

TRANSFORMATION AND ADMINISTRATIVE LAW*

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Abstract

South African administrative law has been radically transformed in the past decade. This has, however, in the case discussed, occurred through an interpretation of precedent without an acknowledgement of the injustices perpetrated by the courts in the past. It is submitted that a 'break' with the past and the principles associated with it should not be disguised as a restatement of what actually was. Such an approach undermines the critical evaluation of precedent and potentially ignores the irreducible exteriority of suffering. A transformative approach to legal interpretation involves acknowledging the openness of texts and remaining open to otherness.

Preface

Imagine being a nun, 43 years old. It is the year 1986, early July. You stay in Guguletu rather than Rondebosch where most sisters of your order are staying, mainly in order to show solidarity with the people that you have dedicated your life to. You want to learn from them and therefore prefer to give up the luxuries of 'suburban life'. The witdoeke are 'busy' in the townships. A young man, one day, having embarked from the bus, sees them coming - in a Casspir. He realises that he has money under his mattress and he cannot afford to lose it. He makes a dash for home. They get to him. He disappears into a Casspir. He is later found in a morgue. The funeral takes place. It is supposed to proceed from the home of the grieving parents to the cemetery and back home again for the ritual washing of hands and the meal provided for in a marquee erected for the occasion to accommodate everyone. You are asked to walk in front of the procession by three Anglican priests (the young man who died was Anglican). The Casspir holds its distance. This is not a 'political'¹ funeral; there are no ANC colours being shown, no liberation songs are sung.

At the cemetery another sister who used your car, arrives. Two people need lifts to the home of the deceased. The one is an old woman. The other a partly paralysed man. Having suffered from a heart attack at a young age, he is not able to speak. You start off in your VW beetle. Most people are walking. The police start coming towards you. The people get scared. They start singing so as to bolster their confidence in the face of oncoming danger. You join in. The other sister starts walking. The Casspir is now right in front of you. The old woman in the back of the car urges you to tell the police not to worry with the people - there will be no violence. The crowd turn down Terminus road because of the Casspir ahead. Your car is forced onto the pavement by a police van. An order comes from a police-officer to disperse. When the crowd does not respond to the order quickly enough, the police start beating them with quirts. Some people fall down in the chaos, old people are being hit. You get out of your car, not quite believing what you are seeing. A policeman

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1. Meaning here the funeral of a person who was prominent in the liberation struggle.

drags a young man (in his late teens) who had tried to run away, to the middle of the street, beating him with quirts on his head. The policeman has a gun. You are scared that he might use it in the event that the young man manages to run away. You stand in front of him, attempting to get him to stop the beating. You shout at the policeman to stop this madness. The young man is thrown onto his back. The policeman puts his boot on the face of the man. He seemingly does not realise that he is dealing with a human being. The policeman is about to hit the man. You hear: 'arresteer daardie non!'. It is around 11H00.

As the young policeman leads you to the Casspir, you ask him 'Can't you see what this is doing to you?' You are told to get into ('Klim op!') the Casspir. You realise that you have the keys of your car in your hand. Knowing that they won't at present be of much use to you, you tell the police-officer that you want to give your keys to someone. He gives an order to a policeman to throw out the keys. The Casspir starts circling KTC. It stops. A 12 year old boy is thrown into the Casspir. You ask what he had done and are told that he was wearing an ANC T-shirt. You are taken to Guguletu police station and fingerprinted. Captain Oosthuizen asks the policeman who was hitting the man 'Wat het jy gesÛ het sy gedoen?' 'Sy het my gevloek en geslaan' he says. You walk to the policeman telling him that he knows that what he is saying is not the truth. You ask him how he can make a statement like that. He responds 'I wrote what I did; that is what happened. You ask what you are being charged with and are told that it is for -

- (a) inciting people to commit violence; and
- (b) preventing the police from carrying out their duties.

You are put into a police van - alone. You wait and wait. Two policemen get into the van, taking you to Pollsmoor. You arrive there in record-time, having been thrown from one side to the other for the whole of the ride and having had nothing to hold on to. You arrive at Pollsmoor. The young, drunk woman ahead of you is told to strip naked. You, luckily, not. You give them your ring and watch for safekeeping. It is getting dark. You walk through long corridors into the heart of the prison. You arrive at your cells. 10 of them in a row, all occupied by white women.

During your stay in prison you are allowed out of your cell for five hours a day. You are allowed into the courtyard twice. At 15H30 every afternoon you are given your supper and locked up for the night. Your cell, like the other nine, has a toilet, a bed, a shelf and a Bible. There is a speaker in the wall. Radio 5, not quite tuned in, is played right through the night, loudly. Every morning a warrant officer comes around and asks if you have any complaints. You are informed that you have a right to speak to a magistrate. You are faced with someone who shows no sense of being a human being. The wardens show no human response. They answer none of your questions. You are interrogated regularly but always unexpectedly, usually for a few hours at a time. This always takes place in a different room. Your interrogators are a senior police officer, a young policeman and a policewoman. At first you are questioned about the incident. They want to know from you who the three Anglican priests at the funeral were, something you are convinced they know. You refuse to give the names.

