

# Aligning the Administrative Justice Act with the Constitution

By G. Feltoe

## Is the Administrative Justice Act consistent with the Constitution?

Section 68(1) of the 2013 Constitution guarantees the right to administrative justice as a fundamental constitutional right. It provides that everyone “has the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.” Section 68(2) further provides that “any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct. Section 68(3) then requires that Act of Parliament must give effect to these rights, and must—

- (a) provide for the review of administrative conduct by a court or, where appropriate, by 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.

There is an Act of Parliament in existence called the Administrative Justice Act [*Chapter 10:28*] [“AJA”] but this Act which was passed in 2004 predates the 2013 Constitution. This Act does not encapsulate all of the provisions of section 68 and also contains provisions which are incompatible with section 68 and would be found to be unconstitutional. It is therefore necessary to align the existing Act with the constitutional provisions.

This memorandum sets out what amendments are required for the existing Act to give full effect to the rights contained in section 68.

Section 3(1)(a) of AJA firstly provides that an administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person must act lawfully, reasonably and in a fair manner.

To be consistent with the constitutional guarantee this provision should be amended to read—

Every person has the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

*Note that the words underlined do not appear in the current provision of AJA. The meaning of what is substantive fairness will need to be interpreted by the courts. Previously the focal point of judicial review of administrative conduct was upon ensuring that there was a fair process leading up to the making of an administrative decision. Substantive fairness appears to go further and seems to require that the actual decision itself must be fair. One of the essential components of procedural fairness is that the decision-maker must be impartial so there is some overlap between the two concepts. It should also be specified in accordance with section 68(3)(b) that the State must impose a duty on the State to give effect to the rights in subsections (1) and (2).*

Section 3(1)(b) of AJA provides that the administrative authority must act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being

requested to take the action by the person concerned. Section 68(1) of the Constitution simply provides that the administrative conduct must be prompt.

Section 3(1)(c) of AJA provides that where administrative action has taken place the administrative authority must supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned. Section 68 of the Constitution simply provides that any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

Section (2) of AJA provides that in order for an administrative action to be taken in a fair manner as required ... an administrative authority must give a person referred to in subsection (1)—

- (a) adequate notice of the nature and purpose of the proposed action; and
- (b) a reasonable opportunity to make adequate representations; and
- (c) adequate notice of any right of review or appeal where applicable.

*This provision could be kept provided that it is made clear that it relates to procedural fairness although the aspects referred to do not cover all aspects of procedural fairness, for example it does not encompass the requirement of impartiality.*

*However, it should be noted that section 68(3) requires that Act of Parliament must provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal. It does not make reference to the remedy of an appeal but it is necessary to make it clear that various statutes provide for a right of appeal and there is a general rule that before taking a matter on review the aggrieved party must exhaust internal remedies before taking the matter on judicial review.*

*Section 68(3)(a) of the Constitution lays down that the Act must provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal. Presently in Zimbabwe judicial review falls within the ambit of the High Court. However, it would make good sense to follow the South African approach under which some magistrates in each magisterial district are trained on the handling run of the mill cases involving maladministration and are given jurisdiction to review such cases. This would allow such cases to be dealt with at local level and make the review process very much more accessible to aggrieved parties. This could be done as section 68(3)(a) of the Constitution does not specify which court can deal with judicial review. Tribunals are normally established to provide internal remedies within various statutes but this internal remedy does not preclude the further remedy of judicial review.*

*Consideration should also be given to reviving the Public Protector system which was aimed at providing an accessible remedy to ordinary people who have suffered administrative injustice at the hands of administrators. This was an informal remedy which allowed matters to be settled by negotiation and mediation. The Public Protector system was abolished and the functions of this office were transferred to the Human Rights Commission which already has many onerous duties in relation to human rights abuses and it would appear to be overburdening it to have to deal with numerous petty cases of administrative failures. An alternative would be to increase the capacity of the Human Rights Commission to attend to matters of administrative injustice in line with the constitutional guarantee of the right to administrative justice.*

### **Unconstitutional provisions in section 3(3) of AJA which are in violation of section 68 of the Constitution**

Section 3(3) provides in effect that an administrative authority may depart from requirements to act lawfully, reasonably and fairly and act within the specified or a reasonable time and supply written reasons within the specified or reasonable period (as laid down in s 3) if—

- the enactment under which decision made expressly provides for any of the matters referred to in s 3(1) and (2) so as to vary or exclude any of their requirements; or
- the departure is, under the circumstances, reasonable and justifiable, in which case administrative authority must take into account all relevant matters, including—
  - the objects of applicable enactment or common law rule;
  - the likely effect of its action;
  - the urgency of the matter or the urgency of acting thereon;
  - the need to promote efficient administration and good governance;
  - the need to promote the public interest.

