

The Right to Reasons for Administrative Action in Zimbabwe

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Abstract

The so-called ‘third wave’ of democratisation in Africa has witnessed a transition from a culture of impunity in the exercise of public power to more emphasis on a culture based on legality and the protection of fundamental rights of citizens. Important strides have been made in enhancing accountability by those who wield public power through judicial review mechanisms. The right to reasons for any administrative action that has an impact on citizens becomes even more paramount in light of these shifts in democratic ethos. This article focuses on the right to reasons for adverse administrative action in Zimbabwe against the backdrop of the 2013 Constitution, which ushered in the dawn of a new era in so far as the scope of the right to just administrative action is concerned. A critical examination of the nature and scope of the right to reasons is undertaken. Insightful recommendations are then proffered to further enhance the practical meaning of the right in the context of the constitutionally entrenched right to just administrative action in Zimbabwe.

Keywords: Right to reasons; adverse administrative action; administrative authority; Administrative Justice Act; Constitution; judicial review; accountability; transparency; Zimbabwe

Introduction

The 2013 Constitution of Zimbabwe entrenches the broad right to administrative justice.¹ Before this, the right could only be located under the common law and as a statutory right in section 3 of the Administrative Justice Act (the AJA).² One of the constituent elements of the right to administrative justice is the right to written reasons for administrative conduct that adversely affects rights, interests or legitimate expectations.³ Section 68(3) of the Constitution provides that an Act of Parliament must give effect to the administrative justice rights in section 68(1) and (2) of the Constitution. Despite predating the Constitution, Zimbabwean courts have held that the AJA is one of the Acts that give effect to section 68 of the Constitution.⁴ This implies that the right to reasons in section 68(2) of the Constitution is a restatement of the statutory right in section 3(1) (c) of the AJA.⁵ The challenge is that the AJA is a codification of the common-law understanding of administrative justice.⁶ Its enactment and interpretation do not have any constitutional foundations.⁷

This contribution critically examines the scope and nature of the right to reasons for administrative action in Zimbabwe from a constitutional perspective. It seeks to ascertain whether the constitutional right to reasons is fully given effect by the AJA. In doing so, the contribution considers whether the limitations imposed on the right to reasons by the AJA are justifiable in a democratic society based on openness, justice, human dignity and equality. Useful guidelines on how to interpret the right in a manner that is consistent with the Constitution are given. To put the study in its proper context, the contribution also evaluates the efficacy of the remedies available to a litigant where an administrative authority refuses, fails, and/or neglects to give reasons for its action.

The Common Law

The common law does not recognise a general right to reasons for administrative action, which adversely affects rights, interests and legitimate expectations.⁸ The right could

1 Section 68(1) of the Constitution provides that, ‘every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.’

2 (Chapter 10:28); Act 12 of 2004.

3 Section 68(2) of the Constitution.

4 *Zinyemba v The Minister of Lands and Rural Resettlement & Another* CCZ 3/16; *B (A Juvenile) v Minister of Primary and Secondary Education* (2014) (2) ZLR 341 (H).

5 *Mahachi & Others v Officer Commanding, Matabeleland South Province N.O & Another* HB 146/16.

6 *U-Tow Trailers (Pvt) Ltd v City of Harare & Another* 2009 (2) ZLR 259 (H); *Zindoga & Others v Minister of Public Service, Labour and Social Welfare* 2006 (2) ZLR 10 (H).

7 P Kaseke, ‘Towards Good Governance: Interpreting the Right to Administrative Justice in the Zimbabwean Constitution’ (2019) Unpublished PhD Thesis, University of the Witwatersrand 113.

8 Geoff Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe* (LRF 2017) 79; Mark Elliot, ‘Has the Common Law Duty to Give Reasons Come of Age Yet?’ (2011) *Public Law* 56.

only arise *ex contractu* or *ex lege*.⁹ Apart from these two circumstances, Zimbabwean courts developed the common law and accepted that the right existed where an overwhelmingly strong case had been made, and fairness required that reasons be given.¹⁰ Other circumstances that warranted the furnishing of reasons included the following: where there was a legitimate expectation that reasons would be given, where the decision involved interests that were so important and where a statute implicitly required that reasons be given.¹¹ Feltoe submits that in determining whether reasons should be furnished, the test developed by the courts was to establish if principles of natural justice required reasons to be given based on the circumstances of the case.¹² Whilst the courts developed the common law to recognise the right to reasons for administrative action, its original scope was not clearly defined, nor did it encompass the duty to give written reasons. This was a result of the deferential nature of the common law judicial review and the reluctance to inquire into administrative policy. Therefore, the jurisprudence developed by the courts was incoherent and inconsistent. The absence of a general duty to give reasons for adverse administrative action remained a serious lacuna in Zimbabwean administrative law.

The Rationales for the Right to Reasons

While the value of reasons in Zimbabwean law is well established, there is criticism arising from the imposition of a general duty to give reasons. The argument against the reason requirement is primarily one of bureaucratic negativism. It has been argued that if administrative authorities were required to give reasons for all their decisions, this would increase bureaucracy, thus rendering administrative action too onerous, difficult, time-consuming and expensive.¹³ Hoexter further submits that reasons may restrict the pursuit of administrative options in similar cases.¹⁴ It may not always be effective in achieving the intended purpose. Notwithstanding this criticism, there are compelling arguments in favour of requiring administrative authorities to provide reasons for their actions.

