Procedural fairness to the public as an instrument to enhance public participation in public administration

D J Brynard
Department of Public Administration and Management
University of South Africa

ABSTRACT

The article attempts to explain the practical functioning of the notion of procedural fairness to the public. The aim of procedural fairness to the public is to provide efficient and effective procedures for public participation to the general public, with the right to be heard on issues of public concern, via mechanisms of a collective nature, such as a public hearing (inquiry) or notice and comment procedure. The very presence of the provisions for procedural fairness has proved to have a positive effect on the quality of meaningful participation in administrative decision-making which, in turn, has the potential to enhance transparent and accountable public administration. However, although it is clear that the requirements of Section 4 of the *Promotion of Administrative Justice Act,* 3 of 2000 (PAJA) have the potential to enrich our administrative justice system considerably, much will depend on the enthusiasm with which these requirements are followed and enforced in practice.

INTRODUCTION

Fairness is what justice really is about. It is a constitutional imperative that administrative action which negatively affects the rights of the public as a group or class should be procedurally fair. However, how much justice is generated by our application of the principle of procedural fairness to the public in the practice of public administration?

The right to fair administrative action has been constitutionalised by the *Constitution of the Republic of South Africa* of 1996 (hereafter the 1996 Constitution) and has been given content and meaning by the *Promotion of Administrative Justice Act,* 3 of 2000 (hereafter the PAJA). The latter Act gives effect to the scope and meaning of this constitutional right to procedural fairness by prescribing particular procedures in Section 4, from which the public official must choose to ensure that administrative action affecting the public is procedurally fair. The public official must decide to hold a public inquiry; or follow a notice and comment procedure; or adopt a combination (or both) of the two above-mentioned procedures; or follow a fair but different procedure in terms of other legislation; or follow another appropriate (i.e. fair) procedure. The aspiration of the requirements of procedural fairness to the public is to create a public administration that is justifiable and accountable in an open and democratic society. Section 4 of the PAJA therefore constitutes a significant innovation in our administrative justice system, as there is almost nothing of a comparable nature in our common law. Section 4 of the PAJA sets out general procedures for the performance of administrative action affecting the public generally. PAJA is thus a law of general application and, as such, requires content and clarity to be given to its application in specific public administrative contexts.

The reality of apartheid in South Africa was that the executive authority (i.e. government) generally did not afford the public the right to be heard before adopting subordinate legislation or when making decisions affecting the public as a group or class of persons. The old-fashioned view (held during the pre-Constitutional era) of fairness as something essentially individual has also been changed by this novel and significant provision, which allows the public as a group or class of persons to contribute to and impact upon administrative action and decisions which affect their lives.

The purpose of this research is to explain the practical functioning of the notion of procedural fairness to the public as a group or class of persons by means of an interpretation and analysis of relevant legislation and judicial decisions. At the same time, it is also the intention to shed light on the benefit of procedural fairness to the public as an instrument to enhance the culture of public involvement and participation, transparency and accountability in public administration.

PROCEDURAL FAIRNESS TO THE INDIVIDUAL AND THE PUBLIC: IS THERE A DIFFERENCE?

The right to procedural fairness of administrative action is granted to everyone by the 1996 Constitution (Section 33(1)). In giving effect to this section of the

1996 Constitution, the *Promotion of Administrative Justice Act,* 3 of 2000 sets out the requirements for procedural fairness of administrative action firstly affecting (having a particular effect on) individual identifiable persons (i.e. any particular person) personally and specifically (the individual relationship – Section 3) and, secondly, affecting (having a general or wide effect on) members of the public (as a class of persons) equally and impersonally (the general relationship – Section 4). The mentioned Sections 3 and 4 of the PAJA apply only when public officials are making decisions that constitute administrative action (as defined by PAJA in Section 1).

However, a particular administrative decision may well have an effect on the general public and a special effect on individuals or vice versa. A hypothetical example of such a twofold effect is a decision by a local government authority to increase property rates in its municipal area. The increase (a single administrative action) will then have both a general and an individual effect on members of the community. In this example, the same administrative action may require the application of both sets of procedures to ensure fairness (i.e. Sections 3 and 4).

