UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

A Critical Analysis of Self-Review Through the Lens of Transformative Adjudication

Mini-dissertation submitted in partial fulfilment of the requirements for the degree LLM (Coursework) Constitutional and Administrative Law by

Felix Rudolph le Roux

15129722

prepared under the supervision of

Prof Melanie Murcott

at the University of Pretoria

January 2023

Acknowledgements

I am deeply indebted to my supervisor, Prof Melanie Murcott, who provided me with invaluable guidance and support throughout the writing of this dissertation.

I am also immensely grateful for the support of my parents, Felix le Roux Sr and Anneke le Roux, without which I would not have been able to complete this dissertation.

Abstract

This dissertation seeks to answer the question whether a critical analysis of the Constitutional Court's judgment in *State Information Technology Agency SOC Limited v Gijima Holdings* (*Gijima CC*), with reference to a method of judicial reasoning known as transformative adjudication and the related concepts of judicial deference and variability, reveals that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) ought to be the basis of review in cases where the state applies for the review of its own administrative action. Section 33(3)(a) of the Constitution stipulates that national legislation must be enacted to provide for the judicial review of a particular type of public power called administrative action. The legislation thus enacted is PAJA. Therefore, one would expect that PAJA is the appropriate basis of review in cases where the state applies for the review of its own administrative action. However, in *Gijima CC* the Constitutional Court held that the state is not a bearer of administrative justice rights in terms of section 33 of the Constitution. Consequently, the state may not apply for the review of its own administrative action under PAJA, the statute giving effect to section 33 of the Constitution. The principle of legality, which imposes less rigorous standards of scrutiny than PAJA, is now the only basis of review available in so-called "self-review" cases. This dissertation critiques the reasoning of the Constitutional Court and considers the broader impact of its decision in *Gijima CC* through the lens of transformative adjudication. Furthermore, this dissertation argues that PAJA ought to be applied in cases where the state reviews its own administrative action and that the concepts of judicial deference and variability allow for ample flexibility in the application of PAJA during judicial review, including self-reviews.

Table of Contents

Chapter 1: Introduction

This dissertation explores the question whether the Promotion of Administrative Justice Act 3 of 2000 (PAJA) *ought* to be the basis of review in cases where the state applies for the review of its own administrative action (self-review). It does so through a critical analysis of the Constitutional Court's judgment in *State Information Technology Agency SOC Limited v Gijima Holdings* (*Gijima CC*),[1] with reference to a method of judicial reasoning known as transformative adjudication and the related concepts of judicial deference and variability that have emerged in South Africa's constitutional democracy.

In terms of section 1 of the Constitution of the Republic of South Africa, 1996 (the Constitution), South Africa is a constitutional democracy founded on the supremacy of the Constitution and the rule of law. Judicial review plays an integral role to uphold the rule of law by ensuring that public power is exercised according to the requirements of the law and the Constitution.[2] Section 33(3)(a) of the Constitution stipulates that national legislation must be enacted to provide for the judicial review of a particular type of public power called administrative action. The legislation thus enacted is PAJA. Therefore, one would expect that PAJA is the appropriate basis of review in cases where the state applies for the review of its own administrative action (self-reviews of administrative action). However, in *Gijima CC* the Constitutional Court held that the state is not a bearer of administrative justice rights in terms of section 33 of the Constitution.[3] Consequently, the state may not apply for the review of its own administrative action under PAJA, the statute giving effect to section 33 of the Constitution. The principle of legality, which generally imposes less rigorous standards of scrutiny than PAJA, is now the only basis of review available in so-called "self-review" cases.[4] This dissertation critiques the reasoning of the Constitutional Court and then considers the broader impact of its decision in *Gijima CC* through the lens of transformative adjudication. Furthermore, this dissertation argues that PAJA ought to be applied in cases where the state reviews its own administrative actions and that the

---

1 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) (hereafter, *Gijima CC*).

2 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (hereafter, *Pharmaceutical Manufacturers*) para 45; B Bekink *Principles of South African Constitutional Law* (2016 2nd ed) 470.

3 *Gijima CC* (note 1 above) para 29.

4 *Gijima CC* (note 1 above) paras 37-40.

concepts of judicial deference and variability allow for ample flexibility in the application of PAJA during judicial review, including self-reviews.

Given that the dissertation explores whether PAJA *ought* to be the basis of review in cases where the state applies for the review of its own administrative action, chapter 2 provides a brief and general background of judicial review in administrative law, and sets out the development of the law of self-review. In essence, the function of the courts during judicial review is to test the validity of exercises of public power and to declare invalid any such exercises of public power that are inconsistent with the requirements of the Constitution.[5] The law requires that the review of administrative action ought to be conducted in terms of PAJA and that the review of public power not amounting to administrative action ought to be conducted under the principle of legality.[6] This is because PAJA and legality entail different standards of accountability that apply to different types of public power. However, the chapter explains that in *Gijima CC*, the Constitutional Court held that all self-review applications must be brought under legality, regardless of the type of public power at issue.[7]

Chapter 3 explains the concept of transformative adjudication and considers whether and to what extent the Court's reasoning aligned with transformative adjudication in *Gijima CC*. The chapter highlights that transformative adjudication requires judges to give effect to the transformative vision of the Constitution and to justify their decisions in a transparent and coherent manner.[8] It is (or should be) the cornerstone of judicial decision-making in post-Apartheid South Africa since it rejects the formalism which often still pervades our legal culture. Whilst formalism can serve to stultify social transformation, legal reasoning that is consistent with transformative

---

5 In terms of section 2 of the Constitution, the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" and section 172(1)(a) of the Constitution provides that "a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". See also C Hoexter *Administrative Law in South Africa* (2012 2nd ed) (hereafter, *Administrative Law*) 113.

6 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) (hereafter, *Motau*) para 27.

7 *Gijima CC* (note 1 above) paras 37-40.

8 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150 and 164; D Moseneke 'The Fourth Braam Fischer Memorial Lecture – Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309 (hereafter, 'Transformative Adjudication') 317 and 319; P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351 353; C Hoexter 'Judicial Policy Revisited: Transformative Adjudication in Administrative Law' (2008) 24 *South African Journal on Human Rights* 281 (hereafter, 'Transformative Adjudication') 283.

adjudication promotes the goals of our "democratic and transformative Constitution".[9] A central component of transformative adjudication is substantive reasoning. Substantive reasoning requires judges to avoid engaging in excessively formalistic or mechanical reasoning and openly consider and promote the constitutional values at stake in a particular case.[10] It is argued that the ruling in *Gijima CC* that the principle of legality is the only basis of review available during self-review is concerning from the perspective of transformative adjudication, specifically the aspect of substantive reasoning, since the reasoning of the Court is based on the questionable and formalistic premise that only "warm-bodied human beings" are meant to be the beneficiaries of rights.[11] This line of reasoning unduly confines the operation of rights to a vertical relationship where individuals enforce rights against the state. Such an understanding of rights reflects a dogmatic application of classical liberal constitutionalism and is contrary to the egalitarian vision of the Constitution and African ideas around constitutionalism, particularly the concept of *ubuntu*.[12] *Ubuntu* is a distinctly African concept "which places ... emphasis on communality and on the interdependence of the members of a community" and "the mutual enjoyment of rights by all".[13] Accordingly, *ubuntu* understands human nature to be inherently community-based or relational.[14] Further adding to the formalistic nature of the Court's reasoning is the failure to engage properly with the principle of subsidiarity. The principle of subsidiarity entails that legislatively enacted specific and indirect constitutional norms should be favoured over more broad and direct constitutional norms during

---

9 Hoexter 'Transformative Adjudication' (note 8 above) 283.

10 G Quinot 'Substantive Reasoning in Administrative-Law Adjudication' 2010 3 *Constitutional Court Review* 111 (hereafter 'Substantive Reasoning') 116-117; G Penfold 'Substantive Reasoning and the Concept of Administrative Action' (2019) 136 (1) *South African Law Journal* 87 and 93.

11 *Gijima CC* (note 1 above) para 18.

12 K Malan *There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism* (2019) (hereafter, *No Supreme Constitution*); TF Hodgson 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution' (2018) 34:1 *South African Journal on Human Rights* 57; JY Mokgoro 'Ubuntu and the Law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 1; T Metz 'African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights' (2012) 13 *Human Rights Review* 19; I Menkiti "On the Normative Conception of a Person" in K Wiredu (ed) *A Companion to African Philosophy* (2006); D Cornell and N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012); DA Masolo 'Western and African Communitarianism' in K Wiredu (ed) *A Companion to African Philosophy* (2006).

13 *S v Makwanyane and Another* 1995 (3) SA 391 (hereafter, *Makwanyane*) para 224.

14 Masolo (note 12 above) 483.

adjudication.[15] However, as the chapter illustrates, the decision in *Gijima CC* bypasses the legislatively enacted specific and indirect constitutional norms in PAJA and applies the broad and direct constitutional norms under the principle of legality instead. In light of this blatant disregard for the principle of subsidiarity, the Court's choice of legality as the basis of review in all self-review applications seems arbitrary, in spite of what have been viewed as weak attempts by the Court to justify its approach.[16]

Chapter 4 discusses some of the (perhaps unintended) consequences of the *Gijima CC* judgment, again with reference to the demands of transformative adjudication, and argues for an alternative approach to self-reviews. The judgment has significant implications for both the substantive and procedural aspects of the law of self-review, as well as the broader dispensation of constitutional democracy in South Africa. It is argued that, substantively, the ruling in *Gijima CC* leads to the illogical and formalistic position where the grounds of review available to challenge state conduct are now dependent, in part, on the identity of the applicant.[17] It also further muddles the distinction between PAJA and legality - both as bases of review and in terms of their respective substantive content.[18] In terms of procedure, the judgment has the effect of making it easier for the state to apply for the review of its own decisions since it will not be exposed to PAJA's more exacting procedural requirements.[19] Finally, the decision to apply the principle of legality to the review of administrative action ignores the principle of subsidiarity and is damaging to our constitutional values.[20] From the perspective of transformative adjudication, it is concerning that the judgment in *Gijima CC* has the effect of undermining these values instead of promoting and protecting them. An alternative approach to self-reviews is provided with reference to the concepts of judicial deference and variability. Judicial deference refers to judicial respect for the legitimate sphere of operation of the other

---

15 M Murcott and W van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity - Critical Reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43 46-47.

16 Murcott and Van der Westhuizen (note 15 above) 54.

17 L Boonzaier 'A Decision to Undo' (2018) 135 (4) *South African Law Journal* 642 657; MN De Beer 'A New Role for the Principle of Legality in Administrative Law: *State Information Technology Agency Soc Ltd V Gijima Holdings (Pty) Ltd*' (2018) 135 (4) *South African Law Journal* 613 625.

18 Hoexter *Administrative Law* (note 5 above) 131-137; Boonzaier 'A Decision to Undo' (note 17 above) 655 and 665-666.

19 Boonzaier 'A Decision to Undo' (note 17 above) 663.

20 Murcott and Van der Westhuizen (note 15 above) 54.

two branches of government.[21] The related notion of variability entails that the scrutiny of the standards of administrative justice should be applied with varying intensity depending on the circumstances of each case.[22] In other words, judicial scrutiny should not take an "all-or-nothing approach", but rather recognise the nuances of different forms of public power and adjust the level of scrutiny accordingly.[23] As such, judicial deference and variability are crucial aspects of a court's substantive reasoning and transparent justification during administrative law-adjudication and are thus closely linked to transformative adjudication.[24] It is argued that transformative adjudication would be better promoted if PAJA were applied to the self-review of administrative action with the appropriate level of deference and variability depending on the circumstances of each case. Lastly, the chapter provides some concluding remarks.

The method of research employed was qualitative desktop research, i.e. reading and engaging with scholarly literature available in the O.R. Tambo Law Library at the University of Pretoria. The dissertation follows an analytical approach to self-review from the perspective of transformative adjudication. The motivation for the study stems from the fact that since the judgment in *Gijima CC* in 2017, the South African courts have experienced what has been described by the Supreme Court of Appeal (SCA) as "an ever growing, and frankly disturbing, long line" of cases where organs of state have brought late applications for the review and setting aside of its own decisions.[25] Self-review applications should, in principle, be used by the state to vindicate the rule of law and respect, protect, promote and fulfil constitutional rights by

---

21 C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) *South African Law Journal* 117(3) 484 (hereafter, 'The Future of Judicial Review') 501-502; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (hereafter, *Bato Star*) para 48; C Plasket 'Judicial Review, Administrative Power and Deference: A View from the Bench' (2018) 135 (3) *South African Law Journal* 502 508-509.