Hepburn advances two groups of rationales in support of the right to reasons.¹⁵ The first group of rationales is that of instrumental rationales, which posit that the reasons requirement helps achieve specific valued goals, which include the accuracy rationale, the public confidence rationale and the review rationale.¹⁶ With the accuracy rationale,

9 Lawrence Baxter, *Administrative Law* (Juta 1984) 741.

10 See *Mutare City Council v Mafunga* 1984 (2) ZLR 242 (H); *Chairman, PSC & Another v Marumahoko* 1992 (1) ZLR 304 (SC).

11 Michael Taggart, 'Review: Administrative Law' (2000) NZ Law Review 439.

12 Feltoe (n 8) 80.

13 *R v Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 All E.R 651.

14 Cora Hoexter, 'Just Administrative Action' in Iain Currie and Johan de Waal (eds), *The Bill of Rights Handbook* (Juta 2014) 685.

15 Jarrod Hepburn, 'The Duty to Give Reasons for Administrative Decisions in International Law' (2012) 61(3) *The International and Comparative Law Quarterly* 641–663.

16 *ibid* 644.

the duty to give reasons results in authorities giving better and more accurate decisions. It is an incentive for them to rigorously and carefully assess all relevant issues and justify their actions.¹⁷ This requires that decisions are well thought out and ultimately act as a check on the exercise of discretion, thus preventing arbitrariness.¹⁸ The public confidence rationale argues that the giving of reasons affords administrative authorities a measure of impartiality. Reasons ensure transparency and give legitimacy to administrative action and, in the process, encourage acceptance of decisions by the parties involved.¹⁹ Therefore, the giving of reasons builds public confidence in administrative authorities and their actions. The review rationale has always been recognised by Zimbabwean courts. They have held that the giving of reasons is essential to the proper functioning of the appeal or review process as one can ascertain whether the decision can be challenged.²⁰ It is the foundational stone on which a litigant builds or loses his hopes of succeeding on review or appeal. Further, reasons facilitate the exercise of review or appellate jurisdiction by senior administrative authorities, specially constituted bodies and the courts.²¹

The second group of rationales stems from the intrinsic duty of fairness that administrative authorities owe to the subjects of their actions. Feltoe submits that citizens will have more faith and confidence in a system where authorities are seen to be respecting the rights of citizens affected by their actions by providing them with reasons.²² Being told why is an important element of fairness of any administrative action.²³ It shows that the subject of the administrative action has been treated with respect and dignity of their personhood.²⁴ Based on this respective rationale, the failure to give reasons can be used as evidence of bad faith, bias or arbitrariness.²⁵ Additionally, the reasons requirement serves an educative purpose. It creates a precedent that administrative authorities can use in the future.²⁶ This contribution does not only adopt the above compelling arguments in favour of obliging administrative authorities to give reasons for adverse administrative action, but it also proposes an interpretive framework of the right to reasons based on these rationales.

17 Howard Kushner, 'The Right to Reasons in Administrative Law' (1986) *Alberta Law Review* 305–333.

18 RMP Antoine, 'A New Look at Reasons: One Step Forward – Two Steps Back' (1992) 44 *Administrative Law Review* 453–460.

19 Paul Craig, *Administrative Law* (8th edn, Sweet and Maxwell 2008) 401.

20 See *Fox and Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173 (S); *Kazingizi v Dzinoruma* HH 106/06.

21 *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC).

22 Feltoe (n 8) 77.

23 Baxter (n 9) 228.

24 Timothy Endicott, *Administrative Law* (OUP 2009) 194.

25 Justice must not only be done; it must be seen to be done.

26 Baxter (n 9) 228.

Constitutionalisation of the Right to Reasons

The 2013 Constitution is a marked departure from the 1980 Constitution. It is founded on the supremacy²⁷ of the Constitution and principles of good governance,²⁸ which include the following: respect for the people of Zimbabwe;²⁹ transparency, justice, accountability and responsiveness³⁰ and respect for fundamental rights.³¹ Section 3(2) of the Constitution is clear that all organs of State institutions, and agencies of government are bound by these principles. Chapter 2 of the Constitution sets out national objectives which establish principles of state policy. Relevant to administrative law is the national objective on good governance³² and fostering of fundamental rights and freedoms.³³ The founding principles and national objectives of the Constitution are core aims of the right to reasons and important interpretative tools of the right. To facilitate good governance and sound public administration, the 2013 Constitution entrenches not only the broad right to administrative justice but also the right to reasons. Section 68(2) of the Constitution provides that ‘any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.’ This constitutionalisation of the right to reasons in Zimbabwe is inspired by Kenya³⁴ and South Africa³⁵ such that where necessary, reliance is placed on Kenyan and South African authorities in interpreting section 68(2) of the Constitution of Zimbabwe.

Significance of Constitutionalisation of the Right to Reasons

Constitutionalisation of the right to reasons must be celebrated. It resonates with the founding values and principles of the Constitution and is indicative of a commitment to openness and transparency in public administration. There are several reasons why constitutionalisation of the right to reasons has the potential to transform Zimbabwean administrative law. Firstly, the consequence of constitutionalising the right to reasons is apparent in section 2(1) of the Constitution. Any fundamental right entrenched in the Declaration of Rights is supreme, and any laws, practices, and conduct inconsistent with it are invalid to the extent of the inconsistency. Thus, the right to reasons is now likely to have a greater impact than what it did when it was only a statutory right. It promises

27 Section 2(1) of the Constitution.

28 Section 3(1)(h) of the Constitution.

29 Section 3(2)(f) of the Constitution.

30 Section 3(2)(g) of the Constitution.

31 Section 3(2)(k) of the Constitution.

32 Section 9 of the Constitution.

33 Section 11 of the Constitution.

34 Article 47(2) of the Constitution of Kenya, 2010 provides that, ‘If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.’

