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CONSTITUTIONAL AND NATIONAL LAW IMPERATIVES IN SOUTH AFRICA**

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## ALIGNMENT OF STUDENT DISCIPLINE DESIGN AND ADMINISTRATION TO CONSTITUTIONAL AND NATIONAL LAW IMPERATIVES IN SOUTH AFRICA

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### 1 Introduction

Higher Education Institutions (hereafter HEIs) have a particularly important role to play in the development of a constitutional state in South Africa and the broader continent of Africa in two critical ways. Firstly, HEIs can contribute as educators of students and the public through the production of knowledge, which forms part of the core business and primary function of universities. Secondly, HEIs make a contribution as employers and managers of the human resources and students in their fold. The administration of work-place and student discipline provides a real litmus test measuring universities' respect for and promotion of the fundamental human rights of individuals and groups of people under their care.

The design of standards and the administration of discipline in general often involve an exercise of power, and such matters are one of the closely guarded territories in companies and organisations.<sup>1</sup> The South African history of political governance has taught us that if the exercise of power is not sufficiently and properly regulated, it can lead to the abuse of power, corruption, and the exploitation of the vulnerable. It is now a requirement of law that the exercise of administrative action and the conduct of administrators must be in accordance with the prescripts of the *Constitution*.<sup>2</sup> The hallmark of the *Constitution*<sup>3</sup> is the protection of the rights of the vulnerable in particular, and the entrenching of a culture of respect for and promotion of human rights at any level of the nation's life.<sup>4</sup>

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<sup>1</sup> Grogan *Workplace Law* 90.

<sup>2</sup> Burns and Beukes *Administrative Law* 27.

<sup>3</sup> *Constitution of the Republic of South Africa*, 1996. Reference hereafter: *Constitution*.

<sup>4</sup> Burns and Beukes *Administrative Law* 28. The authors further argue that the effect of the supremacy of the *Constitution* is that the state is obliged to respect, protect and fulfill the rights

Promotion of and respect for a culture of human rights have been made possible through a new constitutional order which has established constitutional supremacy<sup>5</sup> as opposed to parliamentary sovereignty.<sup>6</sup> Hoexter<sup>7</sup> comments that today there is an array of provisions, including a justiciable Bill of Rights,<sup>8</sup> whose effect is to assist the *Constitution* to express its commitment to an "efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public."<sup>9</sup>

Administrators of student discipline, as further explained in 3.3 below, are allowed to exercise discretionary powers in the administration of student discipline. However, this discretion can be exercised only within the confines and context of applicable national law<sup>10</sup> and the *Constitution*.<sup>11</sup> The use of administrative discretion may result in the limitation of rights in certain circumstances.<sup>12</sup> It is important to note that while

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contained in the Bill of Rights, and does this by ensuring that the rights are not unconstitutionally limited.

<sup>5</sup> Section 2 of the *Constitution* clearly establishes the supremacy of the *Constitution* by providing that "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." According to Burns and Beukes *Administrative Law* 27, "conduct" in this sense includes the exercise of administrative action.

<sup>6</sup> Currie and De Waal *Bill of Rights Handbook* 3 define parliamentary sovereignty to mean that "Parliament could make any law it wished and no person or institution (including the courts) could challenge the laws of Parliament."

<sup>7</sup> Hoexter *Administrative Law* 14.

<sup>8</sup> Justiciability has been defined to refer broadly to the amenability of a dispute to adjudication and its capability of being resolved by the application of legal principles; thus, a justiciable Bill of Rights is one that may be pronounced upon by the courts of law. See Hoexter *Administrative Law* 14.

<sup>9</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 133.

<sup>10</sup> The relevant legislation includes the *Promotion of Access to Justice Act* 3 of 2000 (hereafter PAJA), which is explained in depth in 3.3 below. There is also the *Promotion of Access to Information Act* 2 of 2000 (hereafter PAIA); see 3.2 below.

<sup>11</sup> Several provisions of the *Constitution* are of significance to administrative law and to the conduct of administrative action. Such provisions include but are not limited to s 34, which confers a right to have disputes settled by a court or other independent forum or tribunal, s 32 which confers a right of access to information to be discussed in more detail in 3.3 below, s 38 which allows wide standing to enforce constitutional rights and rights to just administrative action in s 33, which are considered most important in this context. See Hoexter *Administrative Law* 15. Also see a detailed explanation in 3.3 below.

<sup>12</sup> Such circumstances include one which will be discussed in 2.3 below, which is the right to legal representation. The right has already been held not to be a *sine qua non* of a fair hearing and can be limited through qualification. Some universities choose to limit representation to representation by staff and students of that university only. See *Hamata v Chairperson Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 449 (SCA) para 11, where Marais JA went as far as even as to state that "there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness."

the purpose of making the Bill of Rights justiciable is to ensure that rights are not unconstitutionally limited, not all rights are absolute and without limit. According to Burns and Beukes, apart from the general limitation clause in section 36 of the *Constitution*, there are other ways in which rights can be limited without transgressing constitutional principles.<sup>13</sup>

It is however, important to point out that section 33 of the *Constitution* and the PAJA<sup>14</sup> have put safeguard measures in place to ensure that the use of discretion and the limitation of rights must pass constitutional muster. To this end, administrative action, in order to qualify as just, must satisfy the requirements of lawfulness,<sup>15</sup> procedural fairness<sup>16</sup> and reasonableness.<sup>17</sup> Through section 33 of the *Constitution* and the provisions of PAJA, anyone who feels aggrieved by administrative action has a remedy through seeking judicial review. The right of access to the courts in section 34 enhances the possibility of judicial review for those whose rights could have been violated by an exercise of administrative action.

