ACCESS TO JUSTICE AND ADMINISTRATIVE LAW

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1. Background

The principle of access to justice and that of administrative law or justice are intertwined. Access to justice in this discussion will be looked at in the context of both administrative law and administrative justice. The function of administrative law is to regulate the exercise and non-exercise of power by public bodies.[1] Administrative justice on the other has been described instead of being defined. In the most basic sense, administrative justice describes the outcome of executive decisions affecting the right and liberties of the citizenry as applied through the activities of administrative authorities.[2] The difference is ultimately found in the primary focus of administrative law on judicial review as compared to administrative justice's interest in 'a much wider variety of activities and values than simply the work of the higher courts.'[3] The thread that runs through both phenomena is that of accountability; which holds those who administer justice and make decisions over other people accountable. As such, it is clear that both expressions are generally considered to include within their scope the decision making matrix by public officials and the different types of remedies, judicial and non-judicial, that citizens may use to seek redress for grievances against public authorities.

The concept of access to justice is a broad one, with implications that are far and widely reaching. Access to justice revolves around any individual's ability to be able to not only seek, but obtain a remedy for an injustice perpetrated against them. It is not restricted to access to courts or the law only because it has a much wider application than this narrow view. Access to justice encompasses formal and informal institutions of justice (which irrevocably places administrative justice within its ambit). It affects different facets of everyday life, and can be an

[1] Harlow and Rawlings, *Law and Administration*, 3rd ed (2009) Cambridge University Press, Chapter 1 and P. Craig, *Administrative Law*, 8th ed, (2016) Chapter 1. Contains some of the definitions.
[2] **R. Thomas, *Scrutinizing Administrative Justice*, Public Seminars 2010 – 11**
[3] Partington, (n 20 above) 175

undeniable tool to ensure that any individual, regardless of status, is able to enforce the rights they are allotted by virtue of them being a person. A discussion of access to justice should never be limited to accessibility to the law of administrative law only but must be looked at in a much broader manner which includes systems put in place by the State and its institutions to ensure that the ordinary people including women and children are able to vindicate the right to administrative justice without any hindrance.

2. Introduction

The purpose of this paper is to discuss access to administrative justice by the generality of the population especially the poor, the indigent, the vulnerable like women, children and the disabled. The development of administrative justice in this jurisdiction has been in lips and bounds. It started off being applied in terms of common law when the courts developed principles such as natural justice, fairness, and legitimate expectation among others. The second stage of the development was the legislation of the Administrative Justice Act in 2004. The Act essentially codifies the common law rules on administrative justice and also for the first time lays out the duties imposed on administrative authorities when they perform their administrative functions.[4] The Act however has been widely criticized for the manner in which it excuses certain State functionaries from the need to comply with the law.[5] The third development which is also the most far-reaching development of administrative justice is the legislation of s 68 of the Constitution which provides for the Right to Administrative Justice. This development is of fundamental significance to generality of the citizenry as it elevated administrative justice to the level of a fundamental human right.

[4] See section of the Act.
[5] See section 11 of the Act which provides for ouster clauses.

3. Constitutionalisation of the Right to Administrative Justice

The inclusion of the right to administrative justice as part of the bill of rights in the Constitution can only go a long way in enhancing access to justice to the generality of the public who are meant to be protected by this provision. The right is captured as follows:

68 Right to administrative justice

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

(3) An Act of Parliament must give effect to these rights, and must—

(a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;

(b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

This new constitutional order has changed the nature of administrative justice in Zimbabwe. Administrative justice, which was regulated by common law before 2004, and then through common law conjunctly with the Administrative Justice Act (AJA or the Act),[6] has now been elevated to the status of a fundamental right. This development implies that this right now occupies a much higher status than ordinary legislation like AJA. In a constitutional democracy in which the Constitution is supreme, every law and conduct must be consistent with the provisions of section 68.

[6] Administrative Justice Act [*Chapter 10:28*] 2004

MATHONSI J (as he was then) neatly set this out in the case of ***Telecel Zimbabwe (Private) Limited v Postal and Telecommunications Regulatory Authority of Zimbabwe & Ors***, where it is stated that:

> The concept of administrative justice is now embedded in our Constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised.[7]

The implications of **section 68 of the Constitution**, **2013** are fundamental and extensive. As eloquently stated by Professor G. Feltoe:

> "The constitutional guarantee opens the way to constitutional litigation based on this provision. Any ordinary legislation that is incompatible with the constitutional provision on administrative justice is now open to constitutional challenge and the Constitutional Court can now strike down any legislative provision that is in violation of this provision."

A comparative assessment of s 68 of the Constitution with other provisions of similar nature will show that it is similar or even better than the provisions on administrative justice in other jurisdictions in the region like South Africa[8], Kenya[9], Namibia,[10] and others. Zimbabwe is faring even better because unlike other jurisdictions we now have the concept of 'substantive fairness' added to 'procedural fairness' under the element of fairness. Having the best or adequate laws however is not the *sin qua non* of accessibility of administrative justice. Whilst the elevation of the right to administrative justice to a fundamental human right will have a profound positive effect on the application of administrative justice this does not necessarily mean that the right will be fully realized by the generality of the population. The state would need to perform its constitutional mandate[11]

[7] HH–446–15 (unreported).
[8] See s 33 of the Constitution of South Africa.
[9] See Article 47 of the Constitution of Kenya.
[10] See Article 18 of the Constitution of Namibia.
[11] The State is required by s 44 of the Constitution to respect, protect, promote, and fulfil the rights and freedoms set out in the Constitution.

of facilitating the accessibility of that right to the public by putting in place measures and systems that would ensure that the public truly and in reality[12], benefits from this right on the ground.

Administrative justice affects the entire population irrespective of gender, status in life, age, creed, or race. One way or another, the decisions made by public administrators interfere with people's lives. There are, however, certain classes of the population who are affected much more than others, and these are the less privileged like the poor and vulnerable especially the marginalised persons in our communities. The Zimbabwean population is predominantly poor and the majority of the populace is found in the rural and farming areas, high-density suburbs, townships, and growth points. This part of the population is typically unfamiliar with the westernized legal system with its complex legal processes and without the means to afford legal representation to secure, protect and enforce their rights. The decisions made by administrators and the services thereto are bread and butter issues for them. Those are the people in most need of protection of their basic rights including the right to administrative justice. The concern in this paper is that these types of people do not know, let alone appreciate the existence of the fundamental rights that are meant to protect them. Consequently, they cannot use the rights such as those captured in s 68 to protect themselves against acts of maladministration because they are not aware of them. Those that may be aware, they are incapacitated both in terms of knowledge and resources to enforce those rights. It is in such circumstances that one would then argue that access to justice for these classes of people is compromised.

The importance of the right to administrative justice, therefore, lies in the impact that it has on ordinary people. Poverty, unemployment, and illiteracy cause

[12] In terms of s 11 of the Constitution the State is required to take all practical measures to protect the Fundamental Rights and Freedoms enshrined in Chapter 4 and to promote their full realisation and fulfilment.

members of the public to rely heavily on public institutions and officials for services. These services include obtaining important documents like birth records, birth certificates, driver's license, passports and accessing entitlements like pension benefits and social grants, and access to necessities like clinics, hospitals, and, schools. It is when the public approach the bureaucrats directly to access these services that incidences of maladministration are on the rise and victims require legal protection. Where such services are not provided and the quality therefrom is poor, this is the group of people that suffers most but at the same time who are less protected. It is important, therefore, that the law and the systems put in place by the State are conducive and make it easy for them to vindicate this right. The aim of s 68 is to regulate how public officials use power and provide for remedies where there has been an abuse of such power.

