Department of Public Administration and Management

Ethics in public administration and administrative justice

ADMINISTRATIVE JUSTICE

STUDY GUIDE 2 FOR PUB3707

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STUDY GUIDE

Ethics in public administration and administrative justice 2

ADMINISTRATIVE JUSTICE

Foreword

Welcome to a topical and dynamic subject of study, namely administrative justice. The passing of the Constitution of the Republic of South Africa, 1996, marked the dawn of a new day for South African public administration, a day on which the expectations each citizen of the country has of his/her public officials, were accorded constitutional status. Those expectations are expressed in certain basic values and principles that govern public administration and are worded as follows in section 195(1) of the Constitution.

''195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.''

Despite the praiseworthy ideals set for the public administration by the above provisions of the Constitution, we know that the practice of public administration in South Africa sometimes appears less rosy. In particular, it is the wide-ranging delegation of powers to officialdom, which finds expression daily in decision-making and administrative discretion, that could potentially cause matters to go wrong. Due compliance with the entrenched principles referred to at the start of the above provision, is of vital importance. Here, we refer specifically to the right to administrative justice as entrenched in the Bill of Rights in the Constitution.

This study guide therefore deals with administrative justice, and, more specifically, the demands made by administrative justice on public institutions and on public officials as individuals. The first task of the study guide is to convince you as a student, and probably as an official, that administrative justice is a worthwhile, reasonable, practical and core value to be pursued by the public administration. In the process, various aspects of administrative law are touched on, in such a way as to render them more understandable and accessible to the public administration community. It is hoped that, in this way, the importance of administrative justice, as a determining factor in administrative decision-making and the exercise of administrative discretion, will be driven home.

The purpose of the study guide is to stimulate your thinking on matters of administrative justice and promote greater awareness, rather than to meticulously catalogue and analyse those – often fascinating – public administration issues that have implications for justice. It was a temptation to carry out a far more comprehensive study of administrative justice, in all its fascinating facets, but, unfortunately, the scope of this module, which covers ethics in public administration (Study Guide 1) and administrative justice (Study Guide 2), does not permit that. We shall leave it for a more suitable occasion. The purpose is to give public officials an overview of best practice where matters of administrative justice are at issue, rather than to provide a set of prescriptive guidelines. There is no lack of guidelines for administrative action – on the contrary, usually officials have too many guidelines to follow: laws, institutional rules and regulations, court judgments and ethical codes all include directives for administrative action. The aim is not to add to this long list of guidelines. Rather, the aim is to cultivate a positive approach to administrative justice; an approach which seeks to utilise the principles of administrative justice – namely lawfulness, reasonableness and procedural fairness – as building blocks in the construction of a just public administration of which all may be proud.

The study guide has been divided into three overall themes. Theme 1 focuses on the foundations of administrative justice, while theme 2 analyses the foundations of the separation of powers in the state. Theme 2 begins with the theory of the separation of state powers, continues with the necessary departure from this theory which results in the phenomenon of the administrative state, and ends with an analysis of the three main products of the administrative state, namely delegated legislation, administrative adjudication and administrative discretion. Theme 3 focuses on the state institutions that support the promotion of administrative justice, with specific emphasis on the institution of ombudsman, or the Public Protector as it is known in South Africa.

Each theme begins with key questions and concepts that will give you an idea of what you may expect in a specific theme. The themes, in turn, are divided into a number of study units, and each theme ends with self-evaluation questions. The questions should give you an indication of the knowledge and skills you should have acquired in each theme. Each study unit contains several activities. It is important that you complete each of these activities. We recommend that you do not omit the activities, but do them thoroughly and to the best of your ability.

Success with your studies!

THEME 1

Foundations of administrative justice

OVERVIEW

Key questions

Key concepts

STUDY UNIT 1

What is administrative justice?

Constitutional principles of administrative justice

THEME 1

Foundations of administrative justice

OVERVIEW

The object of this theme is to begin by giving you a theoretical grounding in the concept of administrative justice before you are introduced to the constitutional principles involved. A further aim is to inculcate in you specific skills relating to the implementation of administrative justice in public administration.

KEY QUESTIONS

In order to grasp and understand the foundations of administrative justice, it is necessary to find answers to the following questions:

- Is becoming aware of, and understanding, the guiding principles of administrative justice, and a cultivation of those principles and virtues in their own lives and actions, important for students of Public Administration?
- Could informing and educating students about the principles of administrative justice facilitate the establishment of a human rights culture in South Africa?
- What do ''justice'' and ''administrative justice'' mean?
- What responsibility is implied by administrative justice for public administration?
- What qualities should be displayed by a just public official?
- What personality traits are desirable in the make-up of a just public official?
- Against what background should administrative justice in South Africa be seen?
- What is the differentiation between the Constitution and other legislation?
- What two important principles of administrative justice are established by the 1996 Constitution?
- What principles of administrative justice are emphasised in the Promotion of Administrative Justice Act 3 of 2000?
- What are the implications for the public administration of a provision relating to administrative justice in the Constitution?

- To what extent is administrative justice promoted by other relevant provisions of the Constitution?
- Who is bound by the constitutional provisions on administrative justice?
- Is administrative justice a possibility or does it remain an improbability in South Africa?

KEY CONCEPTS

In order to understand the phenomenon of administrative justice, it is essential that you are able to explain the meanings of the following concepts:

- administrative justice
- fairness
- citizen participation
- transparency
- discretionary powers
- justice
- bill of rights
- natural justice
- procedurally fair administrative action
- reasonable administrative action
- just administrative action
- lawful administrative action
- justifiable administrative action
- just official
- accountability

STUDY UNIT 1

What is administrative justice?

Introduction 1.1

Some decades ago, it was accepted that justice did not really have much to do with being an official. On the contrary, justice was regarded as the domain of the courts and the legal profession. Public institutions were more inclined to call in the assistance of lawyers to advise them about such matters. The aim of this study unit is specifically to acquire a grasp both of the concepts of justice and administrative justice, and of the relevance for public administration of the principles of administrative justice. A brief survey of the primary qualities of a just public official is also provided.

The concept of "justice" 1.2

Justice means fairness and respect for the rights of others. The rights of others include, in principle, respect for the dignity and value of each individual. A basic principle of justice is to give to each what he/she is entitled to (Pops & Pavlak 1991:11). Justice, then, is a matter of individual moral responsibility. In the light of factors such as human fallibility and the tendency towards self-interest, which are necessarily present in the make-up of every public official, this concept should now be more closely related to the sphere of activities of public administration.

From justice to administrative justice 1.3

Administrative justice, as a specific form of justice, consists of those principles which the public official should comply with to be able to act in a just and fair way towards others (Brynard 1996a:27). The most fundamental principles at issue here, which government action should comply with, are the requirements of reasonableness, fairness and impartiality. Administrative justice thus provides the foundation for consistent and fair actions of public officials in response to legitimate citizen demands for fair treatment.

1.4 Administrative justice and public administration

As a prerequisite for respecting the dignity and value of individuals, there must be a commitment to the development and upholding of the rights of individuals. This will ensure that their dignity and value are not assailed by others in society. For the public administration, a commitment to administrative justice implies that every public official must be committed to respecting the dignity and value of each and every member of society and to promoting all legislation that protects the rights of all members of society. The correct interpretation, application and implementation of legislation are only possible for someone who is committed to the principle of justice (Denhardt 1991:107).

Officials are confronted every day with problems of administrative justice when they have to allocate benefits (such as awarding or turning down permits and licences), decide disputes or take administrative decisions which often require a considerable degree of discretion. For example, officials have to exercise administrative discretion daily to be able to pass judgement on rates valuations, decide which applicants to admit to state housing, decide which prisoners qualify for parole, and which prospective businessperson will obtain the trading licence. This list of government actions with administrative justice implications is virtually endless.

However, the impact and application of administrative justice extend further than specific government actions, in that they find expression in the fundamental character of public administration in a democratic society. Thus, it could be argued that the organisation of any kind of government action to deliver a specific public good or service, could be regarded as a matter of administrative justice. From the initial policy decision on the allocation of benefits or liabilities to the public, administrative justice issues are relevant from start to finish – this is also true of the innumerable ensuing decisions made in the course of implementing public policy and programmes (Pops & Pavlak 1991:5).

But it is precisely the implementation and application of public policy and programmes that provide the context for injustices. When unfairness in the drafting and applying of a specific law is experienced, this could reasonably be ascribed to the actions of the executive (ie the cabinet) and legislative (ie parliament) branches of government authority. In practice, however, it is the public institutions (the so-called administrative authority) which seek to implement the law which will be blamed. You might be aware of legislation which is already unfair in many respects by the time it gets to the officials who have to implement it. What influence can the public officials exert to alleviate the injustices which are already a reality when it reaches them? When the public and interest groups experience the negative consequences of such government programmes, the complaints are laid at the door of the institutions that implement the programmes. In fact, in such instances the public administration is often less guilty than is generally accepted. Often, it is the natural consequences of the legislator's programme that generate the complaints. However, the public administration is not totally neutral in this regard – specifically as a result of the role it plays in the process of determining policy. Of course, there is also the other side of the coin. Public institutions and officials are often vested with wide-ranging powers. There is, therefore, the potential that those powers can be

exercised to the detriment of the rights of the public. Therefore, every official should appreciate the responsibility to act fairly and justly at all times.

ACTIVITY

- Give four examples of administrative decisions which often require a considerable degree of discretion in your field of work.
- Do you regard the study of a moral imperative, such as the principle of justice, as moral indoctrination or as the way to cultivate a professional official?

  Please substantiate your answer.
- Do you apply these principles in your life?

What responsibility does administrative justice imply for the public administration? 1.5

The question asked here is the following: What does the responsibility to uphold administrative justice signify for the public administration in a constitutional state? In other words, what responsibility rests on the public officials in this regard?

At the outset, it should be realised that there must be limitations on the extensive use of discretionary powers by the public administration. For example, officials act in a quasi-judicial capacity when disputes are heard and settled. The exercise of these extensive powers may be regarded by the public with fear and disapproval if such exercise is experienced as exceeding of authority and even as a violation of the doctrine of separation of powers (ie the *trias politica*).Secondly, officials must accept responsibility for their discretionary action when laws are interpreted and implemented. The possibility of conflict in the interpretation of legislation is inevitable, because legislation is often imprecisely worded and the language usage results in uncertainty. In such instances, the officials, inspired by the concept of administrative justice, are obliged to find a valid or lawful interpretation for the implementation of the legislator's policy objectives. The obligation rests with the officials themselves, failing which the advice of a specialised official, namely the State Law Advisor, can be sought.

Finally, a commitment to administrative justice also requires an acceptance of change. Public institutions develop structures, customs, routines and operational

procedures geared to the requirements of efficiency, effectiveness and their own particular cultures, but not specifically to the pursuit of administrative justice. In order to allow the principle of administrative justice to find expression in public institutions, change is sometimes necessary in the structural design of institutions, in the way in which their interaction with the public takes place, in the criteria which they take into account in their decision-making processes, in the way in which they recruit, select, remunerate, promote and train staff, as well as in the attitudes instilled in their staff.

1.6 *Qualities of the just public official*

At the heart of a public institution that pursues administrative justice is the individual decisionmaker who, in the final analysis, will determine whether the relevant principles and guidelines are implemented. Ultimately, it is the values, sensitivities, knowledge, skills and personal contributions of people within the institution that are essential for administrative justice.

The dilemma of the official is that he/she has to accommodate three overlapping and potentially conflicting perspectives on society. Firstly, he/she has to act on behalf of the institution he/she serves, in order to promote the reputation, efficiency and effectiveness of that institution. Secondly, he/she has to satisfy the expectations of the citizens he/she comes into contact with and treat them fairly and justly. Thirdly, an effort must be made to satisfy the policy objectives of the political rulers and the general public, who are represented by the former. Within this context, the official must comply with specific requirements of administrative justice. Compliance with these requirements requires specific **knowledge, cognitive skills, attitudes** and **personal abilities** to train an official who will be just.

Knowledge and cognitive skills

What ought an official to know to be able to act justly? At the top of the list should be knowledge and ''equipment'' that will enable him/her to be aware of his/her role and responsibility in the constitutional setup, so as to understand both the sources of his/her discretionary powers and the various processes through which the government exercises choices. To start with, the official should have a basic understanding of the principles underlying the constitutional system. This implies a sound knowledge of the Constitution as core legislation, the Promotion of Administrative Justice Act 3 of 2000, the doctrine of the separation of powers (*trias politica*), and the phenomenon of the administrative state. A knowledge of relevant legislation and the process of its implementation is also important.

Attitudes

To be able to act justly, the official should also be equipped with an attitude conducive to justice in the administrative environment. Specific attitudes of the official are necessary to be able to act justly. Attitudes such as understanding of the precedence and sensitivity of client interests, as well as a sense of reasonableness and respect for human dignity, are important.To begin with, the official should be made receptive to the precedence of client interests over and

above personal or institutional interests. A sensitivity to the dependence and consequent vulnerability of clients' interests in service delivery is essential. This does not, however, imply that any client deserves special treatment that goes beyond the fair application of rules.

Another important attitude is a sense of reasonableness. Where the uniform application of a rule in a specific case would result in an injustice, the principle of justice that provides that ''different cases should be handled differently in relation to the extent that they are different'' should be followed. Such an adaptation of the way a rule is implemented ought nevertheless to be implemented in a uniform way. Officials ought therefore to be encouraged to develop an attitude of reasonableness in the application of rules. The just official ought also to be sensitive to what makes people feel that they have been unjustly treated.

A third attitude is respect for human dignity. By listening with interest to each individual and seeing to it that he/she is treated justly, the official protects the dignity of people who come into contact with the public administration. When what are felt to be injustices are allowed to accumulate without a genuine effort to understand them or to furnish assistance where possible, the result is usually an undermining of the legitimacy of the relevant institution.

Personal qualities

Specific personal traits are desirable in the make-up of a just official. Operational virtues such as optimism, courage and fairness are regarded as essential moral qualities in the public administration.

Optimism is a quality that makes it possible for a person to deal with the ambiguities and apparent contradictions of our existence without being paralysed. Pessimism, rather than optimism, would probably be prevalent in a government setup plagued by financial crises and a depressed public service. It is important that public officials believe that the government can indeed be just and make the world a better place.

Courage is necessary to be able to deal with the dose of ambiguity and apparent contradiction present in public decision-making. It requires exceptional courage to handle the pressure that can arise from friendship, popular majorities or expert opinions. For example, it takes far less courage to act impersonally towards specific interest groups than it does towards loyal colleagues whom one has relied on for years for understanding and for professional and personal support. Examples of this are regularly found in the task of a senior official who has to take decisions about the promotion and merit bonuses of subordinates who have been colleagues for years, or the many inspectors employed by the government who cooperate closely, and often have contact, with those whose services are regulated by them. It also takes courage to take decisions about public disputes which will necessarily cause pain and disappointment to some. Examples of such decisions are as diverse as the awarding of funds for community development to particular cities, the selection of an outsider as the head of a section when there were internal candidates for the post, and the decision as to which students will be admitted to a sought-after postgraduate degree programme at a prestigious university.

Fairness, tempered with charity, is the third and most essential moral quality needed in the public service. This quality signifies a sensitivity to the needs and

interests of all persons and groups affected by the policies and programmes of public institutions. A fair attitude is an attitude that is not susceptible to the achievement of results on the basis of prejudice or self-interest. Charity may complement the objectivity that is required for fairness. The reason for this is that officials always have to take decisions on the basis of inadequate information as well as the unconscious tendency to promote self-interest. Charity is the virtue or disposition to think favourably of others, and to do good by them, which compensates for inadequate information and for the subtle difficulty of self-interest in the making of decisions designed to be fair. Fairness without charity tends to ignore the ambiguity of personal motives and judgements.

ACTIVITY

- You are a health inspector in the employ of the regional branch of the Department of Health in your town. You are tipped off that certain unhygienic practices are occurring in a local restaurant in the town. The owner of the restaurant is a personal friend, and you are the only health inspector in the town. What pitfalls must you avoid in your inquiry into the matter, and what knowledge, attitudes and personality traits would be essential to enable you to deal fairly with the situation?

1.7 R.E.V.I.E.W

In this study unit, we encountered the important concepts of justice and administrative justice, as well as the responsibility these place upon the public administration. The qualities needed to properly equip a just public official for his/her task were described.

In the next study unit, we shall attempt to equip the official with the necessary knowledge of the constitutional principles of administrative justice. A sound knowledge of this is imperative in the make-up of the just public official.

STUDY UNIT 2

Constitutional principles of administrative justice

Introduction 2.1

Allegations of government irregularities as a result of public officials who have strayed from the straight and narrow path of fair and just administrative action, are an unfortunate and almost daily reality in many daily newspapers in South Africa. The publicity given to alleged offences, corruption and other wrongdoing, leaves the impression that everything is not as it should be in public administration. A chain reaction of negative perceptions usually results. The public loses confidence in the government. The government loses confidence in the public service. Public officials lose confidence in one another. The credibility of government institutions is called into question. Is there any hope? What is the solution? Can the situation be saved? These are questions that have to be asked. That is the one scenario.

The other scenario sketches a euphoria of optimistic expectations surrounding a new constitution that came into effect in February 1997; a constitution which promised a sovereign and democratic constitutional state in which there would be equality between men and women and people of all races so that all citizens could enjoy and exercise their fundamental rights and freedoms; a constitution which would serve as a framework within which the government would exercise its authority; a constitution based on the noble ideal of justice for all.

These are the two contrasting scenarios that serve as the background to the issue dealt with by this study guide. Can the vital longing and search for justice that forms part of every fallible human being be guaranteed by the provisions of a document like the Constitution? The question then is: is justice a possibility or does it remain an improbability?

The object of this study unit is to determine, by way of an analysis of administrative justice in terms of the 1996 Constitution as well as the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the framework within which public administration should function. The implications for public administration of the provisions relating to administrative justice are also examined.

Background 2.2

The constitution seeks to establish a sovereign and democratic constitutional state within which the fundamental rights and liberties of citizens will be protected.

The ongoing existence of a wide-ranging public administration to achieve these ideals is therefore inevitable. Rawls (1988:195–228) regards a democratic constitutional state as the most basic structure of authority that is best suited to guarantee justice. Nevertheless, it must be appreciated that the above-mentioned praiseworthy ideals will be dependent upon the existence of a system of government with integrity, if the inevitable onslaughts of corrupting, authoritarian and arbitrary actions of those in power are to be contained. Among the expectations in terms of the Constitution are that officials will act justly and not exceed their powers. This necessitates the establishment of a system of justice which seeks to ensure defensible decisions by utilising fair procedures.

Despite the longing for justice, people are only human, distracted by the weakness of greed and desire, influenced by self-interest and the prey of prejudice, and assailed by pride and the desire for power (James 1968:322). Moreover, humanity is trapped in a web of complex government institutions it is unable to escape. The distinguishing mark of these institutions is, on the **one hand**, a multiplicity of rules designed to achieve objectives as efficiently and effectively as possible. Thus, the individual is trapped in a rule-dominated society (Hart 1974:9). On the **other hand**, the possession and exercise of discretionary powers are an essential commodity in the public administration of a democratic society (Cooper 1992:113). Administrative discretion is, however, often regarded as being in conflict with the idea of justice and has even been branded the scourge of justice owing to its tendency to be unpredictable, capricious, questionable and arbitrary (Boulle 1986:138; Burns 1994:350). A balance between clinging to formal rules and the use of discretion in decision-making is probably a solution. A lack of discretion (ie being excessively rule-bound) is likely to lead to unfair decisions, while too wide discretionary powers may lead to a violation of the principle of justice. Unfair decisions are possible when the balance in question is disturbed in either direction (Pavlak & Pops 1989:935).

The Constitution of the Republic of South Africa, 1996, includes a chapter known as the ''Bill of Rights'' (Chapter 2). The chapter thus represents a bill of human rights in the Constitution, and serves as a framework for the public administration. In the Constitution, the right to administrative justice is entrenched in section 33. The 1996 Constitution is sometimes commonly referred to as the ''final'' constitution, because it is the last in a series of constitutions. This constitution can, however, not be regarded as a ''final'' constitution, because the current generation of South Africans who developed the Constitution had no right to bind future generations to it.

In giving effect to subsection 33(3) of the 1996 Constitution, an Act for the promotion of administrative justice was enacted, which is known as the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This Act serves as a basic set of principles to which officials must adhere in the execution of all administrative action.

2.3 Status of the Constitution

In an attempt to understand the status of the Constitution, it is imperative to compare its features with those of ordinary parliamentary legislation. In many countries, the constitution is the supreme law of the state, and it is often regarded as a special law with a higher status than other laws. This is also the case in South

Africa, where the **Constitution of the Republic of South Africa, 1996,** is regarded, in terms of section 2 of the Constitution, as the supreme law of the Republic of South Africa. The purpose of the Constitution, as a key element of our legal system, is to provide the norm to which all governmental actions should conform. The constitutional principles shape the ordinary law and dictate the manner in which legislation is to be drafted and interpreted. All other law is thus subordinate to the Constitution. The content of this other legislation must always be consistent with the norms and principles of the Constitution so as not to be declared invalid. The 1996 Constitution was adopted by the Constitutional Assembly (and not by parliament) after a unique legislative process, and should therefore be treated differently from other laws. All other Acts follow a prescribed legislative process, are passed by parliament (and not a constitutional assembly), and are allocated an Act number. The fact that the 1996 Constitution was also allocated a number as ''Act 108 of 1996'' was an administrative mistake. The Constitution should not have been included in the parliamentary list of 1996 legislation, because it was adopted by the Constitutional Assembly and not by parliament. In fact, the allocation of an Act number undermined the product of the Constitutional Assembly, as its appearance in this form created an impression that it was equal in status to other ordinary parliamentary legislation, whereas it was specifically adopted as the supreme law of South Africa (Van Heerden 2007:33-34). This impression also undermined the following words in the preamble to the Constitution: ''We, the people of South Africa ... adopt this Constitution as the supreme law of the Republic ... .'' It is therefore to be welcomed that the Citation of Constitutional Laws Act 5 2005 restores the status of the 1996 Constitution and acknowledges that it is a special statute which should be treated differently from other Acts of parliament by not being allocated an Act number like the other ordinary Acts of parliament (Citation Act 2005: preamble). This implies that the reference to ''Act 108 of 1996'' will no longer be used when referring to the Constitution, as only the full title and year must be used, that is, **Constitution of the Republic of South Africa, 1996** (Citation Act 2005: section 1(1)).

The Constitution contains legislative provisions on the composition, powers and procedures of government institutions, defines government authority, confers it on particular government institutions, and regulates and limits its exercise. In so doing, the Constitution guarantees and regulates the rights and freedoms of the individual. The Constitution therefore plays an important role in ensuring a fair relationship between government institutions and the inhabitants of the country. To execute this role, the Constitution contains numerous legal directives on how the government institutions must act naturally and vis-à-vis the inhabitants of the country. Ordinary parliamentary legislation then provides directives for administrative institutions such as government departments on the execution of government policy and the allocation of funds and other resources.

2.4 *Administrative justice in terms of the 1996 constitution*

A notable characteristic of the 1996 Constitution is that it seeks to regulate public administration. In the United States of America and Canada, there is a comprehensive and sophisticated body of administrative law; and the latter is not constitutionally grounded. In South Africa, however, the Constitution embodies principles of administrative law, which implies that the right to lawful

administrative action is elevated to the status of a fundamental law. We find the relevant provision in section 33. Section 33, which spells out the right to fair administrative action, is an administrative justice provision from the 1996 Constitution and is currently in effect.

Section 33 reads as follows:

''33(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.''

2.4.1 *Interpretation of section 33*

The converse of a right is an obligation. The right to administrative justice that is expressly guaranteed in Chapter 2 of the 1996 Constitution therefore places an obligation on the bearers of authority, such as the public administration, to treat individuals with dignity and respect. The spirit in which the Bill of Rights was written, is prescriptive in relation to the general obligation of fair treatment of the public by the public administration, and not only where particular rights, interests or reasonable expectations are affected or threatened. Section 33 of the 1996 Constitution puts the execution of administrative authority in perspective by defining certain principles within which the public administration should function. The regular reference to ''administrative action'' includes administrative decision-making and action to be taken based on that decision-making.

Section 33 is – technically and juristically speaking – exceptionally complex and therefore requires careful and thorough analysis. The consequences of these provisions for public administration are far-reaching, but, unfortunately, not entirely predictable, since the courts have considerable latitude in their interpretation owing to the language usage and the concepts embodied in the relevant provisions. The creative and innovative role of the courts in interpreting the provisions can be very significant in guiding administrative justice. Moreover, the methodology of interpretation prescribed in section 39(1) is a value-oriented one which requires that the values of an open and democratic society based on human dignity, equality and freedom be promoted. In terms of section 39(2) the interpretation must also promote the ''spirit, purport and objects of the Bill of Rights ''. This implies that the interpretation of the provisions of the Constitution must reflect the basic values underlying the Constitution.

The right to administrative action which is lawful, reasonable and procedurally fair (section 33(1))

In terms of the first subsection (33(1)) everyone has the right to administrative action which is lawful, reasonable and procedurally fair.

''Lawful'' means that officials should obey the laws, and that their actions and decisions should be within the limits of a vested authority (ie an enabling Act).

''Reasonable'' means that an official's decisions and actions have to be justifiable, and ''justifiable'' means that there has to be a good reason for every decision.

''Fair procedures''means that officials' decisions and actions that affect people negatively may not be taken without first consulting with those people. This also means that officials must act impartially.

