Legislative administrative action and the limited extent of public participation

RADLEY HENRICO*

1 *Introduction*

The preamble of our constitution acknowledges that government is based on the will of the people. Section 1(d) of the constitution states that the Republic of South Africa is one sovereign, democratic state founded on the value of universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Whilst the constitution recognises a representative, participatory and direct democracy, the focus of this paper is on the participatory dimension of democracy as it relates to legislative administrative actions. Participatory democracy is given due recognition in our constitution through public involvement in parliament's law-making process. Parliament is obliged to take adequate steps to ensure public involvement as a pre-condition to the enactment of its laws. This requirement is necessary if we are to maintain (and sustain) the democratic ethos underpinning our constitution. The legislative capacity of parliament has been extended by permitting the executive to make laws in accordance with statutory provisions or powers entrusted to them either in terms of specific acts or the constitution. Laws enacted by members of the executive (subordinate or delegated legislation) are referred to as executive rule-making or legislative administrative action. Such actions, emanating from the executive arm of government, take the form of regulations, proclamations and ministerial rules or notices. Subordinate legislation is not only the most recognisable form of administrative action; it is also the mainstay of the modern bureaucratic state. Legislative administrative action may not be in conflict with the constitution. Neither may it be inconsistent with the empowering or enabling primary legislation. Whilst having no less force than primary legislation – assuming there is no unavoidable conflict arising between original and delegated legislation *in pari materiae* – the question which arises in respect of legislative administrative action is the extent to which the tabling thereof depends on public participation.

This article will focus first on the nature of public involvement as it pertains to the legislature. The purpose of this is to understand the importance of public participation in the legislative process. It will be argued that public participation in the law-making process of parliament is necessary because of certain peremptory provisions in the constitution. More significantly, the need for public participation, it will be argued, is premised on the underlying constitutional imperatives of accountability, transparency and transformation. Second, the paper will look at the limited extent of public participation in respect of legislative administrative actions. Reasons for the limitation of public participation will be considered in the context of having regard to the nature of legislative administrative action. Whilst there can be no question about the extent of public participation in the tabling of

* Senior lecturer in the Department of Public Law and Jurisprudence, University of the Western Cape.

 [ISSN 0257 – 7747]

primary legislation, it is significant to take account of the (limited) extent of public participation when it comes to the tabling of legislative administrative action. The paper finishes with some concluding observations.

2 *The legislative process and public involvement*

Public involvement in the enactment of legislation in the national and provincial legislative spheres of government is expressly recognised under the constitution. Section 59(1)(*a*) of the constitution provides that "[t]he National Assembly *must* facilitate public involvement in the legislative and other processes of the Assembly and its committees". Section 72(1)(*a*) states that "[t]he National Council of Provinces *must* facilitate public involvement in the legislative and other processes of the Council and its committees". Employment of the peremptory verb "must" makes it obligatory for the national assembly and national council of provinces to facilitate public involvement. The aforesaid provisions are buttressed by section 118(1)(*a*), which states that "[a] provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees". This express articulation of duties and obligations – on the part of the national assembly and the national council of provinces – stems from the fact that section 42(1) of the constitution acknowledges parliament as consisting of the national assembly and national council of provinces. In terms of section 43(a)-(c) the legislative authority of the Republic is vested in the national, provincial and local spheres of government. The duty to facilitate public involvement imposed on the national assembly and the national council of provinces is also extended to local government or a municipality passing a by-law under section 156(2) of the constitution. In terms of section 160(4)(*b*) "no by-law may be passed by a municipal council unless the proposed by-law has been published for public comment".[1] One of the objects of local government under section 152(1)(*e*) is "to encourage the involvement of communities and community organisations in the matters of local government". Section 12(3)(*b*) of the Local Government: Municipal Systems Act[2] echoes the above-mentioned provision of section 160(4)(*b*) in providing that "no by-law may be passed by a municipal council unless the proposed by-law has been published for public comment that allows the public an opportunity to make representations" in relation thereto.