This article will start off by clarifying whether private and public HEIs are subject to administrative action and judicial review. It will also identify about five major constitutional principles which the administration of student discipline at HEIs must meet to stand any constitutional test. The adequacy of relevant legislation in guiding the design and administration of student discipline will also be considered. Possible

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<sup>13</sup> Burns and Beukes *Administrative Law* 54. The authors list about three instances of the limitation rights in the Bill of Rights, in addition to s 36. The first refers to inherent limitations where rights are limited by the rights of others. The second refers to special limitation, for example, apart from s 36, the right to freedom of expression in s 16 is subject to special limitation, namely the prohibition of propaganda for war, the incitement of imminent violence or the advocacy of hatred. The third instance touches on internal modifiers. For example, the right to assembly and demonstration in s 17 is qualified by the words *peaceful and unarmed*.

<sup>14</sup> PAJA will be discussed in detail in 3.3 below.

<sup>15</sup> Burns and Beukes *Administrative Law* 50. According to the authors, the concept lawfulness or lawful administrative action should be interpreted to include compliance with the *Constitution*, with enabling legislation and with the rules of common law. In essence lawfulness is an umbrella concept encompassing all of the necessary requirements for valid administrative action.

<sup>16</sup> Procedural fairness has to do with the observance of the rules of natural justice, which are aimed at achieving a minimum standard for fair administrative hearings and inquiries. They ensure that the administrative body/administrator applies its mind to the matter by adhering to certain procedural requirements, by acting fairly, and by giving the individual an opportunity to be heard. See Burns and Beukes *Administrative Law* 51. The concept is further explained in 3.3 below.

<sup>17</sup> *Pharmaceutical Manufacturers Association of SA In Re: Ex parte Application of President of SA* 2000 3 BCLR 241 (CC) para 85. The Constitutional Court ruled that reasonableness or rationality is now a minimum threshold for the exercise of all public power. The *Constitution* in s 33 now requires administrative action to be reasonable. In other words, it should be rational and justifiable.

challenges will be highlighted in the light of case law. The article will conclude with proposals for law reform and general recommendations to improve the administration of student discipline at HEIs in South Africa.

## 2 Are HEIs subject to administrative action and judicial review?

There exists a debate around whether HEIs fall under the purview of administrative action and are subject to judicial review.<sup>18</sup> The debate is located within the broader context of privatisation and the public/private distinction debate. Hoexter states that South Africa has begun to follow the lead of other countries that have privatised or contracted out some of the functions traditionally performed by government, which can include education, and the provision of water and electricity, for the purposes of improving efficiency in service provision.<sup>19</sup>

While it may be less debatable that public HEIs which receive funding from the state are subject to administrative law and judicial review,<sup>20</sup> debates can arise when it comes to private HEIs. There is a traditional, liberal theory of the state which argues for a clear distinction between the public realm and the private. The theory holds that while governments must be accountable for the exercise of public power, private individuals and entities ought to be free to pursue their own economic and social interests with minimal government interference.<sup>21</sup> There is also one other view which sees the relationship between either private HEIs or public HEIs and a student as a contractual relationship.<sup>22</sup> Lewis is of the view that the student on registration or payment of fees enters into a contract with the university whereby he agrees to be bound by its statutes, rules and regulations.<sup>23</sup> There are merits in this argument, when one considers the fact that a student pays tuition fees for academic service,

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<sup>18</sup> HEIs fall into what the *Higher Education Act* 101 of 1997 (hereafter HEA) categorises as "public" HEIs and "private" HEIs.

<sup>19</sup> Hoexter *Administrative Law* 147.

<sup>20</sup> See *Hamata v Chairperson Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 449 (SCA) para 11, where the court held that quasi-judicial proceedings such as a disciplinary hearing can be classified as an "administrative proceeding in the most general sense."

<sup>21</sup> Hoexter *Administrative Law* 149.

<sup>22</sup> Lewis 1983 *Ottawa L Rev* 249-273. Also see De Ville *Judicial Review* 238. The author states that the relationship between a tertiary institution and a student is a contractual one. However, he argues that the requirements of procedural fairness are applicable to decisions of these institutions where such decisions affect the rights or legitimate expectations of students or employees.

<sup>23</sup> Lewis 1983 *Ottawa L Rev* 254.

even in circumstances where a government loan funds the studies of a student who cannot otherwise afford them.