The right to fair procedures constitutionalises an important principle of justice, namely compliance with the rules of natural justice. To a great extent, the rules emphasise two principles very clearly, namely the right of an affected person to state his/her case properly (*audi alteram partem*) and the requirement that the decisionmaker be free from bias (*nemo iudex in sua causa*). The latter principle implies fair and unbiased decisions and decision-making by public officials. The spirit and inspiration of the rules of natural justice should weigh more heavily than a precise definition of its application. Therefore, in appropriate circumstances, a party that is entitled to procedural fairness, can demand more than merely the implementation of the above two principles of natural justice (*Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 at 305C–D). Procedural fairness also implies compliance by the authorities with other procedural requirements for valid administrative action, such as compliance with the statutory provisions of the enabling Act (Du Plessis & Corder 1994:169). In addition, a prospective applicant ought, for example, to be informed in advance of the policy (or procedural requirements) that will apply in the consideration of his/her application (*Tseleng v Chairman, Unemployment Insurance Board, and Another* 1995 (3) SA 162 (T) at 178E to 179B). Thus the persons affected by the administrative action also have a right to be informed of the information on which the action is based. This facilitates transparency in terms of administrative decision-making.

Establishing this general obligation of fair administrative action implies that justice not only be done, but that it also be visible and be seen to be done. The criterion by which administrative justice will be judged in this sense, will depend on whether the procedure followed is indeed conducive to fairness and is accepted by the public as such (Pops 1992:233). Broadly speaking, therefore, natural justice is a manifestation of the broader concept of fairness. But procedural fairness is inherently a flexible concept, and therefore its implementation will to a great extent depend on the circumstances of each case. It implies that procedures must be followed which, in a particular situation or in specific circumstances, can be regarded as right, fair and just. In line with this, the right to procedurally fair administrative action should be interpreted in the light of the preamble to the 1996 Constitution, namely that the values which underlie an open and democratic society based on freedom and equality shall be promoted. This justifies adopting a broad interpretation of procedural fairness, in contrast to a legalistic interpretation constricted by the stringencies of painstaking compliance with the law (*Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 at 305B–J).

An important and last element of procedural fairness is the right of appeal. Provision for this is made in the sense that a judiciable dispute may be settled by a court of law or other independent and impartial forum such as the Public Protector (ombudsman) (section 33 read with section 34 of the 1996 Constitution).

The question of what can be regarded as ''administrative action'' is important in

determining the scope of the provision. The term should be interpreted to include not only ordinary administrative decisions, but also delegated and subordinate legislation, that is, regulations made by executive authorities.

The use of the word ''reasonableness'' has the advantage that it refers to the substantive grounds or justification of administrative action and not merely to the issue of whether the correct procedure has been followed. The requirement of reasonableness, however, will not give the courts the opportunity to take over, *mero motu* (out of mere impulse, of one's own accord), the decision-making function of public administration, in that the law courts are acquiring the authority to impose their decisions in the place of public administration. The latter would be tantamount to a flagrant violation of the doctrine of separation of powers (*trias politica*). The word ''reasonableness'' thus refers to the soundness of the process of administrative decision-making and to whether the final decision is reasonable in the circumstances. It implies, too, that the courts will have the authority to review administrative decisions on the grounds of the criterion of unreasonableness.

The right to be given written reasons (section 33(2))

In terms of the second subsection (33(2)), everyone has the right to be given written reasons if such a person's rights are adversely affected by administrative action. This is a particularly positive development, since, in the past, there was no general obligation in our common or statutory law to furnish reasons for administrative decisions. In fact, South Africa's pre-1994 civil service was notorious for its secrecy, where public access to state records was a privilege to be granted by public officials. In addition to its lack of accountability, this secrecy did not encourage public participation and contributed to an ineffective public administration (Corder(ed) 2006:371–372). In the interests of creating a climate of accountability, transparency and accessibility in public administration, the obligation created by this right is to be welcomed. In practical terms, the obligation has the potential to promote more well-considered decision-making, protection against arbitrary action, and greater public acceptance of, and confidence in, the legitimacy of administrative decisions (Basson 1994:34; Craig 1994:283). The obligation is, however, limited to cases where the rights of the person concerned are adversely affected. The importance of this provision lies not only in the fact that there is now an obligation on the part of the public administration to furnish reasons, but also therein that the provision now enjoys constitutional status as an entrenched provision. Obtaining the reasons for a decision is an important element in the fairness of a decision and may also contribute to instilling confidence in that decision.

But how do the officials feel about the obligation to supply reasons? The general perception is that officials are reluctant to give reasons, probably because of the following factors:

- Officials are not used to giving reasons.
- Officials feel threatened by having to give reasons for their actions.
- Officials cannot (or often will not) understand why it is necessary to give reasons.
- Officials feel that the obligation to supply reasons will burden them unnecessarily and that they do not have the time to do so.
- Officials do not actually know how to give reasons.

The other side of the obligation, particularly for public administration, is less rosy in terms of costs, workload and skills that may be required by the furnishing of written reasons (Barrington 1980:180; Glazewski 1994:10). With reference to

statistics (In respect of temporary residence permits in general, the Department of Home Affairs issued 2 891 721 temporary residence permits to aliens during 1993. Of these, 78 991 applied for renewal and 3 750 were refused. With regard to temporary residence permits for working purposes, 24 060 new applications were received, of which 20 512 were granted and 3 548 refused. With regard to temporary residence permits for study purposes, 8 395 new applications were received of which 7 441 were granted and 954 refused.) in the Department of Home Affairs, in the abovementioned case Mr Justice Stafford remarked that ''if each person – I emphasise the word person – is entitled to written reasons why his/her application was refused, it would cause chaos in the Department of Home Affairs'' (*Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T) at 194D–E).

The scope and extent of the reasons are not defined. What reasons, then, ought to be provided by the official? The reasons provided by a public institution should be not merely adequate, but also relevant to the decision in question. They must, therefore, be the reasons which influenced the official to take the decision in the first place. After all, furnishing meaningful reasons requires due consideration of, and applying one's mind to, a matter. Reasons cannot therefore simply be trumped up as a smoke screen to conceal the actual process of decision-making and the real reasons motivating the decisionmaker. The true purpose for the giving of reasons is to facilitate a transparent method of administrative decision-making that is reconcilable with the letter and spirit of participatory democracy as reflected in the Constitution.

A decision without giving reasons may give rise to the perception that the decision of an official may have been the result of arbitrary decision-making. By providing reasons, the real grounds for a specific decision emerge, and uncertainty and negative speculation among members of the public are eliminated. In addition, confidence in the process of public decision-making is promoted, in that the public gains insight into decisions that affect them closely. An individual may also analyse the reasons provided to determine whether his/her case was accorded due consideration, and whether all relevant facts and evidence were taken into account in taking a decision. In cases where a decision has been taken which is unfavourable to a member of the public, the provision of reasons promotes acceptance and the person in question is made to understand that his/her case was at least accorded due consideration.

It is good administrative practice for officials to supply proactive reasons for their decisions. As explained above, it will help the public understand why certain decisions have been taken, and also reduce the number of formal requests for reasons. Proactively supplying reasons where a person's rights are being prejudiced often has the advantage that it helps to clear up potential disputes before they arise. Being proactive shows that the official has some understanding of the public's circumstances. Imagine yourself in the position of a member of the public who is applying for a concession by the government or who is affected by an official's administrative decision. This should not be difficult, because, in our private capacity, we are all members of the public who come into daily contact with public administration. Imagine, further, that you are not given full reasons for the official's administrative decision. This exercise should give you an idea of the public's need for fair administrative action as well as satisfactory reasons for administrative action.

National legislation must be enacted to give effect to these rights (section 33(3))

The third subsection (33(3)) determines that legislation should be enacted for the promotion of administrative justice and make provision for the requirements that

this legislation should implement the rights contained in sections 33(1) and 33(2), to make provision for the revision of administrative action and to promote an efficient public administration.

This legislation is, therefore, a kind of code of administrative justice, compiled within the constitutional mandate of sections 32 and 33 in particular, as well as other relevant provisions of the Constitution. National legislation is in fact promulgated in accordance with section 33(3) of the Constitution, that is, a law that implements the rights mentioned in sections 33(1) and (2) of the Constitution. This law is known as the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 11 of this Act determines that the law comes into effect on a date determined by the president by proclamation in the *Government Gazette*. In terms of proclamation R73 of 2000, this Act came into operation on 30 November 2000, with the exclusion of sections 4 and 10 thereof. The introduction of this Act fulfils the constitutional requirements of section 33(3) (the enactment of national legislation). Consequently, section 33 of the 1996 Constitution has since come into effect.

2.4.2 *What is the purpose of administrative justice as expressed in the Constitution?*

The aim of administrative justice is twofold in nature:

- Firstly, it attempts to ensure justice for everyone, in that all administrative action must meet the requirements for valid administrative action. These are the requirements of lawfulness, reasonableness and procedural fairness (section 33(1)).
- Secondly, it attempts to ensure administrative transparency, openness and responsibility, in that public institutions must provide reasons for administrative action where a person's rights are adversely affected (section 33(2)).

2.5 *Administrative justice in terms of the Promotion of Administrative Justice Act*

The Promotion of Administrative Justice Act is dealt with in detail in this study guide, because it is essential that you have a clear understanding of the Act and are able to comply with the most important provisions of the Act in real life. To comply with the provisions of the Act, it is usually necessary for the attitudes with which decision-making takes place, to be changed.

It is clear that the aim is to regulate administrative justice, but where exactly does the Promotion of Administrative Justice Act 3 of 2000 fit in? According to its long title, this Act's purpose is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action that has an adverse effect on anyone's rights, as well as to make provision for accessory matters. The Act should serve as a basis for the exercise of all administrative actions. The existence and implementation of the Act should ensure that all officials, functionaries and institutions honour the principles contained in the Act during administrative action.

The preamble to the Act clearly states that the purpose of the legislation is, firstly, to

promote efficient public administration and good governance, and, secondly, to create a culture of accountability, openness and transparency in public administration or in the exercise of public competencies or the performance of a public function, by giving effect to the right to administrative justice.The Act, however, also has a particular constitutional status. As already mentioned, it is legislation that, instructed by the Constitution, must give effect to citizens' constitutional right to administrative justice. As you have seen, this right is briefly and simplistically stated in section 33 of the Constitution. The Act gives more details on this right, and gives an explanation for the specific procedures that have to be followed. The Act is therefore simultaneously legislation (an embodiment of the legislative will) and a legislative extension of a constitutional stipulation (that proclaims values that stand above the legislative will). Both the existence and content of the law are supported by the Constitution, with the purpose of giving effect to particular legislative rights. To the extent that the law interprets fundamental rights and makes provision for mechanisms for promoting and enforcing those rights, the Act has to be interpreted in the same way as the Bill of Rights. The constitutional right to administrative justice is still, however, independent of the legislation that gives effect to it. The Constitution has simply empowered parliament to implement the right to administrative justice and has definitely not given it the authority to create and extend the right as parliament feels fit. This does not, however, detract from the status of the Act as a defining instrument in the definition and demarcation of the extent and content of the right to administrative justice, or the mechanisms and procedures for the enforceability thereof. As such, the Act is the instrument that officials use to determine what their legal obligations are in terms of the authority that enabling legislation allows them.

It is clear from the subsections of the Act that deal with matters such as procedurally fair administrative action, the provision of reasons for administrative action and judicial review of administrative action, that the main purpose of the Act is to create a framework for the valid execution of all administrative action. The Act makes provision for almost all common law requirements for administrative legality. The common law is thus now largely contained in the Constitution and in the Promotion of Administrative Justice Act. In short, the Act gives more detail to the rights mentioned in section 33 of the Constitution and provides specific procedures that must be followed by public officials and by the public if they wish to complain about administrative action or ask for reasons.

What is the purpose of the Promotion of Administrative Justice Act 2.5.1

Briefly, it comes down to the fact that the Act

- is the ''national legislation'' mentioned in section 33(3) of the Constitution
- gives an explanation of the rules, guidelines and procedures that officials should follow when taking decisions and administrative action in order to ensure that their decisions and actions are fair
- stipulates that officials should give reasons for their actions and decisions
- gives members of the public the right to challenge the actions and decisions of officials in court on a number of grounds (ie judicial review)
- gives an explanation of the procedures that should be followed when applying for judicial review
- stipulates that officials should inform the public of their right to judicial review of administrative action or internal appeal, and of their right to ask for reasons

- intends to promote a democratic culture of responsibility, openness, transparency and participation in public administration by giving effect to the right to fair administrative action.

The Promotion of Administrative Justice Act is written in a negative idiom, with mainly the judicial review of administrative action in mind. But the Act has more than just judicial review in mind. The Act also intends to establish an obligation on the part of officials to pursue fair procedures and methods that may promote correct administrative actions and decision-making. Adherence by officials to such procedures and methods would also reduce the need for judicial review. To be of practical value for public administration, the references to judicial review should be turned into a positive obligation. This is done by asking the question: ''How can I, as a public official, ensure that my decisions and actions comply with the legal obligations, and are also lawful and constitutional?''

We will consequently take a proper look at the most important provisions of the Act. The first important provisions refer to the obligation that administrative action that has a material and adverse effect should be procedurally fair (sections 3 & 4).

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) sets out, firstly, the requirements for procedural fairness of administrative action affecting (having a particular effect on) individual identifiable persons (ie any particular person) personally and specifically (the individual relationship – section 3), and, secondly, those requirements for procedural fairness of administrative action 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). Sections 3 and 4 of the PAJA apply only when public officials are making decisions that constitute administrative action (as defined by the 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 (ie 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 (4) SA 1 (A) at 12). One may argue that declaring an existing road a toll road has both a general effect (on all possible users of the toll road as a class) and a particular/individual effect. The particular effect, in the aforementioned case, on the City Council of Johannesburg was that it needed to take this development into account in its budgeting for the upgrading of the Council's roads and service provision caused by the additional traffic on the Council's roads, which translated into higher maintenance and patrolling costs for the Council. However, in terms of the general effect, it was true that some road users might 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 workplaces).

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 the PAJA will be applicable, because the decision has a particular effect on a specific person – the particular alien. However, the provisions of the 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 the PAJA relates to this general relationship, since the Aliens Control Act and the regulations made in terms of that Act apply impersonally (ie generally and objectively) and nonspecifically 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 in determining which procedures to follow to ensure that fairness.

Procedural fairness of administrative action affecting individual persons (section 3 of the PAJA) 2.5.2

The objective of procedural fairness is to ensure a fair and proper hearing for affected individuals. Listening fairly to both sides is a duty resting on every public official who decides anything. This means that individuals must be properly informed, must be given an opportunity to put their side of the story, must be able to challenge adverse allegations by the public administration, and must be provided with reasons.

Duty to act fairly (section 3(1) of the PAJA)

Administrative action needs to be fair. Or as the PAJA states it in legal terms: ''administrative action which **materially** and **adversely** affects the rights or legitimate expectations of any person must be procedurally fair'' [my emphasis] (section 3(1)). This imposes a legislative duty on public officials to use fair procedures for any administrative action which materially and adversely affects the rights or legitimate expectations of any individual. The qualification of being materially and adversely affected implies a marked deprivation or diminution in the right or legitimate expectation of the individual, since a mere determination of rights or expectations will not suffice. The requirement that the rights or legitimate expectations be affected **materially** as well as **adversely** is not restrictive, because it merely indicates that the adverse effects of the actions must not be trivial in nature (Hoexter 2007:358). The PAJA separates the elements of procedural fairness to the individual into the following four categories:

- a case-specific duty of procedural fairness
- a set of compulsory (or mandatory) elements of procedural fairness
- a set of discretionary (or directory) elements of procedural fairness
- procedural fairness as a fair, but different, procedure

Procedural fairness as a case-specific duty (section 3(2)(a) of the PAJA)

Flexibility or variability is one of the trademarks of procedurally fair administrative action (Burns & Beukes 2006:224). The principles of fairness need not be applied by rote and identically in each situation. Fairness is not something that can be reduced to a one-size-fits-all formula. Instead, fairness is a nuanced assessment of the demands imposed by a particular situation. The standards of fairness may change with the passage of time, both in general and in their application to administrative actions and decisions of a particular type. It is therefore not surprising that the PAJA prescribes that a fair administrative procedure depends on the circumstances of each case (section 3(2)(a)). This implies that the **content** of procedural fairness depends on the **context** of the administrative action or decision (ie the particular circumstances of each case in terms of complexity and seriousness), and varies from case to case (with regard to the position of the affected individual). The context of procedural fairness is important, in the sense that the application of fairness is not static but needs to be tailored to the particular circumstances of each case. What is fair depends on the circumstances. Procedural fairness is thus a principle of good public administration that requires a sensitive rather than a heavy-handed application.

Procedural fairness as a specific duty, that is, the compulsory procedures (section 3(2)(b) of the PAJA)

A specific duty is placed on public officials to accord an individual procedural fairness (the so-called mandatory procedures) in order to give effect to the right to procedurally fair administrative action (section 3(2)(b)). The mandatory procedures are a set of minimum fair procedures that must be provided for in every case (section 3(2)(b)), unless a departure (or exemption) is reasonable and justifiable in the circumstances (section 3(4)). Where a deprivation or diminution of rights or expectations occurs, the public official is obliged by the PAJA to do the following (ie the minimum requirements of fairness) in order to ensure that the administrative action concerned is procedurally fair:

- give adequate notice of the nature and purpose of the proposed administrative action
- give a reasonable opportunity to make representations
- give a clear statement of administrative action
- give adequate notice of the right of review or internal appeal
- give adequate notice of the right to request reasons

These are the procedures a public official must follow when making decisions and taking administrative action affecting an individual. They are the core minimum content of the duty of public officials to act fairly, that is, the right of individuals to procedural fairness. As such, the requirements should be seen as a package in which they all link up with one another and follow a practical sequence in the administrative process. They seem to be interrelated by their very nature. In a perfect world, the clear statement of the administrative action would always come after making representations, and the opportunity to make representations should ideally be offered before any decision is taken, and thus before there is any question of a clear statement of the administrative action.

Discretionary procedural fairness (section 3(3) of the PAJA)

As mentioned earlier, the PAJA separates the elements of procedural fairness into a set of compulsory elements and a set of discretionary elements. The discretionary elements are not compulsory, because a public official may, in his/her discretion,

provide the elements described by section 3(3). Departures from the discretionary elements (in terms of section 3(4)) are not necessary, because they are only discretionary in nature. Where the discretionary procedures are inappropriate or unnecessary for achieving fairness, the public official will simply choose not to use them. The use of these requirements is therefore flexible and dependent on the circumstances of each case, but must be exercised justly, lawfully and reasonably. A failure to allow for these elements where they are clearly needed in the interests of procedural fairness will constitute an unreasonable decision on the part of a public official (Klaaren& Penfold 2006:63/98). Where a deprivation or diminution of rights or expectations occurs, the public official has the discretion to allow an individual the opportunity to do the following in order to ensure that the administrative action concerned is procedurally fair:

- obtain assistance and, in serious or complex cases, legal representation
- present and dispute information and arguments
- appear in person

Procedural fairness as a fair, but different, procedure (section 3(5) of the PAJA)

A public official may also follow a fair, but different, procedure (section 3(5)). This allows for a deviation from the compulsory procedures for fairness and for some degree of flexibility. However, the different procedure is subject to the following two requirements:

- the different procedure must be fair, and
- there must be an empowering provision which authorises the public official to follow a different procedure

This happens when, for example, an Act of parliament (ie an empowering provision or enabling statute) mandates a public institution to use its own fair procedure which may differ from the compulsory procedure laid down in the PAJA. This implies a procedure which is different from the specific duty to act fairly prescribed by the PAJA in section 3(2)(b), but still fair in terms its content. Fairness, as always, depends on the circumstances. The enabling statute thus creates the context in which the administrative action or decision takes place. The administrative context of the decision (or the legislation governing it) will bring special features or meanings to the concept of fairness. A case in point is that of *Atlantic Fishing Enterprises* which quoted the Marine Living Resources Act 18 of 1998 (section 80(3)) as stipulating that "every person with an interest in the matter" has an opportunity to state his/her case with regard to an appeal before the minister (*Minister of Environmental Affairs and Tourism v Atlantic Fishing Enterprises (Pty) Ltd* 2004 (3) SA 176 (SCA) at 181D–E).

An empowering provision in terms of the PAJA means a law (enabling legislation), rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken. The question is whether departmental circulars will qualify as an empowering provision. Because of their lack of accessibility to the general public, such a document would not pass the test of public knowledge and would thus not qualify in terms of a fair, but different, procedure (Burns & Beukes 2006:237). The recognition of existing procedures provides for flexibility and ensures that unrealistic burdens are not placed on public institutions. However, the procedures followed must still be fair (and allow, for example, for the affected individual to be heard) or else they would have to be supplemented with one or more of the requirements of section 3(2)(b) of the PAJA. Where no existing

procedure is prescribed by the enabling legislation, the public official must follow the section 3(2)(b) procedure.

Departures /exemptions from the requirements for fairness (section 3(4) of the PAJA)

A public official may depart from any of the compulsory elements of procedural fairness prescribed in the PAJA (section 3(2)) if, to do so, is reasonable and justifiable in the circumstances (section 3(4)(a)). This is another sign of the flexible nature of procedural fairness (Klaaren & Penfold 2006:63/98). In determining whether a departure is indeed reasonable and justifiable, the public official must take all relevant factors into account, such as 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 public administration (section 3(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. A reasonable and justifiable departure is therefore not a breach of fairness. However, situations which do not comply with the compulsory elements of fairness, and which cannot be justified in terms of a legitimate departure, are procedural deficiencies or procedural failures (Currie & Klaaren 2004:44).

2.5.3 *Procedural fairness of administrative action affecting members of the public (section 4 of the PAJA)*

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 the 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 (ie 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 the 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 nonspecifically) as opposed to individuals must satisfy the requirements of section 4 regarding 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'' (ie 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 (ie 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 abovementioned procedures, or
- follow a fair, but different, procedure in terms of other legislation, or
- follow another appropriate (ie fair) procedure (section 4(1)(a)–(e) of the 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 the 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 licences – 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 rulemaking (Currie & Klaaren 2001:121).

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

Public inquiry (section 4(1)(a) & 4(2) of the 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
- the post-inquiry stage.

Notice-and-comment procedure (section 4(1)(b) & 4(3) of the 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 in order 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
- decide whether or not to take the administrative action, with or without changes

A combined procedure: public inquiry and notice and comment (section 4(1)(c) of the 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).

A fair, but different, procedure (section 4(1)(d) of the 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 Act makes provision for a closing date for comments by the public (in a notice-and-comment procedure) 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 of the PAJA and its regulations (see Regulation 18(2)(a)) and should thus be applied.

Another appropriate procedure (section 4(1)(e) of the PAJA)

The last option for procedural fairness to the public is referred to as ''another appropriate procedure'', which gives effect to section 3 of the PAJA. Section 3 refers to the requirements for fairness to the individual regarding 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 (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 of 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).

Departure from the requirements for procedurally fair administrative action affecting the public (section 4(4)(a)&(b) of the 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, owing to the flexible nature of the requirements for procedural fairness, 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).

2.5.4 *Reasons for administrative action (section 5 of the PAJA)*

Section 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) stipulates that any person whose rights have been materially and adversely affected by administrative action, and who has not been given reasons for the action, is entitled to request that the public official concerned give him/her written reasons for the action. Administrative action which materially and adversely affects the rights of any person must be procedurally fair, and, in an instance where rights were materially and adversely affected, the public official must give an affected person adequate notice of his/her right to request written reasons for the action (section 3(2)(b)(e)). The PAJA (section 5(2)) stipulates that, upon request from an affected person, the public official should furnish adequate reasons in writing for the administrative action. Failure to provide adequate reasons will (in the absence of proof to the contrary) lead to a presumption that the administrative action was taken without good reason (section 5(3)). If it is reasonable and justifiable in the circumstances, the public official may depart from the requirement to provide adequate reasons (section 5(4)(a)). In order to promote efficient public administration, a public official may provide automatic reasons for a particular group or class of administrative actions when rights are being adversely affected (section 5(6)). The preamble to the PAJA sets the goal of promoting an efficient public administration and good governance, and of creating a culture of accountability, openness and transparency in the public administration.

Each of the above legislative stipulations will now be analysed in more detail within the context of public administration.

Duty to give reasons

Strictly speaking, the PAJA does not implement a right to reasons. Instead, it

merely implements a right to request reasons and a corresponding duty to provide reasons upon request (Currie & De Waal 2005:681). This duty to give reasons has two components, that is to provide reasons on request and to notify an affected person:

- **To provide reasons on request**

Both the 1996 Constitution (section 33(3)) and the PAJA (section 5(1)) impose a duty on the public administration to give effect to the right to be given written reasons on request where rights have been materially or adversely affected. This means that the public official is not obliged to furnish reasons without a request from the person affected. The duty to provide reasons for administrative action comes into effect only if there has been a prior request for reasons (section 5(2)). All that the public official needs to do is to give adequate notice of the right to request reasons, which is the second component of the duty.

- **To notify an affected person**

The duty to give reasons is extended, in the sense that a public official must, when notifying a person of a decision (which materially and adversely affects that person), inform the person affected by the administrative action of his/her right to request reasons (section 3(2)(b)(e)). This is done in the interest of carrying out procedurally fair administrative action (section (3)(1)).

The duty to give reasons includes three basic qualifications for the person in need of the reasons:

- Everyone is entitled to reasons.
- A request for reasons is needed.
- Rights must have been materially and adversely affected.