Another example of such a twofold effect is a decision to declare an existing road a toll road (see *South African Roads Board v. Johannesburg City Council* 1991:12). One may argue that the building of a toll road has both a general effect (on all possible road-users of the toll road as a class) as well as a particular/individual effect. The particular effect on the City Council of Johannesburg is that they will need to take this development into account in their budgeting for the upgrading of the Council's roads and service provision caused by the additional traffic on the Council's roads which translates into higher maintenance and patrolling costs for the Council. However, in terms of the general affect it is true that some road-users may be affected more severely than other members of that class (those required to use the road daily because of the location of their homes and work places).

Another example of such a twofold effect was the decision made by the Director-General of the Department of Environmental Affairs and Tourism to authorise the construction of a new pebble-bed nuclear reactor. It was found that the decision affected the rights of individual persons and the public in general and may require the application of both sets of procedures (i.e. Sections 3 and 4) (*Earthlife Africa (Cape Town) v. Director-General: Department of Environmental Affairs and Tourism* 2005: par. 72).

Another example flows from the *Aliens Control Act,* 96 of 1991 and the regulations made in terms of that Act. An administrative decision to withdraw the certificate allowing an alien person (a person who is not a South African citizen) to stay on in South Africa is part of the individual administrative justice relationship between the particular alien and the Department of Home Affairs. Section 3 of PAJA will be applicable because the decision has a particular *effect* on a

specific person – the particular alien. However, the provisions of the mentioned *Aliens Control Act* are also applicable to all aliens entering and residing in South Africa and are part of a general administrative justice relationship between aliens generally and the Department of Home Affairs. Section 4 of PAJA relates to this general relationship since the *Aliens Control Act* and the regulations made in terms of that Act apply impersonally (i.e. generally and objectively) and non-specifically to all aliens and not to a particular identifiable legal subject (Beukes 2003:296–297). In this example, the administrative action as such is divided into two categories of administrative action:

- administrative action with a particular effect (requiring the following of the procedures in Section 3); or
- administrative action with a general effect (to which the procedures of Section 4 apply).

From the above it is clear that we have two distinct procedural fairness regimes, but in both instances the guiding principle is that the administrative action must be procedurally fair. However, the distinction between the two categories becomes crucial to determine which procedures to follow to ensure that fairness. The focus of the research reported here will be on procedural fairness affecting the public as stated in Section 4 of PAJA.

MEANING OF PROCEDURAL FAIRNESS TO THE PUBLIC

The implementation of the notion of procedural fairness to the public (in terms of Section 4 of PAJA) was unique in the history of South African administrative justice. In pre-Constitutional history, public administration did not generally afford the public a right to be heard before subordinate legislation was adopted or decisions were made affecting the public as a group. This was supposedly done in the name of efficiency and effectiveness in public administration.

In order to give meaning to the notion of procedural fairness to the public, a number of concepts need to be explained. *Administrative action* which *materially and adversely* affects the *rights* of the *public* must be procedurally fair (Section 4(1) of PAJA). However, what does each of the emphasised concepts mean?

In order to identify the *administrative action* affecting the public, the following test may be applied: the administrative action must (a) have a general effect; (b) the general effect must have a significant public effect; and (c) constitutional, statutory (i.e. by means of enabling legislation), or common-law rights of members of the public must be at issue (Currie & Klaaren 2001:114). To have a general effect, the administrative action must apply to members of the public equally and impersonally. A regulation which authorises an increase

in the petrol price, for example, is a decision with a general effect since it applies generally and equally to and impersonally affects all people using road transport. However, the effect of such a decision may be greater on particular members of the public (such as motor-vehicle owners and taxi operators in particular) than on others (such as occasional drivers). Similar examples may be significant increases in the cost of bus or train fares.