The inadequacies in place at the moment that compromise access to administrative justice to the marginalised persons like women and children are found in one or more of the following ways, firstly, the adequacy of the provisions of section 68 will need to be measured with what is provided for in other jurisdictions, and international best practices. This is important because the right can only be fully realized by the public if its provisions are consistent with what is obtained in other jurisdictions and international law. Secondly, the operationalization of the right to administrative justice will be done through AJA[13]. In other words, the benefits derived from this right are accessible to the public through the Act.[14] It is therefore important that the Act contains provisions that are consistent and *intra vires* with those provided in section 68. Anything short of that would mean that the Act cannot adequately operationalize this right and this would compromise the realization and access of the right by the public. Thirdly, there may be adequate laws in the form of section 68 and the Act but

[13] The Administrative Justice Act [*Chapter 10:28*]

[14] This is in terms of the principle of Subsidiarity. See an illustration of this position by Malaba CJ in the case of Zinyemba v Minister of Lands and Rural Resettlement and Another 2016 (1) ZLR 23 (CC). See also case of Chiware and ors v Minister of Justice Legal and Parliamentary Affairs 2017 (1) ZLR 117 (CC).

these should be complemented by policies and systems that are put in place by the State that would ensure that the people are well aware of these laws and the rights that accrue therefrom, that these laws are easily accessible and that there are effective remedies that enable them to vindicate the right where there has been a violation. The situation prevailing in this jurisdiction at the moment in which administrative law matters are only heard by the high court is not tenable at all because the high court in not located in most areas in the country, the rules of the high court are too technical for the ordinary people and litigation in the high court is expensive hence not affordable by the people who would want to vindicate their violated administrative justice rights. All these factors militates against accessibility of administrative justice as it becomes out of reach to the ordinary people. The majority of the acts of maladministration faced by the ordinary members of the public are those one would describe as 'minor administrative infractions'. These are decisions that would ordinarily be perceived as of a minor nature but however impact heavily on poor and marginalised people. Such decisions would require quick resolutions through methods other than litigation. Embarking on litigation route would not give an immediate solution as it is cumbersome and expensive. When there are no other dispute resolution methods other than the court system then it becomes a hindrance in the accessibility of justice by the generality of the people.

These are the issues that occupy the discussion in this paper on whether there is access to administrative justice by the vulnerable persons. This is done by looking at the factors that militates against easy access to administrative justice and the solutions to these challenges.

4. Enhancing Access to Administrative Justice

Access to justice may only be enhanced by attending to the inadequacies located both in the judicial and non-judicial processes. There is need to look into the judicial processes especially the review system found in the court system to make it less expensive, less technical, remove delays and have the courts located close to the people. The non-judicial process is however more ideal and acceptable to people of no means who are susceptible to abuse. This is because the process is less formal, cheap, and easily accessible to the people. The methods used in non-judicial process to vindicate administrative justice rights are not complex and are suitable for those persons who need quick solutions to their grievances.

4.1. Judicial processes

Access to administrative justice through judicial processes entails an easily accessible court system and procedures that the general public must be able to reach out to or benefit from. The key requirements, then, of judicial processes are physical availability of the courts; simple and cheap court procedures, and an efficient legal aid system. The first aspect in an examination of judicial processes is the courts and court processes, including the extent to which they impact access to administrative justice.

4.1.1. High Court

The High Court is a court of inherent jurisdiction (s 170 of the Constitution) and, through 171, accorded the power to deal with constitutional matters except those that are exclusive to the jurisdiction of the Constitutional Court. This establishes the High Court as a forum for the hearing of an allegation concerning an infringement of s 68 of the Constitution. In addition, by dint of its inherent jurisdiction, the High Court can thus grant all the orders that can be obtained in

a judicial review and at common law including interdicts, *mandamus,* spoliation orders, *habeas corpus* orders, declaratory orders, and damages.

Section 68(3) (a) of the Constitution provides that a person who is aggrieved by some administrative conduct must be able to take the matter upon review. The AJA gives the High Court exclusive jurisdiction to deal with administrative justice reviews and through 4(1) which provides as follows:

> (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to **High Court** for relief.

Thus, any person who wishes to have a decision of an administrative authority reviewed, or maladministration addressed, in terms of the AJA, especially s 3, may only approach the High Court. No other court is given authority or jurisdiction to grant relief in terms of the provisions of the Act.

An application for judicial review is generally made in terms of s 26 of the High Court Act and Order 33 of the High Court Rules, 1971.[15] The requirements for an application of this nature are that the applicant must state clearly the grounds on which the administrative decision should be set aside; the exact relief sought and at the same time establish *locus standi* in the matter.[16]

This position which restricts access to courts to High Court only presents various challenges that militate against the concept of access to administrative justice. First, the main challenge is that accessibility to the High Court is very limited, especially to the general populace. The High Court is located in five cities only,

[15] The application may also be made in terms of section 4 of AJA. The law therefore allows for review to be done in terms of the High Court Act or AJA. See comments by Gwaunza JA (as she then was) on this issue in *Gwaradzimba v Gurta* S-10 -15 at page 10 of the cyclostyled judgment.
[16] See case of *Stevenson v Minister of Local Government and Nationa1l Housing and Ors* 2001 (1) ZLR 321 (H).

namely, Harare, Bulawayo, Masvingo, Mutare, and Chinhoyi.[17] Potential litigants outside these cities would have to travel, in some cases, hundreds of kilometers to access the nearest High Court and this entails costs in fares, inconvenience, and time. The majority of the citizens, therefore, do not have adequate or easy access to the courts to vindicate their se 68 rights.

Secondly, the High Court processes and Rules are too technical and complex and make self-representation by a potential litigant extremely difficult, if not impossible. One is ordinarily expected to engage the services of a legal practitioner when filing papers at the High Court. The professional services of a legal practitioner must be paid for and to expect the general public to afford legal fees is simply asking too much. The members of the public would therefore be compelled through financial restraint to forego the litigation and suffer the violation of their rights.

Thirdly, the Court is affected by a serious challenge of a backlog of cases. It would take normally more than one year, after filing, to have the matter heard and even a longer time for the judgment to be delivered.[18] Such delays are a serious hindrance to accessing justice through the court process. Even those who can afford legal representation would still be frustrated by the lengthy delay in the hearing.

These factors militate against the concept of access to administrative justice in this jurisdiction. It leaves the most vulnerable of our society exposed to various forms of administrative infractions without remedies. It is, therefore, necessary for other courts, like the Administrative Court and the magistrates' courts, to also have jurisdiction to deal with cases of maladministration.

[17] These are merely five provinces out of the ten provinces in the Country.
[18] The High Court received a total of 18 690 cases, completed 20 902 and had a backlog of 1752 as at 31 December 2020. These were annual court statistics provided in the Judicial Service Commission annual report to Parliament.

4.1.2. Administrative Court

The Administrative Court is a specialist court established in terms of s 173 of the Constitution with such jurisdiction over administrative matters as may be conferred upon it by an Act of Parliament.[19] The Administrative Court is greatly underutilized.