The duty to give reasons includes three basic procedural requirements for the public administration:

- a deadline (within 90 days) for the provision of reasons
- a requirement that reasons must be adequate
- a requirement that reasons must be in writing

The effect of the duty to give reasons on the public administration includes, among others, the following aspects:

- failure to provide reasons, and
- exceptions to the provision of reasons

Everyone is entitled to reasons

The right to request reasons is granted to any person. The 1996 Constitution refers to ''everyone'' (section 33(2)), and the PAJA refers to ''any person'' (sections 5(1) and 3(1)). The right therefore applies to all people whether they are young or old, white or black, male or female, rich or poor, worker or employer, and citizen or noncitizen. Thus, the right to request reasons can be used by citizens as well as aliens.

Given the low levels of literacy and rights consciousness in South Africa, it is likely that not many people will make use of this opportunity (Pfaff & Schneider 2001:81). It may therefore be useful to persuade public officials to give adequate reasons proactively for administrative action, even though this is not

compulsory. Such a positive practice will not necessarily lead to inconvenience and intolerable workloads.

A request for reasons

The right to request reasons has two components.

The first is that only a person whose rights have been materially and adversely affected by administrative action may request reasons (section 5(1)). The timing of the request is important, in that the request must be made by that person within 90 days after the date on which the person became aware of the action or might reasonably have been expected to become aware of the action (section 5(1)). The request for reasons must also be for a particular instance of administrative action, which implies that the affected person must identify the relevant administrative action for which reasons are sought. However, no formal requirements for the request are set in the PAJA to avoid a practice of onerous formal requirements which could complicate the requesting process.

The second is that only a person who has not already been given reasons for a particular action may request reasons (section 5(1)). If a person has already received reasons for a particular administrative action, then that person has no right to request further reasons, and therefore there is no duty on the public administration to provide such reasons. The explanation for this disqualification is twofold:

- firstly, to promote efficiency in the public administration by avoiding the unnecessary duplication of administrative duties
- secondly, to encourage public officials to provide reasons proactively, without the need for a request (Currie & Klaaren 2001:138)

However, it is clear that the reasons which were proactively given must have been adequate. It should therefore not be possible for the public official to manipulate and frustrate the purposes of the reason-giving requirement by proactively providing reasons that, if provided in response to a specific request, would be considered inadequate. The furnishing of oral reasons to the affected person at the time of the decision will also not qualify as reasons already provided, because the affected person has a right to written reasons.

Whose rights have been materially and adversely affected

The constitutional right to request reasons applies only where a person's rights have been **adversely** (ie negatively) affected by administrative action (section 33(2)). The PAJA tracks the wording of the 1996 Constitution for the most part, but adds the requirement that the administrative action must also have **materially** affected the rights of the requester (section 5(1)). It seems as if the addition of the word ''materially'' will allow public officials to avoid the necessity of providing reasons for administrative action that is fundamentally insignificant in its effect on rights. Or, to put it differently, the ''materially affected'' qualification refers to a test of significance, that is, the effect of the action on the rights of the requester must have been of sufficient significance to warrant the provision of reasons (Currie & Klaaren 2001:136–137).The intention is clearly to allow public officials to avoid giving reasons for administrative action that is trivial and mundane in its effect.

Deadline for the provision of reasons

The public official must, within 90 days after receiving a request, provide

adequate reasons in writing for the administrative action (section 5(2)). It has been said that this rather long time period creates an inherent danger, as it allows for ample time to fabricate reasons which should have been the basis of the decision and therefore immediately available (Beukes & Southwood 2007:597).

Reasons must be adequate

The PAJA requires that a person whose rights have been materially and adversely affected is entitled to **adequate** reasons (section 5(2) & (3) & (4)). However, the Act offers no criteria for determining what is adequate and what is not. It is suggested that the word ''adequate'' refers to sufficient, satisfactory or what is proportionate to the requirements. The term ''adequate reasons'' therefore sets the standard of reasons that have to be met (Beukes & Southwood 2007:597). But what is the content of the standard, and what kind of reasons would objectively be considered as adequate? The standard of adequacy is clearly an open-ended and flexible one. It is suggested that adequate reasons should comply with at least some of the following criteria:

- There must be a factual and legal basis for the reasons.
- A reasoning process which leads to an objective conclusion, ie reasons which set the administrative action/decision in context.
- Evidence of applying one's mind must be visible in the reason, ie providing evidence of a fair procedure.
- In some cases, the more complex the administrative action taken, the more detailed the reasons should be, ie the complexity of the matter will determine the comprehensiveness of the reasons (more explaining is needed).
- In other cases, a single-line statement of reasons may quite adequately explain a straightforward decision (even with far-reaching consequences).
- The reasons provided must be those that actually influenced the public official in effecting the decision, and must thus be relevant to the decision in question. The reasons cannot be a smoke screen to hide the real reasons which motivated the decisionmaker.

Reasons will be regarded as adequate if they serve the purposes which the PAJA sought to further by imposing a duty to give reasons upon request. It is suggested that the reason-giving requirement principally serves a justificatory function (to justify the administrative action), that is, to explain to the affected person why a particular decision was made. Adequacy is therefore to be assessed from the point of view of the recipient of the reasons, rather than that of the public official. A statement of reasons will therefore be regarded as adequate when it is unambiguous and intelligible to the person seeking the reasons and is of sufficient precision to give that person a clear understanding of why and how the decision was reached (in terms of rationality and reasonableness) (Stander 1990:94–95). Reasons will be regarded as adequate when an affected person can say: "Even though I may not agree with it, I now understand why the decision went against me" (Currie & Klaaren 2001:144). It is clearly better to have a disappointed (but informed) requester than a frustrated (and disillusioned) requester. Frustration and disillusionment are the result when it seems to the affected person that justice was not done and that the decision was probably taken arbitrarily. The provision of adequate reasons has the advantage of illustrating that proper consideration of the issue did take place. Adequacy of reasons also has the added value that it sets standards which may serve as guidelines to treat similar administrative action and decisions in the same way in

future. This is likely to increase administrative consistency, but it may also, to some extent, reduce administrative flexibility (Currie & Klaaren 2001:135–136).

Reasons must be in writing

The reasons provided by the public official must be written reasons (section 5(1)) and not oral reasons. However, if oral reasons (ie the informal provision of reasons) were given at the time of a decision, that should not disqualify a person from subsequently making a request for written reasons (Currie & De Waal 2005:682). Reasons stated in writing are likely to have been properly thought through, because a public official who is compelled to give reasons must at least consider the appropriate factors to be able to justify the decision.

Failure to provide reasons

Administrative inconvenience alone cannot justify a failure to provide reasons. But the provision of reasons may be irksome to some public officials. For this reason, if they can find an excuse to do so, they will probably refuse to give reasons (Dlamini 2000:720). However, the refusal to supply reasons may lead to a situation of uncertainty and distrust of the public administration by the affected person. That is why the PAJA stipulates that failure to provide adequate reasons inevitably leads (in the absence of proof to the contrary) to a presumption that the administrative action was taken without good reason (section 5(3)). However, a failure to provide reasons does not imply that the administrative action is unlawful.

When a request for reasons is refused, the public official must provide reasons for such refusal, because it is likely that such action will have a material and adverse effect on the rights of the affected person (Currie & Klaaren 2001:139–140).

Exceptions to the provision of reasons

If it is reasonable and justifiable in the circumstances, the public official has a discretion to depart from the requirement to provide adequate reasons (section 5(4)(a)). However, the public official must immediately inform the affected person of this deviation. It is apparent that such a deviation will not be easy to justify. The PAJA makes provision for the following substantive criteria which need to be considered to determine whether a deviation is reasonable and justifiable: the objects of the empowering provision; the nature, purpose and likely effect of the administrative action concerned; the nature and extent of the departure; the relation between the departure and its purpose; the importance of the purpose of the departure; and the need to promote an efficient public administration and good governance (section 4(b)). Taking all of these factors into account makes it difficult to envisage a situation where the refusal of the giving of adequate reasons will be reasonable and justifiable. Departures from the requirement to provide adequate reasons will only be allowed in exceptional circumstances. It is important to note that this deviation is not applicable to the 90-day deadline for providing reasons or the requirement that reasons must be in writing.

The giving of reasons should however be distinguished from the supply of comprehensive information on which the decisions are based. The supplying of information by an official, voluntarily or as a result of a request, is the theme of the constitutional right of access to information (section 32) and the Promotion of Access to Information Act 2 of 2000.

Another important provision concerns the right of any person to approach the courts or an appropriate tribunal for the judicial review of specific administrative action (section 6). A court or tribunal has, for instance, the authority to judicially review an administrative action if, among other things,

- the official or institution responsible for the action did not have the required authority in terms of the empowering legislation
- a mandatory procedure or condition as prescribed by the enabling legislation has not been complied with
- the action was procedurally unfair
- the action was taken
  - for a reason that was not authorised in the empowering provision
  - with an ulterior motive
  - because irrelevant considerations were taken into account or because relevant considerations were not taken into account
  - in a manner that was arbitrary and capricious or that the case was not properly considered
- the conduct itself contravened the law, had not been authorised, was dubious or unreasonable in the circumstances

As with the rest of the Act, section 6 is written in a negative idiom, in that it gives a list of actions that the official dare not take. This list may, however, be turned into a positive obligation by simply regarding it as a check list against which officials may measure their actions. As a positive obligation, this list gives practical guidelines that administrative action or decision-making should comply with, in that the official is required to

- act or take a decision only if he/she has the authority to do so in terms of the enabling legislation (or if the authority has been properly delegated to the official)
- be impartial and thus unbiased during administrative action or decision-making
- follow faithfully all the procedures and conditions that are laid down by the enabling legislation
- not allow any unlawful purpose or motive (ie an ulterior motive) to influence his/her administrative actions or decision-making
- take all relevant factors into account during administrative action and decision-making
- ignore all irrelevant factors during administrative action or decision-making
- not allow another person or institution to improperly influence his/her administrative actions or decisions
- act in good faith during administrative action and decision-making
- act reasonably during administrative action and decision-making
- act lawfully and otherwise constitutionally during administrative action and decision-making

These are a few of the guidelines that are mentioned in the Act as grounds for judicial review and to which the official should consider himself/herself bound in carrying out administrative action – particularly action of a sensitive nature

such as administrative action in which discretionary authority plays a role (see study unit 7 on administrative discretion).

The Act also makes provision for the procedure that should be followed in judicial review (section 7), as well as for the remedies that a court or tribunal may apply during judicial review (section 8).

But what is meant by ''judicial review''? It means that anyone who is dissatisfied with the actions or decisions of an official (and who has already exhausted all internal remedies) can take the matter to a court of law. It is not, however, the only route for resolving dissatisfaction with administrative action. It would, for example, be wise for an aggrieved person to first file a complaint with the Public Protector before taking the route of judicial review. The reason for this is that the Public Protector promises free, informal and speedy results as opposed to the expensive and time-consuming process of judicial review in a court of law. An aggrieved person may even request information from the official concerned in terms of the Promotion of Access to Information Act 2 of 2000 (see Roberts 2006:116–130). To ensure that the right to fair administrative action does not simply exist on paper, there has to be a way to enforce it. The judicial review of administrative action is therefore an important instrument in order to achieve this.

Any person who is of the opinion that specific administrative action or a particular decision is wrong, may question the action or decision in a court of law. If the court finds that the administrative action or decision is unlawful, unfair or procedurally unfair, the court may issue an order to rectify the matter, to the effect that

- the official's decision or action is invalid
- the official should reconsider the decision or action
- the official's decision be replaced with a decision of the court
- the public institution be compelled to pay damages to the affected person

In practice, judicial review of administrative actions remains a last resort, because it is an expensive and time-consuming process. Its importance as a procedure for settling disputes should therefore not be overemphasised.

An important facet of judicial review is that all available internal remedies should have been exhausted before a person can demand such review. This means that, where particular legislation makes provision for specific procedures for internal review or appeal of an administrative decision to be followed, such procedures should first be pursued and exhausted before approaching a court. But what does ''internal appeal'' mean? Internal appeal refers to that opportunity that usually exists within an institution for use by the public to lodge a complaint against particular administrative actions or decisions. In this way, the institution concerned gets the opportunity to review its action and, where necessary, take corrective steps itself. The difference between the use of an internal remedy and the remedy of judicial review is that the latter provides the opportunity for the review of administrative action by a court of law, which functions independently of the institution.

It is clear that administrative justice as defined in section 33 of the 1996 Constitution and the PAJA holds definite implications for public administration. This conclusion is based on an earlier analysis of section 33 and the contents of the PAJA. It is a pity, however, that all the good characteristics of section 33 can be undone by the operation of section 37(5)(c), which provides that the right to administrative justice can be suspended during a state of emergency.

Administrative justice has a number of implications (besides those already mentioned) for public administration of which fairness, transparency, accountability, participation, and efficiency and effectiveness are the most important. These are all closely interrelated; they are the determining values that underlie the Constitution as a whole and can be interpreted as the spirit of the Constitution.

Fairness

Fairness is a responsibility of public administration towards the public and is achieved by way of a clear procedure (Rawson 1984:606; Robson 1958:16), the maintenance of high ethical and moral standards, and the availability of public officials with integrity. This procedural fairness is obtained by following the procedures as prescribed in sections 3 and 4 of the PAJA.

The provision of reasons is a crucial building block of not only accountability but also **fairness**. The provision of reasons satisfies an important desire on the part of the affected person to know why a decision was reached, which contributes to procedural fairness in public administration (Baxter 1984:568). The affected person needs to know, for instance, why an application for a passport was turned down, why an application for a business licence was refused, why a permit to hold a public meeting was denied, why a disability grant was terminated or discontinued, why an application for a pension was turned down, or why an application for a temporary residence permit was declined. If a public official has to explain why a particular decision was reached, it will be expected of that official to apply his/her mind to the relevant factors which need to be considered in order to reach a decision. It is important to note that this relates only to the fairness of the procedure and not to the merits of the decision. Justice should not only be done but should be seen to be done. This is not only fair – it may also be conducive to public confidence in the administrative decision-making process, because reasoned decisions are always preferable to unreasoned decisions.

Transparency

A **transparent**, accessible and responsible public administration is an indispensable element of true democracy, because it is well known that, sooner or later, a closed and secret administration will give rise to decay and corruption. Transparency or openness is therefore one of the values that underlies the Constitution as a whole and that is specifically manifested in the obligation to furnish written reasons for administrative action and the operation of procedural fairness.

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 the 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.

The absence of reasons for administrative action creates an impression of secrecy and arbitrary administrative action. The very purpose of providing reasons is therefore to facilitate a transparent and open mode of administrative action and decision-making, thereby furthering the aims of administrative accountability. This is indeed compatible with both the letter and spirit of accountable public administration as reflected in the 1996 Constitution. It also provides a safeguard against arbitrariness, as it is likely that a public official will be exposed if he/she acted arbitrarily. The conduct of public officials should therefore be above reproach, so that account can readily be given of it in public. The provision of reasons will ensure that an affected person will accept administrative action and decisions more readily. This may contribute to public confidence in the public administration, because it demonstrates that the decisionmaker has nothing to hide (Stander 1992:100–102).

Accountability

Accountability implies the obligation to be accountable to others. Accountability ought to be the goal of each and every public official, and is therefore also an important value underlying the Constitution. In terms of administrative justice, accountability can be interpreted as an insistence on procedural fairness and on reasons for decisions.

Accountability, in this sense, means that the public administration has to justify its decisions (ie the manner in which decisions are taken) to the people they serve. This means that decisions must be reasonable and must be seen to be reasonable. The process of justifying administrative actions and decisions in terms of fair procedures and the provision of reasons serve the value of accountability in a direct way.

A primary rationale for procedural fairness in public administration is that it improves the quality of administrative action and decision-making by ensuring that all relevant information, interests and points of view are placed at the public official's disposal. This ensures that the public official has an open mind and a complete picture of the facts and circumstances within which administrative action is performed. Procedural fairness thus promotes informed, rational and legitimate decision-making and reduces the risk of arbitrary decisions. In so doing, procedural fairness enhances the constitutional principles of openness, accountability and participation. This also explains the inclusion of section 195(1)(g) in the Constitution, which provides that one of the basic values and principles governing the public administration is that transparency must be

fostered in the public administration, and the inclusion of section 195(1)(e), which encourages the public to participate in policy-making.

From the perspective of society (ie 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 (ie 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/she is able to account for any decision taken by him/her. The duty also ensures that the public official exercises his/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 in determining and accommodating the needs of the people (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 (ie 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.

At the heart of the realisation of the objective of accountability lies the need for a correct and proper decision-making process to be followed by the public official. The provision of reasons may have a positive effect on the decision-making process, in the sense that reasons may provide the evidence of proper decision-making (ie formalised, structured and reasoned), which, inevitably, may lead to improved decision-making and may help to enhance the acceptability of the decisions. Or, to put it differently: reasons justify the decision (Currie & Klaaren 2001:135). It is common knowledge that a good decisionmaker will formulate his/her findings and reasons before making the decision. Reasons therefore may help to structure the process of decision-making and to encourage consistency and rationality in the process of decision-making, which, consequently, may lead to a better-quality decision. The necessity of explaining why a particular decision was taken requires the decisionmaker to apply his/her mind to the facts of each case before coming to a decision. However, it would be presumptuous to assume that a reasons requirement would automatically improve the quality of all decisions, since some decisionmakers may simply design the reasons to suit their decisions (Baxter 1984:233).

But accountability, by its very nature, implies public scrutiny of public administration. Public scrutiny is made possible through the provision of reasons which expose the decision-making process. Rational criticism of a decision can only be made when the reasons for that decision are known. It is indeed the prospect of this criticism which may be the major reason for the reluctance to provide reasons.

Reasons may also serve an educative purpose, for example where an application has been refused on grounds which the person is able to correct in future applications. In this sense, the provision of reasons fulfils an information function.

Participation

Participation is closely bound up with transparency and openness of the decision-making process and affords individuals the opportunity to participate in a meaningful way and at the same time enhance their dignity (Pops 1992:234). Thus individuals gain access to administrative justice by the opportunity afforded by participation, in order to protect the interests of those who are directly affected by decision-making and in order to reinforce the individual's sense of fair treatment (Pavlak & Pops 1989:939). Under the Constitution, participation in administrative justice is facilitated by the opportunity afforded by procedural fairness.

Procedural fairness to the individual is an important instrument for fostering participation, because it gives the individual affected by the decision a chance to participate in, and influence, that decision-making process. It is also true that an individual will accept a decision of a public official that is negative or affects him/her adversely, if he/she believes that the manner (ie the procedure) by which the decision was arrived at was fair (Pearce 2007:12). It leaves him/her with the knowledge that his/her views have been taken into consideration in the decision-making process.

An added benefit is that fair procedures and fair treatment generate loyalty and cooperation and affirm the equal worth and human dignity of the affected individual (Klaaren & Penfold 2006:63/82). If people trust a public institution, they are more likely to consider its procedures to be fair and participatory democracy is promoted (Pearce 2007:13). Participation, then, enhances the legitimacy of the administrative action by emphasising openness, consultation and reasoned decision-making.

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 (ie 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(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 for the public to monitor the exercise of authority by unelected public officials (Raubenheimer 2007:491)
- it plays an important role in ensuring that lawful, reasonable and fair decisions are made from the outset

Efficiency and effectiveness

Administrative justice and efficiency have sometimes been portrayed as incompatible goals. However, in terms of the 1996 Constitution, efficiency, effectiveness and economy are basic underlying values in public administration (section 195(1)(b)). A warning has been sounded, however, that some may interpret the requirement of efficiency and effectiveness in public administration as providing a green light to public officials to act without any regard for ''procedural niceties'' (Jowell 2006:17). Others are believed to argue that public officials may regard procedural fairness as a ''restriction invented by lawyers'' which may be an obstacle to efficiency and effectiveness in public administration (Wade & Forsyth 2004:440). However, an administrative action or decision made without bias, and with proper consideration of the views of the individuals affected by it, will not only be more acceptable but will also be of better quality. It is believed that fair administrative procedures can be an instrument for reconciling the conflicting interests of an affected individual to have his/her rights adequately protected on the one hand, and to promote the governmental interest in an efficient and effective public administration on the other (Grote 2002:475).

Justice and efficiency can go hand in hand – but how? A possible explanation is that the PAJA uses concepts like rights and expectations (section 3(1)) to narrow the field of application of procedural fairness and thus limit the burden on the public administration and allow for efficiency. The PAJA also employs the opposite approach to widen the application of procedural fairness by ensuring variability and flexibility through the idea that the principles of fairness need not be applied uniformly in every case. The notion that a fair administrative procedure depends on the circumstances of each case (section 3(2)(a)) allows one to apply procedural justice to all administrative action, while tailoring the content of that fairness to suit the particular occasion and again allow scope for efficiency and effectiveness. There is thus a need to balance the interests of the individual affected by the administrative action against the public interest in having an efficient and effective public administration (Devenish, Govender & Hulme 2001:8; Klaaren & Penfold 2006:63/84). To achieve the latter, it is important to ensure the ability of the public administration to act efficiently and promptly. A case in point is disciplinary hearings in public institutions where the administrative decisionmakers do not have to adopt

the technical rules of evidence used in courts. They can actually use any procedures, provided that they observe the principles of fair play. Such a flexible approach is indeed allowed by the PAJA, which expressly recognises, again, that a fair procedure "depends on the circumstances of each case" (section 3(2)(a)). This flexible approach is not only in the interests of efficiency and effectiveness in public administration, but also helps to prevent an overjudicialisation of the administrative process.

Soon after the interim constitution (1993 Constitution) was implemented in 1994, there was profound concern about the possible negative effect of a general duty to provide reasons on the efficiency and effectiveness of the public administration. The estimated cost, time and skills needed to furnish reasons in writing seemed like a daunting prospect (Du Plessis & Corder 1994:169). To counter this prospect of a possible excessive workload, the following limitations (to a general duty to provide reasons) were devised:

- The 1996 Constitution made provision for the fact that rights must have been adversely affected (section 33(2)) and the PAJA added that rights must have been materially and adversely affected (section 5(1)).
- Reasons for the particular administrative action must not have been given already to the affected person (section 5(1)).
- In addition to this, the PAJA stipulates that reasons must be requested by the affected person (section 5(2)).
- The PAJA also stipulates that reasons must be requested within 90 days after the date on which the affected person became aware of the action (section 5(1)).
- A public official may depart from the requirement to furnish reasons if it is reasonable and justifiable in the circumstances (section 4(a)), and one such circumstance may be the need to promote an efficient public administration (section 4(b)(vi)).

It is clear that the above measures to limit the workload in the interest of an efficient and effective public administration were designed to maintain a balance between workload and accountability (Devenish 1999:457). However, in present-day South African public administration, the dictates of an open and transparent public administration by far outweigh the possible inconvenience which the provision of reasons may cause. It simply does not matter whether the provision of reasons inconveniences the public administration of not (Dlamini 2000:718). The dictates of an accountable public administration are more important.

In order to promote efficient and effective public administration, the PAJA stipulates that a public official may provide automatic reasons for a particular group or class of administrative actions when rights are being adversely affected (section 5(6)). This implies that reasons will automatically be furnished to the persons concerned without them having to make a request. It is clearly the intention of the PAJA to encourage individual public officials to act on their own initiative to promote the aims of the Act. For this practice to really promote efficient and effective public administration, the provision of automatic reasons must certainly excuse the public official from the duty to provide reasons (in terms of section 5(2)). However the Act does not explicitly state that automatic reasons will excuse the public administration from its duty to provide reasons upon request, but the intention seems to be clear.

Furnishing reasons for administrative decisions and engaging in transparent decision-making are not merely technical requirements that public officials must comply with. The requirements have a far deeper ideological motivation, in that they are meant to promote participatory democracy in such a way that citizens

have a direct influence on decisions of an administrative nature which affect them and which are taken by public officials. In this way, administrative decision-making becomes participatory and gains democratic legitimacy. This implies not only that the Constitution is legitimate, but also that the administrative decision-making process, whereby the Constitution (which determines the rights of ordinary citizens with regard to ordinary matters which are nevertheless important to them) functions at ground level, is regarded as having credibility. The result is a greater willingness on the part of the public to accept both administrative decisions and the legitimacy of public administration.

The nature of the obligation that the right to just administrative action places on the public administration is threefold. It is an obligation to act fairly (including the provision of reasons), an obligation to act reasonably, and an obligation to act lawfully. The execution of this threefold obligation has certain implications for public administration. But the right to just administrative action also presents a certain vision for public administration. The administrative justice provision in the 1996 Constitution is aimed at the vision of an open, democratic, efficient and effective public administration which shows respect for human dignity, equality and freedom, and which works toward the promotion of the quality of life for all citizens. It is clear that the provisions have the potential to allow the public greater participation in the process of public decision-making, which necessarily can lead to greater transparency, fairness, accountability, responsiveness and openness in public administration. This also implies the evaluation of the public administration's policy decisions in terms of the values that are entrenched in the Constitution. But these rights and their inevitable consequences also have the potential to frustrate and inhibit the authorities in carrying out the policy. Implicit in this vision, therefore, is also the duty to establish a structured, accountable and properly functioning public administration which delivers a service. Therefore, there is a need for a balance between the necessity for an efficient and effective public administration that delivers a service on the one hand, and a public administration that is open and accountable on the other. It is important to realise that the right to just administrative action is more than simply the encouragement of fairness, responsiveness and accountability in the public administration. This right demands it.

The obligation that is created by the right to the provision of written reasons has the implication that the administrative process is now laid open to careful scrutiny. This obligation must be considered in tandem with the Promotion of Access to Information Act 2 of 2000, which makes provision for access to information, except in certain circumstances. The provision of reasons ensures transparency, openness and accountability in public administration. The provision of reasons also has great potential to promote fairness and proper administrative action, because unsatisfactory reasons can lead to judicial review. This means that the public official can no longer hide behind the anonymity of his/her decision.