One day, you are given a confession to sign. You refuse to do so without your lawyer being present. You are sworn at, a fist is beaten on the table. A waving finger is pointed at your face. You are being asked about the Kairos document, of which you are a signatory. You are asked if you agree with it. One day you are led out of prison, taken to a car and driven to town. You ask yourself whether you are being taken to the notorious Caledon

Square to be tortured. None of your questions are answered. You pass Caledon Square and are taken into a building. You wait. The room you are waiting in bears an offprint of the preamble to the 1983 Constitution:

IN HUMBLE SUBMISSION to Almighty God. Who controls the destinies of peoples and nations,
 Who gathered our forebears together from many lands and gave them their own,
 Who guided them from generation to generation,
 Who has wondrously delivered them from the dangers that beset them,
 We declare that we
 ARE CONSCIOUS of our responsibility towards God and man;
 Are CONVINCED of the necessity of standing united and of pursuing the following national goals:
 To uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship,
 To safeguard the integrity and freedom of our country,
 To uphold the independence of the judiciary and the equality of all under the law,
 To secure the maintenance of law and order,
 To further the contentment and the spiritual and material welfare of all,
 To respect and protect the human dignity, life, liberty and property of all in our midst...

After a while you are told that the Jewish consulate who had wanted to see you at the present location had failed to turn up. You are taken back to Pollsmoor. You have no idea as to when your detention will end.

1. Introduction

Since the late 1980s a radical transformation has been taking place in South African administrative law jurisprudence. Cornell² describes transformation as an alteration of a system of such a nature -

‘that it no longer confirms its identity, but disconfirms it and, indeed, through its very iterability, generates new meanings which can be further pursued and enhanced by the sociosymbolic practice of the political contestants within its milieu’.

Exactly this has in my view been happening in administrative law. Since the late 1980s there has, through the decisions of the Appellate Division (now the Supreme Court of Appeal) and Constitutional Court *inter alia* been an expansion of the scope of application of the *audi alteram partem* rule,³ a new approach regarding the reviewability of errors of law

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2. *Transformations: Recollective Imagination and Sexual Difference* (1993) 2. She also reminds us that transformation in the above sense cannot take place without individuals who are willing to take a critical stance of the legal tradition they form a part of and to open themselves to transformation and the creation of new worlds (2-4).
 3. *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A); *Administrator, Transvaal and Others v Traub and Other* 1989 (4) SA 731 (A), *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A), *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A), *Administrator, Natal and Another v Sibiya and Another* 1992 (4) SA 532 (A), *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).

(and fact),⁴ the reaffirmation of the reviewability of decisions based on the non-consideration of relevant factors;⁵ an extension of the scope of review powers of a court;⁶ the introduction of a new ground of review in the form of an inappropriate/incorrect weighing up of considerations;⁷ establishing that the onus is on the state to prove legality should it infringe on a fundamental right through administrative action;⁸ the establishment of the test of a reasonable suspicion of bias for review based on the *nemo iudex in sua causa* principle;⁹ and after the promulgation of the 1993 Constitution, the development of a general duty to act fairly;¹⁰ and subjecting 'executive' decisions to the Bill of Rights.¹¹ The importance of the principle of certainty is also coming to the fore with a recent decision¹² emphasising that changes in policy cannot be made without informing the parties concerned of such change.¹³

This transformation has in some instances been taking place through a reinterpretation of precedent. There is however, on my reading, a fundamental problem which is yet to be addressed in this transformation in administrative law. This is the extent to which the past (precedent) can be relied on in support of new developments. The aim of this paper is to seek answers to this question through a discussion of two cases decided by the Appellate Division: *Minister of Law and Order v Dempsey*¹⁴ and *Jacobs en 'n Ander v Waks en Andere*.¹⁵ Furthermore, an attempt will be made to map out a path for future transformation in administrative law in the light of the provisions of the 1996 Constitution regarding administrative justice.¹⁶

2. Relevant and irrelevant considerations

It has long been a principle of administrative law that an official or body has to take account of all relevant or material considerations in coming to its decision. At the same time it is required to ignore all irrelevant considerations. These 'requirements' are regarded as instances of the more general requirement of legality that an administrative functionary has to apply its mind to the matter.¹⁷ This not only applies where the authorising statute

4. *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A).

5. *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A).

6. *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).

7. *Jacobs en 'n Ander v Waks en Andere supra*.

8. *During NO v Boesak and Another* 1990 (3) SA 661 (A) 672E-680C.

9. *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers Union and Another* 1992 (3) SA 673 (A).

10. *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).

11. *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

12. *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

13. Thus far certainty has only played a role in the context of procedural fairness, but it can be expected that before long substantive legitimate expectations will become a part of our law; see PP Craig 'Substantive legitimate expectations in Domestic and Community law' 1996 *Cambridge Law Journal* 289.

