedence over strictly applying ouster clauses. Secondly, courts would rely on the duty to exhaust internal remedies to protect the interests of justice. Added to this, there were distinct rationales for the duty to exhaust internal remedies.

## 2.5. The rationale for the duty to exhaust internal remedies

While it may be clear that the duty to exhaust internal remedies evolved from the attempts of the courts to qualify ouster clauses, other 'rationales' justified the evolution of the duty to exhaust internal remedies. Specifically, there are three reasons why' the duty to exhaust internal remedies evolved. Firstly, the duty to exhaust internal remedies was used as a tool to advance an abridged version of the separation of powers doctrine. Secondly, the duty to exhaust internal remedies was used in the determination of the ripeness of a dispute for adjudication. Thirdly, the duty to exhaust internal remedies also grew to be used as a tool forcing aggrieved parties to rely on internal remedies because in some instances, the administration was better placed to resolve its own disputes. These three aspects are discussed in that order.

### 2.5.1. The separation of powers

It is no coincidence that the formulation and development of the duty to exhaust internal remedies occurred at the same time as the growth and rise to prominence of the doctrine of the separation of powers in the English law. To illustrate how the separation of powers influenced the development of the duty to exhaust internal

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*Tozer* (at 761) also took time to attack the judgment in *Barraclough v Brown* where the court had applied the principle in *Doe v Bridges* strictly. Thus the court expressed the sentiment that *Barraclough v Brown* was a 'peculiar case which was not the general sort of case from which the general principle could be discerned.'

remedies it is essential to first discuss in general the separation of powers doctrine, and secondly, how the separation of powers influenced the English law.

#### 2.5.1.1. The separation of powers doctrine: A brief overview

The separation of powers doctrine was formulated by English writers and controversialists of the seventeenth century who argued for the separation of the legislative and executive (then including judicial) functions of government, seeing in this a means to restrain the abuse of governmental power. The theory was further developed by the Frenchman Montesquieu who advocated separation into three tiers, the executive, the legislative and the judiciary.

The doctrine is based on the theory that separating the functions and personnel is to prevent the excessive concentration of power in a single person or body.[34] The doctrine holds that the functions of government must be classified and performed by three tiers, the Legislative, the Executive and the Judicial.[35] Thus, the functions of making law, executing the law and resolving disputes through the application of the law should be kept separate along the lines of these three tiers. In principle, these functions are therefore performed by different institutions or persons.

The separation of powers doctrine is more than the separation of personnel and functions. The doctrine requires that there be checks and balances between the three tiers of government. However, under the doctrine it is conceded that if the objectives of efficiency and political freedom are to be served, complete separation is neither feasible nor effectual in preventing malpractices. To achieve success 'checks' and 'balances' are more effective than total separation.[36] The purpose of checks and balances is to ensure that the different branches of government control each other

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34 For more on this doctrine see generally Wiechers *Administrative Law* 16ff, 271 and Currie and J de Waal *Handbook* 18ff.

35 Currie and J de Waal *Constitutional and Administrative Law* 95. Also see JF Garner *Administrative Law* 5 ed (1979) 13-15.

36 G Carpenter *Introduction to South African Constitutional Law* (1987) 157; Currie and J de Waal *Constitutional and Administrative Law* 95.

(checks) and serve as counterweights to the power possessed by the other branches (balances). Thus, 'while the purpose of separating functions and personnel is to limit the power of a single individual or institution, the purpose of checks and balances is to make the branches of government accountable to each other.'[37] In most democracies, the most visible example of a check is the power of the judiciary to review laws and the conduct of the executive and the administration.

The ties between the duty to exhaust internal remedies and the separation of powers doctrine are easily apparent. Wiechers described this link in the following words:

> '[T]he rule that internal remedies must first be exhausted originated in and is based on the doctrine of separation of powers. According to this doctrine the administration must preserve its own autonomy and use its own procedures to keep its affairs in order. Judicial control is an external form of control aimed at ensuring adherence to the requirement of legality but not at taking over the administration and its operation.'[38]

It was because of these ties that the separation of powers played a role in the development of the duty to exhaust internal remedies.

### 2.5.1.2. English common law and the separation of powers

In England, 'the separation of powers was opposed in the eighteenth century by the doctrine of the mixed or balanced constitution in which, monarchical, aristocratic and democratic elements were joined and held in equilibrium.[39] The system of parliamentary government that evolved in the United Kingdom in the nineteenth century under the impetus of the Reform Act of 1832 was evidently not based on a theory of the separation of powers.[40]

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37 *Ibid.* Also see *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (First Certification case)* 1996 (4) SA 744 (CC) 811C-E, where the Constitutional Court stated that checks and balances contained in the 1996 Constitution evidence a concern for both the over- concentration of power and the requirement of an energetic and effective, yet answerable, executive.

38 Wiechers *Administrative Law* 270.

39 P Jackson and P Leopold *Constitutional and Administrative Law* (8ed) (2001).

40 *Ibid.*

In the absence of a written constitution, there was no formal separation of powers in the English common law. While the absence of judicial review of Acts of Parliament may have looked like a separation of powers, it was not based on a theory of that kind but expressed the doctrine of the sovereignty of Parliament.[41] However, the system in application still exhibited characteristics of what was accepted as the separation of powers in all of Continental Europe. The organization of the English government into three tiers was easily apparent.[42] The tiers were however unequal because the English system was based on Parliamentary supremacy, thus Parliament, composed of the Legislature and the Executive occupied a more superior role to the Judiciary.[43] There were, however, extensive efforts made to secure the independence of the Judiciary. Thus, English law did not apply the orthodox separation of powers, instead English law applied an abridged for of the separation of powers. Regardless of this, the separation of powers was instrumental in the development of the duty to exhaust internal remedies in Administrative law.[44]

#### 2.5.1.2.1. The separation of powers and the duty to exhaust internal remedies in the English law

While the orthodox separation of powers was not applied in the English common law, the abridged form which was applied still had a significant impact on the development of the duty to exhaust internal remedies. That abridged version centered on Parliamentary sovereignty and as a consequence, the subservient role which courts played in the legal system. This was compounded by the fact that the English common law was applied under the Westminster system of Parliamentary Sovereignty which meant that the Legislature, essentially being composed of Parliament, assumed

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41 P Jackson and P Leopold *Constitutional and Administrative Law* (8ed) (2001) 27.

42 ECS Wade and AW Bradley *Constitutional and Administrative Law* (10ed) (1985) 58-59.

43 C Turpin (4ed) *British Government and The Constitution: Text, Cases and Materials* (1999) 40ff. Also see P Jackson and P Leopold *Constitutional and Administrative Law* (8ed) (2001) 27-28.

44 See *R v Leicester Guardians* [1899] 2 QB 632 at 638-639.

a superior role among the three tiers of government.[45] Thus, there was no equality among the three tiers of government as prescribed by the separation of powers doctrine.[46] Consequently, the system of checks and balances which lies at the root of the separation of powers doctrine was inefficient.[47] The Judiciary, the ultimate check in the separation of powers system could only check the actions of the Legislature to the extent mandated not by the separation of powers proper applied, but often by the Legislature.[48] This was worsened by the fact that this period coincided with an era when the Judiciary was emasculated and made no moves to challenge any legislative enactments.[49] In the absence of an efficient check system the Legislature could exceed its jurisdiction under the separation of powers doctrine without consequence. Thus, while the abridged separation of powers applied under the English law made provision for the independence of courts, it also made them subject to the nuances of Parliament.

Despite this, it was the application of this abridged separation of powers, particularly in the enforcement of ouster clauses that led to the judicial realization that there was a growing need for the implementation of a principle that would empower courts to extend their review jurisdiction to matters that may have fallen under the purview of the Legislature through statutory remedies. This was inspired, to a significant extent, by the developments arising from the growth of the Diceyan rule of law which directed that courts that were the protectors of civil liberties.[50] Thus, courts had to function as

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45 See L Mulcahly and J Allsop 'A Woolf in Sheep's Clothing? Shifts Towards Informal Resolution of Complaints in the Health Service' in P Leyland and T Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 107, who contend that the English legal system was premised on a top-down approach in which Parliament and the Legislature assumed supremacy.

46 *Ibid.*

47 JF McEldowney *Public Law* (1998) 142-143.

48 M Radford 'Mitigating the Democratic Deficit? Judicial Review and Ministrerial Accountability' in P Leyland and T Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 34.

49 See P Leyland and T Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997). For general discussion see HRW Wade *Constitutional Fundamentals* (1980).

50 JF McEldowney *Public Law* (1998) 176-180 notes that the Diceyan theory was plagued by flaws but early theorists applied his 'conclusions without ever evaluating the reasoning through which those conclusions were reached.' One such conclusion was that courts were the protectors of civil liberties. Also see C L'Heureux-Dube 'The 'Ebb' and 'Flow' of Administrative

the primary review body over any disputed matters. This empowered the Judiciary to exercise a supervisory jurisdiction over all exercises of public power. This culminated in the sentiment that:

> 'In matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of the Executive, tribunals and other officials exercising public functions and to afford protection to the right of the citizen. Legislation which deprives them of this power is inimical to the principle of the rule or supremacy of law.'[51]

These developments culminated in the evolution, from the concept of ouster clauses, of the duty to exhaust internal remedies.[52] The duty to exhaust internal remedies easily lent itself as a legal mechanism which acknowledged the supremacy of Parliament and its legislation. This was because the duty to exhaust internal remedies did not make the judiciary's review function absolute. Courts were still precluded from exercising their review jurisdiction in matters of policy. Where the Legislature legitimately excluded courts' review jurisdiction for reasons of policy courts would honor such exclusion of their jurisdiction.[53] Despite this, the duty to exhaust internal remedies still protected the status of courts as the final arbiters in matters of law.[54] Courts would determine how to proceed based on a consideration of the interests of justice. Thus, the separation of powers doctrine despite the abridged form it assumed in the English law was critical to the creation and development of the duty to exhaust internal remedies.

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Law on the 'General Question of Law' in M Taggart (ed) *The Province of Administrative Law* (1997) 328-330.

51 SA de Smith, H Woolf and J Jowell *Administrative Action* 231.

52 See the discussion above.

53 JF McEldowney *Public Law* (1998) 176. This is reasoning which persists in modern day English law, and in *R v Panel on Take-Overs and Mergers, ex p. Guinness p.l.c.* [1990] 1 QB 146 at 147 the court took the approach that 'if Parliament has provided an appeals procedure, it is not for the courts to usurp the functions of the appellate body.' Also see S de Smith and R Brazier *Constitutional and Administrative Law* 8 ed (1998) 571.

54 F Donson 'Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights' in P Leyland and T Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 345. Also see T Fordham 'Surveying the Grounds: Key Themes in Judicial Intervention' in P Leyland and T Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 184.

### 2.5.2. Ripeness

Another rationale for the development of the duty to exhaust internal remedies is that the rule was relied on in the determination of the ripeness of disputes. It has already been established that ripeness is concerned with whether a dispute is ready for adjudication.[55] Courts used the duty to exhaust internal remedies as a tool to filter the number of cases that landed in court.[56] The rational for this as Lewis notes was that:

> 'The public interest dictates that judicial review should be exercised speedily, and to that end it is necessary to limit the number of cases in which judicial review was used.'[57]

Reliance on the duty to exhaust internal remedies meant that only matters 'ripe' for adjudication would be heard in court. It granted to courts the discretion to determine matters that were amenable to judicial resolution.[58] The duty to exhaust internal remedies granted to courts the discretion to refuse judicial redress where adequate internal remedies existed and the aggrieved party failed to use the internal remedies.[59] Of course this was qualified depending on the specific circumstances of each case as well as a consideration of justice. Thus, only premature applications would be filtered out.

Ripeness was particularly important in cases where the applicants had a cause of action based on the same facts. If each aggrieved party were allowed to have access to court this would clog the court system. This argument was the floodgates argument, which for example, instructed the court in *Clegg v Earby Gas Company*.[60] The facts of

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55 See the discussion in Chapter one.

56 See Lewis *Judicial Review* 410-411 and C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138. Also see Wade and Forsyth *Administrative Law* 688. Also see SA de Smith, H Woolf and J Jowell *Principles of Judicial Review* (1999) 566 who argue that 'it is important that the process should not be clogged with unnecessary cases which are perfectly capable of being dealt with in another tribunal.

57 See Lewis *Judicial Review* 410-411.

58 For more on this, see Wade and Forsyth *Administrative Law* 688-691.

59 See Lewis *Judicial Review* 409.

60 [1896] 1 Q.B. 592.

the case were that, the plaintiffs had sought damages from the defendants for breach of contract to supply gas continuously as required by the plaintiffs and in accordance with the Earby and Thornton Gas Order (1894) which incorporated the provisions of the Gasworks Clauses Act.[61] The plaintiffs alleged that on certain days, no gas had been supplied and on other days only a deficient and impure supply at less than the prescribed pressure had been given. Alternatively, the plaintiffs sought damages for breach of the defendant's statutory duties under the Earby and Thornton Gas Order (1894) and the Act confirming the same, and under the Gasworks Clauses Acts. Wills J presiding over the case found that the case of the plaintiffs had to fail, and he held:

> 'This is one of those cases in which the principle applies that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by statute...the action fails on the principle that where there is an obligation created by statute to do something for the benefit of the public generally...and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner...there is no separate right of action to every person injured by breach of the obligation.'[62]

Internal remedies were therefore used to filter cases to ensure that whatever limited judicial review that was possible was not rendered useless by an unmanageable volume of cases clogging the court system. The issue of ripeness is critical to establishing 'why' the duty to exhaust internal remedies developed in the manner it did.

### 2.5.3. Specialty rule

The third rationale for the duty to exhaust internal remedies was that courts declined to hear matters where they were convinced that internal remedies within the

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61 Gasworks Clauses Act, 1871 (34 & 35 Vict. C. 41), s. 11.

62 *Clegg v Earby Gas Company* 594-595. Wright J presiding over the same case echoed the sentiments of Willis J and endorsed the approach in *Doe v Bridges*.

Administration, being specialized, were better suited to resolve some disputes.[63] Making this point, L'Heureux-Dube[64] argued that:

> 'the specialist tribunal to which the legislature entrusted primary responsibility for the administration of a particular programme is often better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language. Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the frontline agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law.'

Courts therefore would exercise their discretion to restrict their jurisdiction on this ground.[65] The fact that a right to judicial review persisted and supervised the internal dispute resolution mechanisms was used to manipulate and inspire aggrieved parties into placing reliance on such remedies. This approach assumed a form much like modern day judicial deference discussed previously.

This third rationale emerged much later than the previous two. It was a justification which emerged after the qualification of the principle in *Doe v Bridges* had been accepted. It arose after the recognition of the fact that it was often a better avenue of relief to have the administration resolve its own disputes.[66] The administration was better placed to resolve such disputes. Thus, justice was often to be found through internal remedies rather than external controls. This recognition of the specialty of internal dispute resolution mechanisms shaped the manner in which courts approached the duty to exhaust internal remedies.

## 2.6. Conclusion

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63 See Lewis *Judicial Review* 411 who notes that internal bodies possess 'additional expertise' citing examples tax and employment cases to illustrate his point. Also see further Wade and Forsyth *Administrative Law* 688-691.

64 C L'Heureux-Dube 'The 'Ebb' and 'Flow' of Administrative Law on the 'General Question of Law' in M Taggart (ed) *The Province of Administrative Law* (1997) 311.

65 Wade and Forsyth *Administrative Law* 688-691.

66 See Wade and Forsyth *Administrative Law* 692.

The duty to exhaust internal remedies evolved from developments in the judicial approach to ouster clauses.[67] This was a necessary consequence brought about by differing factors, most prominently, the desire to advance the tenets of justice. In some instances internal dispute resolution mechanisms prescribed by statute were not well suited to resolve some disputes. In such instances the interests of justice demanded that the aggrieved party have their dispute resolved in the formal courts.[68]

To a significant extent the formulation of the duty to exhaust internal remedies was also motivated by the development of different views to the separation of powers doctrine.[69] These views saw merit in the application of a more qualified approach to the separation of powers. This had a trickle-down effect, and ultimately led to the qualification of the duty to exhaust internal remedies.

After this initial phase, which saw the development of duty to exhaust internal remedies, the duty grew to be an independent aspect of the law.[70] It was this English common law duty to exhaust internal remedies, accepting of qualifications at the instance of the courts that came to be adopted into the South African law. At the time of such adoption, its formulation was to a large extent complete. The ensuing chapter follows on this discussion by delving into the South African common law roots of the requirement.

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67 See the cases above such as *Doe v Bridges*; *Stevens v Jeacocke*; *Marshall and Another v Nicholls* and *Barraclough v Brown*.

68 See *Cooper v Whittingham* and *Devonport Corporation v Tozer*.

69 G Carpenter *Introduction to South African Constitutional Law* (1987) 157.

70 See *Lamplugh v Norton*; *Cooper v Whittingham*; *Pasmore v Oswaldtwistle Urban District Council*; *Devonport Corporation v Tozer*.

# Chapter Three

# EXHAUSTION OF INTERNAL REMEDIES IN SOUTH AFRICAN COMMON LAW

*'The circumstances in which the court will allow judicial review in the face of an alternative remedy 'defy definition!''*- Lord Donaldson[1]

## 3.1. Introduction

The adoption and development of the duty to exhaust internal remedies into South African common law was shrouded in confusion and uncertainty. Clarity only descended three decades pursuant to the initial adoption of the duty to exhaust internal remedies. This chapter assesses the adoption, application and development of the duty to exhaust internal remedies into South African law. The chapter has two main objectives. Firstly, it examines the adoption of the duty to exhaust internal remedies into South African law. Secondly, the chapter assesses the application and development of the duty to exhaust internal remedies in the South African common law until the inception of PAJA. This discussion is critical to the comprehension of the contemporary duty to exhaust internal remedies insofar as it lays the base and foundation for the discussion of the contemporary duty to exhaust internal remedies.

## 3.2. Adoption into South African law

Due to the English law influence on the South African law of the time, the adoption of the duty to exhaust internal remedies into South African law occurred in two phases. The first phase featured the realization, as was the case with the English law, that there needed to be, in addition to ouster clauses, a provision for the duty to exhaust internal remedies. Thus, the initial phase in the adoption of the duty to exhaust internal

1 *R v Panel on Takeovers and Mergers, ex parte Guinness Plc* [1986] 1 QB 146 at 178.

remedies consisted of the realization that there was a gap in the South African law which could be filled by adopting the duty to exhaust internal remedies. The second phase consisted of the actual adoption of the duty to exhaust internal remedies.

### 3.2.1. Phase one: *Madrassa Anjuman Islamia v Johannesburg Municipality*

The first phase in the adoption of the duty to exhaust internal remedies into South African law occurred in the case of *Madrassa Anjuman Islamia v Johannesburg Municipality.*[2] *Madrassa Anjuman Islamia v Johannesburg Municipality* dealt with the question of whether special remedies in statute would exclude all other remedies. There was a longstanding common law presumption rooted in the English law which directed courts to exclude their own jurisdiction in instances where statute created special remedies. The majority judgment of the case was scripted by Kotze JA. Kotze JA realized that the court *a quo* had applied the presumption that special remedies in statute would exclude all other remedies too strictly, following in the steps of *Doe v Bridges* of the English law. This created the potential problem that the Legislature would have power to determine whether or not an aggrieved party could seek judicial relief. Kotze JA sought a more adaptive and less stringent application of the rule and he held:

> 'To my mind, it is more in keeping with principle and authority to state the canon of construction in the following terms. If it be clear from the language of a statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by statute will be cumulative.'[3]

Solomon JA in the minority judgment encountered similar problems with the principle to the extent that it barred access to judicial review. Solomon JA expressed discomfiture with this position of the law because it gave the Legislature unfettered power to determine when aggrieved parties could approach courts. Regardless of this,

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2 *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 (*Madrassa*).
3 *Madrassa* at 727.

he took a stricter approach to the problem, citing binding precedent in support of adopting a strict application of the principle.[4] He held that the provision of statutory remedies either expressly or impliedly, would exclude or replace other ordinary remedies. The best he could do was emphasize the exception to the rule that where ancillary relief in the form of an interdict would render the statutory remedy more effective, then it could be assumed that such relief had not been excluded by statute.[5]

#### 3.2.1.1. The problem highlighted in *Madrassa Anjuman Islamia v Johannesburg Municipality*

*Madrassa Anjuman Islamia v Johannesburg Municipality* highlighted the problem in the law that the jurisdiction of the courts could be totally excluded on the basis of the common law presumption that the provision of express statutory remedies excluded other remedies. Although this was a valid position of the law, *Madrassa Anjuman Islamia v Johannesburg Municipality* occurred prior to the adoption of the duty to exhaust internal remedies. Being the only available principle canvassing the area, the common law presumption that the provision of express statutory remedies excluded other remedies was being applied to all perceivable circumstances. Aggrieved parties were therefore forced to place reliance on internal remedies in all circumstances where specific remedies were expressly or impliedly provided for in statute. Courts of law in that era, largely adopted a positivistic approach to law, particularly statutory law.[6] The possibility of judicial review was therefore excluded.

This was an untenable situation. There were significant differences between the situations to which the common law presumption that the provision of express statutory remedies excludes other remedies and the duty to exhaust internal remedies applied. There was a pressing need to introduce to the South African law, the duty to exhaust internal remedies. The English law had established that the duty to exhaust internal remedies would oblige aggrieved parties to exhaust internal remedies as per

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4 *Madrassa* at 722.
5 *Madrassa* at 725-727.
6 J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 181.

the statutory directive but would also retain the jurisdiction of the courts where this was in the interests of justice.[7] Thus, the role of *Madrassa Anjuman Islamia v Johannesburg Municipality* in the adoption of the duty to exhaust internal remedies was twofold. Firstly, the case highlighted the discrepancy in the law. Secondly, the case motivated the adoption of the duty to exhaust internal remedies.

This is a novel approach to take to *Madrassa Anjuman Islamia v Johannesburg Municipality*. The case is traditionally relied on as authority for the position that specific statutory remedies exclude other remedies.[8] The accuracy of that manner of approaching the case is not questioned. What is argued is that *Madrassa Anjuman Islamia v Johannesburg Municipality* aside from its normally ascribed status[9] was the case that initiated the process of the adoption into South African law of the duty to exhaust internal remedies. A corollary point to note is that it was the judges who sat on the bench in *Madrassa Anjuman Islamia v Johannesburg Municipality* who eventually adopted the duty to exhaust internal remedies into South African law four years later.

### 3.2.2. Phase two: *Shames v South African Railways and Harbours*

As with the English law, the duty to exhaust internal remedies evolved from the obligation to rely strictly on statutory remedies stemming from ouster clauses.[10] The opportunity to remedy the problem highlighted in *Madrassa Anjuman Islamia v Johannesburg Municipality* arose and was taken in *Shames v South African Railways and Harbours* which is credited with being the case which adopted the duty to exhaust internal remedies into the South African law. The duty to exhaust internal remedies as it was formulated in *Shames v South African Railways and Harbours* was:

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7 See the discussion in Chapter two.

8 See JR de Ville *Judicial Review* 471. Also see Baxter *Administrative Law* 723-725 and Hoexter *Administrative Law* 300-302.

9 This refers to the status of *Madrassa* as the case that bore the requirement that the provision of special remedies in statute excluded other remedies.

10 See *Madrassa Anjuman Islamia v Johannesburg Municipality* at 724-725.

'If a statute in terms of which a particular administrative act had been performed envisaged that a person aggrieved by the act should have only the remedies provided by the statute, then that aggrieved person had no right of recourse to the courts.'[11]

Like its English law predecessor, this duty to exhaust internal remedies was qualified by the exception in the English case of *Cooper v Whittingham*.[12] The exception was that:

'Where the functionary who performed the administrative act failed to comply with the relevant statutory procedure or acted in bad faith, judicial review proceedings could be sought after all statutory remedies had been exhausted.'[13]

The effect of this rule in *Shames v South African Railways and Harbours* was that:

'The court's jurisdiction...was not ousted but rather, was deferred until the internal remedies available to an aggrieved party were exhausted. 'Conversely, if the relevant statute did not restrict an aggrieved person to the remedies provided by that statute (or if the statute did not provide any remedies at all), review proceedings could presumably be initiated on any grounds and within the parameters recognized by the common law.'[14]

*Shames v South African Railways and Harbours* therefore ensured the retention of the courts' review jurisdiction over most administrative action. However, judicial review was only possible after an aggrieved party had exhausted *all* possible internal remedies. Solomon JA opined:

'The question still remains at what stage of the proceedings it is competent for an aggrieved servant to have recourse to a court of law. Is he entitled to do so at the initial stage, so soon as a penalty has been inflicted upon him, or only at the final stage when he has exhausted all the remedies which under the Act are open to him?...It is only if irregularity or illegality has been persisted in up to the final stage that it is competent to the servant to take legal proceedings. For *non constat* that, if he had appealed to the various tribunals which under the Act are open

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11 See DM Pretorius 'The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law' (1999) 116 *SALJ* 113 at 118.