35 Section 33(2) of the Constitution of South Africa, 1996 provides that, ‘Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.’

greater levels of the realisation of the right.³⁶ Secondly, constitutionalisation implies that the right to reasons for adverse administrative conduct is now only subject to limitations in terms of the Constitution as opposed to a statutory right which the AJA can unnecessarily limit. Section 86(2) of the Constitution provides that rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁷ By restricting the limitation of the right to reasons to the constitutional requirements, it enhances the protection and realisation of the right. Thirdly, it implies that the right to reasons must be interpreted generously based on section 46 of the Constitution.³⁸ It has become commonplace in Zimbabwe for the purposive approach to guide the interpretation of constitutional rights and legislation giving effect to such rights.³⁹ Fourthly, constitutionalisation prevents the use of ouster clauses in statutes such as the AJA, which unnecessarily limit a right. This prevents abuse of power and arbitrariness. Lastly, constitutionalising the right to reasons for adverse administrative action gives rise to constitutional remedies and a rights-based approach to litigation.⁴⁰ However, the availability of constitutional remedies is subject to the principle of avoidance and doctrine of subsidiarity. To allow a litigant to bypass legislation giving effect to a constitutional right would be to fail to recognise the role of the legislature to respect, protect and promote the Declaration of Rights.⁴¹ Scope of the Constitutional Right to Reasons

The constitutional right to reasons is available where administrative conduct has adversely affected a person's rights, freedom, interest, or legitimate expectations. Whilst section 332 of the Constitution defines the term administrative conduct,⁴² it does not define the other internal qualifications of the right such as adversely affected, rights, interests and legitimate expectations. Zimbabwean courts have also not been helpful in this regard, as they have thus far not provided any meaningful guidelines to the interpretation of these qualifications. Therefore, we rely on the interpretation of the right

36 James Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights' (2008) *Human Rights Quarterly* 984.

37 For the factors which must be taken into account in assessing whether the limitation is justifiable see section 86(2)(a)–(f) of the Constitution.

38 When interpreting the Declaration of Rights, a court must give full effect to the rights, promote the values and principles that underlie a democratic society, take into account international law, principles and objectives of the Constitution and relevant foreign law.

39 See *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs N.O & Others* 2016 (1) ZLR 101 (C); *Chihava & Others v The Provincial Magistrates Mapfumo N.O* 2015 (2) ZLR 95 (C).

40 George Devenish, K Govender and DH Hulme, *Administrative Law and Justice in South Africa* (Butterworths 2001) 6.

41 *Znyemba v The Minister of Lands and Rural Resettlement & Another* CCZ 3/16; *Chani v Justice Mwayera & Others* CCZ 2/20.

42 It defines the term as 'any decision, act or omission of a public officer or of a person performing a function of a public nature and a failure or refusal of such a person to reach a decision or to perform such an act.'

to reasons adopted by comparable jurisdictions such as Kenya and South Africa.⁴³ In *Transnet Ltd v Goodman Brothers (Pty) Ltd*,⁴⁴ the Supreme Court of South Africa had an opportunity to interpret section 24 of the Interim Constitution of South Africa, which provided for the right to reasons for administrative action that affected a person's rights or interests. The issue for determination was whether Goodman Brothers (Pty) Ltd had a right to reasons for a tender bid that had been rejected. In interpreting section 24 of the Interim Constitution, the Court held that the tenderer was entitled to the constitutional right to lawful and procedurally fair administrative action. Therefore, the rejection of the tender affected these rights. Without reasons, Goodman was deprived of the opportunity to consider further action to which he was entitled. Olivier JA held further that the right that had been affected was the right to equality.

The interpretation of the right to reasons for adverse administrative action in the *Goodman* case has also been extended to section 33(2) of the final Constitution of South Africa, which entrenches the right to written reasons if one's rights are adversely affected. In *Kiva v Minister of Correctional Services & Another*,⁴⁵ the High Court of South Africa held that the Applicant's rights to equality, access to court, just administrative action and the right to fair labour practices had been materially and adversely affected by a decision not to promote him. Thus, the Applicant was entitled to be furnished with reasons for the decision not to promote him. With this interpretation, it is clear that the right to reasons does not only arise where it is expressly guaranteed, but it also arises from other rights, including the broad right to administrative justice and other fundamental rights.⁴⁶ This approach has been criticised on the basis that it amounts to bootstraps reasoning that reads out the adversely affecting rights requirement and disregards the separation of powers doctrine.⁴⁷ Thus Klaaren and Penfold propose an approach that reads the adversely affecting rights requirement as indicating administrative action that determines one's rights.⁴⁸ Although this approach was proposed in the context of South Africa, it can be applied with equal measure in the Zimbabwean context. It is a simplified approach that does not defeat the intention of the legislature and resonates with the values and principles underlying the Constitution.

To trigger section 68(2) of the Constitution, a legally enforceable right or interest must have been adversely affected by administrative conduct. The interest must be sufficient enough to entitle the holder to judicial protection.⁴⁹ Section 68(2) is also triggered if legitimate expectations are adversely affected. The term can be defined as the existence of an expectation that either a certain procedure will be adopted before a decision is

43 Section 46(1)(e) of the Constitution.

44 2001 (1) SA 853 (SCA).

45 (2007) 28 ILJ 597 (E).

46 Cora Hoexter, *Administrative Law in South Africa* (Juta 2012) 424–425.

47 *ibid* 424.

48 Jonathan Klaaren and Glenn Penfold, 'Just Administrative Action' in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta 2006) 63–117.