In *Doctors for Life International v Speaker of the National Assembly*[3] the constitutional court had to decide a matter in which the applicant challenged the constitutional validity of certain health bills passed by the national council of provinces without inviting written submissions, or conducting public hearings in order to facilitate public involvement in the legislative process.[4] Ngcobo J, in a unanimous decision, held that the importance of allowing public participation in the legislative process, as recognised in our constitution, echoes the imperatives contained in articles 25(a) and (b) of the International Covenant on Civil and Political Rights that envisage participatory engagement (by members of the public) in the conduct of government affairs, such as law-making.[5] Moreover, the notion of allowing public participation in the affairs of state is not novel in South African constitutionalism given "the traditional means of public participation [in the form

1 See also *Kouga Municipality v Bellingham* 2012 2 All SA 391 (SCA).
2 32 of 2000.
3 2006 6 SA 416 (CC).
4 par 2.
5 par 98-100.

of] imbizo/lekgotla/bosberaad".[6] Referring to the preamble of the constitution, the court per Ngcobo J held:

> "Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the Preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people *shall* participate to some degree in the law-making process."[7]

The importance of public participation in the law-making process is highlighted by the following observation:

> "The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of State that the Constitution contemplates that the public will participate in the law-making process."[8]

And:

> "Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective of involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of these concerns, this will promote legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."[9]

It cannot be gainsaid that public participation in the law-making process of the three spheres of government gives impetus to our constitutional construct.[10] The value thereof is premised on the following precepts. First, it recognises the value which the South African citizenry can add to the content of legislation in their capacity as interested stakeholders. Put differently, the more input we have from diverse interested persons or bodies regarding legislation, the greater the potential substantive intrinsic worth and value of the outcome. Second, it acts as a measure of holding government accountable and responsive to the needs of the public. Third, it gives effect to the constitutional enshrined freedom of expression[11] and political rights.[12] Fourth, public participation in the legislative process can and should also be seen as a means of mitigating and reducing potential challenges to the substance of legislation on grounds that it impugns rights under section 33(1) of the constitution

6 par 101.
7 par 111 – emphasis added.
8 par 135.
9 par 205. See also the judgment by Yacoob J par 274.
10 The value of public participation in the legislative process was also confirmed by the constitutional court in *South African Veterinary Association v Speaker of the National Assembly* 2019 3 SA 62 (CC) par 18-23; *Matatiele Municipality v President of the RSA* (2) 2007 6 SA 477 (CC), 2007 1 BCLR 47 (CC); *Ramakatse v Magashule* 2013 2 BCLR 202 (CC) and *Oriani-Ambrosini v Speaker of the National Assembly* 2013 1 BCLR 14 (CC).
11 s 16(1).
12 s 19(1).

or a declaration of invalidity in terms of section 172(1)(*a*) of the constitution.[13] Fifth, the relationship between the legislature and the public is essentially based on a power imbalance where the legislative arm of government and the power capable of being exercised is in a superior authoritative position.[14] Public participation at best tempers the legislative authority. In its broadest sense, public participation offers democratic legitimacy to the legislative power of parliament.[15] It is a means by which the people have the ability to influence policy decisions and the ultimate implementation of primary legislation. Having discussed the basis on which public participation is mandatory and lends credence to our democracy it is noteworthy to contrast this with the limited extent of public participation in respect of legislative administrative action.

3 *Contextualising public participation in relation to legislative administrative action*

Our modern state functions and operates with reference to legislative regimes consisting of primary and secondary (subordinate, delegated or derived) legislation. Parliament's legislative capacity – and ability to effectively govern – is assisted by allowing members of the executive to make subordinate legislation.[16] This form of legislation is the most easily recognised form of administrative action.[17] As previously mentioned, it consists of ministerial rules and notices, proclamations and regulations (laws). In this sense they constitute legislative actions or acts of the administration, as opposed to the legislature. The aforementioned laws are referred to as legislative administrative action. This is distinguishable from general administrative functions which refer to decisions by administrators or other bodies[18] who exercise public powers.

The term "legislature" refers to bodies which have deliberate legislative competencies, such as parliament, the national council of provinces (NCOP) and municipal councils.[19] The executive authority of the republic is vested in the president together with members of the cabinet.[20] The executive branch of government implements and gives effect to the will of the legislature. Both arms of government

[13] This is not to mean, however, that public participation in the legislative process *per se* serves to waive any rights an applicant may have under either s 33(1) or 172(1)(*a*) of the constitution.

[14] Burns and Henrico *Administrative Law* (2020) 6, 7 and 24.