No administrative authority can or should be given the discretion to depart from the requirement to act in a lawful manner. Such departure can never be reasonable and justifiable in any circumstances and neither can this be justified on the grounds of urgency. Even the legislature should not be empowered to pass legislation exempting an administrative authority from the obligation to act lawfully or even varying this obligation.

All administrative authorities, no matter how high-ranking, are obliged to obey the law. If an authority acts unlawfully, any person affected must surely have the right to approach a court of law for a ruling that the action is illegal and of no force and effect. This is the essence of the rule of law and the protection of the law. In terms of s 56 of the Constitution everyone has the fundamental right to equal protection and benefit of the law.

It is also strongly arguable that no administrative authority can or should be given the discretion to depart from the requirement to act in a reasonable manner and that no Act of Parliament should exempt an administrative authority from this obligation. The public surely has the right to expect all administrative authorities to act reasonably. The South African legislation does not allow these authorities to be exempted from the obligation to act reasonably.

These provisions are dangerous as they are wide open to abuse. An administrative authority that has acted in a palpably unlawful or blatantly unreasonable manner might still claim that it was reasonable and justifiable for it to have departed from the obligation to act lawfully and reasonably. Many administrative authorities will be tempted to invoke

this provision even where they have acted in a completely unacceptable manner. As regards the various factors that are to be taken into account when considering departure, urgency, for instance, cannot be an excuse for acting unlawfully or unreasonably. This applies also to the wide and vague factor of public interest. The public interest is prejudiced not promoted by unlawful and unreasonable administrative action. The same applies to the factor of the need to promote efficient administration and good governance. Unlawful and unreasonable action amounts to bad governance and inefficient administration.

To allow an Act to exclude the obligation to give reasons for administrative actions or decisions is again undesirable. Already the Administrative Justice provides exemptions from the obligation to give reasons in respect of—

- any exercise or performance of the executive powers or functions of the President or Cabinet;
- decisions to institute or continue or discontinue criminal proceedings and prosecutions;
- decisions relating to the appointment of judicial officers.

It is also provided that the obligation to give reasons may be qualified where disciplinary action is taken in terms of the Defence Act, the Police Act and the Prisons Act.

To allow the legislature to exclude the obligation to give reasons in other legislation goes against the constitutional provisions guaranteeing protection of the law and the right to a fair hearing.

Equally have a general provision allowing the administrative authorities to decide that it is reasonable and justifiable to withhold reasons is a provision which is open to abuse.

It is strongly arguable that the provisions of section 8 are more than sufficient to deal with justifiable grounds for withholding reasons. These allow the High Court to decline to order the giving of reasons or to limit or restrict the giving of reasons. It can do so if it considers that—

- it would be contrary to the public interest for such reasons to be disclosed; or
- the failure to supply reasons by the administrative authority was reasonable and justifiable in the circumstances.

See Feltoe “Giving with one hand and taking back with the other: the exemptions and exclusions in the Administrative Justice Act” 2004 Issue No 11 *Zimbabwe Human Rights Bulletin* 106.

## **Exempted bodies[s 11 read with Schedule]**

A number of decision-makers are exempted from—

- the duty to act in a fair manner by giving the person affected adequate notice of the nature and purpose of the proposed action, a reasonable opportunity to make adequate representations and adequate notice of any right of appeal or review;
- the duty to supply reasons.

The exempted decision-makers bodies are—

- the President or Cabinet in the exercise or performance of executive powers or functions;
- prosecution authorities in respect of decisions regarding the prosecution of offenders; and
- decision-makers in respect of decisions relating to the appointment of judicial officers.

[S 11(1) read with Part 1 of the Schedule.]

The decision-makers in disciplinary proceedings against police, army and prison officers are exempt from the requirement to supply reasons for their decisions.

The Minister may by statutory instrument exempt other administrative authorities than the specified ones from complying with these requirements if “he or she deems it necessary or desirable in the public interest.” The Minister must lay such a statutory instrument before Parliament, which may annul it. [s 11(6) & (7)]