49 *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891.

made or that a certain type of decision would be made.⁵⁰ Mavedzenge identifies two forms of legitimate expectations. First, are legitimate procedural expectations which comprise expectations that a certain procedure will be adopted when making a decision either because of a settled practice or assurances given by the administrative authority.⁵¹ Second, are expectations of a substantive nature, that a substantive benefit will not be withdrawn or will be conferred as a result of impending administrative action.⁵² Procedural and substantive legitimate expectations are enforceable in Zimbabwe,⁵³ and the approach by Zimbabwean courts to legitimate expectations is well settled. Whether a legitimate expectation exists or not is a question of fact determined on a case-by-case basis.⁵⁴

Section 68(2) of the Constitution is also clear that written reasons must be given promptly. The use of the word ‘promptly’ is significant. In *Mabuto v Women’s University in Africa & Others*,⁵⁵ the High Court of Zimbabwe had an opportunity to deal with the meaning of prompt written reasons. The Court held that the Applicant’s request for reasons a day after notice of the administrative conduct was prompt, and inversely, the administrative authority should have acted expeditiously. The giving of reasons after two months showed that the University had failed to supply reasons promptly. In determining whether two months was prompt, the Court considered the nature of the administrative conduct, its relationship with other rights and benefits and the merits of the case.⁵⁶ This interpretation accords with the broad right to administrative justice and the basic values and principles governing public administration in section 194(1) (e) of the Constitution. Useful guidelines can also be drawn from the Constitution of Kenya. Article 259(8) of the Constitution of Kenya clarifies the meaning attributed to the time and provides that where the Constitution does not prescribe a time, the section must be taken to mean ‘without unreasonable delay.’ It can be argued that the prompt requirement is designed to prevent unreasonable delays in the giving of reasons and ensure efficient administrative conduct.⁵⁷

50 Justice A Mavedzenge, ‘The Control of Administrative Power in Zimbabwe and Implications of Substantive Fairness as a Ground of Review’ in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (Siber Ink 2019) 47–66.

51 Mavedzenge (n 50) 57.

52 Mavedzenge (n 50) 58.

53 For a detailed discussion of the enforceability of substantive legitimate expectations in Zimbabwe see Mavedzenge (n 50) 47–66.

54 See *Goba v ZIMRA* HH 159/15; *Matake & Others v Ministry of Local Government & Others* 2007 (2) ZLR 96 (H).

55 2015 (2) ZLR 335 (H).

56 See also *N and B Ventures (Pvt) Ltd v Minister of Home Affairs & Another* 2005 (1) ZLR 27 (H).

57 *Kalraj Singh Bhangra v Director-General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR; *Republic v Amor ole Tiren & Another Exparte James Momanyi Nyaberi* [2018] eKLR.

The Right to Reasons and the AJA

The AJA is the principal Act that gives effect to the constitutional right to administrative justice.⁵⁸ One of the purposes of the AJA is to provide for the entitlement to written reasons for administrative action,⁵⁹ and section 3(1)(c) of the AJA reads as follows:

An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall –

(c) where it has taken the action, supply written reasons thereof within the relevant period specified by law or, if there is no such specified period within a reasonable period after being requested to supply reasons by the person concerned.

Whilst the constitutional right to reasons has an internal qualification of ‘adversely affected,’ the AJA simply requires that rights have to be affected by the administrative action. This may appear to be broader than section 68(2). However, section 6(1)(a) of the AJA provides that to trigger the right to reasons, one must show that he or she has rights, interests or legitimate expectations materially and adversely affected by any administrative action. The standards materially and adversely affected are not controversial. In the *Kiva* case *supra*, it was held that one will always have an adversely affected right to point to, for the right to administrative justice in 68(1) of the Constitution will always be adversely affected by a failure to give reasons, and presumably, the effect will be material too. The AJA also adds several procedural requirements for the enjoyment of the right, which include the following: the request requirement, furnishing of reasons within a specified period or in its absence within a reasonable period and the adequacy requirement.

Request for Reasons

Zimbabwe relies on a request-driven regime for reasons. It can therefore be questioned whether there is a right to reasons for adverse administrative action in the absence of a request? This question was answered in the South African case of *Commissioner, South African Police Service, & Others v Maimela & Another*.⁶⁰ Section 33(2) of the Constitution of South Africa provides every person with a right to written reasons for adverse administrative action and is given effect by section 5(1) of the South African Promotion of Administrative Justice Act 3 of 2000 (the PAJA) which specifies a request-driven regime. The Court held that when interpreting section 33, it must be borne in mind that the right to be furnished with written reasons is very wide; it applies to every person whose rights or interests are affected by any administrative action. In many instances, the persons affected may not be interested in the reasons. The Court then held that the practical interpretation of section 33 is that reasons must be furnished

58 *Mahachi & Others v Officer Commanding, Matebeleland South Province N.O & Another* HB 146/16.

59 See the preamble to the Act.

60 2003 (5) SA 480 (T).

to affected persons who assert the right. The purpose of section 33 was not to oblige administrative authorities to furnish, without a request, reasons for every single administrative action taken. This would overburden administrative authorities and defeat the rationale for the right to reasons.⁶¹