12 15 Ch. 501.

13 Also see *Shames v South African Railways and Harbours*; See too Pretorius 'Wisdom' 118.

14 *Ibid.*

> to him...so that until a final decision had been given adverse to him, there is no necessity or justification for him to have recourse to the ordinary courts of law. That is a course which is reserved to him as a last resort.'[15]

While the duty to exhaust internal remedies protected the review jurisdiction of the judiciary, it did not give courts unlimited jurisdiction to delve into matters of the administration. Courts had to defer their review jurisdiction until internal avenues put in place by the administration were fully explored.

#### 3.2.2.1. Endorsement of *Shames v South African Railways and Harbours*

The decision in *Shames v South African Railways and Harbours* found early endorsement in the case law that followed. One of the earliest cases to endorse *Shames v South African Railways and Harbours* was *Nunn v Pretoria Rent Board.*[16] In *Nunn v Pretoria Rent Board* Barry J quoted *Shames v South African Railways and Harbours* with approval and held that a matter could only be brought to court after all possible avenues available to resolve a dispute had been exploited. He held that even if the aggrieved party complained of gross irregularities of procedure, such party was still bound to appeal to *all* possible appellate tribunals granted by statute.[17]

*Shames v South African Railways and Harbours* was also endorsed in *Ballinger and another v Hind NO and another*[18] where the court dealt with a matter concerning an application for the review of a decision by the Chief Electoral Officer. In *Ballinger and another v Hind*, the statute in question made provision for an appeal from the Chief Electoral Officer to a judge in chambers. The court held that it would be unreasonable for a party to rush to court before having exhausted his or her statutory remedies.[19]

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15 *Shames v South African Railways and Harbours* at 235-236.

16 *Nunn v Pretoria Rent Board* 1943 TPD 24.

17 *Nunn v Pretoria Rent Board* at 27. See however, the challenge to this position in *Slade v Pretoria Rent Board* 1943 TPD 131 and in *Golube v Oosthuizen and Another* 1955 (3) SA 1 (T) at 4 where De Wet J expressed the view that *Nunn v Pretoria Rent Board* is a doubtful authority. Also see *Main Line Transport v Durban Road Transportation Board* 1958 (1) SA 65 (D) at 72A-72E.

18 1951 (2) SA 8 (W).

19 *Ballinger and another v Hind NO and another* at 11D-E. Also see *Klemp v Mentz NO and*

Thus, *Shames v South African Railways and Harbours* as endorsed by the early cases bore the duty to exhaust internal remedies as it was applied in the early South African common law.

For some time it was erroneously considered that *Jockey Club of South Africa and Others v Feldman*[20] had endorsed *Shames v South African Railways and Harbours. Jockey Club of South Africa and Others v Feldman* dealt with the disciplinary action of a jockey by a private tribunal. Centlivres JA in what seemed the majority judgment took a firm stance in support of the judgment in *Shames v South African Railways and Harbours*. The learned judge held:

> 'that the requirement that a litigant should exhaust his remedies is not novel and has been applied in cases coming from inferior courts of law...There is, I think, a great deal to be said in favour of the requirement, for the other remedies open to the litigant are as a rule cheaper and more expeditious than the remedies at law. There does not seem to be any reason in principle why this requirement should no be enforced both where the Legislature has provided other remedies and where the parties by agreement have provided other remedies.'[21]

However, it later emerged that the case report of *Jockey Club of South Africa and Others v Feldman*, erroneously quoted Centlivres JA's judgment as the majority judgment by incorrectly indicating that other presiding judges[22] had concurred with Centlivres JA's judgment. The correct position was that Centlivres JA's judgment had been in the minority. In fact, it was with Tindall JA's judgment that the majority of the bench had concurred.

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*Others* 1949 (2) SA 443 (W) the court dealt with a matter that concerned an application for declaration of invalidity of an election of shaft stewards of a trade union and interdicts. The legislation provided for an appeal from the Registrar to the Minister and finally to court. The court held that it was not possible to approach the court before having appealed to the Minister and therefore exhausted all the remedies. The case however made no reference to *Shames v South African Railways and Harbours*. Its approach to the matter was consistent however with that in *Shames v South African Railways and Harbours*.

20 1942 AD 340.

21 *Jockey Club of South Africa and Others v Feldman* at 362.

22 Wet CJ, Watermeyer JA and Feetham JA.

Tindall JA's judgment went only as far as to ratify the adoption of the duty to exhaust internal remedies into South African law. However, Tindall JA took a different approach to that of Solomon JA in *Shames v South African Railways and Harbours*. Tindall JA distinguished between the duty to exhaust internal remedies applied to the public administration and the duty applied to private organisations.[23] He noted that with private organisations, the mechanisms for internal remedies were very often well structured and well equipped to adequately resolve administrative disputes in a manner that adequately mirrored the court function. Aggrieved parties placing reliance on such remedies would therefore be treated in a just manner. To illustrate his point, Tindall JA referred to *Crisp v South African Council of the Amalgamated Engineering Union*[24] and prescribed the correct manner in which the case was to be read.[25] In *Crisp v South African Council of the Amalgamated Engineering Union* the Appellate Division had dealt with the exhaustion of internal remedies paying particular regard to the constitution of the respondent, a voluntary association.[26] Wessels JA in that case and held:

> 'In that class of case the Legislature provides that the complainant should resort to certain tribunals to remedy his grievances, and as long as these do their statutory duty the courts of law will not interfere. In these cases Parliament enjoins upon the person aggrieved a certain definite procedure and the courts of law are obliged to see that the expressed will of the Legislature is carried out.'[27]

Tindall JA highlighted that in the state administration internal remedies were not always efficient. The possibility of attaining justice placing reliance on such remedies was minimal or at the very least, such remedies were not as efficient as those in private organisations. He held therefore that this was a factor that had to be considered when the duty to exhaust internal remedies was applied.

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23 See *Jockey Club of South Africa and Others v Feldman* at 352.
24 1930 AD 225.
25 See *Bindura Town Management Board v Desai and Co* 1953 (1) SA 358 (A) 351.
26 Also see *Main Line Transport v Durban Road Transportation Board* at 71F.
27 *Crisp v South African Council of the Amalgamated Engineering Union* at 225.

The actual precedent to emerge from *Jockey Club of South Africa and Others v Feldman* was that: 'whether there was a duty to first exhaust internal appeal was to be answered with reference to the terms of the statute or agreement.'[28] Each case had to be considered on the merits and a consideration of the context, such as the adequacy of the internal remedies and the interests of justice. Tindall JA established therefore that an aggrieved party was not bound from the onset to exhaust all the internal remedies prior to seeking judicial redress as Solomon JA had stated in *Shames v South African Railways and Harbors*.

## 3.3. Development in South African law

The development of the duty to exhaust internal remedies was initiated by *Jockey Club of South Africa and Others v Feldman*. However, because of the erroneous case report, such change went unnoticed in the succeeding years. It was in *Bindura Town Management Board v Desai and Co*[29] that the changes and development became apparent culminating in the judgment in *Welkom Village Management Board v Leteno*.[30] These were the changes which shaped the duty to exhaust internal remedies until and even after the emergence of the constitutional dispensation.

### 3.3.1. Period of change: *Bindura Town Management Board v Desai and Co*

The court in *Bindura Town Management Board v Desai and Co*[31] identified the discrepancy in *Jockey Club of South Africa and Others v Feldman*. The court distinguished *Jockey Club of South Africa and Others v Feldman* from *Shames v South African Railways and Harbors*. *Bindura Town Management Board v Desai and Co* then interpreted and correctly applied *Jockey Club of South Africa and Others v Feldman* citing as authority, the majority judgment of Tindall JA. Van den Heever JA in *Bindura Town Management Board v Desai and Co* held that:

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28 *Jockey Club of South Africa and Others v Feldman* at 351-352.
29 See footnote 25.
30 1958 (1) SA 480 (A).
31 *Bindura Town Management Board v Desai and Co* at 362H.

> 'It is not suggested in either *Shames*' case or in the *Jockey Club* case that there is a general rule that a person who considers that he has suffered a wrong is precluded from having recourse to a court of law while there is hope of extra-judicial redress. It must be remembered that in those cases the matter to be determined was a dispute between an individual and an organisation of which he was a member, an organisation which had domestic tribunals for the settlement of disputes...In the former case the organisation was a State department against which the individual had in that particular instance no redress save in so far as he was protected by statute. In the latter cases a somewhat similar situation arose in a private organisation. In such circumstances an implied intention (statutory in the one case, conventional in the other) entirely to exclude recourse to the courts or at least until recourse to domestic tribunals has proved unavailing, may suggest itself.'[32]

This judgment therefore set the tone for a new approach to the application of the duty to exhaust internal remedies. The application of the rule was not to be conducted in a vacuum. Consideration had to be given to other corollary factors such as the efficacy of the remedies.

These were matters that the court in *Golube v Oosthuizen and Another*[33] sought to achieve finality on. The facts of *Golube v Oosthuizen and Another* were that the respondent, Oosthuizen as the superintendent of the Bethal 'location' was sued by the applicant Golube, who alleged that on a number of occasions the respondent had refused to allow him permission to enter the location. The respondent's response was that the applicant was well-known to him as a member of the African National Congress who habitually addressed meetings with the object of 'stirring up opposition to any laws affecting natives.' The respondent averred that he believed in good faith that the applicant would cause trouble in the location if allowed to enter. The respondent raised a preliminary objection to the hearing of the application on the ground that the applicant had not exhausted his statutory remedies, by appealing to Town Council, before approaching the court. De Wet J held:

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32 *Bindura Town Management Board v Desai* at 362.

33 1955 (3) SA 1 (T) 362.

> 'It is clear from the subsequent cases that the court did not lay down in general terms that an aggrieved person's right of recourse to a court of law is necessarily barred wherever there are extra-judicial remedies available to him.'[34]

And further that:

> 'There [does not] seem to be any authority that the Court is entitled to refuse to entertain a suit which it in fact has jurisdiction to entertain on the ground that it would be more reasonable for the suitor to have recourse to some other tribunal, whether judicial or extrajudicial...The mere fact that the legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a court of law should be barred until the aggrieved person has exhausted in statutory remedies.'[35]

Thus, the precedent set in *Jockey Club of South Africa and Others v Feldman* and recognised in *Bindura Town Management Board v Desai and Co* had changed the application of the duty to exhaust internal remedies. Such change culminated in the decision in *Welkom Village Management Board v Leteno.*

### 3.3.2. A new era: *Welkom Village Management Board v Leteno*

In *Welkom Village Management Board v Leteno* the Appellate Division ushered in a new era so far as the duty to exhaust internal remedies was concerned. The case built on and gave finality to the issues that had arisen in the law since the initial discontent voiced in *Jockey Club of South Africa and Others v Feldman* and endorsed in *Bindura Town Management Board v Desai and Co. Welkom Village Management Board v Leteno* was a proactive move by the judiciary to reclaim review authority in the face of various legislative provisions which sought to oust the jurisdiction of the courts.

*Welkom Village Management Board v Leteno* dealt with a matter concerning with the revocation of a certificate (trading permit) issued to the applicant. In a move staunchly departing from the position in *Shames v South African Railways and Harbours*, and

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34 *Golube v Oosthuizen* at 3.
35 1955 (3) SA 1 (T) at 4F-G.

entrenching the position in *Bindura Town Management Board v Desai and Co* the Appellate Division led by the majority judgment of Ogilvie Thompson JA reformed the law and advocated an approach strongly protective of the review jurisdiction of the courts. He held that:

> 'Whenever domestic remedies are provided by the terms of a statute, regulation, or conventional association, it is necessary to examine the relevant provisions in order to ascertain how far, if at all, the ordinary jurisdiction of the courts is thereby excluded or deferred...[36] The rule of *Shames*' case...accordingly is that the courts' jurisdiction is excluded only if that conclusion follows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication...[37] The necessary implication in question can seldom, if indeed ever, arise when the aggrieved person's very complaint is the illegality or fundamental irregularity of the decision which he seeks to challenge in the courts.[38]

Ultimately, the precedent set by *Welkom Village Management Board v Leteno* dictated that there was no duty to exhaust *all* internal remedies prior to seeking judicial redress as had been advocated in *Shames v South African Railways and Harbours*. Courts could exempt an aggrieved party from such duty to exhaust internal remedies based on a consideration of both the interests of justice and the circumstances of each case. Such approach was justified with reference to the strong presumption against interference with the jurisdiction of the courts. De Ville makes the point that while reliance has often been placed on *Shames v South African Railways and Harbours* as the bearer of the principle in law that extra-judicial remedies first need to be exhausted before seeking judicial redress, the *dicta* in *Welkom Village Management Board v Leteno* has proved to be stronger.[39]

In *Main Line Transport v Durban Road Transportation Board*[40] Henochsberg J drawing authority from cases that followed the approach by Tindall JA in *Bindura Town*

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36 *Welkom Village Management Board v Leteno* at 502C-502H.
37 *Welkom Village Management Board v Leteno* at 502G-502H.
38 *Bindura Town Management Board v Desai and Co* at 503D.
39 JR de Ville *Judicial Review* 466.
40 See footnote 17.

*Management Board v Desai and Co* and on *Welkom Village Management Board v Leteno* held that there is always a strong presumption against a statute being construed to oust the jurisdiction of the court completely.[41] Henochsberg J opined that 'the remedy of applying to court for redress where a person's fundamental rights have been disregarded has long been in existence and the mere creation of a statutory right of review and appeal could not be regarded as an indication on the part of the Legislature to take away that remedy and as entirely ousting the jurisdiction of the court in such cases.'[42]And in *Local Road Transportation Board and Another v Durban City Council and Another*[43] Holmes JA added to this, holding that the same reasoning as applied to irregularities and illegalities would similarly apply 'where the exigencies of the situation in which the aggrieved person finds himself, as a result of the irregularity or illegality, renders problematical the effectiveness of recourse to the statutory remedy of appeal.'[44]

Similarly, in *Mahlaela v De Beer NO*[45] a township superintendent decided not to allocate the applicant a house in the township. Instead of appealing to the development board, the applicant applied for judicial review of the decision. Stafford J held that an appeal to the board would have been useless because the Board had already laid down a fixed policy that houses were not to be allocated.[46] Critically, Stafford J in *Mahlaela v De Beer NO* held that:

> '[T]he mere existence of a domestic remedy does not conclude the question. The necessary implication can seldom, if ever, arise when the aggrieved person's very complaint is the illegality or fundamental irregularity of the decision which he seeks to challenge in the Courts. If the respondent's contention that he was entitled as it were to throw the letter of application back in the applicant's face is wrong in law, then the refusal to allocate a house has been made

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41 *Main Line Transport v Durban Road Transportation Board* at 73G.

42 Also see *Lenz Township Co (Pty) Ltd v Lorentz NO* 1961 (2) SA 450 (A) at 458F-459A.

43 1965 (1) SA 586 (A). Also see *Shah and Another v Minister of Education and Culture and Others* 1989 (4) SA 560 (D) at 573G-574A; *Ndara v Umtata Presbytery and Others* 1990 (4) SA 22 (Tk) at 25D-27B; *Blacker v University of Cape Town and Another* 1993 (4) SA 402 (C) at 413I-413J.

44 *Local Road Transportation Board and Another v Durban City Council* at 594C-594D.

45 1986 (4) SA 782 (T) at 790F-790H.

46 *Mahlaela v De Beer NO* at 790I.

without applicant having been given an opportunity of being heard. This would be a fundamental irregularity. The fact that the applicant has an option to appeal does not mean he has an obligation to do so. That obligation he only has if the right to approach this Court has been taken away or deferred, until he has exhausted those remedies.'[47]

*Welkom Village Management Board v Leteno* is therefore the common law authority for the duty to exhaust internal remedies. However, the case must be read with regard to the developments in the case law that followed. Collectively, these cases established and entrenched the rule that the duty to exhaust internal remedies under the South African common law was not absolute.

### 3.3.3. Exceptions to the duty to exhaust internal remedies

The changes instituted by *Welkom Village Management Board v Leteno* led to the establishment of various exceptions to the duty to exhaust internal remedies. Because these exceptions were founded on considerations of the interests of justice, they were developed on a case by case basis. For ease of reference, Rose-Innes[48] compiled a detailed list of exceptions which were discernible from the available case law. Thus, aggrieved parties would be exempt from the duty to exhaust internal remedies:

- Where the appellate tribunal had in some way prejudged the issue, the individual concerned was not required to pursue the appeal remedy.[49]
- Where the empowering statute did not make it peremptory that extrajudicial remedies be resorted to, the aggrieved party had an election and would not be required to exhaust the statutory remedy.[50]

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47 *Mahlaela v De Beer NO* at 790F-790H.

48 LA Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 81.

49 Rose-Innes *Judicial Review* 81. *Crisp v South African Council of the Amalgamted Engineering Union*; *Mahlaela v De Beer NO* at 790I-790J. However, the contrary view was expressed in *Director of Education v Lekethoa* 1949 (1) SA 183 (T) at 202. Also see *Director of Education v Wilkinson* 1930 TPD 471.

50 See Rose-Innes *Judicial Review* 83 but note that at 84 Rose-Innes also stated that the court has a discretion to require prior recourse to statutory remedies even in the absence of any legislative intention to lay down such a requirement.

- Where the empowering statute made provision for further administrative action after the offending decision had been made, but such action was in the nature of a remedy which could be invoked by somebody other than the aggrieved party, the latter was not precluded from bringing a review application pending the outcome of such further administrative action.[51]
- Where the inferior tribunal had acquiesced in the review, the court could entertain the review application at any stage before a decision had been given by the tribunal, and before further statutory remedies had been exhausted.[52]
- Where the appellate tribunal concerned did not possess the power to rectify the irregularity complained of or to grant the particular relief sought, that extrajudicial remedy need not be pursued.[53]
- Where the dispute concerned the jurisdiction of an administrative tribunal, which the court had power to decide, a review application could be brought without exhausting statutory remedies.[54]
- And finally, extrajudicial remedies would not need to be resorted to if the 'decision' giving rise to the dispute amounted to no decision at all, or was arrived at fraudulently, or otherwise than as a result of valid proceedings.[55]

Because the exceptions were created on a case by case basis, there was no exclusive list of exceptions. Exceptions were created based on commonsensical considerations. Despite this, certainty in the manner of formulation of the exceptions lay in two aspects. Firstly, the exceptions arose only in *exceptional circumstances*. Thus, an aggrieved party would not lightly be exempted from the duty to exhaust internal remedies. Exceptional circumstances as the term was used at common law did not refer to a specific set of definable circumstances. The term meant any

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51 Rose-Innes *Judicial Review* 84. Also see *Middelburg Rugbyklub v Suid-oos Transvaalse Rugby-Unie en 'n ander* 1978 (1) SA 484 (T) at 488F-G.

52 Rose-Innes *Judicial Review* 85.

53 Rose-Innes *Judicial Review* 85. Also, Wiechers *Administrative Law* 279 pointed out that in *Msomi v Abrahams NO* 1981 (2) SA 256 (N) at 261A-261C it was held that if the internal remedy cannot provide the same satisfaction as judicial review, this strongly indicates an intention that the internal remedy need not be exhausted.

54 Rose-Innes *Judicial Review* 87.

55 Rose-Innes *Judicial Review* 82.

circumstances in which an aggrieved party could not justifiably be expected to rely on internal remedies. That the term was far-ranging is apparent from a perusal of the exceptions.

Secondly, whether or not to grant exemption was a matter determined on the basis of considering the *interests of justice*. The interests of justice like exceptional circumstances were determined on a case by case basis. What was in the interests of justice would be determined on the basis of basic commonsensical considerations based on the motivation of wanting to advance the tenets of justice. That the reigning standard for formulating exceptions was exceptional circumstances and a consideration of the interests of justice was captured in *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*.[56] The court endorsed the view that:

> 'where extra-curial remedies were available to an aggrieved party and such remedies had not been exhausted, courts would at times hear such matters, albeit in *exceptional circumstances* where *grave injustice* would result, or where no other means existed to resolve the dispute.'[57]

These exceptions to the duty to exhaust internal remedies allowed courts to extend their review jurisdiction in pursuit of advancing the tenets of justice. However, this did not mean that courts considered themselves as having unrestricted jurisdiction over all matters. Courts would only extend their jurisdiction on valid grounds based significantly on a consideration of the justiciability of the dispute.[58]

As in the English law, it often transpired that the interests of justice were better served if a particular dispute was resolved internally using internal dispute resolution mechanisms. If that was the case, where an aggrieved party requested the extension of jurisdiction unjustifiably courts would redirect such party to internal remedies. Thus, courts practised judicial deference to advance the interests of justice.[59] For example,

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56 1959 (3) SA 113 (A).

57 See *Wahlhaus and others v Additional Magistrate, Johannesburg and Another* at 119F-120B.

58 See the discussion on common law justiciability in Chapter one.

59 See earlier discussions on judicial deference in Chapters one and two.

in *Netto v Clarkson*[60] a school principal was in the process of deciding whether or not a pupil had been guilty of grave misconduct. While the principal was still in the process of making such determination, the parents of the pupil applied to court, seeking a declaratory order to the effect that the pupil had not in fact been guilty of the grave misconduct cited. In court such order was refused because, *inter alia*, the principal had not yet taken the decision.[61] The parents were redirected to exhaust their internal remedies before they sought a court order.

*Netto v Clarkson* and cases like it exemplified that courts under the South African law common law like their English law predecessors found value in using the duty to exhaust internal remedies as a determining factor of whether to extend their review jurisdiction or not. The advantages of this were twofold. Firstly, the rule acted as a filter mechanism ensuring that matters deserving judicial attention were heard in court. The duty maintained the status *quo* of the time, that is, of courts not imposing their jurisdiction while ignoring statutory directives. These developments of the duty to exhaust internal remedies meant the rule easily lent itself to be used to protect the right of access to court.[62] Courts used the rule to determine whether or not to extend their jurisdiction to matters in which typically, their jurisdiction had been intended to be deferred to the internal remedies of the Public Administration.[63] This did not mean that any dispute in which an aggrieved party alleged illegality would land in court. Whether to interfere or not, was a matter determined on a value judgment based on a consideration of the interests of justice.[64]

## 3.4. Conclusion

The development of the duty to exhaust internal remedies in the South African law essentially continued from the early development experienced in the English common

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60 1974 (1) SA 66 (D).

61 Also see *Wiseman v Nutman* 1940 NPD 349.

62 See *Welkom Village Management Board v Leteno* and *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*.

63 Rose-Innes *Judicial Review* 81.

64 *Ibid*.

law. The duty to exhaust internal remedies assumed a form more suitable to the South African context. This was exemplified by the fact that the application of the duty to exhaust internal remedies took note of the fact that the South African Public Administration was characterized by rampant injustice and a duty to exhaust internal remedies was more tailored to voluntary associations.[65] It was ill advised to impose an indiscriminate obligation to exhaust internal remedies.[66] Such obligation stringently applied would in that context foster growth of administrative injustice. At the very least it would unjustifiably remove the aggrieved party's avenue to seek justice in the formal courts.[67]

The flaws with the South African Public Administration were not however flaws of the duty to exhaust internal remedies.[68] Courts merely needed to be vigilant with the duty to exhaust internal remedies. This motivated the qualification of the duty to exhaust internal remedies in its application to the Public Administration.[69] Thus, aggrieved parties would be obliged to exhaust internal remedies however in exceptional circumstances courts would exempt aggrieved parties from the obligation to exhaust internal remedies.[70] How courts would apply this exemption was a matter determined on a case by case basis depending on the interests of justice.[71] This led to a series of far-reaching and often unconnected exceptions arose to the principle.[72]

This is how the duty to exhaust internal remedies was applied and development in the South African common law. It was this duty to exhaust internal remedies that came to be adopted into statute in the form of section 7(2) of PAJA.

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65 See MG Cowling 'Judges and Human Rights in South Africa: Articulating the Inarticulate Premise' (2004) 3 *SAJHR* 177. Also see DJ Galligan 'Judicial Review and the Textbook writers' (1982) 2 *Oxford Journal of Legal Studies* 257.

