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THE RIGHT TO BE HEARD – WORTH THE DELAY?

A critical examination of public participation's role in the efficiency of administrative action in democratic South Africa

by

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Telana Deslin Halley

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“It has been suggested that there are three criteria by which to judge the merits of administrative procedures; accuracy of the decisions, efficiency in the decision making and acceptable procedures...an administrator’s natural concern is to complete their administrative tasks as efficiently as possible.”

Lawrence Baxter¹

¹Lawrence Baxter Administrative Law (1984) at 215

ABSTRACT

“Section 4 in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) is a great achievement for South African administrative law, and its very presence in the PAJA is likely to have a positive effect on the rate and quality of participation in administrative decision-making.² Despite the accuracy of this statement, how costly is public participation to efficient administrative action?

In terms of section 4 of the PAJA, in cases where an administrative action materially and adversely affects the rights of the public, to give effect to the right to procedurally fair administrative action, an administrator, must decide whether to hold a public inquiry, follow a notice and comment procedure, follow both a public inquiry and notice and comment procedure, or where an administrator is empowered by any empowering provision, follow a procedure which is fair but different or to follow any procedure that gives effect to section 3³ of the PAJA⁴. However, if reasonable and justifiable in the circumstances, an administrator may depart from the requirement to involve the public in the administrative decision. In determining whether a departure from the public participation procedure is reasonable and justifiable, several factors must be taken in account; one such factor is the need to promote an efficient administration and good governance. To what degree should the public accept this departure?

The PAJA’s preamble sets out its purpose, which is to promote an efficient administration and good governance, and create a culture of accountability, openness and transparency in the public administration.⁵ It can thus be said that an efficient administration is an important aspect of just administrative action. This paper considers the instances where public bodies departed from the requirements of section 4 of the PAJA through a proper assessment of case law and case studies. It considers practical examples of administrative action by South African public entities and instances where the public participation process affected the efficiency of the administrator and the consequences thereof. This paper seeks to answer the question ‘Why is creating a culture of transparency and public participation so important to lawful, reasonable and procedural fair administrative action?’

² C Hoexter *Administrative Law in South Africa* (2007) at 83.

³ Section 3 of the PAJA “Procedurally fair administrative action affecting any person” – Section 3 sets out the requirements of a fair procedure relating to administrative action.

⁴ Section 4(1)(a)–(e) of PAJA.

⁵ Preamble of the PAJA “AND IN ORDER TO –

* *promote an efficient administration and good governance; and*

* *create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.*

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CHAPTER 1 INTRODUCTION

Justice Sachs in the *Residents of Joe Slovo Community*⁶ judgment provides some explanation of what it means to be a South African living in the new constitutional democracy. Sachs J explains that constitutional democracy concerns the responsibility that government has to “*secure the ample benefits of citizenship promised for all by the Constitution.*”⁷ The concept of citizenship goes beyond the historical notions of electoral rights; it focuses on the duty of citizens to be active, participatory and responsible for making their own collective and individual contributions towards the entitlements that they claim.⁸ Democracy stems from the idea of self-government; the people must be ruled only by themselves.⁹ There are several popular types of democracy: representative, direct and participatory. “Representative” affords more or less discretion to individual representatives or to political parties, whereas “direct” is achieved through either a referendum or an initiative. Participatory democracy, on the other hand, acknowledges that a modern state demands that representatives take decisions that affect the public, but it requires extensive participation in the political affairs by the citizens.¹⁰

Our courts have upheld one of the fundamental principles of democracy: participatory democracy.¹¹ South Africa’s democratic government is partly representative and partly participatory; it is also accountable and transparent.¹² The Constitutional Court has affirmed that

⁶*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

⁷*Residents of Joe Slovo supra* (note 6) para 408.

⁸*Ibid*

⁹M Bishop “Vampire or Prince? The listening Constitution and Marafong Demarcation Forum and Others v President of the Republic of South Africa and Others” (2009) 2 *Constitutional Court Review* at 313.

¹⁰*Ibid* at 320.

¹¹*Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 116.

¹²*Ibid*.

participation is part of our constitutional framework. It is for this reason that the Promotion of Administrative Justice Act (the PAJA)¹³, which is the national legislation enacted to give effect to the section 33 right to just administrative action, includes section 4 that considers public participation an essential element to give effect to procedurally fair administrative action that affects the public. Clearly, the idea of self-government and public participation has significant importance, as section 4 of the PAJA states the following:

- (1) *In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action must decide whether:*
 - (a) *To hold a public inquiry in terms of subsection (2);*
 - (b) *To follow a notice and comment procedure in terms of subsection (3);*
 - (c) *To follow the procedures in both subsections (2) and (3);*
 - (d) *Where the administrator is empowered by any empowering provision to follow another appropriate procedure which gives effect to section 3*
- (2) *If an administrator decides to hold a public inquiry—*
 - (a) *the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and*
 - (b) *the administrator or the person or panel referred to in paragraph (a) must—*
 - (i) *determine the procedure for the public inquiry, which must—*
 - (aa) *include a public hearing; and*
 - (bb) *comply with the procedures to be followed in connection with public inquiries, as prescribed;*
 - (ii) *conduct the inquiry in accordance with that procedure;*
 - (iii) *compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and*
 - (iv) *as soon as possible thereafter—*
 - (aa) *publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a*

¹³ Promotion of Administrative Justice Act 2 of 2000.

notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and

- (bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (aa) to the public concerned.*
- (3) If an administrator decides to follow a notice and comment procedure, the administrator must—*
 - (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;*
 - (b) consider any comments received;*
 - (c) decide whether or not to take the administrative action, with or without changes; and*
 - (d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.*
- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1) (a) to (e), (2) and (3).*
 - (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—*
 - (i) the objects of the empowering provision;*
 - (ii) the nature and purpose of, and the need to take, the administrative action;*
 - (iii) the likely effect of the administrative action;*
 - (iv) the urgency of taking the administrative action or the urgency of the matter; and*
 - (v) the need to promote an efficient administration and good governance.*

This paper considers why public participation is essential for procedurally fair administrative action and whether the requirements listed in section 4(1)(a)–(d) of the PAJA are necessary to obtain procedurally fair administrative action in instances where administrative action affects the public.

Section 33(3)(c)¹⁴ of the Constitution envisaged that national legislation, enacted to give effect to the right to lawful, reasonable and procedurally fair administrative action, should promote an efficient administration. Through an analysis of the development of public participation and an examination of the requirement of public engagement as set out in section 4 of PAJA, this paper seeks to answer whether public participation promotes or hinders the prospect of an efficient administration.

Recent decisions taken by the South African government imply that government may have an adverse attitude towards public participation. This is gleaned from examples such as the Western Cape school closures, where the Western Cape High Court found that the public consultation process followed had been inadequate;¹⁵ the public outcry regarding the lack of “meaningful” public participation prior to the implementation of e-tolling; and the North Gauteng High Court’s decision that the public engagement process was inefficient.¹⁶

Public participation is clearly a current and contentious issue. The process of public participation, specifically meaningful public participation, can increase the bureaucratic red tape that so enmeshes public bodies. Through careful consideration of current South African case law, this paper examines how the courts have interpreted section 4 of the PAJA. The debate

¹⁴Section 33 of the Constitution states that:

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

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

(3) National Legislation must be enacted to give effect to these rights, and must –

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

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

(c) Promote an efficient administration. [own emphasis]

¹⁵Jane Etheridge “Western Cape Schools Closures set aside” *News 24* available at <http://www.news24.com/SouthAfrica/News/Western-Cape-school-closures-set-aside-20130731>, accessed on 14 September 2014.

¹⁶Staff Writer “Court dismisses application to scrap Gauteng e-tolls” *Business Day Live* available at <http://www.bdlive.co.za/national/2012/12/13/court-dismisses-application-to-scrap-guateng-e-tolls>, accessed on 14 September 2014.

surrounding public participation is significant, as current events in the one party dominant state of South Africa reveal. This research paper attempts to elucidate what is on many South Africans' minds: are we involved in decisions that affect us, and if we are not, is South Africa going back to the sovereign state regime that is the legacy of Apartheid?

The paper is divided into six chapters including this introduction. The second chapter considers the background and history behind the need for a culture of transparency and accountability. The third chapter examines public participation as embedded in legislation enacted to give effect to the constitutional right to lawful, reasonable and procedurally fair administrative action, section 4 of the PAJA. Section 4(4) of the PAJA consents to an administrator departing from the requirements involving public participation under section 4 of the PAJA, where it is reasonable and justifiable to do so. Chapter 4 considers the administrative law concepts of "reasonableness" and "justifiability", and cases where there has been a departure from the requirements of section 4 of the PAJA and the consequences of such a departure. The final two chapters scrutinise the notion of "an efficient administration" and compare public participation and administrative law in other jurisdictions.

By focusing on both international and South African jurisprudence, the paradigm of efficiency versus participation will begin to break down. This paper sheds light on the value of participation and aims to provide answers to the questions regarding the efficiency of administrative action.

CHAPTER 2 BACKGROUND AND HISTORY TO THE NEED FOR A CULTURE OF TRANSPARENCY AND ACCOUNTABILITY

2.1 Introduction

The Preamble of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) opens with the following:

*“We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land...We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as tolay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;”*¹⁷ (own emphasis)

Section 1 of the Constitution states the following:

“The Republic of South Africa is one, sovereign, democratic state founded upon the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
- (b) ...*
- (c) ...*
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”* (own emphasis)¹⁸

Section 19 of the Constitution provides for a participatory and representative democracy, where each citizen is free to participate in the activities of, and recruit members for, a political party. It is understood that the PAJA¹⁹ is the national legislation enacted to give effect to the right to administrative action that is efficient, lawful, reasonable and procedurally fair.²⁰

¹⁷ The Constitution of the Republic of South Africa, Act 108 of 1996 – Preamble.

¹⁸ Section 1 of the Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁹ The Promotion of Administrative Justice Act 3 of 2000.

²⁰ Section 33 of The Constitution of the Republic of South Africa, Act 108 of 1996.

The PAJA's preamble establishes its purpose, which is to promote an efficient administration, assist in good governance and create a culture of accountability, openness and transparency in the public administration or in the exercise of public power.²¹ Public participation is a key element used to attain the goal of procedurally fair administrative action that adversely affects the public. A proper understanding of why public participation is a requirement of procedural fair administrative action can be better understood by considering administrative law pre-1994, as it is clear that government at that time significantly lacked transparency and accountability.

2.2 Pre-1994 Administrative Law

2.2.1 The rules of natural justice relating to participation

Natural justice not only requires a public authority to use its powers reasonably, it also requires it to exercise its power in a procedurally fair manner.²² This precept stems from the principles of natural justice which prescribe that any person affected by administrative action should be given a fair and unbiased hearing before the decision is taken.²³ These principles of natural justice are expressed in the form of the two Latin maxims: *audi alteram partem* "hear the other side" and *nemo iudex in propria causa* "no one may be a judge in his own case".²⁴

Theorists, such as Etienne Mureinik argue that democracy is closely linked to a responsive government. However, the idea of responsiveness can be a confusing concept. Does the idea of a responsive government demand that people participate in decisions that affect them or does it describe a government that is accountable to the people it governs?²⁵ Etienne

²¹The Preamble to the Promotion of Administrative Justice Act 3 of 2000.

²² Lawrence Baxter *Administrative Law* (1984) at 536.

²³Ibid at 536.

²⁴Ibid.

²⁵Etienne Mureinik "Reconsidering Review: Participation and Accountability" in TW Bennett *et al* (eds) *Administrative Law Reform* (1993) at 36.

Mureinik²⁶ argues that by participating in a decision that affects one, an opportunity to affect the content of that decision is created, which can ultimately influence the outcome.²⁷

Prior to the enactment of the South African Constitution and the PAJA,²⁸ Government refused to satisfy the public's demand to be heard prior to it taking decisions. Government's justification was that only when a decision affected the rights of a person, would the laws of natural justice apply.²⁹ In essence, the narrow interpretation of "affect" would mean that public participation and the right to be heard were limited to decisions that deprive a person of a prior legal right. This, Mureinik describes as the *deprivation theory* of natural justice.³⁰ However, a broad interpretation of the word "affect" would mean that a person may demand public participation if the decision taken by the administration affected a person's right, or if the decision could determine what a person's rights are.³¹ This is described as the *determination theory*.

Prior to 1994, South African jurisprudence had elements of both the deprivation theory and the determination theory.³² In the matter of *Laubscher v Native Commissioner Piet Retief*,³³ Mr Laubscher, an attorney practising in Benoni who had acted for a certain Zulu Tribe residing on various farms in the Piet Retief District, sought an appeal.³⁴ The appeal was a direct result of the decision by the Natives Commission to refuse Laubscher's application to

²⁶ Mureinik op cit (n25) at 35.

²⁷ Ibid.

²⁸ The Promotion of Administrative Justice Act 3 of 2000.

²⁹ Mureinik op cit (n25) at 35.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A).

³⁴ *S v Laubscher Supra* (n33) at 552.

visit the property for professional purposes as per the Native Trust Land Act 18 of 1936.³⁵

Laubscher appealed on the basis that an enquiry had not been held. In the court's view, Laubscher had no right to enter the "native land"; his rights and privilege only arose once the commissioner had granted him the permission. Laubscher's appeal was dismissed on the basis that an official was required by statute to exercise a purely administrative discretion, and the official was under no obligation to provide the applicant with any information upon which the decision was based.³⁶

However, in the matter of *Hack v Venterspost Municipality and Others*,³⁷ the court held that the theory that a body acts administratively only if its function is to deprive a person of an existing right is a narrow test. The court held that this test would then exclude liquor licensing boards and transportation boards, which are clearly administrative boards.³⁸ It is sufficient if the decisions by the body affect the rights of the subject.³⁹ As a general rule, a tribunal or a body when exercising its functions should not do so in an arbitrary way, but as a result of an enquiry into matters of fact and law, these decisions may affect the rights of individuals.⁴⁰

Both the deprivation and the determination theories posed problems for Administrative Law pre-1994. Whereas the deprivation theory was too narrow and led to administrative decisions being taken without any form of participation, the determination theory was far too wide and imposed procedural constraints that frustrated Government's effectiveness.⁴¹ By the 1990s, a more progressive move towards public participation had been

³⁵ *Supra* (n33) at 550.

³⁶ *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 551.

³⁷ *Hack v Venterspost Municipality* 1950 (1) SA172 (W).

³⁸ *Hack v Venterspost Municipality supra* (n37) at 189.

³⁹ *Supra* (n37) at 190.

⁴⁰ *Ibid.*

⁴¹ Mureinik op cit (n25) at 37.

adopted by courts of apartheid South Africa, which saw the courts use the doctrine of legitimate expectation to govern participation.

This doctrine, which can be said to be an expansive version of the deprivation theory, accepts that the right to participate in a decision should be given to those who are at risk of being deprived of a legal right or an expected right.⁴² In *The Administrator, Transvaal v Traub*⁴³, the court had to assess whether the rules of natural justice and in particular the *audi alteram partem* principle were restricted to individuals with existing rights or whether it had a wider impact;⁴⁴ the applicants had a legitimate expectation that they would be appointed based on a long standing practice at the provincial hospital. The applicants had signed a letter shedding light on the unacceptable conditions at the Baragwanath Hospital following which the provincial authority refused to confirm their appointments. The court held that although the applicants did not have an existing right to be appointed to the posts for which they had applied, they had a legitimate expectation that once they had applied for the posts and their posts had been recommended, an appointment would follow as this had been common practice.⁴⁵ The court held that a legitimate expectation included expectations that went beyond enforceable legal rights, provided it had some reasonable basis.

From 1980 and up until 1994, many administrative decisions affecting public were termed “legislative decisions”⁴⁶ because the actions by public bodies regulated the affairs of the people. Where a public body decided to issue a removal order directing an entire group of people to be shifted from one area to another area, as was the case in the enforcement of the Group Areas Act 41 of 1950, this would be termed a legislative decision. Even though such administrative action affected the existing or potential interests

⁴²Ibid.

⁴³*Administrator, Transvaal v Traub* 1989 (1) SA 731 (A).

⁴⁴*Supra* (n43) at 748.

⁴⁵*Supra* (n43) at 761.