14. 1988 (3) SA 19 (A).

15. 1992 (1) SA 521 (A).

16. See s 33.

17. See inter alia *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) 152A-D; *During NO v Boesak and Another* 1990 (3) SA 661 (A) 671F-672D; *Applicant v Administrator, Transvaal and Others* 1993 (4) SA 733 (W); *Suliman and Others v Minister of Community Development* 1981 (1) SA 1108 (A) 1123A; *Goldberg and Others v Minister of Prisons and Others* 1979 (1)

stipulates the factors to be considered,¹⁸ but also in the absence of such a clause in the statute. What is relevant or not is in each instance to be decided with reference to the authorising statute(s), ie it is a question of interpretation. Failure to consider all relevant factors and taking into account irrelevant factors could lead to the invalidity of the decision, in the latter instance if the irrelevant consideration substantially influenced the body or official in reaching its decision.¹⁹ A court could not, according to the Appellate Division (until the decision in *Jacobs*), decide on the weight to be attached to the factors concerned.²⁰ Furthermore, in a number of decisions it was held that in the case of 'purely administrative' acts, failure to consider relevant considerations and the taking into account of irrelevant considerations do not constitute grounds of review.²¹

In the *Dempsey* case the Appellate Division, however, cast doubt on whether the consideration of all relevant factors could be said to be a requirement of legality at all. The court was hearing an appeal from a decision of the Cape Provincial Division.²² An application was launched for the release of a Sister Harkin from detention. She was detained in terms of regulation 3(1) of the emergency regulations issued by virtue of section 3 of the Public Safety Act²³ which provides the following:

'A member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.'

The section further provides for the detention of a person so arrested for 14 days, unless the Minister orders the further detention of such person. From the facts before the court it appears that Sister Harkin was arrested after a funeral held in Guguletu. Policemen were dispersing a crowd with sjamboks after the crowd failed to adhere in time to instructions

SA 14 (A) 48D-H; *Bangtoo Brothers and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) 685; *Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Others* 1975 (4) SA 1 (T) 8; *Anchor Publishing Co (Pty) Ltd v Publications Appeal Board* 1987 (4) SA 708 (N) 719F-720B.

18. Here the question may arise whether the provision in question is mandatory or directory and whether the criteria laid down are exhaustive.

19. *Administrator, Cape v Associated Buildings Ltd* 1957 (2) SA 317 (A); *Jabaar and Another v Minister of the Interior* 1958 (4) SA 107 (T) 114C-D.

20. *Johannesburg City Council v The Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (A) 99A; *Durban Rent Board and Another v Edgemount Investments Ltd* 1946 AD 962 at 974. *Baxter Administrative Law* (1984) 505: 'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.' See further *infra*.

21. *Administrateur van Suidwes-Afrika v Pieters* 1973 (1) SA 850 (A) 859B-G; *Durban City Council v Jailani Caf * 1978 (1) SA 151 (D) 153-154; *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) 793B-C. Defining 'purely administrative' action is a difficult task (see *Wiechers Administratiefreg* 2d ed (1984) 137-153). The criteria used relate either to the scope of the discretion or the interests affected. In this context, the reasoning appears to be that seeing the breadth of the discretionary power, it was the intention of the legislature that any consideration the repository of the power may wish to take account of, may be so taken account of; see *Rose Innes LA Judicial Review of Administrative Tribunals in South Africa* (1963) 134. The distinction between the different types of administrative acts has now largely disappeared.

22. *Dempsey v Minister of Law and Order and Others* 1986 (4) SA 530 (C).

23. 3 of 1953.

from a police officer to disperse. The police officer in charge viewed the conduct of the persons involved as an unlawful gathering, a view with which Marais J disagreed.²⁴ On the version of the police, a policeman was 'busy with a Black man' who was running in the wrong direction, when Sister Harkin grabbed him from behind and also grabbed and held onto his sjambok. He managed to free the sjambok from her grip and pushed her away, whereafter she hit him with a fist on his left shoulder and chest as he was trying to hit the man. She asked him a number of times whether he was 'fucking crazy'. The man managed to run away. She was thereafter arrested by the policeman and detained in Pollsmoor prison. The crowd dispersed within three minutes after the sjambokking began.²⁵

Marais J held that the fact that the police officer did not consider (as appeared from his affidavit) whether arresting and prosecuting Sister Harkin in accordance with the ordinary law of the land would not have served to put an end to any threat to public order which she may have represented, was a fatal irregularity as it was a crucial factor to consider. The court was of the view that her arrest and prosecution in terms of the alternative would have put an end to any further participation by her in that day's events just as effectively as an arrest under the emergency regulations would have done.²⁶