66 See *Jockey Club of South Africa and Others v Feldman; Bindura Town Management Board v Desai and Co.* and *Welkom Village Management Board v Leteno.*

67 *Ibid.*

68 *Ibid.*

69 *Local Road Transportation Board and Another v Durban City Council and Another.* Also see *Shah and Another v Minister of Education and Culture and Others*; *Ndara v Umtata Presbytery and Others*; *Blacker v University of Cape Town and Another.*

70 *Ibid.*

71 See for example, *Wahlhaus and others v Additional Magistrate, Johannesburg and Another.*

72 See Rose-Innes *Judicial Review* 81.

# Chapter Four

# THE DUTY TO EXHAUST INTERNAL REMEDIES IN SECTION 7(2) OF PAJA

*'There are areas of law which, by universal consent, can be codified with advantage, and which in the interests of the administration of justice ought to be codified, if practicable'*–HR Hahlo[1]

## 4.1. Introduction

The common law duty to exhaust internal remedies assumed statutory form in section 7(2) of PAJA. This chapter interprets and discusses the duty to exhaust internal remedies as it is formulated in section 7(2) of PAJA. In interpreting the provision, the common law will inform the interpretation of the provision. The common law will also be relied on to draw comparisons between the former common law duty to exhaust internal remedies and section 7(2) of PAJA. The rationale here is that at the inception of the constitutional dispensation, the common law duty to exhaust internal remedies was accepted and applied as being consistent with the Constitution.[2] It follows therefore, that much can be learnt from comparing the common law duty to exhaust internal remedies to section 7(2) of PAJA and assessing to what extent section 7(2) of PAJA has managed to incorporate the duty to exhaust internal remedies under statute.

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1 HR Hahlo 'Here lies the Common law: Rest in Peace' (1967) 30 *Modern Law Review* 241at 243.

2 See *Legal Aid Board v Msila* 1997 (2) BCLR 229 (E); *Radio Islam v Independent Broadcasting Authority and others* Unreported, case no 31448/97; *Baromoto and Others v Minister of Home Affairs and Others* 1998 (5) BCLR 562 (W); *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); *Simela and Others v MEC for Education Province of Eastern Cape and Another* [2001] 9 BLLR 1085 (LC).

Put differently, this chapter has two objectives. Firstly, the chapter interprets section 7(2) of PAJA. Such interpretation where relevant, takes cognizance of and is informed by the available case law. Secondly, the chapter compares the common law duty to exhaust internal remedies to the duty to exhaust internal remedies as it is formulated in section 7(2) of PAJA. For clarity and ease of reference, both the interpretation of section 7(2) of PAJA as well as the comparison of the provision to its common law predecessor will be conducted consecutively. For the sake of completeness, a contrasting and alternative interpretation to section 7(2) of PAJA will be considered.

## 4.2. Scope and ambit of section 7(2) of PAJA

Section 7(2) of PAJA provides:

> '*(a)* Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
> *(b)* Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
> *(c)* A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

To assess the scope and ambit of section 7(2) of PAJA it is critical to consider firstly, the meaning of the term 'internal remedies' and secondly to render a brief overview of the provision.

### 4.2.1. Internal remedies defined

Internal remedies, as provided for in section 7(2) of PAJA, are ways of correcting, reviewing or appealing administrative decisions using the administration itself.[3] As was noted in the introduction to the thesis, the term 'internal remedies' encapsulates:

> '[a]ll those forms of (internal remedies) and appeal which exist in addition to judicial control. These remedies are a means of control over administrative acts which give aggrieved parties a simple, informal and easy means of settling administrative disputes. Judicial control over administrative acts exists in addition to internal control and is in reality a form of control which is foreign to the internal structure and operation of the administration.'[4]

The meaning of the term 'internal remedies' is a matter that was discussed extensively by Plasket J in *Reed and Others v The Master of the High Court and Others* who pointed out that:

> 'The section [section 7(2) of the PAJA] applies to internal remedies, and not simply to any form of potential extra-curial redress...Section 7(2) does not, in other words, place an obligation on a person aggrieved by a decision to exhaust all possible avenues of redress provided for in the political or administrative system–such as approaching a parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker. Similarly, it is not required of an aggrieved person that he or she approach one or more of the Chapter 9 institutions – such as the Public Protector or the Human Rights Commission–prior to resorting to judicial review.'[5]

Simply put, the term 'internal remedies' refers to those remedies which exist in addition to judicial control however, as Plasket J pointed out in *Reed and Others v The Master of the High Court and Others*, this does not include '*any* form of potential extra-curial redress.'

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3 See generally, *Nichols and Another v The Registrar of Pension Funds and Others* (Case no. 467/04).

4 M Wiechers *Administrative Law* (1985) 270.

5 *Reed and Others v The Master of the High Court and Others* at 436a-436c.

### 4.2.2. An overview of section 7(2) of PAJA

What is immediately clear from a *prima facie* reading of the provision is that section 7(2) of PAJA imposes a barrier on aggrieved parties, in disputes arising in the administration, from automatically seeking judicial review over the dispute. In this way, section 7(2) of PAJA limits the right of access to court in section 34 of the Constitution. However, the restriction of access to court seemingly takes the form of deference of the review jurisdiction of the courts until internal remedies have been exhausted.[6] This is because section 7(2) of PAJA qualifies the obligation to exhaust internal remedies making the restriction of access to court conditional. For example, section 7(2)(b) of PAJA enjoins courts to satisfy themselves to the fact that internal remedies are yet to be exhausted. Where courts are not so-satisfied they are under an obligation to re-direct aggrieved parties who would not have exhausted internal remedies to such remedies. Section 7(2)(c) of PAJA allows courts, in what they perceive to be exceptional circumstances, to exempt aggrieved parties from the obligation to exhaust internal remedies. The decision to exempt aggrieved parties from the obligation to exhaust internal remedies must be made based on the widely framed standard of interests of justice.

Despite the fact that the obligation is qualified, because section 7(2) of PAJA limits the right of access to court, questions of the provision's constitutional validity necessarily arise.[7] However, any enquiry into the question of constitutionality is dependant upon a proper and detailed interpretation of the provision. Thus, the interpretation of section 7(2) of PAJA necessarily informs the enquiry on its constitutional validity.

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6 See the discussion of deference in chapter one.

7 Currie and J de Waal *Handbook* 163-164. Also see Plasket *Just Administrative Action* 294.

## 4.3. General note on statutory interpretation and section 7(2) of PAJA

Statutory interpretation under the constitutional dispensation assumed a different form in which the insistence shifted from ascertaining and giving effect to the intention of the Legislature, to purposively seeking the advancement of constitutional values.[8] In *Matiso v Commanding Officer, Port Elizabeth Prison*,[9] the court held:

> 'The interpretive notion of ascertaining the intention of the legislature does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the legislature. This means that both the purpose and method of interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994.'[10]

Thus, a purposive approach is more suited to the constitutional dispensation.[11] This idea was developed in *Minister of Land Affairs v Slamdien*[12] where the Land Claims Court affirmed that:

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8 See GE Devenish *Interpretation of Statutes* (2005); C Botha *Statutory Interpretation: An Introduction for Students* 4 ed (2005) 95-100. Also see L du Plessis *Re-Interpretation of Statutes* (2002) 133ff.

9 *Matiso v Commanding Officer, Port Elizabeth Prison* [1994] 3 BCLR 80 (SE).

10 *Matiso v Commanding Officer, Port Elizabeth Prison* at 87.

11 The Constitution is 'founded on the recognition and acknowledgement of the wrongs of our past and spells out a vision of the future of a transformed society to which the people of South Africa have committed themselves' (see P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 who cites the *Preamble* to the Constitution to support this contention). If the impracticality of laws was a fatal flaw, then the Constitution, to the extent that it prescribes provisions which are unsuited to the South African context, would be ill fated. Here, the right to reasons in Administrative law lends itself as a good example. At common law, there was no duty to give reasons (see Plasket *Just Administrative Action* 465; Baxter *Administrative Law* 741). It was a right that was included in the law at the inception of the constitutional dispensation. Ultimately, it was largely the inclusion of the right in the Constitution and PAJA that coerced the growth and development of mechanisms to ensure that the requirement was satisfied. See further *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 176 (CC) at 194D.

12 1999 (4) BCLR 413 (LCC) at 422D-423D. In *Minister of Land Affairs v Slamdien* at 423C-423D, Dodson J also noted that the common law presumptions of interpretation have a role to play in purposive interpretation of constitutionally mandated legislation. Currie and Klaaren *Benchbook* 20 note that this is an important point with respect to PAJA. They note that: 'at least one of the presumptions in favor of continuity- that Parliament does not intend to diminish existing rights- therefore applies with some force to the Act. A similar presumption- that Parliament does not intend to change the common law- has a much narrower field of operation when it comes to PAJA.'

'The purposive approach as elucidated in the decisions of the Constitutional Court requires that one must...

(ii) have regard to the context of the provision in the sense of its historical origins;

(iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;

(iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated...'

And recently, the leading case law authority on statutory interpretation under the constitutional dispensation is *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism.*[13] Ngcobo J conducted a detailed discussion on the tenor which statutory interpretation should take under the constitutional dispensation and made the comment that:

'The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights is a cornerstone of [our constitutional democracy. The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.'

Ngcobo J succinctly summarised the three factors on which statutory interpretation is based.[14] Firstly, statutory interpretation must advance at least one identifiable value

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13 2004 (4) SA 490 (CC) at 521E-522C, 524D-525A, 527D-H.

14 For a case law overview see further, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) at 558D-558G; *Daniels v Campbell* 2003 (9) BCLR 969 (C) at 985; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 635, 537.

enshrined in the Bill of Rights.[15] Secondly, the statute must be reasonably capable of a constitutional interpretation. Closely linked to this is the fact that where a statute is ambiguous and capable of two interpretations one constitutional and another, unconstitutional, such statute must be accorded the constitutional meaning.[16]

Thirdly, context is still an important consideration in statutory interpretation.[17] To emphasize this point, Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* made the point that:

> 'The statutory text is still read to establish the initial meaning of the legislation. Therefore, the text of the legislation is the starting point in the process of interpretation. The point that seems to be stressed by the Constitutional Court is that the context of the legislation is equally important.'[18]

Mdumbe[19] has conveniently classified context that falls for consideration in statutory interpretation into two separate but equally important components.[20] First is the 'internal context,' which requires the interpreter to read the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it. Thus, all elements of the legislation such as the long title, express legislative provisions, the preamble, the definition clause, and the immediate context should be taken into account right from the outset.[21] Second is the 'external context' which calls on the

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15 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* at 521D-522B.

16 See *Earthlife v Director General: Department of Environmental Affairs and Tourism* at 167I-168A where Griesel J alluded to this approach. A generous approach must also be taken in statutory interpretation. In *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) at 422D-423D the Land Claims Court held that 'where a constitutional right is concerned, [courts must] adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.' Also see *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at 280B-281B.

17 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*; See further Kentridge AJ's judgment in *S v Zuma* 1995 (2) SA 642 (CC) at 650H-653B.

18 F ka Mdumbe 'Has the literal/intentional/textual Approach to Statutory Interpretation been dealt the *coup de grace* at last?' (2004) 2 *Public Law* 474 at 480.

19 Mdumbe 'Statutory Interpretation' 480.

20 On context in interpretation also see GE Devenish *Interpretation of Statutes* (2005) 100-143. Also see the argument on the 'contextual approach' to interpretation in JR de Ville 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs*' 2004 (20) *SAJHR* 577.

21 This approach is not something new: the Constitutional Court has resorted to the long title to

interpreter to consider all factors outside the statutory text which could assist in determining its purpose, for example; the historical origins of the statute, commission reports, the mischief that the legislation seeks to address, common law principles, *in pari material*, dictionaries and other legislation.[22]

It is the three principles laid out by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* discussed above that instruct the interpretation of section 7(2) of PAJA. It is therefore necessary to explore the extent to which they apply to section 7(2) of PAJA. To begin with, the premier constitutional value with regard to the duty to exhaust internal remedies is the extension of justiciability.[23] While this requires no further discussion having already been discussed in the first chapter, other factors particularly with regard to context require further exploration.

With regard to internal context, PAJA is a short statute, therefore it does not offer much by way of internal context. The bulk of the reference to internal context is therefore made to the *preamble* to PAJA which states the purpose of the Act as being to 'promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.'[24]

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determine the purpose of an Act (see *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at 890H-891F. A similar approach was recently adopted by the Cape High Court in *National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (C) at 194C-194E where the court rejected the argument that the preamble, the long title and the short title of an Act can be used only if the statute is not clear as being an 'antiquated approach to the process of interpretation. The court went on to use all these intra-textual aids to establish the purpose of legislation.

22 Mdumbe 'Statutory Interpretation' 481.

23 It was established in chapter one that extension of justiciability is a value which has been attained by the cumulative application of constitutional supremacy, the rule of law, and the rights of the Bill of Rights, namely the right of access to court, and the right to just administrative action.

24 See the *preamble* to PAJA.

The *preamble* to PAJA must be read with the Public Administration principles in Chapter 10 of the Constitution.[25] Section 195(1) in Chapter 10 of the Constitution requires the Public Administration to be 'governed by the democratic values and principles enshrined in the Constitution' and to comply with nine specific principles, which are:

> '(a) A high standard of professional ethics must be promoted and maintained.
> (b) Efficient, economic and effective use of resources must be promoted.
> (c) Public administration must be development oriented.
> (d) Services must be provided in partially, fairly, equitably and without bias.
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy makings.
> (f) Public administration must be accountable.
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
> (h) Good human resource management and career development practices, to maximize human potential, must be cultivated.
> (I) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

The importance attaching to these Public Administration principles in chapter 10 of the Constitution was highlighted in *President of the Republic of South Africa v South African Rugby Football Union*[26] where the court held that these principles are justiciable. Similarly, in *Reuters Group PLC v Viljoen NO*[27] the court held that administrative action that was unethical was invalid as it was in conflict with section 195(1)(a) of the Constitution which requires that in the public administration a 'high standard of professional ethics must be promoted and maintained.' And, in *Mahambahlala v Member of the Executive Council for Welfare, Eastern Cape*

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25 More recently, the Public Administration Principles have been included in Legislation for example the Public Finance Management Act 1 of 1999 and the Preferential Procurement Policy Framework Act 5 of 2000.

26 1999 (10) BCLR 1059 (CC) at 1115B-D. Also see *South African Association of Personal Injury Lawyers v Heath* at 891E-F. See further the discussion in Plasket *Just Administrative Action* 71-72.

27 2001 (2) SACR 519 (C) at 536d-536f.

*Provincial Government*[28] the court took into account the values and principles of section 195(1) of the Constitution for the purposes of developing an appropriate constitutional remedy when administrative officials had delayed unreasonably in taking a decision in respect of the applicant's eligibility for a social grant. Interpretation of section 7(2) of PAJA must therefore consider not only the *preamble* to PAJA, but also the justiciable principles in section 195(1) of the Constitution.[29]

Secondly, external context in the interpretation of section 7(2) of PAJA invariably consists of the common law discussed in this thesis thus far. However, external context does not consist exclusively of the common law. Other aspects constitute 'external context' for purposes of interpreting section 7(2) of PAJA. Specifically, 'external context' in the form of other legislative clauses similar to section 7(2) of PAJA is important to the interpretation of the provision. Here, focus is drawn to the provisions of two statutes which are similar to section 7(2) of PAJA, namely the Minerals and Petroleum Resources Development Act (MPRDA)[30] and the Environmental Conservation Act (ECA).[31]

## 4.4. Section 7(2) of PAJA interpreted

Interpreting section 7(2) of PAJA requires utilization of the tools of interpretation and particularly, those aspects discussed in the thesis thus far to get at the meaning and purpose of the provision.[32] To place such interpretation in context, comparisons will be drawn between section 7(2) of PAJA and the common law. In order to render a holistic interpretation of section 7(2) of PAJA, the provision will be interpreted in a step-by-step manner, separately interpreting subsections 7(2)(a), 7(2)(b) and 7(2)(c) of PAJA.

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28 2001 (9) BCLR 899 (SE).

29 Due to their prominence in Administrative law and their inclusion in statute, the Public Administration Principles have been at the root of a significant number of cases. See the discussion in C Plasket 'Tendering for Government Contracts: Public Procurement and Judicial Review' in G Glover (ed) *Essays in Honour of AJ Kerr* (1996) 159 and the cases cited there.

30 Act 28 of 2002.

31 Act 73 of 1989.

32 On a purposive interpretation see C Botha *Statutory Interpretation: An Introduction for Students* 4 ed (2005) 96-97.

### 4.4.1. Subsection 7(2)(a)

Section 7(2)(a) of PAJA provides:

> '(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

Section 7(2)(a) largely reasserts the earlier common law duty to exhaust internal remedies.[33] Similarity with the earlier common law duty to exhaust internal remedies vests in the manner in which the clause is premised on an initial restriction of access to court until internal remedies have been exhausted. In this way, section 7(2)(a) mirrors the strict formulation of the common law duty to exhaust internal remedies, in both the English law, in the case of *Doe v Bridges* and the South African law in the case of *Shames v South African Railways and Harbors* discussed previously.[34] Furthermore, because of the similarity to the earlier common law position which section 7(2)(a) exhibits, it must be interpreted as prescribing judicial deference and not ousting of judicial review as was the case with the common law duty to exhaust internal remedies.

Alternatively, in interpreting section 7(2)(a), to get to the purpose of the provision, recourse can be had to 'other' similar statutory provisions. For example, section 96 of the Minerals and Petroleum Resources Development Act (MPRDA) provides as follows:

> '(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to-

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33 'Earlier' as it is used here connotes period around *Shames v South African Railways and Harbours* and the cases that initially endorsed it. See the discussion in Chapter three. It must be noted however, that section 7(2) (a) is not identical to the common law and there are a few notable differences to the common law.

34 See the discussion in chapter three.

*(a)* the Director-General, if it is an administrative decision by a Regional Manager or an officer; or

*(b)* the Minister, if it is an administrative decision by the Director-General or the designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection. (4) Sections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section.'

Subsection 96(3), which provides for the exhaustion of internal remedies like section 7(2) of PAJA, is the focus of this discussion. The provision clearly makes provision for a duty to exhaust internal remedies.[35] While the provision limits access to court it does not bar an aggrieved party's access to court. Subsection 96(3) merely advocates judicial deference by enjoining courts to give the administration leeway to resolve its own disputes prior to exercising judicial review.

Similarly to section 96 of the MPRDA, sub-section 35(3) of the Environmental Conservation Act (ECA) provides:

'(3) Subject to the provisions of subsections (1) and (2) any person who feels aggrieved at a decision of an officer or employee exercising any power delegated to him in terms of this Act or conferred upon him by regulation, may appeal against such decision to the Minister or the competent authority concerned, as the case may be, in the prescribed manner, within the prescribed period and upon payment of the prescribed fee.'

Section 36 of the same Act provides:

'(1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become

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35 This applies only to the extent that it does not eventually provide for appeal to the High Court.

aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.

(2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision.'

Read together, sections 35(3) and 36 of ECA direct that an aggrieved party must exhaust internal remedies prior to seeking judicial relief. While the provisions differ from section 96 of the Minerals and Petroleum Resources Development Act, in that they are not couched in peremptory terms, much like section 96 of MPRDA, the provisions do not prescribe the ousting of the review jurisdiction of the courts.[36] Instead, it is apparent from reading these provisions that the object of the statutory duty to exhaust internal remedies is to advocate judicial deference.[37] The provisions must be read purposively, and read in that way, they pursue the growth of administrative autonomy and administrative justice by requiring that courts should not intervene in administration disputes where effective internal remedies are available. However, where there are no effective remedies, the provisions acknowledge the authority of courts to intervene in the internal process where the interests of justice demand it. It is in this same light that section 7(2)(a) of PAJA must be read. Section 7(2)(a) does not exclude judicial review. It is a provision which pursues the growth of administrative autonomy and consequently administrative justice in line with the purpose of the PAJA set out in the *preamble* to PAJA. This is a conclusion supported by external context in the form of the common law and other provisions such as section 96 of MPRDA and sections 35 and 36 of ECA.

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36 This was clarified in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* at 168B-168I. Griesel J interpreted and applied section 35(3) of ECA and held that the provisions did not constitute a bar to an aggrieved party's right of access to court.

37 See *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* at 168B-168I.

Thus, section 7(2)(a) of PAJA largely reasserts the earlier common law position. However, *Marais v Democratic Alliance*[38] highlighted that on a more technical basis, the wording of section 7(2)(a) of PAJA has also altered the common law position. The departure from the common law position is attributable to the specific inclusion of the phrase '*in any other law*' in section 7(2)(a) of PAJA. The effect of this is the exclusion of the application of the duty to exhaust internal remedies to voluntary associations. Voluntary associations are created by 'empowering provisions' and not 'other laws.'[39] This shift in the scope of the application of the duty to exhaust internal remedies in section 7(2) of PAJA was also recognized in *Van Zyl v New National Party and Others*.[40]

The facts of *Van Zyl v New National Party and Others* were that Van Zyl was a member of the Western Cape Provincial Parliament representing the respondent. Pursuant to having faced internal disciplinary proceedings against her, Van Zyl sought judicial relief. The issue arose that Van Zyl had not exhausted the internal remedies available to her in terms of section 49 of the Constitution of the now defunct New National Party (NNP). The section provided:

> 'A member, chairman, council or body which objects to a judgment, decision, finding or ruling, except of the Congress or of the Provincial Leader or National Leader acting on behalf of the Congress, may appeal to the Legal Commission, with right of appeal to the Congress.'

Van Reenen J held that, the ambit of section 7(2) of PAJA was limited to 'any internal remedy provided for in any other law.' Furthermore, he noted that *Marais v Democratic Alliance*[41] had asserted that 'other law' in section 7(2) of PAJA had to be interpreted in accordance with its definition in section 2 of the Interpretation Act,[42] namely a law, proclamation, ordinance, Act of Parliament or 'other enactment having the force of

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38 2002 (2) BCLR 171 (C).

39 See *Marais v Democratic Alliance* 2002 (2) BCLR 171(C). The accuracy of the entire judgment in this case is doubtful, however to the extent that the court interpreted and applied section 7(2)(a) of PAJA, the conclusions arrived at by the court seem correctly and logically arrived at based on the application of the Interpretation Act.

40 2003 (10) BCLR 1167 (CC) at 1183D-1183E.

41 *Marais v Democratic Alliance* at 184B-184E.

42 Act 33 of 1957

law.' The constitution of a voluntary association did not fall within the ambit of the definition of the phrase '*in any other law*' in section 2 of the Interpretation Act. Section 7(2) of PAJA was consequently not applicable to the case.[43]

### 4.4.2. Subsection 7(2)(b)

Section 7(2)(b) of PAJA provides:

> '(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.'

This provision, like section 7(2)(a) of PAJA, is similar in form and content to the common law duty to exhaust internal remedies. Section 7(2)(a) of PAJA directs that aggrieved parties are bound to exhaust any internal remedies and courts are implored to defer their jurisdiction to internal dispute resolution mechanisms. Section 7(2)(b) builds on this and seeks the active participation of the judiciary in the pursuit of the purpose of section 7(2)(a), administrative autonomy and administrative justice, by imposing on courts the obligation to redirect the aggrieved party to exhaust internal remedies where the court is satisfied that internal remedies have not been exhausted. The foundation, upon which section 7(2)(b) of PAJA is built, is the common law principle of ripeness.[44]

Section 7(2)(b) directs that courts actively apply the equivalent of the common law standard of ripeness.[45] In this way, section 7(2)(b), like the common law duty to exhaust internal remedies, actively militates against aggrieved parties bringing

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43 *Van Zyl v New National Party and Others* at 1183D-1183F.