The *rights* of the public must be affected. These rights are interpreted widely to include constitutional, statutory and common-law rights. These are the rights held collectively by the public as members of a group or class. For example, the right to enjoy the facilities of a public park is one which accrues to all members of the public. If, therefore, the City of Tshwane proposed that all public parks in the suburb of Sunnyside be closed to save on maintenance costs, one could argue that the rights of the general public in the suburb of Sunnyside would be adversely affected. The City of Tshwane would have no choice but to apply the relevant procedures for fairness to the public before implementing the decision.

The effect of the administrative action on the rights of the public must be *material and adverse.* The material effect seems necessary to ensure that matters of a trivial nature (that are fundamentally insignificant in their effect on rights) escape the application of the procedures for fairness to the public (Burns & Beukes 2006:242). The adverse effect seems to indicate that the rights of the public must have been negatively affected by the administrative action.

Since the requirements of procedural fairness to the public are set in motion by administrative action adversely affecting the *public,* we need to establish who constitutes the public. The word "public" is defined as including any group or class of the public (Section 1 (xi) of PAJA). The reference to "group or class" may imply a link between the individuals to constitute a definable group or class of persons (Mass 2004:68–69). Any administrative action which affects the public (generally, impersonally and non-specifically) as opposed to individuals must satisfy the requirements of Section 4 for procedural fairness. An example of administrative action that may have an effect on the public rather than on an individual person can be found in the rezoning of land or the establishment of a township where the input of the public is required. Another example comes from the *Marine Living Resources Act,* 18 of 1998 (Sections 18 & 21) which provides for the allocation of fishing quotas. The granting or refusal of such a quota has a general effect on the fishing industry (as a group or class of the public). Another example may be a decision by the Minister of Trade and Industry to increase the import duty on tyres (with the effect of a significant increase in the cost of imported tyres). This decision, prior to being implemented in the form of subordinate legislation or rules, will have to comply with the procedures for fair administrative action affecting the "public" (i.e. the importers and distributors of tyres as a group or class of the public) (Devenish, Govender & Hulme 2001:158).

CONTENT OF PROCEDURAL FAIRNESS TO THE PUBLIC

To ensure that administrative action affecting the public is procedurally fair (i.e. before the implementation of a particular decision), the public official *must* (note the peremptory "must") decide (on any one of the following options) to:

- hold a public inquiry; or
- follow a notice and comment procedure; or
- adopt a combination (or both) of the two above-mentioned procedures; or
- follow a fair but different procedure in terms of other legislation; or
- follow another appropriate (i.e. fair) procedure (Section 4(1)(a)–(e) of PAJA).

The official is thus mandated or even compelled to choose one of the five optional procedures, and has no discretion whether or not to apply procedural fairness. The official's duty to consider an appropriate course of action in order to give effect to procedural fairness to the public is mandatory. The only discretion is the choice the official has in determining which statutory procedure to adopt. However, this choice is not regarded as "administrative action" and is thus not enforceable (Section 1 read together with Section 6(1) of PAJA). The implication of this is that reasons would not have to be given for such a decision. Unfortunately, the PAJA does not provide any explicit guidance for the choice. However, the choice of which procedure to follow will be informed by factors such as the geographical effect of the decision (local or national), cost and efficiency (Mass 2004:73–74). The first three procedures mainly concern the opportunity to make representations when an administrative action affects a larger number of people. The nature (or subject matter) of the administrative action in question may also be a guiding factor because for specific events or issues of particular public interest – such as the awarding of broadcasting, cellular phone or casino licenses – the public inquiry procedure is appropriate. By contrast, a notice and comment procedure may be better suited for broad and generalised policy-matters such as rule-making (Currie & Klaaren 2001:121).

Having chosen one of the five different procedural options, the public official must then follow the chosen procedure. However, what is the nature and scope of each procedure?

Public inquiry (Section 4(1)(a) & 4(2) of PAJA)

The public inquiry process is based on public testimony given at a specific time at a specific place. Inquiries are thus suitable for administrative action with a localised effect (on a specific group of people) and particularised issues with a public interest element (Currie & Klaaren 2001:120). Three stages in the public inquiry process are distinguishable:

- the pre-inquiry stage;
- the inquiry itself; and
- the post-inquiry stage.

