



Image: Sophie Peters (1996)

# The Role of the Judiciary in the promotion and protection of human rights: Right to Administrative Justice and Judicial Review as tools of accountability

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# PRE-DEMOCRATIC ERA: ADMINISTRATIVE LAW DURING APARTHEID

Parliamentary sovereignty

No Bill of Rights

Judicial review as safeguard?

- Contesting unlawful detentions
- States of emergency
- *Rikhotso* and the pass system



# Section 33 of the Constitution: The Right to Just Administrative Action

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

(2) Everyone whose rights have been adversely affected by administrative action has the **right to be given written reasons**.

(3) **National legislation** must be enacted to give effect to these rights, and must—

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an **efficient administration**.

# SOME FEATURES OF CONSTITUTIONAL ADMINISTRATIVE LAW

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PAJA – and PAJA avoidance!  
Expansion of principle of  
legality as parallel route



Rationality – minimum  
threshold applicable to all  
public power



Culture of justification



Regulating public power –  
including when exercised by  
private parties

# JUDICIAL ACCOUNTABILITY AND PRIVATE ENTITIES



CONSTITUTION:  
NO LONGER ONLY  
VERTICAL



PRIVATISATION

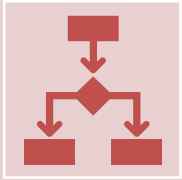


PUBLIC POWER



HORIZONTAL  
APPLICATION

# REMEDIAL RESOURCEFULNESS – JUDICIAL TOOLS OF ACCOUNTABILITY



The problem: positive obligations, socio-economic rights, addressing systemic dysfunction and non-compliance



Innovations in remedies:

Structural interdicts with supervisory jurisdiction  
Appointment of special agents  
Enforcement of judgments



Institutional anxieties: the role of courts

Judicial activism  $\leftarrow$   $\rightarrow$  deference  
Vindicating rights  
Efficient administration  
Competence and expertise  
Lawfare and judicialisation of politics

# THE PATH AHEAD?

**“The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution’s vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country’s most vulnerable.”**

*Mwelase v Director-General for the Department of Rural Development and Land Reform [2019] ZACC 30; 2019 (6) SA 597 (CC) para 46*

All shall be equal before the law

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