The above approach was endorsed by the Zimbabwean courts in *Ex Constable Nzenzo P.T & Another v The Commissioner General of Police & Others*.⁶² The right to reasons in the AJA is available on request.⁶³ This interpretation is premised on the fact that the value of reasons lies with the party affected by the administrative action. However, it is submitted that this may affect efficient public administration. Certain administrative actions are of public interest and affect large sections of communities. In such circumstances, the AJA should impose a general duty on administrative authorities to furnish reasons in the absence of a request. Useful lessons can be drawn from section 5(6) (a) of the PAJA. It gives the Minister powers to gazette a list specifying administrative action which administrators are obliged to give reasons in the absence of a request for reasons. Hoexter submits that such a provision encourages administrators to consider when it will be feasible for them to give reasons automatically.⁶⁴ It also enhances efficient administration in relation to actions affecting large numbers as reasons will be given once instead of several times.⁶⁵ The request for written reasons for adverse administrative action can only be made by a person who has not been given reasons for the action. Therefore, the provision of informal or oral reasons is not enough. Section 6(2) of the AJA further states that the request can be made by a person who has been given written reasons but alleges that the reasons are not adequate. The AJA does not impose any procedural requirements for the request for reasons. It can be written or oral. Also, the AJA does not impose a duty on administrative authorities to inform the subjects of their action of the right to request reasons, and it does not specify a period within which the request must be made. This is the gateway to the enjoyment and protection of the right. Neither does the AJA impose a duty on administrative authorities to acknowledge receipt of a request for reasons. This is different from the approach in the PAJA. For example, section 5(1) of the PAJA provides that the request for reasons must be made by a person adversely affected by administrative action within ninety (90) days after the date which the person becomes aware of the action or might reasonably have been expected to become aware of the action. Regulation 27 of the South African Regulations on Fair Administrative Procedures also sets out the following formal requirements for making requests: the request must be in writing, it must be addressed to the administrator; sent to the administrator by post, fax or electronic mail or delivered

61 Matthew Chaskalson and Stu Woolman, *Constitutional Law of South Africa* (Juta 1999) 25–29; Geo Quinot, *Administrative Justice in South Africa: An Introduction* (Oxford University Press 2016).

62 HH 02/19.

63 See also *Mahachi & Others v Officer Commanding, Matebeleland South Province N.O & Another* HB 146/16.

64 Hoexter (n 46) 426.

65 Hoexter (n 46) 426.

to the administrator by hand;⁶⁶ the request must include the requester's contact details; indicate the administrative action which affected rights and the rights which were materially and adversely affected by the administrative action.⁶⁷ Given the wording of section 68(1), these procedural requirements would be meaningless in the Zimbabwean context. In any event, one major challenge of access to justice in Zimbabwe is that of legal illiteracy. Thus, imposing unnecessary requirements on the requester would inhibit the enjoyment of the right.

Period within which Reasons must be Supplied

It has since been established that section 68(2) of the Constitution requires an administrative authority to supply reasons promptly. Section 3(1) of the AJA provides that administrative authorities must supply reasons within the prescribed period, or if there is no such specified period, within a reasonable period upon request.⁶⁸ In some cases, the legislation sets out the time frames within which reasons must be supplied.⁶⁹ The AJA does not define the term reasonable period. In *Gondora & Another v ZIMSEC*,⁷⁰ the High Court of Zimbabwe held that the term reasonable period is determined by the circumstances of each case. However, the Court did not discuss the considerations which must be taken into account in ascertaining what a reasonable period is. It is submitted that the approach adopted by Mathonsi J in the *Mabuto* case *supra* in interpreting the term 'promptly' is the correct approach in ascertaining what a reasonable period is. Not only does it resonate with the broad right to administrative justice, but it also serves the purpose of the right to reasons. It is, however, proposed that to provide certainty and clarity, Zimbabwe must follow the South African approach. Section 5(2) of the PAJA provides that an administrator must within ninety (90) days of receiving a request provide adequate reasons in writing for the administrative action.⁷¹

The Scope of Reasons

The Constitution requires the provision of written reasons for adverse administrative action. A similar requirement is provided for in section 3(1) (c) of the AJA. However, section 6(2) of the AJA vacillates between 'any' and 'adequate' reasons. It can therefore be questioned, what is the standard for reasons in the Zimbabwean context? The starting point is the ordinary meaning of the term reasons. The Concise Oxford Dictionary defines reasons as a cause, explanation or justification for an action or event. Therefore, reasons are explanations as to why an administrative authority has settled upon its final

66 Regulation 27(1).

67 Regulation 27(3).

68 See also section 6(1)(b)(i)–(ii) of the AJA.

69 For instance, s 67(1) of the Public Procurement and Disposal of Public Assets Act (Chapter 22:23).

70 HH 371/18.

71 For a discussion of this requirement see Margaret Beukes and Isabeau Southwood, 'The Requirement of Furnishing "Adequate" Reasons: An Empty Promise?' (2007) 22 SAPL 597. This period can be extended in terms of section 9 of the PAJA, either by agreement or by a court or tribunal, or may be reduced.

choice or statements which explain why certain action has been taken.⁷² In explaining the nature and scope of reasons in the Australian context, the Federal Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd and Another v Whaith & Others*⁷³ stated as follows:

... requires the decision-maker to explain his decision in a way which will enable a person to say, in effect:

‘Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact or an error of law, which is worth challenging.’

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages.

Zimbabwean courts have since adopted the above approach in relation to the scope of reasons. In *Kazingizi v Dzinoruma*⁷⁴ it was held that reasons could only be reasons if they are properly informed in that they must explain why action was taken or not taken. They should consist of more than mere conclusions and should refer to the relevant facts and the law as well as the reasoning process leading to those conclusions.⁷⁵ Therefore, before the adoption of the 2013 Constitution, the requirement of a minimum standard of explanatory ability was fundamental to the sufficiency of reasons. With the enactment of the 2013 Constitution, the standard of reasons for adverse administrative action is that of adequacy. Whilst section 3(1)(c) of the AJA does not require ‘adequate’ reasons; such a requirement is apparent in section 6(2) of the AJA. These two sections must be read holistically. A person has a right to request for reasons where none have been furnished or where the reasons furnished are not adequate.