As a specialist court, the Administrative Court deals with a specific issue[20] and has jurisdiction and authority as having been conferred on it by an Act of Parliament and any other enactment. Various pieces of legislation allocate functions to the Administrative Court. These include (i) the Land Acquisition Act, which gives the court through s 7 the power to authorize or confirm acquisitions of land to which there has been an objection by the owner;[21] (ii) the Regional Town and Country Planning Act, which gives the court various functions to resolve disputes between local planning authorities and persons aggrieved by the former's proposed use of land or refusal to grant permits for the development of land for certain purposes;[22] and the Sports and Recreation Commission Act which gives the Court the power to deal with appeals made by persons aggrieved by decisions of the Sports and Recreation Commission.[23]

The court also deals with appeals or applications from or of public bodies and these cases are administrative. There are, however, few cases that come from these bodies to put the court to its constitutional and legislative function of delivering administrative justice. By way of illustration, as of 31 December 2020, the court had dealt with only 89 cases throughout the year and had 28 pending

[19] See section 173(2) of the Constitution of Zimbabwe, 2013.
[20] Madhuku L, *An Introduction to Zimbabwean Law*, (Harare: Weaver Press 2010) 76.
[21] See section 7 of the Land Acquisition Act [*Chapter 20:10*] on applications for authorizing or confirming an order where acquisition is contested.
[22] See the Regional Town and Country Planning Act [*Chapter 29:12*].
[23] See section 32 of the Sports and Recreation Commission Act [*Chapter 25:15*].

cases.[24] The numbers are low and bespeak the underutilization of the court. Feltoe provides a plausible explanation for the underutilization:

> It would appear that when this court was established it was simply given a miscellany of tasks to perform and little attention was paid to the role the court would play in developing the field of administrative law on a more systematic basis. Consideration should be given as to whether the Administrative Court should be restructured to allow it to play a more important and coherent role in the regulation of administrative decision-making.[25]

The major reason attributable to the virtually redundant nature of the court is that the AJA does not give the court jurisdiction to deal with matters that are heard in terms of the Act. It would appear, that the Administrative Court deals with administrative matters only and not with administrative justice *per se* as envisaged in the AJA. As already noted, the only designated forum for addressing infractions of the right to administrative justice in terms of the AJA is the High Court.[26] There is a need to augment the role of the Administrative Court in the promotion of administrative justice.[27] Feltoe proposes the following as a means of revamping the role of the court:

> The court could be made responsible for dealing with cases in which decisions of administrative authorities are being taken on review. In other words, it could be given exclusive jurisdiction to review such cases and the High Court would no longer exercise such jurisdiction. This would allow the court that specializes in administrative matters to deal with these matters. Another way in which the court could take a more systematic role is, rather than giving it appeal jurisdiction in respect of decisions made by certain selected statutory bodies, it could be given jurisdiction to deal with all appeals against administrative decisions made under any legislation. It would become the specialist court to deal with all appeals taken by administration authorities.[28]

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[24] These annual court statistics were obtained from the Judicial Service Commission in its 2020 Annual Report to Parliament. See Judicial Service Commission, "2020 Annual Report," Available at: http://www.jsc.org.zw/annual. Accessed on 28 June 2021.
[25] Feltoe, *A Guide to Administrative and Local Government in Zimbabwe*, *op. cit.* 2014 at page 23.
[26] See section 4(1) of the Administrative Justice Act [*Chapter 10:28*].
[27] This becomes more fundamental in light of the high workload in the High Court and that the court is not found in most parts of the Country.
[28] Feltoe, *A Guide to Administrative and Local Government in Zimbabwe*, *op. cit.* 2014 at page 23.

It is only proper therefore that the court should deal with reviews and appeals of administrative decisions in terms of the Act. This necessitates a fundamental departure from the current position in which the court is given jurisdiction over a few selected statutory bodies. This would reduce the burden on the High Court which has a heavy backlog of cases whilst the Administrative Court has virtually no work.

An issue of concern, however, is that the Administrative Court is located in Harare only. This is concomitant with the low volumes of work it currently processes and it would be wasteful of resources to decentralize it under these circumstances. However, the centralization of the Court in Harare may in certain respects account for the low volumes of work because the court is inaccessible to thousands of potential litigants outside the capital. If then, its jurisdiction is expanded to deal with administrative justice matters, it would be necessary to decentralize it so that at the very least, it is located in each province.

4.1.3. Magistrates' Court

Although the Magistrates' Court is not provided for in elaborate provisions by the Constitution as it does with the High Court, the Supreme Court, or the Constitutional Court, the Constitution's starting point is that such a court exists. The first constitutional reference to the Magistrates' Court is in s 174(a) which partly reads, "*An Act of Parliament may provide for the establishment, composition, and jurisdiction of magistrates' courts, to adjudicate on civil and criminal cases.*" Observably, the issue of the jurisdiction of a magistrates' court is relegated to an Act of Parliament. In other words, so long as an Act of Parliament declares that a Magistrates' Court has the competency to hear a matter, then it can. The Magistrates' Courts are located in all provinces and districts of the country.[29]

[29] There are 54 permanent Magistrates' Courts in the Country and 50 circuit courts; see Judicial Service Commission 2020 Annual report to Parliament. See Judicial Service Commission, "2020 Annual Report," (Accessed on 28 June 2021) http://www.jsc.org.zw/annual.

The Magistrates Court Act [*Chapter 7:10*] provides for the establishment, composition, and jurisdiction of the Magistrates' Courts. The personal jurisdiction of the Magistrates' Court is set out in s 11(1) (a) of the Act.

The Magistrates' Court has jurisdiction over any action other than the actions provided for in the Act where the claim or the value of the matter does not exceed such amount as may be prescribed in the rules;[30] the court also has jurisdiction to grant an order for an interdict and *mandamen van spolie*.[31] The Magistrates' Court may further grant an order of specific performance where it is sought with an alternative payment of damages.[32] Accordingly, where in an administrative action order of specific performance with the alternative of payment of damages, or an interdict, or a spoliation order or damages are sought, and the value of the matter does not exceed the amount prescribed in the rules, a litigant may be able to approach the Court for redress.[33] However, declaratory orders are among the typical orders sought on judicial review. The Magistrates' Court has no power to grant declaratory orders and is thus limited as a forum for accessing administrative justice.

Considering that administrative authorities, particularly government departments, are also located in all provinces and districts of the country, it would be more convenient for the Magistrates' Courts in the various provinces to have jurisdiction to adjudicate over administrative decisions brought for review in their areas. This would entail an amendment of the AJA to include the Magistrates' Court as one of the courts that may deal with cases of administrative justice in terms of the Act, as is the case in South Africa, through PAJA.

The extension for review of administrative decisions to Magistrates' Courts in every province in this jurisdiction would be a positive and practical development

[30] See section 11(1) (b) (vii) of the Magistrates Court Act [*Chapter 7:10*].
[31] Ibid. Section 12(1).
[32] Ibid. Section14 (1) (d).
[33] Provided section 4 of the Administrative Justice Act is amended to include magistrates court as part of the court system that deals with administrative justice cases.

because citizens would have more convenient physical access to courts much closer to their homes and it would cost less to process the less technical application.[34] Access to administrative justice would thus be facilitated for a much wider sector of the population.

However, there would, first, be a need to define the jurisdiction of the three primary courts (High Court, Administrative Court, and Magistrates' Court) for accessing administrative justice through allocating specific matters to each court to process. Where the value of the matter can be determined in monetary terms, the resort can be had to the monetary limit of the Magistrates' Court.[35] Whilst monetary jurisdiction is fairly straightforward, jurisdiction in terms of the nature of cases will require careful attention.[36]

Additionally, Parliament or the Minister responsible for the administration of the relevant Acts will need to make the necessary legislative adjustments to assign certain types of administrative cases or issues about maladministration to be dealt with by Magistrates. [37] Legislative amendments may be modeled in such a way as provided for through PAJA s 1(iv) to empower the Magistrates' Court with specific jurisdiction in administrative matters, as provided in part as follows:

> (iv) "court" means –
>
> (a) the Constitutional Court acting in terms of section 167(6) (a) of the Constitution; or
>
> (b) (i) a High Court or another court of similar status; or

[34] It has already been argued in the previous chapters that magistrates may also be used in communities within their locality to provide non-judicial remedies of mediation in order to resolve minor administrative infractions that would not require one to waste time going to court.