According to Lewis,<sup>24</sup> it is debatable if contractual principles alone are capable of explaining all of the aspects of this complex relationship. It can be argued that a contractual relationship between students and HEIs provides a mechanism for subjecting students to university regulations and discipline. While that may be true, a student certainly possesses a status in respect of which public law principles and constitutional remedies are more appropriate.<sup>25</sup> In this context it is vital to note that in South African law, a legal entity "does not have to be part of government itself to be bound by the Constitution."<sup>26</sup> In fact sections 8(1) and (2) of the *Constitution* bind all of the three spheres of governance in a state<sup>27</sup> as well as natural and juristic persons "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed..."<sup>28</sup> Hoexter makes an important point when she argues that even a wholly private body could qualify as an organ of state under section 239, and action taken by it could then be challenged under the Bill of Rights, including section 33, if the action qualified as administrative action.<sup>29</sup>

There is surely no escaping the requirement of just administrative action in this regard by HEIs, whether private or public. In addition to sections 8, 33 and 239 of the *Constitution*, PAJA defines an "empowering provision"<sup>30</sup> to include "an agreement, instrument or other document."<sup>31</sup> De Ville makes a significant point when he argues that even if it were accepted that the disciplinary proceedings of voluntary (including

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<sup>24</sup> Lewis 1983 *Ottawa L Rev* 254.

<sup>25</sup> Lewis 1983 *Ottawa L Rev* 254.

<sup>26</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2006 11 BCLR 1255 (CC) para 40.

<sup>27</sup> This refers specifically to the legislature, the executive and the judiciary, and also includes organs of the state.

<sup>28</sup> Of added significance is s 239 of the *Constitution* which defines an organ of state to include not only the national, provincial and local departments of state or administration, but also "any other functionary or institution ... exercising a public power or function" in terms of the *Constitution*. It becomes important to note that public HEIs are established by means of legislation (statutes) and they are empowered to exercise a public function within a state.

<sup>29</sup> Hoexter *Administrative Law* 152.

<sup>30</sup> Section 1 of the PAJA defines an empowering provision to mean "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken."

<sup>31</sup> Section 1(b) of PAJA and also see the definition of an "empowering provision" in the same section.

private) organisations do not qualify as administrative action, such actions would nevertheless still be subject to review on the basis of common law administrative principles.<sup>32</sup> Some of the common law principles such as lawfulness and the rules of natural justice have now been subsumed by the *Constitution* and are reflected in PAJA, which gave effect to section 33 of the *Constitution*.<sup>33</sup>

Characterisation of HEIs as either public or private is therefore not as relevant and significant as what these institutions do. In the context set out above, although public HEIs acquire jurisdiction over students by means of a contract,<sup>34</sup> they are created by statutes and perform a public function through providing higher education service to citizens or the public. Secondly it is important to note that PAJA does not confine the definition of administrative action to decisions by public bodies. The Act applies to natural persons and private entities.<sup>35</sup> That gives weight to the argument that HEIs are subject to the constitution and judicial review with respect to administrative action. What is relevant is the public nature of the power exercised by an HEI or any other legal entity, rather than the entity or person exercising it,<sup>36</sup> and as long as it can potentially implicate or affect constitutionally entrenched rights.

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<sup>32</sup> De Ville *Judicial Review* 50.

<sup>33</sup> *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of South Africa* 2000 2 SA 674 (CC) para 33. The Court held that "The common law principles that previously provided grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution."

<sup>34</sup> See *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (Ck); *Mkhize v Rector, University Of Zululand*, 1986 1 SA 901 (D); *Lunt v University of Cape Town* 1989 2 SA 438 (C); *Durr v Universiteit van Stellenbosh* 1990 3 SA 598 (A) 609A-G; *Tyatya v University of Bophuthatswana* 1994 2 SA 375 (BG).

<sup>35</sup> See s 1(b) of PAJA. Also see *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC), where the court commented that what counts in determining the scope of the public-law control of power is not the functionary but the function, and whether or not something is administrative action depends on the nature of the power that is being exercised.

<sup>36</sup> Currie and De Waal *Bill of Rights Handbook* 658.

### 3 Constitutional and national law imperatives which student discipline must meet

#### 3.1 *Participatory democracy*<sup>37</sup> in the administration of student discipline

Chapter 4 of the HEA places student discipline at the heart of public institutions' governance matters. As such, section 32 of the Act provides for participatory democracy in this way:

... the disciplinary measures and disciplinary procedures relating to students, may not be made except after consultation with the senate and the students' representative council of the public higher education institution concerned ...<sup>38</sup>

This provision is one of two of the most relevant provisions regulating the design of disciplinary measures and the administration of student discipline at public HEIs and FETs in South Africa. It is clear from this provision that students, through their democratically elected leadership, are expected to participate in rule-designing and disciplinary proceedings which affect their rights. It must be stated that once participatory democracy is achieved, an HEI is empowered to take action against offending students subject to certain constitutional requirements such as procedural fairness, which ensures a fair hearing.<sup>39</sup>

#### 3.2 *Students' right to information*

The *Constitution* requires courts of law to interpret legislation and any right in a manner which promotes the spirit, purport and objects of the Bill of Rights.<sup>40</sup> The

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<sup>37</sup> Participatory democracy is a process emphasising the broad participation of constituents in the direction and operation of a system of governance. It strives to facilitate opportunities for the governed to make meaningful contributions to decision-making which affects them, and seeks to broaden the range of people who have access to such opportunities.

<sup>38</sup> Section 32(2)(d) of the HEA.