44 See Baxter *Administrative Law* 719; Hoexter *Administrative Law* 302-303; JR de Ville *Judicial Review* 448-453.

45 For example, in *Netto v Clarkson* the court redirected an aggrieved party to internal remedies where such remedies still had hope of resolving a dispute. Often such approach was justified by the common law principle of ripeness. Under this principle, courts would not hear matters that were brought for adjudication prematurely.

premature applications to court, voiding the purpose of section 7(2)(a) of PAJA. The rationale behind section 7(2)(b) is threefold. Firstly, it encourages reliance on the internal dispute resolution mechanisms and ensures that courts are an external control. This coerces the development of internal dispute resolution mechanisms within the administration. Secondly, the effective application of the standard of ripeness ensures that by the time disputes are ripe for adjudication corollary and technical issues will have been addressed leaving courts to deliberate on the critical issues. Thus, where internal mechanisms are relied on initially the judicial process is automatically rendered more effective. Most importantly, this also aids in the conservation of judicial resources.[46] In *Radio Islam v Independent Broadcasting Authority and others*[47] Wunsh J held:

> 'There would be very good reasons for only allowing final administrative action to be reviewable in court. As in civil actions, one would want to avoid interlocutory appeals and instead to consolidate all issues into one proceeding. To do so is to conserve judicial resources and to foster administrative efficiency...'[48]

However, section 7(2)(b) of PAJA does not permit the pursuit of efficacy, efficiency and the conservation of judicial resources to overshadow the pursuit of justice. The provision is qualified by section 7(2)(c) of PAJA with the effect that the standard of ripeness is only insisted on where this does not fly against the interests of justice. This means that, just as it was at common law, ripeness is not dependant on having exhausted all remedies.[49] And often, ripeness may be determined based on the effectiveness of the remedy.[50] Thus, a dispute may be ripe for adjudication prior to an aggrieved party having exhausted internal remedies where the remedies are

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46 This is particularly important in the South African constitutional dispensation as Mokgoro J in *Beinash and another v Young and others* at 133A-133B. Also see Wade and Forsyth *Administrative Law* 693 where they argue that the idea of exhaustion of internal remedies 'may have been prompted by the rapid growth of applications for judicial review and a judicial desire to limit them.'

47 Unreported, case no 31448/97.

48 Cited in J Klaaren 'Administrative Justice' in M Chaskalson *Consitutional Law of South Africa* (1996) 25-26, 25-27.

49 See Rose-Innes *Judicial Review* 81. Also see the discussion in chapter three.

50 See the discussion on effective internal remedies by Plasket in *Reed and Others v The Master of the High Court and Others* at 426d-426f.

ineffective.[51] It is not a pre-requisite for an aggrieved party to have exhausted all the available internal remedies for the dispute to be ripe.[52] The imposition of the standard of ripeness is not a mechanical process.[53] Section 7(2)(b) of PAJA enjoins the court to be *satisfied* that an aggrieved party has exhausted internal remedies, coupled with the injunction to courts in section 7(2)(c) to consider the interests of justice. This means that ripeness in section 7(2)(b) as at common law, is a matter determined by the courts based on a consideration of the interests of justice.

### 4.4.3. Subsection 7(2)(c)

Section 7(2)(c) of PAJA provides:

> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

Section 7(2)(c) of PAJA is the exemption clause of the provision and it qualifies both sections 7(2)(a) and 7(2)(b) of PAJA. Section 7(2)(c) provides that the application of sections 7(2)(a) and 7(2)(b) is premised on a consideration of the circumstances of each case (exceptional circumstances) as well as the interests of justice.[54]

The terms 'exceptional circumstances' and 'interests of justice,' find their roots in the common law duty to exhaust internal remedies. However, with the exception of *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*,[55] courts at common law, did not regularly apply the terms exceptional circumstances and

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51 See for example *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* 2005 (10) BCLR 973 (SCA) 515G-515J where the court held that exceptional circumstances were present, thereby holding that the dispute was ripe before internal remedies were exhausted.

52 *Ibid.* For a contrary view see the approach taken by Solomon JA in *Shames v South African Railways and Harbours*. Also see the approach preferred by Pretorius 'Wisdom' 113.

53 See the approach taken to determining the ripeness of the matter in *Earthlife Africa v DG: Department of Environmental Affairs and Tourisms at* 165B-169B.

54 This matter is discussed subsequently.

55 *Wahlhaus and others v Additional Magistrate, Johannesburg and Another* at 119F-120B.

interests of justice in the same manner in which they are used in section 7(2)(c) of PAJA. In *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*[56] the court applied the terms exceptional circumstances and interests of justice in much the same manner as they are used in section 7(2)(c) of PAJA holding:

> 'where extra-curial remedies were available to an aggrieved party and such remedies had not been exhausted, courts would at times hear such matters, albeit in *exceptional circumstances* 'where *grave injustice* would result, or where no other means existed to resolve the dispute.'[57]

Because of its centrality in the application of the whole of section 7(2) of PAJA, section 7(2)(c) is particularly important to the interpretation and application of the entire provision. In *Nichol and Another v The Registrar of Pension Funds and Others* Van Heerden J held:

> 'Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted. However, as is pointed out by Iain Currie and Jonathan Klaaren, 'by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law'. It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)*(c)*. Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given.'[58]

Thus, to properly appreciate and interpret section 7(2)(c) of PAJA separate attention must be devoted to understanding the scope and meaning of section 7(2)(c) and in particular the constituent terms, exceptional circumstances and interests of justice.

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56 *Wahlhaus and others v Additional Magistrate, Johannesburg and Another* at 119F-120B.

57 See *Wahlhaus and others v Additional Magistrate, Johannesburg and Another* at 119F-120B.

58 *Nichol and Another v The Registrar of Pension Funds and Others* (Unreported case no. 467/04) para 15.

#### 4.4.3.1. Exceptional circumstances

There are two aspects to the term exceptional circumstances.[59] Firstly, exceptional circumstances cannot be predetermined. This was a matter highlighted by Griesel J in *Earthlife v Director General: Department of Environmental Affairs and Tourism*. The case dealt with a decision to authorise the construction of a demonstrator model pebble bed nuclear reactor. The applicant had appealed internally, and subsequently had brought an application for judicial review. The point was taken that the review could not be allowed because the internal remedies had not yet been exhausted. Griesel J had to consider whether there were exceptional circumstances in the case justifying exemption from the duty to exhaust internal remedies. Griesel J relied on the English law case of *R v Secretary of State for the Home Department, ex parte Swati*[60] and quoted Sir John Donaldson MR to make the point that:

> 'By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.'

Relying on this as a starting premise, Griesel J held that the ambit of the term exceptional circumstances applied in statute could not be pre-determined.[61] In considering whether there were exceptional circumstances in the case, Griesel J considered *inter alia* that, the application before the court concerned the very sensitive and controversial issue of nuclear power, which potentially affects the safety and environmental rights of vast numbers of people; that the court ruling would have long-ranging effect on other applications to the Minister and the sheer fact that the instance dealt with the interests of more than one applicant. Consequently, Griesel J held that

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59 *Nichol and Another v The Registrar of Pension Funds and Others* (Unreported case no. 467/04) para 16-19.

60 [1986] 1 All ER 717 (CA) at 724a-724b.

61 *Earthlife v Director General: Department of Environmental Affairs and Tourism* at 165D-165G.

exceptional circumstances were present in the case justifying exemption from the duty to exhaust internal remedies.[62]

The second aspect to exceptional circumstances is that they are determined based on the application of common sense. This was apparent from the approach adopted by the court in *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others*.[63] Thring J found that exceptional circumstances were present, justifying exemption from the duty to exhaust internal remedies. Thring J considered that it was the interests of 21 small children which were at stake; that the appeal body to which the dispute was meant was powerless to effect any adequate change; alternatively, that an arbitration procedure would lead to further unwarranted delay.[64] It is the term exceptional circumstances read in this light that functions in juxtapose to the term interests of justice in section 7(2)(c) of PAJA.

#### 4.4.3.2. Interests of justice

As with exceptional circumstances, the common law is a critical tool in interpreting and understanding the ambit of the phrase interests of justice.[65] At common law, the determination of what was in the 'interests of justice' was based on a basic conception of justice.[66] For example, in *Devonport Corporation v Tozer*[67] the court exempted the

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62 *Earthlife v Director General: Department of Environmental Affairs and Tourism* at 165F-166F.

63 See footnote 51.

64 Also see *Western Cape Minister of Education v Governing Body, Mikro Primary School* at 984D-985B where Streicher J endorsed the decision by Thring J.

65 At common law the phrase often included undertones of the distinction between review and appeal. See for example the approach taken by Griesel J in *Earthlife v Director General: Department of Environmental Affairs and Tourism* at 167E-168B. Also see O'Regan J's approach in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* at 503B-503D. Also see JR de Ville *Judicial Review* 466-467. Lewis *Judicial Remedies* 414 argues that 'as the scope of judicial review has expanded, the theoretical distinction between appeal and review has narrowed considerably in practice and that the distinction is therefore not of much assistance in determining the scope of the exhaustion of remedies rule.However, to keep the shape and scope of this discussion, no further reference will be made to the distinction between review and appeal with respect to interpreting the phrase interests of justice. Also see *Nichol and Another v The Registrar of Pension Funds and Others* (Unreported case no. 467/04) para 16-19.

66 See the preceding discussion in chapters two and three on the pursuit and advancement of justice.

67 [1903] 1 Ch. 759 (see the discussion of this case in Chapter two).

aggrieved party from the obligation to exhaust internal remedies based on a consideration of commonsensical interests of justice such as the loss that would be occasioned on the aggrieved party based on the technical definition of what constituted a street.[68] A similar approach to the interests of justice was taken in the South African law. Thus, in *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*, the court took a simple approach to the term 'interests of justice' referring to *grave* injustice.[69]

Contemporary Administrative law has maintained this simple approach to interpreting the term interests of justice.[70] The term is interpreted literally with focus being drawn to factors such as *justice* and *fair process* in the administrative sector.[71] Such an approach to comprehending the term interests of justice is consistent with the Constitution. For example, the Public Administration principles in section 195(1) of the Constitution have introduced the dimension to law that legal consequences attach to any misconduct even conduct which in the past had carried only moral reprimands.[72] The Constitution also calls on the judiciary to show 'an understanding of community struggles, sensitivity to suffering and an appreciation of the complex nature of the judicial function in a diverse society.'[73] A simple and literal approach to interpreting the term 'interests of justice' therefore accords with constitutional considerations.[74]

De Ville also advances the view that interests of justice should be accorded a simple and literal meaning.[75] This is apparent from the considerations he cites as informing

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68 *Devonport Corporation v Tozer* at 761-765. See the discussion of this case in chapter two.

69 Also see *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C) at 6H-7A. See also, Rose-Innes *Judicial Review* 81-88. See further Wiechers *Administrative Law* 272-274 and Baxter *Administrative Law* 721.

70 See for example, the Public Administration principles in section 195(1) of the Constitution referred to above.

71 This requires a basic conception of what is 'just' and 'unjust.'

72 See for example *Reuters Group PLC v Viljoen NO* at 536d-536f where the court established that the guidelines in section 195 of the Constitution were justiciable.

73 P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 672.

74 Also see *Earthlife v Director General: Department of Environmental Affairs and Tourism* at 168D-168I where Griesel J took a literal approach to the interpretation of the term interests of justice which was motivated by his simple assessment of exceptional circumstances.

75 JR de Ville *Judicial Review* 471.

courts' decisions on whether to apply the exemption clause in section 7(2)(c) of PAJA which he lists as being:

> '[t]he subject-matter of the statute; the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which the decision is to be exercised, including the ambit of any 'rehearing' on appeal; the powers of the appellate tribunal, including its power to redress or 'cure' wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains.[76]

Despite how the term is interpreted, perhaps its most telling feature is that it is applied at the discretion of the courts.[77] Furthermore, section 7(2)(c) of PAJA is formulated such that exceptional circumstances and the interests of justice apply simultaneously. It is the cumulative effect of the phrase 'exceptional circumstances in the interests of justice' that courts apply in considering whether to grant exemption or not under section 7(2)(c) of PAJA. Thus, in *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* Thring J held:

> 'To my mind, the cumulative effect of these factors constitutes 'exceptional circumstances' for the purposes of section 7(2) (c) of PAJA, justifying the exemption of the applicants from any obligation which they might otherwise have been under to exhaust their internal remedies, and I deem such exemption, which is sought by the applicants, to be in the interests of justice.'[78]

The phrase 'exceptional circumstances in the interests of justice' must like its constituent parts, be ascribed a simple meaning. When so read, section 7(2)(c) of PAJA covers a wide spectrum of factors that courts are statutorily obliged to factor into the decision of whether to exempt aggrieved parties from the obligation to exhaust

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76 JR de Ville *Judicial Review* 471. For a common law perspective see *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C) at 6H-7A. See also, Rose-Innes *Judicial Review* 81-88. See further Wiechers *Administrative Law* 272-274 and Baxter *Administrative Law* 721.

77 See for example the approach in *Earthlife v Director General: Department of Environmental Affairs and Tourism* 164I-165A and *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 515I-515J.

78 2005 (3) SA 504 (C) at 515I-515J.

internal remedies or not.[79] Consequently, the qualification of section 7(2) of PAJA in section 7(2)(c) of PAJA is similar to the common law qualification of the duty to exhaust internal remedies. This is because the qualification of section 7(2) of PAJA is at the instance of the courts based on a consideration of the circumstances of each case and the interests of justice.[80] It would be errant to ignore the fact that there are a few alterations to the common law duty to exhaust internal remedies introduced by section 7(2) of PAJA however, for the most part these are technical, miniscule and tailored to enhance the functionality of the provision.[81] When purposively read, the provision essentially reasserts the common law duty to exhaust internal remedies.[82] The provision also advances the constitutional value of justiciability by allowing courts more latitude in reviewing disputes that arise in the administration.[83] However, in line with the precedent set by the Constitution, this extension of justiciability is controlled with courts being obliged to apply the principles of deference and ripeness.[84]

This manner of interpreting section 7(2)(c) of PAJA, indeed the entire section 7(2) is not the universally shared view among commentators and academics however, and there has been considerable disagreement on the correct manner of interpreting section 7(2) of PAJA as a whole.[85] While disagreement has not particularly taken the form of two separate schools of thought with conflicting opinions, there has been

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79 See *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others*; *Reuters Group PLC v Viljoen NO*; *Earthlife v Director General: Department of Environmental Affairs and Tourism*; JR de Ville *Judicial Review* 471.

80 See chapters two and three.

81 For example, section 7(2) of PAJA imposes an obligation on an aggrieved party to *apply* for exemption and the aggrieved party has the onus to show that his or her specific circumstances are exceptional. Section 7(2) of PAJA has also been interpreted to mean that the duty to exhaust internal remedies no longer applies to voluntary associations, see *Van Zyl v New National Party and Others* at 1183D-1183E.

82 This approach also accords with the approach to interpretation prescribed in *Minister of Land Affairs v Slamdien* at 423C-423D, where Dodson J highlighted the importance of common law presumptions in the interpretation of constitutionally mandated legislation. See further, Currie and Klaaren *Benchbook* 20.

83 Section 7(2)(c) of PAJA grants courts discretion on when to defer their jurisdiction, when to insist on ripeness and on when to act in the interests of justice. Consequently, the jurisdiction of courts cannot be ousted on the ground that internal remedies have not been exhausted as was sometimes possible under the common law.

84 See in particular sections 7(2)(a) and 7(2)(b) respectively.

85 See for example, Plasket *Just Administrative Action* 285 ff; Currie and Klaaren *Benchbook* (2001).

continuous and consistent comment and reference made to the possibility of a different and alternative approach to interpreting section 7(2) of PAJA.[86] To give a complete overview of section 7(2) of PAJA with regards to its interpretation, it is necessary therefore to consider this alternative interpretation of the provision and highlight the inconsistencies between the two interpretations.

## 4.5. Alternative interpretation of section 7(2) of PAJA

The alternative interpretation of section 7(2) of PAJA is significantly different from the manner of interpreting section 7(2) of PAJA prescribed in this thesis. There is no specific text that has been devoted to this alternative interpretation and only general premises of the interpretation appear separately in different texts and sometimes cases are discernible. Because of this, the discussion of the alternative interpretation of section 7(2) of PAJA focuses in large part on the points of deviation between the interpretation of section 7(2) of PAJA rendered here and the alternative interpretation.[87]

Three basic premises characterize the alternative interpretation of section 7(2) of PAJA. These are firstly, that section 7(2) of PAJA imposes a strict positive and unequivocal obligation on aggrieved parties to exhaust internal remedies.[88] Secondly,

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86 Some academics who have made reference to this alternative interpretation are, Plasket, *Just Administrative Action* 285 ff; Currie and Klaaren *Benchbook* (2001). For cases that have made reference to the possibility of an alternative interpretation of section 7(2) of PAJA see, *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at 262B-262D; *Reed and Others v The Master of the High Court and Others* at 426d-426f and *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 168I-169B.

87 For a concise overview of the alternative approach see Currie and Klaaren *Benchbook* (2001). For a more detailed portrayal of this approach, see Plasket *Just Administrative Action* 285 ff. However, it should be noted that the views expressed therein seem to have changed since the completion of the thesis in 2002. This is apparent in Plaket J's judgments in *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at 262B-263A and *Reed and Others v The Master of the High Court and Others* at 426d-426f.

88 For example, Plasket *Just Administrative Action* 294 notes that 'when compared to the common law rule...section 7(2) places a bar on the ability of a person to approach a court for relief' and '...in some instances, the section may create a more complete bar than in others.' Also see Currie and Klaaren *Benchbook* 182 and *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 165C-165D.

that section 7(2) of PAJA places an onerous burden on an aggrieved party to apply for exemption from having to exhaust internal remedies with the resultant effect that it possibly bars their access to court.[89] And thirdly, that section 7(2) of PAJA ultimately excludes the review jurisdiction of courts even where disputes are justiciable.[90]

### 4.5.1. Positive and unequivocal obligation

A consistent aspect of the alternative interpretation of section 7(2) of PAJA is the premise that the provision places a positive and unequivocal obligation on a person aggrieved by administrative action to utilize internal remedies irrespective of the circumstances in each case.[91] The rationale in support of this premise is that the qualification of this obligation is framed in very strict terms and the requirements for exemption 'are set very high.'[92] The logic that supports the contention that section 7(2)(c) of PAJA is limited in its ambit follows the logic that informed the discussion by Mokgoro J in *Beinash and another v Young and others.*[93] Mokgoro J[94] made an argument for the fact that some limited clauses were mere 'escape hatches,' offering limited prospects of exemption in reality.[95]

The inconsistencies in the interpretation of the obligation imposed in section 7(2) of PAJA between the approach prescribed above and the alternative interpretation are attributable solely to the manner of interpreting section 7(2) of PAJA, particularly the

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89 See Plasket *Just Administrative Action* 295.

90 See *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 515D-515J and *Reed and Others v The Master of the High Court and Others.*

91 See Plasket *Just Administrative Action* 294. Also see Currie and Klaaren *Benchbook* 182 and *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 165C-165D.

92 See Plasket *Just Administrative Action* 295. Currie and Klaaren *Benchbook* 182 make the point that the exemption clause is a 'narrow one' on the basis that it refers to exceptional circumstances...in the interests of justice,' rather than 'good cause.' Also see *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 165C-165D.

93 See Plasket *Just Administrative Action* 295.

94 *Beinash and another v Young and others* at 133F-134A.

95 Mokgoro J downplayed the efficacy of the exemption clause before the court in *Beinash and another v Young and others* at 133F-134A. Mokgoro J argued that an exemption clause in the Vexatious Litigants Act was akin to an 'escape hatch' and generally, such clauses were at a substantial risk of being refused.

exemption clause. The approach prescribed in this thesis interprets section 7(2)(c) of PAJA purposively, in contrast to the seemingly literal approach taken in the alternative interpretation.[96] The literal approach to interpretation has fallen under disrepute under the constitutional dispensation and is largely frowned upon.[97] In a series of critical judgments that culminated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* the Constitutional Court has prescribed the use of a purposive approach to statutory interpretation. With regard to section 7(2) of PAJA, early signs are that courts have adopted a purposive approach to interpreting the provision, in particular, section 7(2)(c) of PAJA. For example, Griesel J in *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* made the point that 'section 7(2)(c) of PAJA gives the court a discretion to exempt the applicant from the obligation to exhaust its internal remedy in terms of ECA.'[98] Thus, the ambit of the qualification in section 7(2)(c) of the PAJA is a matter determined at the discretion of the courts. This is a conclusion motivated by the purposive interpretation of section 7(2) of PAJA placing reliance on context in the form of the common law duty to exhaust internal remedies.[99] Under both the English common law and the South African common law, when literally interpreted, the duty to exhaust internal remedies was characterized by the imposition of a strict obligation on the aggrieved party to exhaust internal remedies.[100] However, the literal strictness of the obligation was not the final determinant of the actual strictness of the duty to exhaust internal remedies on the aggrieved party. Courts determined the actual strictness of the duty to exhaust internal remedies by embracing the fact that the duty

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96 For an overview of the literal approach to statutory interpretation, see L du Plessis *Re Interpretation of Statutes* (2002) 92, 102.

97 See *S v Zuma* at 650H-653B.

98 *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 164I-165A.

99 See *Minister of Land Affairs v Slamdien* and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* in the context in which they were discussed earlier.

100 From the progression of the duty to exhaust internal remedies in the English common law until after the *dictum* laid in *Shames v South African Railways and Harbours* which were the formative stages of the duty to exhaust internal remedies, the duty was accompanied by a strict presumption that aggrieved parties had to exhaust internal remedies. The changes to this which occurred in the South African common law were merely a reaction to the rampant injustice that led to loss of faith in internal remedies. However, even the, it was courts which determined how strictly the initial obligation to exhaust internal remedies applied.

to exhaust internal remedies could be qualified based on a wide spectrum of factors in the interests of justice.[101]

The formulation of section 7(2) of PAJA has been significantly influenced by the common law duty to exhaust internal remedies which has seen the provision retaining facets of the common law.[102] For example, the retention of the concept of re-direction of a dispute to internal remedies where disputes are brought to court prematurely is similar to the common law approach taken in *Netto v Clarkson*. Even the injunction on courts to qualify the application of the duty to exhaust internal remedies based on exceptional circumstances and interests of justice is strongly reminiscent of the common law.[103] It is unlikely therefore, considering the existing similarities to the common law, that the inclusion of the duty to exhaust internal remedies in statute in section 7(2) of PAJA has changed the central role courts have occupied in the actual strictness of the duty to exhaust internal remedies. It is more likely that courts under section 7(2) of PAJA still have the role of determining the actual strictness of the obligation to exhaust internal remedies.[104]

Even if it were to be accepted that section 7(2)(c) of PAJA is limited in its ambit, it would also have to be accepted that such interpretation would be more literal than purposive. This would go against the approach to interpretation prescribed by the Constitutional Court.[105] Accepting such position would therefore, not be consistent with the seemingly purposive approach courts have taken to section 7(2)(c) of PAJA.[106] The problem lies however in the fact that despite assuming seemingly

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101 For an English law perspective see chapter two and the cases cited therein. For a South African common law perspective, see the discussion on the qualification of the duty to exhaust internal remedies in chapter three.

102 See the preceding interpretation of section 7(2) of PAJA.

103 See chapters two and three.

104 The case of *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 165B-169B offers an example of how courts occupy a central role in determining the strictness of the obligation to exhaust internal remedies.

105 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* discussed above.

106 See *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 165B-169B.

purposive approaches to interpreting section 7(2) of PAJA courts have left the door open to the alternative interpretation of section 7(2) by holding that the manner in which they interpret the provision *assumes* constitutional validity, implying the possible validity of a contrary approach to the provision.[107] This is a matter that is discussed further when the constitutionality of section 7(2) of PAJA is considered.[108]

### 4.5.2. Onus on aggrieved party

Another premise at the heart of the alternative interpretation is that section 7(2) of PAJA actively bars an aggrieved party from pursuing judicial redress and therefore bars access to court.[109] This is inferred from the fact that the alternative interpretation to section 7(2)(c) of PAJA places an onerous duty on an applicant for judicial review, to exhaust internal remedies, which creates an 'escape hatch' that is very difficult to utilize.[110] Thus, it is argued that, because of this, section 7(2)(c) of PAJA bars access to court and simultaneously 'casts the burden of maladministration on the applicant.'[111] This argument often incorporates aspects of Diceyan precepts of the rule of law. Diceyan theorists argue that the rule of law enshrines the right to challenge illegal administrative action as soon as it is taken.[112] Therefore, to the extent that section 7(2) of PAJA limits this ability, it restricts access to court.

However, like the premise that section 7(2) of PAJA imposes a strict obligation to exhaust internal remedies, this premise is seemingly based on a literal interpretation of section 7(2)(c) of PAJA. This accounts for the inconsistency with the approach prescribed to interpreting section 7(2) of PAJA above. This alternative approach

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107 See for example *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at262C-262D. Also see *Reed and Others v The Master of the High Court and Others* at 426d-426f.