[35] In terms of the Schedule to the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, 2020 [S. I. 227 of 2020], the maximum value of a claim or matter in dispute is ZWL$3 000 000.00.

[36] The "nature of the case" refers to "the legal character and procedural status of the case," for example 'an application for the registration of an arbitral award.' See New Learner, "Archive: How to "Brief" a case?" (Accessed on 4 July 2021) https://www.newlearner.com/courses/hts/cln4u/lawarc02.htm#:~:text=NATURE%20OF%20CASE%3A%20This%20is,of%20a%20burglary%20conviction%22).&text=Determining%20the%20rule%20of%20law,the%20issue%20of%20the%20case.

[37] In terms of section 174(a) of the Constitution of Zimbabwe, 2013, Magistrates Court's jurisdiction is set out in an Act of Parliament. It is therefore within Parliament's powers to decide on any additional jurisdiction of the Magistrates Court.

> (ii) a Magistrates' Court, either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate designated in writing by the Minister after consultation with the Magistrates Commission, within whose area of jurisdiction the administrative or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.

The key phrase in PAJA relates to the Ministerial authority to designate specified classes of administrative actions as matters that may be heard in the Magistrates' Court. Korn and Corder strongly criticize PAJA, however, in that it overly restricts access to justice:

> This Act serves as the primary basis for judicial review of administrative action. Ironically, this 'triumphal legislation' has done more to curtail — rather than enhance — the enjoyment of administrative justice rights. **This is chiefly due to the Act's narrow and overly-complicated definition of the gateway concept of 'administrative action'**. As a result, the administrative law of today is suffering from its form of complexity and inaccessibility, which has, in turn, led to the emergence of a 'proliferation of pathways' to review to capture in the net those exercises of public power which fall short of the PAJA incarnation of 'administrative action', or simply avoid this stumbling block of a definition altogether.

It is, therefore, important to consider other aspects of access to administrative justice beyond court access.[38]

The second matter for consideration relates to the quality of adjudication required from the Magistrates' Court. Judges are already seized with many cases of this nature and have amassed considerable experience but some of their decisions are set aside on appeal in the Supreme Court. It requires a well-trained and qualified senior magistrate to effectively deal with administrative justice matters and extensive training would be entailed. The training of magistrates will

[38] See L. Kohn and Corder H, "Administrative Justice in South Africa: An Overview of Our Curious Hybrid," in *Pursuing Good Governance: Administrative Justice in Common Law Africa*, Cape Town: Siber Ink, 2019 at page 123. (Accessed on 4 July 2021): https://www.kas.de/documents/275350/0/Corder+and+Mavedzenge+--+Pursuing+Good+Goveernance.pdf/3442ec0d-efbe-1637-1ef4-6d0cee96ae7f?version=1.0&t=1576740866749.

also be in keeping with the constitutional imperative on members of the judiciary to:

> "… Take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular [must] keep themselves abreast of developments in domestic and international law."[39]

Thirdly, there is the issue of the huge workload in the Magistrates' Courts which deal with the highest number of civil cases in the country.[40] Whilst matters are finalized more expeditiously because its rules are more conducive for that purpose, there is the requirement to properly remunerate the magistrates to avoid skills flight and to retain experienced, skilled staff.

4.1.4. Provision of legal aid

The provision of legal aid services in Zimbabwe is governed by the Legal Aid Act [*Chapter 7:16*] which mandates the Legal Aid Directorate to offer its services to indigent clients involved in any criminal or civil or related matters.

Section 3 of the Act provides for the establishment and functions of the Legal Aid Directorate Section 7 provides that any person may apply to the Director, using the prescribed form, for legal aid. The application is granted if the concerned person is eligible in terms of s 8 and if the resources of the legal fund are available to meet the provision of the legal services.

The Act provides for three requirements for eligibility of an applicant through the merits test, which must be proved to the satisfaction of the Director, as follows:

- Must show insufficient means to obtain a legal practitioner at their own cost.
- Must have good ground for initiating or defending the proceedings concerned;

[39] See section 165(7) of the Constitution of Zimbabwe, 2013.
[40] In 2018 the court dealt with a total of 215 322 cases in the country. These statistics were obtained from the Judicial Service Commission 2018 Annual Report provided to Parliament. See Judicial Service Commission, "2018 Annual Report," (Accessed on 28 June 2021): http://www.jsc.org.zw/annual.

- Must need or will benefit from the proceedings concerned.

Applicants also have to satisfy the means test, to determine whether the indigent applicant will get legal aid entirely free; whether they are entitled to legal aid on payment of a nominal contribution; or are ineligible for legal aid.

The provision of the legal aid system in this jurisdiction is weak and leaves exposed those litigants who cannot afford legal fees. First, the Directorate is limited in location as it is situated in Harare and Bulawayo only. The majority of the people especially the marginalised, therefore, do not have access to legal aid services. The independence of the Directorate is also put into question because of its location in the Ministry of Justice, Legal, and Parliamentary Affairs. It compromises its work, especially in situations where it has to give advice to or provide legal counsel for applicants trying to litigate against the conduct of officials in the same Ministry.

Further, when offering legal aid, every indigent person should be represented in court by a legal practitioner in all cases. Due to the limited numbers of legal aid lawyers in the department, however, many clients appear in court as self-actors after being assisted with the drafting of court papers only, and only those clients with complicated cases are offered legal representation. The department, therefore, has a serious shortage of both material and human resources.

Thirdly, although s 14(4) (b) of the Legal Aid Act provides that the Directorate can assist clients financially (by covering clients' costs and expenses incurred in obtaining legal aid), the reality is that its lack of resources and finances prevents the exercise of this function and efforts to deliver meaningful or substantial justice to financially disadvantaged applicants is greatly undermined. To compound this sad situation, the provision of legal aid does not meet court fees and traveling expenses; and clients pay for filing processes and the services of the Messenger of Court and Sheriff when executing judgments. The legal aid system in this jurisdiction, therefore, requires to be revamped and resourced to play a more

meaningful role in assisting poor litigants to assert their Constitutional rights to access administrative justice. The State has a legal obligation to ensure that the legal aid system is efficient and effective.[41]

4.2. ALTERNATIVES TO JUDICIAL REVIEW

Although judicial review has been given impetus following the introduction of a fully justiciable constitutional right to administrative justice,[42] the system of review has been found to be complicated and causes frustrations to indigent and marginalised litigants. Judicial review as the bedrock of administrative justice in Zimbabwe is proving insufficient to adequately satisfy the administrative justice needs of most citizens. There is an increasing push for consideration of alternative and additional means of securing administrative justice, such as the use of Ombudspersons, appeals tribunals, standing commissions which focus on human rights protection, open governance, among others.[43] There is a clarion call as well for more reliance on alternative dispute resolution methods.