The right to just administrative action as embodied in section 33 of the Constitution and in the PAJA is an attempt to establish a set of minimum criteria for administrative justice. It demarcates the area within which administrative authority may be exercised by defining the parameters within which public administration should function. It implies that the legislator may not introduce legislation that does not meet the minimum criteria. No administrative action may occur that does not reach the appointed minimum. No delegated legislative authority or administrative adjudication may be exercised or take place which does not meet the minimum requirements. The existence of this right to just

administrative action in the Bill of Rights guarantees that all legislation and all administrative action can be tested against the law (section 2 on the supremacy of the Constitution and section 8 on the application of the Bill of Rights)

ACTIVITY

- Would you consider that administrative justice in terms of section 33 has the potential to make a contribution to accountability and participation in public administration? Give reasons for your answer.
- On what would you base an opinion that the application of section 33 does have the potential to promote transparency in public administration?

Now read the wording of section 32 of the 1996 Constitution relating to access to information and answer the question that follows.

''32(1) Everyone has the right of access to –

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the financial and administrative burden on the state.''

- What is your opinion now of the potential of sections 32 and 33 to promote transparency in public administration? What practical consequences do you foresee for public administration in terms of the application of the sections in question?
- You are an official dealing with the issuing of trade licences who is now asked by a member of the public to furnish written reasons for your decision which has adversely affected that person. What is the scope and extent of the reasons you will provide?

2.7 *Promotion of administrative justice by other provisions in the Constitution*

The principles of administrative justice and the values inherent in administrative justice are interwoven through the current constitutional dispensation. An analysis of the 1996 Constitution clearly shows that the right to just administrative action (section 33) as embodied in the Constitution does not stand alone in the promotion of administrative justice. In fact, there are a considerable number of other provisions

in the Constitution that have a contributory effect, in that they place the accent on an open, fair, responsive and accountable public administration. It is important for the public administration to realise that, in meeting the requirements of section 33, administrative action should also meet other relevant provisions of the Constitution. This means that the right to administrative justice, the other rights contained in the Bill of Rights, as well as all the other relevant constitutional provisions, should be respected and honoured by the public administration. We therefore provide a brief summary of some of the most important of the other relevant constitutional provisions.

Section 1 of the 1996 Constitution, which sets out the basic values, accentuates, for instance, the duty of accountability, a responsive disposition, openness and human dignity as the crux of the sovereign democratic state in South Africa. Entrenched in the Bill of Rights (Chapter 2), accessory to the right to just administrative action (section 33), is the right of access to information (section 32). Also applicable is the right of access to the courts (section 34). The importance of this section for administrative justice is that it prevents the legislative authority from including exclusion clauses in enabling legislation. This means that the legislative authority can no longer exclude judicial review, as was frequently the case in the past. The section therefore ensures administrative justice through the judicial control of administrative action. In the next chapter of the Constitution (Chapter 3) the principles of cooperative government and intergovernmental relations (section 41) are accentuated, which again accentuates the basic values of an efficient, transparent, accountable and coherent government. In Chapter 9, a number of independent and impartial institutions are identified that were created to support constitutional democracy, most of which can play a role, either directly or indirectly, in promoting administrative justice. Important examples are the Public Protector (section 183) and the Auditor-General (section 188). In the following chapter (Chapter 10) on public administration, the accent is once again on principles/values of administrative justice such as professional ethics, efficiency, citizen participation, accountability and transparency, as well as impartial, just, fair and unprejudiced service delivery (section 195). There are therefore a considerable number of provisions in the 1996 Constitution that have a supportive effect on the promotion of administrative justice, in that they explicitly state that public administration should be open, accountable and responsive. However, there are also a number of provisions that imply the promotion of administrative justice.

The effect of the Constitution on administrative justice in general and public administration in particular is far-reaching. When the 1996 Constitution came into effect, South Africa in general and public administration in particular moved away from a culture of authority to one of justification. The influence and effect of the administrative justice provisions in the Constitution are proof of this.

ACTIVITY

Study the 1996 constitution with the purpose of supplementing the list mentioned above regarding:

- those provisions that explicitly contribute to the promotion of administrative justice in public administration
- those provisions that imply the promotion of administrative justice

2.8 Who and what are bound by the constitutional provisions of administrative justice?

From the outset, it should be clear that only when the action of an official, institution or functionary can be classified as ''administrative'' conduct or activities, do the provisions of section 33 of the 1996 Constitution on administrative justice come into effect. Administrative justice ensures justice for every person in his/her interaction with the public administration. This means that the officials, institutions or functionaries are bound by the Constitution and must pursue the spirit of the Constitution and its fundamental values for an open and democratic society. For more clarity on what is defined as an ''administrative action'', see the decision of the Constitutional Court in *President of the RSA v SARVU* 1999 10 (BCLR) (CC) where it was found that the administration is that part of the government which is primarily concerned with the implementation of legislation. According to the court, the test to determine whether an action amounts to an ''administrative activity'' is not whether the action is carried out by a member of the executive authority. Instead, the focus is on the function rather than the functionary. The question is therefore whether the task itself is an administrative task.

But which officials, institutions or functionaries form part of the administrative justice equation? The Constitution refers to this as an ''organ of state'' and defines it as follows in section 239:

''239 In the Constitution, unless the context indicates otherwise – ''**organ of state**'' means –

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;''

A few practical examples of such officials, functionaries and institutions that perform administrative actions or are engaged in administrative conduct are the following:

- the president who makes proclamations or a minister who issues regulations (ie administrative legislative actions) (see study unit 5 on delegated legislation)
- an administrative official who implements these legislative actions when he/she, for instance, issues licences or applies disciplinary measures
- an administrative institution or official that exercises control over administrative actions in order to determine whether this conduct is lawful or lawfully executed (eg the Publication Appeal Board or other administrative tribunals that perform an administrative judicial action) (see study unit 6 on administrative adjudication)
- any other executive or administrative institutions or officials (eg the president, a premier, ministers, directors general, and other officials in state departments)
- other public institutions that are described as ''organs of state'' in section 239 of the Constitution (eg statutory councils, Transnet, Telkom, public schools, and universities)

The aim of the Bill of Rights in the Constitution is to promote a culture of respect for human rights. An advantage of the provision in the Constitution relating to administrative justice is that it clearly demarcates the juridical parameters within which public administration has to function. Despite certain inherent uncertainties and questions relating thereto, the inclusion in the Constitution of a provision pertaining to administrative justice makes a remarkable contribution to the preservation and promotion of values such as fairness, transparency, accountability and participation in public administration. It is clear that the relevant provisions of the Constitution and the judicial enforcement mechanisms linked to them, for example judicial review, can be effectively used to prevent and deter governmental irregularities. In line with this, however, it is essential to realise that administrative justice is not the sole preserve of the legal profession and the courts, but that public officials should play a decisive role in this regard. The latter is true precisely because no-one can be compelled to act fairly, justly and honourably. But how can fair and just behaviour be ensured? Fair and just behaviour can best be encouraged among those who are sensitive to the personal responsibility their actions may entail. Underlying the search for fair, lawful and justifiable administrative action is, therefore, a consciousness of certain values, attitudes and practices that need to be instilled in both individual public officials and government institutions.

It has become an urgent necessity to instil a sense of the importance of the moral education of public officials within the context of the field of public administration. An approach of this kind ought, however, to be realistic in terms of given human limitations and fallibility. Ethical standards that can be held up to public officials do not require of officials that they be noble and act like angels, but only that they act in a just, fair, honourable and accountable way. Establishing a culture of human rights by way of relevant education in public administration has the potential to make the Constitution a living document. The fundamental principle is still that there is no substitute for the personal integrity of each member of South African society. The possibility or unlikelihood of

administrative justice is therefore in the hands and on the conscience of every well-meaning South African.

With the first two study units, the theoretical and constitutional basis for an understanding of administrative justice has now been laid. The foundations of the separation of powers in the state, and its implications for administrative justice, will be dealt with in the next theme.

SELF-EVALUATION

Theme 1: Foundations of administrative justice

(1) Give a short definition of the concept of ''justice''.

(2) Write brief notes on the responsibility which the maintenance of administrative justice implies for the public official.

(3) Provide an analysis of at least three personality traits that are desirable in the make-up of a just public official.

(4) Provide an analysis of the implications for the acts of the public official of the following three constitutionally entrenched rights:

- lawful administrative action
- procedurally fair administrative action
- reasonable administrative action

(5) Write brief notes on the implications for public administration of the provision in the constitution relating to administrative justice.

(6) Everyone has a constitutional right to be provided with written reasons for administrative action which adversely affects his/her rights. Explain what this statement means to you as an official.

(7) Give an analysis of the other provisions in the Constitution that contribute to the promotion of administrative justice.

(8) Write brief notes on the persons and institutions that are bound by administrative justice.

THEME 2

Foundations of the separation of powers in the state

OVERVIEW

Key questions

Key concepts

STUDY UNIT 3

What is the *trias politica?*

STUDY UNIT 4

What is the administrative state?

STUDY UNIT 5

What is delegated legislation?

STUDY UNIT 6

What is administrative adjudication?

Administrative discretion as a valid administrative act

THEME 2

Foundations of the separation of powers in the state

OVERVIEW

The aim of this theme is to introduce you to the foundations of the separation of powers by outlining the theory of the *trias politica.*Thereafter, the phenomenon of the administrative state as a product of the imperfect application of the *trias politica* in the modern state is analysed in order to place in perspective the implications of the administrative state for every public official and office bearer. The implications to which reference is made here are the wealth of delegated powers that are found in phenomena such as delegated legislation, administrative adjudication and administrative discretion.

KEY QUESTIONS

In order to understand and grasp the foundations of the separation of powers in the state, it is necessary to find answers to the following questions:

- On what four assumptions is the *trias politica* based?
- To what extent is the theory of the *trias politica* followed in South Africa?
- What is the meaning of the administrative state?
- What factors gave rise to the establishment of the administrative state?
- How broad is the scope of the administrative state in terms of its impact on the life of the ordinary citizen?
- What steps can be taken to ensure that the negative consequences of the administrative state are kept to a minimum?
- What kinds of delegated legislation are widely encountered in South Africa?
- Why is delegated legislation essential?
- To what extent would efficient and effective control of delegated legislation successfully limit its disadvantages?
- What is the nature and extent of administrative adjudication?
- Which institutions in the system of government are entrusted with the function of administrative adjudication?

- What are the advantages and disadvantages of the existence of administrative adjudication?
- How successful is the implementation of control measures aimed at neutralising the disadvantages of administrative adjudication?
- What is administrative discretion and how is it exercised?
- What criteria must administrative discretion satisfy to be regarded as a valid administrative act?

KEY CONCEPTS

In order to understand the foundations of the separation of powers, it is essential for you to be able to explain the meanings of the following concepts:

- administrative adjudication
- administrative decision-making
- administrative discretion
- administrative state
- administrative tribunal
- discretionary powers
- concentration of power
- delegated legislation
- *intra vires*
- red tape
- separation of powers
- quasi-judicial decision
- *trias politica*
- *ultra vires*
- checks and balances

STUDY UNIT 3

What is the trias politica?

Introduction 3.1

It is important that students of administrative justice know what the concept of *trias politica* means, since this concept exerts a definite influence on the nature and essence of administrative justice. A thorough grasp of the *trias politica* serves as a basis for understanding the separation, allocation and apportionment of power in the structure of government. Also analysed in this study unit is the degree to which the theory of the *trias politica* finds expression in South Africa.

Meaning of trias politica 3.2

The Latin words *trias politica* refer to the threefold separation of state authority into the legislative, judicial and executive branches of government authority. This separation is also sometimes referred to as the separation of powers. In brief, the theory of the separation of powers (or the *trias politica*) espouses both the prevention of tyranny (caused by placing too much authority in the hands of one person or institution, ie excessive concentration of authority) and the mutual checking of one authority by another (ie the so-called checks and balances).

In principle, according to Van der Vyfer (1987:419), the theory of the separation of powers implies the following four assumptions:

- a formal separation of state authority into three components, namely legislative, judicial and executive components
- a separation of the staff with the aim of preventing a person who works in one of the branches of government from also being a member of any of the other branches (ie no overlapping of staff or membership)
- a separation of functions in three corresponding institutions or categories of institutions to ensure that institutions to which a specific category of powers has been entrusted, are not also expected, or even permitted, to carry out functions entrusted to any of the other components of state authority (ie no interference is permitted)
- the principle of checks and balances, in terms of which each component of state authority is granted specific powers which are designed to keep in check the exercise of powers by the other two components (this fourth principle is America's special addition to the theory of the separation of powers)

In terms of the theory of the separation of powers,

- the legislative authority makes, amends and repeals laws
- the executive authority carries out, implements and enforces the laws
- the judicial authority determines which law is in dispute and how the law should be applied in the relevant dispute (Burns 1999:34)

In brief, the latter separation implies that the legislative authority does not itself implement any laws, nor does it act as a court of law; that the executive authority makes no fundamental laws and cannot punish any person for contravening the laws; and that the law courts may neither make nor implement any laws.

3.3 *Where does the trias politica come from?*

As far back as the time of Aristotle and Polybius, it was informally accepted that state authority could be divided into two components, namely the legislative and the executive components. The first modern writings in this regard were those of John Locke in his *Two treatises of civil government*, which even then distinguished between mainly the legislative and the executive functions of the government. Locke included the judicial authority under the executive branch. After that, Montesquieu was the first to propagate the distinct and independent status of the judiciary. Montesquieu did not, therefore, formulate the theory, but he brought together much of the earlier thinking about the subject and accorded it prominence by publicising it in his writings. This theory came to prominence in 1748 when Montesquieu presented it in his book, *De l'esprit des Lois (The spirit of the laws)*. The latter resulted in the idea of the separation of powers growing from the status of an idealistic theory, into that of practice in modern government. Montesquieu advocated an absolute separation of the legislative, judicial and executive powers. The idea was that the corresponding institutions would not carry out each other's functions. It was soon realised, however, that such an absolute separation was not always possible or desirable.

''The separation of powers principle has been described (alongside representative government) as the most significant constitutional device of the modern era for the limitation of state power'' (Curry & de Waal 2001:17). This principle has traditionally been regarded as the fundamental feature of the American Constitution, where it was first given consistent expression in the United States Constitution of 1787 and coherent theoretical justification, in particular in the Federalist Papers which were published at the time of the Constitutional Convention (Curry & de Waal 2001:17–18).

3.4 *What is the state of affairs today?*

The fundamental question which must be asked now, is whether South Africa (and other states) are closely following the theory of the *trias politica*, and whether it is realistic to do so. There are those who feel that, in many respects, the theory is not being complied with or that it is being complied with in an adapted form.

Let us briefly examine the extent to which South Africa complies with the four basic assumptions on which the separation of powers rests.

The first assumption, that of a threefold division of state authority into legislative, executive and judicial components, does find theoretical expression in South Africa, in that, in the 1996 Constitution, provision is made in separate chapters for the existence of the three branches.

As regards the second assumption, there is only partial separation of persons or a partial overlapping of membership, because members of the executive authority are also permitted to be members of the legislative authority. Under section 85 of the 1996 Constitution, the executive authority rests with the president, who exercises it jointly with the other members of the cabinet. In practice cabinet ministers, who are members of the executive, are also members of the legislative authority.

In reality, there is considerable overlapping of personnel between those in the legislative authority and those in the executive authority. The entire cabinet is appointed from the members of parliament (section 91), with the possible exception of two members of cabinet who may be appointed from outside the members of the National Assembly.

As regards the third assumption of no interference, in South Africa there appears to be a considerable departure from this. In terms of the provisions of the 1996 Constitution, the executive authority has a major influence on the legislative process through the cabinet's important functions of developing policy and initiating legislation (sections 85(2)(b) and 85(2)(d)). The executive, in turn, is accountable to the legislative authority and can be defeated by a motion of no confidence adopted in the legislative authority (section 102).

There is another dimension in which a departure from the third assumption occurs in South Africa, namely in relation to the increasing importance of the executive authority versus the other two components of state authority. The growing importance of executive institutions throughout the world has given rise to drastic changes in the traditional relationship between the legislative, the executive and the judicial authorities in relation to the demarcation of their power boundaries. As a result of the increasing intrusion of executive institutions into present-day community life, it has become essential to vest them with more legislative and judicial powers.

The improved theoretical basis of the separation of powers has been accompanied by practical developments that have destroyed the myth of the unity of institution and function. It became evident that the exercise of the legislative, executive and judicial functions exclusively by the corresponding institutions was impractical. It was inevitable that the expansion of state activities would lead to a new distribution of work and a change in the functions of the various state institutions, of which the transfer of legislative and judicial functions to executive institutions was by far the most important. We now briefly examine these two facets of ''interference'' by the executive authority.

The scope and complex nature of the variety of legislation prevented the legislators from adequately meeting all the needs in respect of legislation in various spheres of life. Generally speaking, laws adopted by the legislative component contain merely a broad framework and policy statement. These laws usually provide that the minister or department concerned may make such regulations as may be deemed essential for the implementation of the Act. These regulations have the same force of law as the Act itself. This implies that, in the final instance, the official must put the Act into effect.

A large percentage of laws and regulations also make provision for the establishment of committees and boards, in which are vested extensive powers to carry out laws and regulations. A citizen who seeks a concession under the law or regulations, must apply to these institutions, which then consider the application and give a final decision. In addition, often these institutions also have to pronounce judgement in disputes between a citizen and the government (as represented by its officials) regarding an executive act. Judicial functions are therefore integrated into the branches of the executive institution.

The next study unit on the administrative state goes into considerably more detail in dealing with the nature, extent and consequences of this increasing importance of the executive authority versus the other two branches, and the importance of this for the study of administrative justice.

The fourth assumption, that of checks and balances, has no special relevance or prominence (as in the United States of America) in the South African constitutional system, except that the executive authority can be defeated by a motion of no confidence adopted in the legislative authority (section 102). In addition, the courts do, of course, have the power to test the constitutional validity of any government act, including parliamentary and provincial legislation. In terms of section 79(1), the president (ie the executive authority) has the power to assent to and sign a Bill adopted by parliament or, if the president has reservations about the constitutionality of a Bill, to refer it back to the National Assembly for reconsideration.

ACTIVITY

You will recall that the president did use this power some years ago when the so-called ''smoking Bill'' was referred by the president to the Constitutional Court to test the constitutionality of specific aspects of the Bill.

- Which components of state authority are at issue here?
- What is your opinion of this in the light of the insights acquired from this study unit? Is the principle of checks and balances, in terms of which one component of state authority is given certain powers that are designed to control the exercise of the powers of another component, at issue here? Or are you rather of the opinion that, in this case, interference occurs, in that one component of government authority is interfering in the exercise of the powers of another component?

Now read the newspaper report below and, when you have done so, answer the questions.

> The decision by President Mandela to release an armed robber earlier because he thought the man in question could help to educate the youth against crime, was yesterday branded as unjust by a number of bodies. Mr Golden Miles Bhudu, President of the South African Prisoners' Organisation for Human Rights (SAPOHR) said: ''It is unjust to focus on one person and to think that is a solution. What becomes of the other prisoners who are

also studying and do not know the right people? They have to serve out their sentences.'' It came to light the day before yesterday that, earlier this year, Prince Masina was released from prison in Pretoria after a telephone call by President Mandela to Mr Ben Skosana, Minister of Correctional Services. Mr Parks Mankahlana, President Mandela's spokesperson, said the president had the right to remit anyone's sentence or grant them amnesty [translation].

(*Beeld* 21 April 1999)

- Which two branches of government are at issue here?
- Would you describe the remission of a sentence, imposed by the judiciary, by the executive as interference which is in conflict with the theory of the separation of powers? Give reasons for your answer.

It is clear from the content of the study unit that, despite its advantages, an absolute separation of powers is neither desirable nor preferable because it would totally immobilise the government. Not even in America is there full separation of powers. But what are the extent and consequences of a departure from the *trias politica*, and why do we refer to it as the administrative state? These are the questions that will be examined in the next study unit.

STUDY UNIT 4

What is the administrative state?

Introduction 4.1

The aim of this study unit is to determine the significance and nature of the phenomenon of the administrative state, which necessarily implies that the questions relating to the reasons for the emergence and existence of the phenomenon also have to be answered. An analysis of the consequences of the rise of the administrative state, and the questions arising out of its existence, requires that specific measures to counteract it must be examined.

Significance of the administrative state 4.2

The administrative state is a phenomenon in public administration. The true significance of the phenomenon lies in the fact that it emphasises the growing importance of the executive branch of the government (of which the administrative branch is a subdivision) relative to the legislative and judicial branches. In practice, this implies, on the one hand, that many legislative functions are performed by administrative officials and institutions, and not by parliament, and, on the other hand, that many judicial functions which would otherwise be performed by the courts, are now performed by administrative officials and tribunals. Another meaning attached to the phenomenon of the administrative state is that it is the regulation of the economy by the government or the public administration. This is often referred to as government interference in the economy.

One significant characteristic of the administrative state is that it establishes a public administration that is still growing in terms of **size, authority** and **penetration** into all facets of public and personal life.

Size

As far as size is concerned, there is an expansion of the functions of the government and an increasing allocation of public functions to the administrative structures of the government. This, of necessity, goes hand in hand with a quantitative expansion in terms of the size of public administration into a dominant position, particularly in the legislative and judicial spheres.

Authority

As far as authority is concerned, there is a concentration of authority in the executive component of the government, in that, besides purely administrative functions, the component also performs extensive legislative and judicial functions.

Penetration

As far as penetration is concerned, it is a necessary implication of the administrative state, as a phenomenon, that public institutions are beginning to influence and penetrate every facet of the lives of citizens, particularly in the economic and social spheres. In practical terms, this means that public officials are increasingly becoming involved in the management of public affairs in society by taking the lead, providing financial support and developing technical skills. This implies that the citizens are now simultaneously being served and controlled by the public administration.

4.3 *Problem statement*

As will soon become clear, the development and growth of the administrative state place considerable pressure on the traditional separation of government power in the constitutional setup. In particular, it is the danger of officials in the administrative state possibly exceeding their authority that grips the imagination of those who insist that, on the one hand, civil liberties ought at all costs to be guaranteed by the government, and on the other, that public administration should function as efficiently and effectively as possible. The apparent contradiction between the two demands gives an indication of the complexity of the problem. The fact that the rights and freedoms of the individual are qualified both by the rights and freedoms of his/her fellow individual and by those of the government, in the endeavour to promote the general welfare of society, makes the problem more complex.

4.4 *What gave rise to the administrative state?*

You are now equipped with an understanding of the significance of the phenomenon of the administrative state. Next, it is necessary to establish what factors give rise to the emergence and continued existence of this phenomenon. A number of **external factors**, which put pressure on the government to extend the administrative branch further, are relevant here:

- **Population growth** makes administrative demands on the government in terms of the extent of services that have to be supplied. The fact that the increase in population gives rise to urbanisation – the concentration of masses of people into limited spaces – places still further pressure on the government to provide public services.
- **Complexity** of society. Public administration increases as the government seeks to protect people against one another, alleviate misery and act as arbiter in conflicts. In brief, what this amounts to is the duty of the government to maintain public order.
- **Regulation** of the economy. An important source of expansion of public administration is the desire of the government to regulate various aspects of economic life.

- Successive **constitutional dispensations** which have caused a shift in the balance of power. The 1961 Constitution made provision for the office of state president as head of state (section 7(1)) and as the executive acting on the advice of the Executive Council (section 16(1)). In practice, however, it was the office of prime minister and his/her cabinet (which was not mentioned in the 1961 Constitution) that had the real executive power. The state president was a mere head of state with ceremonial functions. The 1983 Constitution combined the offices of prime minister and state president in one office, that of an executive state president. Already, this represented a shift in the direction of executive government. This trend was continued in the 1993 Constitution and particularly in the 1996 Constitution, which expressly provides (section 84(1)) that the president is vested with the functions of head of state and head of the national executive. In practical terms, a number of constitutional dispensations, over a period of years, have contributed to the transfer of considerable powers to the executive authority (and, by implication, to the administrative authority, ie to public officials and institutions).
- A number of **indigenous circumstances**, particular to South Africa, also contributed to the emergence of the administrative state, namely settlement and colonial development, the creation of colonial governments, the First World War and its consequences, labour unrest and the Great Depression, race segregation, state security, administrative corporatism, and the diversification of administrative activities (Baxter 1984:7–16).

Certain **internal factors** also reinforced the rise of the administrative state:

- Organisational characteristics of **bureaucracy** (ie public administration). In terms of this approach, bureaucracy, which is the dominant organisational form of the administrative state, is constantly expanding. This culminates in the bureaucracy becoming entrenched to such an extent that society as a whole becomes dependent upon it.
- Influence of public officials on the **process of policy-making** and policy itself. The increasing penetration of the policy function through influential officials has also contributed to the evolution of the administrative state. In line with this, the advisory and discretionary powers of public officials have increased as governments have intervened in society in general and the economy in particular.
- Mobilisation of **administrative experience** and **technical skill**. During the depression of the 1930s, and particularly later during the Second World War, the responsibilities of the authorities grew in extent and complexity, and, as a result, relied heavily on the administrative experience and technical skill of the public administration. Legislators relied heavily on administrative advice and, at the same time, the discretionary decision-making authority of public officials was extended. In later years, legislators still needed the advice, and even became accustomed to advice from officials.

ACTIVITY

- Do you think that the above three internal factors still apply in South Africa?
- Mention a few practical examples of how bureaucracy has become indispensable in society, and how it affects the rights and liberties of citizens.
- Can you mention an example of recent policy/legislation to which public officials have made a significant contribution and which you may be personally aware of?
- To what do you ascribe the fact that legislators have become (and still are) so dependent upon the advice of public officials?