<sup>39</sup> *Phillips v Manser* 1999 1 All SA 198 (SE). The court in this case had to decide on the question of if there was fair hearing in the disciplinary procedure followed by a school disciplinary committee in deciding to expel a student who had violated school rules. Also see *Maritzburg College v Dlamini* (2005) JOL 15075 (N).

<sup>40</sup> Section 39(2) of the *Constitution*.



right of access to information needs to be given an expansive and purposive reading to include a general right to information for students.<sup>41</sup>

### 3.2.1 *Right of access to empowering information*

There is a constitutional right of access to information,<sup>42</sup> which has been given effect to PAIA.<sup>43</sup> The constitutional right is premised on the need to promote the enjoyment of human rights through empowering individuals with the information necessary for the protection of their rights and the promotion of a human rights culture, and ensuring social justice. The PAIA aims at promoting transparency, accountability, and the effective governance of public and private bodies.<sup>44</sup> It can be argued that HEIs fall under the purview of the purpose of the PAIA.<sup>45</sup>

There is an implied legal responsibility on administrators of HEIs to ensure that students are given access to the information necessary for the protection and advancement of their rights as soon as they join an institution as first-year students and at registration thereafter at the beginning of each new academic year. There is access to information which should be given without the student having to ask for it, which must be mandatory by its nature, such as the disciplinary code and policies. HEIs can creatively seek ways to promote access to the rules and policies by their students. One of the best creative ways of doing this is to run educational programmes during the orientation programmes of the universities, and awareness programmes such as the "Know your rights and responsibilities" campaign run by universities such as Fort Hare and the University of the Western Cape.

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<sup>41</sup> Section 2(1) of the PAIA provides for purposive and expansive interpretation as follows: "When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects."

<sup>42</sup> See s 32, which provides for the right of access to information held by the state, and by any other person (including private bodies), where the information is necessary for the protection of any rights. The right also makes provision for legislation (PAIA) to be passed to give effect to the constitutional right.

<sup>43</sup> *Promotion of Access to Information Act 2 of 2000.*

<sup>44</sup> See s 9(e), which gives the following as part of the PAIA's objects, ie "...generally, to promote transparency, accountability and effective governance of all public and private bodies..."

<sup>45</sup> It is not necessary to canvass again the issue of whether HEIs are public or private for the purpose of the PAIA. It has been demonstrated in 2 above that HEIs, which are created by statute, perform a public function such as offering citizens education. The objects of the PAIA are also clearly stated in s 9(e). It applies to both public and private bodies.

### 3.3 *Right to procedural fairness and administrative justice*

The administration of school discipline is classified as administrative action.<sup>46</sup> It falls squarely under the purview of the PAJA as well as section 33 of the *Constitution*, both of which will be explained further below. According to *Despatch High School v Head, Department of Education, Eastern Cape*,<sup>47</sup> the disciplinary function of a public institution is clearly an exercise of a public function or public power in terms of an empowering provision.<sup>48</sup> In giving effect to the section 33 right, the PAJA concerns itself primarily with administrative justice within the context of a "decision of an administrative nature."<sup>49</sup> The "decision" is defined in the act to include "imposing a condition or restriction."<sup>50</sup> In the administrative work of HEIs and FETs this should include decisions of a quasi-judicial nature, like student disciplinary actions.<sup>51</sup>

It is imperative that student disciplinary actions and decisions should comply with the *Constitution* and the PAJA. The constitutional right in section 33 includes a student's right to procedurally fair administrative action. The right entrenches the common law right to natural justice, which is crystallised into two maxims, the *audi alteram partem*<sup>52</sup> and the *nemo iudex in sua causa*<sup>53</sup> rules.

<sup>46</sup> Administrative action means a decision or proposed decision, of an administrative nature, made under an empowering provision by an organ of state or private body when exercising a public power or function, that adversely affects rights, which has direct legal external effects. See s 1 of PAJA.

<sup>47</sup> *Despatch High School v Head, Department of Education, Eastern Cape* 2003 1 SA 246 (Ck).

<sup>48</sup> The empowering provision being the HEA and more specifically the institutional statute which gives effect to the Act in accordance with s 32(1)(a) of the HEA. An empowering provision includes also any agreement (contract) or legal document upon which an administrative action is purportedly taken, which can potentially include disciplinary codes.

<sup>49</sup> Currie and De Waal *Bill of Rights Handbook* 655 distinguish South African administrative law from Australian law, which does not apply to decisions of a judicial character or of a "quasi-judicial" character. The authors go on to make a point about giving "decisions of an administrative nature" an expansive meaning. On 656 they remark that "Reading 'decisions of an administrative nature' too narrowly would mean that the PAJA does not give effects to the constitutional rights."

<sup>50</sup> Section 1(d) of PAJA.

<sup>51</sup> There is authority to support the contention that reading "decisions of an administrative nature" too narrowly would mean that the PAJA does not give full effect to the constitutional right. See Currie and De Waal *Bill of Rights Handbook* 656.

<sup>52</sup> This means a fair hearing to the accused by decision-makers prior to the decision's being made. Simply put, it means "hear the other side".