[15] Rakar "Public participation and democratic legitimacy of rulemaking – a comparative analysis" 2017 *Law and Economics Review* 57 59; Bekker *Citizen Participation in Local Government* (1996) 221; Girma "Effective public involvement in the oversight processes of parliaments and provincial or regional legislatures" 2014 *Journal of the South African Legislative Sector* 21 22; Bishop "Vampire or prince? The listening constitution and *Merafong Demarcation Forum v President of the RSA*" 2009 *Constitutional Law Review* 313 321-326.

[16] In terms of s 239(a) of the constitution, national legislation includes subordinate legislation made in terms of an act of parliament.

[17] Burns and Henrico (n 14) 90.

[18] natural or juristic.

[19] In this regard see s 43(a)-(c) of the constitution which vests the legislative authority of the Republic in the three spheres of government. Also see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 41-42.

[20] s 83 and 85 of the constitution.

and all organs of state,[21] including the judiciary, are bound by the bill of rights.[22] Notionally, when we speak of the executive arm of government, we refer essentially to the administration of government. As noted in *President of the Republic of South Africa v South African Rugby Football Union*,[23] it is in the implementation of legislation (by the administration) that the public service performs its duties in executing the "lawful policies of the government of the day".[24] Currie and De Waal correctly contend that with reference to the definition of organ of state in section 239 and members who comprise the executive, it is difficult to conceive of conduct of the executive that would not also amount to conduct of an organ of state.[25]

The delegation of law-making powers by the legislature to members of the executive or administrators is an essential feature of a modern functional state.[26] In *Bezuidenhout v Road Accident Fund*,[27] Vivier JA observed that a legislature delegates law-making power because it cannot directly exert its will in every detail. All it can do in practice is lay down the outline.[28] Hoexter[29] also aptly refers to *Executive Council, Western Cape Legislature v President of the Republic of South Africa*[30] in which Chaskalson P stated:

> "In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies."[31]

The term "subordinate" or "delegated" legislation is not defined in the constitution. However, section 101(3) provides that "proclamations, regulations and other instruments of subordinate legislation must be accessible to the public". Whilst ministers are responsible for the powers and functions assigned to them by the state president[32] the constitution does not prescribe how regulations are to be made or enacted.[33] In *Minister of Health NO v New Clicks South Africa (Pty) Ltd*,[34] as

[21] An organ of state in terms of s 239(a) and (b) of the constitution is defined as any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.

[22] s 8(1) of the constitution.

[23] 2000 1 SA 1 (CC).

[24] See *President of the Republic of South Africa v South African Rugby Football Union* (n 23) par 138 as read with s 197(1) of the constitution: "Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day."

[25] Currie and De Waal *The Bill of Rights Handbook* (2012) 43.

[26] Hoexter *Administrative Law in South Africa* (2012) 52; and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC) 122.

[27] 2003 6 SA 61 (SCA).

[28] par 10 with reference to Hoexter (n 26) 26.

[29] Hoexter (n 26) 26.

[30] 1995 4 SA 877 (CC).

[31] par 51.

[32] in terms of s 92(1) of the constitution. In the case of provinces, members of the executive council are responsible for the functions of the executive assigned to them by the premier in terms of s 133(1) of the constitution.

[33] See *Minister of Home Affairs v Liebenberg* 2002 1 SA 33 (CC) par 13 and *Mulowayi v Minister of Home Affairs* 2019 4 BCLR 496 (CC) par 28.

[34] 2006 2 SA 311 (CC).

to whether ministerial regulations (subordinate legislation) could be classified as administrative action, Chaskalson CJ found that to hold that subordinate (delegated) legislation does not form part of the right to just administrative action would be contrary the constitutional compact giving effect to an open and transparent government.[35] Moreover, Chaskalson CJ expressly found that subordinate legislation forms an essential part of the public administration giving effect to legislative policy and providing details for the execution of such policies.[36] The general interest of the public in gaining access thereto gives effect to the principle of accountability, transparency and openness, which is axiomatic to our democratic ethos underpinned by a culture of justification. Accessibility also translates into awareness on the part of the public of what the law is. As such it is understandable for laws of a deliberate legislative body and executive decisions[37] to be published in the *Government Gazette*.[38]

Authority to make delegated legislation arises by virtue of primary legislation which vests in a member of the executive or an administrator the power to make rules, proclamations or most typically, regulations giving effect to a specific act or acts.[39] Whilst section 16 of the Interpretation Act[40] prescribes that certain enactments,[41] namely law-making on the part of the executive (legislative administrative actions), shall be published in the *Government Gazette*, no directive is given regarding public comment or participation in respect thereof. Neither does any provision exist in the constitution making allowance for public comment or participation. Whilst the participatory element on the part of the public is sufficiently catered for in respect of the passing of deliberate legislation – as discussed in paragraph 1 of section 3 above – the same typical participation in respect of legislative administrative action is not provided for.