⁴⁶Baxter op cit (n22) at 580.

of individuals drastically, because it was termed a legislative decision affecting the public, the right to a hearing did not exist,⁴⁷ as prior to 1991 the South African courts had established that a group of individuals affected by legislation could not demand a hearing. It would appear, therefore, that courts in the past relied on certain administrative acts affecting many rather than merely one as an excuse.⁴⁸

2.2.2 South African administrative law as it emerged from the Westminster system

Following the Westminster system, the South African government positioned the judiciary as an inferior body to the “democratically” elected parliament.⁴⁹ In the pre-democratic era, the Supreme Court of South Africa created a set of principles that had developed into “administrative law”. These principles relied heavily on English administrative law and the English doctrine of parliamentary sovereignty,⁵⁰ which restrained the courts’ powers. Whilst the courts had the power of judicial review in terms of the legality of administrative conduct, parliament assumed the ultimate power when considering the legality of administrative action.⁵¹

In the British Commonwealth, administrative law practitioners would focus their attention on the right to a fair hearing and fair decisions in terms of decisions relating to individuals. However, there had been very little examination of using what Baxter⁵² describes as a “rule-making process” to enhance public participation in administrative action such as the formulation

⁴⁷Baxter op cit (n22) at 581.

⁴⁸Ibid.

⁴⁹ D M Davis “Administrative Justice in a Democratic South Africa” in TW Bennett *et al* (eds) *Administrative law Reform* (1993) 27.

⁵⁰ Cora Hoexter *Administrative Law of South Africa* (2007) at 13.

⁵¹Ibid.

⁵² Lawrence Baxter “Rule-making and policy formation in South African Law Reform” (1993) 176 *Acta Juridica* at 176.

of legislation. The effect of executive control placed responsibility and accountability relating to policy formulation in the hands of the cabinet.⁵³

The notion of “rule-making” is an American administrative law concept. It involves a set of flexible procedures that a public body follows when it wishes to develop standards to bind the public. These “binding standards” must then be published together with a reasonable explanation of their purpose, while inviting the public to comment either in written or in oral form. Once these comments have been received, the public body analyses all comments and adopts the standard in response to those comments.⁵⁴

South Africa’s pre-constitutional administrative law, however, contained features of a system that was “hostile to the basic principles of rule-making.”⁵⁵ Although the principles of natural justice, in terms of the *audi alteram partem*, embraced some characteristics of participation to promote an accountable government, its primary concern was to ensure a fair administrative decision regarding the individual.⁵⁶ The principle does not “contemplate the kind of mass access that is required for such decisions.”⁵⁷

The 1966 judgment in *Pretoria City Council v Modimola*⁵⁸ is a clear example of the view that administrative decisions affecting a large number of people should be included in the *audi alteram partem* principle. The case was an appeal to the Transvaal Provincial Division concerning the expropriation of Mr Modimola’s property in terms of the Group Areas Development Act 69 of 1955. The court *a quo* held that the Pretoria City Council had to give Mr Modimola an opportunity to be heard before his property was expropriated.⁵⁹ However on appeal, Botha JA held that the expressed maxim of *audi alteram partem* was an annunciation of the principle of natural justice.

⁵³Baxter op cit (n52) at 182.

⁵⁴Ibid at 178.

⁵⁵Ibid at 184.

⁵⁶Ibid.

⁵⁷Baxter op cit (n52) at 186.

⁵⁸*Pretoria City Council v Modimola* 1996 (3) SA 250 A.

⁵⁹*Supra* at 260.

Where the principle of natural justice has been violated, the legislature implicitly incorporates the principle of *audi alteram partem*.⁶⁰ Botha JA, drew on the *Sachs v Minister of Justice*⁶¹ matter and held that if individuals' liberty or property was affected, then the principles of *audi alteram partem* must be applied, but where the statute that empowered the administrative action affects the members of a whole community, the principles of natural justice have not been violated, and therefore the *audi alteram partem* principle would not apply.

Judges of the pre-constitutional era feared "over-extending" natural justice,⁶² as was the case in *S v Moroka*⁶³ 1969 (2) SA 394 (A) 398, where the accused was convicted of occupying certain buildings administered by the South African Bantu Trust that would have been used for grazing stock. The Bantu Affairs Commission issued a notice which *inter alia* stated that the property rights of the members of that community had been terminated. The court held that even though the notice had been "published" by placing it on the Bantu Affairs Office Notice Board, the *audi alteram partem* principle did not apply because the commissioner of Bantu Affairs had the necessary authority to make a decision that affected the interest of the community as a whole.

These principles regarding public administrative action that adversely affected the public were applied throughout South African jurisprudence up until the 1990s when the tide changed slightly in favour of more genuine public participation. In the matter of *South African Roads Board v Johannesburg City Council*,⁶⁴ the South African Roads Board intended to construct a major motorway, and in the process the N13 was converted into a temporary toll road to obtain funds for the project.⁶⁵ The Johannesburg City

⁶⁰ *Supra* (n58) at 261.

⁶¹ *Sachs v Minister of Justice* 1934 AD 11.

⁶² Baxter op cit (n22) 581.

⁶³ *S v Moroka* 1969 (2) SA 394 (A) at 398.

⁶⁴ *South African Roads Boards v Johannesburg City Council* 1991 (4) SA 1 (A).

⁶⁵ *Supra* (n64) at 723.

Council objected to the construction of a temporary toll road on account of the inevitable increase in traffic from the residential suburbs of Johannesburg who would use these residential suburban routes to avoid paying the toll.⁶⁶ The main issue of contention raised in the appeal was whether the erection of a toll gate on a national road was *ultra vires* as the City Council had not been given a hearing prior to the decision being taken. This was clearly a legislative act taken by the Roads Board and the question was whether this legislative act was subject to the rules of natural justice, including the *audi* principle.⁶⁷

The City Council argued that the action by the Roads Board affected its property rights as the creation of a toll road would lead to traffic being diverted.⁶⁸ The Roads Board argued that its decision to have the road declared a toll road was by its nature a “legislative act”, and therefore the *audi alteram partem* rule did not apply.⁶⁹ Milne JA considered the developments surrounding the *audi* principle as a rule of natural justice and expressed that the courts have preferred the view that the principles of natural justice are not violated in instances where a statute authorised a public authority to affect the property rights of members of a community. It follows that should the authority refuse the community member the right to be heard, the principles of natural justice are not violated as the public decision is taken under statute.⁷⁰ The modern approach to administrative action is to consider the nature and facts of each case, Milne JA held that the court had moved away from the classification of administrative action and where statutory powers cause prejudice to a particular group of individuals, the rules of natural justice apply unless expressly excluded by statute. Milne JA was in

⁶⁶ *Supra* (n64) at 725.

⁶⁷ *Supra* (n64) at 730.

⁶⁸ *Supra* (n64) at 729.

⁶⁹ *Ibid.*

⁷⁰ *Supra* (n64) at 732.

favour of the court *a quo*'s decision to set aside the Roads Board's decision and dismissed the appeal.⁷¹

2.2.3 Un-democratic South Africa

Democracy has been described as “the people’s rule”, and that constitutionalism restrains power and codifies the rules that enable democracy.⁷² However, as early as the 1800s, the Boer Republics sought an alternative source of constitutionalism to that of the English idea of constitutionalism.⁷³ In the traditional forms of administrative law, bureaucratic power is often authorised by a representative legislature and policed by the courts, meaning that the traditional view of controlling public power focuses on the judiciary and judicial review.⁷⁴ Although pre-democratic South Africa was racist at heart, it adopted the *ultra vires* doctrine, which later became a founding principle of administrative law. The courts used *ultra vires* as a ground for judicial review; however, as the courts adjusted to the pressure of the growing government and the increase in administrative action, the grounds for judicial review expanded to encompass procedural unfairness, substantive unfairness and gross unreasonableness.⁷⁵

The autocratic government of pre-1994 South Africa and its version of administrative law focused heavily on judicial review, but this could not be the “sole institution of administrative law”; legislation and the common law also have a role to play.⁷⁶ The South African government concentrated an enormous amount of power in the hands of the executive and the state

⁷¹ *Supra* (n64) at 736.

⁷² Richard Bellamy and Dario Castiglione “Review Article: Constitutionalism and Democracy – Political Theory and the America Constitution” (1997) *British Journal of Political Science* vol. 27 No. 4 at 595.

⁷³ Woolman and Swanepoel “Constitutional History” in Woolman, Roux, Bishops (eds) *Constitutional Law of South Africa* 2nd ed OSS 06-08 vol 1 s2.2.

⁷⁴ *Ibid.*

⁷⁵ Catherine O’Regan “Rules for Rule-making: Administrative Law and Subordinate Legislation” (1983) *Acta Juridica* at 158.

⁷⁶ *Ibid.*

administration⁷⁷ expressing a clear notion that “government knew best”. The judiciary in pre-democratic South Africa limited its involvement in executive matters. In the early 1800s, the *Volksraad* adopted legislation denying the courts’ power of judicial review. Despite the then Orange Free State having adopted a constitution, the High Court held that although the constitution at the time provided for judicial review of state action, the legislation had to be interpreted in accordance with the *mores* of the Voortrekkers, which in short meant denying the majority people of South Africa the right to judicial review.⁷⁸

2.3 The development of the concepts of “lawful, reasonable and procedurally fair” administrative action

2.3.1 Lawfulness

Lawfulness and the principle of legality are concepts that are equal in nature, and have often been used interchangeably. The principle of legality is one of the founding values of the rule of law, and applies to the exercise of public power.⁷⁹ In the past, the requirements of lawfulness or legality were applied inconsistently and confined to compliance with the provisions of enabling legislation.⁸⁰ Early administrative law focused on the interpretation and limitation of administrative power. As administrative law developed, the focus shifted from the limitation of public power to the promotion of a “good public administration”.⁸¹ The courts began to consider the effect of administrative decisions on the public,⁸² and it is in this context that the courts developed the “grounds of administrative law – lawfulness, fairness and reasonableness”.⁸³

⁷⁷WHB Dean “Our Administrative Law: A Dismal Science” (1986) 2 *SAJHR* at 64.

⁷⁸Woolman and Swanepoel op cit (n73) s2.1.

⁷⁹Hoexter op cit (n50) at 224.

⁸⁰Y Burn and M Beukes *Administrative Law under the 1996 Constitution* 3ed (2006) at 50.

⁸¹J Jowell “The Democratic Necessity of Administrative Justice” 2006 *Acta Juridica* at 13.

⁸²Ibid.

⁸³Ibid.

In the past, the concept of lawfulness meant that other common law requirements such as reasonable, clear and understandable administrative action did not need to be complied with. This narrow and legalistic view did not conform to the principle of administrative legality which forms the basis of the exercise of lawful administrative action.⁸⁴ The modern day concept of “lawfulness” is interpreted widely to include compliance with the Constitution,⁸⁵ any enabling legislation and the rules of the common law.⁸⁶ Bearing this in mind, it can be said that lawfulness is an “umbrella concept” as it encompasses all the requirements of valid administrative action.⁸⁷ Lawful administrative action describes administrative actions and decisions that have been duly authorised by law and that meet all the requirements listed in the provisions or statute enabling such action.⁸⁸ As the right to administrative justice is embedded in the Constitution,⁸⁹ judicial review has therefore been “constitutionalised” and has extended the common law principles of reasonableness, procedural fairness and lawfulness.⁹⁰ Therefore any legislation or action that infringes on these rights can be challenged as unconstitutional, unless the legislation is justified by section 36 of the Constitution (the limitations clause).⁹¹ The constitutional requirement of lawfulness demanded by section 33(1) of the Constitution⁹² corresponds with the common law principle of legality. The principle of legality is the idea that administrators and other public actors have to act lawfully, and that the exercise of public power is only legitimate where it is lawful.⁹³

⁸⁴Burns & Beukes (n80) at 50.

⁸⁵Constitution of the Republic of South Africa, 108 of 1996.

⁸⁶Y Burns “Administrative Law” in WA Joubert (ed) *The Law of South Africa* 2nd ed Vol 1 (2003).

⁸⁷Burns & Beukes (n80) at 50.

⁸⁸Hoexter op cit (n50) at 224.

⁸⁹Constitution of the Republic of South Africa 108, 1996.

⁹⁰Hoexter op cit (n50) at 224.

⁹¹Ibid.

⁹²Constitution of the Republic of South African 108, 1996.

⁹³Hoexter op cit (n50) at 116.

The principle of legality was originally an extension of the *ultra vires* doctrine that originated in South Africa's Westminster past. The *ultra vires* doctrine, simply put, does not permit an administrative body to exceed its "objective powers".⁹⁴ In South African administrative law today, the principle of legality and the requirement of lawfulness as intertwined concepts have grown to include common law principles such that administrative action must be clear and understandable and not vague and embarrassing, or arbitrary and irrational.⁹⁵

As the concept of lawfulness developed within the South African common law, the courts created more detailed grounds of review using the broad concept of "legality".⁹⁶ The requirements for judicial review are contained in section 6 of the PAJA and therefore any non-compliance with the grounds for review as laid down in section 6 is considered unlawful action.⁹⁷ The PAJA makes specific provisions for administrative action that would have been regarded as *ultra vires*, namely: section 6(2)(a)(i), which stipulates that an administrator must be competent and authorised by an empowering provision to make a decision; 6(2)(a)(ii), which refers to an unauthorised delegation of authority; 6(2)(e)(i), which relates to action taken for a reason that is not authorised by an empowering provision; and 6(2)(f)(i), where the action itself is a contravention of a law or is not authorised by an empowering provision.⁹⁸

Under the parliamentary sovereignty system, Parliament had the authority to exclude judicial review of administrative action via "ouster clauses".⁹⁹ These clauses were popular in South Africa under the state of emergency during the 1980s where individuals were arrested and detained without trial. These clauses curtailed fundamental rights such as freedom of

⁹⁴Burns and Beukes op cit (n80) at 204.

⁹⁵Ibid.

⁹⁶Hoexter op cit (n50) at 224.

⁹⁷Burns & Beukes op cit (n80) at 204.

⁹⁸Ibid.

⁹⁹Ibid at 206.

speech, association and movement.¹⁰⁰ During this time, the courts would not accept that they were restricted from proceeding with judicial review. With the introduction of the Interim Bill of Rights,¹⁰¹ a culture of justification developed. Everyone had a right to “lawful administrative action” under section 24(a) of the Interim Constitution; ouster clauses were therefore permanently annulled due to the constitutional right to lawful administrative action.¹⁰² The constitutional right to lawful administrative action attacks legislative provisions that attempt to isolate administrative action from judicial review.¹⁰³

2.3.2 Reasonableness

Prior to the 1990s, the English courts emphasised the duty placed on the administrator to provide good administration rather than focusing on the right of the public to good administration.¹⁰⁴ The concept of reasonableness in South African administrative law developed significantly over the years prior to the Constitution.¹⁰⁵ The traditional approach was developed from the English judgment of *Associated Provincial Houses v Wednesbury Corporation*,¹⁰⁶ where action that was so unreasonable that no reasonable authority could ever have come to the same conclusion was taken on review.¹⁰⁷ This eventually became the “gross unreasonableness” test: “so unreasonable that no reasonable person could so have exercised the power or performed the function.”¹⁰⁸ The test for unreasonableness developed further following the judgment in *Union Government v Union Steel Corporation*,¹⁰⁹ which developed into the “symptomatic unreasonableness”

¹⁰⁰ Ibid.

¹⁰¹ Constitution of the Republic of South Africa 200 of 1993.

¹⁰² E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” *SAJHR* 33 at 38.

¹⁰³ Ibid.

¹⁰⁴ Jowell op cit (n81) 13.

¹⁰⁵ The Constitution of the Republic of South Africa, 1996.

¹⁰⁶ *Associated Provincial Houses v Wednesbury Corporation* (1948) 1 KB 223.

¹⁰⁷ Devenish, Govender and Hulme *Administrative law and Justice in South Africa* (2001) at 372.

¹⁰⁸ Jowell op cit (n81) at 18.

¹⁰⁹ *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220.

test. This test held that the administrative decision had to be so grossly unreasonable and to such a striking degree to warrant interference as there was a clear irregularity in the making of the administrative decision.¹¹⁰ This can be argued as the development of the English concept of the “gross unreasonableness” test in *Wednesbury*.¹¹¹ The test further developed in the *Chetty’s Motors*¹¹² judgment, which added the “failure to apply one’s mind” concept, in other words the courts would find the administrative action invalid when on review it found that the administrator failed to apply its mind to the issue in accordance with directions of statute and therefore the decision was grossly unreasonable to such a striking degree that it warranted the conclusion that there had been a failure to apply one’s mind.¹¹³

The development of the common law principles surrounding rationality and the establishment of the doctrine separation of powers in South Africa, resulted in the autonomy of the judiciary and the administration; it was accepted that it is not the legitimate function of the Courts to substitute decisions for the administration, but that there must be a measure of control over rationality and basic fairness to ensure administrative justice.¹¹⁴ The jurisprudence of the pre-democratic era is flooded with different approaches to the ground of reasonableness, which slowly encouraged the movement towards finding a unified ground of reasonableness. Lawrence Baxter led this movement and argued strongly that unreasonableness was an independent ground for the invalidity of administrative action, making it subject to review by the courts.¹¹⁵

¹¹⁰Hoexter op cit (n50) at 204.