<sup>53</sup> This translates to mean the decision-making must be and must be perceived to be impartial. In other words, it means a person cannot be a judge in his own case. It forms part of the heart of procedural fairness in disciplinary hearings.

The right to fair procedure in the context of student discipline at HEIs will include not only the procedure to be followed during the disciplinary proceedings or hearings. Firstly, there is an unwritten rule which compels university governing bodies to ensure that an ascertainable disciplinary code (which includes conduct, rules and procedures) should be made available and accessible to students as soon as they join the university as first-year students. Thereafter, the code should be ordinarily made available to students at the beginning of the academic season. Secondly, the PAJA makes it a compulsory requirement that the following elements be complied with; adequate notice of hearing, preferably in writing, the granting of an opportunity to the accused to make representations, which should ordinarily include a right to appear in person, to adduce evidence and call witnesses during the hearing, a clear statement of the outcome of the proceedings, with reasons for the decision, and notice of the right of review or internal appeal.<sup>54</sup>

Of significance to this section is the right to legal representation, which is highly contested in matters touching administrative law and administrative action. It appears from the wording of the PAJA that the Act does not *per se* recognise an automatic right to legal representation in administrative proceedings, but makes the right appear like a discretionary element of the Act. In fact legal representation is made circumstance-based, and reserved for serious and more complex cases in which the administrator is given the discretion when it appears necessary to "...give effect to the right to procedurally fair administrative action".<sup>55</sup>

In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* the court appears to be confirming the discretionary powers enjoyed by domestic or internal disciplinary forums on whether or not to allow legal representation. Even though the court ruled that the internal disciplinary committee failed to exercise its discretionary powers, thereby prejudicing the appellant, Marais JA accepted that there was nothing wrong with the university rules stipulating who it allowed to appear as legal representatives for accused students before the tribunal.<sup>56</sup> The court also

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<sup>54</sup> See s 3(2)(b) of PAJA.

<sup>55</sup> Section 3(2).

<sup>56</sup> *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 449 (SCA) para 18.

ruled that legal representation is not necessarily a *sine qua non* of a fair hearing,<sup>57</sup> thus also confirming PAJA provision which require that legal representation be granted only "in serious or complex cases."<sup>58</sup>

It is important to note that while there are good reasons<sup>59</sup> why the PAJA preferred to subject the right to legal representation of one's choice to an administrator's discretion, it could have opened the use of the discretion to abuse by fashioning the right in too broad terms, raising fears of "unfettered discretion."<sup>60</sup> For example, if there is bad blood between an administrator who must exercise the discretion and an accused student, if the administrator fails to be objective by exercising restraint and uses an ulterior motive<sup>61</sup> to refuse granting the discretion when it is due, then that will amount to an abuse.<sup>62</sup> However the use of discretion can have advantages if properly understood and utilised. For example, it has been held that "discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."<sup>63</sup> However, Burns and Beukes express the opinion that disciplinary hearings usually involve serious charges and the consequences of conviction are harsh. They therefore hold the view that discretion must be used wisely, with the result that legal representation in such situations must be the practice rather than the exception.<sup>64</sup>

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<sup>57</sup> In *Cupan v Cape Display Chain Services* 1995 5 BCLR 598 (D) the court held that legal representation is a *sine qua non* of a fair hearing in complicated matters only, not in relatively simple ones.

<sup>58</sup> Section 3(3)(a) of PAJA.

<sup>59</sup> Hoexter *Administrative Law* 46 argues that one of the values of using discretion is that it enables general rules to be fleshed out with details where necessary, allows gaps in law to be filled, and introduces an element of flexibility to what would otherwise be rigid rules.

<sup>60</sup> See Hoexter *Administrative Law* 46. The *Constitution* requires some constraints on broad discretionary powers to minimise danger of the violation of human rights.

<sup>61</sup> According to Burns and Beukes *Administrative Law* 367, an "ulterior motive" relates to the subjective frame of mind of the administrator and could imply a dishonest frame of mind or even a sinister motive.

<sup>62</sup> Section 6(2)(e)(ii) of the PAJA provides that administrative action taken for ulterior purposes or motives is subject to judicial review. It provides thus: "A court or tribunal has the power to judicially review an administrative action if ... (e) the action was taken ... (ii) for an ulterior purpose or motive".

<sup>63</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 53.

<sup>64</sup> Burns and Beukes *Administrative Law* 232.

### 3.4 Independence and independent decision-making

There is a need to separate independence from independent decision-making capability with respect to internal disciplinary tribunals.<sup>65</sup> Independent decision-making of the student tribunal can be regarded to be a *sine qua non* of procedural fairness and administrative justice. This is true in spite of the fact that the *Constitution*<sup>66</sup> does not generally expect and require other tribunals and forums to be as independent as courts of law.<sup>67</sup> Nonetheless, student tribunals are expected to apply applicable rules and procedures to a set of facts objectively and advance the spirit, purport and object of the Bill of Rights in coming to a decision in a case presented before them.<sup>68</sup>

The student tribunals or courts must be sufficiently free of any outside influences to allow them to objectively make a decision based only on the facts of the matters before them.<sup>69</sup> Fair hearing includes an independently made decision and is a cornerstone of our young democracy. Independence, for a tribunal, means for example that a Professor of law who normally chairs the hearings of a Student Court or Disciplinary Committee has to recuse himself from a case if he has sufficient interest in the matter to cloud his judgment, or if he is the same person who has reported a case of academic dishonesty to the Proctor or Judicial Officer.<sup>70</sup> The principle that one cannot be both an accuser and a judge in the same case applies

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<sup>65</sup> The difference between the two is that while courts of law have no relationship with parties to a case (are independent in that sense) internal tribunals are composed of staff members who are employed by the company or institution and receive their remuneration from such an institution.