There can be no quibble with the fact that publication, as a peremptory requirement, in respect of both primary and subordinate legislation facilitates communication of the content of such laws to the general public. However, the extensive allowance made for public participation in relation to primary legislation may well support the presumption that in general there is greater public awareness of primary legislation than of legislative administrative actions. An immediate concern that arises is the fact that legislative administrative actions – which provide the detail and specificity lacking in the normative provisions of principle legislation – have limited public participation. In the pre-constitutional dispensation members of the public were for

[35] par 113.

[36] par 113. Chaskalson CJ, Langa DCJ, Ngcobo J, O'Regan J and Van der Westhuizen J found that the making of regulations constituted administrative action under Act 3 of 2000. Five justices found it was not necessary to decide the issue. Sachs J was of the view that all regulation-making was governed not by Act 3 of 2000 but by the principle of legality. Chaskalson CJ reasoned that all regulation-making constituted administrative action under Act 3 of 2000 (par 109). The supreme court of appeal in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 3 SA 589 (SCA), relying on the reasoning of Chaskalson CJ in the *New Clicks* case, confirmed the appellant's submission that the making of regulations by a minister constitutes administrative action in terms of Act 3 of 2000 (per par 10-11).

[37] which can also be referred to as legislative administrative action.

[38] See the provisions of s 81, 123 and 162 of the constitution pertaining to the publication of national, provincial and municipal laws as read with s 13, 16 and 16A of the Interpretation Act 33 of 1957.

[39] the *New Clicks* case (n 34) par 211.

[40] 33 of 1957.

[41] The section refers to a "by-law, regulation, rule or order" made by a member of the executive. It must be noted that the reference to by-law under the pre-constitutional dispensation is different to our current understanding of a by-law. In terms of s 43(c), as read with s 156(2) of the constitution, a municipality has deliberate legislative authority to make by-laws in relation to matters listed in part B of schedule 5 of the constitution.

the most part kept in the proverbial dark about proposed legislative administrative actions. Once enacted, the only way of challenging such actions were by way of very limited grounds of judicial review.[42] For purposes of this paper, the crucial question pertaining to legislative administrative actions is the limited extent of public participation. Can one assume that as a matter of administrative efficacy, delegated legislation made pursuant to authority granted to an administrator in terms of original legislation requires the administrator to exercise his or her discretion consistent with the constitution and original legislation? Since public participation has been catered for with respect to original legislation, is further and additional public participation in respect of delegated legislation unwarranted? Surely the answer falls to be rejected on the basis, as previously mentioned, that parliament's legislative capacity is extended by granting law-making powers to administrators? In addition, the definition of national and provincial legislation includes subordinate legislation. By inference, the necessity of public participation in relation to primary legislation is equally applicable in relation to legislative administrative actions.

Regard should be had to the extent to which such laws serve to function as the regulatory edifice of our modern society. As such, the need for public participation in relation to subordinate legislation should depend on the nature of the subordinate legislation in question. The nature of certain regulations may have far-reaching consequences for the public at large compared to, for example, mere guidelines or directives. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*,[43] the minister of finance consulted interested role players regarding the optimal way in which the micro-lending industry could be regulated resulting in the minister issuing an Exemption Notice.[44] The importance and gravitas of the subject matter in question, namely how to effectively regulate the micro-lending industry, gave impetus to the need for public participation. The latter was not required in terms of the original legislation under which the minister had authority to issue the relevant regulations. The minister, in the exercise of his discretion, engaged public stakeholders.