4.2.1. Non-judicial processes

Various non-judicial processes can be relied on to remedy maladministration. The non-judicial processes are attractive especially to the marginalised and the vulnerable like women, children and the disabled amongst others because they are more convenient, less formal and less costly. In this jurisdiction, the leading institution dealing with cases of maladministration in legal terms is the Zimbabwe Human Rights Commission which has a role similar to that of the Public Protector

[41] Section 31 of the Constitution provides for provision of legal aid as follows:
The State must take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice.
[42] Hugh Corder and Justice Mavedzenge, *Pursuing Good Governance Administrative Justice in Common-Law Africa*.
[43] Hugh Corder and Justice Mavedzenge, *Pursuing Good Governance Administrative Justice in Common-Law Africa*.

or the Ombudsman in other jurisdictions. The duties of this commission are spelt out in the Constitution and the Zimbabwe Human Rights Commission Act.[44] The other important non-judicial organs dealing with administrative justice are the administrative tribunals. Although there is a legal provision for the establishment of tribunals[45], these are not yet in existence in this jurisdiction.

4.2.2. Zimbabwe Human Rights Commission

The Constitutional body mandated by the law to deal with cases of administrative infractions in this jurisdiction is the Zimbabwe Human Rights Commission (ZHRC, the Commission).

The ZHRC is an independent body established in terms of s 242 of the Constitution of Zimbabwe, 2013 with the functions enacted through s 243(1) of the Constitution:

> … (d) to receive and consider complaints from the public and to take such action regarding the complaints as it considers appropriate; (e) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions ….

The Zimbabwe Human Rights Commission Act[46] sets out the functions of the Commission, in addition to those specified in s 243. In terms of s 4(1) (a) of the Act, the Commission has an additional duty "to conduct investigations on its initiative or receipt of complaints." The ZHRC replaced the Public Protector[47] and thus has additional functions beyond handling and redressing complaints arising from maladministration.

There have been suggestions that the ZHRC is inundated with work as the sole body responsible for human rights violations and administrative injustices.

[44] [*Chapter 10:30*].
[45] See section 68 (3) (a) of the Constitution, which provides for the adjudication of administrative rights litigation by an independent and impartial court, tribunal or other forum established by the law.
[46] [Chapter 10:30]
[47] See paragraph 16 of the Sixth Schedule to the Constitution of Zimbabwe.

According to Hatchard commenting on the emergence of human rights commissions in Commonwealth Africa:

> Debate continues as to whether or not the protection and promotion of human rights and administrative justice are best served by a single integrated institution. In South Africa, Malawi, and Uganda, the human rights commissions operate alongside offices of the ombudsman whereas the Commission on Human Rights and Administrative Justice in Ghana operate as a 'one-stop' institution. Although national circumstances will inevitably dictate the most appropriate or politically acceptable institutional structure, several factors support an integrated approach: (i) administrative costs are reduced; (ii) focusing attention on a single body can raise its public profile and better counter executive attempts to weaken or undermine its operation; (iii) expertise can be concentrated in a single institution; (iv) providing an integrated approach to human rights cases enables a commission to consider complaints that may involve some different issues; (v) it avoids both uncertainties as to which institution(s) has jurisdiction and the possible duplication of work, and (vi) it sends out the message that all human rights are equally important.[48]

Hatchard further argues that the right to administrative justice has been brought within the mainstream of fundamental rights in the Declaration of Rights by the Constitution of Zimbabwe, 2013; therefore, the Human Rights Commission is the correct agency to deal with violations of this right.[49] Such an argument however will only be accepted if the State puts both human and material resources forward to support the Commission. The Commission, currently, does not provide access to administrative justice especially for the poor because it has a presence in two canters only.[50] Secondly, incidences of administrative infractions by public officials are so frequent in occurrence and number that a separate department

[48] See Hatchard J. "A new breed of institution: the development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission," [*Online*] *XXXII CILSA*,1 Mar 1999 at page 37. Available at: https://hdl.handle.net/10520/AJA00104051_284. Accessed on 4 July 2021.
[49] See Munguma C. "The Role of the Zimbabwe Human Rights Commission in the Promotion of Fundamental Rights and Freedoms," at page 3. Available at: https://www.researchgate.net/publication/333631402_The_Role_of_the_Zimbabwe_Human_Rights_Commission_in_the_Promotion_of_Fundamental_Rights_and_Freedoms. Accessed on 4 July 2021. See also, G. Feltoe, *Administrative Law and Local Government Guide*, (Legal Resources Foundation, 2020) p. 134.
[50] It is located in Harare and Bulawayo only.

within the Commission itself is required with the sole mandate to deal with such cases.

It must, however, be noted that the functions that the Constitution mandates on the ZHRC in administrative justice matters are no different from what was done by the Public Protector before the promulgation of the 2013 Constitution. The functions of the Commission are the same as those performed by the Public Protector or Ombudsmen in other jurisdictions. Whilst the Commission deals with administrative justice alongside the administration of other rights to which it must attend, the Public Protector/ombudsman had the sole mandate to deal with and attend to cases of maladministration only. The Commission is already inundated with other numerous human rights issues as part of its functions stated in s 243 of the Constitution. It is therefore asking for too much for it to give exclusive and particular attention to the many cases of maladministration, especially with the meagre resources at its disposal. The establishment of the office of the Public Protector therefore may be another avenue for the provision of access to administrative justice for the generality of the public.

4.2.3. Public Protector

The function and role of the Public Protector are generally subsumed under the category and rubric of an ombudsman.[51]The office of the ombudsman originates from Sweden through the establishment by the Swedish Constitution in 1809[52] to include:

> … an official appointed by parliament with the authority to supervise the public administration and the judiciary and to prosecute those who failed to carry out their duties.

[51] Mbiada CJ Tchawouo, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa'. *Potchefstroom Electronic Law Journal (PELJ)*, *20*(1), 1-34 (2017). https://dx.doi.org/10.17159/1727-3781/2017/v20n0i1382.
[52] Ibid.

As the institution evolved, its purpose changed from functioning as a purely legislative monitor to a public complaints-driven process.[53]

> The ombudsman is a complaint-handling mechanism tasked with improving the accountability of the government. The ombudsman serves as a vertical and horizontal accountability mechanism by receiving complaints from the people against the government, thereby serving as a check on government activities. The ombudsman is, therefore, an instrument of democratic accountability between individuals and the administration of the state. Despite its origin, the ombudsman has evolved so that it now incorporates several activities such as the following: the human rights ombudsman assumes the protection of human rights (the South African Human Rights Commission falls under this category); the classical ombudsman deals with maladministration in the public sector; and other ombudsmen deal with a range of services (such as anti-corruption, leadership code enforcement and/or environmental protection functions).[54]

The Constitution of Zimbabwe, 1980 provided for the office of an ombudsman through s 107 although this was changed to the office of the Public Protector.[55]

> **107 Ombudsman and Deputy Ombudsman**
>
> (1) There shall be an Ombudsman and, where the President has deemed it desirable, a Deputy Ombudsman, whose offices shall be public offices but shall not form part of the Public Service.
>
> (2) The Ombudsman and the Deputy Ombudsman shall be appointed by the President after consultation with the Judicial Service Commission.