<sup>66</sup> See s 165. However, s 34 requires not only courts of law to be independent and impartial in making decisions in legal disputes, but the same is expected of tribunals, which include student disciplinary courts/committees.

<sup>67</sup> See also Currie and De Waal *Bill of Rights Handbook* 723.

<sup>68</sup> To this end courts or higher tribunals with the power of review are enjoined by s 6(2)(a)(iii) to review decisions by an administrator/tribunal where there was bias or reasonable suspicion of bias. Burns and Beukes *Administrative Law* 302 call this a "rule against bias."

<sup>69</sup> In *Yates v University of Bophuthatswana* 1994 3 SA 815 (BG) 831, the court said that "administrative action must not be vitiated, tainted or actuated by bias". Also see *BTR Industries SA (Pty) Ltd v Metal and Allied Workers Union* 1992 3 SA 673 (AD) 90; *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (C). The court detected actual bias in both cases.

<sup>70</sup> See *Bam-Mugwanyanya v Minister of Finance and Provincial Expenditure, Eastern Cape* 2001 4 SA 120 (Ck) 131. The court ruled that where there is a perception of bias in the minds of ordinary people, the applicant would be "unable to participate in the deliberations of the tender board in an objective and unbiased manner."

also to disciplinary proceedings. It is at the heart of natural justice and it is also a rule of fair hearing.<sup>71</sup>

#### 4 Current challenges of student discipline administration

##### 4.1 Gaps in empowering provisions in the administration of discipline

The HEA is of great significance in terms of regulating the affairs of HEIs. However, the notable deficiency of the HEA is that it does not provide adequate guidelines for the regulation of student disciplinary procedures at HEIs. There are only two sections dealing with student discipline at public HEIs. Section 32 simply provides for the creation of disciplinary measures and procedures through institutional statutes and student participation in the processes. Section 36, which is interestingly subtitled "Disciplinary Procedures," merely provides that students at HEIs are bound by measures and procedures prescribed in the institutional statutes.<sup>72</sup>

The argument in this paper is not necessarily that the HEA should provide a model disciplinary code, as in the case of a model HEA Standard Institutional Statute<sup>73</sup> (hereafter the HEA SIS), which has been adopted by most public HEIs in South Africa.<sup>74</sup> It is acknowledged that various public HEIs have unique backgrounds and there are peculiar circumstances which must be provided for in the disciplinary codes of various public HEIs. Homogeneity is not always the solution to the disciplinary challenges faced by different institutions, and the particularities of the institutions must be left to the specific codes to deal with. However, in our view, there is a duty on a national legislation to deal with overarching principles which are of generic application to all public HEIs. For example, just as the *Labour Relations Act*<sup>75</sup> contains a *Code for Good Practice* in Schedule 8,<sup>76</sup> the HEA or the HEA SIS could

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<sup>71</sup> De Ville *Judicial Review* 274-275 points out to the difficulties in proving bias in hearings. The test entails that both the person alleging bias and the "apprehension of bias" must be reasonable.

<sup>72</sup> Section 36 only provides thus: "Every student at a public higher education institution is subject to such disciplinary measures and disciplinary procedures as may be determined by institutional statute subject to s 32(2)(d)."

<sup>73</sup> GN 377 in GG 23065 of 27 March 2002.

<sup>74</sup> GN 195 in GG 23132 of 15 February 2002 (hereafter the Wits Statute), which follows exactly the style of the HEA SIS, even with respect to student disciplinary provisions.

<sup>75</sup> *Labour Relations Act* 66 of 1995.

<sup>76</sup> Grogan *Workplace Law* 168.

also have a code of Good Practice: Student Discipline. Within that code of good practice, guidelines could be provided on common disciplinary offences such as plagiarism, student violence, dishonest conduct, the use of discretionary powers by the tribunals, procedural matters including how to deal with students' rights in hearings, like the contentious issue of legal representation,<sup>77</sup> student disruptions and protest actions. The guidelines can also leave room for flexibility in the manner in which HEIs choose to implement such minimum standards.

It is to be noted that the PAJA in section 3(5) envisages the use of a procedure or guidelines from an empowering provision other than the PAJA. It has been contended that as long as such a procedure is "fair" it may be followed to the exclusion of the procedures mandated or recommended by the PAJA.<sup>78</sup> Such procedural guidelines could be drafted in the form of a Code of Good Practice: Student Discipline within the HEA.

## **4.2 Comments on selected statutes and HEI's disciplinary codes**

### *4.2.1 The Standard Institutional Statute*

The main provision relating to student discipline simply provides that "The disciplinary measures and discipline provisions applicable to students are set out in the Rules and may be changed by Council after consultation with the senate and SRC."<sup>79</sup> As argued in 3.1 above, the HEA SIS could be an alternative source of the guidelines which have been proposed. As in the parent legislation, the HEA, however, there is little in the way of guidelines, standards and procedures to be found in the SIS.