The Appellate Division, per Hefer JA, however pointed to the wide nature of the power that was granted. The statute made the repository of the power in this instance the sole authority as to whether the fact prescribed existed or not.²⁷ Once it was found that the authority held the required opinion, it was not for the court to intervene if it disagreed with the authority as to the presence or absence of the fact prescribed.²⁸ Hefer JA held that the power of the court to intervene in the present case was limited to the grounds laid down in *Shidiack v Union Government (Minister of the Interior)*²⁹. These are in the case of mala fides; acting from ulterior or improper motives; failure of the authority to apply its mind to the matter (which includes capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the decision to be exercised, a failure to direct its thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles); not having exercised the discretion at all; and disregarding the express provisions of the statute. Hefer JA, however, wished to qualify the requirement that all relevant factors need to be considered and did so in the following manner:

'unless a functionary is enjoined by the relevant statute itself to take certain matters into account, or to exclude them from consideration, it is primarily his task to decide what is relevant and what is not, and also, to determine the weight to be attached to each relevant factor.... In order not to substitute its own view for that of the functionary, a Court is, accordingly, not entitled to interfere with the latter's decision merely because a factor which the court considers relevant was not taken into account, or because insufficient or undue weight was, according to the Court's objective assessment accorded to a relevant factor. A functionary's decision cannot be impeached on such a

24. 540I-541B.

25. 538C.

26. Also followed in *Swart v Minister of Law and Order and Others* 1987 (4) SA 452 (C); *Nqumba and Others v State President and Others* 1987 (1) SA 456 (E).

27. 34A-B.

28. 34C-35C.

29. 1912 AD 642 at 651-2.

ground unless the Court is satisfied, in all the circumstances of the case, that he did not properly apply his mind to the matter.’

It was furthermore held that the onus was on the state only to prove that an opinion had been formed. The applicant bears the onus of proving that the opinion had not been properly formed.³⁰ This the applicant failed to do in the instant case and the appeal was therefore successful. Hefer JA held that it could not be inferred from the silence of the police officer’s affidavit on the point that he had failed to consider the two factors.³¹

The above dictum of Hefer JA (at least up to the last sentence) appears to mean that the consideration of relevant factors is not an independent requirement of legality, unless the statute itself stipulates the factors to be considered. This was also the interpretation that was given to the judgment by certain divisions of the Supreme Court;³² and (insofar as the grant of discretions of a wide nature is concerned) by the Appellate Division itself in a later judgment³³ and the SA Law Commission.³⁴

Not so, held the Appellate Division four years later (after the state of emergency had been lifted and negotiations for a new constitutional dispensation had started). In *Jakobs en 'n Ander v Waks en Andere*³⁵ the court held in a case relating to racial discrimination, that the key words in the above dictum were ‘primarily’ and ‘merely’. According to Botha JA, Hefer JA only wished to point out that a court on review would not interfere with the decision of a functionary clothed with a discretion simply because the court was of the view that the decision is *wrong* (‘verkeerd’). The dictum should be interpreted to mean that a court *would* interfere if a functionary had disregarded a relevant factor (or attached too little weight thereto) when the court is convinced that the functionary had not applied its mind to the issue. Botha JA also pointed out that a few days after the Dempsey decision, the Appellate Division (differently constituted - it was not a case dealing with the state of emergency)³⁶ held in *Johannesburg Stock Exchange and Another v Witwaterrand Nigel Ltd*

30. Overruled in *During NO v Boesak and Another* 1990 (3) SA 661 (A).

31. Nestadt JA in his minority judgment (although agreeing with the order of Hefer JA), refused to split the onus, but nevertheless held that the fact that the police officer failed to apply his mind to the alternative of a conventional arrest and sister Harkin’s future conduct did not affect the validity of the decision. He held that it could not be implied from the provision that these were considerations which had to be considered. It could therefore not be said that his failure to have considered the issues involved meant that he had not applied his mind.

32. See *Sisulu v State President and Other* 1988 (4) SA 731 (T) 736C-D (it is for the Minister alone to decide on which material to base his decision of further detention in terms of reg 3(3)); *South African Allied Workers Union v De Klerk NO* 1990 (3) SA 425 (OK) 438B-D (discretionary powers given to industrial court - it is for tribunal and not the Supreme Court to decide what matters are relevant and material or what weight to attach to various factors if the Act does not specify the matters to be taken account of).

33. *Visagie v State President and Others* 1989 (3) SA 859 (A) 868A-E (In reviewing the Minister’s decision in terms of reg 3(6) to release a person from detention on certain preconditions ‘[a]s long as the Minister bona fide considers a fact to be relevant, no Court may disturb his exercise of discretion simply because the Court itself regards the fact as being unhelpful or indeed entirely irrelevant.’)

34. 158: ‘Dit blyk uit wat hierbo genoem is dat die howe nie sal inmeng op die grond dat die administratiewe orgaan versuim het om aandag te gee aan relevante data of oorwegings as die diskresie wat deur magtigende wetgewing aan hom verleen is, wyd is nie.’

35. 1992 (1) SA 521 (A).