¹¹¹*Associated Provincial Houses v Wednesbury Corporation (1948) 1 KB at 223.*

¹¹²*Chetty’s Motor Transport (Pty) Ltd v National Transport Commission 1972 (1) SA 156 (N).*

¹¹³*Supra* (n112) at 159D.

¹¹⁴Devenish op cit (n107) at 371.

¹¹⁵*Ibid.*

2.3.3 Common law duty to act fairly

The duty for administrators to act fairly is accepted as forming part of the rule of law. Laws need to be certain and predictable; a person cannot be deprived of a substantial interest unless he is given the right to a fair hearing.¹¹⁶

Fairness is not applied in exactly the same way to every situation; it demands that it be applied in the context of the administrative decision.¹¹⁷ The rules of natural justice have been explained as the fundamental principles of fairness underpinning our system of law.¹¹⁸ These principles are expressed in the two common law maxims *audi alteram partem* (hear the other side) and *nemo iudex in propria causa* (no one may judge in his own case).

The *audi alteram partem* principle contains similar rules to those found in the PAJA¹¹⁹ namely, a notice of intended action: a citizen that is concerned with the administrative action must be given notice of the intended action. The citizen must also be given an opportunity to be heard, and although the courts did not demand oral hearings to be held in all cases, hearings may be necessary. Further the person affected has the right to be representation in order to rebut evidence against him, and the right to cross-examine and approach legal representation. Common law principles regarding public hearings held that unless a relevant statute requires a public hearing, it is not essential to natural justice.¹²⁰ *Audi alteram partem* thus provided an individual the opportunity to be heard, rather than the public.¹²¹

The requirements under *nemo iudex in propria causa* embrace two basic principles: first, the principle that the adjudicator should not have a

¹¹⁶Clive Plasket *The fundamental right to just administrative action: judicial review of administrative action in the democratic South Africa* PHD (Rhodes) (2002) at 420.

¹¹⁷*Pharmaceutical Manufacturers Association of SA: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

¹¹⁸South African Law Commission Paper 15 (Project 24) “*Investigations into the court’s Powers of Review of Administrative Acts*” at 26.

¹¹⁹Promotion of Administrative Justice Act 3 of 2000.

¹²⁰South African Law Commission Paper 15 op cit (n118) at 27–30.

¹²¹H Corder “The content of the *audi alteram partem* rule in South African administrative law” (1980) 43 *THRHR* at 156.

personal or pecuniary interest in the matter and secondly that there should be an absence of bias and partiality.¹²² In the matter of *BTR Industries South Africa (PTY) Ltd and Others v Metal and Allied Workers' Union and Another*,¹²³ the court put to rest whether the rule against bias is based on a “reasonable suspicion of bias” or whether the standard for testing bias is the “real likelihood of bias existing”. This matter dealt with the recusal of an arbitrator in a matter between the employer and the employees, who had also presented a one-day seminar to the employer on management’s perspectives on the “new labour law”.¹²⁴ The court held that it was not necessary for there to be a “real likelihood”, only a “reasonable suspicion” of bias, which provided for a less demanding standard of proof; to “insist upon the appearance of a real likelihood of bias, would cut at the very root of the principle deeply embedded in our law, that justice must be seen to be done.”¹²⁵ The essence of the principle is that no one can be fairly judged if the case before him has already been prejudged, for instance where a tribunal shuts its mind to any submission made or evidence tendered, bias arises. The question is always whether, objectively, the circumstances could have caused bias on the part of the administrator.¹²⁶

2.4 Conclusion

It is evident that pre-1994, the courts ‘haphazardly’ considered public participation where administrative action affected the public as between the deprivation theory and the determination theory there was no real focus on the rights of the public at large. As has been explained, administrative law as we know it today developed over time and includes aspects of our Westminster past, such as the theories of natural justice, *ultra vires*,

¹²²South African Law Commission *Investigations into the court’ Powers of Review of Administrative Acts. Working Paper 15 Project 24* at 31.

¹²³*BTR Industries South Africa (PTY) Ltd and Others v Metal and Allied Workers’ Union and Another* 1992 (3) SA 673 (A).

¹²⁴*Supra* (n123) at 675.

¹²⁵*Supra* at 694.

¹²⁶Burns & Beukes op cit (n80) at 198.

lawfulness, reasonableness and procedural fairness. It is understood that it is in this context that the Constitutional right to lawful, reasonable and procedurally fair administration action has developed. Administrative law today will only deem administrative action concerning the public to be procedurally fair if it contains some form of public participation process. How does the PAJA meet this requirement?

CHAPTER 3 THE SCOPE OF SECTION 4 OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

3.1 Introduction

What is the purpose behind section 4 of the PAJA? It is said that section 4's purpose is to provide the public with an opportunity to be heard on matters of public concern.¹²⁷ Raubenheimer¹²⁸ argues that public participation is one of the few tools that assist the public in monitoring the exercise of public power; the procedures used for public participation are therefore important in safeguarding and ensuring that lawful, reasonable and procedurally fair decisions are made.¹²⁹ For public participation to be effective, it requires three important elements: access to information, participation in decision-making and access to justice.¹³⁰ Most importantly, public participation is only fair and effective when the relevant authority intends to incorporate the input gathered from the public into decisions or development plans.¹³¹

Section 4 of the PAJA¹³² promotes public involvement in decisions that affect the public's life. Any administrative action that materially and adversely affects the rights of the public must be procedurally fair.¹³³ The PAJA lists the various elements that contribute to procedurally fair administrative action: holding a public inquiry, following a notice and comment procedure, or following another appropriate procedure that gives effect to the notice and comment procedure.¹³⁴ Section 4 of the PAJA has replaced the common law

¹²⁷ E Raubenheimer "Section 4 of PAJA: The Constitutional standard for participative provisions in land use management" (2007) 22 *SAPR/PL* 491.

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at 492.

¹³⁰ M Kidd "The National Environmental Management Act and public participation" (1999) 6 *SAJELP* at 21.

¹³¹ E Raubenheimer *op cit* (n127) 491.

¹³² PAJA 2 of 2000.

¹³³ Section 4(1) of the PAJA, Act 2 of 2000.

¹³⁴ Section 4(1)(a)–(e) of the PAJA, Act 2 of 2000.

position regarding administrative action that affects the public.¹³⁵ These mechanisms of procedural fairness can be considered mechanisms of a collective nature, the purpose of which is to provide effective public participation in administrative action.¹³⁶ Public participation has been described as a “surrogate political process” as it increases people’s perception of democracy. In addition, public participation assists the aim of the PAJA by creating a culture of accountability, openness and transparency in the administration.¹³⁷

3.2 Unpacking section 4 of the PAJA

If section 4(1) of the PAJA is deconstructed, it can be concluded that only in cases where administrative action materially and adversely affects the rights of the public, will an administrator ensure that the administrative action complies with procedural fairness, which would include the public participation procedure set out in sections 4(1), (2) and (3) of the PAJA. Therefore, to unpack this provision, it seems necessary to define the terms that limit the application of section 4 of the PAJA, which include defining the meaning of *administrative action*, and further identifying when such action is considered to *materially and adversely* affect the rights of the public. In addition, in considering the effect of such action, it is also necessary to unpack the meaning behind “*affecting the rights of the public*”.

Administrative action is defined by the PAJA¹³⁸ as

*“...any decision that is taken, or a failure to take a decision by an organ of state when exercising a power... or exercising a public power or performing a public function in terms of any legislation...”*¹³⁹

¹³⁵ Hoexter op cit (n50) at 366.

¹³⁶ C Mass “Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A comparative Perspective” in Lange and Wessels (eds) *The Right to Know* (2004) at 79.

¹³⁷ Ibid at 63.

¹³⁸ Promotion of Administrative Justice Act 3 of 2000.

¹³⁹ Definition of Administrative Action in the Promotion of Administrative Justice Act 3 of 2000.

Prior to the enactment of the PAJA, the courts had already begun to define administrative action through case law. In *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council*,¹⁴⁰ the court analysed the administrative action by the Municipality of Johannesburg and considered the issue of what constitutes administrative action. The court held that the action by legislative bodies in exercising their original law-making powers would not be considered administrative action.¹⁴¹ Furthermore, the court highlighted that although law-making does not fall within the definition of administrative action, legislation often enables functionaries to make certain laws. This process where laws are created by functionaries can therefore be classified as administrative action.¹⁴² In short, where a functionary develops law (regulations and proclamations) in terms of legislation, that action is considered administrative action.

In the *South African Rugby Football Union (SARFU)*¹⁴³ judgment, the court held that administrative action is closely connected to the part of government that is concerned with implementing legislation. In SARFU, the court distinguished between the actions of Government in developing policy in instigating legislation, and in implementing the policy or legislation created.¹⁴⁴ The court therefore developed criteria to help distinguish what action by the executive would be considered administrative action. The court therefore considers the source of power, the nature of a power and whether it includes an exercise of a public duty, and whether the power is closely related to the implementation of policy or legislation.¹⁴⁵ It was confirmed that in terms of section 84(2)(f) of the Constitution, the discretionary power of the president to appoint a commission of inquiry to investigate the affairs of

¹⁴⁰*Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).

¹⁴¹*Ibid* para 27.

¹⁴²*Ibid* para 27.

¹⁴³*President of the RSA v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC).

¹⁴⁴Devenish op cit (n107) at148.

¹⁴⁵*Ibid*.

SARFU would not be considered administrative action. It is therefore important to focus on the nature of the power, rather than on the organ of state exercising the power.¹⁴⁶

Following the various judicial decisions regarding the definition of administrative action, the drafters of the PAJA ensured that it excluded a number of actions by the state that would not be considered administrative action. These exclusions include the executive power of the national and provincial executive, the legislative functions of parliament, a provincial legislature or municipal council and the judicial functions of a judicial officer.¹⁴⁷ This definition of administrative action is highly convoluted and often confusing and to add to the confusion, public participation only applies to administrative action that adversely affects the public and not all of government's action directly affects the electorate, often it is the process or the implementation of the legislation that may affect the rights of the public.¹⁴⁸

As explained earlier, Section 1 of the PAJA defines administrative action to include any decision or failure to take a decision by an organ of state exercising a power in terms of the Constitution or provincial constitution, or exercising a public power or performing a public function which adversely affects the rights of any person and which has a direct, external legal effect, but does not include:

- (a) National Executive power including sections 79(1) of the Constitution – the power of a president to assent a bill into action; section 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k) of the Constitution – presidential power regarding the referring of bills to the National Assembly and the Constitutional Court, the summoning of the National Assembly and National Council of Provinces, making appointments, calling a national

¹⁴⁶Karthy Govender "An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa." (2003) 18 SAPR/PL at 411.

¹⁴⁷ Hoexter op cit (n50) at 185.

¹⁴⁸Govender op cit (n145) at 405.

referendum, appointing a commission of enquiry, calling a national referendum, receiving foreign diplomats, appointing ambassadors and conferring honours. It does not include administrative action by the president involving the appointment of the deputy president (s 92(2), (3), (4) and (5) of the Constitution), cabinet members providing reports to Parliament about matters under their control (s 92(3) of the Constitution), appointing deputy ministers, transferring of powers of cabinet members, assigning cabinet members functions, national intervention in provincial administration (ss 93, 97, 98, 99 and 100 of the Constitution)

- (b) Executive power or function of the provincial executive include functions referred to in Constitutional section 121(1) and (2) – assenting bills, section 125(2)(d), (3) and (f) – the premiers’ powers to develop and implement provincial legislation and policy, section 126 – assigning functions of executive council to municipal council, section 127(2) – the premier’s responsibility regarding bills, section 132(2) – the premier’s responsibility to appoint the member of her/his executive council, section 133(3)(b) – reports by members of executive council to the legislature, sections 137 and 138 – the premier’s power to transfer functions as well as temporarily assign functions of members of the executive, section 139 – provincial intervention in local government, and section 145(1) – the signing, safe keeping and publication of provincial constitutions.
- (c) The executive powers of a municipal council.
- (d) Parliament’s, a provincial legislature’s and a municipal council’s legislative functions.
- (e) The judicial functions of a judicial officer – section 166 of the Constitution, including traditional leaders’ judicial functions and the judicial function of Special Investigating Units.
- (f) A decision to institution or continue a prosecution.

- (g) Any aspect of appointing a judicial officer by the Judicial Service Commission.
- (h) Any decision taken, or failure to take a decision in terms of the Promotion of Access to Information Act 2 of 2000 (the PAIA).¹⁴⁹
- (i) Any decision taken or failure to take a decision in terms of section 4(1) of the PAJA.¹⁵⁰ (own emphasis)

It would appear that the PAJA's creators purposefully excluded section 4(1) of the PAJA in the definition of administrative action to ensure that the process of public participation should not be subject to scrutiny by the PAJA.¹⁵¹ This could be interpreted as the drafters' attempt to prevent a burdensome process of participation. Should the decision by an administrator to hold a public inquiry, follow a notice and comment procedure, or follow a fair but different approach be subject to reasonableness or judicial review, the process would be inordinately inefficient.¹⁵² Therefore it is clear that the section 4 decisions or the process involved in section 4 is not considered administrative action and therefore not reviewable. However, this process remains subject to the common law principles of legality and the provisions of the Constitution.¹⁵³

Some confusion remains with regard to the implementation of legislation and the formation of policy over whether it is considered administrative action. The court in *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College*,¹⁵⁴ considered the issue of policy formulation resulting from a legislative obligation and held that where an executive determines a policy but does so outside a legislative framework, the executive's action would not be administrative in nature, as it

¹⁴⁹Promotion of Access to Information Act 2 of 2000.

¹⁵⁰Section 1(i) of the Promotion of Administrative Justice Act 3 of 2000.

¹⁵¹Govender op cit (n145) at 410.

¹⁵²Ibid.

¹⁵³Ibid.

¹⁵⁴*Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College 2001 (2) SA 936 (CC)*.

involves a political decision. On the other hand, where an executive is implementing legislation and by doing so creates policy, this action would be administrative in nature.¹⁵⁵

Through case law, and the definitions of administrative action contained in the PAJA, it is clear what is and is not considered administrative action. In saying this, it is equally important to assess the meaning of administrative action “materially and adversely” affecting the rights of the public. Govender explains that the nature of this requirement focuses on the effect of the action rather than on the nature of the action.¹⁵⁶ It would seem almost limiting that administrative action must materially and adversely affect the rights of the public before section 4 of the PAJA is applicable. What adds to the questions behind this “proviso” that limits the application of a public participatory process to all administrative action affecting the public, is that there is no such “limitation” contained in the section 33 constitutional right, which provides a right to all citizens to lawful, reasonable and procedurally fair administrative action.¹⁵⁷

The meaning of “rights” in section 4 of the PAJA applies to all pre-existing rights, and includes contractual, delictual, property rights and constitutional rights.¹⁵⁸ The interpretation relating to “rights that have been affected”, has been further extended to the procedural fairness of tender processes. Although a person contracting with government does not have the right to the contract, the right to have the application considered in a procedurally fair manner does exist.¹⁵⁹

From the definition of administrative action as per section 1 of the PAJA, and further bearing in mind that section 4 applies only to action that materially and adversely affects the rights of the public; it is clear that PAJA

¹⁵⁵ Ibid at 18.

¹⁵⁶ Govender op cit (n145) at 413.

¹⁵⁷ Ibid at 415.

¹⁵⁸ Ibid at 414.

¹⁵⁹ Ibid.

centres on the notion of deprivation rather than on determination, and therefore, those without an existing right are excluded from the protection of the PAJA.¹⁶⁰ It is argued, however, that restrictions placed on what is considered administrative action and whether the action affects the public's rights materially and adversely are necessary to prevent the administration from being overburdened by the requirements set out in section 4, which may lead to inefficiency in government.¹⁶¹ In order to encourage efficiency in government, judges should develop a theory of deference when applying the PAJA. Theorists believe the courts must achieve a balance between intervening and not intervening in government decisions.¹⁶² The focus on the requirement that a right must be affected is premised on the insistence that it must be of "direct and external legal effect" on all pre-existing rights.¹⁶³ In this regard, the Supreme Court of Appeal (SCA) matter of *Transnet Ltd v Goodman Brother (Pty) Ltd*¹⁶⁴ is applicable. In this matter, Transnet failed to award a tender to the Goodman Brothers. The Goodman Brothers argued that this was administrative action, however Transnet was of the opinion that the Goodman Brothers did not have an existing right, and therefore the requirement that administrative action must "affect a right" was not fulfilled, and the PAJA was not applicable. However, the Goodman Brothers as tenderers had a right to lawful and procedurally fair administrative action in terms of the adjudication of their bid.¹⁶⁵ It is clear that the concept of rights has extended somewhat, and rights in the context of administrative action may be broader than the definition of "rights" in private law¹⁶⁶. This was evident in the matter of *Dilokong Chrome Mines v Direkteur-General*,

¹⁶⁰ Hoexter op cit (n298) at 29.