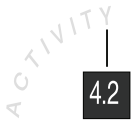
4.5 *What is the extent of the administrative state?*

We have now established the significance and cause of the phenomenon of the administrative state. The next step is to determine the scope of the administrative state. Now read the following quotation:

> A child may be born in a public hospital, receive aftercare from a public official called a health visitor, be vaccinated by a government vaccinator, be educated in a Government primary school, a Government secondary school or a technical college, receive medical or dental treatment from Government sponsored services, be fed in school, and secure employment from a Government employment exchange. He may live in a house obtained through a housing board, use publicly provided water and electricity, place his savings in a Post Office bank, receive medical treatment at the public expense, draw unemployment benefit if he loses his job, travel in municipal or government buses or trains, send and receive letters through the public services and so on (May 1955:300).

The essence of the administrative state is therefore that citizens are born and live in subordination to the authority of the government by which they are at the same time served and controlled. This implies an ongoing exposure to the government. Officials therefore take decisions that affect citizens even before the cradle and until after the grave. Public administration accordingly has a considerable influence on the lives of citizens, and this is the case in all forms of government, from a totalitarian autocracy to a liberal democracy, of which the present South Africa is an example.

In order to care for citizens from the cradle to the grave, conserve the environment and educate citizens and provide them with job opportunities, training, housing, medical services, pensions and even food, clothing and shelter, the government needs an extensive public administration. The administrative state is therefore the instrument with which to serve the interests of the society, with the citizens at the receiving end. The rise of the administrative state necessarily goes hand in hand with the expansion of public services in a quantitative and qualitative sense. As a result of the extent of service delivery, the interaction between the citizen and the government also undergoes a qualitative and quantitative change. The penetration of the public administration into the private lives of society increasingly brings the citizen into contact with the government, which is an indication of the individual's dependence upon the administrative state. Society therefore becomes dependent upon the officials who provide skills, continuity and stability in the government. The mere existence of the administrative state is evidence of the dependence of society on the regulation, control, production and manipulation that goes hand in hand with the functioning of administrative institutions. In this way, society condones the broad scope of the administrative state.



ACTIVITY

It is sometimes said that the broad scope of the administrative state goes hand in hand with bureaucracy, bureaucracy with red tape, red tape with rules, and rules with imprisonment of the human spirit, which seeks to break free from the stifling spiral of those rules.

- Is it your experience, as an ordinary citizen, that bureaucracy, red tape and excessive rules result from the workings of the administrative state?
- Mention some examples, with reference to your own contact with public institutions, of instances where the above three phenomena caused you discomfort.
- Do you think it is possible and desirable to eliminate red tape in public administration entirely? Give reasons for your answer.

The wide scope of the administrative state has particular **disadvantages** and **advantages** that we should examine briefly.

The **disadvantages** of the wide scope of the administrative state are, among other things, secrecy, precipitous decision-making and irreversible decision-making. Another disadvantage is the finality that is vested, through legislation, in the powers of officials in matters which could potentially and seriously infringe the

rights of citizens. Think of cases where it is stated that the decision of the institution or official concerning a specific matter is ''final''. Fortunately, the review powers of the courts can no longer be excluded by legislation. More about this at a later stage in the study guide.

However, there are also **advantages** to the extent of the administrative state. Some of these are the advantages of continuity, concern with details, and specialised skill that public administration has in its favour. These have a lot to do with the fact that permanent public officials possess valuable knowledge about the operation of the processes of government which members of the legislative authority often do not have owing to the relatively temporary nature of their terms of office.

4.6 *What are the consequences of the administrative state?*

Before analysing the consequences, we ought first to survey briefly what the public expect of public administration in an administrative state. In the spirit of justice in public administration, and as a prerequisite for democratic morality, citizens are entitled to humane treatment in the administrative state. This implies an expectation that every person ought to be treated with respect as an individual, taking into account his/her rights, interests and feelings.

One important consequence of the rise of the administrative state and of the involvement of the government in the economy has been the increase in government regulation and the associated encroachment on individual rights. The administrative state therefore has the potential to be regarded as bureaucratic and inhuman. Another consequence of the rise of the administrative state is the shift in the balance of power, discretion and initiative – from the courts and legislators to public officials. This shift has the potential to instil fear in citizens vis-à-vis the administrative state concerning the possibility that rights and interests can be infringed, leaving them powerless. It is important to realise that the shift in powers implies more than the mere fact that officials are expected to fill in the details of enabling legislation. The delegated powers even enable officials to exercise basic choices, take decisions and give rulings which may have far-reaching consequences. Another consequence of the administrative state is the anomaly that, instead of the government being dependent (as a creation of the electorate) on the public, as democracy requires, the public is now increasingly being made dependent upon the government. In a certain sense, therefore, there is a reversal of roles, in that conventional practices, for example anonymity, secrecy, neutrality and hierarchy, designed to ensure that citizens control public administration, are now being used as a means whereby public administration rules its nominal master, the public. The result is a greater potential for imposing governmental domination of the public's rights as against the role of the government as supplier of services.

To what extent are the expectations of the public being satisfied? Judge for yourself. It appears that the public feels unprotected and encroached upon by the consequences of the existence of the administrative state; on the one hand, because the latter fails to give the public a sense of personal safety and an understanding of the phenomenon of the administrative state, and, on the other

hand, because it is increasingly generating arbitrary rules which have the potential to restrict the freedom of citizens. The result is that some citizens are rebellious and discontented and oppose the consequences of the administrative state, while others view it with fear, mistrust and uneasiness, while still others accept it uncomplainingly.

4.7 What problems are created by the administrative state?

The logical question that you are now, no doubt, facing is whether the consequences of the phenomenon of the administrative state result in any problems in society. There are those who contend that the administrative state is a phenomenon that conceals no particular dangers. In the light of the evidence thus far, such a statement is of doubtful validity. There are two main standpoints in this regard. On the one hand, there are those who feel that the administrative state is the cause of many problems and controversies in society. On the other hand, there are those who believe that the administrative state, with a few adjustments, could be a means for establishing a societal order that would promote greater fairness.

There is no doubt that there is a positive side to the administrative state. Unfortunately, the negative side is often more visible and raises specific problems that require consideration.

Firstly, the administrative state affords officials the potential to abuse their wide authority and use them to evade public accountability and responsibility. One need only call to mind the Sarafina affair, which caused considerable controversy in South Africa.

Secondly, the administrative state is sometimes used as a smoke screen behind which to lay claim to excessive secrecy in public administration.

Thirdly, it is sometimes contended that the rise of the administrative state poses a fundamental threat to democracy as a form of government. It is argued that the operation of the administrative state causes an inherent tension between the goal of effectiveness of the management sciences and the insistence on responsiveness and participation in accordance with the principles of democracy.

Fourthly, it is contended that the administrative state does not necessarily solve social problems, but rather binds them together. This causes private initiative to be undermined, subverts individualism and makes citizens overly dependent on officialdom.

4.8 What steps are necessary to limit the negative consequences of the administrative state?

Once specific negative consequences and problems have been identified, it is important to investigate the possibility of solutions. But, here, it is necessary to

display great realism. To begin with, it should be realised that an escape from the administrative state is not possible, simply because we cannot get away from an administered society. The latter is omnipresent and exists in both the public and the private sector, since the running of society as a whole is done by institutions and organisations with specialised functions. Moreover, the public and private sectors of the administered society are very closely interwoven. The private sector is dependent upon the public sector just as the public sector is dependent upon on the private sector. For that reason, one cannot reject the administrative state without also undermining the private sector of the administered society. Accordingly, the administrative state cannot be unconditionally withdrawn without forgoing substantial advantages, which the citizens value highly. Because citizens have interests that can only be served by the public administration, it is probable that expansion of the administrative state will continue within the administered society. This does not imply, however, that efforts should not be made to limit the extent of the administrative state. Some proposed measures in this regard deserve attention.

Firstly, it is sometimes proposed that the activities of the executive as a whole be reduced and scaled down by eliminating unnecessary programmes, reducing services and privatising public resources. The poor economic showing worldwide that is often ascribed to increasing regulation by the administrative state, has increased demands for deregulation, commercialisation and privatisation. The assumption is, therefore, that increasing government interference is the cause of the decline in economic growth, and it is therefore proposed that government interference be limited.

Secondly, decentralisation is sometimes proposed in order to bring decision-making closer to the public, thus making the decisionmakers more responsive. One problem of the administrative state is that decisions are too far removed from those who are affected by them. In practical terms, this means that the functional activities of public institutions ought to be localised. The latter approach ought also to make public administration more accessible to the public.

Thirdly, greater citizen and public participation is proposed at all levels of government functioning in order to promote greater public control and ensure that the interests of participants are duly taken into account in decision-making.

Fourthly, competition among institutions and rewards for exceptional performance ought to be introduced in order to increase internal effectiveness and make institutions more responsive to clients.

Fifthly, it is proposed that the constitutional balance of power be redressed. The authority of the legislators and courts should be reinforced in an effort to question the domination of the administrative state. The branches in question should not so easily cede their authority to the executive authority, but should guard them jealously. In particular, their function of controlling delegated legislation, administrative discretion and administrative adjudication needs to be stepped up. This will be discussed further later on.

The mention of the function of control raises the question of the kinds of control that could be considered. Legislative supervision by the legislative authority of the acts of officials includes measures such as the budget debate, the no-confidence debate, the adjournment debate, and select committees. Organisational measures and institutional control refer, in turn, to the advisory function of the Public Service Commission, and the control functions of the Auditor-General, an independent, impartial functionary

for handling of complaints such as the ombudsman (Public Protector), administrative courts, the Treasury, and the Attorneys-General. Other measures that could be utilised in the control function are social control of the use of authority (Corder 1989:2), a bill of rights, a free press and extraparliamentary organisations. As will be seen later in the study guide, only some of these measures exist in South Africa, and those that do exist are not always fully utilised.

Will the administrative state continue to exist? 4.9

The development, growth and continued existence of the administrative state are inevitable – particularly because it takes place with the consent of those involved, such as the legislative authority, the courts and the South African public. Moreover, the administrative state cannot be done away with without consequences, because it satisfies important human needs and, despite shortcomings, appears more democratic than private administration. The shortcomings of the control function in relation to the administrative state are indeed appreciated and, even though the measures to limit problems cannot always prevent problems, an effort nevertheless should be made to rectify abuses and design procedures that prevent repetition of abuses.

The solution probably lies in making the administrative state as human as possible. This is indeed possible, because the science of administration is probably the most human science, next to medicine. But, then, the society in which the administrative state functions must also be a human society – a society in which there is broad recognition of the human dignity and integrity of each person, irrespective of race, creed or gender. It ought also to be an open society in which excessive secrecy cannot be tolerated. Furthermore, it should be a participatory society in which the ability and desire to participate are so widely distributed that officials and leaders are kept sensitive to the interests of all. It is in such a society that those who serve in the administrative structures of the administrative state can similarly seek to behave in a humane way towards those who are exposed to and work within it.

ACTIVITY 4.3

A C T I V I T Y

- To what extent are the abovementioned values of the recognition of human dignity and integrity of every person, an open society, no excessive secrecy, a participatory society and sensitivity to citizen interests, with specific reference to public administration, reconcilable with the 1996 Constitution?

- If you think they are reconcilable with the 1996 Constitution, indicate the relevant sections in the Constitution that support your answer.

4.10 R . E . V . I . E . W

This study unit introduced you to the administrative state with all its consequences. For the purposes of public administration, it is important that a closer analysis of, in particular, three specific consequences of the administrative state be carried out, namely delegated legislation, administrative adjudication and administrative discretion. Therefore, these three will be the subjects of discussion in the next three study units.

STUDY UNIT 5

What is delegated legislation?

Introduction 5.1

This study unit mainly concentrates on the **phenomenon** of delegated legislation as an outcome or product of the administrative state. The meaning of delegated legislation as well as the different kinds in existence are explored in some detail. This is followed by an evaluation of the existence and exercise of delegated legislative authority by weighing up its advantages and disadvantages. The possibility of effective control of these wide-ranging powers is considered in the light of their considerable potential to encroach on the freedom and rights of the public if they are abused. In public administration today, the public official is becoming increasingly involved with the phenomenon of delegated legislation. It is therefore important that this part of administrative justice be studied in depth and be thoroughly understood, primarily by the official himself/herself, but also by the public at large who are in daily contact with the public service delivery of public institutions.

Significance of delegated legislation 5.2

In terms of section 44(1)(a) of the 1996 Constitution, the legislative authority in South Africa consists of the following:

''44(1) The national legislative authority as vested in Parliament –

(a) confers on the National Assembly the power –

(i) to amend the Constitution;
(ii) to pass legislation with regard to any matter, ...
(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; ...''

In South Africa, the principal function of parliament, and, for that matter, of any legislative institution or legislative assembly in any democratic political entity, whether national, regional or municipal, is to enact legislation. It is customary to refer to legislation as a function of the legislative component, and to the immediate consequence or product of that function as laws or other enactments serving a similar purpose. The essential meaning of the word ''legislation'' is the same in both cases, but we have to distinguish between the two meanings that the same word can convey in different contexts. The first context in which the word ''legislate'' can be used as a verb is dynamic – here it refers to the process or

function of making laws. The second context is static – here the word ''legislation'' serves as a general term for all laws or similar enactments resulting from the legislative process. It therefore refers to the Acts themselves as a product of the legislative process.

When parliament partly delegates its power to enact legislation, or, stated differently, when parliament delegates powers to any subordinate institution or public official to make laws on its behalf in accordance with a prescribed method and concerning a prescribed matter, then it follows that such an institution or public official is empowered to make subordinate laws. The institution or public official has the capacity to fulfil the function of making laws, from which delegated legislation can then proceed.

It is clear from the above that the term ''delegated legislation'', when seen outside its grammatical context, also has two meanings. It can refer to

- the exercise of legislative powers by the subordinate institution or public official to whom parliament has delegated such powers
- all the rules, regulations, proclamations and municipal bylaws (subordinate laws) promulgated in the exercise of the delegated legislative powers

The term ''delegated legislation'' is mainly used here in the first of the two meanings given above. In some instances, there is a preference to refer to ''administrative rulemaking''. The second meaning given above is used, however, to denote the scope of delegated legislation. It should not be difficult to determine which of the two meanings is conveyed by the expression in a particular context. Special efforts have been made to ensure that the sense in which the expression is used allows for only one interpretation.

Public service delivery has developed in recent years to the extent that people are living completely within the bounds of the administrative jurisdiction of public institutions. It would be correct to say that the walks of life affected by delegated legislation are virtually unlimited. Delegated legislative authority is sometimes exercised by the head of state, and sometimes by the minister of a department, and, often, it is even exercised outside the departmental constellation by a council or a commission.

We take a brief look at an illustrative example. As you know, it is the task of a minister to regulate certain matters within the department with the help of the officials in the department. So, for instance, the Minister of Home Affairs will promulgate regulations that relate to the issuing of passports and identity documents. This is therefore a legislative function that is executed in terms of delegated authority. However, you should realise that this delegated legislation/ administrative legislation/subordinate legislation (such as proclamations and regulations) is on a lower level than, for instance, original legislation (legislation promulgated by parliament and the provincial legislators).

5.3 What kinds of delegated legislation are there?

Delegated legislation comprises such a motley collection of rules, regulations, proclamations and notices (clearly evident from scanning any *Government Gazette*) that it is extremely difficult to establish a simple, effective classification

of these enactments. On the whole, all delegated legislation is subordinate legislation. This means that the institution that delegated legislative powers is in a position to control the legislative measures instituted by virtue of delegated powers. The courts also control subordinate legislation, in the sense that they may declare such legislation to be outside the realm of the empowering legal provisions where this is in fact the case.

We are now going to mention a few examples of delegated legislation. The first comprises proclamations published by the president and by ministers as government notices in the *Government Gazette*. Usually, each law makes provision for the issue of regulations in the name of the president or the minister, and these are published in a supplement to the *Government Gazette* known as the *Regulation Gazette*. Official notices issued by executive officials are also classified as delegated legislation, cases in point being notices issued by the Price Controller, the Commissioner of Customs and Excise and the Registrar of Medicines. Local authorities have the authority to make bylaws, rules and regulations that can be classified as delegated legislation. Official codes and procedural manuals such as personnel codes, financial guidelines and financial instructions from the Department of State Expenditure have the force of delegated legislation. Although a public official will not necessarily be dragged off to court for not complying with a guideline or instruction, noncompliance can nevertheless lead to personal harm for him/her, in the sense that such an official may be disciplined for misconduct.

In South Africa, delegated legislation is mainly classifiable into the following two groups:

- **Legislative authority to supplement empowering enactments**

  Parliament can invest the president, a minister, a local authority or a council with the authority to make regulations. This eases the practical implementation of the policy guidelines laid down by legislation. Nearly every Act passed by parliament has a section near the end of its text that enables a minister or premier to issue regulations. The competence to supplement a particular Act of parliament or a provincial law is explicitly contained in such legislation. The minister usually lacks the specialised knowledge or the time to compile the detailed regulations, which is why the directors-general of state departments and state legal advisors are entrusted with this task. The bulk of delegated legislation existing today falls under this kind of legislation. Provisions of an Act can also be expanded by instituting additional measures where the Act is silent. For example, standing rules that are too elaborate to be subsumed in an Act can also be instituted in this way.

- **Legislative authority of professional institutions**

  A variety of organised professional institutions have been given the authority to make regulations concerning admission tests, the registration of practitioners, codes of conduct, professional ethics, and disciplinary measures. Normally, these regulations would be drawn up in conjunction with a State Law Advisor, would be submitted to the minister for his/her approval, and would then be published in the *Government Gazette*. Provision for such delegated authority in South Africa can be found in relevant statutory provisions in the following Acts:

  (1) Medical, Dental and Supplementary Health Service Professions Act 56 of 1974

(2) Public Accountants' and Auditors' Act 80 of 1991
(3) Nursing Act 50 of 1978

Councils were instituted under these statutes for the registration of the relevant practitioners. An example is the South African Nursing Council. These councils are authorised to prescribe the qualifications required for registration, to regulate matters relating to unprofessional conduct, and to impose sanctions that the councils may deem necessary in cases of misconduct.

5.4 *Why is delegated legislation necessary?*

Delegated legislation is not a new phenomenon. The application of delegated legislative authority is as old as the oldest system of organised government. Today, social, political and economic problems – of both international and national significance – impose major obligations on authorities. State institutions provide a variety of social and economic services to promote the wellbeing of the community. Consequently, these institutions must regulate social relations and control national economic resources accordingly. The existence of these services depends on the issuing of elaborate regulations to secure communal as well as individual privileges.

Today, parliament and provincial legislators have neither sufficient time nor sufficient knowledge to draw up the large amount of measures required for the effective implementation of all government activities. It is impossible to make provision for every possible contingency in the Acts passed by parliament. Usually, parliament only prescribes the basic policy frameworks and empowers the executive institution to make regulations that cover the finer detail. It is also impracticable to expect parliament to formulate technically specialised particulars in an era of major and rapid technological change.

These are just some of the factors that necessitate the use of delegated legislative powers within the sphere of public administration. Now let us take a brief look at these and other factors.

- **Workload and limited time at the disposal of Parliament and provincial legislators**

  It is clearly impossible for parliament and the provincial legislators to attend to all the legislative measures required for executive actions in the limited time at their disposal. As matters stand, parliament and the provincial legislators are overburdened by the yearly legislative programme, which is disposed of with difficulty. Parliament and the provincial legislators barely have time to debate essential policy and are therefore restricted to policy determination (ie the broad policy framework) and authorise the executive institution to proclaim more elaborate rules and regulations for the practical implementation of approved policy. The items on the parliamentary agenda that traditionally command the highest priority, such as the no-confidence debate and the latest international situation, have all become more extensive and time-consuming and therefore leave less time for other matters. The number of Acts that should be passed each year, but have to stand over for the next session, is further proof of the time constraints. It is clear that the

legislative process would collapse if the legislator were to attempt to promulgate legislation that covers every possible matter.

On occasion, the Constitutional Court has actually declared invalid the authority that parliament has granted the president to amend an act of parliament by way of proclamation (*Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC)). The court decided that parliament does have the authority to delegate subordinate legislative authority to the executive authority, because it is essential to carry out the will of parliament. But to allow the president to amend an Act of parliament, by way of proclamation, can undermine the prescriptions of the Constitution on how legislation on various matters should be adopted. So, for instance, ordinary Bills that affect the provinces, should be adopted by both the National Assembly and the National Council of Provinces (section 76). The objection is that, if the authority to make this kind of legislation is transferred to the president to legislate by means of proclamation, he/she is exempt from the carefully composed constitutional legislative process. Another objection is that such authority means that control over legislation shifts from parliament to the executive authority. The result would be that such authority could then be used to introduce contentious provisions into what was previously noncontentious legislation.

- **Technically specialised nature of problems**

  The drafting of legislation at the present juncture is often technically highly specialised. Unlike policy matters, technical matters are less amenable to parliamentary debate and therefore cannot be incorporated directly into an Act. The delegation of authority to the head of state, ministers or some other public officials enables these functionaries to consult with specialist advisors and interested parties while the regulations are still in the draft phase. It goes without saying that a highly technological matter such as nuclear power cannot be regulated properly without drawing on expert advice. An example of legislation in South Africa that necessitates regulations of a highly specialised nature can be found in the Public Health Act 63 of 1977, which provides, in sections 32 to 44, that public health may be regulated by regulations on, for example, control over milk products, blood and blood products, and a number of other matters.

- **Need for more flexibility**

  The enabling legislation cannot always provide for all eventualities and local conditions. Delegated legislation provides for some flexibility, since it allows changes to be made from time to time depending on experience. Decision-making and legislative powers are therefore delegated to officials at lower levels who are in possession of relevant information concerning circumstances, time and place. For example, the expansion of the fishing industry in South African coastal areas has compelled the Department of Environmental Affairs to promulgate regulations under the Sea Fishery Act 12 of 1988 in *Government Gazette* R.2221 in order to control the large variety of fish species, boats and fishnets. Officials at ground level are thus enabled to apply knowledge and practical experience with a view to promoting adaptability and flexibility. Delegation also allows experimentation. Delegated legislation can be passed and amended relatively

quickly, which makes experimentation possible. Creativity and innovation are promoted by giving officials room for manoeuvre and discretion in the regulation of a specific matter.

- **Emergency measures**

  Under current world conditions, this matter is one of the most pressing reasons for swift action. The executive component of governmental power must have the authority to act swiftly, timeously and effectively in emergencies (eg war, civil war, imminent coup d'état, drought, epidemics or a proclaimed state of emergency). Delegated legislation presents the only solution in these cases, to which end a general enabling Act gives the head of state the authority to issue any regulation deemed necessary. For example, the Minister of Law and Order is authorised by the Public Safety Act 3 of 1953 to issue regulations to declare certain areas to be areas of unrest under conditions and for a period deemed necessary to restore law and order.

- **Contingencies**

  No legislative institution can always make provision for every possible problem. Given the unpredictability of future events that may take place at any time, for example an oil tanker that runs aground on our coast, floods such as that at Laingsburg, earthquakes, runaway forest fires, a volcanic eruption or a nuclear power station that runs out of control, executive government institutions must be empowered to act without delay to ensure the safety of the public and of property. Since parliament cannot by its nature be prepared for every eventuality, the executive institutions are vested with wide authority to deal with any contingency.

  Accordingly, provision is made in specific legislation for executive institutions to be empowered to act in the case of contingencies. See the Prevention and Combating of Pollution of the Sea by Oil Act 67 of 1971 in this regard.

- **Panic among legislators**

  An exceptional situation may arise that arouses public controversy about a specific matter. It may even happen that the situation causes panic. The outbreak of congo fever in the vicinity of Oudtshoorn during November 1996 is an example of an event that aroused public controversy. In such cases, the legislators, who may not have a clear idea of how to handle the situation, may delegate sweeping powers to executive institutions on the spur of the moment so that the situation can be dealt with. It is to be expected that, in the near future, the HIV/AIDS epidemic will assume proportions of such magnitude that delegated legislation will have to be used to allay panic among the legislators and the public at large. The advantage of delegated legislation in this situation is that it provides a mechanism for the controlled defusing of panic among the legislators. However, the problem is that, once the problem has been solved, the legislation remains on the statute book. On the other hand, the advantage is that, if the problem should arise again, sufficient authority will be in place to handle it.

- **Specific group concerned**

  Acts of parliament and associated delegated legislation are usually applicable to society at large rather than to particular persons, but it may happen that a particular group of persons (association or council) requires special legislation for their particular needs, in which case parliament may pass legislation for a particular occupational group or type of work. In such cases, the main institution of the group may be authorised to draw up delegated legislation for the group, for example the South African Medical and Dental Council, which was instituted under the Medical, Dental and Supplementary Health Service Professions Act 55 of 1974, is authorised to impose disciplinary sanctions on its members. The same applies for the South African Nursing Council, the Veterinary Council, the Public Accountants' and Auditors' Council and the South African Council for Professional Engineers.