22 Hoexter 'The Future of Judicial Review' (note 21 above) 502.

23 Hoexter 'The Future of Judicial Review' (note 21 above) 504.

24 Hoexter 'Transformative Adjudication' (note 8 above) 293.

25 *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA) para 1. In *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality* 2021 (3) SA 25 (SCA) (hereafter, *Altech)* para 1, Ponnan JA noted that although self-review is a novel phenomenon, it has become a "burgeoning species of judicial review that has occupied the attention of our courts in a number of recent decisions" and that public procurement cases are "particularly worrisome". See also C Lewis, LJ Maralack and A Dey-van Heerden 'A Need For Haste? The State's Self-Review of the Legality of its Contracts' (20 April 2021) available online at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-20-april-a-need-for-haste-the-states-self-review-of-the-legality-of-its-contracts-.html (accessed on 18 July 2021).

undoing its prior improper decisions.[26] Over the past ten years, however, self-review has become an increasingly popular tactic by which the government has sought to undo its own decisions for reasons that are unclear at best and unscrupulous at worst.[27] In particular, section 217 of the Constitution is often invoked to institute a counter-application in response to claims for payment by contractors after services have been rendered.[28]

There is no doubt that these reactive or collateral (self) reviews are often motivated purely by the legitimate desire to undo a decision that was tainted by corruption. However, in other cases, the lack of credible explanations for lengthy delays leaves the true motivations of the state unclear. Some scholars argue that these self-reviews are used to avoid unwanted contractual obligations by having the contract set aside on the ground that the state failed to follow a proper procurement procedure.[29] The SCA has argued along similar lines by speculating that the state's "true objective" in these self-reviews is to avoid contractual terms that have become unfavourable to it.[30] The Constitutional Court has expressed the view that the absence of credible explanations for delays in launching self-review applications "can only lead one to infer" that there is either "no reason at all" or that the state is "not able to be honest as to [the] real reasons".[31] Given the high volume of self-reviews in our courts and the heavy scholarly and judicial criticism referred to above, it is necessary to evaluate critically whether the principle of legality is the appropriate basis of review when the state reviews its own administrative action.

---

26 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) (hereafter, *Khumalo*) para 36. Section 7(2) of the Constitution provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

27 L Boonzaier 'Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama' (2015) 7 *Constitutional Court Review* 1 (hereafter, 'Good Reviews, Bad Actors') 4.

28 Section 217 of the Constitution provides that public procurement must take place "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

29 L Boonzaier 'Good Reviews, Bad Actors' (note 27 above) 4; H Corder and L Kohn 'Administrative Justice in South Africa: An Overview of Our Curious Hybrid' in H Corder and J Mavedzenge (eds) *Pursuing Good Governance: Administrative Justice in Common Law Africa* (2019) 120 139.

30 *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) (hereafter, *Gijima SCA*) para 39.

31 *Khumalo* (note 26 above) para 51.

Chapter 2: Judicial Review in South Africa and Self-Reviews

Since the purpose of this dissertation is to explore the proper legal basis for conducting a self-review, and to set the scene and lay a doctrinal foundation for the analysis, this chapter provides a brief and general background of judicial review in South Africa, and explains the current legal position in respect of self-reviews. First, this chapter explains the role of judicial review in the South African constitutional dispensation and distinguishes between the different bases of review and grounds of review in terms of PAJA and the principle of legality respectively. The interaction between the different bases of review is also discussed. Second, this chapter sets out the development of the law of self-review in case law. Particular attention is paid to the judgment in *Gijima CC* given that it represents a turning point in the approach to the judicial review of self-reviews.

2.1 Judicial review

2.1.1 An incident of the separation of powers

The Constitutional Court has described judicial review as "an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government".[32] In other words, the function of the courts during judicial review is to test the validity of exercises of public power and to declare invalid and unconstitutional any such exercises of public power that are inconsistent with the requirements of the law and the supreme Constitution.[33] Although there is no "bright line" that separates review from appeal, the distinction still lies at the heart of the court's judicial review function.[34] The court generally focuses on the regularity of the decision-making process rather than the merits of the decision.[35]

Before 1994, the justification for the court's right to review exercises of public power was derived from the "inherent jurisdiction of the courts" at common law.[36] After

---

32 *Pharmaceutical Manufacturers* (note 2 above) para 45.

33 In terms of section 2 of the Constitution, the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" and section 172(1)(a) of the Constitution provides that "a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". See also Hoexter *Administrative Law* (note 5 above) 113.

34 H Corder 'The Development of Administrative Law in South Africa' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 14.

35 Hoexter *Administrative Law* (note 5 above) 108-109.

36 *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 at 115.

1994, the perception was held for some time that two different systems of judicial review existed - one at common law and one in terms of the Constitution.[37] However, this position was firmly rejected by Chaskalson P in 2000 when he held that:

> There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[38]

Thus, the Constitution replaced the common law as the exclusive source of the court's power to review exercises of public power. The common law remains relevant only as an interpretive aid and as the basis of review for private power that mimics public power.[39]

2.1.2 Bases of review and grounds of review

The basis of review refers to the specific source of the court's review power in a particular case, whereas the grounds of review refer to the cause of action giving rise to the review application. The primary basis of review for public power that amounts to administrative action is PAJA, which is constitutionally mandated legislation giving effect to the right to just administrative action in section 33 of the Constitution.[40] The basis of review for public power that is not administrative action is the principle of legality, which is implied within the founding value of the rule of law in section 1(c) of the Constitution, and has come to serve as "a safety net" for holding public power accountable by providing for the review of public power that falls outside of the scope of the review powers conferred by PAJA.[41] Thus, the appropriate basis of review for public power depends on whether the public power concerned amounts to administrative action or not.[42] Accordingly, the first step a court is required to take in judicial review proceedings is to establish whether the impugned conduct amounts to

---

37 See, for example, *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA) para 20.

38 *Pharmaceutical Manufacturers* (note 2 above) paras 44.

39 Hoexter *Administrative Law* (note 5 above) 29 and 117. Common law review is available in the case of private power that mimics public power. For example, if a voluntary association takes disciplinary action against one of its members, such a decision is subject to common law review.

40 *Bato Star* (note 21 above) para 25; Hoexter *Administrative Law* (note 5 above) 118.

41 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58; C Hoexter 'Administrative Action in the Courts' (2006) *Acta Juridica* 303 308; *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) (hereafter, *New Clicks*) para 97.

42 *Motau* (note 6 above) para 27.

administrative action.[43] The fundamental distinction between administrative action and public power that does not amount to administrative action flows from the need to subject functions that involve "the conduct of the bureaucracy ... in carrying out the daily functions of the state"[44] to more rigorous standards of accountability, whereas functions that involve high policy-making, political considerations, or sensitive subject matter are better addressed by more general, and potentially less rigorous standards of accountability.[45] Accordingly, the standards and extent of scrutiny applied by the courts under the respective bases of review corresponds to the type of public power that is under review. Administrative action may be subjected to higher standards of scrutiny in terms of PAJA, while public power not of an administrative nature may only be subjected to the standards of scrutiny under the principle of legality, some of which replicate the standards imposed by PAJA.[46]

The provisions of PAJA provide for more grounds of review than the principle of legality and the requirements of PAJA are more detailed and exacting. Unlawfulness and irrationality are the two standalone grounds of review under the principle of legality,[47] whereas section 6(2) of PAJA contains 20 provisions that extensively cover three grounds of review: unlawfulness, unreasonableness, and procedural unfairness.[48] There is considerable overlap between the grounds of review under PAJA and the principle of legality respectively, but substantial differences exist. Whilst the lawfulness and rationality standards are essentially duplicated under both PAJA and legality, PAJA goes further by also requiring reasonableness and procedural fairness pursuant to section 33(1) of the Constitution.[49]

---

43 *Motau* (note 6 above) para 27, fn 28.

44 *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24.

45 *Motau* (note 6 above) paras 43-44.

46 For example, as will be explained below, the standards of rationality and lawfulness under legality are essentially a duplication of the same standards found under PAJA. For example, in *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (hereafter, *Simelane*) at para 44, the Constitutional Court stated that "rationality does not conceive of differing thresholds" and that "a decision that would be irrational in an administrative law setting [cannot] mutate into a rational decision if the decision being evaluated was an executive one".

47 See C Hoexter 'A Rainbow of One Colour? Judicial Review on Substantive Grounds in South African Law' in H Wilberg and M Elliott *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 178-184 for a discussion on how the standards of lawfulness and rationality have been interpreted by our courts to mean various things, and how their content is continuously evolving.

48 M Murcott, G Burns and S Payne 'Administrative Law' in M Tait (ed) *Yearbook of South African Law* (2021) 70 77.

49 In terms of section 33(1) of the Constitution, "everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

Reasonableness includes rationality but is a wider concept in that it also includes proportionality - the idea that the benefits of a decision must not be outweighed by its adverse effects.[50] The added proportionality element is significant because it requires the court to consider the merits and consequences of a decision rather than merely the regularity of the decision-making process.[51] The proportionality enquiry thus challenges the traditional distinction between appeal and review but does not entirely nullify it. The courts are still required to respect the legitimate sphere of operation of the decision-maker and "take care not to usurp the functions of administrative agencies".[52] The goal of the judge conducting the proportionality enquiry is generally not "to substitute his or her own opinion on the correctness" of the decision, but rather to determine whether the decision falls within the acceptable range of reasonableness.[53] Nevertheless, the reasonableness standard subjects the decision to a much higher level of scrutiny than rationality, which only requires a rational link between the decision and the purpose for which the power was conferred.[54]

The standard of procedural fairness only applies in terms of PAJA, although elements of procedural fairness may find indirect application under the principle of legality as an ingredient of lawfulness or rationality.[55] For example, if the law prescribes a fair procedure that a decision-maker must follow or if the failure to follow a fair procedure would be irrational in the circumstances of a particular case, the principle of legality includes some elements of procedural fairness.[56] However, such an indirect application of procedural fairness under legality is no match for the detailed

---

50 *New Clicks* (note 41 above) para 637; Hoexter *Administrative Law* (note 5 above) 343-346.

51 *Bato Star* (note 21 above) para 45.

52 *Bato Star* (note 21 above) para 45.

53 *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 36. It should be noted, however, that judges do sometimes substitute decisions based on the merits of the case during reasonableness review and that the distinction between review and appeal may be somewhat artificial in such cases. See Hoexter *Administrative Law* (note 5 above) 108-11.

54 *Simelane* (note 46 above) para 32; Hoexter *Administrative Law* (note 5 above) 340.

55 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) (hereafter, *Law Society*) paras 61 - 64.

56 See, for example, *Motau* (note 6 above) para 80 and *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) (hereafter *Albutt*) para 72. In particular, our courts have employed "procedural rationality" as a means of imposing some of the requirements of procedural fairness under legality's rationality standard, depending on the circumstances of the particular case. For example, in *Simelane* (note 46 above) at para 37, the Constitutional Court held that a decision would be irrational if "the absence of a connection between a particular step [in the decision-making process] (part of the means) is so unrelated to the end as to taint the whole process with irrationality". More recently, the Court confirmed procedural rationality as a requirement of legality in *Law Society* (note 55 above) at para 64.

and comprehensive prescripts of procedural fairness in terms of sections 3 and 4 of PAJA.[57]

Finally, although it is not a ground of review as such, PAJA also provides for the right to request reasons pursuant to section 33(2) of the Constitution.[58] The principle of legality does not include an explicit right to reasons but the SCA has recognised that the rationality standard may, in certain cases, impose a duty to provide reasons.[59] Nevertheless, such an implied duty pales in comparison to the comprehensive provisions regarding reasons in section 5 of PAJA.

2.1.3 The continuum of constitutional accountability

From the above, it is evident that PAJA and the principle of legality are not simply interchangeable concepts that a court can invoke arbitrarily. They entail different standards of accountability that apply to different types of public power. Phrased differently, PAJA and the principle of legality lie on different places on a so-called "continuum of constitutional accountability".[60] On the one end of this continuum, there are broad and general norms such as the rule of law in section 1(c) of the Constitution and the right to administrative justice in section 33 of the Constitution.[61] Further along the continuum, there are legislatively enacted specific and indirect norms such as the provisions of PAJA and, at the other end, various other empowering or controlling provisions in primary and secondary legislation.[62] Building on the imagery of a continuum of accountability, Murcott and Van der Westhuizen point out that:

> courts must follow a principled and justified approach to choosing the appropriate standards on a possible 'continuum of constitutional accountability' against which impugned exercises of public power should be measured.[63]

---

57 M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 145 168. See also *Law Society* (note 55 above) para 64, where the Constitutional Court distinguished between the detailed and exacting requirements imposed by procedural fairness as a standalone requirement in terms of PAJA, and the broad and less exacting requirements imposed by procedural rationality as part of legality's rationality standard.

58 In terms of section 33(2) of the Constitution, "everyone whose rights have been adversely affected by administrative action has the right to be given written reasons".

59 *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) paras 43-45. See also Hoexter *Administrative Law* (note 5 above) 472; M Kidd 'Reasons' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 193 217-218.