108 See chapter five of the thesis.

109 See Plasket *Just Administrative Action* 294-295.

110 The burden is made onerous because the exemption clause is narrow in its ambit. See Plasket *Just Administrative Action* 295. Currie and Klaaren *Benchbook* 182. the argument is also supported by reference to the judgment (referred to above) by Mokgoro J in *Beinash and another v Young and others* to the extent that the learned judge held that exemption provisions afford little exemption opportunities.

111 See Plasket *Just Administrative Action* 75.

112 This is a matter discussed in more detail in chapter five.

seemingly downplays the fact that the premier purpose of section 7(2) of PAJA is the advocacy of administrative autonomy and administrative justice. If this should be accepted, it must also be accepted that in order to achieve this purpose, it is imperative that section 7(2) of PAJA demand that internal remedies, where effective, be exhausted.[113] One way in which section 7(2) of PAJA does this is by the imposition of a dual obligation on courts to apply judicial deference as well as to demand ripeness.[114] Admittedly, this onus, literally appraised, is restrictive of access to court, but considered purposively, the onus on aggrieved parties to apply for exemption is essential for the functional application of section 7(2) of PAJA.

In any respect, the determination of when to exempt an aggrieved party from the obligation to exhaust internal remedies is not as entirely dependant on the ability of the aggrieved party to dispatch the onus on him or her as a literal interpretation of section 7(2)(c) of PAJA may indicate. Where the interests of justice are truly in question, courts have shown an early appreciation of this fact, with the result that an aggrieved party does not bear an onerous burden to prove exceptional circumstances or a threat to justice.[115] Indeed, courts have even shown a tendency to take up the responsibility of showing the prevalence of exceptional circumstances.[116] It is difficult therefore to reconcile this approach, with the suggested possibility that the obligation to apply for exemption from the duty to exhaust internal remedies in section 7(2) of PAJA is an onerous burden because it bars access to court, with limited hope for exemption.[117]

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113 Failing this, the pursuit of administrative autonomy and administrative justice could be defeated by allowing aggrieved parties to approach the courts directly disregarding internal remedies even where effective internal remedies exist.

114 This is highly probable. See Hoexter 'Future' 484 who argues that there is little faith shown by the public in the Public Administration and often aggrieved parties opt for judicial redress.

115 See for example, *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 165B-169B. Also see *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 515G-515J.

116 *Ibid.*

117 See Currie and Klaaren *Benchbook* 182.

### 4.5.3. Exclusion of courts' review jurisdiction

The third premise which is characteristic of the alternative interpretation of section 7(2) of PAJA is that the provision restricts the review jurisdiction of the courts unless internal remedies have been exhausted or unless an exemption has been granted.[118] The argument is that section 7(2) of PAJA denies courts the opportunity to determine justiciable disputes merely because internal remedies are yet to be exhausted.[119] As with the other premises of the alternative approach, this is seemingly a literal approach to take in interpreting section 7(2) of PAJA which downplays the purpose of the provision.

A purposive interpretation of section 7(2) of PAJA, noting its intended purpose of developing administrative autonomy and administrative justice, suggests that by advocating judicial deference section 7(2) of PAJA imposes an obligation on courts to actively support administrative autonomy. The restriction of the review jurisdiction of courts serves the functional purpose of encouraging the growth of effective internal remedies within the administration even where a dispute is justiciable. The fact that disputes are justiciable need not necessarily mean that they are resolved in court. Prospectively, this will limit the cases that go to court for resolution. A corollary benefit of this is the conservation of judicial resources.[120] This is also qualified by the fact that the exclusion of review in such situations, is at the courts' instance using the discretion afforded courts in section 7(2)(c) of PAJA. Thus, courts must consider the facts of each case as well as the interests of justice.

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118 See *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 515E-515J and *Reed and Others v The Master of the High Court and Others.*

119 See C Plasket and WH Mandlana 'Administrative Law' (2004) *Annual Survey* 100.

120 See Wunsh J in *Radio Islam v Independent Broadcasting Authority and others* where he held that 'there would be very good reasons for only allowing final administrative action to be reviewable in court. As in civil actions, one would want to avoid interlocutory appeals and instead to consolidate all issues into one proceeding. To do so is to conserve judicial resources and to foster administrative efficiency...'

### 4.5.4. Alternative interpretation: a final appraisal

The alternative approach to interpreting section 7(2) of PAJA is seemingly premised to a significant extent on a literal interpretation of section 7(2) of PAJA.[121] Assuming a literal approach in statutory interpretation does not necessarily culminate in a wrong conclusion, however, in recent years there has been marked departure from the literal approach to statutory interpretation.[122] This change has been spearheaded by the Constitutional Court which has held that statutory interpretation must be purposive taking into account the spirit and purport of the Constitution.[123] A literal approach to interpreting section 7(2) of PAJA is certainly not consistent with the constitutionally prescribed approach to statutory interpretation.

Even if the alternative interpretation should not be based on a literal interpretation of section 7(2) of PAJA that does not automatically make it viable. All that would mean is that there is ambiguity over how to interpret section 7(2) of PAJA, with the possibility of two conflicting interpretations of the provision. And in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*, Ngcobo J held that one of the founding premises of statutory interpretation is that 'the statute must be reasonably capable of a constitutional interpretation.'[124] Consequently, where a statute is ambiguous and capable of two interpretations one constitutional and another, unconstitutional, such statute must be accorded the constitutional meaning.[125] Therefore, the final

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121 It must also be considered that this alternative approach to interpreting section 7(2) of PAJA can not easily be reconciled with the common law presumptions of interpretation. These presumptions advocate, among other things, that Parliament does not intend to diminish existing rights and that, Parliament does not intend to change the common law. See *Minister of Land Affairs v Slamdien* at 423C-423D. See also, Currie and Klaaren *Benchbook* 20.

122 Mdumbe 'Statutory Interpretation' 474.

123 See the discussion on *Matiso v Commanding Officer, Port Elizabeth Prison*; *Minister of Land Affairs v Slamdien* and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* above.

124 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* at 521E-522C, 524D-525A, 527D-527H.

125 See *Earthlife v Director General: Department of Environmental Affairs and Tourism* 167I-168A where Griesel J alluded to this approach. A generous approach must also be taken in statutory interpretation. In *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) at 422D-423D the Land Claims Court held that 'where a constitutional right is concerned, [courts must] adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.' Also see *Govender v Minister of Safety and Security*

determinant of the viable interpretation of section 7(2) of PAJA would have to be based on which interpretation leads to a finding of constitutional validity. This is a matter discussed in the next chapter which discusses the constitutionality of section 7(2) of PAJA.

## 4.6. Conclusion

This chapter interpreted section 7(2) of PAJA, following the purposive approach to statutory interpretation endorsed by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*. This interpretation of section 7(2) of PAJA revealed that with the exception of a few features[126] the provision is alike to the common law duty to exhaust internal remedies. Section 7(2) of PAJA has incorporated the common law duty to exhaust internal remedies into statute under the constitutional dispensation. It was also submitted that the provision not only advances the constitutional value of extending justiciability, but in accordance with the constitutional approach, section 7(2) of PAJA also controls justiciability.[127] For the sake of completeness, the chapter also considered an alternative interpretation of the provision. The interpretation of section 7(2) of PAJA based on this interpretation is seemingly based on the literal text of the provision. If so, the interpretation does not accord with the Constitution to the extent that the Constitutional Court has consistently held that the Constitution endorses a purposive approach to interpretation.

At the close of the discussion, what is clear is that there are two viable but conflicting interpretations of section 7(2) of PAJA. Ultimately, the validity of the manner of interpreting any legislation and in this instance, section 7(2) of PAJA, is a matter solely dependant on the outcome of the enquiry into the constitutional validity of the provision following its interpretation. Thus, ascertaining the constitutional validity of section 7(2) of PAJA becomes the critical factor in determining the manner in which to

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2001 (4) SA 273 (SCA) at 280B-281B. See further Kentridge AJ's judgment in *S v Zuma* at 650H-653B.

126 For example, the exclusion of voluntary associations and the imposition of an *onus* to apply for exemption from the duty to exhaust internal remedies.

127 See the discussion above and also see the discussion on justiciability in chapter one.

interpret the provision. The ensuing chapter is devoted to the determination of the constitutionality of the provision. This chapter therefore serves merely as a prelude to the discussion in the next chapter. The discussion of constitutionality in that chapter is wholly premised on the interpretation of section 7(2) of PAJA given in this chapter.

## Chapter Five

# CONSTITUTIONALITY OF SECTION 7(2) OF PAJA

*'The Constitution does not envisage that citizens will always have to institute legal proceedings in order to contest the justification of actions that affect them'*- Justice Langa[1]

## 5.1. Introduction

Constitutionality under South African law is essentially the enquiry into the consistency of specific laws with the Constitution.[2] The primary objective of this chapter is the determination of the constitutionality of section 7(2) of PAJA. The discussion is necessarily premised on the interpretation of the provision in the previous chapter. That interpretation of section 7(2) of PAJA established that the provision restricts the right of access to court in section 34 of the Constitution. The fact that section 7(2) of PAJA restricts the right of access to court is the initial premise in determining the constitutional validity of section 7(2) of PAJA. Essentially, the discussion concerns itself with whether section 7(2) of PAJA is acceptable and essentially, reasonable and justifiable limitation of section 34 of the Constitution in terms of the limitation clause in section 36 of the Constitution.

While the acceptability of the limitation imposed by section 7(2) of PAJA on the right of access to court may be the focal point of the discussion, it is imperative to note that constitutional validity is a concept that supersedes mere analysis of whether limitation of rights is reasonable and justifiable under section 36 of the Constitution. Apart from being reasonable and justifiable, laws which limit fundamental rights such as the right of access to court must also meet other important and constitutionally prescribed

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1 P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 674.

2 Also see section 2 of the 1996 Constitution.

criteria. For example, section 2 of the Constitution requires that for laws to be valid, they must be consistent with the Constitution, and section 39 of the Constitution requires laws to reflect the spirit and purport of the Constitution. Thus, the context to which section 7(2) of PAJA is applied, to the extent that such context has been shaped by the Constitution, plays an integral role in the enquiry into the constitutional validity of the provision.[3]

In order to render a complete overview of these factors, this chapter is presented in four distinct sections. The first section offers a general assessment of the constitutionality of section 7(2) of PAJA, which also considers how the question of the constitutionality of the duty to exhaust internal remedies was resolved under common law, prior to PAJA. The second section offers an assessment of the constitutionality of the provision based on the limitation clause. The third section considers how courts have addressed the question of the constitutionality of section 7(2) of PAJA. Finally, the fourth section considers an alternative approach that could be taken in the assessment of the constitutionality of section 7(2) of PAJA.

## 5.2. General overview of the constitutionality of the duty to exhaust internal remedies

In considering the constitutionality of section 7(2) of PAJA, it is useful to first consider the constitutionality of the common law duty to exhaust internal remedies. The relevance of such discussion stems from the fact that, the duty to exhaust internal remedies, prior to the enactment of section 7(2) of PAJA, had already passed constitutional muster. Assessing 'how' the constitutionality of the common law rule was determined is helpful to the determination of the constitutionality of section 7(2) of PAJA.

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[3] See the *preamble* to the Constitution.

### 5.2.1. The common law duty to exhaust internal remedies

Under the common law, prior to the constitutional era, the duty to exhaust internal remedies was a tool used to protect the right of access to court.[4] The period after the inception of the constitutional dispensation was the first time that courts explored the constitutional validity of the duty to exhaust internal remedies.

Courts applied the duty to exhaust internal remedies as it had been applied in *Welkom Village Management Board v Leteno* and the cases that endorsed it. Courts found the duty to exhaust internal remedies to be consistent with the right of access to court and the Constitution.[5] Thus, while protecting the right of access to court may have been a prominent theme in the duty to exhaust internal remedies that was applied prior to the inception of the constitutional era, it is a theme that persevered and permeated into the constitutional dispensation.

The acceptance of the constitutionality of the duty to exhaust internal remedies by courts is even apparent from the case law. For example, in *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province*[6] the court had to decide an issue to which the exhaustion of internal remedies was corollary. The respondent had argued that the application should have been dismissed because the applicant had not exhausted her internal remedies prior to approaching the court for relief.[7] Southwood J placing reliance on *Lawson v Cape Town Municipality*[8] held that the duty to exhaust internal remedies:

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4 See chapters two and three.

5 See for example *Legal Aid Board v Msila* 1997 (2) BCLR 229 (E); *Radio Islam v Independent Broadcasting Authority and others* Unreported, case no 31448/97; *Baromoto and Others v Minister of Home Affairs and Others* 1998 (5) BCLR 562 (W); *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); *Simela and Others v MEC for Education Province of Eastern Cape and Another* [2001] 9 BLLR 1085 (LC).

6 1999 (4) SA 367 (T), 372G-H. See Plasket 'Standing, Welfare Rights and Administrative Justice, *Maluleke v MEC, Health and Welfare Nothren Province*' 2000 (117) *SALJ* 647.

7 *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province* at 372E-372F.

8 1982 (4) SA 1 (C).

> 'will seldom be upheld – particularly where the aggrieved person's very complaint is the illegality of the decision which he seeks to challenge...generally an aggrieved person such as the applicant should have unrestricted access to the court to seek redress.'[9]

It was in *Simela and Others v MEC for Education Province of Eastern Cape and Another*[10] that the issue of the compatibility of the duty to exhaust and the right of access to court was best laid out. The court held:

> 'While it is accepted that, ordinarily, a person is required to exhaust internal or statutory remedies before having recourse to the courts, this is by no means an absolute rule. This court will not deny an applicant access for this reason when the respondent's actions have already undermined the domestic remedies themselves, or where it is apparent that the respondent has formed a fixed resolve to abide by the disputed decision. In view of the constitutional right of access to competent courts of law, the common law test of ripeness has to be applied more strictly.'[11]

Thus, at common law, courts accepted the fact that the duty to exhaust internal remedies served the salient purpose of protecting the right of access to court, as such, the rule and the right of access to court could co-exist. This was the situation that preceded the enactment of PAJA.

### 5.2.2. The change brought by section 7(2) of PAJA

Simply put, section 7(2) of PAJA gave legislative effect to the duty to exhaust internal remedies.[12] Because the provision, like the common law duty to exhaust internal remedies which preceded it, limited the right of access to court, questions arose and continue to arise with regard to the constitutionality of section 7(2) of PAJA considering the limitation it poses to the right of access to court. The mere fact that section 7(2) of PAJA limits the right of access to court automatically invokes the

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9 Plasket *Just Administrative Action* 286.

10 [2001] 9 BLLR 1085 (LC).

11 *Simela and Others v MEC for Education Province of Eastern Cape* at 1090I-1091A. For more on the test of ripeness at common law, see Baxter *Administrative Law* 719-720. Also see Hoexter *Administrative Law* 302.

12 See chapter four.

evaluation of the constitutionality of the provision based on the limitation clause in section 36 of the Constitution.

## 5.3. Section 7(2) of PAJA, access to court and the limitation clause

Section 7(2) of PAJA limits section 34 of the Constitution which provides for the right of access to court. It is useful therefore, prior to assessing the constitutionality of section 7(2) of PAJA using the limitation clause, to first explore scope and ambit of the right to court as it relates to section 7(2) of PAJA. After this, a detailed assessment of the constitutionality of section 7(2) of PAJA based on the clauses of section 36 of the Constitution can then be conducted.

In sum, the assessment of the constitutionality of section 7(2) of PAJA here is conducted in a two-stage format. The first stage consists of, the assessment of the scope and ambit of the right of access to court as it relates to section 7(2) of PAJA. The second stage consists of, the assessment of the reasonableness and justifiableness of the limitation posed by section 7(2) of PAJA to the right of access to court based on the limitation clause.

### 5.3.1. The scope and ambit of the right of access to court

Traditionally, the term 'right of access to court' as it relates to section 7(2) of PAJA has been used to denote the right of access to court in section 34 of the Constitution which provides:

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

However, legal discourse on section 7(2) of PAJA and access to court has also tended to canvass the right of access to court implicit in the rule of law.[13] Thus, a critical aspect of assessing the constitutionality of section 7(2) of PAJA is the consideration of the extent to which the provision restricts not only the right of access to court in section 34 but also access to court which emanates from the rule of law.[14]

To the extent that the rule of law provides for access to court, it must be read with section 172(1)(a) of the Constitution which provides:

> 'When deciding a constitutional matter within its power, a court-
>
> > (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

Finally, and more importantly, section 33 of the Constitution, which makes provision for the right to just administrative action, also empowers courts to declare unconstitutional administrative action invalid. Thus, when read together, section 33, the rule of law and section 172(1)(a) of the Constitution direct that courts must declare as invalid any administrative action which is in conflict with the Constitution.[15] This injunction applies irrespective of whether or not an aggrieved party has exhausted his or her internal remedies.[16] Therefore, an aggrieved party has access to court whenever his or her rights or interests are violated. This has important ramifications for the duty to exhaust internal remedies particularly when a Diceyan perspective of

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13 See Wade and Forsyth *Administrative Law* 691-692. See too JR de Ville *Judicial Review* 467 who discusses the access to court that stems from the rule of law. Also see *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and others* 2005 (8) BCLR 786 (CC) at 802B-802D.

14 Chapter one of this thesis conducted a general assessment of the rule of law and there is no need to restate that discussion here. What is relevant for current purposes however is the provision of access to court that emanates from the rule of law.

15 See JR de Ville *Judicial Review* 467. Also see the comments by C Plasket 'Tendering for Government Contracts: Public Procurement and Judicial Review' in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 159 at 166.

16 See JR de Ville *Judicial Review* 467.

the rule of law is considered.[17] For example, Wade and Forsyth basing their argument on this Diceyan perspective argue:

> 'In principle there ought to be no categorical rules requiring the exhaustion of administrative remedies before judicial remedies can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need to first pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter.'[18]

Wade and Forsyth are English lawyers however, and in the English context, the underlying premise on which this argument is based, that the rule of law guarantees direct access to court is theoretically sound. However, the argument cannot be universally applied to the South African context. Under the South African Constitution rights are not absolute.[19] This qualification on rights is more absolute with regard to rights which are bestowed communally such as the right of access to court stemming from the rule of law.[20] Whether or not an aggrieved party has access to court is a matter that may well be determined by a consideration of other corollary, often communal issues.[21]

The need to protect access to court has been borne out of the extension of justiciability that accompanied the inception of the constitutional dispensation.[22] A result of this was that a higher volume of cases was taken to courts for resolution limiting the availability of the avenue to courts. This has created a need to conserve judicial resources.[23] This prompted Mokgoro J in *Beinash and another v Young and*

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17 *Ibid.*

18 Wade and Forsyth *Administrative Law* 691.

19 Currie and J de Waal *Handbook* 163.

20 On the right of access to court see generally, G Budlender 'Access to Courts' (2004) 121 *SALJ* 339.

21 See *Beinash and another v Young and others* at 132H-133C.

22 See chapter one.

23 This was referred to in *Radio Islam v Independent Broadcasting Authority and others* unreported, case no 31448/97.

*Others* while addressing the matter of vexatious litigants, to make the point that there is a need to preserve the right of access to court for meritorious cases:

> '[A] restriction of access [to court]...is in fact indispensable to protect and secure the right of access for those with meritorious disputes...the court is under a constitutional duty to protect *bona fide* litigants, the processes of the courts...'[24]

It is in the light of this broader formulation of the right of access to court, that section 7(2) of PAJA must be read. Part of the function of the provision is to serve as a mechanism to control and reserve the availability of the avenue to courts for meritorious cases. By insisting on the exhaustion of internal remedies, section 7(2) of PAJA functions as a filter mechanism, ensuring that courts are not burdened with frivolous matters.[25] Section 7(2) of PAJA minimizes pressure on the courts while simultaneously protecting the right of access to court by referring disputes to effective relief. In this way, section 7(2) of PAJA coerces the development of effective alternative dispute resolution forums.

Thus, in the pursuit of conserving judicial resources, care is taken to ensure that conservation of judicial resources does not lead to violation of the right of access to court[26] and ultimately, the case load of the courts alone is not the final determinant of whether a dispute is allowed in court.[27] Where the interests of justice cannot possibly be served by insisting on recourse to extra-judicial mechanisms, section 7(2)(c) of PAJA makes provision for such disputes to be taken to court.[28]

In sum, the limitation on access to court in section 7(2) of PAJA serves the salutary purpose of conserving and protecting the right of access to court. Such limitation also

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24 *Beinash and another v Young and Others* at 133A-133B.

25 Also see *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others* at 503B-503C.

26 This coincides with the constitutional doctrine of ripeness which was referred to earlier.

27 See the argument by Froneman J in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* at 1328H-1329B where he argued that 'in relation to so-called public law litigation there can be no proper justification for a restrictive approach to the application of constitutional rights.'

28 This is the interpretation accorded the exemption clause in chapter four.

facilitates the growth and development of administrative autonomy which leads to benefits such as administrative justice and the growth and development of more effective internal remedies.[29] 'The Constitution does not envisage that citizens will always have to institute legal proceedings in order to contest the justification of actions that affect them'[30] and section 7(2) of PAJA is a mechanism toward achieving this objective. However, to be constitutionally valid, the provision must still meet the requirements of reasonable limitation set out in section 36 of the Constitution.

### 5.3.2. Section 7(2) of PAJA and the limitation clause

The limitation of any fundamental right in the Bill of Rights is only acceptable where such limitation accords with the limitation clause in section 36 of the Constitution which provides:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

Thus, to be constitutional, section 7(2) of PAJA must amount to reasonable and justifiable limitation of the right of access to court based on the standard set by section 36 of the Constitution.

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29 Also see another rationale behind section 7(2) of PAJA noted in *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others* at 503B-503C where O'Regan J commented that the provision must be applied to avoid duplicate and conflicting decisions.

30 P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 674.

#### 5.3.2.1. Nature of the right[31]

The right of access to court is of cardinal importance to the law and it occupies a central role in the application of all law.[32] A constituent part of protecting the right of access to court is ensuring that there are other viable forums which can effectively perform the adjudication function.[33] While limitation of the right is acceptable, such limitation must serve a functional and important purpose.

#### 5.3.2.2. Importance of the purpose of the limitation[34]

The last chapter identified the purpose of section 7(2) of PAJA, as being *inter alia*, the pursuit of administrative autonomy, thereby coercing the growth of administrative justice and controlling judicial activity in matters of the administration.[35] This advocacy of administrative autonomy and administrative justice is important, to the extent that it fosters conditions that allow for the effective application of the right of access to court.

##### 5.3.2.2.1. Administrative autonomy and administrative justice

The importance of the limitation of access to court by section 7(2) of PAJA is best understood in the context of 'administrative autonomy' and 'administrative justice,' which are significantly co-dependant concepts. The prosperity of administrative justice depends on a significant amount of 'faith' being placed in the ability of the administration to conduct its own affairs. De Smith[36] makes the point that:

> 'In the broad context of administrative process the role of judicial institutions is inevitably sporadic and peripheral. The administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their

31 Section 36(1)(a) of the Constitution.
32 See *Beinash and another v Young and others* at 132H-133A.
33 *Ibid.* Also see Currie and J de Waal *Handbook* 708ff.
34 Section 36(1)(b) of the Constitution.
35 See chapter four.
36 See SA de Smith, Woolf and Jowell 3.

every act were to be reviewed on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action.'[37]

Because the pursuit of administrative justice is significantly dependant on administrative autonomy, section 7(2) of PAJA in seeking the advancement of administrative justice,[38] also provides for administrative autonomy by making provision for judicial deference and ripeness.

#### 5.3.2.2.1.1. Judicial deference and ripeness

Judicial deference and ripeness emanate from the fact that section 7(2) of PAJA requires courts to show 'faith' in the dispute resolution capabilities of the administration offered through internal remedies.[39] It is possible that this insistence on deference and ripeness by section 7(2) of PAJA may allow lawyers to clutter the adjudication process by raising preliminary issues in an intentional and *mala fide* attempt to delay judicial review[40] despite the fact that the disputes may be justiciable.[41] However, this is a possibility that can be overcome by adopting an approach to the concept of ripeness, similar to that applied under the common law.