5.5 *Are there any disadvantages attached to delegated legislation?*

As with any phenomenon in society, it is inevitable that the application of delegated legislative powers will be subjected to criticism. Such criticism is not aimed **at the legislation itself**, however, since it is indispensable in the contemporary state, but at **how** delegated legislative powers are exercised. The main disadvantages of delegated legislation can be summarised as follows:

- Some draft Bills of parliament are passed in the form of a **mere framework**. They establish only the broadest principles. In such cases, the authority to pass "subordinate" legislation about other matters that may fundamentally violate the rights, privileges, liberties and property of the subject is delegated to ministers who act in conjunction with officials in state departments. The result is that legislative provisions concerning matters of principle and policy are promulgated in the absence of proper control by the representative legislative institution, which means that parliamentary authority is undermined and the authority of the courts is jeopardised by the disproportionate influence of the executive component, and that even the civil and personal freedom of the ordinary citizen is threatened to the same extent.
- The available means of **parliamentary control** and investigation of the delegated legislative powers are **inadequate in themselves or inadequately utilised**. A case in point can be found in section 41(3)(a) of the Public Service Act proclamation 103 of 1994 which provides that a regulation remains in force until parliament repeals it by resolution. (See the issue of gaps in parliamentary control dealt with under the next heading.)
- Delegated legislative powers are so **sweeping** in some instances that the subject loses the protection he/she is given by the law courts against inequitable and unlawful actions of executive institutions.
- The delegated authority is often so **poorly defined** that the area in which it should be exercised remains uncertain. Consequently, it is difficult in some instances for the individual to enjoy the protection offered by the courts against unreasonable and unfair treatment by executive functionaries. This is all the more true where it is stated that the decision of the minister, official or any other functionary is final. This can lead to a sense of uncertainty among the public.

- There is often a **lack of participation**. Provision is not always made for interested parties to be notified or consulted in advance, and, in cases where this does happen, the regulations are often impracticable, since the affected parties are too unspecialised or unorganised. In contemporary practice, provision is made for participation by publishing draft regulations (as well as draft legislation) in the *Government Gazette* with an appeal to interested parties to submit their comments on the proposed legislation. Unfortunately, in some cases, the provision made for prior study, time limits and submission requirements is impracticable and inadequate because the interested persons are too numerous and sometimes lack the specialised knowledge to appreciate fully the meaning of the delegated legislation. Often, there is also a lack of publicity during the enactment of delegated legislation, which implies that interested parties may have no knowledge of the proposed legislation.

5.6 *Is control of delegated legislation the solution?*

By now, it is clear that the delegation of certain legislative powers to the executive institutions by the legislative authority is both necessary and unavoidable as a means to secure good government. But the nettlesome problem that arises here is that the sweeping powers entrusted into the hands of officials can lead to an abuse of power that may make serious inroads on the freedom and dignity of the public. The most intractable problem concerning the application of delegated legislation is that control over these sweeping powers is inadequate. It is realised that proper control is essential to ensure that the delegated legislation generated by the exercise of delegated powers protects the interests of the individual as well as those of the public at large.

The main consideration in exercising effective control, therefore, is the need to balance the demand for speed, effectiveness and technical competence against exercising control so that the individual's interests are protected without imposing excessive restrictions on the efforts of the executive institution that serves the needs of the public.

5.7 *What forms does control of delegated legislation take?*

Consider what we learned about the *trias politica* (ie the division of state authority into three components) in an earlier study unit. There, we said that the reason for the existence of this division is both the prevention of tyranny (caused by excessive power being concentrated in the hands of one person or institution) and the control exercised mutually by one authority over another (ie the so-called checks and balances). The greatest and most obvious initiator of delegated legislation in South Africa is the executive authority per se – that is, the possibility of tyranny as a result of power concentration. Control over the legislative powers of the executive institutions is mainly exercised by the remaining two partners of the governmental troika, namely the legislative and the juridical branches – that is, the operation of the said checks and balances. The measures and methods of each of these branches will now be considered briefly and separately.

■ **Legislative control over delegated legislation**

Legislative control over delegated legislation in South Africa can be exercised in the following ways:

■ **Through the operation of the legislative authority**

Section 2 of the 1996 Constitution provides that the Constitution is the supreme law in the Republic, while section 43 provides as follows concerning the seat of legislative authority in the Republic of South Africa:

''43. In the Republic, the legislative authority –

(a) of the national sphere of government is vested in Parliament ...;

(b) of the provincial sphere of government is vested in the provincial legislatures ...; and

(c) of the local sphere of government is vested in the Municipal Councils ...''

Parliament is therefore subject to the Constitution, but – as the highest legislative authority in the country – it is authorised to repeal or amend regulations, proclamations or other forms of delegated legislation. This implies, too, that the legislative authority (parliament) may repeal or amend any statute or regulation that enabled the exercise of delegated powers if such powers are abused. The fact that the life span of a statute is determined by the will of the legislative authority can therefore be seen as a control measure.

The operation of the legislative authority may also play a role, in that the enabling legislation is so formulated that the aim and vision of a particular Act is clearly spelled out (eg section 1 of the Labour Relations Act 66 of 1995). By doing this, the legislator can prevent enabling legislation from being promulgated in the form of empty, amorphous receptacles that invite functionaries to provide content by way of uncontrolled delegated legislation, and, in this way, to determine its final form and vision. This latter function remains the duty of the legislator and is essential to provide the mandate within which delegated legislation can be accepted.

■ **Through tabling in the legislative authority**

A list of delegated legislation that appears in the *Government Gazette* must be tabled in parliament. An alphabetic list of the rules and regulations tabled in the course of a session is distributed among members of parliament and in state departments every year. Before the rules and regulations are finalised, they are submitted to a standing committee for consideration. The said list must be tabled despite the provisions contained in other laws that authorise the promulgation of delegated legislation and that contain a variety of protective measures concerning the period from submission of regulations up to their approval.

The tabling of delegated legislation as a control measure exercised by parliament and the provincial legislators is relatively ineffectual for the following reasons:

– The volume of delegated legislation makes documents too cumbersome to be tabled.
– The degree of specialisation of delegated legislation makes it difficult to understand.

– The time constraint does not allow for the study of delegated legislation, and lack of interest among members of Parliament and of provincial legislatures make it improbable anyway.

- **Through provision by way of parliamentary procedure**

  Ministers often announce in parliament that they are going to issue proclamations and government notices, and these announcements are recorded in the minutes of parliament, after which the regulations can be looked up and studied in the *Government Gazette*. Criticism of the proclamations can then be expressed on the usual occasions provided for the government to be criticised in a parliamentary debate, for example during the budget debate, on days when private members have priority, or during motions for the interruption of the general programme of parliament in order to debate a matter of compelling public interest. Naturally, such matters may also be raised during question time when ministers are at the disposal of the public. Any debate in the context of the legislative authority about, for example, a draft Bill intended to confer legislative authority on officials as a means of supplementing the draft Bill can be seen as a control measure.

- **Where there are deficiencies in existing legislative control**

  Exercising parliamentary control over delegated legislation on the tabling of a list of such legislation is relatively ineffectual in practice. Parliamentary machinery and procedure offer the ordinary member little if any opportunity to study the nature and content of delegated legislation and propose amendments. The main contribution that a member can make is to pose questions, and then he/she has to be satisfied with the answer given by the minister. It is possible, therefore, that members of parliament may fail to make a concerted study of all the relevant proclamations and regulations. In South Africa, there are no consolidated collections of proclamations and regulations, as is the case with statutes and ordinances. Moreover, the volume of existing delegated legislation is as great as the time constraint is severe, with the result that any effort made by parliament to consider it in depth would be futile. These control measures are made even more difficult by the fact that only a list of rules and regulations is tabled.

  The reasons why the tabling of a list of delegated legislation is of little value are therefore as follows:

  – The **volume** of such legislation makes documents too cumbersome to be tabled.
  – Its **specialised nature** makes it difficult to understand.
  – The **time constraint** and the frequent lack of interest among members of parliament rule out the possibility of studying the legislation.
  – The **function** of parliamentary procedure to **criticise** such legislation in parliament and insist on amendments thereof is too **limited**.

The inherent defect of a select committee is that it often comprises members who do not have the required specialised knowledge or objective approach, because they are too busy or are obliged by political considerations to rubber-stamp their approval on whatever is placed before them, and the minister does not object. The appointment of a number of specialist functionaries (eg legal practitioners who are not members of parliament) seems indicated as the appropriate way to exercise effective control, because these functionaries can then study the legislation and report to parliament.

■ **Judicial control**

In South Africa, it is accepted that the courts have primary and inherent jurisdiction over the validity of any regulation made in accordance with an enabling Act. The only cases in which the jurisdiction of the courts is not final are those in which the enabling Act (directly or indirectly) determines the contrary.

The limits of the topic for this module do not allow us to give a detailed account of the principles whereby statutory regulations promulgated under an Act of parliament may be declared invalid by a court of law.

The general characteristics of a regulation, and not necessarily the legal requirements for validity, can be classified as follows:

- Regulations must be clear and positive.
- They must be generally applicable.
- They must be in accordance with general legal principles, in that they must lend themselves to constructive interpretation and application.
- They must be fair.
- They must be *intra vires*.

In South Africa, the courts are authorised to investigate regulations to ensure that they accord with general legal principles, that is, that they are *intra vires*, and to a limited extent, to ensure that they are clear and positive. The other requirements cannot be enforced if the enabling legislation enables the legislators to ignore them. Furthermore, the courts are not under a general obligation to revise regulations. Regulations can only be revised if somebody objects to them.

The concepts of *ultra vires* (beyond competence) and *intra vires* (within competence) are often confused and are therefore explained.

- *Ultra vires.* This term describes an action that is beyond the delegated competence of the person performing the action; in other words, it describes the situation where a person carries out an action without being authorised to do so. Usually, the authorisation to perform a delegated legislative action is contained in a particular Act of parliament. The legislation whereby administrative powers are delegated is known as the enabling Act. Such an Act defines the sphere and content of administrative competence and may also prescribe the specific procedures to be followed.

  There are two kinds of *ultra vires* rules, namely the substantive *ultra vires* rule and the procedural *ultra vires* rule.

  The substantive *ultra vires* rule mainly applies to a person who acts without the required authorisation. The problem of delegation of powers is important in this instance. If a particular power is conferred on a specific person, that person may not delegate the power concerned to another person, except in cases where explicit provision is made for such subdelegation.

  The procedural *ultra vires* rule is less problematic than the substantive *ultra vires* rule. Where a particular procedure prescribed by a particular Act is not complied with, such act of omission is *ultra vires*. The procedural requirements are laid down in the enabling Act. If a public official ignores these procedural requirements, it is accepted that he/she has acted outside the framework of the enabling Act, which invalidates the action concerned.

– *Intra vires.* Where an official or public institution has received specific powers by virtue of delegated legislation, the official or institution concerned cannot perform any act legally unless it is explicitly and unconditionally authorised by law. Any discretion that is exercised must be in compliance with the *intra vires* legal rule, which means that action taken by an official or institution must be within the competence of the official or institution. Any restrictions, conditions or requirements contained in the delegated legislation must be taken into account. This implies that only the explicit and specific provisions have to be applied and carried out, and that no ulterior intentions or implied provisions may be inferred.

  In the case of *Ebrahim v City of Johannesburg* 1956 (2) SA 301 (WPA), the verdict was that the prohibition of the sale of ''dried fruit'' as laid down in the ordinance was invalid, because the enabling provisions only referred to ''fruit'', which does not include ''dried fruit''.

5.8 R . E . V . I . E . W

After studying this study unit, you should have a sound knowledge of the nature, sphere of applicability and value of delegated legislation, and of the dangers inherent in inadequate control of these sweeping powers given into the hands of the executive authority. Another product of the administrative state is administrative adjudication, which is the topic of the next study unit.

STUDY UNIT 6

What is administrative adjudication?

Introduction 6.1

You will recall from the study units on the doctrine of the *trias politica* and the phenomenon of the administrative state that, for reasons of effectiveness, both the institutions and the functions of the state authority sometimes overlap. You will also recall from the previous study unit that the majority of the members of the cabinet are part of both the legislative authority (section 91(3)(c) of the 1996 Constitution provides that the president may select no more than two ministers from outside the National Assembly) and the executive authority; that parliament cannot pass legislation without the assistance of the executive institutions; and that the executive institutions even act as subordinate legislator, subject to specific control measures of doubtful standards of effectiveness. But now we are entering a new dimension, namely that the executive institutions may also take judicial decisions in specific spheres in certain circumstances and subject to prescribed procedural requirements.

The preceding succinct formulation of an empirically verifiable situation does not mean that we reject the value of the doctrine of the *trias politica*. Basically, this doctrine is still adhered to, but the operational requirements of the modern state have rendered the inflexible separation of components of state, their powers and functions totally impossible. In the performance of their duties, therefore, public officials are sometimes entrusted with a form of adjudication. To equip officials for the task, it is desirable that the meaning, nature and extent of administrative adjudication are studied and that the existence of the phenomenon be evaluated in terms of its advantages and disadvantages. The extent to which these wide-ranging powers are successfully and effectively controlled, is also investigated.

Meaning of administrative adjudication 6.2

Administrative adjudication is a special kind of decision-making (in government institutions) which developed out of the conditions that were created by the actual structural and functional overlapping, and the actual integration of functional aspects of the traditional *trias politica* as a result of the changes in the nature and extent of their activities. The development of administrative adjudication is similar to the development of delegated legislation, if the latter concept is regarded as something dynamic or as a series of processes of decision-making.

Let us now try to be more practical by formulating a definition of administrative adjudication:

Administrative adjudication is a special kind of decision-making which

(1) affects rights, interests or obligations of individuals, and is conducted by officials in institutions which traditionally are regarded as a part of the executive and by certain specially authorised nongovernment institutions or officials, and which

(2) would ideally fall within the jurisdiction of the judicature but in regard to which, in view of the speed and technical precision required to deal successfully with the extensive and complex government activities, the judicial institutions (ordinary law courts) are not regarded as an effective operational locus.

In brief, and in simple language, the decisions described as administrative adjudication occur when judicial authority is delegated to the executive component, enabling government institutions and officials to make decisions which are in fact quasi-judicial. We take a brief look at an illustrative example. If a person who applies to the Department of Home Affairs for a passport is unhappy about the refusal of his/her passport, he/she can appeal to the appropriate administrative tribunal or judicial administrative component in the department. The deciding of such a dispute amounts to a judicial function. It is thus a judicial function that is fulfilled in terms of delegated authority. However, you should realise that, here, we are dealing with administrative adjudication or actions of administrative justice that are carried out by lower tribunals or functionaries, which are not part of the ordinary court structure.

Administrative adjudication finds practical expression in quasi-judicial decisions taken by officials and institutions within the ambit of enabling provisions. In the taking of such decisions, the official or institution must routinely use discretion to reach a conclusion. As will be explained in the next study unit, it is primarily the exercise of this administrative discretion by officials and institutions that constitutes the field of study of decision-making issues.What we are dealing with here, then, is the transfer of judicial authority to institutions other than the ''ordinary courts''. This was essential in order to develop a subordinate judicial system which was both cheap and prompt in its functioning. The ponderous processes of cross-examination, insistence on first-hand evidence, obligatory personal appearance of witnesses in court, the requirement that written pleadings be formulated in judicial language, and the use of legal representatives – all these, despite innumerable advantages – have the grave disadvantage of making legal proceedings cumbersome and expensive.

6.3 *What is the nature and extent of administrative adjudication?*

Quasi-judicial findings arise out of the existence and implementation of enabling provisions, that is, the statutory provisions whereby the legislative component delegates or entrusts powers to a person or institution. The exercise of such delegated powers is based on the assumption that the person or group to whom they are entrusted, employs discretion in doing so. The word ''quasi-judicial'' as it is used here, indicates that these findings appear to be similar to those issued by

a judge in a court of law, but are in reality not the same nor are they issued by judges. The findings are not associated with all the ceremony and procedure of a court of law. In a limited sense, the decisions are often ''quick'' decisions and are guided by considerations different from those that usually apply in a court of law. But you should also realise that an ordinary administrative decision is not the same as a quasi-judicial decision. Bear in mind that we are dealing here with a special kind of decision-making.

The extent of administrative adjudication can best be determined by making a summary of institutions or persons outside the judicial component to whom authority is granted to make quasi-judicial decisions about a wide variety of matters. Administrative adjudication in South Africa, as in most world states, is not limited to a specific sphere of community life. Equally, its operational sphere is not limited to the normal executive institutions (departments) of a government as one might sometimes mistakenly infer from the content of some textbooks. Administrative adjudication is truly a macroterritorial and macrogovernment phenomenon.

Where it is a matter of the granting of privileges, the public is most affected by administrative adjudication. To a great extent, the state regulates economic life. One of the most important aspects of this is the allocation of permits and licences. Here, we could refer to the licensing powers of local authorities, the Liquor Board, the road transport boards, rural licensing boards, state departments and other statutory institutions. Officials and institutions possessing such powers ought at all times to act reasonably and fairly in exercising these powers. There is a whole series of rules, of which the rules of natural justice are the most important, that must be complied with in the course of such decision-making. It is evident from the large number of court cases that have taken place thus far in regard to the awarding of licences, that the public is not always happy with the way in which administrative adjudication is exercised in such instances.

Apart from the above, quasi-judicial decisions are also taken by a variety of other institutions, for example ad hoc commissions and committees, the Auditor-General, military courts, disciplinary courts, electoral officers and municipal valuation courts, in regard to a variety of functions of a regulatory nature.

6.4 *To which institutions is administrative adjudication entrusted?*

The following three main categories of institution have, amongst other things, the function of administrative adjudication:

(1) the ordinary courts of law
(2) the ordinary executive institutions
(3) special institutions (*ad hoc* institutions)

- *Ordinary courts of law*. Initially, the ordinary courts of law were seldom regarded as institutions to which administrative adjudication was entrusted. This tendency may be ascribed to the old view that administrative adjudication is confined to nonjudicial institutions. It must be borne in mind that the ordinary courts of every state do in fact perform the function of administrative adjudication. It is in the Anglo-Saxon world in particular, where administrative courts such as the French *Conseil d'État* do not exist, that

the ordinary courts of law may play an important role in administrative adjudication in terms of their control over administrative discretion.

The ordinary courts of law in South Africa also control discretionary administrative decisions. Before the adoption of the 1993 and 1996 Constitutions, the powers of review of the courts could still be expressly excluded by statute. In terms of the provision in the Constitution relating to administrative justice, each person now has a constitutional right to just administrative action. This provision now prohibits the controversial exclusion clause which could prohibit judicial review. Accordingly, the ordinary courts of law play an important role in administrative adjudication.

- *Ordinary executive institutions*.Administrative adjudication is also practised in the course of ordinary administrative activities. These activities are normally carried out within the context of the various state departments, although all departmental activities or decisions are carried out under the aegis of the name of the president, or that of a minister or, most common of all, that of the director-general of a specific department. The administrative adjudication implemented by ordinary executive institutions or state departments consists mainly of the settlement of disputes, to which a departmental official or a department as such is a party, by a highly placed official (such as a commissioner) or a minister.
- *Special institutions*.Administrative adjudication is also to a great extent carried out by heterogeneous statutory institutions which do not form part of the judicial authority and are sometimes virtually independent of the ordinary state departments. They include all the so-called ''independent'' state institutions and comprise the so-called ''administrative tribunals'' and the regulatory boards and commissions.

  These institutions can easily be distinguished from the courts of law in so far as they do not operate within the framework of the law courts. However, it is difficult to distinguish them from the ordinary executive institutions (the state departments), since they also fall within the administrative framework. The matter is further complicated by the fact that these special institutions have differing degrees of independence vis-à-vis the departmental constellation. Some do indeed constitute an integral part of one or other state department. We shall, however, continue to regard these special institutions as independent in so far as their judicial function is concerned.

  Most important of these ''independent'' state institutions which have already been mentioned, is the administrative tribunal. The most important characteristics of administrative tribunals are their independence of the judicial authority and often of the departmental constellation as well. These tribunals are sometimes established in order to afford better opportunities to settle disputes than are afforded by the ordinary courts. In other instances, the reasons for their establishment are that the legislator would like to prevent the ordinary executive institutions from **exercising** judicial functions, while the courts of law, on the other hand, are not regarded as the appropriate institutions for the settlement of these disputes. Disputes are removed from the courts in the first instance and from the state departments in the second.

  It is clear, then, that these special institutions that are responsible for administrative adjudication consist of such subordinate judicial

institutions that do not form part of the normal judicial authority, but occupy an independent position within the administrative framework in accordance with their judicial functions. The composition of these institutions varies in each case. Since they have manifold functions, it is difficult to draw absolute boundaries in an effort to classify them. Some have direct executive responsibility vested in them, while others act in an advisory capacity vis-à-vis a minister. Some have ordinary state officials as members, while others are financially self-supporting and appoint their own staff.

A well-known example of these special institutions (which also stands apart from all three branches of the *trias politica*) is the ombudsman (or Public Protector in South Africa). This is examined in greater detail in study unit 9.

What is a quasi-judicial decision? 6.5

We have seen that administrative adjudication is a special kind of decision-making and that the product of this decision-making is a quasi-judicial decision. But what are the requirements that such a decision must comply with? These are briefly listed:

(1) The competence to take such a decision must be derived from an Act, ordinance, bylaw, statutory regulation, proclamation or other rule with the indisputable force of law.

(2) A person/persons or institutions must have an interest of some kind in the decision.

(3) The decision must arise out of the exercise of the original discretion of the authorised person(s), after consideration of the pros and cons of the matter.

(4) Before a decision is given, procedural practices and requirements as prescribed in enabling legislation must be complied with, as supplemented and confirmed by the courts. For example, administrative decisions relating to procedure in a state department, the actions of the police in the interests of law and order and public safety, and the related decisions are not quasi-judicial decisions.

(5) It is true that there is a possibility of appeal to the ordinary courts about the procedural fairness of the decisions. However, there is no appeal to the ordinary courts on the reasonableness of the decisions, unless express provision to that effect has been made in the enabling legislation. The requirement of reasonableness of a decision does not, therefore, afford the courts the opportunity to impose their decisions in the place of those of the public administration.

(6) Quasi-judicial decisions are not confined to specific matters in society and may be extended by the legislative authority to any sphere.

If a decision meets these criteria, such a decision is quasi-judicial. Note that these requirements are an effort to explain what a quasi-judicial decision is (in contrast to an administrative decision or ruling) and not how a quasi-judicial ruling must be given.

6.6 What are the advantages of administrative adjudication by way of administrative tribunals?

The advantages of administrative tribunals may be summed up as follows:

(1) The exercise of administrative adjudication by administrative tribunals is **cheaper** than court cases in the ordinary courts. ''Cheaper'' means here that the relevant parties need not incur such heavy expenses to settle a dispute. The most important cost item is the salaries of officials and accommodation, which are paid by the Treasury. Owing to the high cost of modern litigation in the ordinary courts, low cost is an important consideration.

(2) Legal business can usually be despatched with **greater speed** by administrative tribunals. Institutions and persons vested with delegated judicial authority are, generally speaking, free within the bounds imposed by the enabling legislation to decide on their own procedures. The freedom that administrative adjudication creates, in that a state department or tribunal can dispense with the calling and cross-examination of oral evidence, and is not tied to the other complex pleading procedures that apply in an ordinary court, means that considerable time can be saved.

(3) Administrative tribunals have the additional advantage that they allow a hearing by persons with **specialised knowledge** and experience of the particular subject. The persons who compose administrative tribunals – in contrast to ordinary judges who have to assimilate a large volume of legal data from the evidence before them in a relatively short time – have first-hand knowledge based on personal experience and training. In practice, the ordinary courts have to rely for their data on the evidence advanced by the parties involved in the dispute, however incomplete and inadequate this may be. The biggest problem in respect of the ordinary courts is that they have limited opportunities to obtain information about social and economic implications, since they have to focus on the facts proved by evidence. Administrative tribunals are not subject to these limitations. Their main purpose is to settle, in a just way, disputes that come before them, irrespective of the formal presentation of the facts by the parties themselves. These tribunals also possess the powers and the means to investigate the facts themselves.

(4) Another advantage of administrative tribunals is the **greater flexibility** with which they are able to perform their functions. They are not bound by precedent. Such tribunals do, of course, endeavour to maintain continuity and a stable policy, but they are free to deviate from a previous ruling/decision which yielded unsatisfactory results or had its origin in outdated policy. Accordingly, administrative tribunals are capable of setting new standards from time to time when such action is regarded as being in the public interest. In addition, by means of their rulings, they can promote specific social or economic policy which will contribute to the effective and efficient functioning of public administration.

What are the disadvantages of administrative adjudication by administrative tribunals? 6.7

(1) The first disadvantage that can be considered, is the **lack of publicity** attached to the activities of administrative tribunals which, in contrast to the ordinary courts, do not always admit the public to their hearings, merely because it is not always possible in practice. The result is that these cases are not subjected to the close examination and influence of public opinion. Here it should be added that there is no inherent reason why administrative tribunals should suffer as a result of this drawback. There should be no objection to the presence of the public at the hearings of these tribunals, just as there can be no reason why the executive institutions to which judicial functions have been entrusted, should not publish reports on their rulings from time to time. In some instances, the rulings are indeed published, but this is done in official documents inaccessible to the ordinary public. Decisions of the South African Medical and Dental Council are published in the *Government Gazette*. The publication of reports need not necessarily mean that irrefutable precedents are created, particularly if it is clearly stated that the opinions expressed are subject to review with a view to differing circumstances in future. Such a system would permit public criticism of the tribunal's findings, and this would be to the benefit of the interests both of those affected, and of the institution itself.

(2) Administrative tribunals seldom give reasons for judgments, **seldom issue reasoned judgments**, seldom publish precedents, and seldom take uniform standards into account. Usually, a finding/decision is announced without any indication to the parties concerned on what grounds it was reached. If the reasons for a decision are not furnished, the disadvantaged person cannot determine on what grounds he/she can enter an appeal against the decision.

(3) Another important shortcoming in the operation of administrative tribunals is that the **quality of the investigation of factual matters is often poor**. Since administrative tribunals do not follow the same lengthy procedure of cross-examination to test the truth of facts as is done in the ordinary courts, they are inclined to use unconfirmed and inadequate evidence. They often rely on unsworn statements not supported by oral evidence given under oath, and which is not subjected to cross-examination. Some administrative tribunals do not always have the authority to demand the required document or to compel witnesses to appear in person. This disadvantage may be eliminated by giving the administrative tribunal the necessary authority and by allowing a party to insist on an oral hearing in order to refute the allegations of the opposition and expose untruths.