The role of the Public Protector was to receive and look into complaints by citizens of unjust or unlawful administrative action.[56] The office of the Public Protector had officers deployed in various parts of the country.[57] The ambit of work of the Public Protector was broad through the mandate to investigate any action by a Ministry or member of a ministry; a statutory body; local authorities; institutions controlled

[53] Ibid.
[54] Ibid.
[55] According to G. Feltoe, *Administrative Law and Local Government Guide*, (Legal Resources Foundation, 2020) p. 133, the enactment of the then Public Protector Act [*Chapter 10:18*] in 1982 gave effect to this provision.
[56] G. Feltoe (n 39 above) 133.
[57] Each district had at least one officer and some had more depending on the size of the district.

by the State such as hospitals, clinics, and training institutions.[58] The Public Protector could also investigate allegations that any provision of the Declaration of Rights has been contravened by any officer, person or Ministry referred to in the repealed Public Protector Act [*Chapter 10:18*].[59] Feltoe states that after any investigation, the Public Protector could then take remedial action in circumstances where the action was contrary to the law; an action was based wholly or partly on a mistake of law or fact; there was an unreasonably delayed action, or an action otherwise unjust or manifestly unreasonable.[60] In such a case, the Public Protector would then only act if it considered that (1) the matter should be given further consideration; (2) an omission should be rectified; or (3) a decision should be cancelled, reversed, or varied; or (4) any practice on which the act, omission, decision or recommendation was based should be altered; or (5) any law on which the act, omission, decision or recommendation was based should be reconsidered; or (6) reasons should have been given for the decision; or (7) any other steps should be taken.[61]

The office of the Public Protector can have a significant contribution to the access to administrative justice for the ordinary people. This is through the global aim of administrative tribunals or ombudsmen:

> …to resolve disputes fairly, informally, efficiently, quickly and cheaply' [whilst retaining] … the overall requirement for fairness. The absence of formality and the technical requirements of the rules of evidence does not displace due process, natural justice, or procedural fairness.[62]

The South African Supreme Court of Appeal rightly commented in the case of ***Public Protector v Mail and Guardian & Ors* 2011 4 SA 420 (SCA) that:**

[58] Ibid. See also section 108 (2) of the Constitution of Zimbabwe, 1980
[59] See section 108(1) (b) of the Constitution of Zimbabwe, 1980.
[60] G. Feltoe (n39 above) 133.
[61] G. Feltoe (n39 above) 133.
[62] Downes, Garry. "Tribunals in Australia: Their Roles and Responsibilities." Reform, no. 84 (2004): 7–9. https://search.informit.org/doi/10.3316/agispt.20051346. Accessed on 29 June 2021.

> The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an inquiry, and on no more than 'information that has come to his or her knowledge' of maladministration, malfeasance, or impropriety in public life.[63]

In a different decision, the Constitutional Court of South Africa underscored the importance of the office of the Public Protector in a judgment by the Chief Justice of South Africa, Mogoeng Mogoeng, in ***Economic Freedom Fighters v Speaker of the National Assembly & Ors; Democratic Alliance v Speaker of the National Assembly & Ors***[64] when he stated thus:

> [52] The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice, and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide, and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalized a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well–resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.

The Constitution of Zimbabwe, 2013 saw the office of the Public Protector abolished and its work transferred to the ZHRC. Saungweme, writing on the need for the office of the Public Protector remarked that:

> Zimbabwe does not have an independent office of the public protector because it was repealed by the 2013 Constitution. Its functions have been incorporated into the ZHRC. This means that there is a gap in respect of a public office which is solely designed to

[63] *Public Protector v Mail and Guardian & Ors* 2011 4 SA 420 (SCA)

[64] *Economic Freedom Fighters v Speaker of the National Assembly & Ors*; *Democratic Alliance v Speaker of the National Assembly & Ors* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para [52].

investigate allegations of corruption or abuse of powers by public officials on behalf of the public."[65]

Feltoe describes the utility of replacing the Public Protector with the ZHRC as "debatable."[66] This could explain why the clauses 17 and 18 of the Constitution of Zimbabwe Amendment Bill (No. 2) that would have created the office of the Public Protector which would then take over some of the functions of the ZHRC on maladministration, were withdrawn.[67] However, *Veritas* was particularly critical of the necessity of this amendment as it commented that:

> "… there seems no good reason why the Public Protector system is to be revived. The people who held the office of Public Protector before 2013 did not distinguish themselves and the office afforded the public little protection against misgovernment. In 2013 the ZHRC had to take over the Public Protector's backlog of hundreds of cases that had not been dealt with; it trained its officials to deal with them and has finalized them and current cases with commendable efficiency. The ZHRC, incidentally, was not consulted about the proposed constitutional amendment."[68]

The mixed views on whether or not the Public Protector's office should be reintroduced in this jurisdiction are exhibited by the report delivered during the second reading of the Bill and on the submissions received from members of the public.[69] Some citizens considered that the reintroduction of the office of the Public Protector was necessary but was concerned about the limited scope

[65] S. Saungweme, "The Nkandla Judgment: Lessons for Zimbabwe," *Zimbabwe Rule of Law Journal*, Vol. 1 Issue 1, 2017 at page 28. (Accessed on 30 June 2021) https://zimlii.org/zw/journal/2017-zrolj-09/%5Bnode%3Afield_jpubdate%3Acustom%3AY/nkandla-judgment-lessons-zimbabwe.
[66] See G. Feltoe, *Administrative Law and Local Government Guide*, (Legal Resources Foundation, 2020) p. 134.
[67] The clauses are available at; Constitution of Zimbabwe Amendment (No. 2) Bill HB 23/19. *Veritas. (*Accessed on 30 June 2021) https://www.veritaszim.net/node/3887..
[68] See Veritas, accessed from Kubatana, "AMENDING THE CONSTITUTION – PART 4 – CONSTITUTION WATCH 4 / 2020," Kubatana.net. (Accessed on 30 June 2021) : https://kubatana.net/2020/01/29/amending-the-constitution-part-4-constitution-watch-4-2020/.
[69] National Assembly Hansard (Deb), 9 July 2020 Vol. 46 No. 53 at par. 23. (Accessed on 30 June 2021) https://www.parlzim.gov.zw/national-assembly-hansard/national-assembly-hansard-09-july-2020-vol-46-no-53 .

envisaged for that role.[70] Other members of the public were averse to the reintroduction of the Public Protector as it would amount to a duplication of roles with the ZHRC.[71] Instead, they suggested that, given the scarce resources, it would have been better to strengthen the existing Chapter 12 institutions.[72]

Comparatively, Zambia is yet to constitutionally provide for the right to administrative justice but still provides for the office of the Public Protector whose key mandate is to promote practices of good governance within public institutions. The Public Protector (Ombudsman) of Zambia also has the mandate to promote and safeguard the interests and the rights of an individual or their quest to receive a public service that is just and fair.[73] In Namibia, the right to administrative justice,[74] through Art. 18 of the Constitution, also has the office of the Ombudsman who plays an important role in promoting accountability on public officials and investigating cases of maladministration including corruption.[75] In South Africa, the office of the Public Protector is provided under Chapter 9 of the Constitution[76] and its role is properly captured by the court in *Public Protector v Mail and Guardian and Others*[77] as follows:

> The constitutional mandate and duty of the Public Protector are stated by implication in the powers that are recited in s182 of the Constitution:
> '(1) The Public Protector has the power, as regulated by national legislation –

[70] Clause 18 of the Bill *op. cit.* provided that the Public Protector would mainly investigate any conduct of any Ministry or department or any member of such Ministry or department.
[71] National Assembly Hansard (Deb), 9 July 2020 Vol. 46 No. 53 at par. 24. Available at: https://www.parlzim.gov.zw/national-assembly-hansard/national-assembly-hansard-09-july-2020-vol-46-no-53. Accessed on 30 June 2021.
[72] Ibid.
[73] The office is created through the Constitution of Zambia (Amendment) Act No.2 of 2016.
[74] Namibia is considered as one of the first countries to provide for the right to administrative justice in Africa. See the foreword to Kohn L. and Corder H, "Administrative Justice in South Africa: An Overview of Our Curious Hybrid," in Mavedzenge and Corder (Eds) *Pursuing Good Governance: Administrative Justice in Common Law Africa*, Cape Town: Siber Ink, 2019.
[75] The office established by Articles 89 – 94 of the Constitution of Namibia. Article 3 (1) of the Ombudsman Act 7 of 1990 provides for the powers of the Ombudsman. In Uganda, the Inspectorate of Government, is an independent institution charged with the responsibility of eliminating corruption, abuse of authority and public office.
[76] Chapter 9 of the Constitution provides for Independent Institutions.
[77] 2011 (4) SA 420 at para 7.

