



INCLUSIVE SOCIETY INSTITUTE

Op-Ed

Ensuring Administrative Justice for a Truly Inclusive Society *By the Inclusive Society Institute in collaboration with the Daily Maverick*

As South Africa reflects on the remarkable journey it has undertaken in the pursuit of constitutional democracy, the pivotal role of administrative justice in the collective struggle against apartheid cannot be ignored. During the dark days when the oppressive regime reigned, the courts provided a glimmer of hope by employing the principles of administrative justice inherited from the common law tradition. Justice Albie Sachs, a distinguished former Constitutional Court Judge, in a recent talk with Inclusive Society Institute, exemplified how the courts allowed individuals to challenge the government's unjust actions, albeit within certain limitations.

Administrative justice became a potent defensive weapon against the oppressive measures of the apartheid regime. The principles of administrative justice, originally developed by the judiciary under the common law in England and later embraced by South African judges, were employed to contest unfair actions such as banning orders and restrictions on movement without a fair hearing. The judiciary, serving as a beacon of justice, firmly declared that fundamental rights should not be stripped away without due process. However, this fight for justice was not without obstacles. Whenever the courts struck down an unfair action, Parliament promptly passed laws to circumvent these rulings. Individuals, including Justice Sachs, personally experienced this injustice when they were banned without a hearing. Nonetheless, the determination to establish a just and inclusive society persisted.

The vision for administrative justice gained momentum during the creation of the interim constitution, thanks to the efforts of legal minds Hugh Corder and Lawrence de Kock. They championed the cause of administrative justice within the constitutional framework and successfully included the right to fair administrative justice in the interim constitution, alongside the crucial right to non-discrimination based on sexual orientation. This victory marked a significant milestone in the ongoing struggle against manifest injustice and persecution.

When the final constitution was established, the principles of administrative justice were further expanded. The administration of laws was required to be reasonable, fair, and accompanied by written justifications. These principles were enshrined in the text of the Bill of Rights, symbolising a comprehensive commitment to administrative justice as a fundamental pillar of South Africa's constitutional democracy.

Notable cases, such as the South African Rugby Football Union (SAFRU) case and the pharmaceutical industry case involving President Nelson Mandela, highlighted the interplay between administrative justice and the Bill of Rights. These cases demonstrated the need for administrative justice to be integrated within the constitutional framework, emphasising that it should not be divorced from the broader legal landscape.

The Promotion of Administrative Justice Act (PAJA) further solidified the importance of administrative justice by providing constitutional support for fair treatment in the application of the law. PAJA replaced the artificial rules of the past, serving as a vital safeguard for ordinary people in South Africa's democracy and ensuring fair dealing in the administration of the law.

While the significance of administrative law has diminished compared to the apartheid era, it remains an essential component of South Africa's legal framework. The main defence against unfair laws and abuse of power now lies in the Bill of Rights, which upholds fundamental rights and includes the right to fair administrative action.

The country is currently grappling with a complex dilemma arising from widespread and deeply rooted systemic government failures. These failures have permeated various aspects of governance, making it increasingly challenging to navigate the appropriate mix of strategies such as judicial intervention, civil society engagement, public protests, and the establishment of politically created institutions. Striking the right balance among these approaches is of utmost importance to effectively address systemic issues. It is essential to exercise caution and ensure that the interventions implemented do not excessively encroach upon the domain and independence of the courts. By considering these factors, the country can work towards mitigating government failures while upholding the integrity and effectiveness of the judicial system.

When it comes to administrative justice, we expect public officials to uphold the principles of fairness, reasonableness, and accountability in their actions and decision-making processes. Going forward, public officials must be committed to fostering a culture that values transparency and respects the rights of individuals. They should ensure that administrative actions are carried out in accordance with the law, providing written justifications when necessary. Public officials play a crucial role in safeguarding the rights and liberties of citizens, and their dedication to administrative justice is vital in maintaining a robust and inclusive constitutional democracy in South Africa. It is questionable whether the current civil service ethos meets these standards.

In conclusion, administrative justice has been and continues to be a cornerstone of South Africa's ongoing struggle for a just and inclusive society. It has evolved and adapted to the changing legal landscape, with the Constitution providing the ultimate framework for administrative justice. Despite persistent challenges, a steadfast commitment to fostering a culture of fairness, reasonableness, and accountability at all levels of government is essential. Upholding administrative justice ensures that South Africa's constitutional democracy remains robust and truly inclusive for all its citizens.

The Inclusive Society Institute is an independent Non-Profit institution which has as its objective the promotion of a more inclusive, just and equitable South African society. This article draws on the Institute's Constitutional Insights: A series of Talks with Judge Albie Sachs. The series is being promoted in collaboration with the Daily Maverick.