**An administrative justice perspective on improving EIA effectiveness**

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**Abstract**

The aim of this letter is to provide an administrative justice perspective on EIA effectiveness. EIA is described as essentially an administrative instrument, reflecting a number of principles that revolve around an assessment process which should reflect administrative justice. This includes lawfulness, procedural fairness and reasonableness. Consciously and explicitly incorporating these principles into EIA decision making has significant potential to strengthen EIA effectiveness and making it fit for the 21st century.

**Key words:** environmental impact assessment, administrative justice, effectiveness

**Administrative justice and EIA**

Over the past 50 years, fundamental perspectives of what EIA is and what it aims to achieve has evolved to reflect different stakeholder views and changes in policy mandates (Petts, 1999; Pope et al, 2013; Cape et al, 2018). Importantly, EIA has typically been understood as a ‘decision support’ and not a ‘decision making’ instrument, in that it informs decision makers and does not in itself compel a specific decision outcome (Sadler, 1996; Morgan, 2012). Even though it is based on an ambition to make decisions more environmentally sustainable, in itself, EIA is not action forcing but allows for discretion by decision makers. Another perspective of EIA is that it serves as an instrument for implementing and achieving certain policy objectives, typically related to environmental and/or sustainability outcomes. EIA therefore does not function in a vacuum, but has a very specific purpose which is to implement policy (Beattie, 1995). In this context, the need for a tiered ‘systems’ approach, in which strategic environmental assessment (SEA) for policies, plans and programmes and EIA for projects systematically and consciously refer to each other has been accepted (Fischer, 2006). Conceptually, EIA is understood as an ‘art and a science’, in that it aims at generating evidence for impacts based on ‘hard’ science, whilst accepting that the political nature of decisions requires consideration of softer issues that revolve around governance, values and the possibility of contested outcomes (Kennedy, 1988; Fischer, 2003; Wood, 2003; Morrison-Saunders and Sadler, 2010). The ‘art and science’ perspective aligns EIA as a profession with other professions such as architecture and town planning as well as other research disciplines, including in particular policy and decision making sciences.

Whilst we agree with the above, we believe that an important perspective has not received adequate consideration, namely administrative justice. Whilst just administrative actions and/or just administrative decisions have been widely researched in, for example, law, the relationship between just decisions and the application of EIA has been poorly researched. In this context, a literature search on key research platforms such as Scopus and Google Scholar revealed essentially no EIA specific literature for the search terms “EIA” AND *Administrative Justice*. The aim of this letter is therefore to highlight the important, and we would argue fundamental perspective, on the interface between administrative justice principles and EIA effectiveness. A more detailed and in depth understanding of this interface is important to enhance EIA and make it fit for the 21st century.

**Administrative justice in a nutshell**

A vast body of literature, spanning more than a 100 years, exits on administrative law and justice. One of the early papers by Pound (1924) entitled ‘The growth of administrative justice’ referred to a so-called ‘mass phenomena’ of legal development in the English speaking world, around the growth and progress of administrative justice. The importance of administrative justice is also well recognised in young democracies, like South Africa, where specific provisions on administrative justice are included within national constitutions (GTZ, 2002; Kotzé and Van Der Walt 2003; Kidd, 2018). For the purpose of this letter we will explain the current understanding of administrative justice in generic terms in order to extend the discussion beyond a specific administrative context. We will then apply this understanding to EIA. Whilst the details of the interpretation and application of administrative law in jurisdictions differ, fundamental principles that are important for our discussion are similar and can therefore be generalised.