36. In *Dempsey* the judges were Rabie ACJ, Joubert JA, Viljoen JA, Hefer JA and Nestadt JA. In casu the judges were Corbett JA, Van Heerden JA, Smalberger JA, Nicholas AJA and Kumleben AJA. See also Michael A Kidd ‘Internal security and specialist judges’ 1990 *SAJHR* 417.

and Another³⁷ that the taking into account of relevant circumstances was a requirement of legality (as an instance of a failure to apply the mind). Consequently the decision of the Carletonville Town Council to set aside the use of certain parks in town for whites only was declared invalid seeing that the council had not taken into account the interests of the residents of the town and the broader public, this in spite of the fact that the Separate Amenities Act³⁸ expressly authorised a Council to so reserve amenities for different racial groups or classes of persons,³⁹ even if only certain groups are granted facilities (and not others) or the facilities granted to different racial groups are of an unequal standard.⁴⁰

Jacobs has thus managed to rehabilitate the consideration of relevant factors as a requirement of legality. This has been confirmed in the Administrative Justice Bill.⁴¹ A further development insofar as the consideration of relevant factors is concerned has been the introduction of a Bill of Rights in both the 1993 and 1996 Constitutions. The Bills of Rights have emphasised certain factors (the fundamental rights) which would obviously require consideration within certain contexts.⁴² This is the position in Germany where the courts have, on the basis of the fundamental rights entrenched in the Basic Law, held that an administrative authority has to take the effect of a decision on the fundamental rights of the individual into account, failing which the decision would be invalid.⁴³ In England, the courts regard the European Convention on Human Rights and Fundamental Freedoms as a factor to be taken account of by administrative authorities, at least insofar as powers are exercised in terms of legislation enacted after 1950 is concerned.⁴⁴

3. Critique and the Other

Jacobs is a judgment which is in many respects commendable. As stated above, in the face of legislation expressly authorising racial discrimination, the Court holds that the administrative action effecting such discrimination is invalid.⁴⁵ The court also extends the application of the *locus standi* requirement in administrative law.⁴⁶ A *dictum* from one of the most oppressive judgments of the Appellate division during the state of emergency, through reinterpretation, has become a vehicle for a progressive extension of the grounds of

37. 1988 (3) SA 132 (A).

38. 49 of 1953.

39. s 2(1).

40. s 3. See Du Plessis Lourens M 'n *Regterlike Bries oor Carletonville* 1989 SAJHR 450 for a discussion of the ironies of the *quo* judgment (where more or less the same approach was followed) seeing the aims of the legislation.

41. The reference here is to the sixth draft of the Bill prepared by the Project Committee of the South African Law Commission and adopted by the Commission on 13 August 1999. Clause 7(1)(e)(iii) provides that 'A court has the power to review administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations not considered'.

42. *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) appears to give some support to this contention.

43. See MP Singh *German Administrative Law in Common Law Perspective* (1985) 92-93.

44. See William Wade *Administrative Law* 6th ed 415-416.

45. It must be noted that at the stage of the hearing the Act concerned had already been repealed (see Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990 which came into effect on 15 October 1990) and negotiations for a new constitutional dispensation had already started. A judgment upholding the decision of the Town Council would have appeared pretty ridiculous.

46. See Jeannie van Wyk 'The Appellate Division takes another look at locus standi' 1992 SAPL 320; Elmene Bray 'Jacobs v Waks from an environmental angle' 1992 SAPL 329.

review.⁴⁷ The *Dempsey* case, insofar as it 'recognises' that a court may scrutinise whether sufficient weight was attached to a relevant consideration,⁴⁸ can now even be relied on to support the recognition of proportionality as a ground of review.⁴⁹ Based on the ground of review as 'recognised' on Botha JA's reading of *Dempsey*, if an administrative organ did not properly balance the advantages and disadvantages of the measure taken, it can be said that the organ did not properly apply its mind to the question concerned and that the action is therefore invalid.⁵⁰

The methodology of Botha JA in his interpretive efforts is to read precedent - and in particular the *Dempsey* judgment - in its best light: making the law the best it can be.⁵¹ The effect of the *Dempsey* judgment, however, was to render judicial review of the power to detain under emergency powers impossible.⁵² This was done by adopting the subjective jurisdictional facts approach, severing the link between applying the mind and consideration of relevant considerations, and placing the onus of proof on the applicant who seeks review to prove that the opinion was not properly formed. Yet Botha JA finds something 'good' in this judgment. The 'break' of the Appellate Division with our apartheid past and the principles associated with it (as epitomized in this judgment) is disguised as a restatement of what actually was. This raises serious questions concerning integrity and honesty. The approach of Botha JA has two other unfortunate consequences:

- * it undermines the critical evaluation of precedent; and
- * it potentially ignores the irreducible exteriority of suffering.⁵³

Insofar as the critical evaluation of precedent is concerned, Botha JA in *Jacobs* does not reject the principle laid down in *Dempsey* which disestablishes the link between consideration of relevant factors and applying the mind. This disconnection was one of the direct causes of the oppression perpetrated by the security forces. Interpretation, understanding and application is a unified act - the hermeneutic act - and cannot be separated in the way Botha JA attempts to do. By simply reading the judgment in its best

47. The court even manages to reconcile the irreconcilable dicta in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) and the AD decision in *Dempsey*. The *Johannesburg Stock Exchange* case sustains the logical link between relevant factors and applying the mind whereas the *Dempsey* case severs it.