¹⁶¹ Govender op cit (n145) at 415.

¹⁶² Hoexter op cit (298) at 29.

¹⁶³ Ibid at 30.

¹⁶⁴ *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853.

¹⁶⁵ *Supra* at para 42.

¹⁶⁶ Govender op cit (n145) at 415.

Department van Handel en Nywerheid,¹⁶⁷ where the publishing of an export incentive scheme in the government gazette, enabled a right that was applicable to all those who would participate in the schemes.¹⁶⁸

3.3 The difference between administrative action affecting the person and administrative action affecting the public

The PAJA created two separate and unrelated procedural fairness regimes. The first applies to administrative action affecting any person; the second applies solely to administrative action that has a broad effect.¹⁶⁹ Where an individual is involved, procedural fairness entails a number of general requirements, which *inter alia* include notice of the intended action, an opportunity to make representations prior to the decision being taken, and a clear statement of the administrative action; these aspects of procedurally fair administrative action affecting the person are embodied in section 3 of the PAJA.¹⁷⁰ Section 4 of the PAJA is quite different from section 3's general requirements for procedurally fair administrative action; section 4 contains specific requirements aimed at public participation.¹⁷¹ The need for section 4 to be a free standing provision indicates that the drafters of the PAJA intended that the administrative actions targeted in section 3 and 4 fall into entirely separate categories.¹⁷² It was explained in chapter 2 of this paper that pre-1994, administrative decisions affecting a large number of people were categorised as legislative actions and therefore exempted from the *audi alteram partem* principle of natural justice.

As was also explained in chapter 2, the tide relating to the applicability of the principles of natural justice turned following the *South African Board v*

¹⁶⁷ *Dilokong Chrome Mines v Direkteur-General, Department van Handel en Nywerheid* 1992 (4) SA 1 (A).

¹⁶⁸ *Supra*.

¹⁶⁹ Currie and Klaaren *The Promotion of Administrative Justice Act Bench Book* (2001) at 113.

¹⁷⁰ Raubenheimer op cit (129) at 495.

¹⁷¹ Mass op cit (n136) at 65.

¹⁷² *Ibid* at 65.

Johannesburg City Council,¹⁷³ where the court dismissed the criteria set in the *Pretoria City Council*¹⁷⁴ judgment but did not abandon the general concept of distinguishing administrative action affecting the individual from that which affects the public.¹⁷⁵ Section 4 contains comprehensive directives to ensure procedural fairness; these directives include the holding of a public inquiry, following a notice and comment procedure, or adopting a combination of the two.¹⁷⁶

There is also a significant difference between the wording of section 3 and section 4 of the PAJA. Section 4 of the PAJA is narrow and only applies to “rights affecting the public”, whereas section 3 applies to “rights or legitimate expectations of any person.”¹⁷⁷ Section 4 of the PAJA contains the minimum rules and procedures to be followed to attain procedurally fair administrative action affecting the public. It is possible that in drafting section 4, the PAJA drafters understood the background to the public’s right to be heard and the courts’ fear¹⁷⁸ that natural justice may be overextended, and so created specific procedures instead of the more wide ranging procedures in section 3. The procedures set out in section 4(1)–(3) do not concern holding individual hearings for each person; rather it has been drafted to focus on large numbers of people for which the procedure set out in section 3 would be too laborious and inefficient.¹⁷⁹

This distinction between section 3 and section 4, however, poses an interpretation problem. Although it has been argued that section 3 contains general procedures to be followed to obtain procedurally fair administrative action, the application of section 3 is far from general. The administrative action in terms of this section applies to particular instances that affect the

¹⁷³ *South African Roads Board v Johannesburg City Council* 1991 (4) SA 722 (AD).

¹⁷⁴ *Pretoria City Council v Modimola* 1996 (3) SA 250 (A).

¹⁷⁵ Mass op cit (n136) at 65.

¹⁷⁶ Burns and Beukes op cit (n80) at 245.

¹⁷⁷ Currie and Klaaren op cit (n169) at 108.

¹⁷⁸ *S v Moroka* 1969 (2) SA 394 (A).

¹⁷⁹ C Mass op cit (n136) at 66.

private individual. Section 4 applies broadly to the general public; its application is general although the requirements it sets out are specific.¹⁸⁰ The problem is that “any person” and the “the public” are phrases that are not independent of each other, since the public comprises a number of people.¹⁸¹ Some argue that a particular administrative decision affecting the general public often has a special effect on individuals or vice-versa.¹⁸² An example of this would be the case of *Earthlife Africa v Director-General: Department of Environmental Affairs and Tourism*,¹⁸³ where it was held that the decision by the department to erect a pebble-bed nuclear reactor affected the rights of individual persons and the public in general, and thus could require the application of both section 3 and section 4 procedures.¹⁸⁴

The effect of separating section 3 and section 4 is that in every instance of administrative action an assessment must be made to distinguish whether the act affects the public or whether it affects the person, especially as different procedures are used for the two separate categories.¹⁸⁵ It has been suggested that the following questions should be asked when considering whether the administrative action materially affects the public: Has the administrative action had a general impact? Has the general impact had a significant public effect? Have the constitutional, statutory or common-law rights of a member of the public been an issue?¹⁸⁶ The PAJA defines the public for the purposes of section 4 as “any group or class of the public.”¹⁸⁷ An example of this is the legislation that allows the Minister of Education to formulate national policy regarding the admission of students to schools.

¹⁸⁰Currie and Klaaren op cit (n169) at 110.

¹⁸¹Mass op cit (n136) at 67.

¹⁸²DJ Brynard *Procedural fairness to the public as an instrument to enhance public participation in public administration* Administratio Publica Vol 19 No 4 (2011) at 102.

¹⁸³*Earth life Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*, 2005 (3) SA 156 (C).

¹⁸⁴*Supra* at para 72.

¹⁸⁵Currie and Klaaren op cit (n169) at 114.

¹⁸⁶*Ibid* at 114.

¹⁸⁷Section 1 (xi) of the Promotion of Administrative Justice Act 3 of 2000.

Should the minister determine the age of admission to all schools in a policy, this ministerial decision will generally affect the rights of those members of the public that have children in the process of being admitted to school.¹⁸⁸

This illustrates that the term “public” implies that the effect of the administrative action must be purely general in nature, meaning that the administrator has not defined any individually affected persons.¹⁸⁹ It therefore seems that the objective of section 4 of the PAJA is to balance the right to fair administrative action against the need to promote efficient administrative action. In short, although this right would be “best served” if everyone that affected by an action could be notified personally, practically this is impossible.¹⁹⁰

3.4 Types of public participation

It is said that the political theory of civic republicanism best describes public participation.¹⁹¹ Public participation involves the promotion of discussion among citizens to attain the best possible outcome for all participating. Public participation does not involve negotiating an agreement among interest groups, but allows all citizens to partake as equals to reach a decision for the greater good of society.¹⁹² The importance of public participation lies in the theory that governmental decisions have a far greater chance of being accepted by society where public participation is involved as citizens are more informed and educated, and administrators are held accountable for the decisions.¹⁹³

The PAJA does not set out the criteria that an administrator should follow to select the form of public participation, which means the administrator has a free choice in which public participation procedure set out

¹⁸⁸ Burns and Beukes op cit (n80) at 241.

¹⁸⁹ C Mass op cit (n136) at 68.

¹⁹⁰ Ibid at 68.

¹⁹¹ Hoexter op cit (n50) at 78.

¹⁹² Ibid.

¹⁹³ Ibid.

in section 4 of the PAJA to choose.¹⁹⁴ The administrator may choose from the two options: to hold a public inquiry or to follow a notice and comment procedure. The administrator is further entitled to follow a combination of both these procedures. The administrator may also follow a fair but different approach, or follow another appropriate procedure. An administrator's choice of procedure is informed by factors such as the effect the decision may have on the geographical area, i.e. whether the administrative decision affects people locally or nationally. The administrator has to consider the cost of the public participation and the efficiency required in making the decision.¹⁹⁵ In most circumstances, an administrator would opt to hold a public inquiry or follow a notice and comment procedure where large numbers of people are concerned.¹⁹⁶

The nature and scope of each procedure is different. A public inquiry process involves the public providing verbal testimony at a specific time and in a specific place.¹⁹⁷ There are three stages of a public inquiry: the pre-inquiry stage (also known as the preliminary stage), the inquiry stage and the post-inquiry stage.¹⁹⁸ The first stage involves preparation by the administrator who must appoint a suitable panel to preside over the public participation process and give proper notice of the hearing.¹⁹⁹ The pre-inquiry stage is detailed in the regulations to the PAJA, and sets out requirements such as the language of the notice, the form of publication of the notice, and the requirement to obtain special assistance for members of the public who are unable to read or write.²⁰⁰ Regulations 11 to 16²⁰¹ of the PAJA regulations regulate the conduct at public hearings. The post-inquiry stage requires the holder of the inquiry to compile a written report and to publish the report in

¹⁹⁴ Ibid.

¹⁹⁵ Brynard op cit (n182) at 105.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid at 106.

¹⁹⁸ Ibid.

¹⁹⁹ Burns and Beukes op cit (n80) at 247.

²⁰⁰ Ibid.

²⁰¹ Regulations on Fair Administrative Procedure GN R 1022 (GG 23674) 2002 07 31.

the Government Gazette or any relevant Provincial Gazette, and in a newspaper both in English and in at least one other official language.²⁰²

These regulations set the minimum standard for procedural fairness to ensure that the enquiry is brought to the public's attention and to provide for the use of press conferences, electronic media, posters and leaflets to achieve adequate notification. Instead of reducing the obligations placed on authorities, the focus is rather on maximising the efforts to attract the attention of those affected by the proposed administrative action.²⁰³

A notice and comment procedure in terms of section 4(3) of the PAJA consists of four stages: taking the appropriate steps to communicate the action, calling for comments, consideration of the comments received and deciding whether or not to proceed with the administrative action.²⁰⁴ This procedure is often the quicker, and more effective and cost efficient procedure.²⁰⁵ Proper notification, however, must be achieved both procedurally and substantively. Procedurally, the administrator must be able to confirm that notice has been given to people who are affected and therefore that these people have been informed.²⁰⁶ Substantively, the notice must contain sufficient detail to enable the public to make meaningful representations.²⁰⁷

This, however, poses a potential problem as often it is the private sector that possesses the necessary expertise and information that may be beneficial in making the administrative decision. For parties in the private sector, the best type of notice is detailed, specific and inclusive of the necessary data. Other affected parties, however, may not be as knowledgeable and so much detail may obscure the general points of the proposed administrative action. A compromise reached by administrators is

²⁰² Burns and Beukes op cit (n80) at 247.

²⁰³ E Raubenheimer op cit (n129) at 496.

²⁰⁴ Burns and Beukes op cit (n80) at 249.

²⁰⁵ Govender op cit (n127) at 418.

²⁰⁶ Raubenheimer op cit (n127) at 497.

²⁰⁷ *ibid.*

to keep the notice brief but to attach a more detailed appendix to the notice with the “sophisticated information”.²⁰⁸ The problem with this approach though is the paucity of information on the notice itself; some applicants could dismiss the notice on the basis of lack of information and not consider the appendix at all.²⁰⁹

When an administrator proceeds with a notice and comment procedure, there must be a genuine and appropriate application of the mind to the representations made by the public.²¹⁰ The notice and comment procedure must consider the issues presented by the community, as if it does not, the process lacks any benefit.²¹¹

Section 4 is essential for regulating the process of decision-making, and a failure to comply would render the decision invalid. Further, any legislative decision or rule giving effect to such a decision would be set aside if the process used to formulate the decision was not according to the requirements of section 4.²¹² As grave consequences are applicable for not complying with section 4, should an administrator depart from the requirements, the administrator must justify that departure by demonstrating that a conscious decision was taken to depart from the section 4 procedure.²¹³

3.5 The application of section 4 of the PAJA in South African jurisprudence

The paper thus far has unpacked the history of public participation in South Africa and considered the path towards a more representative democracy. However, in order to fully understand public participation, it is important to

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* at 421.

²¹⁰ *Ibid* at 423.

²¹¹ *Ibid.*

²¹² G Devenish *op cit* (n107) at 161.

²¹³ *Ibid.*

understand the application of section 4 by the courts. How does the judiciary apply section 4 of the PAJA?

In the 2006 judgment in *Chairperson's Association v Minister of Arts and Culture*,²¹⁴ the court considered the controversial decision by the Minister of Arts and Culture to change the name of the town Louis Trichardt to Makhado. Counsel for the minister argued that section 10(1) of the South African Geographical Names Council Act 118 of 1998 was silent on the question of public consultation. Section 10(1) provided that "*the minister may approve or reject a geographical name recommended by the Council in terms of section 9(1)(d) of the Geographical Names Council Act.*" The court held that although the act was silent on the question of consultation, the subject matter was of a sensitive nature, and thus that a decision without considering the relevant consultation would be problematic.²¹⁵ The minister held that in terms of section 4(1) of the PAJA, where administrative action adversely affects the rights of the public, an administrator must give effect to procedurally fair administrative action and must decide amongst other things whether it wishes to hold a public inquiry or follow a notice and comment procedure, or to follow a procedure empowered by an enabling provision.²¹⁶

Although counsel for the minister argued that the Geographical Names Council was a body constituted of councillors elected by the people, thus representing the people, and therefore that consultation was not needed, the court held that the necessary consultation had taken place. What is surprising is that the court accepted that the minister had complied with the consultation requirement on account of his answering affidavit stating that he had considered objections to the proposed name change, and that the objections emanated from a "minority group that failed to exert their influence during the democratic process." The minister further stated that he had considered the objections very carefully, but had been unpersuaded that the

²¹⁴ *Chairperson's Association v Minister of Arts and Culture* 2006 (2) SA 32 (T).

²¹⁵ *Supra* (n214) at para 23.

²¹⁶ *Supra* (n214) at para 24.

will of the majority should be denied.²¹⁷ Section 10(3) of the Geographical Names Council Act provides as follows:

“Any person or body dissatisfied with a geographical name approved by the Minister may, within one month from the date of publication of the geographical name in the Gazette, lodge a complaint in writing to the Minister.”

As an administrator is permitted to follow a procedure empowered by any empowering provision that is fair but different, it would appear that the court held that section 10(3) of the Geographical Names Council Act provided some sort of participation procedure.²¹⁸

In the fairly recent SCA matter involving the Scalabrini Centre in Cape Town,²¹⁹ the Department of Home Affairs closed the Refugee Reception Office in Cape Town following a policy decision to move all refugee offices closer to the borders. The Scalabrini Centre, a non-profit organisation assisting migrant communities and a number of other parties, objected to the office closure based on the premise that director-general’s action constituted administrative action and was procedurally unfair, as prior to making decision, the Department had not given interested and affected parties the right to be heard.

The High Court held that the department’s decision was indeed administrative action and that there was no rational connection between the purpose of the provision and the manner in which it was taken.²²⁰ However, the SCA held that decisions heavily influenced by policy generally belonged in the domain of the executive.²²¹ The SCA found that the department’s action did not constitute administrative action and held that the decision makers did not possess a general duty to consult organisations or individuals

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *The Minister of Home Affairs v Scalabrini Centre, Cape Town (SCA)* unreported case no. 735/12 and 360/13 3 September 2013 ZASCA 134.

²²⁰ *Supra* (n219) at para 47.

²²¹ *Supra* (n219) at para 57.

having an interest in such decisions, but held rather that a duty would only arise in circumstances where it would be irrational to take the decision without such consultation because the person or organisation had special knowledge that would assist in the decision-making and that the decision maker was aware of this.²²² Although “*the very nature of representative government is that matters of government policy are properly to be ventilated in the appropriate representative forums,*” the court held that the submission that those who exercise public power have a general obligation to afford a hearing to interested parties is a broad submission and “went too far.”²²³

In the dissenting judgment, Willis JA held that the department’s action was administrative action. In interpreting section 4(1) of PAJA, however, Willis JA held that there was no an inherent “right” on the part of the public, as envisaged by section 4(1) of the PAJA, to have the Refugee Reception Office specifically in Cape Town or in any other particular place.²²⁴ In Willis JA’s opinion and quoting from a Roman comic playwright, he states that:

*“There are many opinions as there are people...each have [their] own correct way...opinions among reasonable men and women may differ. That is why we have politics. That is why, when it comes to political matters in a constitutional state such as ours, the courts will, as a general rule, hold their swords behind their backs. Ordinarily, moreover, the courts will, in such matters, hold the sword in their left hands and their shields in the right: the courts hold up the shield in preference to the sword when it comes to political matters of policy.”*²²⁵

In short, Willis JA deemed the action by the department as administrative, but concluded that there had been no “right” that had been adversely affected.