Typically, administrative justice falls within the body of law known as administrative law. This governs the administrativeactions ofagencies of government. A government’s administrative actions may include rule making, adjudication, or the enforcement of a specific regulatory agenda. The aim of administrative law and in particular administrative justice is the regulation of administrative actions and thereby the behaviour of the state towards its citizens. Essentially it protects citizenry against excesses of government power. This is based on the principle that the ‘weak’ (citizens) need to be protected from the ‘strong’ (government). The United Kingdom Administrative Justice Institute (UKAJI) explains administrative justice as that aspect of the justice system which is conventionally concerned with disputes between the citizen and the state (UKAJI, 2015).In jurisdictions where administrative courts exist, those are typically not engaged in determining the rights and duties between individuals. Rather, they rule on matters between individuals and government in terms of benefits sought or harm incurred from government/administrative action. Central to the consideration of administrative justice is government decision making and Adler (2010) goes as far as defining administrative justice in these terms as, *“ … the justice inherent in decision making”*. Furthermore, Mashaw (1983) emphasised that government needs to be able to explain, *“ … those qualities of the decision making process that provide arguments for the acceptability of its decisions”*, and thereby identify so-called ‘legitimating principles’ for administrative decision making. With regards to what may be important in the context of EIA, we focus on three key legitimating principles for just administrative actions / decisions, namely: lawfulness, procedural fairness and reasonableness (Kidd, 2018). In line with the aim of this letter the following sections discuss these administrative justice principles, and how they relate to the future of EIA.

*Lawfulness principle*

A fundamental international democratic principle is that government power is controlled and limited by law. Governments must be given the authority by a law for any action that it takes and it must obey this law. This is referred to as lawful administrative action. Any action without authority is seen as acting unlawfully, and the ‘decision’ taken should therefore have no legal effect. Simply, before administrators can perform an administrative action (for example a decision on granting or refusing authorisation) they must ensure that a provision of law allows them to do so. In the context of EIA, the lawfulness principle relates to the empowering EIA legislation and to the extent of the decision making mandate of government regulators in accordance with this legislation. The decision making mandate for EIA differs in different contexts. At a most basic level, it is determined by the legal definition of the ‘environment’. EIA systems sometimes have rather narrowly defined substantive foci. For example, in Australia, Germany, France and Sweden, the legal term ‘environment’ (as well as its translations) mainly relates to biophysical aspects, which means that the lawfulness principle provides little scope to incorporate social considerations in decision making. Other jurisdictions however, like South Africa, have a much broader legal definition of the term ‘environment’ which explicitly includes the socio-economic aspects and therefore allows decision makers to include these considerations in EIA (Retief, 2010; Morrison-Saunders and Retief, 2012). There are also examples where the definition of the ‘environment’ is somewhat ambiguous and where a broad mandate is implied and not explicit, such as Mexico. The point is that the interpretation of the definition of the ‘environment’ provides the legal decision making mandate for EIA. It also needs to be understood that the legal mandate for EIA in different jurisdictions vests with different hierarchical tiers/spheres of government, i.e national, regional, provincial, local, etc. The definition of the environment combined with the mandated hierarchal tier of government will therefore determine who (tier of government) can decide on what (definition of the environment).

The multitude of complex problems we are faced with today means that isolated views of what should be addressed in EIA may leave important issues unaddressed if we only focus on narrow environmental definitions. This explains the move to and popularity of many different forms of impact assessment such as sustainability or integrated assessments. Whilst integration is what decision makers often want to see, a problem is that trade-off rules are frequently defined either only rather vaguely or not at all (Morrison-Saunders and Fischer, 2006), meaning that economic considerations are given preference over those that are of an environmental and social nature (Therivel, 2019). Also, depending on how integration is approached, effectiveness in terms of achieving important objectives for the different issues that are to be integrated may actually decrease, rather than increase. This was shown by Tajima and Fischer (2012) for English integrated assessments. Here, whilst ‘full’ integration of different aspects in one integrated assessment (IA) resulted in a weakened ability to meet objectives represented by dedicated IA instruments, conducting them in separate, but parallel processes that connect frequently improved the ability to meet objectives. Similar observations have also been made with the integration of spatial and transport planning (Fischer et al, 2013).

As a consequence of the above observations, we argue that in order for EIA to effectively deal with the sustainability challenges of the 21st century (such as climate change, biodiversity loss, inequality and inequity), a broad EIA mandate is required in law, with the different dimensions of sustainability (environmental, social, economic) being represented by strong substantive (and as far as possible non-negotiable) standards. This would allow decision makers at different hierarchical tiers to lawfully incorporate sustainability in their decisions.