(4) Another disadvantage is that the **dispute is not always properly formulated**. Since administrative tribunals do not focus purely on the legal aspects of a case, but always deem the broader implications of social and economic policy to be important, it is often difficult for the parties concerned to determine on precisely what grounds their defence should be based. This is particularly true of cases where they rely exclusively on written statements.

(5) A case before an administrative tribunal often suffers from the difficulty of inadequate presentation because the **parties concerned are sometimes denied legal advice**. We are not all equally competent to present a case properly. There are times when it is imperative that a party use the services of an experienced legal practitioner. Legal representatives should be permitted.

(6) Another objection is that members of the tribunal are often appointed by the minister whose department is a party to the case. In this case, the **impartiality and objectivity** of the tribunal are mistrusted, with the further danger that political interference may be encouraged. There is no evidence, however, to suggest that administrative tribunals are more susceptible to political interference than the courts of law, which are recognised to be independent.

(7) Besides the disadvantages mentioned, there are objections in respect of cases in which the adjudication is closely combined with other functions. Accordingly, it can be stated that **the vesting of legislative and judicial authority in the same hands** (ie delegated legislation and administrative adjudication by the executive institutions) is undesirable. These powers ought always to be exercised separately, because, otherwise, persons will be subject to findings based on rules of law of which they could not have been aware, since such rules are only created by the same findings under discussion. But if the two powers are in the same hands, the temptation to utilise them simultaneously will be almost irresistible. Furthermore, legislative authority includes policy-making and ought to be subject to political control. On the other hand, the exercise of judicial authority should take place independently of political considerations.

ACTIVITY

Now begin by rereading the provision relating to administrative justice in the Constitution. Pretend you are one of the parties to a case that has come before an administrative tribunal, and that your rights and interests have been adversely affected by the decision of the tribunal. The administrative tribunal does not supply a reasoned judgment and argues that it is acting within the guidelines of the enabling Act, which specifies that a reasoned judgment is unnecessary.

- Are you entitled to demand from the administrative tribunal that reasons for the decision be supplied?
- What kinds of reasons could you give?

- What is the advantage to you as a member of the public and to the public administration of the provision of such reasons?

6.8 Is control of administrative adjudication a solution?

As is the case with delegated legislative powers, the authority to make quasi-judicial decisions in the hands of officials and institutions is a potentially dangerous situation which ought to be controlled in order to protect the rights and interests of the individual. In South Africa, there is no special institution or unified system for control purposes such as the *Conseil d'État*(administrative court) in France. Control is exercised by various state officials, state institutions and statutory directives. The system of control in South Africa may be divided into the following four categories, namely control measures contained in the system of administrative adjudication itself, parliamentary control, judicial control, and control through public opinion.

6.8.1 Control measures contained in the system of administrative adjudication itself

In general, the legislation which authorises officials and institutions to exercise administrative adjudication also describes the procedure to be followed when exercising delegated administrative authority. We will explain later that these procedural requirements can only serve as a means of control if someone enforces compliance with them. The most obvious, if not the only, control measure included in the South African system of administrative adjudication is the right to appeal.

6.8.2 Parliamentary controls

If it is accepted that the activities of the public institution are guided by the basic principle of legislative directive, it follows that all the powers granted to departments and other public institutions were created by the legislative institutions. The legislative institutions at the national, provincial and local authority levels (see sections 44, 104 and 156 of the 1996 Constitution) have the final word (provided that this is not irreconcilable with the Constitution) in regard to the organisation of the executive authority, the distribution of duties among the various officials, and the procedure they must follow. It is therefore the responsibility of the legislative institution to implement the necessary control.

Parliamentary control over administrative adjudication can be divided into three categories, namely the passing of Bills, the allocation of funds, and the supervision of the execution of directives by the public service by means of question time in Parliament and legislative institutions at every other level of government.

- *Adoption of Bills*. The overall policy is usually embodied in Acts, but often considerable leeway is left for the executive institutions to impose their own standards on any situation or case that could arise. If, however, this authority is misused by the executive institutions, the legislature may withdraw the authority by legislation – that is the Act can be repealed or amended. Furthermore, the legislative institution also has the right to make special provision in regard to the way in which the delegated judicial authority of the executive institutions must be exercised.
- *Allocation of funds.* All funds used by the executive institutions must first be voted by the legislative institution. Consequently, the legislative institution exerts control over the expenditure of the executive institutions through agents such as the Auditor-General, the Joint Standing Committee on Public Accounts, and the Public Protector. This method of control, however, is not particularly effective in so far as the performance of judicial functions by the executive officials is concerned.
- *Question time in parliament.* The cabinet serves as a link between parliament and the executive institutions. Parliamentary control over administrative activities is therefore exercised by way of questions addressed to ministers or through criticism of government policy. Since the cabinet is directly responsible for all the activities of the state departments, parliament can hold the cabinet accountable for all these activities. For example, in terms of the 1996 Constitution, the National Assembly can pass a motion of no confidence in the cabinet by way of majority vote, which would mean that the president would have to reconstitute the cabinet (section 102(1)). While this method of control hangs over ministers' heads like a sword, it is still indirect and accordingly not so effective in respect of the performance of administrative adjudication by officials.

6.8.3 *Judicial control*

Thus far in South Africa not a great deal of effort has been devoted to introducing a coordinated and scientific system of administrative justice. Accordingly, control over the performance of judicial functions by executive institutions also leaves much to be desired. The emphasis is still mainly on the courts' powers of review. However, these powers are insignificant, since the real merit of a case must necessarily be disregarded and the technical requirements are all that can be investigated. Fortunately, the possibility of the review powers of the courts being excluded, for example by a provision that ''the decision of the Director-General or Board is final'', is now something of the past, in view of the adoption of the provision relating to administrative justice in the Constitution, which prohibits an exclusion clause.

Determining to what extent and in what circumstances administrative decisions should be subject to judicial review, is extremely difficult. The judicial review of all administrative decisions is one way to achieve full control. However, this is impractical, since it would swamp the process of law, cause severe delay in the

process of administration and lead to endless friction. The alternative is to withdraw the ordinary courts from the field of administrative justice and leave it to an administrative court such as the *Conseil d'État* in France.

Finally, it is important to distinguish between the terms ''appeal'' and ''review''. In cases where legislation makes provision for **appeal** against the decision of an official or administrative tribunal, the intention is that the court may reconsider the decision by hearing the case in question again. The decision of the tribunal may be set aside by the court of appeal and replaced by a finding of the court itself. For example, section 25 of the Air Services Licensing Act 115 of 1990 provides that any person who feels aggrieved by the refusal of the Air Service Licensing Council or the Commissioner for Civil Aviation may in the prescribed manner appeal to the provincial or local division of the High Court. **Review**, on the other hand, means that the court may declare null and void a decision by an official or tribunal, but it differs from appeal in that the court does not hear the case again and replace the initial decision with the court's own decision. The case is referred back to the original tribunal for reconsideration and adjustment of the decision. For example, where an official or tribunal has failed to exercise a prescribed authority or to follow the prescribed procedures in reaching a decision, the court can declare the decision null and void and refer the case back to the relevant official or tribunal.

Public opinion and the press 6.8.4

While the effect of public opinion is not always as concretely visible as other mechanisms of control, we cannot overlook the role of public opinion and the press in the exercise of control over administrative adjudication. Since the greater percentage of activities in the government sector are public activities (that is why we speak of **public** administration and not **secret** administration), many ''unlawful'' acts by public officials find their way into the press. The general public can assess the ''unjust'' action and demand possible action from the responsible minister. Take the examples we have seen in newspapers of the refusal of visas to individuals from abroad or the destruction of agricultural products by agricultural product control boards to maximise prices. This method of control – Pericles called it the ''guarantee of freedom through the vigilance of the individual'' – is by no means effective post facto control, but it does serve as a factor in promoting greater awareness and caution in the practice of administrative adjudication.

R . E . V . I . E . W 6.9

The problem of administrative adjudication is an integral part of the far broader socioeconomic and political problem of the real extent and nature of the role of authorities in the present-day state. By and large, it is the increase in government activities in all dimensions of society that has led to a system of administrative adjudication. The complexity of any system of administrative justice is therefore

directly proportional to the extent of government activities in society. More government services therefore increase the possibility of violation of individuals' rights and interests. But the discretionary authority granted to officials in executive institutions with the aim of reaching settlement of disputes between the executive institutions and the public, are essential in the administrative state. The main reason for this is the need for the smooth functioning of widely differing public services. The primary issue appears to be the maintenance of a harmonious balance between the public interest on the one hand and private interests on the other. This is the foundation for the control of discretionary powers. This brings us to the next product of the administrative state – administrative discretion – which is the subject of the next study unit.

STUDY UNIT 7

Administrative discretion as a valid administrative act

Introduction 7.1

Present-day society is characterised by a public administration in which public officials are increasingly vested with wide-ranging delegated authority. It would, however, be inappropriate to transfer both specific functions and duties and the necessary authority without permitting the delegated official to make use of his/her discretion. For that reason, the exercise of discretion by public officials, as a result of the existence of phenomena like the administrative state and its consequences, has become a significant facet of the exercise of government authority. Administrative discretion is therefore applicable to both the process of delegated legislation and that of administrative adjudication. From this it follows that the increasing extent of transfer of legislative and judicial authority to the executive institutions necessarily leads to increasing administrative discretion. Through the allocation of these powers to officials, the sphere of authority of the public administration is extended to such an extent that virtually every facet of the citizen's life can be intimately affected by the decisions and acts of public officials. But the exercise of discretion by officials also takes place in their executive and service-delivery capacities. The criticism levelled at the extended authority of officials is that it may enable the thoughtless official to violate indiscriminately the rights and freedoms of the individual. For that reason, it is imperative that each official appreciates his/her responsibility in this regard. The purpose of this study unit is therefore to create, among officials, a specific awareness of the nature, extent and responsibility of these powers. In addition to this, we should also be aware that administrative discretion, if exercised in a responsible and rational way as a valid administrative act, will not threaten individual rights and freedoms, but may, as a mechanism, serve to promote the general welfare.

What is administrative decision-making? 7.2

Administrative discretion involves the taking of a decision. Decision-making, therefore, is the instrument whereby the administrative discretion is exercised. But what does administrative decision-making involve? It is generally accepted that decision-making is an important matter and a central activity of public administration. Indeed, decisions are the pivot around which the actions and conduct of the public administration revolve. Decision-making is regarded as a process whereby a choice is made between alternative ways of acting in order to pursue a specific goal. Besides, decision-making is multifunctional, in that it

includes aspects of executive, legislative and judicial functions. Decision-making within these broad areas of administrative activity may vary considerably in nature and extent, from the routine, almost programmed implementation of a rule or regulation in an individual matter, to the formulation of a totally new policy or the design of a new programme. The municipal official who considers an application from a homeowner to build a room onto his/her house is engaged in administrative decision-making. This is also true of the chief director of the Department of Health who has been instructed by the legislative authority to launch a coordinated government campaign to counteract actively the disturbing spread of HIV/AIDS among the population. Therefore, whereas some decisions have little direct impact on the daily lives of citizens, others can have literally life-and-death implications for a large section of the population. Administrative decisions also vary in other important respects such as the financial cost involved, the degree of uncertainty that prevails as to the outcome or result of the decision, and the moral and ethical implications of the alternative decision-making options. The quality of each decision can be evaluated in terms of criteria such as its timeliness, the degree to which it yields the required results, and the degree to which it complies with the standards of administrative justice.

7.3 *What is administrative discretion?*

It is widely recognised that discretionary power is essential for efficient and effective public administration. The authority is ordinarily granted in such a way that, by applying his/her own judgement, the official is able to take a meaningful decision. This does not imply that the official has a free discretion in all matters, but that the discretion is exercised within the bounds determined by legislation, regulations or delegation. The discretion of public officials is sometimes specifically granted by a specific Act or regulation which specifies ''the Director-General may, at his/her discretion ...''. More often, the discretion is granted by a less direct, but still clear, statutory provision which authorises the discretionary authority. This is therefore a qualified discretion for which the official has to accept responsibility. The licensing official who grants a licence to an applicant or the commissioner who grants permission for a farmer to graze his/her cattle on state land, is exercising a discretion. Both officials have to make a judgement on the grounds of the available evidence and assessed with reference to the statutory requirements. The licensing official takes a quasi-judicial decision and the commissioner an administrative decision, but both involve exercising a discretion..

7.4 *How is administrative discretion exercised?*

Regulations that supplement laws are usually drafted in such a way as not to grant an exclusive discretion to the official. However, where it would be very difficult for the regulation to specify what must be complied with, the creation of a discretionary authority is permissible. The regulation must then contain the criteria required for the exercise of the discretion, and these also serve as a guideline for the official and the affected members of the public.

The public official who exercises discretionary powers in the course of administrative decision-making has to take the public interest, government policy and administrative effectiveness into account. Such an official is usually vested with specific discretionary authority as a result of his/her specific qualifications, special experience and first-hand knowledge of the relevant administrative matters. The official should be equipped with the necessary statutory authority, should follow the correct procedure, and should take into account the relevant and admissible factors, which implies that the irrelevant factors are ignored. For example, a town planning committee has the discretion to decide whether a proposed town planning scheme is accepted or rejected, and, in exercising this discretion, all relevant factors and matters are taken into account. No administrative action is performed involuntarily or automatically by public servants. It is therefore important that, in the exercise of administrative discretion, the necessary attention is paid to the matter in question. The result of the exercise of the discretion ought to be reasonable and serve the authorised purpose. In brief, the discretion ought to be exercised in such a way as to comply with the requirements of a valid administrative act.

Kinds of administrative discretion 7.5

Administrative discretion can be classified into two main categories, namely prescribed or fettered discretion and free or unfettered discretion.

- **Prescribed or fettered discretion.** Fettered discretion is indeed restrained discretion and should be exercised within the bounds of the prescribed legislation. In the case of fettered discretion, specific guidelines for decision-making are prescribed. The possibilities of choice for the decisionmaker are limited by legislation or the provisions of the delegated legislation that spell out the conditions that have to be complied with before the discretion can be validly exercised. If, therefore, an application for a specific licence complies with all the requirements of the relevant regulation that prescribes the procedure, the official is obliged to grant the licence. Where one of the conditions has not been complied with, the licence may be refused. If the official furnishes sufficient reasons as to why the licence is not granted, the decision cannot be questioned.
- **Free or unfettered discretion.** Free discretion is not an absolutely statutorily free discretion, but is in fact a discretion whereby the enabling legislation permits considerable freedom of choice, without the exercise of such freedom escaping the requirements of the legislation. Free discretion comprises those kinds of decision which the official must take in the absence of specific prescribed criteria, provisos or guidelines. It is typically to be found where a regulation contains the following words: ''... in the discretion of the ...'' or ''... in the judgement of ...''. One could argue that, in fact, there is no genuinely free discretion and that there must be some form of criteria that the discretion must comply with. According to this argument, the enabling legislation never allows free discretion, because really free discretion would imply that the official has the authority to take a decision on his/her own that is not subject to any limitation whatsoever. On the contrary, the enabling legislation supplies exact guidelines on how the decision should be made.

ACTIVITY

A regulation (ie delegated legislation) provides as follows:

''A licence is issued to any person who has –

(a) completed the prescribed application form;

(b) submitted the required plans;

(c) obtained the approval of the city council; and

(d) paid the necessary fees.''

In this instance:

- Does the official who must decide whether to grant the licence have an unfettered or fettered discretion? Give reasons for your answer.
- What must the official bear in mind in terms of the constitutional provision relating to administrative justice if he/she should decide to turn down the application because one of the directives has not been complied with?

7.6 *Use and abuse of administrative discretion*

A lack of meaningful discretionary power usually results in unfair/unlawful decisions, particularly when officials have to apply general rules to specific situations. Discretionary powers are essential in order to apply/facilitate decisions needed for the unique demands made by differing circumstances. On the other hand, too wide a discretionary power could lead to the violation and abuse of the important principle of justice through the unequal or inconsistent treatment of matters which are in essence the same as far as their factual basis is concerned. The crux of the problem is to find a suitable balance between the need for uniform treatment and the need for official discretion in order to make special adjustments possible for unique and unforeseen circumstances. Unfair decisions are more probable when the balance shifts in one of the two directions.

There is sometimes a tendency to associate administrative discretion with unpredictability, arbitrary action, uncertainty and inconsistency. In particular, it is the inconsistent exercise of administrative authority that conflicts with the concept of justice because the individual is as a result unable to guide his/her actions in accordance with predictable and decisive administrative action. It is

expected that the decisionmaker will act reasonably and not in an unreasonable way that could be classified as mala fide (ie with bad intentions) or where the official has not duly applied his/her mind to the matter. The official should be specifically concerned that his/her act not be the cause of unreasonable and unfair consequences.

For administrative discretion to be a valid administrative action, the official who exercises the discretion or carries out the action must act legitimately or *intra vires*. An official will act *intra vires* if he/she acts within the bounds of his/her authority. Thus, for instance, the enabling Act may prescribe that a licensing officer should have certain qualifications (eg be a magistrate) to approve applications for licences. Say, now, a magistrate issues a licence according to the written and formal requirements as set out in the legislation, but acts with false intentions by asking for commission for his/her work. Does such conduct meet the requirements as set out in the administrative justice provisions in the Constitution? The written and formal requirements of the enabling legislation are in fact fulfilled, but it is clear that the magistrate has not behaved fairly and that his/her false intentions (mala fides) have tarnished the objectives and aim of the limited administrative discretion (ie to serve the public interest and to ensure that licences are awarded in a lawful/valid and procedurally fair manner). In short, what it amounts to is that the exercise of administrative discretion must meet all the requirements for administrative justice and not only the prescriptions of the enabling Act.

In particular, it is the right to reasonable administrative action within the context of administrative justice that is directly linked with the exercise of an administrative discretion. Where an official thus has a discretion to choose between two or more options, it may be asked whether the exercise of the discretion was reasonable or otherwise.

7.7 What must an administrative discretion comply with to be regarded as a valid administrative act?

At the outset, it must be clearly stated that an administrative discretion that is exercised is merely another administrative act or action. But what must the act or discretion comply with to be regarded as just or lawful? A just or lawful administrative discretion must be in accordance with the Constitution, the enabling legislation, the PAJA, and the rules of common law. Justice or lawfulness is therefore an all-embracing term which incorporates all the requirements for a valid administrative act.

The 1996 Constitution (section 33) provides that administrative action must be just or lawful. Administrative action must therefore comply with the **Constitution**. This implies that the right to administrative justice and all other rights mentioned in the Bill of Rights, as well as all other relevant constitutional provisions, must be respected, protected and upheld by the public administration. The question now asked is to what extent does the constitutional provision relating to administrative justice have legal force in relation to administrative discretion and by implication, administrative decision-making? In brief, all

decisions taken after the Constitution came into effect are subject to it, but not the decisions taken before then. The aspect of locus standi (ie who is able to take up a case of administrative justice) is also at issue. Section 38 of the 1996 Constitution radically liberalised this aspect, in that administrative justice is now made considerably more accessible for persons affected by administrative decisions. For example, a person may act in his/her own interest, on behalf of someone else, a group or class of persons, or in the public interest to bring a case before court.

As you already know, the **Promotion of Administrative Justice Act** 3 of 2000 (PAJA) was promulgated by parliament as proposed in section 33(3) of the 1996 Constitution. Act 3 of 2000 forms a link between the Constitution, as the most important Act on administrative justice, and the enabling legislation. The Promotion of Administrative Justice Act is mainly aimed at implementing the rights as contained in sections 33(1) and 33(2) of the 1996 Constitution in order to make provision for the review of administrative actions and to promote an effective public administration. In terms of proclamation R73 of 2000, this Act came into operation on 30 November 2000, with the exclusion of sections 4 and 10 thereof.

All administrative authority and powers are derived from legislation. Legislation which grants administrative authority is known as **enabling legislation**. The enabling legislation defines the extent and content of the administrative authority and may even prescribe specific procedures to be followed. Therefore, if the official ignores the procedural requirements, he/she has acted outside the framework of the enabling legislation (ie action *ultra vires*) and the action is invalid.

The Bill of Rights in the Constitution does not deny the existence of any other rights or freedoms that had existed in terms of the **common law**, indigenous law or legislation, provided that they can be reconciled with the Bill. This means that the rich source of principles of administrative law that has developed over the years, will continue to apply. Because the content of these common law requirements is comprehensive and technically complex, an effort will not be made to deal with it here. You are welcome to study this yourself in any South African textbook on administrative law.

7.8 R . E . V . I . E . W

This study unit deals with an important product of the administrative state, namely administrative discretion. After working through the study unit, you should now be in a position to appreciate that many of the decisions which you as an official take every day are in fact of a discretionary nature. A realisation as to how easily these powers could be abused, makes it important to examine next those institutions which could contribute to the maintenance of the principles of administrative justice.

Theme 2: Foundations of the separation of powers in the state

(1) Define the following phenomena:

- *trias politica*
- administrative state
- delegated legislation
- administrative adjudication
- administrative discretion

(2) Write brief notes on the *trias politica*.

(3) Provide a brief historical survey of the origin of the theory of the *trias politica*.

(4) ''The exercise of legislative, executive and judicial functions exclusively by the corresponding institutions is an impractical ideal.'' Analyse this statement with specific reference to the governmental structure in South Africa.

(5) Identify and define the factors which gave rise to the establishment and continuation of the phenomenon of the administrative state.

(6) Write brief notes on the problems created by the existence of the administrative state and on the possibility that the phenomenon will continue to exist.

(7) Evaluate the measures necessary to limit the negative consequences and problems of the administrative state.

(8) Explain why delegated legislation is essential.

(9) ''The biggest disadvantage of delegated legislation is that executive institutions act as subordinate legislator subject to specific control measures of questionable standards of efficiency.'' Analyse this statement with specific reference to the various control measures in respect of delegated legislation.

(10) Evaluate the nature and extent of administrative adjudication with reference to practical examples.

(11) ''Administrative adjudication is largely administered by heterogeneous statutory institutions which do not form part of the judicial authority and which sometimes act virtually independently of the ordinary government departments.'' Analyse this statement with specific reference to the various kinds of administrative tribunal, and furnish examples.

(12) Explain what a quasi-judicial decision is with reference to the requirements that such a decision must comply with.

(13) Evaluate the value of administrative adjudication to society in terms of its advantages and disadvantages.

(14) Assess the measures to control administrative adjudication in terms of the possibility that the abuse of such authority may violate individual rights and interests.

(15) Give a critical analysis of administrative discretion as a valid administrative act.

THEME

3

State institutions supporting administrative justice

OVERVIEW

Key questions

Key concepts

STUDY UNIT 8

What is an ombudsman?

The South African Public Protector

THEME

3

State institutions supporting administrative justice

OVERVIEW

In terms of the 1996 Constitution, there are a number of state institutions that support constitutional democracy (see chapter 9). The list mentioned includes the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Most of these institutions could also play a supporting role in relation to the promotion of administrative justice in public administration. Owing to the limited scope of this study guide, we only concentrate on the institution which, in our opinion, is able to make the biggest contribution to the promotion of administrative justice, namely the Public Protector. The South African Public Protector is an institution similar to the internationally recognised institution of ombudsman. Theme 3, therefore, includes, first, an analysis of the ombudsman as encountered internationally, followed by an analysis of the South African version, namely the Public Protector.

KEY QUESTIONS

A grasp of theme 3 requires answers to the following questions:

- What are the general characteristics of an ombudsman?
- What influence does an ombudsman have on public administration?
- How successful is an ombudsman in the task of supporting and promoting administrative justice?
- What are the history and origins of the institution of ombudsman in South Africa?
- What is the nature and extent of the functions and powers of the Public Protector?
- To what extent does the Public Protector comply with the general requirements of an ombudsman?

KEY CONCEPTS

The following concepts are important in the study of theme 3:

- authority to recommend
- administrative reform
- humanisation of public administration
- indirect control
- jurisdiction
- corrective control
- qualitative control
- guiding control
- investigative powers
- ombudsman
- Public Protector
- accessibility
- reporting authority
- maladministration

STUDY UNIT 8

What is an ombudsman?

Introduction 8.1

The purpose of this study unit is to acquaint you with an independent and impartial institution which can make a special contribution to supporting and upholding the principles of administrative justice in public administration. It is an institution which has achieved international recognition and acceptance for the contribution it is making to the combating of maladministration and corruption. It is widely known as the ombudsman.

Although the ombudsman system is adapted from state to state to make provision for local conditions in every state, there is a reasonable degree of international consensus about what an ombudsman is and what the internationally accepted characteristics of a classic ombudsman institution are. In this study unit, the institution of ombudsman as it is viewed internationally, and not as it is in South Africa, is outlined. In South Africa, the institution of the ombudsman is known as the Public Protector. The South African situation is the subject of the next study unit.

In order to acquire a better grasp of the ombudsman system, it is important, after considering a definition of the ombudsman, also to analyse the general characteristics of the classic ombudsman. Thereafter, consideration is also given to the purpose of the ombudsman and the impact of the institution on public administration. In order to be realistic about the contribution of the ombudsman, the success of this institution is briefly examined.

Definition 8.2

An authoritative and internationally accepted definition of the office of ombudsman was adopted by the International Bar Association in 1974. In terms of the definition, the ombudsman is an office established by way of the constitution or a special Act of the legislative authority, and the office is entrusted to an independent, impartial and highly respected functionary who is accountable to the legislative authority and receives complaints from aggrieved persons against public institutions and public officials or launches an investigation on his/her own initiative, recommends corrective action and issues reports (Frank 1978:100).