²²² See *The Minister of Home Affairs v Scalabrini Centre, Cape Town (SCA) supra* (n219) at para 50–57 with regard to the discussion by Nugent JA and the application of cases involving policy. Nugent JA held that it was clear from the cases cited that decisions heavily influenced by policy generally belonged to the domain of the executive.

²²³ *Supra* (n219) at para 67.

²²⁴ *Ibid* at para 84.

²²⁵ *Ibid* at para 90.

Another recent judgment dealing with administrative action affecting the public was the matter concerning the most recent upgrade of roads in Gauteng province by the infamous South African National Roads Agency Limited (SANRAL) in terms of the National Roads Act 7 of 1998.²²⁶ In this matter the applicants, the Opposition to Urban Tolling Alliance (OUTA), a voluntary association opposed to e-tolling as a means to fund construction of road improvements, sought an interdict against the Minister of Transport and SANRAL to prevent SANRAL from levying and collecting tolls on certain sections of the Gauteng freeways using an electronic tolling system known as e-tolls.

The applicants relied on section 6 of the PAJA contending that the decision lacked rationality; they also relied on a number of other grounds for review,²²⁷ one of which was that SANRAL had failed to allow for public participation in terms of section 4(1) of the PAJA, as the administrative action materially and adversely affected the rights of the public.²²⁸ The High Court held in favour of OUTA and granted an interim interdict restraining SANRAL from proceeding with e-tolls.²²⁹ SANRAL, the National Treasury and the Gauteng Department of Roads and Transport appealed to the Constitutional Court against the High Court's decision. The Constitutional Court considered the separation of powers doctrine and Moseneke DCJ held that before granting interdictory relief pending a review, a court must in absence of any *mala fides* examine carefully whether its order will intrude on the territory of another arm of Government in a manner inconsistent with separation of powers.²³⁰ The Constitutional Court criticised the High Court for its "deafening silence on the over-arching consideration of the separation of

²²⁶ *Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd* (GNP) unreported judgment 2012 JDR 0808 28 April 2012.

²²⁷ *Supra* (n226) at para 22.

²²⁸ *Ibid* at para 25.

²²⁹ *National Treasury v Opposition to Urban Tolling Alliance Case* unreported judgment case no. CCT 38/12 15 August 2012 ZACC 18.

²³⁰ *Supra* (n229) at para 71.

powers doctrine”.²³¹ By applying the principles in the *Doctors for Life*²³² and *International Trade Administration*²³³, the court warned against usurping the power or function of administrators who have been entrusted powers by valid legislation and that the balance of power implied by the separation of powers should not be frustrated.²³⁴

3.6 Why public participation?

Clearly there is a fine line when challenging government actions and the courts are careful not to cross that line and encroach on the separation of powers doctrine. If this is the case then why is public participation important considering that the demand for public participation places such an exhaustive burden on government? A short answer would be that public participation is an important element of democracy. When a government is responsive to the people’s needs it is said to be democratic.²³⁵ Pluralists consider politics as a struggle among interest groups for the minimal social resources available to citizens and that law is a “commodity” subject to the effects of supply and demand.²³⁶ The various interest groups within society compete for majority support, and once they have enough support they put political representatives under pressure to respond to their needs.²³⁷ Under the pluralist theory, law is created by the decision-makers taking into account the opinions of the majority interest group within society. A direct response to pluralism is “civic republicanism”, which totally rejects the pluralist idea. Civic republicans believe that decision makers do not get involved in the lobbying process, but rather seek new information and different perspectives before

²³¹ Ibid at para 72.

²³² *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

²³³ *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2012 (4) SA 618 (CC).

²³⁴ *Supra* (n233) at para 20.

²³⁵ Hoexter op cit (n50) at 77.

²³⁶ Ibid.

²³⁷ Ibid.

making decisions. Civic republicanism considers basic principles, namely: deliberation, equality of all involved, universalism and citizenship.²³⁸

Accountability is the basic constitutional value and principle of democracy in the governing of public administration.²³⁹ Accountability in government promotes justification by administrators. Administrators have to justify to citizens the reasoning behind any decisions taken, and it is for this reason that administrative decisions must be reasonable, lawful and procedurally fair.²⁴⁰ By justifying administrative action in terms of a fair procedure, the value of accountability is served in a direct way.²⁴¹ Public participation improves the quality of administrative action, which is an outcome of the procedure whereby the administrator is able to make its decision based on all the relevant information and points of view it has gathered.²⁴² Procedurally fair administrative decisions promote legitimate decision-making and reduce arbitrary decisions made by government.²⁴³ Section 4 of the PAJA enables procedurally fair administrative action, which in turn enhances the constitutional principles of “openness, accountability and participation.”²⁴⁴ There is truth in the theory that an individual will accept a negative administrative decision where the procedure in arriving at that decision was procedurally fair; a procedurally fair administrative action affecting the general public must therefore promote participation as it generates loyalty, cooperation and affirms equal worth to all affected persons.²⁴⁵

In short, public participation in administrative and legislative decision-making is important for a number of reasons: it leads to informed decision

²³⁸ Ibid at 78.

²³⁹ DJ Brynard “The duty to act fairly: a flexible approach to procedural fairness in public administration” *Administratio Publica* Vol 18 no. 4 at 136.

²⁴⁰ Brynard op cit (n239) at 137.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

making; it inspires public confidence in government; and through its process in reaching decisions that affect citizens, it encourages transparency and participation by the public. People in turn own the decision-making process on account of their involvement. Lastly, participation is considered a proactive rather than a reactive form of eradicating detrimental administrative conduct.²⁴⁶

3.7 Conclusion

There has been considerable development in the approach to participation in administrative decisions. Even though South Africa has come a long way from the determination and deprivation theory of the past, the “right” to public participation is not an exclusive right. Limitations to public participation are necessary to avoid over burdening the executive. The various limitations regarding section 4 include the definition of administrative action and the fact that there must be a right that has been materially and adversely affected. It is clear that the courts use these limitations and are careful not to intrude on other branches of government.

It is understood that public participation is an important aspect of democracy, but at what cost? Does public participation hinder the efficiency of government or do the limitations embedded in the PAJA encourage and promote efficiency? Are administrators compelled to follow the procedures of section 4 or can an administrator depart from the requirements to promote efficiency?

²⁴⁶Kidd op cit (n130) at 22.

CHAPTER 4 A REASONABLE, JUSTIFIABLE DEPARTURE FROM THE PUBLIC PARTICIPATION REQUIREMENT

4.1 Introduction

In terms of section 4(4)(a) of the PAJA, an administrator has the discretion to depart from the public participation procedure set out in section 4(1)(a) to (e), (2) and (3) of the PAJA if there are reasonable and justifiable circumstances to permit such a departure. Section 4(4)(b) of the PAJA lists the relevant factors that an administrator should consider when determining whether the departure from the requirements of procedurally fair administrative action affecting the public, is reasonable and justifiable. Section 4(4)(b) of the PAJA stipulates that an administrator should take into account all relevant factors including:

- (a) The objects of the empowering provision;
- (b) The nature, purpose and need to take the administrative action;
- (c) The urgency of the matter or the taking of the administrative action;
- (d) The need to promote an efficient administrative action and good governance.

In the matter of *Matiso v The Commanding Officer, Port Elizabeth Prison*,²⁴⁷ Froneman J held that the rules that apply to the interpretation of legislation, particularly “the intention of the legislature”, do not apply in a system of judicial review that is based on the Constitution being the supreme law of the land. In short, the Constitution is sovereign and not the legislature, and therefore legislation must be tested against the values and principles imposed by the Constitution.²⁴⁸ This implies that when interpreting the PAJA, and in particular section 4(4)(a) and (b) of the PAJA for the purposes outlined in this paper, the interpretation must give effect to the values and principles

²⁴⁷ *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 BCLR 80 (SE) 87E–G.

²⁴⁸ *Supra* 87E–G.

imposed by the Constitution, and further, the spirit, purport and objects of the Bill of Rights must be realised.²⁴⁹ This is important when interpreting whether a departure from the section 4(1)(a)–(e), (2) and (3) is reasonable and justifiable.

4.2 What constitutes reasonable and justifiable in the context of section 4(4) of the PAJA?

South Africa will attain a culture of justification through the proper application of the Bill of Rights.²⁵⁰ A democratic government is a responsive government. A responsive government promotes participation and accountability and an accountable government is able to justify its decisions to those it governs.²⁵¹ This is the context that the drafters of the PAJA had in mind when stipulating that any departure from section 4 of the PAJA must be justifiable and reasonable in the circumstances. The word “justifiable” suggests that a sound process went into making the decision, it does not suggest a “second guessing” of important policy choices²⁵²

Etienne Mureinik considers three questions a decision maker must consider when establishing a justifiable decision. An administrative decision cannot be regarded as justifiable unless the administrator has considered all the serious objections to the decision and contemplates credible answers in response to the objections.²⁵³ Further, a decision-maker must consider all serious alternatives to the decision and discard any implausible ones, and finally, a decision-maker must establish a rational connection between the premises and the conclusion, between the information it has and the decision taken.²⁵⁴ All in all Mureinik states that a decision maker must be conscious

²⁴⁹Margaret Beukes “The Constitutional Foundation of the Implementation and interpretation of the Promotion of Administrative Justice Act 3 of 2000” in Lange & Wessels (eds) *The Right to Know* (2004) at 9.

²⁵⁰Mureinik op cit (n102) at 38.

²⁵¹Ibid at 46.

²⁵²Ibid at 41.

²⁵³Ibid.

²⁵⁴Ibid.

that a court may eventually scrutinise its decision under the criteria outlined above.²⁵⁵

South Africa's Interim Constitution contained the right to administrative action that is justifiable in relation to the reasons provided by an administrator with regard to its decisions or action that had an effect on or threatened an individual's rights.²⁵⁶ It is clear that the original drafters of the constitution completely avoided the word "reasonableness", although there was much support for the interpretation of the word "justifiable" as a synonym for "reasonableness".²⁵⁷ It can be argued, therefore, that in order to depart from the requirements of procedurally fair administrative action that affects the public, the departure should embody the principles of reasonableness, which in turn embody various elements but have no single meaning. Reasonable administrative action in terms of section 33(1) of the Constitution promised two elements: "rationality" and "proportionality".²⁵⁸

Rationality considers the principle that all decisions made by an administrator must be supported by evidence and information, and when assessing an administrator's action, the court will assess whether a reasonable person could have arrived at the same conclusion.

Proportionality encourages a public authority to consider the need for the action and the possibility that a less drastic means may accomplish the end.²⁵⁹ Therefore when a public authority acts proportionally, it will consider suitability, balance and necessity in conducting its administrative decision.²⁶⁰ Reasonableness is a concept that *"begins with rationality, as a minimum threshold, moves on to proportionality and ends with a value judgment on*

²⁵⁵ Ibid.

²⁵⁶ Section 24(d) of the Interim Constitution of the Republic of South Africa.

²⁵⁷ Hoexter op cit (n50) at 303.

²⁵⁸ Ibid at 306.

²⁵⁹ Ibid at 323.

²⁶⁰ Ibid at 310.

what the best approach would be.²⁶¹ As it is in this context that an administrator wishing to depart from the public engagement process under section 4 of the PAJA should consider the four factors set out in section 4(b), it can be inferred that these factors draw on the elements and requirements of reasonableness and justifiability. It simplifies the role of the administrator in situations where there is a dire need to depart from the requirements of section 4, especially situations that require swift, effective and efficient administrative action. Such was the case in the matter of *Kyalami Ridge Environmental Association*,²⁶² where the Minister of Public Works selected an area near Leeuwkop to house temporarily flood victims from Alexandra Township in Johannesburg.

The government in erecting temporary houses did not consult the neighbouring community; the community argued that they had had a right to be heard prior to the administrative decision being taken as it directly and adversely affected their environmental rights and the right to just administrative action.²⁶³ The Kyalami residents contended that government had no powers conferred on it by legislation to grant relief to the Alexandra flood victims and further that it had failed to comply with the provisions of the Township Ordinance 15 of 1986, NEMA²⁶⁴ and the Environmental Conservation Act 73 of 1989.²⁶⁵

All parties involved in the matter agreed that the Alexandra flood victims had a constitutional right to be provided with access to housing. All parties further agreed that section 26(2) of the Constitution requires government to take “reasonable legislative and other measures” within its available resources to achieve the right to access to housing; however the Kyalami

²⁶¹A Pillay “Reviewing Reasonableness: An appropriate standard for evaluating state action and inaction” (2005) 122 SALJ at 419.

²⁶²*Minister of Public Works and others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1153 (CC).

²⁶³*Supra* at para 12.

²⁶⁴National Environmental Management 107 of 1998.

²⁶⁵*Minister of Public Works and others v Kyalami Ridge Environmental Association and Another supra* (n262) at para 25.

residents argued that in this case, government had not acted within the framework that catered for disaster management.²⁶⁶

The court held that although the residents may have various forms of rights derived from legislation, those rights remained intact and had not been affected by government's decision to relocate the Alexandra flood victims onto the property, and further that government did not dispute that it was obligated to establish the transit camp within the provisions of the applicable legislation.²⁶⁷

Chaskalson P held that the Kyalami residents' interest in terms of their property values being diminished by government developing low-cost housing to house the Alexandra Township flood victims was not a sufficient argument to support their claim that their rights had been affected.²⁶⁸ The court had to reconcile two conflicting interests (the rights of the Kyalami residents and those of the Alexandra flood victims); procedural fairness depends on the facts of each case and the balance of various relevant factors.²⁶⁹ The court held that there was no legal impediment to government establishing a transit camp on its own ground at Leeuwkop and that "procedural fairness does not require the government to do more than in the circumstances of this case than it had undertaken to do."²⁷⁰ Government had to discharge its duty to provide everyone with access to housing; the fact that property values may be affected by a low-cost housing development was a factor that had to be considered, but the court held that this factor could not stand in the way of the needs of homeless people and the urgency that government had to address the plight of the flood victims.²⁷¹ The court held

²⁶⁶ *Ibid.*

²⁶⁷ *Supra Minister of Public Works and others v Kyalami Ridge Environmental Association and Another* (n262) at para 92.

²⁶⁸ *Ibid* at para 100.

²⁶⁹ *Ibid* at para 101.

²⁷⁰ *Ibid* at para 108.

²⁷¹ *Ibid* at para 107.

that the absence of consultation did not invalidate government's decision and therefore upheld the appeal.²⁷²

The matter of *Minister of Home Affairs v Eisenberg and Others*,²⁷³ dealt with immigration regulations promulgated under the Immigration Act 13 of 2002. The applicant, the Minister of Home Affairs, appealed to the Constitutional Court against a High Court decision that declared the regulations promulgated by the minister to be invalid. In the court *a quo* the respondents had challenged the minister's regulations on the grounds that the minister had not complied with the public notice and comment procedure prescribed in the Immigration Act 13 of 2002, and further that this was in conflict with section 4 of the PAJA.²⁷⁴ The respondents argued that in terms of section 33 of the Constitution and the PAJA, administrative action should be consistent with a "culture of accountability, openness and transparency."²⁷⁵ The respondents relied on section 4 of the PAJA in that the minister's administrative action affected the public. The Constitutional Court held that it was doubtful that the PAJA applied to the promulgation of regulations but that it was unnecessary to decide whether the PAJA was applicable, as in any event the PAJA provided special procedures for administrative action which materially and adversely affected the rights of the public, and these procedures need not be followed if a departure from those special procedures was justified in the circumstances.²⁷⁶ In terms of this matter, there had been insufficient time to follow the special procedure prescribed by the PAJA, and as section 4(4) of the PAJA authorises a departure from section 4(1) procedures if reasonable and justifiable in the circumstances; the court therefore held that the High Court had erred.²⁷⁷ The

²⁷² *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another* (n262) *supra* at para 110.

²⁷³ *Minister of Home Affairs v Eisenberg and Other* 2003 (8) BCLR (CC).

²⁷⁴ *Ibid* at para 839.

²⁷⁵ *Ibid* at para 48.

²⁷⁶ *Ibid* at para 48–50.

²⁷⁷ *Ibid* at para 49.

Immigration Act would be unworkable without the regulations and the old regulations could not fill the void; if section 4(1) was applicable to the promulgation of regulations, it was reasonable and justifiable for the minister to depart from the notice and comment provisions in section 4 of the PAJA.

4.1 General and specific departures from the obligations of section 4

Section 4(4) of PAJA provides for a general departure from the entire section dealing with administrative action affecting the public. However, some argue that section 4(4)(a) cannot be interpreted to include a departure from section 4(1) – the section stipulating that an administrator must decide on a particular procedure to give effect to procedurally fair administrative action.²⁷⁸ The reasoning behind this argument is that section 4(4)(a) states:

“If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections 1(a) to (e), (2) and (3)” (own emphasis).

