https://www.dailymaverick.co.za/article/2023-08-21-the-constitution-and-administrative-justice-albie-sachs/

CHALLENGING UNFAIR LAWS

‘The Constitution is in charge’ – Justice Albie Sachs lays out the role of administrative justice in today’s South Africa

Retired Constitutional Court judge Albie Sachs. (Photo: Gallo Images / Netwerk24 / Felix Dlangamandla)

By Tamsin Metelerkamp

21 Aug 2023

During the apartheid era, principles of administrative justice were often seen as the only way to challenge unfair laws. Now, the Bill of Rights provides the foundation for ordinary people to protect themselves and ensure the fair application of law.

The main challenges to unfair law or abusive conduct in today's South Africa come through the Bill of Rights – the fundamental rights that all people have. One part of that doctrine is the right to fair administrative action.

In this sense, administrative law is no longer a separate sphere of law but one that exists under and is informed by the Constitution, according to Justice Albie Sachs, the anti-apartheid activist and former Constitutional Court judge, in the second of a three-part webinar series providing constitutional insights into participatory democracy, administrative justice and socioeconomic rights.

"There isn't a Constitution administrative law, and a separate common law for administration – it's one single thing. It's all under the Constitution. So, it meant [that] now the court stopped using the old technical arguments that we used in the old days… and now looked to the text of the Constitution. And we have Paja – the Promotion of Administrative Justice Act – that lays down the principles and rules," he said.

The Promotion of Administrative Justice Act 3 of 2000 ensures the right to administrative action that is lawful, reasonable and procedurally fair, and the right to written reasons for administrative action, as provided for in section 33 of the Constitution.

"Today, Paja is used very, very expensively, and it's a very important protection for ordinary people in the country of fair dealing in the application of the law. It's got a constitutional backing now; it's not dependent on the often very artificial rules developed in the previous regime. It's a very, very important part of our democracy today," said Sachs.

During the apartheid era, the role of administrative law was different in that it was often seen as the only way to challenge unfair laws, he explained.

Parliament was supreme. The courts couldn't challenge a law to say 'this is manifestly unjust and cruel… it's unfair, manifestly discriminatory'.
"The only way you could fight back a little bit through the courts, trip up the government just here or there, [was] using principles of administrative justice that had originally been developed by the judiciary under the common law in England, taken over by South African judges, and we used to use them sometimes in a defensive way," he said.

Read more in Daily Maverick: 'Unity in diversity' – Justice Albie Sachs reflects on the importance of participatory democracy in SA

Sachs gave the example of the apartheid government issuing a "banning order" on someone without giving them a hearing. Principles of

administrative justice could be used to reach a ruling that a person's rights could not be taken away without giving them a hearing.

"It would work for a little while… Then Parliament would pass a law saying you can do it without the hearing. I know, that happened to me – I was banned twice and I wasn't given a hearing, I just received the notice," he said.

"…Parliament was supreme. The courts couldn't challenge a law to say 'this is manifestly unjust and cruel… it's unfair, manifestly discriminatory'. You couldn't do that, so we all become experts on administrative law."

The right to fair administrative justice was included in the interim Constitution, and those principles were expanded in the final Constitution, according to Sachs.

The Sarfu case

"The first case that we had where we had to see what's the connection now between the administrative justice and the Bill of Rights was the famous Sarfu case – the South African Rugby Football Union case – where Louis Luyt, the [then] president of the Rugby Football Union, felt that he was equal to the president, Nelson Mandela," he said.

Mandela had been persuaded by the then minister of sport to set up a commission of inquiry into the management of rugby and football in South Africa. The inquiry stemmed from economic concerns, as well as allegations that open access to rugby for all was being prevented.

A high court judge initially set aside the commission of inquiry on the grounds that Luyt wasn't given advance notice of the intention to set up the commission, according to Sachs. The case was taken on appeal to the Constitutional Court.

Read More in Daily Maverick: South Africans cannot afford to sit on the sidelines of our young democracy – experts say

"It was actually – I'm gonna put it very bluntly – a rubbish law by that judge, based on pre-constitutional principles. Now, we had a Bill of Rights, fundamental rights… This was not administrative action in the ordinary way. This was the president exercising powers under the Constitution to set up a commission of inquiry. So, completely out of court," he said.

"The Public Protector has a duty… when you're going to make findings to give you a chance to respond to the findings. You don't have to give notice in advance. So, that was the important point we made in the SARFU case: that it's now the Constitution that's in charge." **DM**

Register for the Daily Maverick *and the Inclusive Society Institute webinar on administrative justice here.*

The Inclusive Society Institute is an independent nonprofit 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 Daily Maverick.

INCLUSIVE SOCIETY
INSTITUTE