60 Murcott and Van der Westhuizen (note 15 above) 43.

61 Murcott and Van der Westhuizen (note 15 above) 43-44.

62 Murcott and Van der Westhuizen (note 15 above) 43-44.

63 Murcott and Van der Westhuizen (note 15 above) 43.

They argue that such a principled and justified approach to choosing the appropriate basis of review is provided by the principle of subsidiarity, which has been endorsed by the Constitutional Court on many occasions.[64] Subsidiarity entails that legislatively enacted specific and indirect constitutional norms should be favoured over more broad and direct constitutional norms during adjudication.[65] In favouring such norms, the courts respect the democratically elected legislature's constitutionally ordained role in South Africa's scheme of the separation of powers.[66] When it comes to applying the correct basis of review during judicial review, PAJA contains specific and indirect constitutional norms to regulate public power that is administrative in nature, while legality derives from section 1(c) of the Constitution and is thus a broad and direct constitutional norm.[67] Therefore, PAJA ought to be applied when administrative action is reviewed and it ought not to be bypassed in favour of the principle of legality.[68]

In judicial review proceedings, the proper application of subsidiarity necessitates an assessment of whether the impugned conduct amounts to administrative action or not so that the appropriate basis of review can be applied.[69] Such an assessment invariably requires engagement with the provisions of PAJA, specifically the definition of "administrative action". However, there has been an inclination among lawyers and judges to avoid PAJA ever since its inception due to its complex definition of "administrative action" and many procedural technicalities.[70] In *Albutt v Centre for the Study of Violence and Reconciliation and Others* (*Albutt*), this inclination came to the fore again when the Constitutional Court decided to avoid the

---

64 See, for example, *Bato Star* (note 21 above) paras 22-25; *New Clicks* (note 41 above) para 96; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 52; *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73; *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) para 4; *Mbatha v University of Zululand* (2014) 35 ILJ 349 (CC) para 173; *Motau* (note 6 above) para 27; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (hereafter, *My Vote Counts*) para 160. The Court recently emphasised once more "how deeply entrenched in South African constitutional litigation the principle is" and that it "serves important practical and normative purposes". See *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 paras 102-108.

65 Murcott and Van der Westhuizen (note 15 above) 46-47.

66 Murcott and Van der Westhuizen (note 15 above) 54-55.

67 Murcott and Van der Westhuizen (note 15 above) 51.

68 Murcott and Van der Westhuizen (note 15 above) 49 with reference to Hoexter *Administrative Law* (note 5 above) 134; *New Clicks* (note 41 above) paras 96-97.

69 Murcott and Van der Westhuizen (note 15 above) 51-52 with reference to Hoexter *Administrative Law* (note 5 above) 134.

70 Hoexter *Administrative Law* (note 5 above) 131-137. See also Murcott, Burns and Payne (note 48 above) 70.

question of whether the impugned conduct amounted to administrative action or not on the basis that such an enquiry would lead to many "complex questions" and that, in any case, the application of either basis of review would lead to the same final outcome.[71] The judgment in *Albutt* in 2010 marked the start of a trend in South African jurisprudence to undermine subsidiarity by avoiding PAJA and applying the less cumbersome principle of legality instead.[72] The principle of legality is known for its "generality and flexibility" and is thus regarded as an attractive alternative to PAJA.[73] However, bypassing PAJA in cases where it ought to apply ignores the principle of subsidiarity and undermines section 33 of the Constitution, which specifically mandates the regulation of administrative action by national legislation.[74] The Court's approach in *Albutt* could also cause PAJA to "become redundant" eventually, especially considering the ongoing duplication of administrative law rules under legality.[75] The development of the law of self-review discussed below should be understood against the background of this trend to avoid PAJA, as well as the constitutional scheme discussed.

2.2 Self-review

2.2.1 The standing of organs of state to review their own decisions

It is well established in South African law that an unlawful exercise of public power is valid and has legal consequences until it is set aside by a court on judicial review.[76] In other words, an organ of state may not simply reverse its decision or choose to ignore it, unless such reconsideration or variation is authorised by an empowering provision. This principle, known as the *functus officio* doctrine, was originally enforced so strictly

---

71 *Albutt* (note 56 above) paras 80-83. The Court reasoned that since the rationality standard applies both in terms of PAJA and under the principle of legality, the choice of the basis of review was inconsequential and could be ignored. Ngcobo J stated in para 81: "the question [is] whether the victims of the crimes that fall under this category of applications for pardon are entitled to a hearing. Once this question is answered in the affirmative in the light of the context-specific features of the special dispensation, it is not necessary to consider the question whether the exercise of the power to grant pardon under section 84(2)(j) constitutes administrative action".

72 Hoexter *Administrative Law* (note 5 above) 134-135; G Quinot 'Regulating Administrative Action' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 113-114.

73 Hoexter *Administrative Law* (note 5 above) 134.

74 Hoexter *Administrative Law* (note 5 above) 137; *New Clicks* (note 41 above) paras 96-97.

75 Hoexter *Administrative Law* (note 5 above) 137.

76 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) (hereafter, *Kirland*) para 101 with reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26 (hereafter, *Oudekraal*). This is often referred to as the *Oudekraal*-principle.

by our courts that an organ of state was barred from approaching a court to set aside its own prior decision.[77] However, the Appellate Division later took a different course by holding that in some cases an organ of state "would not only be entitled to but also bound" to approach a court to set aside a prior improper decision that it becomes aware of.[78] After the entry into force of the Constitution, the SCA in *Pepcor Retirement Fund and Another v Financial Services Board and Another* (*Pepcor*) endorsed this approach and held that organs of state not only have standing to bring review applications in respect of their prior improper decisions but also a duty to do so.[79]

2.2.2 The development of the law of self-review

The phenomenon of self-review came to the fore in no less than five prominent Constitutional Court judgments between 2013 and 2017.[80] In *Khumalo* the Member of the Executive Council (MEC) for Education, KwaZulu-Natal brought a self-review application to have one of its own employment decisions set aside.[81] The Court referred to *Pepcor* with approval and confirmed the standing of organs of state to bring self-review applications.[82] Furthermore, the duty of the state to undo prior improper decisions was emphasised with reference to the duty to uphold the Bill of Rights provided for in section 7(2) of the Constitution.[83] The Court explained that this duty should be performed diligently and without delay in terms of section 237 of the Constitution and that self-review proceedings must therefore be brought without undue delay or after the court has heard the reasons for the delay and exercised its discretion to overlook the delay.[84] Against this background, the Court highlighted the importance of the delay bar to ensure that organs of state act timeously and honestly, and concluded that the failure by the MEC to explain the delay "can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real

---

77 See, for example, *Osterloh v Civil Commissioner of Caledon* (1856) 2 Searle 240 at 243; *Mining Commissioner of Johannesburg v Getz* 1915 TPD 323 at 323; *Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd* 1950 (3) SA 598 (T) at 601H.

78 *Transair (Pty) Ltd v National Transport Commission* 1977 (3) SA 784 (A) at 793A-F.

79 *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) (hereafter, *Pepcor*) paras 13-15.

80 *Khumalo* (note 26 above); *Kirland* (note 76 above); *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) (hereafter, *Merafong CC*); *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) (hereafter, *Tasima CC*); *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) (hereafter, *Aurecon*).

81 *Khumalo* (note 26 above) para 1.

82 *Khumalo* (note 26 above) para 32.

83 *Khumalo* (note 26 above) para 36. Section 7(2) of the Constitution provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

84 *Khumalo* (note 26 above) paras 45-46.

reasons".[85] The Court emphasised that the "basic procedural requirement" to bring review proceedings without undue delay enhanced legal certainty and public confidence in the state, and that it was thus a fundamental aspect of the rule of law.[86] Consequently, the Court in *Khumalo* confirmed the possibility of self-review but ruled that the MEC was non-suited due to the unexplained delay in bringing the self-review application.[87]

In *Kirland* the Court refused to set aside an unlawful approval of a building license because the MEC for Health, Eastern Cape had not brought an application for self-review.[88] The Court explained that adjudicating upon the lawfulness of the approval in the absence of such an application would allow the MEC to bypass the delay bar which the court would have used to scrutinise the reasons for the delay in seeking to undo the decision.[89] The Court thus again affirmed the competence of the state to bring self-review proceedings. The Court also gave its resounding endorsement of the SCA judgment in *Oudekraal* in that it confirmed that unlawful administrative action continues to be valid and has legal consequences until it is set aside by a court during judicial review.[90] Therefore, the decisions in *Khumalo* and *Kirland* established unequivocally that the state had standing to institute self-review proceedings, and illustrated the importance of the delay bar as a means to scrutinise the reasons for delays in seeking self-review.

Some doubt still remained around whether self-review in the form of a counter-application, often referred to as collateral or reactive review, was permissible. In *Merafong* the SCA had interpreted the insistence on procedural compliance in *Oudekraal* and *Kirland* to mean that collateral review was not available to organs of state.[91] However, the Constitutional Court rejected this view and held that *Oudekraal* and *Kirland* did not imply that the state had an absolute duty of proactivity when faced with an irregularity or that collateral review was unavailable to it.[92] Instead, collateral review was available to organs of state "where justice requires it to be".[93] The Court

85 *Khumalo* (note 26 above) para 51.
86 *Khumalo* (note 26 above) para 45-47.
87 *Khumalo* (note 26 above) para 68.
88 *Kirland* (note 76 above) para 82.
89 *Kirland* (note 76 above) para 83.
90 *Kirland* (note 76 above) paras 101-102.
91 *Merafong City Local Municipality v AngloGold Ashanti Limited* 2016 (2) SA 176 (SCA) para 17.
92 *Merafong CC* (note 80 above) para 44.
93 *Merafong CC* (note 80 above) para 55.

confirmed this decision in *Tasima*.[94] In this case, the SCA had held that collateral review was not available to organs of state.[95] The Constitutional Court overturned the decision of the SCA and affirmed that collateral review was available to organs of state as long as the delay was not "unwarrantably undue".[96] Thus, self-review in the form of collateral or reactive review received the green light from the Constitutional Court.

In *Aurecon* the Constitutional Court acknowledged the remaining uncertainty around the appropriate basis of review when the state reviews its own administrative action (i.e. whether the appropriate basis for review was PAJA or legality), but expressly left open the question to be decided when "the opportunity properly presents itself".[97] The Court proceeded to decide the self-review application in terms of PAJA on the basis that both parties had agreed to this basis of review.[98] The Court acknowledged that it was not bound by a legal concession of the parties if it was wrong in law but concluded that since the law on the matter was unsettled, it could not be said that the parties' legal concession was wrong in law.[99] The Court quoted from *Albutt* with approval[100] and echoed the *Albutt* Court's indifferent approach to determining and applying the correct basis of review when it stated that, on the facts of the particular case, the delay bar entails "essentially the same enquiry" under both PAJA and legality.[101] Even though PAJA was applied as the basis of review in *Aurecon*, the Court refused to engage with its provisions in any detail and thus the trend of refusing to interpret and apply PAJA reared its head once more.

In short, the judgments above revealed that self-review, including in the form of a counter-application, was available to the state and that the state had a general duty to undo its prior improper decisions when it became aware of it. Despite the Constitutional Court's reluctance to settle the issue of the basis of review, it was generally assumed that the state had standing under both PAJA and the principle of legality, and that the appropriate basis of review would thus be dependent on whether the impugned exercise of public power amounted to administrative action or some

94 *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) (hereafter, *Tasima SCA*).
95 *Tasima* SCA (note 94 above) paras 26-27.
96 *Tasima CC* (note 80 above) para 143.
97 *Aurecon* (note 80 above) paras 34-36.
98 *Aurecon* (note 80 above) para 36.
99 *Aurecon* (note 80 above) paras 34.
100 *Aurecon* (note 80 above) para 35.
101 *Aurecon* (note 80 above) para 37.

other form of public power.[102] The issue was not addressed expressly until the lengthy litigation between the State Information Technology Agency (SITA) and Gijima Holdings (Pty) Ltd (Gijima), which spanned the High Court, SCA, and Constitutional Court.[103] The facts giving rise to the litigation are discussed next, followed by a discussion of the key findings as they relate to self-review.

2.2.3 The litigation between SITA and Gijima

SITA and Gijima had entered into a contract in terms of which Gijima was to provide information technology services to the South African Police Service (the SAPS contract).[104] SITA subsequently terminated the SAPS contract and Gijima suffered a loss of R20 million.[105] Gijima instituted urgent proceedings against SITA in the High Court but the matter never went to court because the parties entered into a settlement agreement.[106] In terms of the settlement agreement, Gijima was appointed as a service provider for the KwaZulu-Natal Health Department and the Department of Defence (the DoD contract).[107] This was meant to compensate Gijima for the losses it suffered as a result of the termination of the SAPS contract.[108] Gijima repeatedly raised concerns about the lawfulness of the DoD contract but SITA assured Gijima each time that the contract had been concluded according to the prescribed procurement process.[109] The DoD contract was extended several times but 15 months after its commencement SITA informed Gijima that it would not extend the contract again and a payment dispute arose.[110] Gijima instituted arbitration proceedings for a claim of nearly R10 million allegedly owed by SITA to Gijima for services rendered.[111] At this point, SITA went back on its previous assurances and argued that the DoD contract had not complied with the public procurement provisions in section 217 of the Constitution.[112] The arbitrator held that he did not have jurisdiction to adjudicate on the

---

102 For example, the SCA in *Tasima SCA* (note 94 above) at paras 29-39 applied PAJA to a self-review application on the basis that the decision concerned amounted to administrative action. See also the comments in Boonzaier 'Good Reviews, Bad Actors' (note 27 above) at 13-14.