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37 Of course there are exceptions where special circumstances are present. Special circumstances would be present for example, where judicial review is necessary because the aggrieved party raises issues of general importance going beyond the significance of a particular case. See for example, S Halliday *Judicial Review and Compliance with Administrative Law* (2004) 9 who makes the point that 'court rulings...have a much wider role to play in society than to simply secure compliance with their narrow terms. They may be inspirational, providing a catalyst for social movements, or may be used as resources in situations of social conflict.' And see too Lewis *Judicial Remedies* 420 who contends that to regulate such situations, test cases may, in appropriate circumstances, be prosecuted through the statutory appeal procedure. This may be particularly appropriate where there is no urgency in determining the point, and providing that there is no difficulty in finding an appropriate test case. For a conflicting opinion see, Plasket J in *Reed and Others v The Master of the High Court and Others.*

38 See the *preamble* to PAJA.

39 See chapter four.

40 This was an issue raised by Plasket J in *Reed and Others v The Master of the High Court and Others.*

41 See for example, *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* and *Nichol and Another v The Registrar of Pension Funds and Others* (Unreported case no. 467/04).

At common law, courts worked under the premise that, where their jurisdiction was not statutorily excluded over justiciable disputes, they would prefer judicial remedies over internal remedies.[42] Thus, in Golube v Oosthuizen De Wet J held that there was no authority for the view that:

> 'the Court is entitled to refuse to entertain a suit which it in fact has jurisdiction to entertain on the ground that it would be more reasonable for the suitor to have recourse to some other tribunal, whether judicial or extra-judicial.'[43]

At the time, this approach was justifiable because judicial review was often the dispute resolution avenue best suited to the attainment of justice.[44] However, this approach came with the undesirable consequence that it encouraged and fostered over-activity by the Judiciary in the Administration.[45] Such over-activity though no longer justifiable under the constitutional dispensation, has carried over to the constitutional era.[46] In recent years, this over-activity has met with immense criticism[47] and has been charged with being accountable for stunted growth of effective dispute resolution mechanisms in the Public Administration.[48]

Of course there might be instances where the remedies offered by the administration are so inadequate that it would be contrary to the interests of justice to insist on autonomy and continued reliance on such remedies.[49] To avoid this, section 7(2) of

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42 See for example, the approach taken by De Wet J in *Golube v Oosthuizen* at 4G-4H.

43 See *Golube v Oosthuizen* at 4G-4H.

44 See Hoexter 'Future' 484.

45 See the discussion in chapter one.

46 See in general, Hoexter 'Future' 484-485. Also see C Plasket 'Tendering for Government Contracts: Public Procurement and Judicial Review' in G Glover (ed) *Essays in Honour of AJ Kerr* (1996) 159 at 161 who while discussing public procurement cases made the contention that 'judicial review may be used to address instances of unlawful action and to limit the scope of corrupt practices.'

47 See in general, Hoexter 'Future' 501-502. See also JR de Ville 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs*' 2004 (20) SAJHR 577. *Minister of Environmental Affairs v Phambili Fisheries* [2003] 2 All SA 616 (SCA) and *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 471A-471C.

48 See in general, Hoexter 'Future' 484-485.

49 See for example *Governing Body, Mikro Primary School and another v Minister of Education,*

PAJA provides that aggrieved parties should only rely on internal remedies where the remedies are effective.[50] Under this system, courts have a dual function, firstly to ensure that aggrieved parties do not pre-empt the prescribed system by exercising without restraint a right of access to court. Secondly, courts must ensure that the avenue followed in each case ensures that the interests of justice are protected.[51]

#### 5.3.2.2.2. Creation of effective internal dispute resolution bodies

As a corollary to the provision of 'administrative autonomy' and 'administrative justice,' through the utilization of deference and ripeness, section 7(2) of PAJA places an implied duty on the administration to put in place effective internal remedies. The institution of effective internal remedies in the administration is yet to occur across all sectors however, and existing internal remedies in the South African Public Administration are in a deplorable state.[52] Despite this, the fact that section 7(2) of PAJA is premised on the existence of functional internal remedies does not discount its value as a tool in the pursuit of satisfactory levels of administrative justice.

True to what is generally accepted as being the function of the duty to exhaust internal remedies, section 7(2) of PAJA merely *fosters* the growth of administrative justice and does not *create* administrative justice.[53] Indeed, De Ville notes that section 7(2) of PAJA advocates a principle to that akin to the one accepted and endorsed by the Constitutional court that, 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'[54]

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*Western Cape and Others* at 515D-515J.

50 See the exemption in section 7(2)(c) of PAJA and the interpretation of that exemption in chapter four of this thesis. Also see Plasket J in *Reed and Others v The Master of the High Court and Others.*

51 There is the possible criticism that this is a system that has as its central aspect, an active judiciary. It follows therefore that should the judiciary for some reason become conservative, the restrictions on access to court may become more rigid and constitute a more effective bar on access to court. The possibility of such situation materializing considering that presently South Africa is characterized by an over-active judiciary is slight however. See further, the discussion in Hoexter 'Future' 484ff.

52 See Hoexter 'Future' 499. Also see Plasket *Just Administrative Action* 288-293. Also see Plasket 'Exhaustion' 53-60.

53 Currie and Klaaren *Benchbook* 181.

54 See JR de Ville *Judicial Review* 470.

In sum, the importance of the limitation in section 7(2) of PAJA, lies in the fact that the provision encourages the development of administrative justice and consequently, viable dispute resolution mechanisms as effective alternatives to courts.[55] If achieved, this would make dispute resolution more accessible and effective, thus ensuring the active protection application of the right of access to court.[56] These are not the only purposes of the provision, other advantages, highlighting the importance of the limitation which section 7(2) of PAJA, are easily apparent.

#### 5.3.2.2.3. Other advantages of section 7(2) of PAJA

There are three distinct advantages of section 7(2) of PAJA. Firstly, internal remedies as provided for in section 7(2) of PAJA tend to be quicker in the dispute resolution process than judicial remedies.[57] The quickness of internal remedies is attributable to the fact that they are easily accessible being rooted within the Administration. Furthermore, internal remedies are quicker because, internal adjudicators usually have expertise in the particular field making for swift dispute resolution. While the actual validity of this advantage to South African law has been questioned, this should be placed in context, and consideration given to the fact that the duty to exhaust internal remedies in foreign jurisdictions has shown itself to be a quicker and viable alternative to judicial remedies.[58]

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55 See for example the discussion of the success achieved with the duty to exhaust internal remedies in the Australian law.

56 For a comparative view, see C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138.

57 The validity of this advantage in the South African Administration has however been questioned largely because in the South African Administration, there is no centrality in the internal dispute resolution mechanisms (See JR de Ville *Judicial Review* 385; Also see Plasket J's judgment in *Reed and Others v The Master of the High Court and Others*). Thus, the efficacy of internal remedies in South Africa differs across administrative sectors. Thus, while some remedies are quick, others are notoriously slow (See the 'Pongolo' example in Plasket 'Exhaustion' 57-59). Logic dictates therefore, that it is impractical to universally classify all internal remedies in South Africa as being quicker than judicial remedies.

58 See the discussion by Lewis *Judicial Remedies* 417-419. There is the criticism that this advantage in foreign jurisdictions is attributable to the fact that the administration is more centralised and therefore inefficient and because the South African Public Administration is not centralised, this advantage will never materialise in South Africa. Such criticism is not entirely accurate, for example, the English administrative system is not excessively centralised but the

Secondly, internal remedies are generally cost effective and less formal. This is due to the fact that disputing parties usually conduct their own cases. This negates the need to pay for legal representation and consultation, limiting their expenses significantly.[59] Again this is not an advantage without qualification in the South African context where some internal remedies are conducted by legal practitioners at all levels with the resultant effect that they are not as cheap as they initially seem.[60]

Thirdly, section 7(2) of PAJA offers dispute resolution mechanisms which are less formal as opposed to judicial remedies, which can be alienating.[61] The applicant usually loses control of the process to lawyers, judges and the courts.[62] These are merely some of the advantages attaching to internal remedies which promise to become more practical with the continued application of section 7(2) of PAJA.[63]

In sum, by advocating and coercing the growth of administrative justice going forward, section 7(2) of PAJA stands to benefit the populace rather than place the burden of an underperforming administration on them. The risk that section 7(2) of PAJA places the burden of a malfunctioning administration on the populace may be real, but it is a risk

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duty to exhaust internal remedies still yield these benefits (see the discussion by Lewis *Judicial Remedies* 417-419). Also see the discussion on the foreign law below.

59 See further G Budlender 'Access to Courts' (2004) 121 *SALJ* 339 at 347 who discusses the implications of excessive costs of adjudication on the right of access to court and related matters.

60 For example, internal remedies in the field of Environmental law are often conducted by lawyers.

61 As C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138 at 144 noted, 'the criticisms of the rule do not on analysis constitute convincing objections to such a rule.' Conversely, the advantages to emerge from section 7(2) of PAJA are real and the experiences of the English law, the Australian law and the American law are testament to this.

62 Also see Lewis *Judicial Remedies* 419-420.

63 For more advantages, see the American case of *Palmer v. Regents of the University of California* 107 Cal. App. 4th 899 (2003) at 904 in which the California appellate court upheld the dismissal of a former employee's whistle blowing claim because the employee had failed to fully avail herself of either of two internal grievance procedures. The court held: 'an internal grievance mechanism 'serves the salutary function of eliminating or mitigating damages. If an organization is given the opportunity quickly to determine through the operation of its internal procedures that it has committed an error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by immediately reversing its initial decision ... an individual should not be permitted to increase damages by foregoing the available internal remedies.'

diluted by the fact that courts are obligated to actively ensure that the risks do not equate to real travesties of justice in every perceivable instance.[64]

#### 5.3.2.3. The nature and extent of the limitation[65]

Generally, the limitation of access to court posed by section 7(2) of PAJA serves the salutary purpose of protecting the right. Thus, the nature and extent of the limitation is a matter which section 7(2) of PAJA leaves to the determination of the courts.[66] This not only renders the process more transparent, but also ensures that the provision must not be read to oust the jurisdiction of courts.[67]

Of course, the fact that section 7(2) of PAJA leaves the determination of when to restrict access to court to the courts does not necessarily negate the fact that the provision restricts access to court.[68] However, it illustrates that the limitation of the right of access to court is specifically sought for the express purpose of developing the efficacy of the right of access to court.

#### 5.3.2.4. The relation between the limitation and its purpose[69]

The relation that subsists between the limitation of the right of access to court and the purpose of section 7(2) of PAJA is best understood in the context of the impact of the provision on the Public Administration.

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64 Courts have already assumed this role, see for example, the discussion on *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* and *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* in chapter four of this thesis and how those cases dealt with section 7(2)(c) of PAJA.

65 Section 36(1)(c) of the Constitution

66 See chapter four.

67 See *Beinash and another v Young and others* at 133D-133F.

68 See the interpretation of section 7(2)(c) of PAJA in chapter four. Also see *Beinash and another v Young and others* at 133F-134C.

69 Section 36(1)(d) of the Constitution

#### 5.3.2.4.1.1. The Public Administration

There has traditionally been judicial over-activity in the Public Administration that section 7(2) of PAJA in advocating deference and ripeness seeks to control.[70] Consequently, the fact that the provision limits access to court even where disputes are justiciable is justifiable on two grounds. Firstly, the requirement of deference and ripeness creates a corollary duty on the administration to implement effective internal remedies. The administration has often and to a significant extent evaded this duty because:

> 'In the South African context, the terms 'Administrative law' and 'judicial review' have often been synonymous. Administrative law, for many South Africans, as and always has been about the judicial diagnosis of maladministration; about subjecting the actions of governmental bodies to judicial scrutiny and constraint...The reason is, doubtless, that South African Administrative law has never had much to offer except judicial review. South Africans have never experienced an integrated system of Administrative law in which judicial review is regarded as merely supplementary to the business of making good primary decisions, and in which other forms of control and reconsideration-such as administrative adjudication-are taken seriously.'[71]

The insistence on exhaustion of internal remedies therefore advocates the adoption of a different approach where the administration has an obligation to provide dispute resolution at first instance. In this way, section 7(2) of PAJA coerces the development of administrative justice which, with regard to the right of access to court, would mean that there would be viable alternatives to courts, relieving the burden on courts.[72]

Secondly, section 7(2) of PAJA aids in the conservation of judicial resources by ensuring that disputes are not brought for judicial adjudication prematurely. Internal dispute resolution mechanisms by their very nature assume a hierarchical structure

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70 By directing that courts can hear matters only after exhaustion of internal remedies and if internal remedies are not exhausted, courts must insist on the exhaustion of internal remedies, section 7(2) controls the intrusion by courts into administrative disputes. However, this control is subject to the dominant goal which is the pursuit of justice. See the interpretation of section 7(2) in chapter four.

71 Hoexter 'Future' 485-486.

72 See the discussion in chapter four.

within the Administration.[73] Appeals are usually set up to allow for the curing of procedural or other defects in the initial hearing. The hierarchical structure assumed by internal dispute resolution mechanisms as well as the correlative duty to exhaust internal remedies accord with common sense. Lewis[74] makes the point that:

> 'The basis of the rule that an appeal may in appropriate circumstances 'cure' a flawed initial hearing is that, in certain circumstances, the statutory decision-making process must be viewed as a whole and, so long as the whole is fair, the individual should not be able to complain that a part of the process was flawed.'

An aggrieved party must go through the whole of the hierarchical process before prematurely resorting to the courts. Challenging part of the decision-making process prematurely would circumvent the remainder of the internal procedures. When internal procedures are circumvented, the problem may arise that the review jurisdiction of courts extends only so far as the decision of the initial decision maker.[75] Courts often cannot investigate what occurs at initial hearings because the circumstances under which courts are willing or procedurally allowed to investigate facts on review are limited. Courts on review rely largely on affidavits and the evidence of contemporaneous documents.[76] Therefore, there are advantages to allowing the appellate body to investigate facts and letting the reviewing court determine the legal position that arises from those facts.[77] Thus, 'judicial review of the appellate body's decision as opposed to that of the initial decision-maker provides a better degree of judicial protection'[78] because by the time disputes reach the courts they have been adjudicated on, to a level that guarantees expediency and the best possible resolution of the dispute in court. This protects and advances the efficacy of the right of access to court in the Constitution.

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73 See *Reed and Others v The Master of the High Court and Others.*

74 C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138 at 144.

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

As alluded to earlier, it is possible that section 7(2) of PAJA may be exploited by rogue lawyers to delay judicial review of justiciable disputes. However, if reliance in interpreting the provision is placed on the common law, where this possibility arises, courts are empowered to quash the threat of harm being occasioned. Section 7(2)(c) of PAJA enjoins courts to guard the interests of justice and it is unlikely that courts would allow such exploitation of either judicial deference or ripeness.[79] The tools that have been put in place to aid the pursuit of the goals of section 7(2) of PAJA therefore have the intriguing characteristic of protecting and advancing the right of access to court. They are certainly reasonable and show an appreciation of the particular context to which they are to apply, thus they cannot be construed to violate section 34 of the Constitution.

Clearly, section 7(2) of PAJA harbors two tangible advantages which, justify and account for the limitation it imposes on the right of access to court. Firstly, section 7(2) of PAJA places the spotlight on and encourages scrutiny of the Public Administration and its internal remedies coercing the development of the dispute resolution structures within that Public Administration. The promotion of public scrutiny of administrative decision-making ensures that the rationality and legitimacy of the decision-making process is strengthened.[80] This serves as a deterrent to future ill conceived unlawful acts by administrators.[81] And by coercing administrators to act in a just manner,

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79 See for example, *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* and *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 168I-169B. Furthermore, guidance can be drawn from the courts' approach to frivolous litigation. Generally, frivolous litigation is frowned upon. However, Galligan, 408-409 argues that the cure for such litigation is not to bar the cases from getting to court. The cure is for frivolous litigators to be punished in court, most commonly by the use of adverse costs orders (See TJM Paterson *Eckard's Principles of Civil Procedure in the Magistrate's Courts* (2001) 232-250.) Drawing from this, where lawyers manipulate the duty to exhaust internal remedies to simply constrict the jurisdiction of the court to determine an otherwise justiciable dispute this is a matter which can be rectified in court. This would be done in the interests of justice and would therefore be permissible under section 7(2)(c) of PAJA. Rogue lawyers cannot be the downfall of section 7(2) of PAJA as much as frivolous litigators should not lead to wholesale barring of access to court.

80 J Jowell 'Judicial Review of the Substance of Official Decisions' (1993) *Acta Juridica* 117 at 118.

81 Also see HRW Wade *Constitutional Fundamentals* (1980) 70 who contends that in Australia in the 1970's and 1980's senior civil servants even called for judicial review as a stimulus for efficiency and morale. See M Aronson *Judicial Review of Administrative Action* (1996) 33.

section 7(2) of PAJA performs a function similar to that performed by the Public Administration principles in section 195 of the Constitution.[82] Consequently, section 7(2) of PAJA advances and encourages the growth of the concept of administrative justice.

#### 5.3.2.5. Less restrictive means to achieve the purpose[83]

The need to stem out judicial over-activity in the administration by the courts in matters of the administration is a matter that must be addressed tactfully, taking caution not to oust the jurisdiction of the courts entirely.[84] This is a balance that legislation has often failed to find, either ousting judicial review entirely, or alternatively granting unlimited review.[85] Similarly, the need to encourage administrative autonomy in order to lay a foundation for the growth of administrative justice is a task which surpasses any available alternative means of advocating the growth of administrative justice.

Section 7(2) of PAJA is certainly desirable, to the extent that the limitation it poses to the right of access to court is not arbitrary. In fact, section 7(2) of PAJA allows flexibility[86] in its application. The sole prescribed standard in the application of the provision is that there must be a marked effort to uphold the interests of justice.[87] A practical example of the flexible nature of section 7(2) of PAJA can be found in *Governing Body, Mikro Primary School and another v Minister of Education, Western*

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82 See the discussion on these principles in chapter four.

83 Section 36(1)(e) of the Constitution

84 See generally, Hoexter 'Future' 484ff.

85 *Ibid.*

86 Generally, statutory provisions by their very nature often are considered 'rules' of law(See AB Edwards in WJ Hosten *et al Introduction to South African Law and Legal Theory* 2 ed(1995) 527) because they often apply in an 'all-or-nothing' manner (Dworkin *Taking Rights Seriously* 87-88; 110-115). However it is no aberration for a statutory provision to be construed as a 'principle' of the law. It commonly occurs that statutory provisions are arbitrarily labelled 'rules' without any critical consideration of each provision on its own merits. The inevitable consequence is that all statutory provisions are often considered rigid rules of the law. In spite of being a statutory provision, section 7(2) of PAJA like any principle admits exceptions and is applied on the basis of value judgments by the court.

87 See section 7(2)(c) of PAJA.

*Cape and Others*. Thring J considered the magnitude of the issues before the court particularly that the court dealt with the education of young people and held:

> '...delay can be avoided if the matter is finalised here and now...moreover, this case has generated considerable public interest. It can be safely assumed, I think, that there are many people to whom the principal issues raised in this matter...are of great moment. It would be regrettable if issues of such magnitude and importance were to be decided behind closed doors by a statutory board or by an arbitrator. To my mind, the cumulative effect of these factors constitutes 'exceptional circumstances' for the purposes of section 7(2)(c) (of PAJA), justifying the exemption of the applicants from any obligation which they might otherwise have been under to exhaust their internal remedies, and I deem such exemption, which is sought by the applicants, to be in the interests of justice.'[88]

Thus, while section 7(2) of PAJA may restrict access to court, such restriction is flexible and tailored toward the development of the administration while controlling judicial interference in the administration.[89] This is not possible with any alternative provision. In fact, this is especially apparent in the context of the Public Administration.

#### 5.3.2.5.1. Section 7(2) of PAJA and the Public Administration

Section 7(2) of PAJA ensures that even in the pursuit of an ideal internal remedy system, contemporary rights of the populace are still protected.[90] Section 7(2)(c) of PAJA allows for judicial review where the internal remedies offered by the administration are inadequate or not consistent with the interests of justice.[91] The retention of judicial review is particularly important in South African Administrative law because it ensures that in the process of developing the internal dispute resolution system, the burden of the underperforming administration is not borne by the

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88 *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 515G-515J.

89 See also, *Western Cape Minister of Education v Governing Body, Mikro Primary School* at 984D-985B.

90 See *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* at 515D-515J. Also see *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 168I-169B.

91 *Ibid.* Also see the interpretation of section 7(2)(c) of PAJA in chapter four of this thesis.

populace.[92] Hoexter, in an article which was critical of judicial activity in the administration, makes the point that:

> 'The depressing pervasiveness of corruption in our public service suggests that we should be grateful for the existence of a vigorous system of judicial control of administrative action; *a fortiori* if the Minister fails to exercise his statutory discretion to initiate future reform, and we are stuck forever with a system that insulates and shields the real sources of bureaucratic maladministration from sustained exposure and eradication.'[93]

The dual function of section 7(2) of PAJA is well suited to address the problems facing the South African Public Administration. Section 7(2) of PAJA may restrict access to court, but it does so primarily to ensure administrative autonomy and consequently, the advancement of administrative justice. This coincides with the constitutional vision which includes the development of an effective system of administrative justice.

Section 7(2) of PAJA successfully addresses the pressing needs in the South African Administrative law in a unique manner which achieves a balance between these conflicting factors.[94] The extent of the limitation which the provision imposes on the right of access to court could not be any less restrictive in the pursuit of the benefits it pursues. And in considering the extent of the limitation, care should be taken to note that it is not arbitrary limitation, instead it is limitation which the courts themselves have power to either acquiesce to or override.[95]

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92 For example, the potency of the provision in the aversion of harm being occasioned on the populace is apparent in *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* 515D-515J. For a contrary view see Plasket *Just Administrative Action* 288-293. Also see MH Cheadle, DM Davis and NRL Hysom *South African Constitutional Law: The Bill of Rights* (2002) 611.

93 See Hoexter 'Future' 499. For a comparative perspective see AC Hutchison 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 *Modern LR* 293 at 323.

94 Section 7(2) of PAJA advocates a co-existence between administrative autonomy and judicial review.

95 See for example, *Earthlife v Director General: Department of Environmental Affairs and Tourism* 164A-169B and *Governing Body, Mikro Primary School and another v Minister of Education, Western Cape and Others* 515D-515J.

Despite this analysis of section 7(2) of PAJA using section 36 of the Constitution, the question of the constitutionality is a matter that courts ultimately have to determine.[96] The discussion of the constitutionality of section 7(2) of PAJA must therefore necessarily include an overview of the case law that has addressed the question of the constitutionality of section 7(2) of PAJA.

## 5.4. Constitutionality of section 7(2) of PAJA: A judicial perspective

From a judicial perspective, there is what at best, may be described as a fragmented approach to the question of the constitutionality of section 7(2) of PAJA with courts addressing the matter on a case by case basis. Presumably, this is due to the fact that there has not been a Supreme Court of Appeal or Constitutional Court decision on the matter, which would establish binding precedent on the matter. Although certain themes are discernible in the approach courts have taken to the question of the constitutionality of section 7(2) of PAJA, it is still a matter that is plagued by much uncertainty.

In *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province*[97] the court dealt with section 10 of the Social Assistance Act.[98] The Act creates a right of internal appeal. However, the Act carries no express or implied provision placing an obligation on an aggrieved party to exhaust internal remedies before approaching the court. Plasket J held that PAJA was not applicable since the conduct complained of took place prior to the coming into effect of the Act. More importantly however, Plasket J held *obiter* that section 7(2) of PAJA merely defers the right of access to court stating:[99]

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96 JR de Ville *Judicial Review* 470.
97 2005 (6) SA 248 (E).
98 Act 59 of 1992.
99 *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at 262B-262D.

> 'Section 7(2) certainly does not oust the jurisdiction of the courts when an applicant has chosen not to utilize an internal remedy or, if for some other reason, has not done so. Such an interpretation of the section would most probably render it unconstitutional.'

The problem with this *obiter* comment is that, its acknowledgment of the fact that section 7(2) of PAJA does not oust the jurisdiction of courts merely indicates that the constitutionality of the provision is subject to whether it is reasonable and justifiable in terms of section 36 of the Constitution. There is no further input on the constitutionality of section 7(2) of PAJA. Regardless of the fact that the comment was made *obiter*, it sufficiently creates uncertainty with regard to the constitutionality of section 7(2) of PAJA.