Before the inquiry, the public official must decide whether to conduct the inquiry personally or to appoint another suitably qualified person or panel of people to conduct it (Section 4(2)(a)). The official must give proper notice of the inquiry. The notice must include details and information about the matter and issues being investigated in the public inquiry and invite the public to participate by way of written or oral representations. Then a formal public hearing (i.e. the public inquiry) must be held and must comply with the prescribed procedures in Regulations 1–16 (Section 4(2)(b)(i)–(ii)).

After the inquiry, the public official must compile a written report on the inquiry and give reasons for any administrative action taken or recommended (Section 4(2)(b)(iii)) and publish a summary of the report (Section 4(2)(b)(iv)). This duty to report and provide reasons is clearly aimed at the promotion of a culture of justification, accountability and transparency.

This requirement for procedural fairness is not new, since public inquiry procedures have been mandated in some statutes. An example is the *Eskom Act,* 40 of 1987 (Section 15) which requires Eskom to publish a notice and invite the public to respond to the Electricity Control Board on an intention to amend its tariffs. The Electricity Control Board then has to hold a public hearing before deciding on the tariffs. Another example is found in the *South African Schools Act,* 84 of 1996 (Section 33) and the *Adult Basic Education and Training Act,* 52 of 2000 (Section 6) which require a notice and public hearing before the closing of a public school or centre.

Notice and comment procedure (Section 4(1)(b) & 4(3) of PAJA)

As the name of this procedure suggests, information concerning the proposed administrative action is submitted for public comment. Written submissions are then received and considered within a specified time period to reach a fair decision. This procedure is therefore more appropriate to administrative action with a national or regional scope and on general issues (Currie & Klaaren 2001:20).

Four stages in the notice and comment procedure are identifiable:

- communicate the proposed administrative action by means of notice;
- call for comments by means of notice;
- consider the comments received; and
- decide whether or not to take the administrative action, with or without changes.

Notice must be given, which implies that the public must be given sufficient information about the proposed administrative action to allow them to make meaningful representations (Section 4(3)(a)). This is the *procedural* requirement of proper notification, which implies that the notice must be given in such a manner that the people affected are indeed informed (Govender 2003:420; Raubenheimer 2007:497). However, who are the affected people? The notice must be addressed to those likely (or potentially) to be materially and adversely affected by the administrative action, therefore not necessarily the entire public. The word *likely* certainly needs a generous approach to the identification of the target group, but targeting the entire public would certainly be inefficient and potentially ineffective (Currie & Klaaren 2001:125; Mass 2004:75).

The public official must call for comments on the proposed administrative action and must allow enough time (at least 30 days) for meaningful comments to be made (Section 4(3)(a)). This is the *substantive* requirement of proper notification which implies that the notice of proposed decisions must contain sufficient information in terms of depth and detail to enable the public to make meaningful representations (Govender 2003:420; Raubenheimer 2007:497). The official needs to facilitate the process of public comment with sufficient information on where, how (usually in writing but with special assistance to illiterate people) and when to make comments. If a person is then supplied with insufficient information and is thus prevented from dealing with material issues, there will be a failure of procedural fairness to the public (*Du Preez v. TRC* 1997:41–42).

The official must consider and reflect on any (and indeed all relevant) comments (i.e. written data, views or arguments) received (Section 4(3)(b)). The word "must" indicates that a peremptory duty is placed on the public official to consider the essential substance of such comments (i.e. a genuine and proper application of the mind) prior to reaching a final decision on the matter.