The AJA does not provide the criteria for determining the adequacy or otherwise of the reasons. Useful lessons can be drawn from South Africa. Section 5(2) of the PAJA explicitly requires adequate reasons. In *Rean International Supply Company (Pty) Ltd v Mpumalanga Gaming Board*,⁷⁶ it was held that it is impossible to lay down a general

72 Baxter (n 9) 242.

73 (1983) 48 ALR 500 at 507.

74 HH 106/06; *Fox and Carney P/L v Sibindi* 1989 (2) ZLR 173.

75 Jacobus Rosier De Ville, *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths 2005) 294.

76 1999 (8) BCLR 918 (T).

rule of what could constitute adequate or proper reasons, for each case must depend on its own facts. The adequacy is usually assessed from the point of view of the recipient of the reasons, and there is an inevitable connection between the adequacy of reasons and their explanatory power.⁷⁷ In *Commissioner, South Africa Police Service, & Others v Maimela & Another*,⁷⁸ it was held that the adequacy of reasons depends on the following: the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Furthermore, in *Nomala v Permanent Secretary, Department of Welfare*,⁷⁹ the Court found that reliance on a standard form of reasons was unacceptable. The Court held that the standard form merely provided conclusions and did not indicate the facts and reasoning process leading to the conclusions. They were not adequate reasons in that they failed to educate the affected person about what to address in an appeal or new application.⁸⁰ It is argued that the approach by South African courts is convincing. Sections 3(1)(c) read with 6(2) of the AJA imply that reasons must be adequate. This must be interpreted to mean that the reasons must be specific, clear and their length and detail must depend on the circumstances of the case. The standard of reasons must allow flexibility as demanded by circumstances. The reasons must refer to the relevant facts and outline the reasoning process adopted by the administrative authority. Ultimately, reasons can only be adequate if they serve the purpose that section 68(2) of the Constitution and the AJA sought to achieve in the context of each case. They can only be adequate if they contribute to the enhancement of accountability, responsiveness and openness.

Departures and Exclusions from the Reasons Requirement

The right to reasons for adverse administrative action is not absolute. As a general rule, section 86(2) of the Constitution permits the limitation of constitutional rights only in terms of a law of general application. The limitation must be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. The factors which must be taken into account in assessing whether the limitation is justifiable include the following: the nature of the right, the purpose of the limitation, the nature and extent of the limitation; the need to ensure that the enjoyment of the right by any person does not prejudice the rights of others; the relationship between the limitation and its purpose and whether there are any less restrictive means of achieving the purpose of the limitation.⁸¹ Apart from being qualified

77 Hoexter (n 46) 428.

78 2003 (5) SA 480 (T).

79 2001 (8) BCLR 844 (E).

80 See also *Kiva v Minister of Correctional Services & Another* (2007) ILJ 597 (E); *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA).

81 Section 86(2)(a)–(f) of the Constitution. For a detailed discussion of the limitation clause see Justice Mavedzenge and Douglas Coltart, *A Constitutional Law Guide: Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Rights* (Zimbabwe Human Rights Association 2014) Chapter 6.

in the way discussed in the preceding paragraphs, the AJA also makes provision for departures and exemptions from the reasons requirement.

Departures from the Reasons Requirement

Section 3(3) of the AJA allows for departures from the requirement to give reasons. Firstly, a departure from the obligations imposed by the right is permissible where a statute under which the decision is made allows the departure. Secondly, the duty to provide reasons is excused if it is reasonable and justifiable. In determining whether a departure is reasonable and justifiable, an administrative authority must take into account the following factors: the objects of the applicable enactment or rule of common law, the likely effect of the action concerned; the urgency of the matter; the need to promote an efficient public administration and good governance and the need to promote the public interest.⁸² It is disquieting to note that the AJA does not impose an obligation on administrative authorities to inform the affected person of any deviation from the requirements of section 3(1)(c) of the Act. Useful lessons can be drawn from section 4(a) of the PAJA, which requires an administrator who has departed from the reason requirement to inform the person requesting the reasons for such departure forthwith. The wisdom of vesting a discretion in the administrative authority to refuse to give reasons is open to doubt. Feltoe argues that a general provision allowing administrative authorities to decide when it is reasonable and justifiable to withhold reasons is open to abuse.⁸³ The same applies to the constitutionality of the method used to achieve this end. It is therefore suggested that in determining whether reasons may be refused, an administrative authority must apply the same criteria in section 86(2) of the Constitution.

Exemptions from the Reasons Requirement

Section 11 of the AJA limits the scope of the right to reasons for adverse administrative action by excluding the duty to give reasons in the following circumstances: executive powers and functions of the President and Cabinet; decisions of the Prosecutor General to institute or continue or discontinue criminal proceedings and prosecutions and decisions relating to the appointment of judicial officers.⁸⁴ Additionally, section 11(2) of the AJA excludes the right to reasons for any disciplinary action taken against members of the security services.⁸⁵ Both sections 11(1) and (2) also exclude section 6 of the AJA, which excludes the jurisdictions of the courts. However, members of the security services can, in terms of section 11(3) of the AJA, apply to the High Court for

82 Section 3(b)(i)–(v) of the AJA.

83 Geoff Feltoe, ‘Aligning the Administrative Justice Act with the Constitution’ <<https://zimllii.org/content/aligning-administrative-justice-act-constitution>> accessed 18 January 2021.

84 Section 11(1) of the AJA read with Part 1 of the Schedule to the Act.

85 These include members of the defence force, the police service, intelligence services and the prisons and correctional services.

an order compelling the giving of reasons. The Minister of Justice also has the power to add or remove exempted administrative authorities by statutory instrument.