The drafters of the PAJA specifically mention subsection (1)(a)–(e) and not merely “section 4(1)”. If the drafters had intended to include section 4(1) they would not have specifically included “subsections (a)–(e)”. In other words, theorists argue that the section 4(4)(a) “departure clause” does not allow for departure from the decision that administrators must take to give effect to procedural fairness. Section 4(4)(a) of the PAJA is interpreted to permit departure from those specific procedures laid down by the PAJA.²⁷⁹

Besides this departure, the drafters of the PAJA included other “departure” or “escape” clauses. These include section 4(1)(d) – the exercise of a fair but different procedure; section 4(1)(e) – follow another procedure that gives effect to procedural fairness; section 2(1)(a) of PAJA – where the minister responsible for administrative justice can exercise his power and exempt any administrative action or group or class of administrative action from the provisions of section 4 of the PAJA, and similarly section 2(1)(b) of

²⁷⁸ Currie & Klaaren op cit (n169) 132.

²⁷⁹ Ibid.

PAJA whereby the minister may permit an administrator to vary any of the requirements set out in section 4(1)–(3) of the PAJA. These “escape/ departure” clauses within the PAJA have caused some theorists to question why the legislature deemed it necessary to include section 4(4) of the PAJA, “particularly in light of the fact that any decision or failure to take a decision in terms of section 4(1) is not reviewable.”²⁸⁰

4.3 Conclusion

The reassurance that administrators have is that where reasonable and justifiable in the circumstances, an administrator may depart from holding a public inquiry, proceeding with a notice and comment procedure, following a fair but different procedure or following another appropriate procedure.

This chapter has shown that any departure will be interpreted in accordance with the principles of the Constitution. There must be a rational explanation as to why the administrator departed from the procedures, and this departure must be proportional to what the relevant act entailed. The PAJA drafters did not forget to include that the need to promote an efficient administration and good governance is a relevant factor to be considered when departing from a public participation process.

Did the PAJA drafters foresee that the extensive obligations of the public participation process may hinder government’s efficiency? The next chapter considers the need to promote an efficient government.

²⁸⁰Burns & Beukes op cit (n80) at 250.

CHAPTER 5 AN EFFICIENT ADMINISTRATION AND GOOD GOVERNANCE

5.1 Introduction

It is said that the provision to “promote an efficient administration” was added to the list of rights under section 33 of the Constitution²⁸¹ at the very last moment;²⁸² even if true, a just administration constitutes an efficient administration and the two concepts must be compatible with each other.²⁸³ The right to an efficient administration prevents the judiciary from turning judicial review into appeal, it curtails the judiciary from being “trigger happy” with the judicial review gun and it limits the continuous involvement of the judiciary in executive affairs.²⁸⁴ At the same time, the need for an efficient administration could encourage public bodies to ignore procedural requirements to avoid prolonged administrative decision-making.²⁸⁵ There is therefore a “tension” between participation and the expertise of government: participation and transparency promote democratic legitimacy on the one hand, while the expertise of those making the decision implies that the administrative decision-making process is impartial, rational and efficient.²⁸⁶ Judicial review of administrative action challenges the tension between the public’s right to participation and government’s expertise in making the decisions that affect the public.²⁸⁷

An important aspect of the concept of an efficient administration is the principle of separation of powers. The principle of separation of powers rests

²⁸¹The Constitution of the Republic of South Africa, 1996.

²⁸²Jowell op cit (n81) at 17.

²⁸³Ibid.

²⁸⁴Ibid.

²⁸⁵Ibid.

²⁸⁶Ibid.

²⁸⁷C Donnelly “Participation and expertise: judicial attitudes in comparative perspective” in Ackerman & Lindseth (eds) *Comparative Administrative Law* (2010) at 357.

on various concerns and in this regard, Anashari Pillay²⁸⁸ lists three important considerations that should be highlighted when considering judicial review for administrative action. Pillay states that one should be mindful that the judiciary does not have the mandate of the electorate to pronounce on certain issues; secondly, the courts do not have the capacity to continuously second guess the actions of the executive, and thirdly, by extending the ambit of judicial review, Government action will be slowed down.²⁸⁹

The PAJA was enacted to give practical effect to the rights contained in section 33 of the Constitution. Section 33(3)(c) provides that national legislation must be created to promote an efficient administration; thus the purpose of the PAJA is to promote an efficient administration and good governance, and to create a culture of accountability, openness and transparency in the public administration.²⁹⁰ The application of section 4 of the PAJA has been discussed, but the practical aspect of attempts by government to achieve procedurally fair administrative action may have an effect on the efficiency of the administration. This chapter considers the theory behind efficiency and good governance and whether public participation hinders good governance.

5.2 An efficient administration, good governance and the courts' deference

Catherine O'Regan in her 1993 journal article "*Rules for Rule-making: Administrative law and Subordinate Legislation*"²⁹¹ establishes three important normative requirements that would guide the development of administrative law. Drawing on the failures in terms of the un-democratic South Africa's administrative law, O' Regan views efficiency, fairness, and accountability as important. An efficient administration will consider the time, costs and success

²⁸⁸Pillay op cit (n261) at 419.

²⁸⁹Ibid at 439.

²⁹⁰ Preamble of the Promotion of Administrative Justice Act 3 of 2000.

²⁹¹ O'Regan op cit (n75) at 156.

of policy implementation, however most autocratic governments (much like the Apartheid government) would claim that their government is efficient; however this efficiency often goes hand in hand with illegitimacy and oppression. Efficiency must be both fair and acceptable, and O'Regan points out that this is particularly necessary in South Africa with regard to the scarcity of resources.²⁹² Fairness is essential for a functional administration, more so in South Africa considering that not everyone in the apartheid government was equal before the law. Fairness will ensure that certain individuals or groups are not oppressed. The third important standard that administrative law should embody is accountability. O'Regan expresses that this should not be a narrow form of accountability, i.e. a responsive government, but rather accountability in its broad sense, where administrators make their decision acceptable to the people, which requires that the decisions should be rational and properly informed (through a consultation or participation process).²⁹³

Society perceives the right to procedural fairness as a mechanism that imposes a duty on public officials to achieve and uphold a fair, honest, transparent and accountable public administration. This administration serves the general interest of the common good and not the interest of the administrator taking the decision.²⁹⁴ The practical aspect of this duty demands that a public official remain accountable for any decision taken, and that the exercise of action is not for its benefit but for that of the public.²⁹⁵ This is why the nature of accountability of government works hand in hand with the concept of justification and of public participation. Through consulting with the public, government is able to account for its decisions, which in turn enable it to justify its decisions contrary the public's rights. Within the context of a culture of justification, an administrator may be required to justify a decision on request, and therefore the duty of accountability imposed on an

²⁹² O'Regan op cit (n75) at 159.

²⁹³ Ibid at 160.

²⁹⁴ Brynard op cit (n239) at 112.

²⁹⁵ Ibid at 112.

administrator promotes a responsive government and helps determine the needs of the public.²⁹⁶ The duty that procedural fairness imposes on an administrator also facilitates the gathering of information to assist in ensuring administrative accountability.²⁹⁷

Backed by democratic constitution, South Africa's administrative law has instilled the democratic principles of accountability and participation.²⁹⁸ Section 32 (the right to access to information), 33 (the right to lawful, reasonable and procedurally fair administrative action) and 34 (the right to access to courts and tribunals) of the Constitution achieve these principles. However, democracy goes further than the rights contained in the Bill of Rights; in fact, the Constitution sets out nine guiding values in section 195(1), the idea being that the peoples' needs must be responded to.²⁹⁹ Section 195 of the Constitution sets out the basic values and principles that govern the public administration as the courts cannot be expected to single-handedly regulate the exercise of public power effectively. The Breakwater Declaration of 1993³⁰⁰ suggested that a range of procedures and institutions be developed to ensure good governance.³⁰¹ Procedures that would ensure good governance include access to official information, genuinely participatory rule-making and decision-making procedures, and a duty on administrators to provide reasons for decisions made.³⁰² These concepts of good governance assisted the South African government in moving away from its history of a culture of authority and parliamentary sovereignty to a culture of justification and accountability.

²⁹⁶ *Ibid* at 113.

²⁹⁷ *Ibid* at 113.

²⁹⁸ Cora Hoexter "The Current state of South African Administrative Law" in Corder and Van Der Vijver (eds) *Realising Administrative Justice* (2002) at 22.

²⁹⁹ *Ibid* at 22.

³⁰⁰ Breakwater Declaration of 1993 – a document that was produced by participant of a workshop held in Cape Town in 1993 on the future of Administrative Law.

³⁰¹ Hoexter *op cit* (n298) at 26.

³⁰² *Ibid*.

In terms of the Constitution, specifically section 195(1)(b), efficiency, effectiveness and economy are the basic underlying values in public administration.³⁰³ However, it has been suggested that this creates a green light for public officials to make administrative decisions that do not incorporate procedural fairness.³⁰⁴ Some administrators may regard procedural fairness as a restriction created by the law to hinder efficiency and effectiveness.³⁰⁵ However, where an administrator makes a decision that is without bias and with due consideration of the views of the public, it is argued that the decision will not only be acceptable but will also be of better quality.³⁰⁶ Others argue that procedures promoting procedurally fair administrative action reconcile the conflicting interests of the various individuals on the one hand and promote government's interest in an efficient and effective public administration on the other.³⁰⁷ In short, justice/fairness (the public's right) and efficiency are interrelated concepts, achievable by the application of the PAJA.³⁰⁸

The PAJA separates rights and expectations and further defines when an individual can demand procedurally fair administrative action. Section 3(1) of the PAJA details a fair process and applies this to administrative action that materially and adversely affects the rights or legitimate expectations of a person, with a focus on there being either a right that is adversely affected by the administrative action or a *legitimate* expectation that is affected. This limits the burden on the public administrator and prevents a scenario where every action taken by government will be under scrutiny for procedural fairness; in addition, this allows for efficiency of government.³⁰⁹ Section 3 of the PAJA may contain the proviso of a "legitimate expectation", but section 4

³⁰³Brynard op cit (n239) at 137.

³⁰⁴Ibid at 138.

³⁰⁵Ibid.

³⁰⁶Ibid.

³⁰⁷Ibid.

³⁰⁸Ibid.

³⁰⁹Ibid.

does not; the legislature did not provide the public with a right to procedurally fair administrative action affecting a legitimate expectation of the public. This demonstrates the drafter's intention to carry through the constitutional focus of an effective and efficient administration. The PAJA also promotes the concept that the principles of fairness need not be applied uniformly in every case; section 3(2) of the PAJA states that a fair administrative procedure depends on the circumstances of each case, thereby allowing the principle of procedural justice to apply to all administrative action but modifying the content of fairness to suit the occasion, thus further allowing for efficiency of government.³¹⁰

The effect of all these principles and sections such as section 195(1) and section 33 of the Constitution, and the PAJA (especially its preamble), is that there is a duty on the administrator to behave as a "public servant" should, and to deliver services to the public in a manner that is lawfully and procedurally fair and reasonable. It is said that this idea of positive action is summarised in the public administration principle of *Batho Pele* – the people are first.³¹¹ Section 4 of the PAJA was specifically created to help determine and accommodate the public's needs and to achieve the objective of government accountability. The normative requirements pertaining to the public administration and its relationship with the public as envisaged in the Constitution (transparency, accountability, responsiveness, efficiency) and repeated in the PAJA, must always be taken into consideration when the right to just administrative action is implemented.³¹²

A balance must be struck between the administrator "getting the job done" when delivering administrative services to the public and the need to protect individuals against the abuse of power by government.³¹³ The

³¹⁰ *Ibid* at 138.

³¹¹ M Beukes "The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000" in Lange & Wessels (eds) *The Right to Know* (2004) at 7.

³¹² *Ibid* at 8.

³¹³ J Evans *op cit* (n313) at 322.

judiciary has a definite role to play in achieving the balance between efficiency of government and the protection of the rights of the public to procedurally fair administrative action. In order to achieve this balance, administrative law needs to facilitate resourceful decision-making that is in the public interest, but at the same time allow the public to assert their rights effectively and to limit abuse;³¹⁴ in short, achieving the balance between empowering administrative officials while at the same time controlling those powers.³¹⁵ The problem is that the judiciary often prevents the administrator from “*creative decision making by having controls and imposing duties...that are applied to oppressively by courts.*”³¹⁶

This problem is why Professor Hoexter’s argument that the courts should adopt a theory of deference, is so important.³¹⁷ Hoexter³¹⁸ argues that “variability” is an important concept that the judiciary should adopt. In essence, the courts should not have an “all or nothing” attitude when attempting to achieve administrative justice.³¹⁹ Administrative justice must be “given out in appropriate doses to everyone.”³²⁰ In addition the courts should not take a rigid approach to judicial review of administrative action, but rather should rather apply “specific content in light of the particular administrative contexts” of the challenged action.³²¹ In saying this, and considering the context of section 4, perhaps the challenge that our courts face lies in the broad interpretation of the word “rights”. Hoexter argues that the broad interpretation of “affected rights” in judgments such as the *Goodman*

³¹⁴ Hoexter op cit (n298) at 27.

³¹⁵ Ibid.

³¹⁶ Ibid at 28.

³¹⁷ Ibid at 29.

³¹⁸ Ibid at 20.

³¹⁹ Ibid at 29.

³²⁰ Ibid.

³²¹ Evans op cit (n313) at 322.

*Brothers*³²² provides evidence of a dire need for a theory of deference among the judiciary.³²³

Some may argue that the judiciary adopting a theory of deference or judicial restraint when dealing with administrative action affecting the public's rights would mean that it relinquishing its responsibility to uphold the rule of law.³²⁴ However, a practical and realistic approach in realising the responsibilities of both courts and administrative bodies assists with government efficiency.³²⁵ Administrators should not be unduly burdened, and therefore when challenging the legality of administrative action through judicial review, a coherent theory of difference should be able to achieve the balance between decision-making and accountability of government.³²⁶

Skweyiya J in the Constitutional Court Judgment of *Joseph and others v City of Johannesburg and others*³²⁷ held that, “*efficiency and capacity considerations are indeed an important aspect of any contextual determination of the content of procedural fairness.*”³²⁸ Quoting from the judgment of *Premier, Mpumalanga*,³²⁹ Skweyiya explained that when determining procedural fairness, a court should be slow to impose obligations upon government that would constrain its ability to make and implement policy effectively. This principle is recognised in many other countries, and as the court in the *Premier, Mpumalanga* held, that one

“cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly, especially in a young democracy like South Africa that faces immense challenges of transformation”.

³²² *Transnet Ltd v Goodman Brother (Pty) Ltd* 2001 (1) SA 853 (SCA).

³²³ Hoexter op cit (n298) at 32.

³²⁴ Evans op cit (n313) at 322.

³²⁵ *Ibid* at 329.

³²⁶ Hoexter op cit (n298) at 32.

³²⁷ *Joseph and others v the City of Johannesburg and others* (CC) unreported judgment case no. CCT43/09 18 August 2009.

³²⁸ *Supra* at para 62.

³²⁹ *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* (1999) (2) SA 91 (CC) at para 41.

5.3 Public participation, environmental and land use planning law – the public participation dilemmas

Land use management and environmental law frequently use public participation. In terms of land use management, Raubenheimer³³⁰ argues that municipalities have a special duty to provide “substance to participatory processes.”³³¹ It is procedurally unfair to curtail the right to be heard, which means that section 4 of the PAJA is important in the application of land use management in the municipal sphere.³³² Planning law is applied in the local government sphere where municipalities use planning law to create spatial planning frameworks, and to manage land use and land development.³³³ Planning legislation at the municipal level has included public participation as is evident from legislation such as the Local Government: Municipal Systems Act 32 of 2000 (Systems Act), which dedicates an entire chapter to the duty of municipal councils to encourage the involvement of the local community.³³⁴

Section 4 of the Systems Act creates a duty on municipalities implement a system of participatory governance to allow communities to participate in the affairs of local government.³³⁵ When interpreting land use planning legislation, the courts have adopted a careful approach, balanced against the principle of legality, and more so in cases which involve public interest. This is clear in the matter of *Hayes v Minister of Finance and Development Planning WC*;³³⁶ the respondents had wanted to erect a four-storey flat; however the erven belonging to the respondents were registered for residential use under Stellenbosch’s Municipality Zoning Scheme Regulations and were subject to restrictive conditions that only permitted

³³⁰ Raubenheimer op cit (n127) at 491.

³³¹ Ibid at 491.

³³² Ibid.

³³³ Ibid at 498.