An administrator exercises public power or performs a public function in terms of legislation.[45] Essentially it is state power which seeks to regulate the public or a particular aspect of public affairs. In *Mittalsteel South Africa Ltd v Hlatshwayo*[46] it was held that the exercise of public power amounts to the ability to regulate and control conduct on the part of others.[47] Moreover, in *Logbro Properties CC v Bedderson NO*[48] the exercise of public power was said to amount to someone acting from a position of superiority or authority by virtue of it being a public authority.[49] The exercise of state power – on the part of administrators in enacting delegated legislation – speaks directly to the imbalance of power between the state and citizenry. A way of addressing this imbalance is the facilitation of public participation in respect of delegated legislation. Participation in a way that allows

[42] For reading on judicial review in the pre-constitutional dispensation, see Burns and Henrico (n 14) 23-24; and Hoexter (n 26) 13-15.
[43] (n 26).
[44] par 11-12.
[45] as read in terms of the definition of organ of state under s 239 of the constitution.
[46] 2007 1 SA 66 (SCA).
[47] par 12.
[48] 2003 2 SA 460 (SCA).
[49] par 10. Also see *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA) and *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T).

for interested stakeholders to comment on proposed delegated legislation lends credence and cogency to the democratic status of such delegated legislation.

Due account must be had of the fact that any person aggrieved by administrative acts which are allegedly unlawful, unreasonable or procedurally unfair has recourse to just administrative action under section 33 of the constitution. The latter is animated by the Promotion of Administrative Justice Act,[50] which should be used as the default route to judicial review applications.[51] Alternatively, even where the exercise of power does not constitute administrative action reviewable under Act 3 of 2000 it can still be reviewed in terms of the principle of legality.[52] The right to judicially review all exercise of public power is demonstrative of the culture of justification in terms of which the exercise of all power needs to be accountable. The right an individual would have to judicially review administrative action is an individual right pertaining to purely administrative functions. In other words, it relates to the review of decisions by administrators or other bodies exercising public power. This right may be described as a so-called "reactive" right, since it seeks to challenge and set aside or vary a decision already taken. Rights which members of the public have under section 4 to challenge legislative administrative action are discussed in more detail below.

The constitutional right of judicial review, whether to challenge a purely administrative decision[53] or legislative administrative action[54] because of its "reactive" nature, is something which arises or takes place *ex post facto*. A constitutional guarantee of judicial review is one of the functional aspects of a democracy. However, such guarantee must be juxtaposed with the benefits to be gained from public participation in the deliberative legislative process *and* legislative administrative action which are essentially "proactive" democratic rights. Hutchinson is sceptical of judicial review. This is due to the limit to which the court can intervene on account of the separation of powers doctrine and also due to the practical inability of the population in general to engage judicial review as an effective remedy.[55] With reference to judicial review, as opposed to public participation or involvement in the democratic process, Hutchinson comments that:

> "Judicial review operates as a pale and perverse substitute for genuine and vigorous popular involvement and control. Indeed, the need for judicial review is premised on the failure of the institutional structure of British democracy to ensure meaningful citizen participation in government."[56]

[50] 3 of 2000.

[51] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 25; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) par 73; *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) par 69; the *New Clicks* case (n 34) par 94-96 and 437 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 4 SA 331 (CC) par 112.

[52] Hoexter "The principle of legality in South African administrative law" 2004 *Macquarie Law Journal* 165 168 ff.

[53] in terms of s 1 of Act 3 of 2000.

[54] in terms of s 4 of Act 3 of 2000.

[55] Hutchinson "Mice under a chair: democracy, courts and the administrative state" 1990 *University of Toronto Law Journal* 374 376 and 403.

[56] Hutchinson "The rise and ruse of administrative law and scholarship" 1985 *Modern Law Review* 323.

Access to courts[57] and express recognition of the enforcement of rights[58] serve to bolster just administrative action rights.[59] However, practically – and realistically – the ability to bring a judicial review application is often outside the reach of many citizens adversely affected by administrative decisions. Put differently, their ability to enforce any rights they may have in terms of a judicial review application is informed (and determined) by their financial wherewithal. On the other hand, the ability of a citizen to participate and deliberate in respect of executive decision-making is not dependent on financial resources; it merely depends on the extent to which the public is made aware of potential delegated legislation and given an opportunity to comment thereon prior to its finalisation.[60] Moreover, O'Regan J contends that instead of reliance being placed on judicial review, administrative law needs to focus on making correct decisions. This is aided by inter alia involving interest group representation in the decision-making process and facilitating notice-and-comment procedures on the part of the public.[61]

The International Association for Public Participation, of which South Africa is a member, has established certain core values for the practice of public participation.[62] These values are premised on the fact that public participation:

- is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process;
- includes the promise that the public's contribution will influence the decision;
- promotes sustainable decisions by recognising and communicating the needs and interests of all participants, including decision makers;
- seeks input from participants in designing how they participate; and
- communicates to participants how their input affected the decision.