103 *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2015] ZAGPPHC 1079 (18 May 2015) (hereafter, *Gijima HC*); *Gijima SCA* (note 30 above); *Gijima CC* (note 1 above).

104 *Gijima CC* (note 1 above) para 4.

105 *Gijima CC* (note 1 above) para 4.

106 *Gijima CC* (note 1 above) para 5.

107 *Gijima CC* (note 1 above) para 6.

108 *Gijima CC* (note 1 above) para 5.

109 *Gijima CC* (note 1 above) paras 6-7.

110 *Gijima CC* (note 1 above) paras 8-9.

111 *Gijima CC* (note 1 above) para 9.

112 *Gijima CC* (note 1 above) para 9.

lawfulness of the procurement process.[113]

SITA subsequently launched a review application in the High Court to set aside the DoD contract on the ground that a proper procurement process in terms of section 217 of the Constitution had not been followed.[114] The proceedings were instituted after a delay of 22 months - well after the 180 days prescribed by PAJA.[115] The High Court held that the decision to award the DoD contract to Gijima was administrative action and that PAJA was the appropriate basis of review.[116] However, the High Court ruled that it would not be just and equitable to condone SITA's delay in launching the self-review application and dismissed the application with costs.[117]

The matter was taken on appeal and the SCA was split on the issue of the appropriate basis of review. Although it was uncontroversial that the award of a tender amounted to administrative action, there was disagreement as to whether the state was obliged to bring its self-review application in terms of PAJA. The majority confirmed that a decision to award a contract for services amounted to administrative action and that PAJA was the appropriate basis of review.[118] It then dismissed the appeal with costs since the review application was launched outside the 180 days in terms of PAJA and because, even if a legality review could be entertained, SITA still failed to offer a reasonable explanation for the delay.[119] The minority reasoned that the principle of legality could be applied, even if the impugned conduct amounted to administrative action, since the dictates of justice required a court not to non-suit an applicant merely because it chose the incorrect basis of review.[120] Accordingly, the minority would have set aside the contract for its illegality.

The Constitutional Court delivered a unanimous judgment that overturned the decision by the majority of the SCA. The Court interpreted section 33 of the Constitution and the relevant provisions of PAJA to mean that only private persons are entitled to the right to just administrative in terms of section 33 of the Constitution.[121] Thus, the state was found not to be a bearer of rights in terms of section 33 of the

113 *Gijima CC* (note 1 above) para 9.
114 *Gijima CC* (note 1 above) para 10.
115 *Gijima CC* (note 1 above) para 42.
116 *Gijima HC* (note 103 above) para 19.
117 *Gijima HC* (note 103 above) para 22.
118 *Gijima SCA* (note 30 above) para 16.
119 *Gijima SCA* (note 30 above) paras 39-45.
120 *Gijima SCA* (note 30 above) para 55.
121 *Gijima CC* (note 1 above) paras 27-34.

Constitution but only a bearer of obligations.[122] An organ of state may now not apply to review its own decision under PAJA but must do so under the principle of legality.[123] The Court based this decision on what it regarded as the "quite axiomatic" premise that "rights are meant to protect warm-bodied human beings primarily against the State".[124] The judgment referred to passages from the *First Certification Judgment*, which discussed fundamental rights as relating to "human beings", to fortify the validity of the decision.[125] The Court highlighted that section 33(3)(b) of the Constitution imposes a duty on the state to give effect to the right to just administrative action and concluded that it would be "inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation".[126] The Court also explained that "any person" in section 6(1) of PAJA does not include the state since the ambit of administrative justice rights in terms of PAJA cannot be wider than what was "envisaged by the source" of the legislation, i.e. section 33 of the Constitution.[127]

Having concluded that only private persons enjoy the right to just administrative action in section 33 of the Constitution, the Court emphasised that an organ of state may still institute self-review proceedings but that it must do so under the principle of legality.[128] The Court found that the 22 month-delay could not be condoned even under legality's relaxed standard of "unreasonable delay".[129] Nevertheless, the Court emphasised its duty in terms of section 172(1)(a) of the Constitution to declare unlawful conduct invalid and thus declared SITA's decision to award the contract in contravention of section 217 of the Constitution invalid.[130] In the interests of justice and equity, it was decided that the declaration of invalidity must not have the effect of divesting Gijima of any contractual rights it would have been entitled to, but for the declaration of invalidity.[131]

Subsequent judgments of our highest courts, most notably *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*, have endorsed the

---

122 *Gijima CC* (note 1 above) para 29.
123 *Gijima CC* (note 1 above) paras 37-40.
124 *Gijima CC* (note 1 above) para 18.
125 *Gijima CC* (note 1 above) paras 19-23.
126 *Gijima CC* (note 1 above) para 27.
127 *Gijima CC* (note 1 above) paras 31-32. Section 6(1) of PAJA provides that "any person may institute proceedings in a court or tribunal for the judicial review of an administrative action".
128 *Gijima CC* (note 1 above) paras 38-40.
129 *Gijima CC* (note 1 above) paras 45-50.
130 *Gijima CC* (note 1 above) para 52.
131 *Gijima CC* (note 1 above) paras 53-54.

decision in *Gijima CC* and confirmed that self-review applications must be brought under the principle of legality.[132]

2.3 Conclusion

This chapter has described the different bases upon which judicial review can operate to hold exercises of public power to account, the phenomenon of self-reviews, and the path toward the finding in *Gijima CC* that legality is the proper legal basis upon which to bring a self-review. In summary, the Court's judgment in *Gijima CC* is contrary to the supposedly trite principle that, due to the different standards of accountability that apply to different types of public power, PAJA applies to the review of administrative action and legality applies to the review of public power not amounting to administrative action. The next chapter analyses the reasoning underlying the Court's judgment, and discusses whether such reasoning aligned with the demands of transformative adjudication.

---

132 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) (hereafter, *Buffalo City*) para 1. See also *Hunter v Financial Sector Conduct Authority and Others* 2018 (6) SA 348 (CC) para 100; *Notyawa v Makana Municipality and Others* (2020) 41 ILJ 1069 (CC) para 52; *Altech* (note 25 above) para 17; *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA) paras 24-25.

Chapter 3: Transformative Adjudication and *Gijima CC*

Having explained the distinction between PAJA and the principle of legality as bases of review, and having shown that the Court in *Gijima CC* disregarded such distinction in its judgment, this chapter analyses the legal reasoning of the Court with reference to the demands of transformative adjudication. The judgment in *Gijima CC* has received extensive academic criticism.[133] It has rightly been argued that the Court (1) contradicted its own prior jurisprudence without explanation;[134] (2) ignored section 38 of the Constitution (the standing clause);[135] (3) did not appreciate the difference between a right-bearer and a party that has standing to enforce a right;[136] and (4) did not consider appropriately the constitutional duties of the state to protect constitutional rights and ensure an efficient public administration.[137] However, a point that has not received much attention, and which is discussed in this chapter, is whether the Court's reasoning lived up to the demands of transformative adjudication. This inquiry is important because transformative adjudication is (or should be) the cornerstone of judicial decision-making in post-Apartheid South Africa since it seeks to reject the formalism which often still pervades our legal culture, and to promote the goals of our "democratic and transformative Constitution".[138]

Firstly, this chapter explains the concept of transformative adjudication with reference to prominent scholarly work and case law. Secondly, this chapter considers whether and to what extent the Court's reasoning in *Gijima CC* aligned with the demands of transformative adjudication.

3.1 Transformative adjudication: the mission of the post-apartheid judiciary

Transformative adjudication is a method of judicial reasoning that flows from the prescripts of transformative constitutionalism. Klare, an American jurist, coined the

---

133 Boonzaier 'A Decision to Undo' (note 17 above); De Beer (note 17 above); E Van der Sijde and G Quinot 'Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review Its Own Decisions?' (2019) 2019 (2) *Journal of South African Law* 324; RH Freeman 'The Rights of the State, and the State of Rights in *State Information Technology Agency Soc Limited V Gijima Holdings (Pty) Limited*' (2019) 9(1) *Constitutional Court Review* 521.

134 Boonzaier 'A Decision to Undo' (note 17 above) 646-649 and 651-652; De Beer (note 17 above) 622.

135 Boonzaier 'A Decision to Undo' (note 17 above) 645-646; De Beer (note 17 above) 622; Van der Sijde and Quinot (note 133 above) 335.

136 Boonzaier 'A Decision to Undo' (note 17 above) 644-645; De Beer (note 17 above) 621-623.

137 Boonzaier 'A Decision to Undo' (note 17 above) 651-652 and 654; Van der Sijde and Quinot (note 133 above) 335.

138 Hoexter 'Transformative Adjudication' (note 8 above) 283.

term “transformative constitutionalism” and defined it as “a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”.[139] Former Chief Justice Langa elaborated on this notion by explaining that “transformation ... is a social and economic revolution” aimed at establishing substantive equality.[140] Former Deputy Chief Justice Moseneke further wrote that “the primary purpose of the Constitution is to intervene in unjust, uneven and impermissible power and resource distributions, in order to restore substantive equality”.[141] Thus, the core goal of transformative constitutionalism is to use the law, grounded in the Constitution, to achieve an egalitarian society aligned with the spirit, purport and objects of the Constitution. In this context, Moseneke formulated the concept of transformative adjudication and asserted that “adjudicators should perhaps acknowledge their political and moral responsibility in adjudication”,[142] and that “the judiciary is commanded to observe with unfailing fidelity the transformative mission of the Constitution”.[143] Hoexter observed further that “there is no mistaking the transformative aim” of the Constitution and that transformative adjudication is the device by which judges must achieve this aim.[144]

The need for transformative adjudication in the post-1994 constitutional dispensation is reaffirmed by several provisions in the Constitution. From the outset, the Preamble states that the overarching goal of the Constitution is to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.[145] Section 1 proceeds to identify “the achievement of equality” as one of the founding values of the new South African republic.[146] Crucially, section 7(2) places a positive obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”.[147] Section 9(2) contains a clear commitment to substantive equality by requiring “full and equal enjoyment of all rights”, and mandates the taking of positive measures to realise the achievement of equality.[148] Section 39(2)

139 Klare (note 8 above) 150.
140 Langa (note 8 above) 352.
141 Moseneke ‘Transformative Adjudication’ (note 8 above) 318.
142 Moseneke ‘Transformative Adjudication’ (note 8 above) 317.
143 Moseneke ‘Transformative Adjudication’ (note 8 above) 319.
144 Hoexter ‘Transformative Adjudication’ (note 8 above) 284-286.
145 Preamble of the Constitution.
146 Section 1(a) of the Constitution.
147 Section 7(2) of the Constitution.
148 Section 9(2) of the Constitution.

requires the judiciary to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation and to develop the common law and customary law to align it with the demands of the Bill of Rights.[149] Since it is well-established that the content of constitutional rights are informed by the foundational values of the Constitution, section 39(2) in effect obliges the courts to promote the transformative values of the Constitution during adjudication.[150] The above provisions in the Constitution taken together lead Albertyn and Goldblatt to conclude that a transformative approach to adjudication is the "most faithful to the spirit and letter of the Constitution", since it seeks to achieve "a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines".[151]

The Constitutional Court has confirmed the need for transformative adjudication by subscribing to the notion of substantive equality and acknowledging the role of the judiciary in actively pursuing it. For instance, the Court has stated that the Constitution "is primarily and emphatically an egalitarian constitution",[152] that it "imposes a positive duty on all organs of state to protect and promote the achievement of equality - a duty which binds the judiciary too", and that this duty is rooted in "a transformative constitutional philosophy".[153]

In short, the Constitution requires judges to give effect to its transformative mission and transformative adjudication is the mode of judicial reasoning required to do so. An implied aspect of this approach is a rejection of the formalism that characterised adjudication in the apartheid-era.[154] In this context, Mureinik identified the need for a shift from "a culture of authority" to "a culture of justification".[155] Aligned with the pursuit of a culture of justification among the judiciary, one of the requirements

---

149 Section 39(2) of the Constitution.

150 Moseneke 'Transformative Adjudication' (note 8 above) 315; Hoexter 'Transformative Adjudication' (note 8 above) 285; Langa (note 8 above) 353; C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 (2) *South African Journal on Human Rights* 248 249; Quinot 'Substantive Reasoning' (note 10 above) 113; Penfold (note 10 above) 88-89.

151 Albertyn and Goldblatt (note 150 above) 249.

152 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (hereafter, *Hugo*) para 74.

153 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 142.

154 Klare (note 8 above) 170; Langa (note 8 above) 356-357; Hoexter 'Transformative Adjudication' (note 8 above) 287-289; Quinot 'Substantive Reasoning' (note 10 above) 115-116; Penfold (note 10 above) 85-88.