³³⁴ Ibid at 499.

³³⁵ Ibid.

³³⁶ *Hayes v Minister of Finance and Development Planning WC* 2003 4 SA 598 (C) 628.

single-storey houses³³⁷ The respondents applied to the municipality to grant the necessary departures from the Stellenbosch Municipal Zoning Scheme Regulations but the court held that the applicable restrictive conditions had been imposed in favour of every owner of an erf in the township, which resulted in all erf owners in the township being bound. In terms of invoking the Removal of Restrictions Act 84 of 1967, a notice had to be sent to each owner of land directly affected by the removal of the restriction. The court held that as there had been clear failure to give proper notice to each erf owner in the township who was directly affected by the application, it was procedurally unfair and a breach of the principle of legality.³³⁸

In terms of environmental law, the National Environmental Management Act 107 of 1998 (NEMA), includes one of the most extensive public participation processes in South Africa.³³⁹ This paper has shown that the ideology behind public participation is a concept that evolved from democracy and the expansion of justice to all.³⁴⁰ Public participation is regarded as democratising the administrative decision-making process, and to advance the constitutional principle of public participation, a number of statutes provide opportunities for the public to provide input in matters that affect them.³⁴¹ As a result of section 4 of the PAJA including the requirements for procedurally fair administrative action affecting the public, any legislation that provides for public participation must meet these requirements for procedural fairness.³⁴² Therefore, land use, planning law and environmental legislation must refer to the various processes found in section 4(1)–(3) of the PAJA to meet the requirements of procedurally fair administrative action affecting the public.

³³⁷ *Supra* at paras 606–608.

³³⁸ *Supra* at 631E, 631J, 632 D and 632J–633B.

³³⁹ Kidd op cit (n130) at 21.

³⁴⁰ Raubenheimer op cit (n127) at 492.

³⁴¹ *Ibid.*

³⁴² *Ibid* at 498.

The 1992 Rio Declaration on Environment and Development includes the theory that environmental issues are best handled with the participation of all concerned citizens. It is for this reason that the drafters of NEMA included public participation as a cornerstone of the legislation.³⁴³ Public participation is important in environmental law, as due to South Africa's past, environmental policies have often been seen in the South African context as being an elitist or a "white issue". By incorporating transparency and the participation of the public in environmental issues, environmental actions and policies will improve.³⁴⁴ NEMA is clear about the commitment to public participation. Section 2 sets out the national environmental principles and section 2(4) in particular sets out the factors that are important aspects of sustainable development. Section 2(4)(f) considers the participation of all interested and affected parties in environmental governance as important in promoting sustainable development. The right of access to environmental information is an important aspect of public participation, and section 31 of NEMA sets out the application of this right in respect of environmental management.³⁴⁵ Closely linked to public participation is effective access to judicial and administrative proceedings, which NEMA includes in terms of section 32.³⁴⁶ Section 32 enforces legal standing for members of the public wanting to seek appropriate relief in respect of a breach of their environmental rights and those statutory provisions in terms of NEMA.

Although it is clear that through the proclamation of NEMA, public participation in environmental law exists, considering the legacy of apartheid, public participation in South Africa is challenging, especially with the cultural, linguistic and economical divides among communities.³⁴⁷ A further challenge to proper public participation is the increasing pressure the public places on

³⁴³Kidd op cit (n130) at 23.

³⁴⁴Ibid at 22.

³⁴⁵Ibid at 26.

³⁴⁶Ibid at 27.

³⁴⁷R Hamann "South African Challenges to the theory and practice of public participation in environmental assessment" (2003) 10 SAJELP at 21.

government in relation to job creation, economic growth, and infrastructure development.³⁴⁸ Unfortunately, although the public participation procedure is necessary, it cannot be considered separate from South Africa's political and cultural context.³⁴⁹ Administrative decision-making in pre-1994 South Africa was deeply unfair and hierarchical. Regarding land and environmental law, conservation went hand-in-hand with dispossession.³⁵⁰ Post 1994, through policy development and legislation, Government has attempted to curtail the injustices of the past, but implementation of these policies and laws has been weak.³⁵¹

In the context of the social division between the privileged minority of South Africa and the underprivileged, uneducated and poverty stricken majority, many of the public participation procedures undertaken relating to land use and environmental legislation are characterised by interest groups and NGOs.³⁵² The economic status of the minority affects their participation in environmental matters that concern them, as is evident from most matters involving development. It is the wealthy and affluent who make up the majority of interest groups and NGOs.³⁵³ The poor uneducated South African lacks the ability to effectively engage in the public participation procedure, and frankly has greater concerns such as hunger and the lack of adequate housing to focus on. It seems unlikely therefore that this majority will pay attention to notices regarding public participation meetings or respond to the request for comments; thus the inability to fully participate in matters affecting them, means the voice of the impoverished South Africa is not heard. The need for fairness in public participation is crucial as it enables the poor to participate in decision-making. Fairness includes increasing opportunity and capacitating the poor, in other words the practical constraints hindering

³⁴⁸ Ibid at 22.

³⁴⁹ Ibid.

³⁵⁰ Ibid at 23.

³⁵¹ Ibid at 24.

³⁵² Ibid at 28.

³⁵³ Ibid at 29.

participation by the poor in South Africa should be addressed.³⁵⁴ If government does not address these constraints, the public participation process will continue to be dominated by interest groups and will not be owned by the citizens of South Africa.

5.4 Considering public participation as an ineffective tool

Often the motivation behind enhanced citizen participation is the consideration of the merits of the process and an acceptance of the theory that an engaged public is better than a passive public.³⁵⁵ South Africa's historical lack of transparency may have been the real motivator for government to promote participation. In the new democracy, government required citizens to have faith in the government to move forward and away from South Africa's secret sovereign state. Whatever may have been the motivation, it is clear that there are ample benefits from incorporating a public process, but there are also negatives and disadvantages that may accompany the public participation process.

Irvin and Stansbury in their journal article detailing the disadvantages of citizen participation in the United States of America claim that not only is citizen participation in government decision-making time consuming, it is also pointless if the decision is ignored.³⁵⁶ The participation is time-consuming, costly to government and often has a "boomerang" effect by creating an even more hostile attitude towards the government. Another disadvantage is that public participation could result in the policy decision being heavily influenced by opposing interest groups.³⁵⁷ Government may lose control of its decision-making power, which in turn may result in a bad decision that is politically impossible to ignore.³⁵⁸

³⁵⁴ Ibid at 30.

³⁵⁵ R Irvin and J Stansbury "Citizen Participation in Decision Making: Is it Worth the Effort?" *Public Administrative Review* January/February 2004, Vol 64 No. 1 at 55.

³⁵⁶ Irvin and Stansbury op cit (n355) at para 58.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

Citizen-participation requires a heavy time commitment; administrative decisions are therefore affected and decisions take place slowly; government decisions taken without convening a public forum are slow enough. It has also been said that the participation process can pull resources away from a government agency's real aim and mission.³⁵⁹ Furthermore, public participation is often met with the challenge of citizenry apathy and no guarantee that a representative of a certain community is influential in that community.³⁶⁰ A further concern about representivity in public participation is that participants are not paid for their time, which means that the public participation process may be dominated by the wealthy and those who can afford to participate regularly.³⁶¹ In addition, as the public becomes more involved in the decision-making process of government, their expectations inevitably become exaggerated; citizens expect their input to be considered and that the administrative decision will be taken as per their influence. This unfortunately can result in increased public dissatisfaction.³⁶²

5.5 Conclusion

The PAJA was created to promote an efficient administration. Administrative action must not only be procedurally fair, but it must also be efficient, although efficiency should not have an impact on the effectiveness of the administrative action. It has been shown that the public participation procedure contains a number of difficulties (time, cost, difficulty in reaching all affected) that hinder efficiency, more so in socially, economically and culturally divided South Africa. With the democratic principles accountability, responsiveness and openness, it is difficult to justify public participation not being essential. The courts, however, play an important role in giving out

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Ibid* at 59.

³⁶² *Ibid* at 59.

administrative action in “proper doses”³⁶³ and in developing a theory of deference to promote efficiency.

³⁶³ Hoexter op cit (n298) at 29.

CHAPTER 6 THE INTERNATIONAL PERSPECTIVE

6.1 Introduction

It is often argued that the words “constitutionalism” and “democracy” are contradictory.³⁶⁴ The argument contains some truth as these principles may oppose each other in a certain sense: democracy means the unified and unconstrained will of the people, whereas constitutionalism refers to the division or restraint of power.³⁶⁵ Some may argue that it is important that the people of a democracy should be free to redefine their rules whenever they desire, and should not be tied down to one definition of what democracy entails.³⁶⁶ Bellamy and Castiglione argue that if this is so, and democracy is interpreted as the “people’s rule”, then even more should the “people” define their own rules.³⁶⁷

The limitation to the “people’s will” is unavoidable as constitutionalism requires that certain power be restrained in order to lay the foundation of an open and democratic society.³⁶⁸ So in essence constitutionalism gives way to democracy, and democracy and constitutionalism can even at times be interchangeable, as can be seen in the development of the internationalisation of administrative justice. The concept of administrative justice as a constitutional right is considered by many democracies. The European Union Charter of Rights, under chapter V at Article 41,³⁶⁹ confers a right to good administrative action and testifies that the international arena has moved towards the theory that the right to a good administration is an inalienable right that allows citizens to take part in the government of their

³⁶⁴Richard Bellamy and Dario Castiglione “Review Article: Constitutionalism and Democracy – Political Theory and the American Constitution” (1997) BJ P595.

³⁶⁵Ibid.

³⁶⁶Ibid.

³⁶⁷Ibid.

³⁶⁸Ibid at 597.

³⁶⁹EU Charter of Human Rights.

country. The international perspective considers good administrative action as that which is fair, impartial and reasonably timeous.

Article 41 of the European Union Charter of Rights includes the right to be heard before a decision is taken by an institution; this further reiterates the world view regarding participation in decisions that adversely affect an individual. The international arena promotes equal access to public service and the right of citizens to partake in government as is clear from the Universal Declaration of Human Rights which states that:

“1. Everyone has the right to take part in the government of his country directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”³⁷⁰

South Africa has moved from a culture of limited public participation and secrecy to one with a legislative duty on government to include the will of the people and listen to the people’s voice when making decisions that affect them. South Africa’s answer to public participation in administrative decisions is section 4 of the PAJA, although this section also allows for limitations, variations and departures from the requirements of procedural fair administrative action affecting the rights of the public.

The South African government has a legislative duty to consider public participation; however, to promote efficiency, the courts have adopted an attitude of deference. Is this the correct attitude? Should South African jurisprudence consider the promotion of efficiency as more important than the voice of the public? At this point it is helpful to consider foreign jurisprudence to gain insight into the various methods of including the “will of the people”.

³⁷⁰Universal Declaration of Human Rights.

6.2 Germany

Similarly to South Africa, German administrative law differentiates between administrative law that affects the individual and that which affects the public in general. Under German law, persons who have their individual rights violated by the public authority have a constitutional right to judicial review.³⁷¹ Administrative action that affects the public at large is labelled a “general order” (*allgemeinverfügung*).³⁷² In German administrative law, the right to a hearing can be terminated when an administrator issues a general order; further where it is impractical to issue an individual notice of the administrative action affecting a particular person, the administrator may promulgate a general order publicly, and in this instance no statement of reason is required.³⁷³ The right to be heard and the right to access to information is only available to an individual who is directly affected by administrative action, therefore the common administrative remedies available in German administrative law are only available to the individual and not to the public. This is to promote procedural efficiency, however there are certain scholars who believe that this does not conform to the rule of law and flouts good governance.³⁷⁴ Although there is no specific reference to procedural fairness in German administrative law, there are German Federal Constitutional Court decisions that have held that administrative action must be procedurally fair, more so when that action affects an individual’s fundamental right to procedural fairness.³⁷⁵ German law also considers the right to human dignity as relevant and requires administrators to treat

³⁷¹ J Pietzcker “Individual rights, the external effect on administrative action and judicial review” in Corder & Van Der Vijver (eds) *Administrative Justice* (2002) at 101.

³⁷² *Mass op cit* (136) at 69.

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ C Wefelmeier “Public Participation in German Administrative and Environmental Law” in Lange and Wessels (eds) *The right to Know* (2004) at 101.

individuals with concern, instead of viewing individuals affected by administrative action as mere “objects of the administrative process”.³⁷⁶

The German Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) provided little assistance to the public at large until the inclusion of a “planning law” section into the act. This section seeks to protect the rights of the public and reconciles the administrative decisions with the views of the public; the decision-making therefore includes making as much information as possible available to the public.³⁷⁷ The European Community Council (an entity of the European Union), directed all member states to incorporate an assessment of the effects of defined public and private projects on the environment. This resulted in German law changing to include an assessment of environmental effects, which requires the administrator assessing a development affecting the environment to obtain the public’s comments.³⁷⁸ It stipulates that a developer must submit a host of information to the administrator, including relevant information relating to the environmental effects of the development, a description of the property, and a description of the proposed methods to reduce or avoid environmental issues. The administrator compiles a report based on the public’s comments and the information submitted by the developer. Although it would appear there has been some improvement in public participation in German law, there is no real subjective right to public participation, which renders the aforementioned development rather ineffective, particularly considering the extent of protection relating to individual rights.³⁷⁹

6.3 Canada

Prior to 1980, Canadian administrative law was a collection of common-law rules developed by the courts that had an inherent power of judicial review,

³⁷⁶Ibid at 101.

³⁷⁷Ibid at 102.

³⁷⁸Ibid at 105.

³⁷⁹Ibid at 105.

which included the power to ensure that subordinate authorities acted within their jurisdiction.³⁸⁰ With the development of the Canadian Charter, the courts' position has changed. The Canadian courts have the constitutional authority to review legislation and declare it invalid if it is inconsistent with the fundamental values of the Charter. The courts may review laws if they are fundamentally unjust, and further the courts will insist on a fair process whenever any person is deprived of a right to life, liberty or security. There is therefore an expressed constitutional right to procedural fairness.³⁸¹ The courts of Canada approach administrative law and procedural fairness in a functional and pragmatic way.³⁸² In fact, the term "pragmatic or functional analysis" is a term used by the Supreme Court of Canada which suggests its approach to most of the administrative problems that come before it.³⁸³ The Canadian courts use a pragmatic and functional approach to examine the context of administrative action, and in turn determine the content of the duty of fairness.

The Canadian case of *Knight v Indian Head School Division No. 19*,³⁸⁴ which dealt with an appeal to the Supreme Court of Appeal by Mr Knight, a director of education who had been dismissed after he refused the renewal of his contract for a shorter term than the original, illustrates the Canadian courts' pragmatic approach to administrative law. The Supreme Court in this matter held that procedural fairness was due to the director of education, but the requirements of procedural fairness had been met in this instance.³⁸⁵ The Court held that although there is a general right to procedural fairness that is independent of any other statute, the right itself depends on the consideration of three factors which determine whether the

³⁸⁰ Burns and Beukes op cit (n80) at 199.

³⁸¹ Ibid.

³⁸² J Evans op cit (n313) at 324.

³⁸³ Ibid.

³⁸⁴ *Knight v Indian Head School Division No 19* (1990) 1 SCR 653 (Sask.).

³⁸⁵ Beckman, Van Harten & Mullan *Administrative Law: Cases, Texts and Materials* (2010) at 92.

circumstances of the matter warrant the right.³⁸⁶ Where it is determined that there is a right to procedural fairness, the courts will consider whether there is any legislation that will limit the right completely.³⁸⁷

In assessing whether a duty to act fairly exists, the courts consider the nature of the decision by the administrative body, the relationship existing between the body and the individual and the effect of that decision on the rights of the person affected. The Canadian courts consider the duty of fairness via a cost-benefit analysis, i.e. *“Is the harm likely to be avoided by affording the particular procedural right claimed greater than the likely cost of requiring it?”*³⁸⁸ This pragmatic and functional approach to legal issues allows a judge to weigh up the relevant factors and exercise discretion when considering the circumstances of a case. By taking into account the social context and the likely consequences of a decision as opposed to focusing on the elaborate details of case law, judicial restraint and deference is promoted. It has been argued previously that deference can promote efficiency.

6.4 The United States of America

The United States of America (the US) bases its administrative decision-making on pluralism. The fifth and fourteenth amendments to the American Constitution contain the concept of “due process of law”. American citizens are protected against the arbitrary denial of life, liberty or property by the government without due process of law.³⁸⁹ The American courts have held that government actions that are “shocking to the conscience violate due process”.³⁹⁰ Although there is no constitutional entrenched right to just administrative action, there are rights that protect the public in its relationship with the government, namely the US rule-making procedure. The rule-making procedure of the US has been discussed earlier in this paper; informal rule

³⁸⁶Ibid at 92.