1. to investigate any conduct in state affairs or the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
2. to report on that conduct; and
3. to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.'

Kenya has the Commission on Administrative Justice – Office of the Ombudsman[78] established in terms of Art. 59(4) of the Constitution of Kenya, which provides for the Kenya National Human Rights and Equality Commission.

The Commission on Administrative Justice (CoAJ) was born out of the need to address poor service delivery in Kenya. CoAJ cites a report by the former Kenya Anti-Corruption Commission which stated that about 85% of the complaints received from the public were administrative and could have been addressed by the Office of the Ombudsman.[79] Upon adoption of the Constitution of Kenya, in 2010, it became possible through Art. 59(4) to establish the CoAJ.

The CoAJ describes its mandate as being twofold, first, it has the mandate of tackling maladministration in the Kenyan public sector.[80] Accordingly, the Commission has the power to investigate any complaints of delay, abuse of power, unfair treatment, manifest injustice, or discourtesy.[81] Secondly, it has the unique mandate of overseeing and enforcing the implementation of the Access to Information Act, 2016.[82] As such its work spans the breadth of administrative law and processes in Kenya.

[78] In Uganda, the ombudsman is known as the office of the Ugandan Inspector-General of Government. It is established in terms of the Constitution of Uganda under Chapter 13, which prescribes its mandate, functions and powers.
[79] Commission on Administrative Justice – Office of the Ombudsman. *History.* Available at: https://www.ombudsman.go.ke/index.php#history. Accessed on: 28 June 2021.
[80] Commission on Administrative Justice – Office of the Ombudsman. *History.* Available at: https://www.ombudsman.go.ke/index.php. Accessed on: 28 June 2021.
[81] Ibid.
[82] Ibid.

Overall, the Public Protector is the embodiment of a cheap, fair, accessible, and informal remedy for access to administrative justice, especially for the poor and the vulnerable. In this jurisdiction, the office has been replaced by the ZHRC with ten other functions in addition to investigating cases of maladministration.[83] It is expected that the ZHRC could be far more effective if accorded the necessary support in both human and material resources, which it currently lacks.

It was, however, not necessary to do away with the office of the Public Protector in the 2013 Constitution and it was indeed a grave error to remove the amendment which intended to bring back the office in the Constitutional Amendment Number 2. An assessment is done above on what other countries like South Africa, Zambia, Namibia, and Kenya have done, clearly shows that there has to be in existence a separate office of the Public Protector or ombudsman that deals solely with cases of maladministration but more importantly that office also promotes good governance and public administration in government departments and by public officials. Zimbabwe like the four countries mentioned above is a third-world country. There are numerous evils associated with third world countries with chief among them being the abuse of office by public officials specifically directed at the poor, the vulnerable and the marginalized because these are the classes of people that rely a lot on service delivery from the State for their livelihood. This jurisdiction must follow suit and establish such an office without delay. The office must be available in districts, townships, and growth points to receive and attend to complaints from the members of the public living in those areas. It must do away with the formalized approach to complaints that is followed by the Human Rights Commission as stated in its regulations. The office must be able to deal with the localized cases of maladministration using any of the alternative dispute resolution methods like mediation, conciliation, negotiation, and others depending on the nature of the

[83] See Section 243 of the Constitution.

complaint being dealt with. The office may also refer complaints that amount to criminality to law enforcement agencies like the Police and Zimbabwe Anti-Corruption Commission for investigations and possible arrests. This is important because it is in the poor communities that you will find public officials who demand to be paid a bribe to do their work. It is also in these communities that you find some people being marginalized because of gender, political, or even religious affiliations. Some members of the public would fail to access some basic needs like food aid and medicine because the public officer reposed with the power to distribute these things is corrupt, incompetent or uses politics[84] as a yardstick for one to qualify to receive food aid. Where there is no quick resolution of such evils it is the poor and the marginalized who would suffer or even die of hunger. This is the reality that is found on the ground in the poor communities in this jurisdiction and such reality cannot be resolved by the bookish approach found in the Human Rights Commission regulations which (the Commission) in most instances is not accessible as well. The right to administrative justice by the vulnerable will not be realized when there is no institution or mechanism in place within their localities which can react instantly and promptly when the service delivery is poor or they have been treated unfairly. The office of the ombudsman or Public protector may play a key role in this respect.

This then brings to the fore an important aspect of access to administrative justice that is the awareness or knowledge of the protection afforded to this class of people by the law. A lot has been done in putting together the necessary and important laws like s 68 of the Constitution to protect the marginalised of our society from abuse by public officials. A lot may still be done by the State to put in place mechanisms that facilitate easy access to such laws. All this however will count to nothing if the people who are meant to benefit from such laws and

[84] See Physicians for Human Rights Denmark, Zimbabwe: Post Presidential Election March to May- We'll Make Them Run, page 14-24, at http://www.phrusa.org/healthrights/phr_den052302.html. The International Federation for Human Rights reported politicization of the government food program in a statement "Political causes at the root of the current food crisis" (Harare), December 17, 2002, at http://fidh.org/article.php3?id_article=450.

systems are not aware of them. It is therefore of fundamental importance that the generality of the public be aware and have the knowledge of the rights that have been afforded to them by the law. It would indeed be an exercise in futility to set up such an office or institution even within the locality but the people who are supposed to benefit from its services are not aware of the purpose of that office, let alone the law that is meant to protect them. One may for obvious reasons not realize or seek to access a right which he or she is not aware of. Human rights awareness is vital for creating a culture of human rights. More importantly, carrying out human rights awareness campaigns among the common people in their language is vital for creating a culture of human rights. Unless people are aware of their human rights, they cannot protect their rights or seek redressal when it is violated.[85] In Tunisia, an organization called Democracy Reporting International (DRI) launched an administrative justice awareness campaign to the generality of the public in June 2021. What came out as a result of that campaign was astounding; 95.7% of the respondents were not sufficiently informed about administrative justice, while 50% did not have an idea at all about the existence of administrative courts. Only 9.2% of the respondents had some basic knowledge of administrative justice and administrative courts. Mohammed Yassine Jamali, a volunteer leading the campaign commented that during the exchanges with the public, it was clear that many of them were currently in situations that needed to be taken to the administrative court, and they did not have much information on administrative justice.[86] This was described as a national campaign for access to administrative justice which was launched to help citizens, especially the poorest groups, to know their rights and ways to access administrative justice through clear and simplified content.[87]

[85] See, National Human Rights Commission, India Website Home page at https://webcast.gov.in/nhrc/
[86] See Democracy Reporting International: Know Your Rights: Raising Awareness on Administrative Justice Rights bin Tunisia, 14.03 2022, https://democracy-reporting.org/en/office/tunisia/story/know-your-righs-raising-awareness-on-administrative-justice-in-tunisia
[87] See Tunis Africa Press of 10 June 2021, https://allafrica.com/stories/202106110251.html

The right to administrative justice would be meaningless if the people who are supposed to benefit from it do not know about it. The objective of access to administrative justice will not be fulfilled if it does not include conducting awareness and educative campaigns for the generality of the public to know and appreciate this right and how they can benefit from it. When this right was legislated into the 2013 Constitution, no such campaign was undertaken; this is a gap that requires to be attended to without delay. This is a right that impacts and affects a lot of people daily. It's only proper that the public is aware of such protection being afforded to them by the law. The awareness campaign may be done by institutions like the Human Rights Commission[88] and other civic organizations[89] with an interest in administrative justice rights. This is what has been done in voter registration campaign for example which is carried out by the Zimbabwe Electoral Commission and civic organizations.[90] Such awareness campaigns are not politics and would go a long way in enhancing the participation of citizens in governmental affairs.