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<sup>77</sup> As demonstrated in 2 above, matters such as the use of discretion to allow legal representation, for example, by internal tribunals, are not straight-forward issues. Guidance supplied by minimum guidelines could be quite helpful.

<sup>78</sup> Currie and De Waal *Bill of Rights Handbook* 668.

<sup>79</sup> See HEA SIS s 60(1).

#### 4.2.2 A few examples of HEIs statutes and disciplinary codes

It will be found that most HEIs' statutes follow the example of the HEA SIS with respect to provisions for student discipline. For example, the statutes of Wits University and the University of KwaZulu-Natal's student disciplinary provisions are identical to the HEA SIS and leave it up to the institutional rules documents to flesh out how student discipline should be structured and administered.<sup>80</sup> It can be argued that HEIs have the freedom to decide on the content of their policies, regulations and disciplinary rules applicable to students as long as they are clear and meet the requirements of fairness. Despite the fact that the HEA and the HEA SIS do not contain guidelines with respect to student disciplinary procedures, the disciplinary codes of various HEIs follow similar patterns with respect to the flow of their disciplinary procedures. Common features include complaint and investigation procedures, the provision of notice to accused students, the role and composition of disciplinary tribunals, enquiry procedures and decision-making, the imposition of punishments, appeals and reviews.<sup>81</sup> The features might vary in shape and size but they commonly cover the above. It can be assumed that universities have been able to have such commonalities in disciplinary procedure features through benchmarking, because there is nothing in the HEA or even the HEA SIS to provide guidelines for the flow of disciplinary procedures.

There is no clearly discernible challenge with respect to the content or constitutionality of rules when one looks at case law on student discipline. Most challenges, it can be discerned, are mainly about procedures not having been followed by HEI's student tribunals, as was the case in *Yates v University of Bophuthatswana*,<sup>82</sup> problems with the use of or failure to properly exercise discretionary powers, as happened in *Hamata v Chairperson, Peninsula Technikon*

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<sup>80</sup> See s 37(1) of GN 195 in GG 23132 of 15 February 2002. See also s 66(1) of GN 684 in GG 29032 of 14 July 2006.

<sup>81</sup> See the University of Fort Hare 2010 [www.ufh.ac.za](http://www.ufh.ac.za). Also see the University of the Western Cape 2010 [www.uwc.ac.za](http://www.uwc.ac.za). Also see University of KwaZulu-Natal 2010 [www.ukzn.ac.za](http://www.ukzn.ac.za).

<sup>82</sup> 1994 3 SA 815 (BG) 831. The court ruled in favour of the applicant (student) because the university tribunal had not followed acceptable procedures and its action was deemed to have demonstrated bias against the applicant.



*Internal Disciplinary Committee*<sup>83</sup> or students' (applicants') lack of understanding of the powers or functions of internal tribunals.<sup>84</sup> Hence the need for guidelines on matters of procedure in student discipline, as is the case with workplace discipline.

## 5 Conclusions and recommendations

### 5.1 Conclusion

In this article, it has been demonstrated that HEIs are subject to just administrative action and judicial review. The basic principles which the administration of student discipline at HEIs should comply with to meet constitutional requirements for just administrative action have been established. To this extent, it has been established that administrative action should be lawful, procedurally fair and reasonable in order to stand constitutional muster. To this end this article has identified in 3.3 about four important rights provided for in the PAJA and the *Constitution* which can help to ensure that the administration of student discipline is lawful, procedurally fair and reasonable. It has also been stated that the PAJA and *Constitution* provide for judicial review if the constitutional rights to just administrative action are violated.

Case law has been cited and it has been revealed that the discernible challenges faced by institutions have much to do with procedural matters than the content of student disciplinary rules at HEIs. Relevant pieces of legislation such as the HEA have been analysed and it has been argued that there are some gaps in the HEA and in the practice of student discipline. Proposals for the improvement of the HEA and general recommendations will be made below in 5.2.

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<sup>83</sup> *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 449 (SCA) para 20. The court ruled that the domestic tribunal of Pentech did indeed have the discretion to allow "outside" legal representation but failed to use the discretion.

<sup>84</sup> In *Phillips v Manser* 1999 1 All SA 198 (SE), and *Maritzburg College v Dlamini* (2005) JOL 15075 (N), the students challenged decisions of the school disciplinary bodies because they were under the wrong assumption that the bodies were not empowered to take the decisions they took, and therefore claimed unfair hearings. The court ruled in favour of the schools in both cases.

## 5.2 *Proposed amendments of the HEA and other improvements*

### 5.2.1 *National guidelines to student discipline administration in the HEA*

Proposals are made to the reconfigured Department of Higher Education and Training to facilitate the amendment of the HEA to provide national guidelines with respect to student disciplinary procedure at South African HEIs. This can be done in the form of creating a Code of Good Practice: Student Discipline at HEIs as an appendix to the HEA. Alternatively, the amendments (including the proposed Code) can be effected in the Standard Institutional Statute.<sup>85</sup> The statute could potentially play the standard-setting role by containing the minimum standards for student discipline design and administration in South Africa. As demonstrated above, case law points to the challenges with regard to the clarity of procedures and the use of discretion by administrators.