155 E Mureinik *'A Bridge to Where?: Introducing the Interim Bill of Rights'* (1994) 10 *South African Journal on Human Rights* 31 32.

of transformative adjudication is a commitment to substantive reasoning.[156]

Substantive reasoning requires judges to justify their decisions in a transparent and coherent manner, with reference not only to legal authority but also ideas, values, morals, policy objectives, and even political considerations.[157] Such justifications must be underpinned by our constitutional values, which should be allowed "to permeate the various areas of [South African] law".[158] During legal interpretation, substantive adjudication entails that judges should avoid engaging in excessively formalistic or mechanical reasoning and openly consider and promote the constitutional values at stake, while still respecting the legislative text by avoiding interpretations that unduly strain it.[159] As Hoexter notes, if the judiciary is to contribute to the post-1994 objective of establishing a culture of justification, it is imperative that judges interpret legal texts "boldly and purposively, in accordance with the substantive vision propounded by the Constitution".[160] Thus, the courts ought to justify their decisions with reference to substantive considerations that are grounded in the normative framework of the Constitution, and these justifications must be robust and theoretically sound.[161]

Having described transformative adjudication, and its requirement of substantive reasoning, the next section analyses the reasoning of the Constitutional Court in *Gijima CC* against that requirement.

3.2 Mission failed? The shortcomings of the Court's reasoning in *Gijima CC*

In this section, it is argued that the Court did not engage in transformative adjudication in *Gijima CC* for the following reasons: (1) the Court interpreted the provisions of the Constitution and PAJA formalistically by following a strictly textual approach; (2) the Court adopted an understanding of constitutionalism that is inconsistent with the transformative values of the Constitution; and (3) the Court ignored the principle of subsidiarity in its judgment and came to a seemingly arbitrary conclusion.

---

156 Moseneke 'Transformative Adjudication' (note 8 above) 316; Langa (note 8 above) 357; Hoexter 'Transformative Adjudication' (note 8 above) 287; Quinot 'Substantive Reasoning' (note 10 above) 113.

157 Klare (note 8 above) 164; Moseneke 'Transformative Adjudication' (note 8 above) 317; Langa (note 8 above) 353; Hoexter 'Transformative Adjudication' (note 8 above) 283-284; Quinot 'Substantive Reasoning' (note 10 above) 113; Penfold (note 10 above) 87-88.

158 Penfold (note 10 above) 87; Quinot 'Substantive Reasoning' (note 10 above) 116-117.

159 Langa (note 8 above) 357; Penfold (note 10 above) 93.

160 Hoexter 'Transformative Adjudication' (note 8 above) 289.

161 Quinot 'Substantive Reasoning' (note 10 above) 116-117.

3.2.1 A strictly textual approach

The Court's conclusion that the state may not rely on PAJA when seeking to review its own administrative action is based on two related premises. Firstly, the Court noted that section 33(3)(b) of the Constitution imposes a duty on the state to give effect to the right to just administrative action and argued that it would be "inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation".[162] In other words, the state could not be a bearer of the administrative justice rights provided for in section 33 of the Constitution. Secondly, the Court stated that "any person" in section 6(1) of PAJA does not include the state, since the ambit of administrative justice rights in terms of PAJA cannot be wider than what was "envisaged by the source" of the legislation, i.e. section 33 of the Constitution.[163]

The Court's reasoning focused exclusively on the text of section 33 of the Constitution and section 6(1) of PAJA respectively, without any explanation or justification as to why the interpretation put forward ought to be followed. This formalistic mode of reasoning conceals the substantive (as opposed to textual) reasons for a decision by creating the impression that no choice was available to the decision-maker.[164] It also leaves room for speculation by observers as to reasons behind the decision beyond the text.[165]

Examples of such speculation may be found in the academic scholarship dealing with *Gijima CC*. For example, Boonzaier suggests that the ruling is part of a wider strategy among some of the Court's members to make it easier for the state to review its own decisions by removing the onerous procedural obstacles imposed by PAJA.[166] On the other hand, De Beer suggests that the Court may be applying "a substantive brake" on self-reviews where the state is acting in its own interest, as legality offers fewer grounds of review than PAJA.[167] Both these inferences are plausible but without clarification from the Court, observers are unable to engage critically with the decision of the Court and any opinion expressed in this regard remains mere speculation.[168] The lack of substantive justification from the Court is

---

162 *Gijima CC* (note 1 above) para 27.
163 *Gijima CC* (note 1 above) paras 31-32. Section 6(1) of PAJA provides that "any person may institute proceedings in a court or tribunal for the judicial review of an administrative action".
164 Penfold (note 10 above) 87.
165 Quinot 'Substantive Reasoning' (note 10 above) 137.
166 Boonzaier 'A Decision to Undo' (note 17 above) 659-663.
167 De Beer (note 17 above) 625.
168 Quinot 'Substantive Reasoning' (note 10 above) 137.

contrary to the constitutional values of accountability and non-arbitrariness and does damage to the rule of law.[169] Furthermore, it undermines the culture of justification required by transformative adjudication.

3.2.2 The adoption of a classical liberal understanding of constitutionalism

The Court's sole attempt to provide substantive justification for its decision is a frenetic passage of six paragraphs that broadly traverse the origins of constitutional rights in international human rights law, as it was set out in *Certification of the Constitution of the Republic of South Africa*.[170] The Court highlighted the multiple references in that judgment to individual "human beings", as well as the statement that "what the drafters had in mind [in relation to constitutional rights] were those rights and freedoms recognised in open and democratic societies as being the inalienable entitlements of *human beings*" (own emphasis).[171] The Court relied on these passages to support the purportedly "quite axiomatic" premise that constitutional rights "are meant to protect warm-bodied human beings primarily against the State".[172] The Court clarified in a footnote that juristic persons also enjoy the protection of constitutional rights by virtue of their legal personality.[173] The Court relied on this premise to restrict the operation of administrative justice rights to a vertical relationship where individuals (human beings and juristic persons) enforce rights against the state.

It is important at this stage to remind ourselves that transformative adjudication does not entail the justification of decisions with reference to merely any substantive considerations. The substantive justification required must be robust, theoretically sound, and grounded in the normative framework of the Constitution.[174] While the Court's "warm-bodied human beings"-argument does take *some* substantive considerations into account, the underlying assumptions upon which the argument is based seem out of step with the normative framework of the Constitution. The Court's reasoning reflects a dogmatic application of what Malan refers to as "statist-individualist constitutionalism",[175] and what can also be referred to as "classical liberal

---

169 Quinot 'Substantive Reasoning' (note 10 above) 137. See also *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 para 12.

170 *Gijima CC* (note 1 above) paras 18-23; 1996 (4) SA 744 (CC) (hereafter, *First Certification Judgment)*.

171 *First Certification Judgment* (note 170 above) para 50.

172 *Gijima CC* (note 1 above) para 18.

173 *Gijima CC* (note 1 above) para 18, fn 17.

174 Quinot 'Substantive Reasoning' (note 10 above) 116-117.

175 Malan *No Supreme Constitution* (note 12 above).

constitutionalism". In terms of this understanding of constitutionalism, which derives from so-called classical liberal thinkers such as Hobbes, Locke and Bentham, the state and the individual are the only two legally recognisable entities in public law.[176] Accordingly, constitutional rights exist to protect the vulnerable individual from the powerful and overbearing state.[177] These underlying assumptions of classical liberal constitutionalism are evident from the Court's conclusion that "rights are meant to protect warm-bodied human beings primarily against the state".[178] From the perspective of transformative adjudication, the adoption of a classical liberal approach is problematic for at least four reasons.

Firstly, classical liberal constitutionalism fixates on individual autonomy and neglects the interests of communities.[179] Such an approach is contrary to the egalitarian and communitarian vision of the Constitution propounded in the Preamble, founding values, and equality clause of the Constitution, and endorsed by the Constitutional Court on numerous occasions.[180] The standing clause further emphasises the collective nature of the rights protected in the Constitution by providing that anyone may approach a court for relief in the public interest.[181] The horizontal application of the rights in the Constitution means that the duties in respect of these rights are imposed not only on the state, but also on natural and juristic persons (when applicable).[182] As Klare notes, our Constitution is different from classical liberal constitutions (such as the US Constitution, for example) in that it prioritises the collective good and social justice through its "pervasive and overriding commitment to equality".[183] Moseneke underscores the point by stating that:

> Unlike classical liberal jurisprudence, animated by individual autonomy and protection

176 Malan *No Supreme Constitution* (note 12 above) 19.

177 K Malan *Politocracy: An Assessment of the Coercive Logic of the Territorial State and Ideas Around a Response to it* (2012) 206-215.

178 *Gijima CC* (note 1 above) para 18.

179 Malan *No Supreme Constitution* (note 12 above) 40-41.

180 Section 1(a) of the Constitution provides that the South African state is founded upon, *inter alia*, "the achievement of equality". Section 9(2) of the Constitution advances the notion of substantive equality by providing that "equality includes the full and equal enjoyment of all rights and freedoms". See, for example, *Hugo* (note 152 above) para 74, where Kriegler J stated that the Constitution "is primarily and emphatically an egalitarian constitution" and that "equality is our Constitution's focus and organising principle". See also Klare (note 8 above) 150-151; Albertyn and Goldblatt (note 150 above) 249-250; Moseneke 'Transformative Adjudication' (note 8 above) 318; Langa (note 8 above) 352-354.

181 Section 38(d) of the Constitution provides that "the persons who may approach a court [include] anyone acting in the public interest".

182 Section 8(2) of the Constitution.

183 Klare (note 8 above) 153-154.

> of property, the attainment of collective good, through redistributive fairness in an open and accountable society, informs transformative jurisprudence.[184]

Malan further notes that the operation of constitutional rights cannot properly be restricted to the straitjacket of abstract individualism, owing to the fact that the existence of communities is a precondition for the exercise of such rights and that an infringement of such rights affects not only the individual but the broader community.[185] The right to just administrative action illustrates this point as well as most other constitutional rights. Its operation cannot be reduced to the individual exclusively. Its benefits - transparency, accountability, efficiency - are not enjoyed by any particular individual to the exclusion of others and when the right is violated, the South African community at large is affected since the community has a collective interest in a well-functioning and law-abiding public administration.[186] The Court did not take account of this communal or collective aspect of constitutional rights and came to a conclusion that misconstrues rights as "the sole property of plaintiffs, to be jealously guarded by them" instead of entitlements that endure for the benefit of communities and the public more broadly, and that introduce collective (as opposed to merely individual) rights and positive and negative duties.[187] Corder and Kohn correctly observe that the Court's reasoning reflects a "narrow and dated approach to constitutional rights".[188] Such an approach is contrary to the egalitarian, communitarian and transformative values of the Constitution and, accordingly, fails to adhere to the demands of transformative adjudication.

Secondly, the centrality of the individual under classical liberal constitutionalism is incompatible with African ideas around constitutional rights. African conceptions of morality tend to ground constitutional rights in the existence of communities rather than the autonomy of the individual as is common in Western moral thought.[189] *Ubuntu* is an example of such a community-based conception of rights and has been recognised by the Constitutional Court as one of the values underlying the Constitution

---

184 Moseneke 'Transformative Adjudication' (note 8 above) 317.
185 Malan *No Supreme Constitution* (note 12 above) 245-251.
186 Malan *No Supreme Constitution* (note 12 above) 245-251; Boonzaier 'A Decision to Undo' (note 17 above) 654.
187 Boonzaier 'A Decision to Undo' (note 17 above) 654; Malan *No Supreme Constitution* (note 12 above) 251-254.
188 Corder and Kohn (note 29 above) 140.
189 Metz (note 12 above) 35.

even though it is not mentioned explicitly in the text.[190] It is a distinctly African concept "which places ... emphasis on communality and on the interdependence of the members of a community" and "the mutual enjoyment of rights by all".[191] In contrast to the notion of abstract individualism, *ubuntu* is based on the idea that "the individual's whole existence is relative to that of the group".[192] At the centre of *ubuntu* is the understanding that an individual's path to personhood is dependent on the assistance of the community.[193] This implies what Masolo refers to as participatory difference - the idea that each individual, having been assisted by the community to mature into personhood, must through their actions enhance the well-being of the community.[194] Accordingly, *ubuntu* understands human nature to be inherently community-based or relational.[195] These principles have been recognised by the Constitutional Court and applied to our Bill of Rights. For example, Sachs J stated in *Port Elizabeth Municipality v Various Occupiers* that *ubuntu* "suffuses the whole constitutional order" and "combines individual rights with a communitarian philosophy".[196] The demands of transformative adjudication would have required the Court in *Gijima CC* to be guided by these principles in its interpretation of the Constitution and PAJA, instead of relying exclusively on Western principles that ground the operation of constitutional rights in the abstract individual.