4.2.4. Traditional leaders

Access to justice is also obtainable through traditional means of ADR. Bolaji Owasanoye records that traditional leaders generally provide remedies in family and land disputes.[91] In terms of s 5(1) (a) of the Traditional Leaders Act,[92] Chiefs have some of the following functions:

[88] In India the campaign is being carried out by the Human Rights Commission of India, (see n687 above).
[89] In Tunisia the campaign is carried out by civic organisations in collaboration with the administrative tribunal and government. (see note 688 above).
[90] See Zec Urges Civil Society to Scale up Voter Registration, https://www.newzimbabwe.com/zec-urges-civil-society-to-scale-up-voter-registration-campaigns/.
[91] See Bolaji Owasanoye, "Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa," United Nations Institute for Training and Research (UNITAR), Geneva, 2001 at p. 18. Available at: https://biblioteca.cejamericas.org/bitstream/handle/2015/725/Alternative-Dispute-Resolution-and-Sub-Saharan-Africa.pdf?sequence=1&isAllowed=y.
[92] [Chapter 29:17].

(*g*) ensuring that Communal Land is allocated following Part III of the Communal Land Act [*Chapter 20:04*] and ensure that the requirements of any enactment in force for the use and occupation of communal or resettlement land are observed; and

(*h*) preventing any unauthorized settlement or use of any land; and

(*i*) notifying the rural district council of any intended disposal of a homestead and the permanent departure of any inhabitant from his area, and, acting on the advice of the headman, to approve the settlement of any new settler in his area;

Chiefs are, thus, in a position to provide mediatory remedies within their jurisdiction and can ensure compliance with the administrative procedures for the allocation and use of land by administrative authorities. The poor and marginalised people in remote areas under the jurisdiction of a Chief may, therefore, utilize the remedies reposed with traditional leaders to vindicate certain identified rights like land disputes. An additional reason for reliance on traditional leaders for remedies against administrative authorities is that:

> Viewed from below, from the inner recesses of the village, the [traditional] leader is a man of authority; a man who has used wealth, heredity, or personal magnetism to gain a position of influence. As seen by nation builders and development experts, the rural leader is tacitly pointed to as the key to success. It is he who can mobilize the people. It is through him that more energy will be expended, more muscles used, and more attitudes changed.[93]

The Zimbabwean population has an urban and rural divide, with the latter forming the higher percentage.[94] As such, traditional leaders retain a great deal of influence even on the urban population which is largely able to trace their traditional roots. Thus, the adoption of traditional leaders as an ADR mechanism is a measure that is cognisant of the social context. These informal systems can extract greater compliance with the dictates of administrative justice, predominantly in rural communities that are largely detached from judicial

[93] See Miller, Norman N., and Elliott P. Skinner. "The Political Survival of Traditional Leadership: The 'Paradox' of Rural Leadership: A Comment." *The Journal of Modern African Studies* 6, no. 2 (1968): 183-201 at page 183. http://www.jstor.org/stable/159466. Accessed June 30, 2021.
[94] See the 2012 Zimbabwe Population Census: Population Projections Thematic Report.

influences. Traditional leaders' authority is ingrained in the social structures of their respective communities. Thus, the remedies that can be accessed by the poor are largely binding and dispose of their issues. This is because the traditional remedies are ethnically-based and there is greater appreciation, even where the outcome is adverse, as parties can trace the premise of the traditional leaders' verdict or intervention.

The prominent limiting factor to this mechanism is that administrative justice is at times a very complex topic and traditional leaders such as chiefs may resort to measures that do not meet the muster of its set standard. The ethnic-based remedies may militate upon the aforesaid litigant's access to administrative justice. The expertise of the traditional leader is, in certain instances, limited to the social sphere of their existence.

4.2.5. Complaints Handling System as Part of Good Governance

It has already been argued that there are certain acts of maladministration which are so minor but impact heavily on the poor and vulnerable people. These cases are ordinarily referred to as minor administrative infractions. For example when a public official refuses to issue a birth certificate or record of a child, or a headmaster refuses to release examination results of a student; these are minor administrative infractions which do not necessarily need to be dealt with by way of review in the high court. They can easily be dealt with administratively by raising a complaint against the offending public official. This class of people would benefit from the introduction of an effective and accessible complaints handling system.[95] It is fundamental to have an enhanced complaint handling system in the public sector in Zimbabwe. A complaints handling system receives complaints and grievances from the public about the manner their matters had been

[95] The establishment of the office of the Public Protector is a proposed provision in the impending Amendment Number 2 of the Constitution. This will be discussed in greater detail in the later chapter.

handled by the public institution or officials. The institution would then investigate such complaints to take corrective measures depending on the outcome of the investigations. This is a system that is ideal and most suitable for the generality of the public who do not have the financial or technical capacity to challenge such acts of maladministration through the formal court system. Such a complaint handling system must be established in every public institution or Ministry as part of good governance practices by that institution.

If a complaint handling system is introduced in every public institution or Ministry then it would be the answer to the challenges faced by the poor and vulnerable victims of maladministration as their matters would be resolved without delay by the institution. This is a much cheaper, informal, less technical, and easily accessible process. It is therefore important that at the policy level, public institutions must be required to set up complaints desks with officers well capacitated and trained to receive, deal and resolve complaints made by the public against acts of maladministration by their officers. The majority of incidences of administrative infractions can be resolved at this level.

If an official from the Registrar's office for example refuses to issue a birth certificate to a widow's child it would mean that the child may not be able to attend school. It's much easier for the widow to make use of the complaint handling system in the office of the Registrar General so that the officer would be directed to do his or her work. The beauty about such a system is that the raising of the complaint may be done informally and verbally or even in written form but there are certainly no formalized systems like the High Court rules that would regulate the making of the complaint. Furthermore, the resolution of the complaint would not be restricted to the complaint by the widow only but it would assist a wider group of people in that area who would also be victims of the maladministration by the registry officer. An elaborate and localized complaints handling system would be one of the most effective alternatives to judicial review

in this context and would certainly enhance access to justice for those people with no capacity to litigate.

5. CONCLUSION

The responsibility of making administrative decisions is largely placed in the hands of state agencies and administrative authorities, and these decisions have far-reaching consequences to the people especially those who cannot afford litigation. Whilst administrative justice plays a fundamental and critical role in the lives of the general populace it is important that the State puts in place mechanisms that would ensure that its easily accessible to all manner of people.

The law in place at the moment in the form of s 68 of the Constitution is adequate to facilitate the generality of the public to access administrative justice but the Administrative Justice Act would require to be amended so that its provisions are *intra vires* the Constitution. The system in place however makes access to justice for the poor especially women and children difficult if not impossible. The discussion has observed that a formalised judicial system is not the most ideal as it is not easily accessible to the poor and marginalised. An informal system which is less technical and less expensive would ensure that the people in the lower echelon of the society are in a position to vindicate their administrative justice rights. The population demographics of this jurisdiction where the poor are surviving below the poverty datum line requires that access to justice can only be achieved for them if the system of vindicating rights is simplified, clear and informal. The current system is yet to measure up to this requirement. Accessibility to administrative justice in the circumstances remain a pipe dream.