ACTIVITY

- Have you ever heard of something like an ombudsman?
- Ask your family, friends and colleagues whether they were aware of anything of the kind.
- If indeed you were aware of it, did you have any idea of the purpose of such an institution or the value which access to such an institution could have in your life?

8.3 *General characteristics of an ombudsman*

If you were to analyse the definition of the ombudsman, specific characteristics of such an institution could be ascertained. These characteristics are common to most of the systems and are internationally recognised as criteria, but there are a few exceptions. The characteristics are the following:

(1) The ombudsman is usually appointed by the **legislative authority** of a state. If the appointment is made by the executive authority, it must take place with the confirmation of the majority (preferably a two-thirds majority) of the legislative authority. An important aspect here is that the office bearer ought to be appointed with the consent of all the parties in the legislative authority, which will ensure that all parties have confidence in that person.

(2) The ombudsman usually receives complaints about **maladministration** in public institutions. The jurisdiction of the various systems usually varies from state to state and is usually a product of the history and origin of an ombudsman in a particular country. The jurisdiction is usually wide enough to investigate any action or failure to act on the part of any public institution or public official. It also grants authority to investigate the justice, correctness of findings and motivations, adequacy of reasons, effectiveness and correctness of procedures in any action or failure to act of a public institution or official.

(3) The ombudsman is usually **highly accessible** to prospective complainants. (The British and French systems are an exception, in that complaints cannot be submitted directly to the ombudsman.) The accessibility of the ombudsman, which implies that the institution must be readily available to members of the public, is usually directly proportionate to the success that the institution can expect to achieve. The accessibility of an ombudsman institution cannot be better illustrated than by the wording of the

signboard at the entrance to the offices of the Danish Ombudsman in Copenhagen, which reads: *Folketingets Ombudsmand: doren er aaben*. The words *doren er aaben* mean that the door is open, which has both a literal and a figurative meaning in terms of the accessibility of the ombudsman.

(4) The ombudsman can make use of both **formal** and **informal** methods of investigation. As a rule, the ombudsman makes more use of informal methods. The informal methods of investigation make it possible for the ombudsman to deal with a complaint quickly and cheaply (in contrast to long and expensive court procedures). The ombudsman usually has the discretionary authority to decide whether or not to investigate a complaint, and to decide what criticism to make and publish (or not to make and publish). Where the ombudsman intends to level criticism, the public institution or official will be informed beforehand of the criticism so that a defence can be prepared to be published together with the criticism.

(5) The ombudsman usually has **free access** to information which is needed for an investigation. This implies access to any public documents that may be relevant to a specific investigation. It is standard practice that no state department would be able to refuse the ombudsman access to those documents or files. If the latter were to be the situation, this would undermine the purpose and function of the institution of ombudsman. To be able to finalise investigations speedily (without using coercive measures), the ombudsman is dependent upon the goodwill and cooperation of public institutions to gain access to documents or obtain answers to questions.

(6) The ombudsman occupies a highly respected and **high-status office**. Because the recommendations of the ombudsman are not enforceable, it is important that the office bearer be regarded with the necessary respect. It has happened before that a specific department does not necessarily agree with the findings of the ombudsman, but, out of respect for the office, nevertheless decides to implement his/her recommendations. Moreover, the public is more willing to accept the recommendation of a high-status office, even though it may not be in their favour. The same consideration applies to requests by the ombudsman for information from the institutions being investigated.

(7) The ombudsman is an **autonomous** and **independent** institution. Thus the ombudsman is independent of any other institutions, except in so far as his/her accountability to the legislative authority is concerned. Independence is usually ensured by a long term of office (preferably not less than five years), with protection against discharge, except in the case of misbehaviour, and then only on the recommendation of the majority (preferably two-thirds) of the legislative authority. In most states, too, the appointment is only for one nonrenewable term, which is also conducive to independence and impartiality. It is usually clearly stated in legislation that the ombudsman may not be influenced. The budget of the ombudsman is usually also allocated in an impartial way by the legislative authority – usually as part of the budget of the Speaker.

(8) The ombudsman normally issues detailed **reports** on his/her investigations and findings. The reports are submitted to the legislative authority for study by a special committee in the legislative authority. The latter committee is usually a multiparty committee which itself is able to call in department

heads of departments that are tardy in implementing recommendations of the ombudsman, to ask for explanations. Reports are usually drawn up so that they can be illuminating for members of the public and so that public officials, where appropriate, can even use them as a training guide.

(9) The ombudsman cannot change administrative decisions – he/she can only make **recommendations** for the improvement and rectification of administrative practices. However, there are ways in which the ombudsman can ensure that his/her recommendations are indeed complied with. Usually, persuasion will come into play, in that a solution is sought in conjunction with the institution in question. Publicity for the recommendations can also be used as a sanction to ensure their acceptance. As already mentioned, the prestige of the office in society is also useful in ensuring acceptance of recommendations.

(10) Usually, the ombudsman can launch an inquiry on his/her **own initiative** without receiving a complaint in the prescribed way. (Again, Britain and France are exceptions to this rule.) This means that, should the ombudsman become aware of irregularities, for example by way of press reports of allegations of corruption, an investigation can be launched on his/her own initiative without waiting for an official complaint to be lodged. In this way, the air can be cleared in regard to a matter which often elicits considerable public reaction. This is an important power and makes the ombudsman proactive in his/her approach, rather than merely reactive like the courts.

8.4 *Purpose of the institution of ombudsman*

The purpose of the institution of ombudsman is twofold. **Firstly**, it is to receive, investigate and act upon complaints from the public. The **second** purpose is to improve public administration. In the light of this, it would be a mistake to think of the ombudsman merely in terms of the remedying of individual complaints. Equally important is the duty of the ombudsman to encourage the improvement of systems in public administration.

ACTIVITY

Now answer the following questions:

- You are now aware of the twofold purpose of the institution of ombudsman. The immediate question, in terms of this twofold purpose of the ombudsman, is where the emphasis should fall. Should it be on investigating specific complaints or matters of a broader nature affecting society as a whole?

- What consequences (for the ombudsman and public administration) may it have, in your view, if a ombudsman were to decide to investigate only individual complaints?

8.5 The influence of the ombudsman on public administration

The purpose of the ombudsman ought now to be clear. In pursuing that aim, the real task of the ombudsman is the prevention of injustice and reducing maladministration. If the ombudsman succeeds in that goal, this will necessarily have an impact on public administration. The influence of the ombudsman is usually manifested in the following facets of public administration: administrative reform, determining of policy, procedures, control, information and communication, efficiency and effectiveness, humanisation of public administration, and administrative justice.

(1) **Administrative reform.** It is the duty of an ombudsman to look further than individual errors and the mere settlement of a complaint with a view to the adjustment and changing of procedures, practices and regulations which are the cause of repeated errors and injustices. This is an important duty and can come second only to the handling of individual complaints. A single complaint may be the symptom of a defective administrative practice or procedure, but successive complaints in one area will certainly suggest a pattern of malfunctioning in a practice, procedure, regulation or policy. The duty of the ombudsman in such a case would be to investigate the entire system in order to trace the origin of repeated complaints, rectify it and in so doing ensure that the same complaints will not be repeated in future as the result of a systemic error. In this way, the ombudsman makes a significant contribution to administrative reform in public administration.

A C T I V I T Y

''The fact that an ombudsman is the focal point for administrative complaints presents the office with the unique opportunity to identify these patterns of administrative inconsistency or persistent problem areas which indicate that the cause of the problem is systemic'' (Brynard 1993:179).

Reflect on the above quotation and then answer the following questions:

- What do you think is meant by a systems approach to administrative fairness as far as the investigations of the ombudsman are concerned?
- What possible benefits to public administration would be entailed by such a systems approach to investigations by the ombudsman?

(2) **Policy.** The ombudsman can make a contribution to policy in relation to its purpose and to the method of determining policy. As far as the purpose is concerned, it is important to appreciate that it is not the task of the ombudsman to instruct that the policy which gave rise to a specific complaint be reformulated. He/she can only make recommendations. In the recommendations, an indication may be given of what, according to him/her, ought to be the correct standards for the action of the government and what ought to be done in specific cases. In this way, a contribution is made to policy formulation. The contribution in regard to method comes about as follows: The interpretation of legislative policy to adapt to individual circumstances gives rise to the development of administrative policy. The determining of administrative policy is therefore a process which makes essential the exercise of discretion by public officials, and this creates the potential for arbitrary action. The latter is of importance for, and may justify, action by the ombudsman.

(3) **Procedures.** One important aspect of the task of the ombudsman is to act as catalyst for change in the procedures of a public institution which, owing to the investigation of a complaint, are found to be inadequate. A build-up of justified complaints about a specific matter is often indicative of a defect in the system. A defect of this nature necessitates the taking of a decision, which goes further than the relevant complaints, aimed at improving the system. The ombudsman should see it as his/her task not only to enquire about the action complained of, but also to investigate the administrative procedures that made that action possible and, where necessary, to recommend improvement of the procedures in order to prevent a repetition of the action in question. Therefore, the approach of the ombudsman in this instance ought to be one of prevention rather than cure. Realistically speaking, a recommendation by the ombudsman that a procedure be rectified which is unnecessarily wasteful, slow, ineffective or unreliable, is not a monumental contribution to a better life. Thus each amendment of a procedure may seem insignificant in the context of the total system of practices and procedures in a public institution, but it may nevertheless have a significant cumulative effect in the long term.

(4) **Control.** The fact that the ombudsman acts on behalf of the legislative authority or parliament, is an indication that the idea is to reinforce the control which traditionally is exercised by parliament and by implication the public (theoretically speaking). As such, the ombudsman represents an apolitical, independent check on the administrative actions of public institutions. A number of forms of control will now be examined.

The action of the ombudsman may be regarded as **corrective control** when he/she attempts to improve deficiencies/errors of public institutions by recommending changes in procedure, rules or regulations. His/her actions may, on the other hand, be regarded as **directive control** when public institutions are encouraged to effect alterations aimed at preventing repetition of an error or irregularity. The purpose of the ombudsman of promoting administrative fairness may be regarded as a matter of **qualitative control** in public institutions, because it compels the taking of the right decisions and prompting the correct action. In addition, the mere fact that the office of ombudsman exists exerts an indirect effect **(indirect control)** in the form of a psychological fear among officials of committing an offence in the course of their duties. The argument is that the mere existence of the office, and the fact that each official realises that his/her conduct in the institution may be the subject of an investigation by the ombudsman if incorrect action is taken, may serve as a deterrent which will keep public officials on their toes.

ACTIVITY

- What is your opinion of the value of the existence of the ombudsman as a psychological deterrent?
- What role is played in the success of the ombudsman as an indirect control mechanism by public knowledge of the existence of such an office and publicity in regard to the functions of the office?

(5) **Information and communication.** Communication plays a vital role in the administrative process. It is evident that defective communication is a recurring problem which the public is faced with time and again in its interaction with public institutions. Some public officials take refuge in technical jargon, safe legalistic terminology, ambiguous expressions and a complicated way of speaking. The task of the ombudsman in such circumstances is to remind public institutions that it is important, by devoting more attention to their clients, to ensure that messages are understood by those at the receiving end. The ombudsman will also insist that public officials, where practicable, provide reasons for their decisions. Where clear and unambiguous reasons are supplied, the citizen is usually in a better position to accept administrative decisions. In his/her interaction with the public, the ombudsman will always be prepared to listen to any problem, try to assist where humanly possible or, at least, to offer advice, provide useful information or place a person on the right track. An important source of information is the annual report of the ombudsman. If worded

appropriately, the report can serve as an important training guide, in that it contains relevant information and guidelines which can help to prevent public officials from repeating the same mistake in the future.

(6) **Efficiency and effectiveness.**The ombudsman can be an instrument to promote efficiency and effectiveness in public administration, because it assists public institutions to improve their performance. The latter is the result of the ombudsman's efforts to see to it that complaints are not repeated. By means of the elimination of administrative deficiencies through the improvement of practices, procedures and regulations, the ombudsman can indeed assist public institutions to improve their own efficiency and effectiveness. While the latter improvements were originally supported by a desire on the part of the ombudsman to achieve administrative justice and fairness, he/she will also take other considerations, such as efficiency and effectiveness, into account. It is sometimes wrongly assumed that administrative fairness is only achieved at the expense of efficiency and effectiveness. However, it is a fact that administrative fairness is not only reconcilable with efficiency and effectiveness, but may even be an essential prerequisite for it.

(7) **Humanisation of public administration.** The main reason why public officials tend to be the focal point of public controversy, is the immediacy of their interactions with citizens and the effect this has on the lives of citizens. While a decision taken by a public official may not be of great importance to himself/herself, it may be of profound importance in the life of the citizen affected thereby. It is in this context that the ombudsman can play a role in humanising the citizen's relationship with the impersonal public institution by recognising the sensitivity of some of the citizens' problems. In this regard, the ombudsman sees it as his/her duty to encourage the public administration to become more sensitive to individual fairness.

The ombudsman is in a unique position to appreciate that well-founded complaints and justified grievances are very often the result of an attitude on the part of public officials who are inclined to overlook their true purpose as officials of the public (hence the name ''public officials''). As a result they show, in their dealings with the public, arrogance or a lack of consideration and sensitivity. When this happens, the ombudsman is ideally positioned to help such public officials to regain their sense of perspective and, in this way, restore tact and understanding to their handling of the public. The ombudsman sees it as his/her task to bring the public and the public officials closer to one another in an effort to resolve their apparent differences, rather than to keep them apart. It is only in such a situation that the one can learn appreciation and understanding of the other's position. Often, it is only a minor misunderstanding concerning some aspect of the law, procedures or advice which gives rise to the unhappiness. Quite often this can be dealt with by way of a simple, but helpful, explanation by the official, which satisfies the complainant and may dissipate any hostility that could have developed.

(8) **Administrative justice.** Administrative justice focuses attention on the increasing interaction between the individual and public administration. As such, administrative justice is a search for means to ensure justice for the citizen in his/her dealings with public institutions. The resolution of conflict and the reconciliation of the citizen and the public official are part of the search for administrative justice. The public rightly expect public institutions

to treat them not only lawfully, but also justly and fairly. Fairness therefore implies more than mere legal authority. Laws may seek broad achievement of objectives or define a specific target, while fairness in an individual situation demands justice. Unfairness includes things like oppressive conduct, arrogance, delays and unreasonableness by public officials. In his/her investigations, the ombudsman can make a definite contribution in this regard.

Success of the ombudsman 8.6

Assessing the success of an ombudsman is a difficult task. There are several criteria which an ombudsman should comply with in order to be successful. Firstly, complainants should lay a complaint directly with the offices of the ombudsman without first working through a member of parliament, as is the case in Britain and France. Secondly, the ombudsman must be widely known and easily accessible. Publicity for the existence and functions of the institution are therefore of the utmost importance. Thirdly, the jurisdiction of the ombudsman should be wide enough to include all kinds of administrative wrongdoing and all possible executive institutions. Fourthly, the ombudsman should have wide-ranging powers, except the authority to make enforceable recommendations. This implies authority to act on his/her own initiative, gain access to all relevant information and use specific sanctions in order to ensure implementation of recommendations. The fifth requirement is that the ombudsman must function totally independently and be protected against biased influence (Rowat 1985:183–185).

It ought already to be evident that the ombudsman has considerable potential for improving the public administration. It is also clear that one ought to be realistic in one's expectations of the powers of the office. At the outset, the maturity of the administrative system within which the ombudsman functions may play a role. In a reasonably sophisticated system, the proposed improvements of the ombudsman will not seem to be radical innovations in public administration. However, in the majority of states, the activities of the ombudsman will at least make the system of public administration fairer and more efficient.

The ombudsman can only be effective if expectations are reasonable and when the real limitations are recognised. The successes of the ombudsman may not seem particularly striking, but his/her substantive and psychological impact may be supplemented by the institution's subtle influence on public administration. It must be appreciated that the ombudsman is not an administrative panacea. It is therefore probable that those who are disillusioned by the successes of the ombudsman are those who expected too much. It is for this reason that the qualitative aspects of the impact of the ombudsman on public administration may be more important than the quantitative aspects.

ACTIVITY

"It is the task of the ombudsman to expose administrative corruption on a large scale and to bring about extensive changes in administrative practices in every sphere of public administration."

- Is the opinion expressed in the above quotation possible and feasible? Give reasons for your answer.

8.7 REVIEW

You now ought to have a clear picture of what the international perception of an ombudsman is in terms of the goal and characteristics of the institution, as well as of the potential impact it has on public administration. With reference to this knowledge, in the next study unit we shall analyse the South African version of an ombudsman.

STUDY UNIT 9

The South African Public Protector

Introduction 9.1

South Africa has an ombudsman institution in the form of the office of the Public Protector. The South African version of an ombudsman is now briefly analysed with reference to the history of how the office came into being in South Africa and the relevant provisions in the 1996 Constitution. The jurisdiction and other powers to act in the arsenal of the Public Protector are also briefly dealt with.

History of the institution of ombudsman in South Africa 9.2

The earliest existence of a similar institution is to be found in the office of the Independent Fiscal, established as far back as 1687 at the Cape of Good Hope by the Here XVII to keep a watchful eye over the activities of the colonial governors. The Heren XVII (also referred to as the Lords XVII) was the controlling board of the VOC (Vereenigde Oost-indische Compagnie) in Holland. As the name Independent Fiscal (Dutch: *Fiscaal Independent*) suggests, the institution was independent of the colonial government and directly accountable to the Here XVII. His job was to guard against corruption.

The next reference to a similar office occurs only in 1945, when a Mr H Russel (MP for Woodstock) proposed in the then House of Assembly that a ''*scrutiniser*'' or ''*scrutineer*'' be appointed with powers similar to those of an ombudsman. After consideration of the motion in various committees, it was decided that it would be impractical and the matter was taken no further.

A more well-considered effort to establish a full-fledged ombudsman took place on 23 March 1973 when Mr DD Baxter (MP for Constantia) moved a motion in the then House of Assembly that a judicial commission be appointed to determine the need for an ombudsman. While the government was sympathetic towards the motion, it felt that the system had not yet been in operation long enough in comparable countries such as Britain and New Zealand, for South Africa to benefit from their experience.

The establishment of the first ombudsman-type institution in South Africa only became a reality on 18 July 1979 when the office of Advocate-General was introduced in terms of the Advocate-General Act 118 of 1979. The office was established in the wake of the notorious Department of Information debacle

which involved misspending of public funds. The jurisdiction of the Advocate-General was a product of the spirit of the times, in that it emphasised the misspending of public funds. As a result of this limited jurisdiction, the office was classified as a special-purpose ombudsman.

On 22 November 1991, however, the situation was rectified in that a full-fledged ombudsman replaced the Advocate-General. The new office of Ombudsman was a purely classic ombudsman, in the international sense, with the authority to investigate any alleged maladministration. The Ombudsman was appointed and functioned in terms of the Ombudsman Act 118 of 1979, as amended.

With the introduction of a new and democratic constitutional dispensation in South Africa on 27 April 1994, provision was made for the replacement of the office of Ombudsman by that of Public Protector. The latter office was established in accordance with the provisions of Chapter 8 of the 1993 Constitution. Provision was made in the Public Protector Act 23 of 1994 for the operational requirements of the office. The first office bearer only took office 18 months later on 1 October 1995. The 1996 Constitution, which came into effect in February 1997, also makes provision for the continued existence of the Public Protector.

ACTIVITY

- Were you aware of the existence of the office of Public Protector?
- Have you or your colleagues in the institution where you work, had contact with the office of the Public Protector?
- If you had in fact been aware of the existence of the office, you are now requested, before reading further, first to write down what you think the object of the institution is in society.
- Who currently occupies the office of Public Protector in South Africa?

9.3 What is the Public Protector?

The Public Protector, or ombudsman, as this institution is known internationally, is a highly respected functionary who functions independently of the government or any political party, who is appointed by parliament in terms of the Constitution, and who receives complaints from aggrieved persons against government institutions or who acts on own initiative and has the authority to

- launch an investigation
- recommend corrective action
- issue reports

The 1996 Constitution provides in Chapter 9 for the establishment of several state institutions supporting constitutional democracy. The office of ublic rotector is identified as one of these institutions. The constitutional provisions relating to the office read as follo s

1 1 1 The follo ing state institutions strengthen constitutional democra cy in the epublic

a The ublic rotector.

b ...

These institutions are independent and sub ect only to the Constitution and the la and they must be impartial and must e ercise their po ers and perform their functions ithout fear favour or pre udice.

ther organs of state through legislative and other measures must assist and protect these institutions to ensure the independence impartiality dignity and effectiveness of these institutions.

o person or organ of state may interfere ith the functioning of these institutions.

These institutions are accountable to the ational ssembly and must report on their activities and the performance of their functions to the ssembly at least once a year.

1 1 The ublic rotector has the po er as regulated by national legislation

a to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or pre udice

b to report on that conduct and

c to ta e appropriate remedial action.

The ublic rotector has the additional po ers and functions prescribed by national legislation.

The ublic rotector may not investigate court decisions.

The ublic rotector must be accessible to all persons and communities.

ny report issued by the ublic rotector must be open to the public unless e ceptional circumstances to be determined in terms of national legislation re uire that a report be ept confidential.

Tenure

183. The Public Protector is appointed for a non-renewable period of seven years.''

''**Appointments**

193(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who –

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.

...

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, ...

(5) The National Assembly must recommend persons –

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote –

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector ...

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

Removal from office

194(1) The Public Protector ... may be removed from office only on –

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of –

(a) the Public Protector ... must be adopted with a supporting vote of at least two thirds of the members of the Assembly; ...

(3) The President –

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.''

What is the jurisdiction of the Public Protector? 9.5

The word ''jurisdiction'' refers to the legal authority of a person or institution to act. The scope of action of the Public Protector is accordingly determined by his/her jurisdiction. The jurisdiction of the Public Protector is spelled out in broad terms in the 1996 Constitution and in the 1994 Act.

The Constitution provides that the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any level or sphere of government that is improper or could result in any impropriety or prejudice (section 182(1)(a)). Court decisions are specifically excluded. Examples of improper conduct or improper prejudice, which probably fall within the bounds of the above constitutional jurisdiction, are mentioned in the 1994 Act and comprise the following:

- maladministration
- abuse of power
- unfair, capricious, impolite or other improper conduct
- inexcusable delay
- improper or unlawful enrichment
- receipt of any improper benefit
- unlawful or improper prejudice suffered by a complainant as a result of a decision by the authorities (section 6(4))

It is clear from the above definition that the jurisdiction is particularly wide and includes virtually any imaginable subject in the broad spectrum of public administration and state affairs. In addition, the Public Protector, like any ombudsman, has a considerable discretion in determining the extent of his/her authority within the broad context of his/her jurisdiction. The 1994 Act also gives the Public Protector the authority to investigate any matter falling within his/her jurisdiction on his/her own initiative *(mero motu)*(section 6(4)–(5)). This authority to investigate a matter *mero motu*, without the bringing of a formal charge, represents one of the most positive characteristics of the system.

What are the investigative powers of the Public Protector? 9.6

In terms of the 1994 Act, the procedure followed in holding an investigation is determined by the Public Protector with reference to the circumstances of each case (section 7(1)). It is clear that the Public Protector prefers an informal investigative method, because it has the advantage of investigations conducted on a basis that may be described as rapid, smooth and nonadversarial. The Public Protector has free access to information required for an investigation (section 7(4)).

9.7 What powers of recommendation does the Public Protector have?

The 1996 Constitution provides that the Public Protector has the authority to investigate any improper or prejudicial conduct in the public administration and to recommend appropriate corrective steps (section 182(1)(a)&(c)). The Public Protector regards this institution as a last resort for complaints of improper prejudice by the authorities. This implies that the complainant first has to obtain a final reaction from the relevant institution before the Public Protector is approached.

A C T I V I T Y

You have now had a brief survey of the Public Protector and have read the provisions relating to the Public Protector in the 1996 Constitution. Study the previous study unit again, and then answer the following questions.

- To what extent does the Public Protector comply with each of the general characteristics of an ombudsman as defined in the previous study unit?
- Would you regard the Public Protector as a full-fledged ombudsman?

9.8 R . E . V . I . E . W

The study unit provided you with a brief introduction to the South African Public Protector. It ought to be clear to you that the institution has the necessary authority to make a meaningful contribution to administrative justice in public administration. However, be alert to have realistic expectations of the real contribution of the office to public administration.

SELF-EVALUATION

Theme 3: State institutions supporting administrative justice

(1) Furnish a definition of the ombudsman.

(2) Explain the twofold purpose of the institution of ombudsman.

(3) Provide an analysis of the basic characteristics of an ombudsman.

(4) Evaluate the influence of the ombudsman on public administration.

(5) ''It is the task of the ombudsman to expose administrative corruption on a large scale and to effect extensive changes to administrative practices in every sphere of public administration.'' Analyse this statement with specific reference to the degree to which an ombudsman can be successful in the task entrusted to him/her.

(6) Provide an historical survey of the origin and history of the institution of ombudsman in South Africa.

(7) Explain what the Public Protector is.

(8) Describe the powers of the Public Protector in terms of his/her jurisdiction, investigations and recommendations.

(9) Using the yardstick of the definition and general characteristics of a classic ombudsman, assess the nature and essence of the office of Public Protector so as to evaluate the degree to which the Public Protector performs the role of an ombudsman institution.

(10) Mention the requirements which the Public Protector must comply with to be successful in promoting administrative justice and evaluate the extent to which the Public Protector meets the requirements.

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