*Procedural fairness principle*

The procedural fairness principle relates to a very basic legal right which is ‘the right to be heard’ or the *audi alterim partem* rule. Accordingly, an administrator should not make a decision that might adversely affect someone without first giving them an opportunity to have their say and to raise any concerns they may have about a decision. Moreover, procedural fairness requires subsequent decisions that are made in an even-handed and impartial manner, taking raised concerns into account. This means that the decision-making process must be free from any partiality, bias or prejudice. The procedural fairness principle is well entrenched in the vast majority of international EIA systems, and has received particular attention in the field of social impact assessment (SIA). In this context (and in line with a dominant post-modern paradigm in many systems; see for example Fischer, 2003), it has been argued that EIA is more about process than about product (Andre et al., 2006). Whilst this view is supported by the (now somewhat dated) International Association for Impact Assessment (IAIA) best practice principles that define EIA as essentially a process, underpinned by transparency, accountability and other similar principles (IAIA and IEA, 1999), a lack of focus on substantive outcomes has recently been criticised (see for example Jiricka et al, 2018 and Arts et al, 2013). However, most EIA appeals, judicial review and case law deals with procedural fairness matters, at the expense of substantive issues, which brings us to a discussion of the next principle of reasonableness.

*Reasonableness (rationality and proportionality) principle*

The reasonableness principle has proven to be the most difficult to define and operationalise within the administrative justice context. It relates to the ‘reasonable person’ test for administrators and is based on the question whether a ‘reasonable’ person, provided with the same information, would always come up with a similar decision. In an attempt to justify reasonableness, according to Kotzé and Van Der Walt (2003) and Kidd (2018), the following requirements must be met:

1. The information available to an administrator supports the decision made,
2. The decision is supported by sound reasons,
3. The decision makes logical sense in relation to the available information,
4. The empowering legal provision/mandate and other relevant provisions are correctly understood and applied.

In practice, these requirements mean that administrators firstly need to take all relevant factors, comments, inputs, representations, information and evidence into account before making a decision. Secondly decisions need to be explained to those affected – to the point where, even if those affected disagree with the decision, they can still understand the reasoning behind them. Giving reasons for decisions taken to those affected ensures that decision makers are held accountable for the use of public power. The reasonableness principle still accepts the subjective nature of decision making but requires decision makers to make the reasoning behind decisions explicit and transparent. This requirement for administratively just decisions may also incorporate the principles of ‘rationality’ and ‘proportionality’. Essentially decisions must be deemed rational given the information that was available (rationality test similar to point (i) above) and the adverse effect of the decision must be proportionate to the objective sought to be achieved (proportionality test).

The reasonableness principle has obvious and direct relevance to EIA decision making, especially the eventual authorisation decision. The important point is that just administrative action requires more than mere procedural compliance or procedural fairness. Decisions makers also clearly have to demonstrate reasonableness. This brings into sharp focus the substantive quality of the information provided by the EIA process to decision makers. Much research has been done over the years on the quality of EIA reports (Lee et al., 1999; Sandham et al. 2008) and weak EIA substance (or report quality) has been found to influence outcomes (Phylip-Jones and Fischer, 2013), therefore potentially severely jeopardising the achievement of administrative justice. This is because reasonableness and justness of the decision is judged on the basis of the information provided to the decision maker. Importantly, in this context, examples of environmental decisions being overturned by the courts based on lack of reasonableness is becoming more common in certain jurisdictions. A recent case example from South Africa is the 2018 case of the World Wildlife Foundation (WWF) vs Minister of Agriculture, Forestry and Fisheries where the minister of fisheries’ decision to increase rock lobster harvesting quotas was overturned because she ignored the overwhelming scientific evidence presented to her suggesting otherwise. Here, the decision was deemed unreasonable and irrational and inconsistent with her mandate to protect the environment.