The official must then decide whether or not to take the proposed administrative action (or decision), with or without changes (Section 4(3)(c)). The effect of this is a duty being placed on the official to decide (i.e. the exercise of a discretion) whether or not to take (and implement) the administrative decision, and whether or not to alter the proposed administrative action in the light of the comments received and considered (Currie & Klaaren 2001:128). The official must be prepared genuinely to be persuaded either to change or modify the original proposal based on the comments received. If there is no proper consideration of the issues, then the entire exercise is a smokescreen which is devoid of any benefit and is simply a waste of public funds (Govender 2003:423). There is no requirement in Section 4 of PAJA (or the regulations) that reasons must be given for the administrative decision or action taken after consideration of the comments, which is unfortunate. However, it may be

expedient to publish decisions with a concise statement setting out the basis for the decision. This will at least demonstrate that the officials have been responsive to the comments received (Hoexter 2007:373).

The right to be heard before a decision is taken has been part of our public administration practice (the common law at one time being its source) for a long time, and this is often confirmed (*Buffalo City Municipality v. Gauss* 2005: 503–504). However, statutory notice and comment procedures with *general application* to all administrative action (in terms of the PAJA) are a new feature of our administrative justice regime. However, the *specific application* of notice and comment procedures, as provided in particular for enabling legislation, is not new. Examples of the latter are the *Removal of Restrictions Act,* 84 of 1967 (Section 3(6)), the *Environment Conservation Act,* 73 of 1989 (Section 32), the *National Forests Act,* 84 of 1998 (Section 54) and the *National Water Act,* 36 of 1998 (Section 69) with regard to the authorisation of certain administrative actions and, in particular, the making of regulations.

A combined procedure: public inquiry and notice and comment (Section4(1)(c) of PAJA)

The public official can hold a public inquiry and follow a notice and comment procedure as a combined procedure (Section 4(1)(c)). It is possible to employ both procedures by, for example, first having a notice and comment procedure and then, based on the comments received, have a public enquiry on specific issues for a specific group of people or vice versa. The proposal a few years ago of allowing the dunes at St Lucia to be mined was an example of the possibility of a combination of the procedures. The possible effect of the mining operations on the environment could have been the subject of a public inquiry to hear arguments from both sides and a notice and comment procedure to solicit the views of the general public. (Govender 2003:427)

To give effect to the right to procedural fairness to the public, it has been suggested that the official can decide to combine the procedures or even to repeat the same one. A repetition of either procedure can be called for when the first application of a procedure to ensure fairness leads to a significant change in the proposed administrative action. The revised version of the proposed action is then publicly displayed for a second time to allow for comments on the amendments. (Mass 2004:76)

A fair but different procedure (Section 4(1)(d) of PAJA)

Another option for procedural fairness to the public is the so-called "fair but different" procedure. This option allows a public official to follow a fair but

different procedure but only if that procedure is mandated or empowered by the relevant enabling legislation (Section 4(1)(d)). This implies that the "different" procedure prescribed by the empowering provision of the enabling Act must be tested against the minimum standard set by the PAJA for procedural fairness to the public.

An example for testing a particular empowering provision of an enabling Act against the PAJA can be found in the *National Water Act,* 36 of 1998. The mentioned Act makes provision for a closing date for comments by the public (in a notice and comment procedure) as 60 days after publication of the notice (see Section 69(1)(a)(ii) and 110(1)(b)(iii)). This time frame for the submission of comments is more generous than the 30 days allowed in terms the PAJA and its regulations (see Regulation 18(2)(a)) and should thus be applied.

Another example of an empowering provision containing a fair procedure can be found in the *South African Schools Act,* 84 of 1996. Section 33 of this Act allows a Member of the Executive Council (MEC) of a particular province to close public schools in certain circumstances. Such a decision may have serious and adverse consequences for the rights of learners, parents, educators and other members of the community, and therefore the MEC, after proper notice, must conduct a public hearing to enable the affected community to make representations. The representations must then be taken into account in making the decision. This is regarded as an example of an empowering provision which contains a fair procedure in the circumstances.