48. See *Bangtoo Bros v National Transport Commission* 1973 (4) SA 667 (N) 685; *Anchor Publishing Co (Pty) Ltd v Publications Appeal Board* 1987 (4) SA 708 (N) 719I-720G; *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission* 1988 (3) SA 485 (W) 493; and *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck) 348B-350E, 357D-E which also adopt this view.

49. See *Roman v Williams NO* 1997 (9) BCLR 1267 (C). See now also clause 7(1)(g) of the Administrative Justice Bill: 'A court has the power to review administrative action if the effect of the action is unreasonable, including any

- (i) disproportionality between the adverse and beneficial consequences of the action; and
- (ii) less restrictive means to achieve the purpose for which the action was taken'.

50. See also *United Democratic Front (Western Cape Region) v Van der Westhuizen* 1987 (4) SA 926 (C) and the *Dempsey* a quo judgment for examples of instances where the court uses proportionality as a ground of review.

51. As proposed by Etienne Mureinik, following Ronald Dworkin; see 'Law and Morality in South Africa' 1988 *SALJ* 457.

52. Marcus G 'The nun and the rabbi's son' 1990 *SAJHR* 410 at 411.

53. Drucilla L Cornell 'Institutionalization of meaning, recollective imagination and the potential for transformative legal interpretation' 1988 *Univ Penn LR* 1135 1167-1170.

light, Botha JA is doing nothing but giving his implicit approval to the oppression perpetrated by the security forces authorised by the *Dempsey* case.

Secondly, as Cornell⁵⁴ says, '[t]he suffering of others introduces an irreducible exteriority into the process of interpretation'. Or, in the words of Robert Cover: '[l]egal interpretation takes place in a field of pain and death'.⁵⁵ The suffering of those who were detained, interrogated, tortured and murdered in terms of (or at least because of the powers given through) emergency legislation, is ignored by Botha JA in the *Jacobs* case.⁵⁶ Cornell, in her discussion of Dworkin's approach to interpretation, appositely asks the following question:⁵⁷

'Why should we put our history of racist exclusion [which was the direct cause of our oppressive emergency legislation] into the best light? The real suffering imposed by...[*Dempsey*] can only be respected if we take off our rose-colored glasses and honestly face the harm done by the legal system through the perpetuation of an unjustifiable principle....It is the irrevocable loss, which cannot be overcome in spite of all of our pleadings and all of our prayers, that provides the limit to interpretation through rose-colored glasses. We can interpret, but we cannot will backwards so that the past simply disappears. For all his insistence on attention to the past, Dworkin does not give enough "weight" to the burden history imposes upon us.'

What is asked for if the legal system wishes to 'break' with an oppressive past, is an acknowledgement thereof, an acknowledgement that the wrong principle(s) was applied (a condemnation through evaluation)⁵⁸ as well as an acknowledgement of the suffering caused thereby.⁵⁹

5. Transformative interpretation

The transformation taking place in administrative law has, except for the above-mentioned critique, many positive elements. It is my contention that this transformation was brought about through two factors:

- * a changing view (as yet not explicitly acknowledged by the courts) as to the nature of interpretation; and
- * a changed vision with regard to democracy.

The belief that rules can be interpreted in only one way, ie that rules have a single meaning, has been thoroughly discredited.⁶⁰ Meaning is the result of an interplay between

54. Cornell 1988 *Univ Penn LR* 1170.

55. 'Violence and the Word' 1986 *Yale LJ* 1601.

56. The same criticism can be levelled against Botha JA for his treatment of past precedent relating to racial discrimination. He passes the opportunity by of distancing himself and the Appellate Division from precedent where the policies of apartheid were explicitly endorsed (see eg *Minister of the Interior v Lockhat and Others* 1961 (2) SA 587 (A) 602). Had Botha JA's approach been followed in the past with regard to all discriminatory legislation, such legislation would have been toothless.

57. 1988 *Univ Penn LR* 1170.

58. Drucilla Cornell *The Philosophy of the Limit* (1992) 153.

59. The chance the judiciary had at the Truth Commission was not properly utilised; see the *Truth and Reconciliation Commission of South Africa Report* (1998) vol 4 93. For the written representations of the bench see 'The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal academics' 1998 *SALJ* 15.