**Administrative justice contribution to EIA effectiveness**

Administrative justice requires EIA decision making to be lawful, procedurally fair and reasonable (i.e. being rational and proportional). Since EIA is essentially applied in practice as an administrative process, different EIA systems should reflect on the extent to which EIA legislation and practice gives effect to these administrative justice principles. Above, we have argued that the lawfulness of EIA should be based on a broad mandate and a broad definition of the ‘environment’, incorporating the elements of sustainability (i.e. environmental, social economic). Furthermore, we are of the view that procedural fairness lies at the heart of most EIA systems and there is a justified expectation that this principle is generally well met. However, what is clear from observations into EIA systems globally is that demonstrating reasonableness is a particular challenge, and one that is not often being questioned, not even by the courts (who typically avoid – and often are not enabled to raise substantive issues). The reasonableness principle relies on the substance of EIA (and the quality of that substance) and the extent to which it has been considered and incorporated in the decision made. However, the nature of EIA decision making in many systems appears to have become increasingly uncertain and complex (Retief et al., 2016). So the question is how to comply with the reasonableness principle in an uncertain and complex world?

Firstly, and crucially, the EIA process should be expected to provide a higher level of certainty for certain non-negotiable matters, than what is currently observed. In this context, we suggest an approach which aligns itself to the certainties provided to decision makers by – and inherent in – other professions, such as architecture and engineering. Rather than giving non-binding recommendations, these professions rely on and make certain ground rules which are non-negotiable points of departure, as otherwise a building or a bridge might simply collapse. Considering the seriousness of current trends *of* *inter alia* biodiversity loss and climate change, we believe that a similar approach is needed in EIA. In fact, practice already appears to be picking up on this. In the UK, for example, new legislation is asking for ‘net biodiversity gain’ in planning new developments. Furthermore, the country is the first globally to have subscribed to reaching carbon neutrality by 2050. In order to achieve these objectives, it will become vital that associated impact reduction and mitigation action is enforceable and that, among others, biodiversity and carbon reduction targets become non-negotiable matters (following Morrison-Saunders and Fischer, 2006). We therefore suggest that in particular those emerging challenges that are associated with protection and reduction targets need to become fixed within project processes and their associated EIAs, being approached as non-negotiable. Not doing so could be argued as diluting the possibility of challenging dissenting decisions or administrative actions on the grounds of reasonableness.

Secondly, in instances where trade-off decisions are unavoidable, trade-offs must be explicitly named and be clearly presented before the decision makers. Failure to do this would potentially jeopardise the possibility of holding to account the decisions on the grounds of reasonableness. However, research has shown that decision makers (especially politicians) are notoriously reluctant to make certain trade-offs known or explicit, out of fear of exposing underlying agendas (Retief, et al., 2013). For example, and based on observations by the second author, in the UK the recent round of local plan preparation (since 2014), many of the sustainability appraisal impact matrices that are being produced show that whilst impacts of a large number of new housing developments are positive in terms of for example economic growth criteria they consistently tend to be negative for climate change mitigation. Many of these developments are built in the green belt at some distance away from existing towns and centres and are heavily reliant on motorised transport. Often, associated climate change implications are not fully made explicit. Furthermore, when it comes to biodiversity, whilst many new developments are said to include some green infrastructure (often without dealing with the question of who is responsible for its management), the net effect is questionable, in particular if the objective is net biodiversity gain.

In conclusion, we recommend that EIA for projects – and considering the imperative of a systems approach, SEA for policies, plans and programmes – should be viewed through the lens of administrative justice. This provides an ideal perspective on the fundamental nature of impact assessment. Essentially, it is one that is lawful, that must be conducted in a procedurally fair manner and one that must have a reasonable outcome or result. It is thus conceivable that if EIA is going to be effective in contributing towards a more just and sustainable world, it will have to comply and give effect to basic administrative justice principles. Fundamental to this success is the provision of an empowering legal and procedural framework within which decisions must be made, along with critical and substantive information against which the reasonableness of decisions should be weighed.

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