This uncertainty is compounded by the fact that within the same year, in *Reed and Others v The Master of the High Court and Others*, Plasket J assumed a slightly different stance, commenting:

> 'Section 7(2) of PAJA, assuming as I must for present purposes that it is constitutional, limits the fundamental right of access to court by barring resort to judicial review until internal remedies provided by any law have been exhausted (or until the time period for utilising the internal remedy has elapsed). By deferring resort to judicial review in this way, section 7(2) restricts the jurisdiction of a court to determine an otherwise justiciable issue before it. Because it interferes with fundamental rights, it must be interpreted restrictively.'[100]

This conditional acceptance of the constitutionality of section 7(2) of PAJA also leaves the actual question of constitutionality unanswered. This tentative and conditional approach to the constitutionality of section 7(2) of PAJA is also apparent in other cases.[101]

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100 *Reed and Others v The Master of the High Court and Others* at 426d-426f.

101 See *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 168I-169A. Griesel J made a subjective and tentative attempt at rationalizing the constitutionality of section 7(2) of PAJA but he left the possibility alive of a different finding.

Because there is a conditional acceptance of the constitutional validity of section 7(2) of PAJA, there is the possibility that the provision is open to be interpreted in a manner that holds it to be unconstitutional. This uncertainty from a judicial perspective, with regard to the constitutionality of section 7(2) of PAJA, is a problem which surrounds the application of the provision and in a sense cultivates the development of different modes of interpreting the provision.[102]

From a judicial perspective therefore, whether section 7(2) of PAJA is constitutionally valid or not is presently unclear with courts holding that the provision must be interpreted restrictively.[103] An argument could be made however that the fact that courts have conditionally read section 7(2) of PAJA as constitutional means that there is a greater likelihood of the acceptance of the constitutionality of section 7(2) of PAJA. The rationale is that where two interpretations of a statutory provision are possible, one constitutional and the other not, it is the interpretation asserting constitutional validity that takes precedence.[104] There was the hint of the adoption of such approach in *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited*, where Griesel J made the remark that:

> 'Finally, all other things being equal, and in case of doubt in relation to...section 7(2)(c) of PAJA, the Court should, in my view, incline to an interpretation of the facts and the law that promotes, rather than hampers, access to courts.'[105]

Although he relied on a different approach,[106] De Ville also makes the point that:

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102 See the interpretation and alternative interpretation of section 7(2) of PAJA in chapter four.

103 See for example: *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* 262B-262D.

104 See *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at 280B-281B. See further Kentridge AJ's judgment in *S v Zuma* at 650H-653B. Also see the discussion on principles of interpretation in the last chapter.

105 See *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 168I-169A.

106 See JR de Ville *Judicial Review* 470 who argues that the principle laid down in section 7(2) of PAJA is in line with a principle adopted by the Constitutional Court that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.' JR de Ville cited the following cases in support of his argument: *S v*

'In light of the prevalence of a requirement to first exhaust internal remedies and the reasoning behind such duty, it appears unlikely that the courts will declare section 7(2) of PAJA invalid.'[107]

The conclusion that there is a greater likelihood that courts will accept that section 7(2) of PAJA is constitutional, is based solely on the application of logic and general principle.[108] Presently, this is not the approach courts have taken to the interpretation and application of section 7(2) of PAJA. Courts have only tentatively accepted the constitutionality of section 7(2) of PAJA while leaving open the possibility for an alternative finding of unconstitutionality based on an alternative interpretation of section 7(2) of PAJA.[109] This has meant that from a judicial perspective, the question of the constitutionality of section 7(2) of PAJA is mired in uncertainty.

The current judicial approach to the constitutionality of section 7(2) of PAJA is gradually becoming the orthodox approach to section 7(2) of PAJA.[110] As was highlighted above, this approach has been characterized by uncertainty. Until certainty over this area of law is affirmed, this is an undesirable state of affairs because, it leaves open the possibility of another court adopting a different approach to the interpretation of section 7(2) of PAJA and finding section 7(2) of PAJA unconstitutional.[111]

The problem with this approach is that, it fails to take into account the lessons of the common law with regard to the application of the duty to exhaust internal remedies.[112] Consequently, the contemporary approach to the duty to exhaust internal remedies is

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*Mhlungu and Others* 1995 (7) BCLR 793 (CC) at 820J-820I; *S v Vermaas; S v Du Plessis* 1995 (7) BCLR 851 (CC) at 857F-858H; *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at 758D-758E.

107 JR de Ville *Judicial Review* 470.

108 See for example, the approach JR de Ville *Judicial Review* 467-470 uses to get to his conclusion.

109 See chapter four.

110 This is particularly true in the absence of a superior court decision (Constitutional Court or Supreme Court) to create binding precedent on the matter. The courts that have addressed the matter, most of which are discussed above are at best, High Court decisions.

111 See for example, the rather subjectively qualified view rendered by Griesel J in *Earthlife Africa (Cape Town) v Director-General: Department Of Environmental Affairs & Tourism and Eskom Holdings Limited* at 168I-169A.

112 These were generally discussed in chapter two and chapter three.

reminiscent of the approach taken by courts in both the English law and South African law in the periods preceding the evolution of the duty to exhaust internal remedies. In the early English law and South African law, courts strictly applied ouster clauses primarily because they functioned under the constraints of a legal system based on parliamentary sovereignty.[113] Courts were compelled to 'to function under and administer illegitimate laws,'[114] as a result courts had little choice, but to strictly apply ouster clauses to the exclusion of judicial review.[115] However, courts realized the propensity of ouster clauses to cause injustice where they were applied without qualification.[116] It was this realization that accounted for the extensive qualification of ouster clauses which ultimately spawned the duty to exhaust internal remedies by the courts.[117] This motivation to protect the interests of justice was what also prompted courts to assume a central role in the application of the duty to exhaust internal remedies.[118]

Tragically, the lessons learnt in the developmental phases of the common law duty to exhaust internal remedies,[119] instead of informing the interpretation and application of the duty to exhaust internal remedies in section 7(2) of PAJA, as one would expect, seem to have been overlooked in the contemporary law. Courts have reverted to the earlier common law position where, in matters of the application of the duty to exhaust internal remedies, they assume a passive role in which they defer to the Legislature. Courts have shied away from the obligation to determine the extent of the exclusion of judicial review imposed by section 7(2) of PAJA, which at common law had become a

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113 For an English common law perspective, see chapter two and the discussion on the strict application of the duty to exhaust internal remedies in *Doe v Bridges* and the cases that followed it. For a South African common law perspective, see too, the strict application of the duty to exhaust internal remedies in *Shames v South African Railways and Harbours* and the cases that endorsed it.

114 See P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 672.

115 This was because Parliament was a superior tier of government and generally, courts had to honor the directives by Parliament in the legislation. See further, the discussion on the strict application of the duty to exhaust internal remedies in chapter two and chapter three.

116 See the discussion on the qualification of the duty to exhaust internal remedies in chapter two.

117 See the discussion on the qualification of the duty to exhaust internal remedies and also the central role courts assumed in the application of the duty in chapter three.

118 *Ibid.*

119 For example, that the duty to exhaust internal remedies had a propensity to cause injustice where the duty was applied without qualification, prompting courts to assume a central role in the application of the duty to exhaust internal remedies.

critical aspect of the application of the duty to exhaust internal remedies.[120] Such approach can hardly be considered as being consistent with the constitutional mandate, and is unjustified under the constitutional democracy where courts are not subservient to the Legislature.[121] From a constitutional perspective, courts are more empowered to apply the lessons of the common law in the application of the duty to exhaust internal remedies in section 7(2) of PAJA.[122]

It is submitted that there may be an alternative, or better, approach to the interpretation and application of section 7(2) of PAJA which would bring certainty to the question of the constitutionality of section 7(2) of PAJA. The impetus for this alternative approach comes from three sources: firstly, the Constitutional Court's declaration that the common law may be used to aid interpretation and application of PAJA and secondly, the Constitutional Court's declaration that legislation to give effect to fundamental rights in the Constitution is the culmination of a partnership between the courts and the Legislature. Thirdly, much guidance can be drawn from the comparative law.

## 5.5. Constitutionality of section 7(2) of PAJA: an alternative understanding

The current judicial approach to the constitutionality of section 7(2) of PAJA is gradually becoming the orthodox approach to section 7(2) of PAJA.[123] This is undesirable, because it leaves the possibility of any court, which is called on to interpret section 7(2) of PAJA, assuming its own approach to the matter and finding the provision to be unconstitutional. It is submitted that there may be an alternative, or better, approach to the interpretation and application of section 7(2) of PAJA which

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120 See for example the tentative approach taken by Plasket J to the issue in *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at 262B-262D.

121 See P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 672.

122 *Ibid.*

123 This is particularly true in the absence of a superior court decision (Constitutional Court or Supreme Court) to create binding precedent on the matter. The courts that have addressed the matter, most of which are discussed above are at best, High Court decisions.

would have the effect of bringing certainty to the question of the constitutionality of section 7(2) of PAJA.

The impetus for this alternative approach comes from three sources: firstly, the Constitutional Court's declaration that the common law may be used to aid interpretation and application of PAJA, secondly, the Constitutional Court's declaration that legislation to give effect to fundamental rights in the Constitution is the culmination of a partnership between the courts and the Legislature. Thirdly, reliance is also placed on the law of foreign jurisdictions which have successfully integrated the duty to exhaust internal remedies into their law.

### 5.5.1. The common law and the constitutionality of section 7(2) of PAJA

In *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others*, O'Regan J, referring to the role of the common law under the constitutional dispensation, made the important point that, 'the common law informs the provisions of the Constitution and PAJA.' The learned judge also alluded to the fact that 'the extent to which the common law remains relevant to administrative review will have to be developed on a case by case basis as the courts interpret and apply the provisions of PAJA and the Constitution.'[124]

Surprisingly, the importance of the common law is a factor that has been overlooked in the application of section 7(2) of PAJA, particularly since the common law could be used to establish the exact nature of the relationship that subsists between section 7(2) of PAJA and the right of access to court. This could be done in a manner that would lend unparalleled certainty to the question of the constitutionality of section 7(2) of PAJA.

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[124] 2004 (4) SA 490 (CC) at 504F-505A. See too *Pharmaceutical Manufacturers Association of SA: In re Ex Parte The President of the Republic of South Africa.*

#### 5.5.1.1. The rationale behind the duty to exhaust internal remedies under the common law

Except for when it originated and while it was in its formative stages, the rationale behind the duty to exhaust internal remedies has always been the protection of the avenue of access to court.[125] This was achieved in two notable ways, firstly, the duty to exhaust internal remedies was used by the judiciary as a tool to allow access to court where such access had been sought to be deprived by the Legislature. Secondly, the duty to exhaust internal remedies ensured the conservation of the judicial resource by restricting access to court for only meritorious matters.[126]

It was only with the progression of time that deference came to feature in discourse on the duty to exhaust internal remedies. Even then however, it was well accepted that judicial deference was purposive.[127] It was intended to allow for administrative autonomy and consequently that would lead to the growth and development of administrative justice. This would also protect the avenue of access to court by providing adequate alternative forums to effectively undertake the adjudication function. In all this it was understood that two things were paramount, the protection of access to court and the advancement of the interests of justice.[128]

Thus, even after the inception of the constitutional dispensation, courts accepted that the rationale for the duty to exhaust internal remedies was not the exclusion of access to court. On the contrary, the common law duty to exhaust internal remedies could even be argued to facilitate the effective application of the right of access to court.

#### 5.5.1.2. The duty to exhaust internal remedies as facilitator for access to court

The argument has recently been made that internal remedies is a term that is strictly defined to include only effective remedies which resolve disputes by the application of

125 See chapters two and three.
126 See chapters two and three.
127 *Ibid.*
128 *Ibid.*

law.[129] The argument is sound and in theory, it formed the foundation of the duty to exhaust internal remedies at common law. However, in practice, there often was departure from the application of strict theory. Examples abound of instances in which the definition of the term 'internal remedy' in the context of exhausting internal remedies, was more dependant on the efficacy and adequacy of the remedy than on whether it was attained by application of law.[130] The logic fuelling this departure from the strict application of theory was based on the idea that the protection of rights by the Judiciary took precedence to the honoring of the application of a skewed separation of powers. This is explained below in more detail.

The duty to exhaust internal remedies is rooted in the separation of powers.[131] Because the administration forms part of the Executive and the Legislature,[132] administrative remedies very often are political and wholly immersed in policy choices. Such matters, under the separation of powers fall outside the realm of the courts. Courts only had jurisdiction to review on the explicit grounds of lawfulness, reasonableness or procedural fairness. However, the problem often arose that the review jurisdiction of courts on the established grounds of lawfulness, reasonableness or procedural fairness was excluded arbitrarily based on logic that derived from a strict application of the separation of powers doctrine.[133] This meant that aggrieved parties were deprived their right of access to court at the instance of the Legislature.

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129 See *Reed and Others v The Master of the High Court and Others.*

130 Also note that the term 'application of law' is more contemporary (see for example, section 34 of the Constitution and section 7(2) of PAJA). At common law, courts relied more on considerations of justice and not necessarily the application of law.

131 Central to the separation of powers is the concept of separation and control. Control is achieved largely by the 'check' system. See Wiechers *Administrative Law* 270.

132 See JF Garner *Administrative Law* 5 ed (1979) 3 who says: 'the administration...is used to signify the government of the day or the body of persons who for the time being carry on that government. Finer has defined administration as being 'the governmental machine by which policy is implemented. Unfortunately, this at once introduces another difficulty of definition, as a distinction has to be made between administration and 'policy.' By policy is meant formation of a general line or course of action-the idea of leadership, and the taking of a major decision on a matter of discretion; administration involves the execution or implementation of that policy so formulated in accordance with general principles.'

133 This could be done by various means, see Wade and Forsyth *Administrative Law*; Jones and AS de Villars *Administrative Law* and Baxter *Administrative Law*.

To counteract this, and to ensure that they could protect the right of access to court, courts, in turn, relied on the duty to exhaust internal remedies to facilitate and justify their extension of the right of access to court to aggrieved parties in the administration. Courts extended their jurisdiction to aggrieved parties where the subject matter of the disputes was not blatantly out of the jurisdiction of the court.[134] This grew to be be standard practice and ultimately, in some cases, the nature of the remedy, whether political or policy based was not the final determinant on whether courts extended their jurisdiction to the aggrieved parties.[135] Courts qualified the duty to exhaust internal remedies to allow them to intervene to avoid injustice even prior to internal remedies having been exhausted.[136] Focus was drawn solely to the preservation of justice and consequently the adequacy of the relief offered internally[137] and not whether the relief was attained by application of law or policy.[138]

At common law, in order to apply the duty to exhaust internal remedies for the purpose of protecting the right of access to court, the Judiciary placed itself at the centre of the application of the duty to exhaust internal remedies.[139] This was central

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134 See JF Garner *Administrative Law* 5 ed (1979) 3.

135 See Craig *Administrative Law* 250 for a perspective on the English law duty to exhaust internal remedies.

136 The qualified duty to exhaust internal remedies was appropriate because firstly, it provided justification for judicial review. Secondly, by imposing an obligation to exhaust statutorily imposed remedies it ensured that judicial review would not be in blatant violation of the separation of powers. See further, the discussion in chapters two and three.

137 It is for this reason that internal remedies in the case law have featured varying forms of dispute resolution such as Ministers, Councils, etc... Under the constitutional dispensation, the situation is different. The constitutional commitment to 'accountability, responsiveness and openness' in section 1, the Bill of Rights and section 195(1) (f) of the Constitution empowers courts to let their gaze on all conduct even that which could be hidden as 'policy' in the past.

138 See for example *Devenport v Tozer* and *Cooper v Whittingham* in Chapter two. Also see MH Cheadle, DM Davis and NRL Hysom *South African Constitutional Law: The Bill of Rights* (2002) 611. The authors also discuss some disadvantages soon after the quoted section.

139 See the discussion of the duty to exhaust internal remedies in chapters two and three. This was not always the case when the duty to exhaust internal remedies originated and was in its formative phases. At the time, the duty to exhaust internal remedies applied in a rigid fashion which excluded court and access to court until internal remedies were exhausted. The core concern with such an approach was not the advancement of justice, but the exclusion of judicial review. *Shames v South African Railways and Harbors* is an example of how the duty was initially applied strictly in the South African law. *Shames v South African Railways and Harbors* and the cases that endorsed it advanced the view that the duty to exhaust internal remedies meant that *all* internal remedies had to have been exhausted prior to an aggrieved party seeking judicial review. See the discussion in chapter three. It is precisely because of the effect of the duty to exhaust internal remedies to exclude judicial review that courts departed from the

to the success of the duty to exhaust internal remedies at common law[140] and it was this approach to the duty to exhaust internal remedies, which was endorsed as being consistent with the Constitution, and applied prior to the enactment of PAJA.[141]

Section 7(2) of PAJA, being the provision which incorporated the duty to exhaust internal remedies must necessarily follow the precedent set by the common law. Thus, the Judiciary must occupy a central role in the application of section 7(2) of PAJA. The formulation of section 7(2) of PAJA is indicative of an intention on the part of the Legislature to replicate the common law duty to exhaust internal remedies. To this end, it is submitted that, as long as courts occupy and accept a central role in the application of section 7(2) of PAJA, there can be no questions about its constitutionality lending certainty to the law.

### 5.5.2. Section 7(2) of PAJA: a culmination of efforts by the Judiciary and Legislature

The role of courts as the custodians of rights[142] is magnified where courts deal with legislation that gives effect to a fundamental right in the Constitution such as PAJA.[143] Such legislation is the cumulative effort of both the Legislature and the Judiciary working together to regulate the breadth and manner of application of the legislation.[144] This issue arose in *NEHAWU v University of Cape Town and Others*[145]

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approach in *Shames v South African Railways and Harbors*. See *Crisp v South African Council of the Amalgamated Engineering Union*; *Jockey Club of South Africa v Feldman*; *Bindura Town Management Board v Desai and Co* and *Welkom Village Management Board v Leteno*.

140 See the discussion in chapter three. Also see *Welkom Village Management Board v Leteno*.

141 See for example *Legal Aid Board v Msila* 1997 (2) BCLR 229 (E); *Radio Islam v Independent Broadcasting Authority and others* Unreported, case no 31448/97; *Baromoto and Others v Minister of Home Affairs and Others* 1998 (5) BCLR 562 (W); *Maluleke v Member of the Executive Council, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); *Simela and Others v MEC for Education Province of Eastern Cape and Another* [2001] 9 BLLR 1085 (LC).

142 *Motala and another v University of Natal* 1995 (3) BCLR 374 (D) at 382A-E.

143 See also, P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 671, where Justice Langa makes the point that the judiciary must meet the challenge posed by the demands of a transforming ladscape.

144 See generally the views expressed by J Klaaren 'Constitutional Authority to enforce the rights of Administrative Justice and Access to Information' 1997 (13) *SAJHR* 549.

145 2003 (2) BCLR 154 (CC) at 159H-160C.

which dealt with the Labour Relations Act.[146] Ngcobo J held that the interpretation of statutes enacted to give effect to constitutional rights was a constitutional matter. Indeed, he held:

> 'In many cases, constitutional rights can only effectively be honored if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfillment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights.'[147]

It could also be said that, statutes which are enacted to 'give effect' to rights of the Bill of Rights are the subject of a partnership between the courts and the legislature. Furthermore, where courts are called on to interpret legislation that is enacted to 'give effect' to rights in the Bill of Rights, they need not defer to Parliament with regard to the interpretation of the content of the constitutional right.[148] Bednar also makes the point that, 'the Legislature is no better placed than the courts to determine the content of the right, and it is quite properly, the province of the Judiciary.[149]

Courts are therefore under an obligation as part of the legislative partnership that created section 7(2) of PAJA to clarify matters of its constitutionality. For uncertainty to emanate from the courts is an untenable state of affairs which surely goes in the face of Ngcobo J's judgment in *NEHAWU v University of Cape Town and Others.* This is compounded by the fact that, the solution to the uncertainty surrounding section 7(2) of PAJA, lies in the adaptation of an approach to the provision which would be similar to that taken to the common law duty to exhaust internal remedies. Such approach is

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146 The Labour Relations Act gives effect to section 24 of the Constitution in the same manner that PAJA gives effect to the right to just administrative action in section 33 of the Constitution.

147 At 160A-160C.

148 For a more detailed overview, see Klaaren 'Constitutional Authority' at 551-554.

149 Bednar *Review for Unreasonableness* 115.

acceptable under PAJA, thus, in *Manong and Associates v Director General: Department of Public Works and Others*, Davis J made the point that:

> 'Even a cursory examination of the provisions of PAJA reveals that, the body of common law, which had been developed prior to the introduction of PAJA remains relevant to the interpretation and development of PAJA.'[150]

Furthermore, this is an approach that finds support in the presumptions of statutory interpretation.[151] In establishing the pertinence of the common law to the interpretation of section 7(2) of PAJA, recourse could be had to the presumption that, Parliament does not intend to change the common law.[152]

### 5.5.3. The foreign law, the South African Law and the right of access to court

In addition to the two factors discussed above, the foreign law offers practical examples of how and whether the duty to exhaust internal remedies can be applied in juxtapose to the right of access to court. The law of two foreign jurisdictions is particularly relevant to this discussion, namely the English law and the Australian law. The English law is a highly instructive source of comparative foreign law due to the fact that the duty to exhaust internal remedies applied in the South African law originated in the English law.[153] The Australian law on the other hand, symbolizes what may be considered the prototype of a functional administrative system with an effective internal dispute resolution mechanism.

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150 *Manong and Associates v Director General: Department of Public Works and Others* at 1026H-1026I.

151 For example, with regard to the uncertainty which surrounds the question of whether section 7(2) of PAJA unconstitutionally limits the right of access to court, certainty could be achieved by placing reliance on the presumption that, Parliament in enacting legislation, does not intend to diminish existing rights. See Currie and Klaaren *Benchbook* 20.

152 See further, Currie and Klaaren *Benchbook* 20. However, Currie and Klaaren also point out that this presumption has a narrow field of operation.

153 See chapters two and three.

#### 5.5.3.1. The English law duty to exhaust internal remedies

Lewis, who has written extensively on the English law duty to exhaust internal remedies, contends that the duty to exhaust internal remedies is a critical tool in the attainment of administrative justice.[154] However, administrative justice is attainable only when courts perform a watchdog function and ensure that insistence on the duty to exhaust internal remedies does not lead to injustice. To guarantee this, the scope of the application of the English law duty to exhaust internal remedies is well defined.[155] Consequently, the duty to exhaust internal remedies is a functional aspect of the contemporary English law. The principle has proven to be a solid and purposive aspect of the law. This is despite the fact that the English Law does not have a constitutionally entrenched Bill of Rights.[156] The persistent risks and threat to the right of access to court often raised have not been felt in any significant proportions. In South Africa, where there is a constitutionally entrenched Bill of Rights which enshrines both the express and idealistic right of access to court the risk is even more limited.

#### 5.5.3.2. The Australian Law duty to exhaust internal remedies

In Australia in the 1970's and 1980's senior civil servants called for judicial review in the administration as a stimulus for efficiency and morale.[157] However, 'over the last twenty years, Australia has developed a federal system of Administrative law that is comprehensive and integrated.'[158] At its peak, this development culminated in the creation of the efficient and largely successful Administrative Review Council.[159] The

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154 Lewis *Judicial Remedies* 411.

155 *Ibid.*

156 The English law does have a Constitution, but it is not codified in the same manner as the South African Constitution.

157 HRW Wade *Constitutional Fundamentals* (1980) 70. Also see Wade and Forsyth *Administrative Law* 904.

158 A Robertson 'Monitoring Developments in Administrative Law: The Role of the Australian Administrative Council' in M Harris and M Paddington *Administrative Justice in the 21st Century* (1999) 491.

159 Also see H Corder 'Without Deference, With Respect: A Response to Justice O' Regan' (2004) 121 *SALJ* 438 at 444.

Council has supervisory jurisdiction over all administrative issues. Thus, Robertson notes that:

> 'In the 20 years since its establishment, the Administrative law system has increased government accountability and significantly improved the quality of government decision making...it has been accepted by citizens and, although not without intermittent skepticism, Government as an integral part of the country's democratic system.'[160]

Because 'a significant part of the Council's work is taken up with ensuring that discretionary government decision-making is subject to appropriate review, both judicially and on the merits,'[161] the effects of such structure have resonated to the exhaustion of internal remedies. Consequently, the Australian duty to exhaust internal remedies is more complex than that of most constitutional states following the same model as Australia.