The provisions of Section 4 of the PAJA are therefore of general application and must be read together with the enabling legislation (*Zondi v. MEC for Traditional and Local Government Affairs* 2005:par. 101). Where the enabling legislation is silent on the subject of fairness to the public, or makes incomplete or inadequate provision for such fairness, the provisions of Section 4 of the PAJA will apply. An example may be the *National Environmental Management Act,* 107 of 1998 (hereafter the NEMA) which requires that decisions (which may significantly affect the environment) should take into account the interests, needs and values of all interested and affected parties (Section 2(4)(g)), and that the participation of all interested and affected parties must be promoted in environmental governance (Section 2(4)(f)). It has been argued that this introduces a lower threshold for the requirement of public participation than that contemplated by the PAJA (Eastwood & Pschorn-Strauss 2005:131). The existing procedure should then be supplemented with one or more of the procedures prescribed in PAJA. This Act (PAJA) will only have a supplementary effect on the relevant enabling legislation (in this case the NEMA) and does not make the latter obsolete (Van Rensburg 2001:66; Currie 2006:345).

Another example of this was where immigration regulations were challenged on the grounds that the Minister of Home Affairs had failed to comply with

the notice and comment procedures as specified in the relevant enabling legislation, namely the *Immigration Act,* 13 of 2002 (Section 7). It was ruled that the administrative action mentioned in the enabling legislation must be carried out consistently with PAJA **(***Minister of Home Affairs v. Eisenberg &* Associates: In *re Eisenberg & Associates v. Minister of Home Affairs* 2003:par. 59).

In yet another example, the relevant enabling legislation, namely the *Medicines and Related Substances Amendment Act* 59 of 2002 (Section 22G), was unspecific about the procedure to be followed in the making of regulations, and therefore the relevant requirements were indicated as those which are prescribed by Section 4(1) of PAJA **(***Minister of Health v. New Clicks South Africa (Pty) Ltd* 2006:par. 150).

Another appropriate procedure (Section 4(1)(e) of PAJA)

The last option for procedural fairness to the public is referred to as "another appropriate procedure" which gives effect to Section 3 of PAJA. Section 3 refers to the requirements for fairness to the individual on decisions with a particular effect. It is suggested that this provision must be considered against the backdrop of the flexible nature of procedural fairness. However, in what way is "another appropriate procedure" different from a "fair but different procedure"?

It has been suggested that the public official may opt for "another appropriate procedure" when the enabling legislation does not provide for a specific procedure for participation (i.e. a "fair but different procedure") and neither the public inquiry nor the notice and comment procedure is appropriate (Mass 2004:78). However, procedural fairness is meant to be an inherently flexible concept (cf. Brynard 2010:124–140). It may therefore be suggested that the use of a combination of options (from Section 4 for decisions with general effect), and even the use additional options (from Section 3 for decisions with particular effect), in order to achieve procedural fairness may be appropriate. This implies that the public official may adopt some of the procedural requirements for individual fairness (Section 3) if those requirements are appropriate within the context of fairness to the public (Section 4).

In terms of the flexible nature of procedural fairness, it has been suggested that the use of fair procedures appropriate for administrative action with general effect but not explicitly listed in Section 4 (for example, consultation, mediation, negotiated rule-making and other techniques associated with public participation) may be appropriate (Currie & Klaaren 2001:130–131; Hoexter 2007: 369–370). Negotiated rule-making happens when interested parties (those from a particular industry) negotiate among themselves and come up with a draft rule or set of rules on a particular issue in their industry. The public administration will then have to adopt and approve the rule in its final form. The

rule (or subordinate legislation) will be the product of extensive participation by the parties actually involved and, it is hoped, not to the exclusion of other interested parties (Currie & Klaaren 2001:131). Let us now consider the possibility of departure from any of the requirements for procedural fairness to the public.

DEPARTURE FROM THE REQUIREMENTS FOR PROCEDURALLY FAIR ADMINISTRATIVE ACTION AFFECTING THE PUBLIC (SECTION 4(4)(A)&(B) OF PAJA)

A public official may depart from any of the requirements for procedural fairness to the public as prescribed in the PAJA (Section 4(1),(2)&(3)) if to do so is reasonable and justifiable in the circumstances (Section 4(4)(a)). However, with the flexible nature of the requirements for procedural fairness, the use of any departure is not likely to happen often.