³⁸⁷Ibid.

³⁸⁸Evans op cit (n313) at 324.

³⁸⁹Y Burns and M Beukes *Administrative Law under the 1996 Constitution* (2006) at 200.

³⁹⁰Ibid.

making allows for public comments through a notice and comment procedure.³⁹¹

American writers argue that this form of participation helps manage complicated socio-political disputes that are discovered during the public participation process.³⁹² The American framework for administrative decision-making is highly participatory; it began with regulatory agencies in the environmental and occupational health and safety field aiming to protect the public from any health and safety issues. The legislation establishing these agencies prescribed a notice and comment rule-making procedure.³⁹³ The increase of public participation in the US is linked to citizens' distrust in the autocratic administrative expertise that claimed to make decisions in "the best interest" of the public.³⁹⁴ Therefore, by considering the rule-making process when making decisions, meaningful public participation is created which enables the administrator to make an informed decision.³⁹⁵

The American courts do not supplement legislative procedures in terms of rule-making; courts in the US tend to police compliance with procedural requirements.³⁹⁶ In addition, courts in the US scrutinise the quality of administrative decisions and place a duty on the administrator to show the rational connection between the facts they have found from extensive public participation and the decision that followed.³⁹⁷

6.5 The United Kingdom

Similarly to the United States, the United Kingdom's (UK) administrative law embodies pluralist traditions.³⁹⁸ The UK principles of natural justice are

³⁹¹Donnelly op cit (n286) at 358.

³⁹²Ibid.

³⁹³Ibid.

³⁹⁴Ibid.

³⁹⁵Ibid at 359.

³⁹⁶Ibid at 359.

³⁹⁷Ibid at 360.

³⁹⁸Ibid at 367.

considered as a code for fair administrative procedure. It has been argued that the role the principles of natural justice play in UK administrative law are similar to the role that “due process” has played in the United States.³⁹⁹ The UK courts do not compel administrators to follow a participatory procedure outside the adjudicatory decisions. Public participation arises out of policy; these are standards rather than obligations and therefore have no real legal force, although generally these standards are enforced and government institutions comply with them.⁴⁰⁰ On account of parliamentary sovereignty, the rules of natural justice do not limit statutes. There is a presumption that parliament, when granting powers, expects administrators to exercise such powers in a just and appropriate way.⁴⁰¹

Administrative law in the UK does not contain a common law duty to consult; the duty arises when a minister issues an order to consult or formulates a policy, so the courts only impose a duty to consult where there is statute or policy that requires it.⁴⁰² However, the courts abandon this approach where there is a legitimate expectation that the administrator should consult with the public.⁴⁰³ This legitimate expectation arises out of two situations: first, where it is an established practice that the administrator consults prior to making such decisions, and secondly where an existing policy affecting an individual or a group of individuals has the likelihood of changing, the administrator is obligated to consult with those affecting parties prior to making the change.⁴⁰⁴

The UK courts are different from the US courts where the focus is on public participation as an instrument to promote democracy and advance deliberation in administrative decision making. The UK courts tend to focus on using public participation as a means to avoid the abuse of power;

³⁹⁹Burns and Beukes op cit (n80) at 199.

⁴⁰⁰Donnelly op cit (n286) at 367.

⁴⁰¹ Burns and Beukes op cit (n80) at 200.

⁴⁰²Ibid.

⁴⁰³Donnelly op cit (n286) at 368.

⁴⁰⁴Ibid.

therefore where a legitimate expectation is concerned, a judiciary will enforce public participation to promote straightforward and consistent decision-making by public bodies.⁴⁰⁵ The UK judiciary is sceptical of the inclusion of a right to public participation as it is argued that this suggests that the courts have difficulty in drawing a line regarding what is relevant consultation that would assist in the decision making and further that they find it difficult to prevent public participation from interfering with the separation of powers and the executive's entitlement to formulate and reformulate policy decisions.⁴⁰⁶

The problem that the UK courts find with an administrative law system that allows for "widespread consultation" is the possibility that this would generate "defensive forms of public administration" where the administrator's decisions are constantly open to legal challenges.⁴⁰⁷ However, even though there is no real legal obligation to conduct public participation, once a public body proceeds with public participation, it is obliged to conduct the process efficiently and effectively.⁴⁰⁸

It is interesting to note that similarly to the Canadian courts, the United Kingdom's traditional approach was in terms of the *Wednesbury* case.⁴⁰⁹ The courts in the past would only interfere with an official decision where the decision-maker had acted "so unreasonably that no reasonable authority could so act"; however this test for "gross unreasonableness" has been lowered in respect of matters involving human rights issues.⁴¹⁰

6.6 Conclusion

There is no real right to public participation in the German Federal Administrative Procedure Act. Although there has been some development in

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid* at 369.

⁴⁰⁸ *Ibid* at 369.

⁴⁰⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 233.

⁴¹⁰ J Jowell "Administrative justice and the new constitutionalism in the United Kingdom" in Corder and Van der Vijver (eds) *Realising Administrative Justice* (2002) at 79.

the environmental law sector in Germany with regard to the public commenting on the environmental effects of developer's actions, the lack of a real right to hearing in respect of administrative decisions that affect the public does not assist the public participation cause. The pragmatic approach taken by the Canadian courts poses a similar problem. As these courts are hesitant to become involved in executive action, the monitoring and policing of fair procedure affecting the public is unlikely. However, both Canada and Germany argue that this promotes efficiency of administrative action. The US courts consider public participation as a way of promoting democracy, and the UK courts consider it as a form of restricting abuse. However, UK administrative law does not include a right to public participation, but rather a right arises where there is a legitimate expectation. Similarly to the Canadian courts, the UK courts limit interference with the executive, on account of separation of powers. Where does this leave South Africa, considering that there appears to be a trend to promoting efficiency over participation?

CHAPTER 7 CONCLUSION

South Africa's administrative law prior to 1994 encapsulates the secrecy, parliamentary sovereignty, lack of accountability and responsiveness of government that sums up South Africa's historical context. Universal adult suffrage, the supremacy of the Constitution and the rule of law, accountability, responsiveness, openness and a government based on the will of the people are among the founding provisions of the Constitution. South African administrative law has come a long way from the limited consideration of the *audi alteram partem* principle with regard to administrative decisions that affect the public.

South Africa has moved away from reactive measures by the courts to proactive measures that promote procedurally fair administrative action. Not only has the courts' scope with regard to judicial review widened since the days of the *ultra vires* doctrine, but the public administration is encouraged by the Constitution to respond to the people's needs and to encourage the public to participate in policy-making.⁴¹¹

The question of why public participation is essential to democracy and procedurally fair administrative action has been asked, and the simple answer lies in two important facts. The first fact is that the *audi alteram partem* principle is an element of the common law duty of fairness, and this principle has expanded to include the public at large, which is evident from the *South African Roads Board v Johannesburg City Council*⁴¹² matter. The second fact is that democracy is defined as "the people's will" and our Constitution lays the foundations for a government based on the will of the people. Furthermore, public participation incorporates the essential elements of democracy: responsiveness and accountability of government. Based on

⁴¹¹S195(1)(e) of the Constitution

⁴¹²*South African Roads Boards v Johannesburg City Council* 1991 (4) SA 1 (A)

these two considerations, it is clear why public participation is essential for procedural fairness and democracy.

Section 33 of the Constitution lists lawfulness, reasonableness and procedurally fair administrative action as a right. This, simply put, is the combination of the common law elements that an administrator must act within the ambit of the law. He or she must take a rational decision and follow a fair procedure which incorporates the right to be heard by an unbiased and impartial decision maker who has no vested interest in the matter.

It can therefore be said that as public participation is an extension of the *audi alteram partem* principle, it is an essential element of procedural fairness; however, this paper has shown that the various types of public participation are laborious in nature and not always effective.

The PAJA has been enacted not only to ensure that administrative action is procedurally fair, reasonable and lawful, but also efficient. This paper has analysed section 4 of the PAJA, and it can safely be said that although the PAJA considers public participation as a “path” towards the right to procedural fair administrative action, this path is by no means wide. The use of public participation is narrow in the sense that there must be an infringement of an existing right and not a mere expectation of a right. Further, the administrator can proceed with alternative methods to public participation, and use a fair but different approach or depart entirely from the section 4 of PAJA requirement, where it is reasonable to do so. The doctrine of separation of powers and the courts take on deference promotes efficiency. The courts seem hesitant to usurp the powers of the executive, and one could argue that the courts are following the trend of deference that is recognised in many other countries.

Although this approach by the judiciary is essential for preserving the principle of separation of powers and efficiency, the judiciary should always remember that they have a policing function when it comes to administrative

action. As O'Regan⁴¹³ said, an efficient government often goes hand in hand with illegitimacy and oppression; therefore efficiency must be both acceptable and fair. Having already concluded that fairness is achieved through public participation, if efficiency must be both acceptable and fair, it is therefore argued that there can be no efficiency without participation.

⁴¹³ Catherine O'Regan *Rules for Rule-making: Administrative Law and Subordinate Legislation* (1983) Acta Juridica at 156.

Chapter 8 BIBLIOGRAPHY

Primary Sources

Statutes

Promotion of Administrative Justice Act 2 of 2000

South African Constitution Act of 108 of 1996

National Environmental Management 107 of 1998

Environmental Conservation Act 73 of 1989

Case Law

Administrator, Transvaal v Traub 1989 (1) SA 731 (A).

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

Chetty's Motor Transport (Pty) Ltd v National Transport Commission 1972 (1) SA 156 (N).

Chairperson's Association v Minister of Arts and Culture 2006 (2) SA 32 (T).

Dilokong Chrome Mines v Direkteur – General, Department van Handel en Nywerheid 1992 (4) SA 1 (A).

Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC).

Earth Life Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism 2005 (3) SA 156 (C).

Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC).

Hack v Venterspost Municipality 1950 (1) SA 172 (W).

Hayes v Minister of Finance and Development Planning WC 2003 4 SA 598 (C).

Joseph and others v the City of Cape Town and others (CC) unreported judgment case no. CCT 43/09 18 August 2009.

Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A).

Matiso v The Commanding Officer, Port Elizabeth Prison 1994 (3) BCLR 80 (SE) 87E-G.

Minister of Home Affairs v Eisenberg and Other 2003 (8) BCLR (CC).

Minister of Public Works and others v Kyalami Ridge Environmental Association and Another 2001 (3) SA 1153 (CC).

National Treasury v Opposition to Urban Tolling Alliance Case unreported judgment case no. CCT 38/12 15 August 2012 ZACC 18.

Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd (GNP) unreported judgment 2012 JDR 0808 28 April 2012.

Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College 2001 (2) SA 936 (CC).

Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa 2000 (2) 674 (CC).

Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal (1999) (2) SA 91 (CC).

Pretoria City Council v Modimola 1996 (3) SA 250 (A).

S v Moraka 1969 (2) SA 394 (A).

South African Roads Boards v Johannesburg City Council 1991 (4) SA 1 (A).

Transnet Ltd v Goodman Brother (Pty) Ltd 2001 (1) SA 853 (SCA).

Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 220 (AD).

The Minister of Home Affairs v Scalabrini Centre, Cape Town (SCA) unreported case no. 735/12 and 360/13 3 September 2013 ZASCA 134.

Associated Provincial Houses v Wednesbury Corporation (1948) 2 KB 223.

Knight v Indian Head School Division No 19 (1990) 1 SCR 653 (Sask.).

Secondary Sources

Books

Baxter L *Administrative Law* (1984) Juta & Co Ltd: Cape Town.

Beukes, M "The Constitutional Foundation of the implementation and interpretation of the Promotion of Administrative Justice Act 3 of 2000" in Lange & Wessels (eds) *The Right to Know* (2004) Siber Ink: Cape Town.

Burn Y and Beukes M *Administrative Law under the 1996 Constitution* 3rd ed (2006) Lexis Nexis Butterworths: Durban.

Currie I & Klaaren, J *The Promotion of Administrative Justice Act Benchbook* (2002) Siber Ink: Cape Town

Davis DM "Administrative Justice in a Democratic South Africa" in in Bennett TW, Cockrell A, Jooste R, Keightley R and CM Murry CM (eds) *Administrative Law Reform* (1993) Juta & Co Ltd: Cape Town.

Devenish GE, Govender K and Hulme D *Administrative Law and Justice in South Africa* (2001) Butterworths:Durban

Donnelly C *Participation and expertise: judicial attitudes in comparative perspective in* Ackerman and Lidseth (eds) *Comparative Administrative Law* (2010) 357 Edward Elgar Publishing Inc: Northampton, USA.

Heckman G, Van Harten G and Mullan D *Administrative law Case, Texts and Materials* (2010) 6th ed Emond Montgomery Publications Limited: Toronto.

Hoexter C *Administrative Law of South Africa* (2007) at 13

Hoexter, C "The current state of South African Administrative Law" in Corder H & Van der Vijver, L *Realising Administrative Justice* (2002) Siber Ink: Cape Town.

Jowel J "Administrative Justice and the new constitutionalism in the United Kingdom" in Corder H & Van der Vijver, L *Realising Administrative Justice* (2002) Siber Ink: Cape Town.

Lange C & Wessels J *The Right to know South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) Siber Ink CC: Cape Town.

Mass, C "Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A comparative Perspective" in Lange and Wessles (eds) *The Right to Know* (2004) Siber Ink: Cape Town.

Mureinik M "Reconsidering Review: Participation and Accountability" in Bennett TW, Cockrell A, Jooste R, Keightley R and CM Murry CM (eds) *Administrative Law Reform* (1993) Juta & Co Ltd: Cape Town.

Plasket, C *The fundamental right to just administrative action: judicial review of administrative action in the democratic South Africa* PHD (Rhodes) (2002) at 420.

Pietzcker, J "Individual rights, the external effect on administrative action and judicial review" in Corder H & Van der Vijver, L *Realising Administrative Justice* (2002) Siber Ink: Cape Town.

South African Law Commission *Investigations into the court' Powers of Review of Administrative Acts. Working Paper 15 Project 24 at 26*

Wefelmeier, C "The Constitutional Foundation of the implementation and interpretation of the Promotion of Administrative Justice Act 3 of 2000" in Lange & Wessels (eds) *The Right to Know* (2004) Siber Ink: Cape Town.

Woolman and Swanepoel "Constitutional History" in Woolman, Roux, Bishops (eds) *Constitutional Law of South Africa* 2nd ed Chapter 2 Juta & Co Ltd: Cape Town

Journal Articles

Baxter, L "Rule-making and policy formation in South Africa Law Reform" (1993) *Acta Juridica* 176

Bishop, M "Vampire or Prince? The listening Constitution and Marafong Demarcation Forum and Others v President of the Republic of South Africa and others" (2009) 2 *Constitutional Review* 313.

Brynard, DJ "Procedural fairness to the public as an instrument to enhance public participation in public administration" (2011) *Administratio Publica* Vol 19 No 4 December 100.

Brynard, DJ "The duty to act fairly: a flexible approach to procedural fairness in public administration" *Administratio Publica* Vol 18 no. 4 at 136.

Corder, H "The content of the audi alteram partem rule in South African administrative law" (1980) *THRHR* 156

Dean, W "Our Administrative Law: A Dismal Science" (1986) 2 *SAJHR* 164

Evans, J "Deference with a Difference: of Rights, regulation and the judicial role in the administrative state" *SALJ* v120 no. 2 (2003) 322

Govender, K "An Assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa" (2003) 18 *SAPR/PL* 411.

Hamann, R "South African Challenges to the theory and practice of public participation in environmental assessment" (2003) 10 *SAJELP* at 21

Irvin, R and Stansbury, J "*Citizen Participation in Decision Making: Is it Worth the Effort?*" *Public Administrative Review* January/February 2004, Vol 64 No. 1 at 55

Jowell, J "The Democratic Necessity of Administrative Justice" (2006) *Acta Juridica* 13

Kidd, M "The National Environmental Management Act and public participation" (1996) 6 *SAJELP* 21.

Mureinik, E "Introducing the Interim Bill of Rights" *SAJHR* 31 (1994) 10 at 38

Mureinik, E "*A Bridge to Where? Introducing the Interim Bill of Rights*" *SAJHR* 33

O' Regan, C "Rules for Rule-making: Administrative Law and Subordinate Legislation" (1983) *Acta Juridica* 157.

Pillay, A “Reviewing Reasonableness: An appropriate standard for evaluating state action and inaction?” (2005) 1222 SALJ 419.

Raubenheimer, E “Section 4 of PAJA: The Constitutional standard for participative provisions in land use management” (2007) 22 *SAPR/PL* 491.

Richard Bellamy and Dario Castiglione “Review Article: Constiutionalism and Democracy – Political Theory and America Constitution” (1997) *British Journal of Political Science* vol 27 No.4 595