### 5.2.2 *Self-regulation*

An alternative to national regulation in this matter would be self regulation by either NASDEV<sup>86</sup> or SAASSAP<sup>87</sup>. It is to be noted, however, that while the two bodies have made great strides in improving the development of practitioners, they haven't risen to the level where they can set national standards as envisaged above for various reasons.<sup>88</sup> Chief among these is the fragmentation and proliferation of student affairs practitioners' representation in the country, which continues to frustrate the development of national professional standards for student development in South

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<sup>85</sup> See GN 377 in GG 23065 of 27 March 2002. The HEA SIS lacks detail on student discipline, as does the parent legislation, the HEA. Section 60 of the Statute should be developed to contain national standards on student discipline as proposed above.

<sup>86</sup> The acronym for the National Association of Student Development Practitioners. Its role includes the training and development of student development practitioners at SA's tertiary institutions. It also represents those officers responsible for student discipline administration, commonly known as "Judicial Officers" at HEIs.

<sup>87</sup> This stands for the South African Senior Student Affairs Professionals. The body usually consists of senior Student Affairs officers such as Managers, Directors, Deans of Students or Deputy Vice-Chancellors.

<sup>88</sup> There is no justifiable rationale why the two organisations should exist side by side. The Department of Education and the two organisations themselves have been making efforts during the past 5 years to ensure the amalgamation of the two associations to create an umbrella body for student affairs in the country. If united the two organisations would be capable of making policy proposals to the Department of Higher Education and Training with respect to student discipline.

Africa. If NASDEV and SAASSAP are to rise to the occasion, then they will have to collaborate with interested organisations such as the South African Union of Students (SAUS)<sup>89</sup> and Higher Education South Africa (HESA).<sup>90</sup> Because of the number of stakeholders who may need to be consulted, self-regulation may prove to be a challenge, but it is still possible.

### *5.2.3 Student access to information provision in the HEA*

The HEA may also be amended to clearly provide for matters of access to information by students such as a complete Disciplinary Code with a full complement of the disciplinary rules plus access to other policies which regulate student conduct, backed by a clear disciplinary procedure. This could also form part of the Code of Good Practice proposed above.

### *5.2.4 Ministerial task team on student discipline*

The Ministry of Higher Education and Training can set up a Task Team or Ministerial Committee to carry out a study of the design of procedures and the practice of student disciplinary procedures at HEIs with a view to making proposals for amendments of the HEA as proposed above. In the past year, the Department has successfully set up a committee on Transformation, Social Cohesion and Racism<sup>91</sup> and it can do the same to achieve the above.

### *5.2.5 Public accessibility of disciplinary code documents*

It should be made a standard that documents containing procedures should be publicly accessible, that is, through the university websites. The procedures should exceed the minimum standards to be set by the amendments to the HEA as proposed.

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<sup>89</sup> An umbrella body for SRCs in South Africa.

<sup>90</sup> An association representing the Vice-Chancellors of South African universities.

<sup>91</sup> The Ministerial Committee on Transformation and Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions, which has already produced a 2008 Report. Department of Education 2008 [www.pmg.org.za](http://www.pmg.org.za).

### 5.2.6 *Mandatory training of student discipline administrators/ bodies*

It is proposed that the amendments to the HEA, especially the Code of Good Practice: Student Discipline should include standards for the mandatory training of all members of student disciplinary committees/tribunals. This implies that HEIs should ensure that administrators responsible for heading student administration are properly qualified for the role they play in guiding student discipline administration. This will prevent officials from acting *ultra vires*, and case law supports this.<sup>92</sup> Advantages would accrue to both students and HEIs. For the HEIs there will be less likelihood of their being found liable for unlawful, unreasonable or procedurally unfair administrative action.

### 5.2.7 *The student development dimension of student discipline*

Even though student discipline by its nature is inherently corrective, efforts to ensure that there is an emphasis on the developmental aspect of disciplinary procedures through deliberate efforts by relevant university departments still need to be made, given the nature of the issues commonly dealt with by disciplinary committees, such as the abuse of drugs and alcohol, violence, and academic dishonesty, patterns of behaviour which, if left unchecked, may lead in time to the commission of crimes such as fraud and other forms of dishonesty after the students have left university. HEIs can achieve student development through conducting educational programmes such as 'Awareness Campaigns' and 'Restorative Justice Programmes'. This is in line with one of the primary functions of HEIs.

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<sup>92</sup> See *Awumey v Fort Cox Agricultural College* 2003 8 BCLR 861 (Ck). The right to lawful administrative action as given effect in s 6 of PAJA encompasses the common-law requirement that an administrative organ or official who is to exercise an administrative power must not act *ultra vires* in the sense that the official who is to carry out the administrative duty must be qualified and competent to exercise the authority.

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**List of abbreviations**

HEA	Higher Education Act
HEA SIS	Higher Education Act Standard Institutional Statute
HEIs	Higher Education Institutions
Ottawa L Rev	Ottawa Law Review
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Access to Justice Act