Thirdly, classical liberal constitutionalism tends to depict the state as an abstract monolith.[197] This notion of the monolithic state is what caused the Court to find that it is "inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation".[198] However, as Freeman points out, it is more appropriate to conceive of the state as "an assortment of processes" rather than a "homogeneous whole".[199] Once this is accepted, it is conceptually perfectly plausible

---

190 *Ubuntu* was recognised as a constitutional value for the first time in *Makwanyane* (note 13 above). The Constitutional Court recently affirmed the status of *ubuntu* as a constitutional value in *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31 at para 81. *Ubuntu* was mentioned by name in the Postamble of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution).

191 *Makwanyane* (note 13 above) para 224.

192 Mokgoro (note 12 above) 2.

193 Menkiti (note 12 above) 326.

194 Cornell and Muvangua (note 12 above) 4, with reference to the work of DA Masolo. See, for example, DA Masolo *Self and Community in a Changing World* (2010).

195 Masolo (note 12 above) 483.

196 2005 (1) SA 217 (CC) para 37.

197 Malan *No Supreme Constitution* (note 12 above) 40.

198 Freeman (note 133 above) 535; *Gijima CC* (note 1 above) para 27.

199 Freeman (note 133 above) 534.

for the state to rely on constitutional rights against itself, since the making of a decision by the state and the review of that same decision are two entirely different processes.[200] Furthermore, even if we were to accept the Court's understanding of the state as a monolithic entity, it seems artificial and arbitrary to distinguish between the state's reliance on a constitutional right against itself as opposed to its reliance on the founding value of the rule of law against itself. The Court's failure to appreciate these nuances reflects a formalistic approach that did not align with the demands of transformative adjudication.

Fourthly, classical liberal constitutionalism seeks to maintain existing social and power structures.[201] To this end, it implements a model of the separation of powers doctrine that is focused on demarcating individual autonomy from state interference and preventing an overconcentration of state power in any particular branch of government. In contrast, our Constitution unambiguously seeks to advance social justice by promoting radical social change and the achievement of equality.[202] Our model of the separation of powers doctrine is augmented by the positive duty of the state to "respect, protect, promote and fulfil the rights in the Bill of Rights",[203] and the judiciary's wide powers of review, in terms of which any conduct of the executive or law of the legislature must be declared invalid to the extent of its inconsistency with the Constitution.[204] Accordingly, the state is required to be dynamic and responsive to socio-economic conditions, and empowered to intervene in unjust social and power relations.[205] There is no reason why the positive duty of the state to protect and fulfil constitutional rights ought not to include a duty to vindicate the right to just administrative action (or any other right) when it is discovered that one of its own decisions was constitutionally invalid. The Court in *Gijima CC* seems not to have contextualised the right to just administrative action within our social justice-orientated model of the separation of powers and, accordingly, failed to live up to the demands of transformative adjudication.

---

200 Freeman (note 133 above) 535; *Gijima CC* (note 1 above) para 27.

201 Hodgson (note 12 above) 66.

202 Hodgson (note 12 above) 66; D Moseneke 'Shades of the Rule of Law and Social Justice' presented as the Helen Suzman Memorial Lecture (2016) available online at https://hsf.org.za/publications/lectures/helen-suzman-memorial-lecture-2016-1 (accessed on 15 February 2021).

203 Section 7(2) of the Constitution.

204 Section 2 of the Constitution, read with section 172(1)(a) of the Constitution.

205 AZ Huq 'A Tactical Separation of Powers Doctrine' (2019) 9 *Constitutional Court Review* 19 43 – 44; Moseneke 'Transformative Adjudication' (note 8 above) 318.

For the reasons set out above, the reasoning underlying the Court's finding that the state is not a bearer of administrative justice rights, and that the state may therefore not rely on PAJA, fell short of the demands of transformative adjudication. Transformative adjudication and its adjunct requirement of substantive reasoning ought to have compelled the Court to ground its reasoning in the egalitarian and transformative values of the Constitution. Instead, the Court's reasoning was formalistic and grounded in a classical liberal understanding of constitutionalism that derives from Western ideas that are out of step with South Africa's constitutional scheme.

3.2.3 Disregard for the principle of subsidiarity

Further adding to the formalistic nature of the Court's reasoning is the failure to engage with the principle of subsidiarity. As explained above, the principle of subsidiarity entails that legislatively enacted specific and indirect constitutional norms should be favoured over more broad and direct constitutional norms during adjudication.[206] In the context of administrative law-adjudication, PAJA contains specific and indirect constitutional norms that were enacted by Parliament to regulate public power that amounts to administrative action, pursuant to section 33(3)(a) of the Constitution.[207] On the other hand, the principle of legality derives from the founding value of the rule of law in section 1(c) of the Constitution and is thus a broad and direct constitutional norm.[208] Therefore, when the impugned conduct amounts to administrative action, PAJA ought to apply and it ought not to be side-lined in favour of the principle of legality.[209] Only when the impugned conduct does not amount to administrative action does the principle of legality apply as a safety-net to ensure compliance with a baseline standard of legality.[210] Accordingly, the application of subsidiarity ensures that the impugned exercise of public power is subjected to the appropriate standards of accountability. In addition, the application of subsidiarity serves at least three important functions: (1) it promotes constitutional supremacy by according primacy to the legislation prescribed by the Constitution to provide for the protection and fulfilment of

206 Murcott and Van der Westhuizen (note 15 above) 46-47.
207 Murcott and Van der Westhuizen (note 15 above) 51.
208 Murcott and Van der Westhuizen (note 15 above) 51.
209 Murcott and Van der Westhuizen (note 15 above) 49 with reference to Hoexter *Administrative Law* (note 5 above) 134; *New Clicks* (note 41 above) paras 96-97.
210 Hoexter *Administrative Law* (note 5 above) 134; *New Clicks* (note 41 above) para 96.

a particular right;[211] (2) it protects the separation of powers by according respect to the legislation that was enacted by Parliament;[212] and (3) it ensures that our constitutional jurisprudence develops coherently.[213]

The decision in *Gijima CC* that the state must rely on legality when reviewing its own administrative action has the effect of bypassing the legislatively enacted specific and indirect constitutional norms in PAJA and applying the broad and direct constitutional norms under the principle of legality instead. The Court did not explain its departure from the much-venerated principle of subsidiarity. In fact, the Court did not mention subsidiarity at all in its judgment. Accordingly, the Court's choice of legality as the basis of review in all self-review applications comes across as arbitrary - a feature that is diametrically opposed to the demands of transformative adjudication.

3.3 Summary

In summary, the Court in *Gijima CC* failed to justify its decision with reference to the normative framework of the Constitution. As shown above, the Court interpreted the provisions of the Constitution and PAJA formalistically by following a strictly textual approach. The "warm-blooded human beings"-argument put forward by the Court reflects a classical liberal approach to constitutionalism which is contrary to the values of the Constitution. The Court ignored the principle of subsidiarity and ruled in a seemingly arbitrary fashion. The presence of *some* substantive considerations in the Court's reasoning does not save it from failing to live up to the demands of transformative adjudication. As Quinot explains, from the perspective of transformative adjudication, baseless substantive reasoning is as bereft of legitimacy as high formalism.[214] Thus, the Court's reasoning may be described as substantive without proper justification at best, and highly formalistic at worst.

In deciding whether PAJA or legality should have applied to the state's self-review application, the Court ought to have been guided by the question whether it is appropriate to subject the impugned exercise of public power to the higher level of scrutiny in terms of PAJA.[215] Once it was accepted that it was appropriate to subject the award of a tender to the rigorous standards of PAJA, the Court ought to have

211 *My Vote Counts* (note 64 above) para 61; Murcott and Van der Westhuizen (note 15 above) 54.
212 *My Vote Counts* (note 64 above) para 62; Murcott and Van der Westhuizen (note 15 above) 54.
213 *My Vote Counts* (note 64 above) para 63.
214 Quinot 'Substantive Reasoning' (note 10 above) 139.
215 *Motau* (note 6 above) para 44.

conducted the self-review in terms of PAJA, regardless of the fact that the applicant was the state. However, the Court failed to take these considerations into account and failed to provide substantive justification for its decision in terms of the Constitution. In light of the above, the Court failed to align the reasoning in its judgment with the demands of transformative adjudication.

The next chapter discusses an alternative approach to self-reviews, with reference to the doctrine of judicial deference and its related notion of variability, and argues that such an approach would better align with the demands of transformative adjudication.

Chapter 4: An Alternative Approach to Self-Review and Concluding Remarks

The judgment in *Gijima CC* has significant implications for both the substantive and procedural aspects of the law of self-review, as well as the broader dispensation of constitutional democracy in South Africa. This chapter discusses some of these implications and argues that transformative adjudication would be better advanced if the self-review of administrative action was conducted in terms of PAJA and with reference to judicial deference and its related notion of variability. Finally, this chapter provides some concluding remarks.

4.1 The substantive impact of *Gijima CC* on the law of self-review

As stated above, PAJA and the principle of legality are not merely two interchangeable pathways to review. They represent different standards of accountability that apply to different types of public power.[216] The decision in *Gijima CC* to designate legality as the only available pathway to review in self-reviews thus significantly impacts the substantive law applicable to self-reviews.

As we have seen above, PAJA generally provides for more rigorous standards of accountability through its detailed provisions that cover three review grounds and the right to reasons.[217] The principle of legality, on the other hand, provides for two standalone review grounds and lacks the detail and precision of PAJA.[218] The effect of the *Gijima CC* ruling is therefore that administrative action in a self-review application will be subject to less scrutiny than administrative action in a review application brought by a private party. One could debate the prudence or otherwise of such a distinction. On the one hand, if one is suspicious of the state's motives for reviewing its own decisions,[219] it may be argued that the state ought not to enjoy the benefit of all the review grounds provided in terms of PAJA.[220] On the other hand, if one accepts that the state's motive is purely to undo decisions that were tainted by corruption or other irregularities, it may be argued that the state ought to have every

---

216 See 2.1.3 above.
217 See 2.1.2 above.
218 See 2.1.2 above. Unlawfulness and irrationality are the only standalone grounds of review under the principle of legality, whereas the grounds of review in terms of section 6(2) of PAJA cover unlawfulness, unreasonableness (which includes but is broader than irrationality) and procedural unfairness.
219 Boonzaier 'Good Reviews, Bad Actors' (note 27 above) 4.
220 De Beer (note 17 above) 625.

possible review ground at its disposal.

Whatever the merits of these considerations, the point is that the ruling in *Gijima CC* leads to the situation where the grounds of review available to challenge state conduct are dependent, in part, on the identity of the applicant.[221] For example, if a private party challenges the state's decision to award a tender, the review grounds in terms of PAJA apply. If, however, that very same decision is challenged by the state, the more limited review grounds under legality apply. The Court did not deal with this consequence of its judgment and, in the absence of substantive justification therefor, the distinction is arbitrary. The Constitutional Court had previously emphasised that the question of whether PAJA or legality ought to apply in a particular case was dependent on the nature of the impugned exercise of public power and, specifically, the appropriateness or otherwise of subjecting the impugned conduct to the rigorous scrutiny of PAJA.[222] These factors were not considered by the Court in its judgment.

The ruling of the Court in *Gijima CC* therefore results in the application of parallel standards of administrative justice to the same decision.[223] To that extent, it worsens the trend of avoiding PAJA started in *Albutt*,[224] and further muddles the distinction between PAJA and legality. As explained above, lawyers and judges have long sought to avoid PAJA's onerous definitional requirements and procedural technicalities.[225] Instead of affirming legality's role as a safety-net only in cases where the impugned conduct does not amount to administrative action, the judgment in *Gijima CC* further blurs the line between PAJA and legality, both as bases of review and in terms of the content of the respective review grounds, as our courts are now obliged, in certain cases, to apply legality to decisions that are undisputedly administrative in nature.[226]

The Court did not consider or acknowledge the above anomalies created by its judgment or, if it did, the Court did not disclose its reasoning on the issues. The failure to deal with these significant implications for the substantive law of self-review is contrary to the transparent and theoretically robust reasoning required by transformative adjudication.

---

221 Boonzaier 'A Decision to Undo' (note 17 above) 657; De Beer (note 17 above) 625.
222 *Motau* (note 6 above) para 44.
223 De Beer (note 17 above) 625-626.
224 Hoexter *Administrative Law* (note 5 above) 131-137.
225 See 2.1.3 above.
226 Boonzaier 'A Decision to Undo' (note 17 above) 655 and 665-666.

4.2 The procedural impact of *Gijima CC* on the law of self-review

It is well known that the principle of legality is more flexible in its procedure than PAJA.[227] For example, the principle of legality provides for the more lenient delay bar of "unreasonable delay" instead of the strict 180-days rule in terms of section 7(1) of PAJA, and does not impose the duty to exhaust internal remedies contemplated in section 7(2) of PAJA. Therefore, the judgment in *Gijima CC* has the effect of making it easier for the state to apply for the review of its own decisions since the state, during self-reviews, is not exposed to PAJA's exacting procedural requirements.[228] Extending such leniency towards the state is contrary to the idea expressed by Cameron J in *Kirland* that:

> Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.[229]

The Court in *Gijima CC* paid lip service to *Kirland* by quoting the above passage with approval,[230] despite the clear effect of its judgment from a procedural perspective.