In determining whether a departure is indeed reasonable and justifiable, the public official must take all the relevant factors into account, for example the objects of the empowering provision; the nature and purpose of, and the need to take the administrative action; the likely effect of the administrative action; the urgency of the matter and the need to promote an efficient and effective public administration (Section 4(4)(b)). A departure is only permissible when a public official has considered the particular circumstances (applied his/her mind) and can justify a departure in the light of these circumstances. Such a departure is also referred to by some as a *savings clause* (Van Rensburg 2001:65) or a *loophole* (Hoexter 2007:343) for the public official who normally follows a fair procedure but, because of the circumstances of a particular case, has to dispense with one or more of the requirements of a fair procedure.

An example may be when, in an emergency, a camp has to be set up in a public park after a natural disaster such as a flood. Such a camp will then be erected without following any of the procedures set out in Section 4(1)). A reasonable and justifiable departure is therefore not a breach of fairness. However, the decision by a public official to depart from the requirements of Section 4 must be a deliberate decision made prior to embarking on the administrative action in question. An inadvertent omission to comply with the requirements of procedural fairness to the public cannot be justified as a departure retrospectively (Govender 2003:428).

The procedures to ensure procedural fairness to the public and the possible departures from these procedures have now been explained. Let us now explore the possible benefits of procedural fairness to the public to enhance transparency, accountability and public participation in public administration.

CREATING A CULTURE OF TRANSPARENCY

From the preamble to the PAJA we learn that the object of administrative justice in general and procedural fairness in particular is to create a culture of accountability, openness and transparency in public administration. Public officials need to take the preamble seriously because it offers an opportunity for a more constructive, systematic and purposeful reading and interpretation of the procedural fairness provisions of the PAJA. In a sense, the preamble serves as a benchmark for the proper functioning of administrative justice (Beukes 2003:292).

Transparency (or openness) is an important element of democratic public administration because decisions which are shrouded in secrecy lead to suspicion and distrust on the part of the public. The requirement for openness is provided for in Section 4 of PAJA as the requirements of procedural fairness to the public help to inform the administrative process. For instance, the public inquiry process can uncover information that a public official did not know. The benefit of the notice and comment process is that it may result in an interested party submitting new information which may contribute to a final decision which is better informed and less susceptible to error. Another benefit of the procedures for fairness is that they serve to facilitate an open and transparent analysis and consideration of the administrative action being undertaken. This *effort* may then expose any possible weakness of logic in the administrative decision. During a public inquiry process, the public official concerned will most probably need to be very clear about the reasons for the proposed administrative action. One would hope that the need for such clear thinking would result in better-informed decisions.

CREATING A CULTURE OF ACCOUNTABILITY

From the perspective of society (i.e. the general public) the right to procedural fairness is aimed at imposing a duty on public officials to achieve and uphold a fair, honest, transparent and accountable public administration which serves the interests of the general public (i.e. the common good). The practical effect of the duty is to demand and require positive action from any public official in such a way that he or she is able to account for any decision taken by him or her. The duty also ensures that the public official exercises his or her authority in the public interest and not for the personal gain or benefit of the official (Beukes 2003:294).

The purpose of procedural fairness to the public is thus to provide the general public with a right to be heard on issues of public concern. The duty therefore requires public officials to consult the public by adopting, among others, a notice and comment procedure before important decisions are taken. The requested

public comments in terms of the notice and comment procedure need to be seen within the context of a culture of justification where the public administration may be required to justify its decision on request. The duty also serves to promote responsive public administration as it is an aid to determine and accommodate the needs of the people (i.e. the public) by adopting, among others, a notice and comment procedure or a public inquiry process. At the same time, this duty facilitates the gathering of information which will help to ensure administrative accountability (i.e. a written report and reasons after a public inquiry process). It is hoped that this will contribute to the creation of a new underlying culture of accountability and participation in public administration.