60. See De Ville 'Eduard Fagan in context' 1997 *SAPL* 493 at 506-510.

the text (and its context), the interpreter and the community. Intention, although at times important, does not determine meaning.⁶¹ The meaning of a text is disconnected from what it meant to its author and can - also in the legal context - mean something which is not identical to what it meant to its author (because of the iterability of language).⁶² This necessarily implies that the interpreter is responsible for what the law should become as meaning is never just 'there' for us to grab.⁶³ This responsibility is, in the South African context, a responsibility to memory, to the injustices perpetrated in the name of apartheid. This responsibility is not in the first place to the legal system, but to the parties that appear before the judge.⁶⁴ As the past cannot simply be recollected, a degree of invention is always involved in legal interpretation. This again points to the responsibility of the judge for his or her projection of the good embodied in the norms of the legal community.⁶⁵ As interpretation cannot be said to be mere calculation, it follows that those standing before the law should not be turned into objects by simply subsuming them under the ('existing') universal norm. Justice, in this model, is concerned only with the 'generalised other' and neglects the 'concrete other'.⁶⁶ The silent background norm of the dominant perspective is used to view the other from. An ethics of care, on the other hand, requires us 'to view each and every rational being as an individual with a concrete history, identity and affective-emotional constitution'.⁶⁷ The perspective of the other thus needs to be taken.⁶⁸

'It is quite an easy and safe thing to ensconce oneself in the universalising modes of thought, and to disregard or reappropriate within one's own point of view that which would appear to be other. It is quite another thing to try to think from the position of the other, a project which involves subordinating one's own certainty and personal boundaries to a different set of norms, experiences and expectations. Clearly, such an attempt can never be totally successful because total success would involve the erasure of our own history as subjects: I cannot simply step out of my own history, though by recognising its situatedness and the contingency of my own boundaries, I can at least use my imagination to try to step into someone else's. What is important here is that understanding of the other does not come without some sacrifice to the self. This is the necessary consequence of interactions on a subject-to-subject basis, rather than on a subject-to-object basis.'

The judgment of Marais J in the court a quo shows a willingness to take the position of the person subject to the force of the law. He attempts putting himself into the position of Sister Harkin. The following paragraph from the judgment gives an example of his approach:

'I have some difficulty in appreciating why Constable Nel found it necessary to persist in attempting to strike the man whom sister Harkin attempted to prevent him from

61. See De Ville 1997 *SAPL* 506.

62. Cornell 1988 *Univ Penn LR* 1221.

63. See De Ville 1997 *SAPL* 510-513.

64. Cornell *The Philosophy of the Limit* 143.

65. Cornell *The Philosophy of the Limit* 118.

66. Will Kymlicka *Contemporary Political Philosophy: An Introduction* (1990) 272.

67. Kymlicka *Contemporary Political Philosophy* 273.

68. See also Martha Minow 'The Supreme Court 1986 Term Foreword: Justice Engendered' 1987 *Harvard LR* 10; and Stuart Woolman 'Out of Order? Out of balance? The limitation clause of the final Constitution 1997 *SAJHR* 102 121-128.

striking. On his own version the man was attempting to disperse. Indeed, Nel was trying to catch up with him. Nel's explanation, namely that he did not wish him to run in the direction in which he appeared to wish to run, but in another direction, makes little sense to me. If that was indeed Nel's object I do not understand why he did not tell him that that was what he wanted him to do. How else would the man in question know that the direction in which he had chosen to run was not to Constable Nel's liking and how would striking him indiscriminately with the quirt assist in that realisation dawning upon him? It is not a matter for surprise that in the circumstances Sister Harkin took exception to what must have appeared to her as a gratuitous assault.'

His reading of the law is consequently such that it includes protection for those suffering from the attempts of the apartheid government to crush all traces of opposition (through his recognition of 'consideration of relevant considerations' as an independent requirement of legality). By contrast, Hefer in the Appellate Division sees no need to take the perspective of Sister Harkin. For him, it is simply a matter of the law that has to be applied. Through (cold) citation of precedent and analysis he explains the meaning to be attached to the provision concerned. There is no attempt to place himself into the position of sister Harkin or of the man being assaulted through the force of law.⁶⁹ For him the other (traces of opposition to the government of the day) is not included within the protection the law offers. The law does not and need not protect them. Hefer JA does not see or refuses to see the oppression perpetuated by the principle he adopts.

In taking a decision, one of the different perspectives/normative visions of the good necessarily has to be deligitimated. The perspective of the other can, in other words, not always be adopted in framing legal rules/principles. The need to deligitimate one of the conceptions of the public good is required because of the fact that the judge/bureaucrat/legislature is not only faced with the other. Cornell explains that -

'[t]he entry of the third is inevitable, and with the entry of the third comes the need to make comparisons and to synchronize the competing demands of individuals within the space of a given legal system.'⁷⁰

The third here refers to *sittlichkeit* - the embodied norms of the community (our shared ethical order). In other words, the paradoxical paradigm of every ethical decision is that in the singular decision there is a demand by the Other. To, however, give in to this demand would lead to the 'sacrifice' of all the other others.⁷¹ An analogy is to be found in the story of Abraham having to sacrifice his son Isaac, Abraham taking the position of the self, God that of the Other and Isaac that of the other others.⁷²

Cornell explains that as all claims cannot be vindicated, we need legal principles in order to guide us through the maze of competing legal interpretations.⁷³ These principles cannot give us a single correct answer but they can help us decide which answers would be

69. As Marais J showed in the judgment *a quo*, this is possible even when the court (in motion proceedings) has at times to accept the version of the facts relied on by the respondent where it conflicts with that of the applicant.