Boonzaier suggests that this contradiction must be understood in the context of the view among certain judges on the Constitutional Court and SCA that the rule of law requires unlawful decisions to be automatically of no effect, regardless of procedural non-compliance by the applicant.[231] Such a view is based upon a strictly textual interpretation of sections 2 and 172(1)(a) of the Constitution, to the effect that any law or conduct inconsistent with the Constitution is invalid and that a court has no other option but to declare it as such.[232] The problem with this strict approach is that it may lead to unjust and inequitable consequences for innocent parties who have benefitted from government's unlawful action. The continued validity of unlawful decisions until they are set aside by a court provides legal certainty and prevents the harsh consequences that would result if state decisions were automatically of no

---

227 Hoexter *Administrative Law* (note 5 above) 134.

228 Boonzaier 'A Decision to Undo' (note 17 above) 663.

229 *Kirland* (note 76 above) para 82.

230 *Gijima CC* (note 1 above) para 50.

231 Boonzaier 'A Decision to Undo' (note 17 above) 661.

232 Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Section 172(1)(a) of the Constitution provides that a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

effect.[233] Furthermore, procedural hurdles such as delay bars promote finality and transparency in state decision-making and affirm the state's obligation to perform its constitutional obligations diligently and without delay.[234]

While PAJA's procedural hurdles may be criticised as being too restrictive in the context of review applications brought by private persons, its onerous requirements are well justified in the context of self-review applications.[235] The South African public is entitled to a measure of finality in state decisions and, where a decision was tainted by corruption or other irregularities, to a transparent explanation for the delay in bringing the self-review application. The judgment in *Gijima CC* undermines the important role of PAJA's procedural requirements by allowing the state to bypass PAJA and rely on legality instead. Again, the Court either failed to appreciate the issues mentioned above or did not disclose its reasoning thereon. This lack of transparency and the Court's reliance on a strictly textual interpretation of sections 2 and 172(1)(a) of the Constitution fall well short of the demands of transformative adjudication.

4.3 The broader impact of *Gijima CC* on our constitutional values

The judgment in *Gijima CC* also has wider implications for our constitutional values generally. As mentioned above, the decision to apply legality to the review of administrative action flies flagrantly in the face of the principle of subsidiarity by bypassing the more specific and indirect constitutional norm in favour of the more broad and direct constitutional norm.[236] Besides violating a principle that the Constitutional Court had endorsed previously and still continues to endorse subsequently, the decision is damaging to the constitutional values contained in section 1 of the Constitution, particularly those of constitutional supremacy, constitutional democracy, and non-arbitrariness.[237]

Firstly, the decision subverts the supremacy of the Constitution by ignoring the injunction in section 33(3)(a) of the Constitution that "national legislation must be

---

233 See, for instance, *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC), where the Constitutional Court suspended its declaration of invalidity in respect of an unlawful tender process to prevent disruption to the payment of social grants.

234 Section 237 of the Constitution.

235 Boonzaier 'A Decision to Undo' (note 17 above) 658.

236 Murcott and Van der Westhuizen (note 15 above) 54.

237 Section 1 of the Constitution provides that South Africa is a democratic state founded on, among others, the values of supremacy of the Constitution and the rule of law.

enacted … and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal".[238] The legislation that was enacted by Parliament to provide for the review of administrative action is PAJA and thus the failure to apply PAJA to administrative action is contrary to section 33(3)(a) of the Constitution. Secondly, democracy and the separation of powers are undermined since legislation that was purposely drafted by the elected legislature is side-lined.[239] Thirdly, in the absence of thorough and robust reasoning, the Court's choice of legality over PAJA lacks transparent justification and seems arbitrary.[240]

As mentioned above, a crucial element of transformative adjudication is that judicial decisions must promote the values of our "democratic and transformative Constitution".[241] It is disappointing that the judgment in *Gijima CC* has the effect of undermining these values instead of promoting and protecting them.

4.4 An alternative approach: judicial deference, variability, and transformative adjudication

As explained above, the Court's ruling in *Gijima CC* that legality is the only basis of review available during self-reviews seems to have been motivated, at least in part, by the desire to avoid the provisions of PAJA - whether simply to avoid the statute's rigid procedural requirements generally[242] or specifically as a means of making it easier for the state to review its own decisions.[243] However, as will be shown below, the doctrine of judicial deference and its related notion of variability provide ample flexibility to a court during judicial review, and accordingly the Court in *Gijima CC* did not need to contrive the formalistic arguments that it did to achieve a situation where, if appropriate, the full force of PAJA's exacting requirements would not apply to the self-review of administrative action.

Judicial deference is a somewhat controversial doctrine in our law and is sometimes misconstrued as judicial servility to the executive and legislative branches of government. Given our country's history of executive-mindedness during the apartheid era,[244] this is a valid concern. However, the doctrine of judicial deference described here and applied by our highest courts refers to judicial respect for the

238 Murcott and Van der Westhuizen (note 15 above) 54.
239 Murcott and Van der Westhuizen (note 15 above) 54.
240 Murcott and Van der Westhuizen (note 15 above) 54.
241 Hoexter 'Transformative Adjudication' (note 8 above) 283.
242 See 2.1.3 above.
243 See 4.3 above.
244 Hoexter 'The Future of Judicial Review' (note 21 above) 487-488.

legitimate sphere of operation of the other two branches of government.[245] Such respect is "perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and administration" and is primarily concerned with the need "not to usurp the functions of administrative agencies".[246]

There are two broad justifications underpinning the doctrine of judicial deference: (1) the separation of powers; and (2) the institutional capacity and competence of the judiciary.[247] Firstly, the separation of powers requires the courts to avoid usurping the functions of the executive or the legislature. This does not mean that a court is precluded from scrutinising the decision-making of the other two branches of government, as all exercises of public power are bound by the principle of legality pursuant to the rule of law.[248] However, a court ought not to interfere in the decision-making of another branch of government unless it is necessary to vindicate the provisions of the Constitution. Secondly, there are certain decisions that the courts are not best placed to take.[249] Some decisions may be of a highly technical nature and require specialist expertise to resolve, while other decisions may involve policy considerations that require deliberation by a democratically elected body. Thus, judicial deference serves to set the boundaries of the judicial function during review proceedings.

Related to judicial deference is the notion of variability. Variability entails that the scrutiny of the standards of administrative justice should be applied with varying intensity depending on the circumstances of each case to ensure the appropriate degree of deference for the relevant circumstances.[250] In other words, judicial scrutiny should not take an "all-or-nothing approach" but rather recognise the nuances of different forms of public power and adjust the level of scrutiny accordingly.[251] Several

---

245 Hoexter 'The Future of Judicial Review' (note 21 above) 501-502; *Bato Star* (note 21 above) para 48; Plasket (note 21 above) 508-509.

246 Hoexter 'The Future of Judicial Review' (note 21 above) 501-502, quoted in *Bato Star* (note 21 above) with approval at para 46.

247 A Konstant 'Administrative Action, the Principle of Legality and Deference - The Case of *Minister of Defence and Military Veterans v Motau'* (2015) 7 *Constitutional Court Review* 68 79-80; A Price 'The Evolution of the Rule of Law' (2013) 130 *South African Law Journal* 649 655-657; L Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *South African Law Journal* 810 823-824. See also *Bato Star* (note 21 above) paras 46-48.

248 *Pharmaceutical Manufacturers* (note 2 above) para 17.

249 See A Kavanagh 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (2008) 194, where judicial deference on this basis is specifically argued for.

250 Hoexter 'The Future of Judicial Review' (note 21 above) 502.

251 Hoexter 'The Future of Judicial Review' (note 21 above) 504.

factors may influence the application of variability in a particular case, including the nature of the impugned exercise of public power, the identity and expertise of the decision-maker, the range of factors relevant to the impugned decision, the reasons given for the impugned decision, the nature of the competing interests involved in the impugned decision, and the impact of the impugned decision on those affected by it.[252] Variability requires a court to consider and balance these factors and modulate the intensity of its scrutiny accordingly.

Judicial deference operates at three different stages of the judicial review inquiry. At the outset, the court must decide whether it is appropriate to subject the impugned decision to the more rigorous standards of accountability in terms of PAJA, or whether to apply the less exacting standards under legality.[253] Accordingly, this stage is sometimes referred to as "starting-point deference".[254] During this stage, judicial deference intersects with the principle of subsidiarity. The proper application of subsidiarity requires the court to apply PAJA when the impugned conduct amounts to administrative action, and deference requires the court, when deciding whether the impugned conduct amounts to administrative action, to determine whether it is appropriate to subject the impugned conduct to the more rigorous standards of accountability in terms of PAJA.[255] In making this determination, the court should also consider whether the public power concerned is more closely related to the formulation of policy or the implementation of legislation, the source of the power, and the extent of the discretion afforded to the functionary.[256]

Subsequently, during the application of the grounds of review concerned, the court can show deference to the decision-maker by varying the intensity with which the applicable standards are applied to the impugned conduct.[257] This stage is sometimes called "adjudicative deference"[258] and it is at this stage that variability

---

252 *Bato Star* (note 21 above) para 45; Hoexter 'The Future of Judicial Review' (note 21 above) 503.

253 *Motau* (note 6 above) para 44.

254 Konstant (note 247 above) 84, with reference to M Elliot 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in H Wilburg and M Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 61.

255 *Motau* (note 6 above) paras 27 and 44.

256 *Motau* (note 6 above) paras 37-44.

257 Hoexter *Administrative Law* (note 5 above) 151-152; Hoexter 'The Future of Judicial Review' (note 21 above) 502-505.

258 Konstant (note 247 above) 85, with reference to Elliot (note 254 above). A good example of the application of adjudicative deference and variability by the Constitutional Court can be found in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at paras 56-64.

serves as the instrument whereby the court modulates the intensity of its scrutiny. For example, when applying the review ground of procedural fairness, it may be appropriate in cases where the impact of decision is relatively low for the court to accept the issuing of a written notice to those affected as sufficient; whereas in cases where the impact of the decision is more drastic, procedural fairness may require the opportunity for those affected to make representations in writing or at a hearing. The main idea of variability is thus that no exercise of public power should be excluded from accountability but that the intensity of the court's scrutiny should be adjusted according to the nuances of the particular public power at stake.[259]

Finally, judicial deference also operates at the order/remedy stage, as the court must decide to what extent (if at all) it is going to intervene in the impugned exercise of public power.[260] In terms of section 172(1)(b) of the Constitution, the courts have a wide discretion in determining the appropriate remedy in judicial review proceedings, and may make any order that is just and equitable.[261] Section 8 of PAJA similarly provides that a court may grant any order that is just and equitable.[262] While there are a great number of different remedies at a court's disposal, the three most prominent categories in the context of judicial review are: (1) setting aside and remittal; (2) interdicts (including structural/supervisory interdicts); and (3) setting aside and correction or substitution. These categories are often applied alongside a declaration of invalidity. Setting aside and remittal is the least invasive remedy as the court allows the decision-maker to reconsider and retake the decision. An interdict is more invasive in the sense that the decision-maker is obliged to take certain action or prohibited from taking certain action, but the agency of exercising the relevant public power remains with the decision-maker (albeit often subject to specific and narrow conditions). Setting aside and correction or substitution is the most invasive remedy as the court replaces the decision of the decision-maker with its own. The agency of exercising the relevant public power is effectively taken away from the decision-maker in such a case and

259 Hoexter 'The Future of Judicial Review' (note 21 above) 503.

260 Hoexter 'The Future of Judicial Review' (note 21 above) 504.

261 Section 172(1)(b) of the Constitution. This includes an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period and on any conditions.

262 Section 8(1) provides for remedies pursuant to review in terms of section 6(1) of PAJA, whereas section 8(2) provides for remedies pursuant to review in terms of section 6(3) of PAJA. Both subsections are not an exhaustive list.

therefore this remedy is only appropriate in very exceptional circumstances.[263] In determining which of these remedies to apply, judicial deference serves to guide and justify the degree of the court's intervention in the conduct of another branch of government.[264]

The upshot of the above is that the application of judicial deference and its related notion of variability does not lead to a singular outcome and may in fact influence a court's judgment in various divergent ways. Starting-point deference may be invoked to apply the less stringent principle of legality in cases where "the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater level of deference".[265] Even in clear-cut cases of administrative action where the application of legality as the basis of review is inappropriate, adjudicative deference and variability would allow the court to take into account circumstances that warrant a lower level of scrutiny in terms of the grounds of review under PAJA.[266] A court could also mitigate the increased invasiveness of PAJA's provisions at the remedy stage by making an order that respects the agency and competence of the other branches of government. Furthermore, it should be kept in mind that while much is made of PAJA's rigid procedural requirements and its 180-day delay bar in particular, section 9(2) of PAJA provides for the condonation of non-compliance with the delay bar where the interests of justice so require.[267] Thus, the state would only be non-suited during a self-review in terms of PAJA if there is not a reasonable explanation for the delay. Even in the absence of a reasonable explanation, the Constitutional Court has suggested that the delay could still be condoned if "the seriousness of the unlawfulness at issue warrants overlooking" the delay.[268] Accordingly, the 180-day delay bar is by no means an unreasonable or insurmountable obstacle.