Kaseke argues that the blanket exclusion in section 11(1) of the AJA allows for executive impunity, ‘a state of affairs that allows the Executive to go unchecked and thus creating, or further perpetrating, lawlessness.’⁸⁶ It goes against fundamental values and principles of the Constitution, such as equal protection of the law and the right to a fair hearing.⁸⁷ This creates an opportunity for abuse by administrative authorities in that they can act irrationally and unlawfully, and the action cannot be challenged under the AJA. However, such executive action can still be controlled through the ground of rationality under the concept of legality as a consequence of the rule of law.⁸⁸ Equally, giving the Minister the power to add or delete exempted authorities has the potential to violate section 134(b) of the Constitution. Whilst section 11(7) of the AJA gives Parliament an oversight power to annul such a statutory instrument; it is submitted that the Minister must not be given powers to infringe or limit any of the rights entrenched in the Declaration of Rights. The constitutionalisation of the broad right to administrative justice seeks to prevent and prohibit the enactment of legislation that ouster or excludes judicial control over administrative action.⁸⁹

Relief against the Refusal to Supply Written Reasons

If an administrative authority fails to comply with the requirements of section 3(1)(c) of the AJA, an aggrieved party is entitled to approach the High Court for relief in terms of section 4(1) of the AJA. This provision is applicable if one does not have rights, interests or legitimate expectations affected. All the Applicant has to prove to the Court is that he or she is aggrieved by the failure of an administrative authority to supply written reasons for the action concerned within either the period specified in the relevant enactment or in the absence of any such period, a reasonable period after a request for such reasons has been made.⁹⁰ If a court is satisfied that the administrative authority failed to comply with section 3(1)(c) of the AJA, it will direct the administrative authority to supply reasons for the action within the relevant period specified by law, or if no such period is specified, within a period fixed by the Court.⁹¹ If one alleges that his rights, interests, or legitimate expectations have been affected by the failure to supply reasons for administrative action. In that case one can apply to the High Court for an order compelling the authority to supply reasons in terms of section 6(1)(a) of the AJA.

86 Kaseke (n 7) 66.

87 Geoff Feltoe, ‘Giving with One Hand and Taking Back with the Other: The Exemptions and Exclusions in the Administrative Justice Act’ (2004) 11 Zimbabwe Human Rights Bulletin 106.

88 See *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

89 Klaaren and Glenn (n 48) 63–116.

90 Section 6(1)(b)(i)–(ii) of the AJA.

91 Section 4(2)(d) of the AJA.

If the Court is satisfied that there was an obligation to furnish reasons and that the requirements of section 6(1) have been met, the Court will compel the administrative authority to supply the reasons and specify the period within which reasons must be given.⁹² If an administrative authority fails to comply with an order compelling it to provide reasons, section 6(3) of the AJA creates a statutory presumption of improper exercise of power by the authority. It must be emphasised that the AJA clothes only the High Court with jurisdiction to entertain applications brought in terms of the Act.⁹³ The AJA does not also prescribe a specific format for approaching the High Court. It only states that one ‘may apply.’ This signifies that one must approach the High Court by way of an ordinary court application. This statutory remedy is different from an application for review contemplated in section 26 of the High Court Act read with Order 33 of the High Court Rules, 1971.⁹⁴

The right to reasons is further limited by section 8 of the AJA. In determining applications brought in terms of section 6 of the AJA, the High Court can allow for partial or complete non-disclosure of reasons for administrative action. They are two grounds upon which the High Court can refuse or restrict the supply of reasons. Firstly, the Court may decline to grant a compelling order if it is of the view that it would be contrary to the ‘public interest’ for such reasons to be disclosed.⁹⁵ Section 8(3) of the AJA defines the term ‘public interest’ to include matters relating to the security or defence of the State, the proper functioning of the Government, the maintenance of international relations, confidential sources of information concerning the enforcement or administration of the law, and the prevention or detection of offences or contravention of the law. The list is not exhaustive; it is couched in broad terms and is open to abuse. Kaseke argues that the definition undermines section 68 of the Constitution and can easily be used by the State to deny citizens the right to reasons.⁹⁶ It tilts the scales of justice in favour of the Executive at the expense of ordinary citizens, thus defeating the principles and values underlying the right to reasons. The limitation of the right is inconsistent with the limitation clause in section 86(2) of the Constitution.

Secondly, the High Court can allow for partial or complete non-disclosure of reasons if the failure to supply reasons by the administrative authority was reasonable and justifiable in the circumstances. This requires the Court to consider the factors set out in section 3(3)(b)(i)–(v) of the AJA, which were discussed in the preceding paragraphs.

92 Section 6(2) of the AJA.

93 This is despite the existence of a specialist Administrative Court established by the Administrative Court Act (Chapter 7:01) and other subordinate courts. Regrettably, the Administrative Court is a creature of statute whose jurisdiction is limited to matters prescribed in section 4 of the Administrative Court Act. See *Derdale Investments (Pvt) Ltd v Econet Wireless (Pvt) Ltd & Others* 2014 (2) ZLR 662 (H).