70. *The Philosophy of the Limit* 105.

71. John D Caputo (ed) *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (1997) 139.

72. See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) which gives a vivid example of this triad.

73. *The Philosophy of the Limit* 105.

wrong.⁷⁴ These principles are embedded in our legal order. In order to guide us in choosing between principles and assist us in interpreting the principles we choose, we need a conception of community. Cornell proposes a conception of community which is based on reciprocal symmetry. This type of community calls for respect of the individual as individual as an equal, as a citizen. This can be translated into the principle of nonsubordination (or a nonviolative relationship towards the Other).⁷⁵ Racial discrimination (even if authorised by parliament) and the arbitrary arrest and detention of persons are radically at odds with this principle. Insofar as the law (precedent) is not in accordance with the principle of nonsubordination, a break with precedent is justified and required. The principle of nonsubordination needs to be placed within the broader perspective of the type of democratic society one believes in.

In *Dempsey* and *Jacobs* the issues turn around the question of the position of the courts vis-a-vis that of the executive (the nature of the separation of powers). To which extent should the judiciary, on review, be willing to interfere with the decisions of the executive? The question concerns the degree of deference which should be given to decisions of the executive. Hefer JA in the *Dempsey* judgment (on one reading thereof) is of the view that it is not for the judiciary to tell the executive what to take account of and what not, if parliament has not laid down explicitly the factors to be considered in the authorising Act. Botha JA in *Jacobs* however decides that the judiciary can so interfere and can even decide on the weight that needs to be attached to the different considerations in question. This raises fundamental questions as to the role of the courts within a constitutional democracy. The *Dempsey* (AD) approach is supported by a vision of *unitary democracy*. In short, this entails that all public power finds its origin in parliament. It is the role of the courts to ensure that the will of parliament is implemented. This is a matter of ascertaining the intention of the legislature.⁷⁶ This can be said to have been the dominant approach in South African law pre-1994. The *Jacobs* and *Dempsey* (a quo) judgments can be seen as (partly) based on a *civic republican* model of democracy.⁷⁷ This model (at least according to some adherents) rejects the view that the role of the courts is to ascertain the intention of parliament. In adjudication, competing interpretations of legal texts should be resolved with reference to that which best promotes the common good. The latter is, in the light of the above discussion, to be conceived of as an openness to otherness. The common good is not to be regarded as an objective foundation on which to base adjudication. Rather it should be seen as always open to interpretation, in other words open to the dialogical questioning of the interpretive process.⁷⁸ Because interpretation takes place through application within an interpretive community and not through atomistic interpreters, the common good cannot be regarded as an empty concept which can be filled with any meaning the interpreter chooses. The common good, although a concept with an indeterminate meaning, has a determinate meaning within each concrete context because of the continuing dialogue between text, interpreter and community.⁷⁹ The responsibility of the courts within this approach is a much broader one than within that of a unitary democracy. The idea of deference towards

74. Cornell *The Philosophy of Limit* 106.

75. Cornell 1988 *Univ Penn LR* 1219; Cornell *The Philosophy of the Limit* 13.

76. Craig *Administrative Law* 3d ed (1994) 4-9.

77. See also *Applicant v Administrator, Transvaal, and Others* 1993 (4) SA 733 (W).

78. Stephen M Feldman 'Republican Revival/Interpretive Turn' 1992 *Wisconsin LR* 715.

79. Feldman 1992 *Wisconsin LR* 716.

executive decisions (especially in instances where the principle of nonsubordination is not adhered to) would, in accordance with this view, constitute an abdication of responsibility on the part of the judiciary.⁸⁰

6. Conclusion

The Administrative Justice Bill is currently before Parliament. In interpreting and applying this law care should be taken not to simply perpetuate the visions of a unitary democracy within a new constitutional dispensation. Within this model, judges and bureaucrats bear no responsibility for their interpretation and application of the law as they are simply implementing the wishes of parliament. Instead, in accordance with republican theory, the courts have a fundamental role to play as one of the forums where dialogue is to take place as to the best vision of the common good, a vision where the individual is not to be treated as an object of bureaucratic decision-making.

Postscript

Sister Clare Harkin was released after 17 days in detention. She returned to her work in Guguletu a few weeks after having been released. The police continued harassing her. She was arrested again for participating in peaceful protests, but always detained for only a few hours without being charged of any offence. At the time of writing she was living in Stellenboch. Haneen and I had the unforgettable experience of meeting her in person.

80. Minow 1987 *Harvard LR* 83.