CREATING A CULTURE OF PUBLIC PARTICIPATION

Public participation can be defined as an open (transparent) and accountable process through which individuals and groups (i.e. the public) can exchange views and influence decision-making in public administration.

Procedural fairness to the public, as prescribed by the PAJA, stipulates the necessity for a participatory process. The procedures to be followed seek to be inclusive by allowing people to participate in the decision-making process and seek to minimise the chances of an erroneous decision being made by exposing the official to a wide range of views and opinions. The benefit to the public administration of a participatory process lies in the making of more informed and defensible decisions with a greater potential for public support. In many instances, the notice and comment procedure will be a less formal and complicated as well as a more cost effective and cheaper option for the official to follow to ensure public participation (Govender 2003:419).

The benefits of public participation (resulting from the requirements of procedural fairness) for both the public officials and the public are as follows:

- it allows the public the opportunity to participate in the making of decisions that affect them as an informed community (Hoexter 2007:75);
- it allows for the views of a wide range of stakeholders to be canvassed and increases the likelihood of underprivileged or marginalised communities voicing their concerns alongside the more affluent sectors of society (Eastwood & Pschorn-Strauss 2005:132);
- it educates the public and counters their "sense of powerlessness";
- it is a helpful tool for the public administration because it provides new information and different perspectives before making decisions;
- it has a proactive effect as it exposes possible weaknesses in proposed administrative action, which may lead to better and more informed decision-making (Raubenheimer 2007:506);

- it alerts the public to the intention of the public administration and allows for early intervention and possibly protest (i.e. it plays a preventative role where an ill-informed decision could cause possible harm);
- it can increase the general acceptance and popular support of and public confidence in administrative action (Mass 2004:63–64);
- it allows the public officials to make more informed (and, it is hoped, more defensible) decisions with a greater potential for public support (Kidd 1999:22);
- it increases the democratic legitimacy of administrative action by emphasising openness, consultation, objectivity and reasoned decision-making (i.e. the broadening of democracy and justice);
- it compensates for the fact that most administrative actions are not taken by democratically elected representatives (Currie & Klaaren 2001:108);
- it helps ensure that officials remain or become accountable to those (the public) affected by their decisions (Hoexter 2007:78);
- it serves as a tool to the public to monitor the exercise of authority by unelected public officials (Raubenheimer 2007:491); and
- it plays an important role in ensuring that lawful, reasonable and fair decisions are made from the outset.

Public participation encourages citizens to exercise their rights and can increase their confidence in administrative decisions. The participatory process allows for the views of a wider range of stakeholders to be canvassed and it increases the likelihood of underprivileged or marginalised communities voicing their concerns alongside the more affluent sectors of society.

CONCLUSION

The analysis of the practical functioning in our public administration of procedural fairness to the public provided evidence that our administrative justice system is now empowered and ready to make a meaningful contribution to sound governance. The mandatory choice from the five alternative procedures for procedural fairness to the public places a great deal of responsibility on public officials who must determine, on a case-by-case basis, the most appropriate procedure. There is a special duty resting on public officials to provide substance to procedural fairness to the public as any attempt to curtail the right of the public to be heard (through public participation) will be seen as procedurally unfair. In essence, the substance needed is for public officials to know that justice requires fairness and transparency of the process by which they make their decisions.

The very presence of the provisions for procedural fairness to the public (with particular emphasis on public enquiries and the notice and comment procedure) in the PAJA is its potential to have a positive effect on the rate and quality of meaningful participation in administrative decision-making which, in turn, has the potential to enhance transparent and accountable public administration. However, although it is clear that the requirements of Section 4 of the PAJA have the potential to enrich our administrative justice system considerably, much will depend on the enthusiasm with which they are followed and enforced. Even so, procedural fairness to the public as a principle of administrative justice is here to stay. There will always be a demand for high levels of fairness where the rights of the public as a group or class are affected. In the interest of promoting justice through fairness, one would hope that forthcoming judicial decisions on the practical implementation of procedural fairness to the public would have more value in terms of the refinement of legal principles than the uncovering of dysfunctional implementation of administrative action.

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