Some scholars, like Plasket, question the utility of judicial deference and consider it to be "empty or pernicious", since respect for constitutionally authorised decision-makers is already required by the separation of powers.[269] While it is true that

---

263 See *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) paras 34-55.
264 Hoexter 'The Future of Judicial Review' (note 21 above) 504.
265 *Motau* (note 6 above) para 43.
266 Hoexter *Administrative Law* (note 5 above) 151.
267 Section 9(2) of PAJA.
268 *Buffalo City* (note 132 above) para 127.
269 Plasket (note 21 above) 523.

both judicial deference and variability flow from the separation of powers, as outlined above, such a critique seems to overlook the role judicial deference can play in assisting the court to justify transparently and substantively its decisions during the various stages of judicial review proceedings. Judicial deference, along with the principle of subsidiarity, underpins the threshold decision of which standards of accountability to apply to the impugned conduct.[270] In conjunction with variability, judicial deference also assists the court in determining what the content of the standards applied to the impugned conduct should be.[271] At the end of the proceedings, judicial deference provides justification for the court's intervention or non-intervention in the conduct of another branch of government.[272] As such, judicial deference and variability are crucial aspects of a court's substantive reasoning and transparent justification during administrative law-adjudication, and are thus closely linked to transformative adjudication.[273]

The Court's judgment in *Gijima CC* was regrettably misguided and out of step with the Constitution and the demands of transformative adjudication. Instead of applying the principle of legality to the self-review of administrative action, the appropriate course of action would have been to apply PAJA, as is required by the Constitution, with the appropriate level of judicial deference and variability depending on the circumstances of the case. Such an approach would better accord with the demands of transformative adjudication since it would be grounded in substantive reasoning that recognises the need to apply different standards of accountability to different types of exercises of public power, and the need to vary the intensity of review according to the circumstances of each case. Moreover, by applying PAJA, the Court in *Gijima CC* could have come to the same conclusion regarding the lawfulness of the state's conduct, but importantly its decision would have been substantively justifiable, and it would have avoided creating the anomalies highlighted above.

4.5 Concluding remarks

The main aim of this dissertation was to show, with reference to the demands of transformative adjudication, that PAJA ought to be the basis of review that applies to

---

270 *Motau* (note 6 above) paras 43-44.

271 Hoexter *Administrative Law* (note 5 above) 151.

272 Hoexter 'Transformative Adjudication' (note 8 above) 293; Hoexter 'The Future of Judicial Review' (note 21 above) 504.

273 Hoexter 'The Future of Judicial Review' (note 21 above) 293.

the self-review of administrative action. Unfortunately, the Court in *Gijima CC* failed to justify substantively and transparently its ruling that the principle of legality should apply to all self-reviews. As shown above, the Court interpreted the provisions of the Constitution and PAJA formalistically by following a strictly textual approach. Furthermore, the "warm-blooded human beings"-argument put forward by the Court reflects a classical liberal approach to constitutionalism which is contrary to the spirit, purport and objects of the Constitution. The Court also ignored the principle of subsidiarity and ruled in a seemingly arbitrary fashion. Ultimately, the Court's reasoning may be described as substantive without proper justification at best or highly formalistic at worst, and the presence of *some* substantive considerations in the Court's reasoning did not save it from failing to live up to the demands of transformative adjudication.

In deciding whether PAJA or legality should have applied to the state's self-review application, the Court ought to have been guided by the question whether it is appropriate to subject the impugned exercise of public power to the higher level of scrutiny in terms of PAJA. Once it was accepted that it was appropriate to subject the award of a tender to the rigorous standards of PAJA, the Court ought to have conducted the self-review in terms of PAJA, regardless of the fact that the applicant was the state. The Court failed to do so and, consequently, the judgment in *Gijima CC* has brought about some significant and unfortunate changes in the law of self-review, both substantively and procedurally. The Court's failure to deal with the problematic impact of these changes or to disclose its reasoning on the issues is further contrary to the ideals of transformative adjudication. Most disappointing of all is the damaging impact of the judgment on the values of constitutional supremacy, constitutional democracy, and non-arbitrariness that lie at the heart of our post-apartheid constitutional dispensation.

In closing, the core submissions of this dissertation may be summarised as follows: (1) the judgment in *Gijima CC* failed to live up to the demands of transformative adjudication; and (2) the law of self-review, following the judgment in *Gijima CC*, is contrary to the Constitution's provisions, which explicitly provide that administrative action must be reviewed in terms of PAJA.[274] While it is unlikely (but not impossible)

[274] Section 33(3)(a) of the Constitution.

that the Court will reverse its decision in *Gijima CC* any time soon,[275] this dissertation has sought to show that PAJA is not the legal straightjacket that many lawyers and scholars perceive it to be. The concepts of judicial deference and variability allow for ample flexibility in the application of PAJA during judicial review proceedings and there should be no reason for the avoidance of PAJA to continue, whether in the context of self-reviews or otherwise.

[275] See *Buffalo City* (note 132 above) para 112, where the Court stated that "it may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time [but] now is not that time".

Bibliography

Books and Journal Articles

Albertyn, C and Goldblatt, B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248

Bekink, B *Principles of South African Constitutional Law* (2016 2nd ed) Johannesburg: Lexis Nexis

Boonzaier, L 'A Decision to Undo' (2018) 135(4) *South African Law Journal* 642

Boonzaier, L 'Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama' (2015) 7 *Constitutional Court Review* 1

Corder, H 'The Development of Administrative Law in South Africa' in Quinot, G (ed) *Administrative Justice in South Africa: An Introduction* (2015) Cape Town: Oxford University Press

Corder, H and Kohn, L 'Administrative Justice in South Africa: An Overview of Our Curious Hybrid' in Corder, H and Mavedzenge, J (eds) *Pursuing Good Governance: Administrative Justice in Common Law Africa* (2019) Cape Town: Siber Ink

Cornell, D and Muvangua, N (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) New York: Fordham University Press

De Beer, MN 'A New Role for the Principle of Legality in Administrative Law: State Information Technology Agency Soc Ltd V Gijima Holdings (Pty) Ltd' (2018) 135(4) *South African Law Journal* 613

Elliot, M 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in Wilburg, H and Elliott, M (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) London: Bloomsbury Publishing

Freeman, RH 'The Rights of the State, and the State of Rights in State Information Technology Agency Soc Limited V Gijima Holdings (Pty) Limited' (2019) 9(1) *Constitutional Court Review* 521

Hodgson, TF 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution' (2018) 34:1 *South African Journal on Human Rights* 57

Hoexter, C 'A Rainbow of One Colour? Judicial Review on Substantive Grounds in South African Law' in Wilberg, H and Elliott, M *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) London: Bloomsbury Publishing

Hoexter, C 'Administrative Action in the Courts' (2006) Acta Juridica 303

Hoexter, C *Administrative Law in South Africa* (2012 2nd ed) Cape Town: Juta

Hoexter, C 'Judicial Policy Revisited: Transformative Adjudication in Administrative Law' (2008) 24(2) *South African Journal on Human Rights* 281

Hoexter, C 'The Future of Judicial Review in South African Administrative Law' (2000) *South African Law Journal* 117(3) 484

Huq, AZ 'A Tactical Separation of Powers Doctrine' (2019) 9 *Constitutional Court Review* 19

Kavanagh, A 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (2008) 194

Kidd, M 'Reasons' in Quinot, G (ed) *Administrative Justice in South Africa: An Introduction* (2015) Cape Town: Oxford University Press

Klare, K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146

L Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *South African Law Journal* 810

Konstant, A 'Administrative Action, the Principle of Legality and Deference - The Case of *Minister of Defence and Military Veterans v Motau'* (2015) 7 *Constitutional Court Review* 68

Langa, P 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351

Malan, K *Politocracy: An Assessment of the Coercive Logic of the Territorial State and Ideas Around a Response to it* (2012) Pretoria: Pretoria University Law Press

Malan, K *There is no Supreme Constitution: A Critique of Statist-Individualist Constitutionalism* (2019) Stellenbosch: African Sun Media

Masolo, DA *Self and Community in a Changing World* (2010) Bloomington: Indiana University Press

Masolo, DA 'Western and African Communitarianism' in Wiredu, K (ed) *A Companion to African Philosophy* (2006) New York: Wiley-Blackwell

Menkiti, I 'On the Normative Conception of a Person' in Wiredu, K (ed) *A Companion to African Philosophy* (2006) New York: Wiley-Blackwell

Moseneke, D 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18(3) *South African Journal on Human Rights* 309

Metz, T 'African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights' (2012) 13 *Human Rights Review* 19

Mokgoro, JY 'Ubuntu and the Law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 1

Murcott, M 'Procedural Fairness' in Quinot, G (ed) *Administrative Justice in South Africa: An Introduction* (2015) Cape Town: Oxford University Press

Murcott, M, Burns, G and Payne, S 'Administrative Law' in Tait, M (ed) *Yearbook of South African Law* (2021) Cape Town: Juta

Murcott, MJ and Van der Westhuizen, W 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *MyVoteCounts*' (2015) 7 *Constitutional Court Review* 43

Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31

Penfold, G 'Substantive Reasoning and the Concept of Administrative Action' (2019) 136(1) *South African Law Journal* 84

Plasket, C 'Judicial Review, Administrative Power and Deference: A View from the Bench' (2018) 135(3) *South African Law Journal* 502

Price, A 'The Evolution of the Rule of Law' (2013) 130 *South African Law Journal* 649

Quinot, G (ed) *Administrative Justice in South Africa: An Introduction* (2015 1st ed) Cape Town: Oxford University Press

Quinot, G 'Regulating Administrative Action' in Quinot, G (ed) *Administrative Justice in South Africa: An Introduction* (2015) Cape Town: Oxford University Press

Quinot, G 'Substantive Reasoning in Administrative Law Adjudication' (2010) 3(1) *Constitutional Court Review* 111

Van der Sijde, E and Quinot, G 'Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review Its Own Decisions?' (2019) 2019(2) *Journal of South African Law* 324

Case Law

Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality 2021 (3) SA 25 (SCA)

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

AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency (No 2) 2014 (4) SA 179 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)

Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited 2019 (4) SA 331 (CC)

Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd 1950 (3) SA 598 (T)

Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)

Centre for Child Law v Director General: Department of Home Affairs and Others [2021] ZACC 31

Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC)

Commissioner for Customs and Excise v Container Logistics (Pty) Ltd 1999 (3) SA 771 (SCA)

Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC)

Department of Transport and Others v Tasima (Pty) Limited 2017 (2) SA 622 (CC)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)

Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd [2021] 2 All SA 700 (SCA)

Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)

Hunter v Financial Sector Conduct Authority and Others 2018 (6) SA 348 (CC)

Johannesburg Consolidated Investment Company v Johannesburg Town Council 1903 TS 111

Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC)

Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)

Khumalo and Another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 (CC)

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

Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

Mbatha v University of Zululand (2014) 35 ILJ 349 (CC)

MEC for Education, Kwa-Zulu Natal and Others v Pillay 2008 (1) SA 474 (CC)

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

Merafong City Local Municipality v AngloGold Ashanti Limited 2016 (2) SA 176 (SCA)

Merafong City Local Municipality v AngloGold Ashanti Limited 2017 (2) SA 211 (CC)

Mining Commissioner of Johannesburg v Getz 1915 TPD 323

Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)

Mphahlele v First National Bank of South Africa Ltd 1999 (2) SA 667

My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC)

Notyawa v Makana Municipality and Others (2020) 41 ILJ 1069 (CC)

Osterloh v Civil Commissioner of Caledon (1856) 2 Searle 240

Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA)

PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)

Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC)

South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another [2022] ZACC 5

South African National Defence Union v Minister of Defence and Others 2007 (5) SA 400 (CC)

Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd 2022 (5) SA 416 (SCA)

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd [2015] ZAGPPHC 1079 (18 May 2015)

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA)

State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

Tasima (Pty) Ltd v Department of Transport [2016] 1 All SA 465 (SCA)

Transair (Pty) Ltd v National Transport Commission 1977 (3) SA 784 (A)

Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another 2015 (5) SA 245 (CC)

Legislation

Constitution of the Republic of South Africa, 1996

Promotion of Administrative Justice Act 3 of 2000

Online Sources

Lewis, C and Maralack, LJ and Dey-van Heerden, A 'A need for haste? The state's self-review of the legality of its contracts' (20 April 2021) available online at https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-20-april-a-need-for-haste-the-states-self-review-of-the-legality-of-its-contracts-.html (accessed on 18 July 2021)

Moseneke, D 'Shades of the Rule of Law and Social Justice' presented as the Helen Suzman Memorial Lecture (2016) available online at http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1 (accessed on 15 February 2021)