The success of the Australian system of internal dispute resolution is attributable to two factors. Firstly, the centralization of the internal dispute resolution mechanisms and secondly, to the decentralization of judicial power coupled with the recognition of the validity and authority of the administrative adjudicative forums.[162] The result of this has been certainty in Administrative law stemming from the application of uniform standards across all internal dispute resolution. This assists applicants, enhancing the independence and credibility of administrative dispute resolution and ensuring that review tribunal decisions are used by agencies to improve decision making generally.[163]

Furthermore, 'because dispute resolution for all administrative disputes is centralized and the Administrative Review Council is separate from any specific state department

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160 *Ibid.*

161 A Robertson 'Monitoring Developments in Administrative Law: The Role of the Australian Administrative Council' in M Harris and M Paddington *Administrative Justice in the 21st Century* (1999) 502. (Robertson 'Monitoring.')

162 Robertson 'Monitoring' 501.

163 Robertson 'Monitoring' 505. For a contrasting view see Hoexter 'Future' 498.

all users of the system see it as sufficiently impartial in dispensing its dispute resolution function.'[164] Robertson opines that:

> 'The Council's independence from government and continuity of existence combined with its unique mix of membership, means that it has achieved a high level of credibility amongst all the participants in the Administrative law system.'[165]

Under such system, the duty to exhaust internal remedies is not perceived as carrying a threat to the right of access to court. On the contrary, the duty to exhaust internal remedies in Australia, indeed most foreign jurisdictions which apply it carries advantages.

In contrast to the Australian system, the South African Administrative law duty to exhaust internal remedies is highly unstructured. De Ville notes that 'South Africa does not have a general administrative appeals tribunal as exists in Australia. Instead, legislation on an *ad hoc* basis makes provision for appeals from administrative bodies to a wide range of officials, boards, tribunals and courts.'[166] Thus:

> 'The current system has been criticized for the absence in may instances of a right of appeal on the merits, (where an appeal exists) the lack of independence of appellate bodies or officials, the lack of coherence in the current system, the lack of a uniform procedure, uncertainties as to the procedure to be followed, as well as the lack of a controlling body (insofar as the establishment, membership and functioning of these bodies are concerned).[167]

Similarly, in contrast to the English law,[168] the South African law duty to exhaust internal remedies harbors various uncertainties. But this is largely attributable to the novelty of section 7(2) of PAJA. The efficiency and efficacy displayed by the duty to exhaust internal remedies in both the English law and the Australian law has

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164 Robertson 'Monitoring' 501.
165 Robertson 'Monitoring' 502.
166 JR de Ville *Judicial Review* 385. Also see, Rabie 1979 *De Jure* 128; Baxter *Administrative Law* 263-267; SALC (1992) 22-51.
167 JR de Ville *Judicial Review* 388-389.
168 Craig *Administrative Law* 249.

developed over the course of long periods of time.[169] Consequently, the duty to exhaust internal remedies is seen as a reasonable and justifiable limitation of the right of access to court.[170] Lewis, discussing the relationship that subsists between the right of access to court and the duty to exhaust internal remedies argues that 'the criticisms of the rule do not on analysis constitute convincing objections to (the duty to exhaust internal remedies).'[171]

The South African law ties to either system[172] indicate that there is certainly a possibility that a balance can be found between the duty to exhaust internal remedies and the right of access to court.[173] Furthermore, such ties encourage optimism that, given time, the efficacy of section 7(2) of PAJA will rise to the levels of prominence enjoyed by its counterparts in the English and Australian legal systems.[174]

### 5.5.4. Overview of alternative approach

Should this alternative approach is accepted, and the common law as well as foreign law, relied on in the interpretation and application of section 7(2) of PAJA, there would

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169 The level of development those two systems have achieved over time cannot possibly be matched by PAJA which has been in existence for only six years. See generally, the preceding discussion which quoted Lewis *Judicial Remedies* on the English law and Robertson 'Monitoring' on the Australian law.

170 Also see JR de Ville *Judicial Review* 467.

171 C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138 at 144.

172 JR de Ville, 388-389 cites evidence of the fact that the inclusion in statute of the South African law duty to exhaust internal remedies was motivated by a desire to emulate the Australian law model. Also see *Reed and Others v The Master of the High Court and Others* (Footnote 9) where Plasket J noted that 'in South Africa, there is no general administrative tribunal that has the power to hear appeals or to review administrative actions, although the possibility of such a development in the future is contemplated in sections 33(3) (a) and section 34 of the Constitution.' This however did not come to fruition. The best result achieved was section 10(2) (a) (iii) of PAJA, which empowers the Minister of Justice and Constitutional Development to make regulations to establish an advisory council to advise on, *inter alia*, 'the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialized administrative tribunals, including a tribunal with general jurisdiction over all organs of state, to hear and determine appeals against administrative actions.' See further H Corder *Empowerment and Accountability: Towards Administrative Justice in a Future South Africa* (1991) 27-29.

173 See the discussion on the English law and the Australian law above.

174 For example, in theory, the South African constitutional dispensation is formulated so as to offer greater protection to fundamental rights, than the English law.

be certainty over the law and the current difficulties facing the interpretation and application of section 7(2) of PAJA would be resolved. The uncertainty that surrounds the question of the constitutionality of section 7(2) of PAJA would be eliminated. Most importantly however, because this process would be led by the courts, the elimination of such uncertainty would be arrived at in a way that is not offensive to the Constitution.[175]

Indeed, in the absence of Legislation to reformulate section 7(2) of PAJA, it is only through judicial activism that there may arise, from the superior courts, a judgment which would resolve the matter. However, the stark reality is that there is a dearth of case law on section 7(2) of PAJA and it may be a long time before the provision is the subject of debate in either the Supreme Court of Appeal or the Constitutional Court. In the interim, what has been proposed above may be a better and more principled method of rooting out the uncertainty over the interpretation, application and constitutionality of section 7(2) of PAJA.

## 5.6. Conclusion

Section 7(2) of PAJA is certainly constitutionally valid. In recent years, the general trend, even from the courts has been to accept the constitutional validity of section 7(2) of PAJA. Despite this, there remains uncertainty on whether the provision is constitutional or not which has been fostered by the tentative approach to the matter taken by the courts. The result is that there has been agreement on the fact that section 7(2) of PAJA limits the right of access to court. However, there are divergent theories on the correct approach to interpreting section 7(2) of PAJA. The alternative interpretation of section 7(2) of PAJA fosters the possibility, yet to be quashed at a judicial level, that the provision is unconstitutional.[176] The sole argument against this approach, vests in the principle that 'where a statute is ambiguous and capable of two interpretations one constitutional and another, unconstitutional, such statute must be

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175 For a discussion on the ability of courts to spearhead change under the constitutional dispensation see, P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 672ff.

176 See the discussion above.

accorded the constitutional meaning.'[177] This is certainly an insurmountable hurdle with regard to the alternative interpretation of section 7(2) of PAJA. The only other option therefore is to assume the interpretation of section 7(2) of PAJA submitted in the previous chapter. The logic is straightforward leading to a more satisfactory conclusion.

Considering the predicament in which the South African Public Administration finds itself, the most important way in which the rights to just administrative action can be enforced is by judicial review. This means that any person who is unhappy with an administrative decision can challenge the decision in court.[178] There, they can argue that the decision is a violation of the rights to just administrative action. However, the importance attaching to this judicial avenue necessarily creates a pressing need to ensure that this resource is perennially available to parties who deserve it. This creates the need for mechanisms which firstly, filter cases that are heard in court and secondly, mechanisms that also serve an adjudicatory function and allow matters to be resolved in other forums other than courts of law.[179] To achieve any progress, there has to be an obligation on aggrieved parties to seek judicial review as a last resort.[180] However, because the core concern of all this is the pursuit of justice, there must also be mechanisms to ensure that in the pursuit of these goals, the contemporary interests of justice are not jeopardized. This is what is sought to be achieved by section 7(2) of PAJA and it is submitted, what the provision does provide for. Section 7(2) of PAJA by pursuing the establishment of viable alternative forums for dispute resolution actually seeks to ensure the availability of viable adjudicatory forums which are alternative to courts with the desire to foster administrative justice

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177 See *Earthlife v Director General: Department of Environmental Affairs and Tourism* at 167I-168A where Griesel J alluded to this approach. A generous approach must also be taken in statutory interpretation. In *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) at 422D-423D the Land Claims Court held that 'where a constitutional right is concerned, [courts must] adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.' Also see *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at 280B-281B. See further Kentridge AJ's judgment in *S v Zuma* at 650H-653B.

178 See sections 33 and 34 of the 1996 Constitution.

179 See *Beinash v Ernst and Young and Others* at 133A-133C.

180 This is a matter that was discussed extensively in this thesis.

and conserve judicial resources. At a most basic level, this is not in violation of the right of access to court. Instead it is an important aspect of protecting the right.

## Chapter Six

# CONCLUSIONS AND RECOMMENDATIONS

*'The application for judicial review is the primary means of challenging the legality of action taken by public bodies. Judicial review is not, however, the only avenue by which an individual may challenge a particular decision'*-C Lewis[1]

## 6.1. Introduction

Internal remedies, as provided for in section 7(2) of PAJA, are ways of correcting, reviewing or appealing administrative decisions using the administration itself.[2] The Constitution expects the administration to aid in relieving the burden on the courts.[3] To this end, internal remedies are supposed to be the way in which the administration aids in relieving the burden on the courts making them both a critical and a functional aspect of the law.

However, due to the inescapable ties that lie between the duty to exhaust internal remedies in section 7(2) of PAJA and the right of access to court, both the critical and functional aspects of the duty to exhaust internal remedies must be weighed against the right of access to court. In the context of the right of access to court, there are two reasons why internal remedies retain importance in the law. Firstly, internal remedies foster the growth of administrative justice by their insistence on adequate and effective internal dispute resolution mechanisms. Secondly, the rise to prominence of the right to just administrative action and the increased pursuit of administrative justice have

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1 C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138.
2 *Nichols and Another v The Registrar of Pension Funds and Others* (Case no. 467/04).
3 See, JR de Ville 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs*' 2004 (20) *SAJHR* 577. Also see the discussion in Chapter one.

led to marked efforts in the constitutional dispensation to ensure the institution of effective internal dispute resolution mechanisms. Such mechanisms seek to put in place, viable alternatives to courts for dispute resolution. A natural consequence of this has been that the development of internal remedies has necessarily created corollaries to the formal courts, which in turn has had the desirable effect of protecting the right of access to court by ensuring that only the cases that are most deserving of are resolved in court.[4]

Despite the benefits which internal remedies and the accompanying duty to exhaust those remedies have brought to the law, section 7(2) of PAJA has consistently been called to task on the basis that the provision seemingly restricts access to court by making access to court conditional to the exhaustion of internal remedies, or at the very least, to a court of law acquiescing to such access. Due to this, questions have constantly surrounded the constitutionality of section 7(2) of PAJA. These were the matters addressed in this thesis.

## 6.2. Conclusions

Pursuant to an excursion into the common law origins of the duty to exhaust internal remedies, the initial step in the assessment of section 7(2) of PAJA was the interpretation of the provision relying on the purposive approach prescribed by the Constitutional Court.[5] The interpretation of section 7(2) of PAJA established as a starting premise, that the provision restricts the right of access to court.[6] Because the right of access to court is of cardinal importance in the law,[7] the issue arises whether the restriction on the right is constitutional.

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4 See chapters four and five.

5 See chapter four and the cases discussed therein: *Matiso v Commanding Officer, Port Elizabeth Prison*; *Minister of Land Affairs v Slamdien* and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*.

6 See chapter four.

7 See *Beinash and another v Young and others* at 132H-133A.

Generally, with regard to the right of access to court in section 34 of the Constitution, the general rule is that, where restriction of access to court is absolute, then such restriction to the extent that it ousts the review jurisdiction of the courts, can not be constitutional.[8] However, if restriction amounts to limitation of the right and if such limitation is reasonable and justifiable in terms of the limitation clause in section 39 of the Constitution, then the limitation is constitutional.[9] Because section 7(2) of PAJA restricts the right of access to court, for it to retain validity, the provision must be shown to be reasonable and justifiable in terms of the limitation clause in section 39 of the Constitution.

Two approaches were considered in the thesis to assess, and ultimately justify the claim that section 7(2) of PAJA is constitutionally valid. The first such approach was the strict and, perhaps, more orthodox, approach to the assessment which assessed section 7(2) of PAJA based on the clauses contained in section 39 of the Constitution. The second, and alternative, approach to the assessment of the constitutionality of section 7(2) of PAJA centered more on rationalizations of its constitutionality based on deductions informed by extensive assessment of the common law and the foreign law.

### 6.2.1. The strict approach

It was submitted that section 7(2) of PAJA limits the right of access to court by expressly providing that courts are precluded from adjudicating matters in which the aggrieved party has neglected to exhaust internal remedies.[10] Despite this, it was submitted that while section 7(2) of PAJA may limit the review jurisdiction of courts, such limitation of the right of access to court merely amounts to reasonable and justifiable limitation of the right of access to court.[11]

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8 See chapter five. Also see *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at 262B-262D.

9 *Ibid.*

10 See chapter five. Also see *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* at 262B-262D.

11 *Ibid.*

This conclusion is bolstered by the fact that from a contextual perspective, section 7(2) of PAJA accords with the spirit and purport of the Bill of Rights. This is because, at the heart of section 7(2) of PAJA, is the acknowledgment that in the pursuit of administrative justice, considering the flaws that characterise the Public Administration, and the absence of effective internal remedies,[12] judicial review must still be relied on to guarantee the protection of the interests of justice.[13] As Hoexter points out:

> 'It is futile to deny the dangers of unbridled judicial activism...a particular willingness to intervene in administrative matters, or alacrity in setting aside administrative action, correcting it, or granting some other remedy. Here it is important to bear in mind the distinction between scrutiny and the potential consequences of that scrutiny. Activism no doubt includes and is logically preceded by judicial enthusiasm for scrutinizing administrative action. But over-enthusiastic or unwarranted intervention-and not scrutiny-is where the real difficulty lies, because that is where the destructive effects of review may begin.'[14]

However, even this judicial activity, despite being justifiable, is sought to be controlled. Thus courts are still obliged to defer their jurisdiction to internal dispute resolution mechanisms where the interests of justice are not under immediate threat and internal remedies have not been exhausted.[15] Because of its formulation, section 7(2) of PAJA achieves the necessary balance between the need for judicial review and the need for judicial deference. All things considered, section 7(2) of PAJA is a reasonable and justifiable limitation of the right of access to court and is certainly not an unconstitutional restriction of the right.[16]

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12 See chapter five.

13 See Hoexter 'Future' 484 who argues that despite the over-activity of the judiciary in the administration, there is still a need for judicial review in the administration.

14 See Hoexter 'Future' 493-494. See however, V Bronstein 'Drowning in the Hole of the Doughnut: Regulatory overbreadth, Discretionary Licensing and the Rule of Law' (2002) 119 *SALJ* 469 at 482-483.

15 See sections 7(2)(a) and 7(2)(b) of PAJA and the interpretation of these provisions in chapter four.

16 See chapters four and five.

### 6.2.2. The alternative approach

The orthodox approach to evaluating section 7(2) of PAJA, using the limitation clause and also assessing the compatibility of the provision with the constitutional mandate, is certainly the preferred and prescribed manner of assessing the constitutional validity of the provision. However, an alternative approach could be taken to the enquiry into the constitutional validity of section 7(2) of PAJA which would endorse the conclusions stemming from the orthodox approach.

This alternative approach is premised on the idea that section 7(2) of PAJA cannot limit the right of access to court in section 34 of the Bill of Rights, for the sheer reason that, the provision protects the right of access to court. Section 7(2) of PAJA ensures that when disputes are first addressed internally, that process weeds out corollary issues which courts will not have to address. This leaves courts in a position to dispose of matters more efficiently.[17] This amounts to protection and conservation of the judicial resource. Furthermore, recourse to effective internal remedies means that disputes may be resolved without the need for judicial review, further aiding in the conservation of judicial resources.[18] Read in this light, section 7(2) of PAJA can not be adjudged to be unconstitutional or in violation of the right of access to court.

## 6.3. Recommendations

The recommendations offered here are informed by, and based on a purposive appraisal of section 7(2) of PAJA, which resolved that, the provision is not only consistent with the Constitution but, it also advances constitutional tenets such as the right of access to court and administrative justice. In order to place these recommendations in context it is necessary to highlight expressly, the problem which faces section 7(2) of PAJA.

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17 See chapter five. Also see C Lewis 'The Exhaustion of Alternative Remedies in the Administrative Law' (1992) *CLJ* 138 at 144.

18 *Ibid.*

### 6.3.1. The problem facing section 7(2) of PAJA

The primary problem facing section 7(2) of PAJA is the question of its constitutionality.[19] Unfortunately, such uncertainty is unjustified and is the product of an absence of judicial activism when it comes to asserting the constitutionality of section 7(2) of PAJA.[20] This has led to consistent criticism of section 7(2) of PAJA. Typically, these criticisms draw comparisons between section 7(2) of PAJA and the common law duty to exhaust internal remedies and argue that section 7(2) of PAJA has unnecessarily rigidified the law.[21] There have even been calls for the repeal of the provision and the reversion to the common law duty to exhaust internal remedies.[22]

The problem is exacerbated by the fact that courts have shied away from their obligation to affirmatively assert the constitutionality and the true value of section 7(2) of PAJA to Administrative law.[23] This passivity by the courts has resulted in the emergence of a grey area in the law. Thus, there lingers, over section 7(2) of PAJA, the very real possibility of any court holding either that the provision is constitutional or unconstitutional depending on the views of that court, as well as, how well the adjudicating panel can justify its conclusions.[24] This, and corollary issues, is the problem that this thesis sought to redress.

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19 See chapter five.

20 See chapter five.

21 Plasket *Just Administrative Action* 296-297. Also see Plasket 'Exhaustion' 296.

22 *Ibid.*

23 See the discussion in chapter five and the cases discussed there: *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape Province* 2005 (6) SA 248 (E); *Earthlife v Director General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C)and *Reed and Others v The Master of the High Court and Others* [2005] 2 All SA 429 (E).

24 See chapter five.

### 6.3.2. The recommended solutions

In the light of the problem facing section 7(2) of PAJA highlighted above, two recommended solutions come to mind, which if implemented, would resolve the issues cited and also bring certainty to the law.

#### 6.3.2.1. The immediate solution

The problems facing section 7(2) of PAJA could easily be resolved by the Judiciary asserting their authority over the determination of the content of section 7(2) of PAJA, and actively endorsing the constitutional validity of section 7(2) of PAJA.[25] This is an avenue open to the Judiciary, which carries the advantage, that it is supported by principle.[26] The Constitution expects courts to actively pursue the effective application of law, and this expectation is magnified where courts deal with legislation giving effect to fundamental rights such as PAJA.[27]

With regard to the issue of the relationship that subsists between section 7(2) of PAJA and the right of access to court, it is pertinent to note that 'the Constitution does not envisage that citizens will always have to institute legal proceedings in order to contest the justification of actions that affect them.'[28] The fact that section 7(2) of PAJA excludes access to court should not be over-emphasized by courts, particularly since the provision grants, to courts, a discretion over when exclusion of judicial review should be enforced.[29] Furthermore, the benefits yielded by the co-existence of the duty to exhaust internal remedies and the right of access to court in foreign jurisdictions establishes compelling precedent that, a duty to exhaust internal

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25 See the discussion in chapter five on the problem with what is gradually becoming the orthodox approach to section 7(2) of PAJA and the alternative approach to the provision furnished there which would incorporate the lessons of the common law. Also see Klaaren 'Constitutional Authority' at 551-554.

26 See further, P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 672ff.

27 See generally, Klaaren 'Constitutional Authority' at 551-554.

28 P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670 at 674.

29 See the interpretation of section 7(2) of PAJA in chapter four. Also see *Western Cape Minister of Education v Governing Body, Mikro Primary School* 2005 (10) BCLR 973 (SCA) at 984D-985B.

remedies possesses can be effectively applied in juxtapose to a right of access to court.[30] From a South African point of view, this is supported by the fact that, when purposively interpreted, section 7(2) of PAJA is consistent with the right of access to court and other rights, such as the right to just administrative action.[31]

In chapter five it was argued that, courts must embrace the role they play in the enactment of legislation, which gives effect to fundamental rights.[32] This role is that of partnering with the Legislature to ensure that the legislation enacted actually gives effect to the right in issue.[33] This obligation is enhanced where the content of the legislation is in doubt, as is the case with section 7(2) of PAJA. This is because the Judiciary is as important, and occupies the same status as the Legislature, in determining the content of law to give effect to the fundamental right to just administrative action. [34] It is not the exclusive province of the Legislature.[35] In this regard, courts perform a 'law-making' function, and it is well within their jurisdiction to delimit the content of section 7(2) of PAJA, particularly questions of its effect on the right of access to court. This would settle the disputes over the constitutionality of section 7(2) of PAJA.[36]

#### 6.3.2.2. The prospective solution

Prospectively, the duty to exhaust internal remedies in section 7(2) of PAJA lends itself as a tool for the exploration of the constitutional ideal of devolution of power and decentralization. Decentralization and devolution of power advances the separation of

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30 See chapter five.

31 It does so by advancing administrative justice and justiciability. See the discussion in chapter five.

32 See *NEHAWU v University of Cape Town and Others* at 159H-160C where Ngcobo J held that 'courts and the legislature act in partnership to give life to constitutional rights.' On the role of courts in the constitutional democracy, see also P Langa 'The Vision of the Constitution' (2003) 120 *SALJ* 670.

33 See chapter five. Also see *NEHAWU v University of Cape Town and Others* at 159H-160C.

34 See generally, Klaaren 'Constitutional Authority' at 551-554.

35 See *NEHAWU v University of Cape Town and Others* at 159H-160C. Also see Klaaren 'Constitutional Authority' at 551-554.

36 *Ibid.*

powers.[37] Of the three tiers of government, it is only the Executive and Legislative tiers which can be said to have instituted the decentralization and devolution of power.[38] The Judiciary's power is still centralized to a significant extent. Of course this can be justified on the grounds that decentralization and devolution of Executive and Legislative power is provided for in the Constitution while decentralization and devolution of judicial power is not.

It is submitted however, that the absence of express provisions allowing for decentralization and devolution of judicial power alone should not account for the absence of such decentralization and devolution in South African law. The problem that threatens the growth and development of administrative justice in the South African law is the lack of adequate adjudicatory forums within the administration.[39] This inadequacy motivates the over-activity of the judiciary in matters of the Public Administration.[40] These problems, namely, the inadequacy of effective internal remedies, and the over-activity of the judiciary in matters of the Public Administration, are problems that can be pre-empted by the devolution of judicial power. Obviously, on a technical basis, devolution of powers in the court function, particularly if it entails conferring constitutionally recognized adjudicatory power to administrative dispute resolution mechanisms may infringe the separation of powers.[41] However, this can be avoided when it is considered that: firstly, it has long been accepted that strict application of separation of powers yields undesirable results.[42] Secondly, the precedent set by the Australian law establishes that devolution of the judicial responsibility is highly beneficial to the administration.[43]

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37 On the separation of power see, Currie and J de Waal *Handbook* 18.

38 See Chapter three of the Constitution for example.

39 On the inadequacy of adjudicatory forums within the administration see Hoexter 'Future' 484.

40 *Ibid.*

41 On the separation of powers see, Currie and J de Waal *Handbook* 18.

42 See Currie and J de Waal *Handbook* 18-19.

43 M Aronson 'A Public Lawyer's Responses to Privatisation and Outsourcing' in M Taggart (ed) *The Province of Administrative Law* (1997) 40.

Looking to the future, there is much to be gained from the decentralization and devolution of power in the Judiciary tier of government.[44] The lack of such decentralization accounts in large part for the lack of faith exhibited toward any adjudicatory forums other than formal courts of law.[45] If decentralization and devolution were attained, it would greatly accelerate the growth and development of administrative justice in the South African Public Administration. Section 7(2) of PAJA, by making provision for deference and imposition of the standard of ripeness,[46] encourages the Judiciary to trust, albeit in a qualified manner,[47] the judicial function to other lesser forums.[48] To the extent that it does so, section 7(2) of PAJA would be the perfect stepping stone toward a future where judicial power is devolved and decentralized.

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44 The only and best possible rationale is the one Hoexter 'Future' 484 cites, that is, the excessive and sole reliance on courts is a hold-over from the apartheid era.

45 See Hoexter 'Future' 484 who points out that the pro-review and anti-administration position is the result of a lack of faith in the administration borne of the apartheid era.

46 See the interpretation of section 7(2) of PAJA in chapter four of the thesis.

47 *Ibid.*

48 The term 'lesser', as it is applied here, refers to the fact that the other forums do not share the same status as courts of law.

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