94 See *Gwaradzimba N.O v Gurta A.G* SC 10/15; *CJ Petrow and Co. (Pvt) Ltd v Gwaradzimba N.O* 2014 (1) ZLR 487 (H).

95 Section 8(1)(a) of the AJA.

96 Kaseke (n 7) 65.

In exercising its discretion in terms of section 8(1) of the AJA, the High Court has other options available to it. For example, it can direct that the reasons be disclosed privately to the Court for its consideration.⁹⁷ The High Court can, after examining the reasons which would have been disclosed in private, edit the reasons in the interests of public interest and those of the Applicant.⁹⁸ The Court can also consider whether disclosure should be limited or restricted in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act (Chapter 7:04).⁹⁹ It must also be noted that section 8(2) of the AJA commences with the following words, ‘for purposes of determining any matter referred to in subsection (1) the High Court may.’ This implies that these instances are factors used to determine the two grounds in section 8(1) of the AJA. Section 8(2) circumstances are not distinct from section 8(1) of the AJA.

Administrative action involving disciplinary action of members of the security services is exempted from the application of section 3(1)(c) of the AJA.¹⁰⁰ However, section 11(3) of the AJA gives members of the security services the right to apply to the High Court for an order compelling the supply of reasons on the basis that no public interest is served by withholding from the member the reasons for the action. Before the High Court determines the application, it must direct that reasons be disclosed privately to the Court for its consideration.¹⁰¹ Thereafter, the High Court can do the following: direct the administrative authority to supply reasons within a period fixed by the Court; edit the reasons in the interests of the public and the Applicant and order the administrative authority to give to the Applicant the edited reasons within a specified period or decline to grant the relief sought.¹⁰² In proceedings brought before the High Court by members of the security services in terms of section 11(3) of the AJA, the Minister of Justice can issue a certificate to the effect that the supply of reasons is against public interests or any other grounds.¹⁰³ In that event, the High Court has no discretion but to decline to make an order compelling the supply of reasons. We submit that the AJA gives the Minister unnecessary wide powers which have the effect of limiting a constitutionally entrenched right. It puts administrative action beyond judicial review. This is untenable in a constitutional democracy as constitutional rights cannot be taken away by Ministerial certificates. We submit, therefore, that this section is unconstitutional to the extent that it allows the Minister to limit a constitutionally entrenched right.

Conclusion

The contribution critically examined the nature and scope of the right to reasons for administrative action in Zimbabwe. It established that the right is alien to the common

97 Section 8(2)(a) of the AJA.

98 Section 8(2)(b) of the AJA.

99 Section 8(2)(c) of the AJA.

100 Section 11 (2) of the AJA and Part II of the Schedule to the Act.

101 Section 11 (3) of the AJA.

102 Section 11 (4)(a)–(c) of the AJA.

103 Section 11 (5) of the AJA.

law in its original form. However, Zimbabwean courts developed the common law and recognised that the right to reasons was part and parcel of the rules of natural justice. In 2004, the common law right to reasons was codified in the AJA. This was followed by the elevation of the right to a constitutional right in the 2013 Constitution. It is argued that the constitutionalisation of the right to reasons has the potential of transforming Zimbabwean administrative law. The Constitution is premised upon values and principles such as openness, transparency, fairness, justice, equality and accountability. These values inform and give effect to the duty to provide reasons and require administrative authorities to give reasons for their actions as a safeguard against arbitrariness. In light of this development, the 2013 Constitution displaces long-held retrogressive common law and statutory positions and replaces them with new progressive approaches. It was demonstrated that the optimistic can conclude that there is a positive promise in Zimbabwe's administrative law, which is now based on tenets of constitutionalism. This positivity will cascade to affect several provisions of the AJA which are inconsistent with the Constitution.

Having made a case for the alignment of the AJA with the 2013 Constitution, the following recommendations are proposed in this regard. Firstly, the AJA does not impose a duty on administrative authorities to inform the subjects of their decision of the right to request reasons for decisions. One major challenge of access to justice in Zimbabwe is that of legal illiteracy. Therefore, imposing a duty on administrative authorities to inform the subjects of the decisions of their right to reasons is the gateway to the enjoyment and protection of the right. Secondly, it was established that the AJA does not impose specific periods within which reasons can be requested and supplied by the administrative authorities. Section 68(1) of the Constitution provides that administrative action must be prompt and efficient. To facilitate the expeditious resolution of administrative disputes, the AJA must prescribe periods within which reasons must be requested and supplied. Thirdly, there is a need to revisit the limitations of the right to reasons in the AJA through departures from the right and exemptions. Section 3(3) of the AJA provides circumstances in which an administrative authority can depart from the reasons requirement. However, the AJA does not impose a duty on the administrative authority to inform an affected party of the departure. Subjects of administrative action must be informed of any departures forthwith. As if that is not enough, section 3(3) of the AJA gives administrative authorities wide discretion in departing from the reasons requirement. Such discretion must be interpreted restrictively and following the limitation clause in section 86 of the Constitution.

Additionally, the exclusion of certain administrative authorities from the application of the AJA is unnecessary and goes against constitutional principles such as equal protection of the law and the right to a fair hearing. It is submitted that all administrative authorities and action as defined in section 2 of the AJA must be subjected to the obligations of section 3(1)(c) of the AJA. They must be subjected to judicial review, which is the cornerstone of the rule of law. Any exclusions of administrative authorities from the scrutiny of the judiciary go against the purpose underlying constitutionalisation

of the right to reasons. This requires the repealing provisions of the AJA, which give the Minister powers to add exempted bodies and the power to issue a Ministerial certificate in terms of section 11(5) of the AJA. These powers are arbitrary and have no constitutional foundation. Finally, the key to greater protection of citizens does not only lie with the alignment of the AJA with the Constitution. The full realisation of the right to reasons also lies with the judiciary taking the lead in giving effect to the right. This demands a purposive interpretation of the right, which meshes with constitutionalism ideals. The right must be interpreted in a manner that promotes the values and principles that underlie a democratic society based on openness, justice, human dignity, equality, transparency and accountability.

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