The aforesaid values are all demonstrative of active public involvement, alternatively the opportunity given to the public to become involved in the decision-making process. Moreover, they facilitate meaningful engagement between the public and those in authority duly authorised to make laws which can potentially affect the public in general and individuals in particular.[63] Such engagement enables – and recognises – the value of dialogue and the ability of the public to materially influence and impact upon policy before it is implemented in the form of a binding decision. Creighton considers it imperative that an obligation of public participation is that the public must be kept informed and made aware of decisions that could possibly affect them. This is important so that they can decide whether or not they wish

[57] in terms of s 34 of the constitution.
[58] in terms of s 38 of the constitution.
[59] in terms of s 33 of the constitution.
[60] For further reading on the importance of civic participation and deliberation in the administrative processes of government, see Eskridge and Peller "The new public law movement: moderation as a postmodern cultural form" 1991 *Michigan Law Review* 707 710; Seidenfeld "A civic republican justification for the bureaucratic state" 1992 *Harvard Law Review* 1512 1514; Czapanskiy and Manjoo "The right of public participation in the law-making process and the role of the legislature in the promotion of this right" 2008 *Duke Journal of Comparative and International Law* 14 16; Rakar (n 15) 60 and Ntsikelelo, Mekoa and Nondumiso "Participatory democracy in theory and practice: a case study of local government in South Africa" 2014 *Africa's Public Service Delivery and Performance Review* 31 32.
[61] O'Regan "Rules for rule-making: administrative law and subordinate legislation" 1993 *Acta Juridica* 168 170 ff.
[62] https://www.iap2.org/page/corevalues (03-09-2019).
[63] Calland *The First Five Years A Review of South Africa's Democratic Parliament* (1999) 62.

to become involved in the public participation process.[64] It has also been asserted that public participation strengthens institutions of representative democracy by democratising such institutions.[65] Masango emphasises that public participation constitutes an essential ingredient of good governance in any democracy.[66] Put differently, a democracy is the poorer for lack of adequate and sufficient public participation. This raises the inevitable question of what constitutes adequate and sufficient public participation. There can be no universal principle set down in this regard. Given the rapid ever-expanding and ongoing decision-making process of legislative administrative action it would be unreasonable and unrealistic to expect and anticipate public participation in respect of each and every particular regulation or ministerial notice. The ability of the modern state to effectively govern would simply grind to a halt were public participation be required in respect of every legislative administrative action.

It should be accepted that for public participation to hold any weight, it must be meaningful, failing which it is *de facto* nugatory and effectively valueless. In this regard, Arenstein has pointed out that whether public participation is meaningful depends on the extent to which it can be argued that such participation affects the outcome of the process or the result.[67] A justifiable concern arising from public participation is the extent to which such participation may favour the exclusive interests of a select citizenry, such as business, who are able to organise themselves as opposed to citizens in general who may be socio-economically disadvantaged and unable to mobilise themselves. This is aptly described by Hoexter[68] who refers to the following observation by Atkinson:

> "… public participation in administrative decision-making, planning and implementation is inherently particularistic. At best, it opens the way for enthusiastic, motivated, skilled and confident interests to build co-operative relations with specific administrative departments. At worst, it can degenerate into exclusivist, clientelist or corporatist forms of special treatment. The problem of involving the unorganised, the demoralized, the unfashionable and underprivileged tends to remain intractable."[69]

The only means of addressing this potentially intractable problem is in terms of section 4 of Act 3 of 2000. Where administrative action materially and adversely affects the rights of the public, a notice-and-comment procedure and public inquiry must be held by the administrator[70] in order to give effect to the right to procedurally fair administrative action.[71] A decision, or a failure to take a decision, by an administrator in terms of section 4(1) of Act 3 of 2000 is excluded from the definition of administrative action under section 1 of Act 3 of 2000. Whilst this may

64 Creighton *The Public Participation Handbook* (2005) 23.

65 Calland (n 63) 62; and Kotze (ed) *Development Administration and Management A Holistic Approach* (1997) 37; Davids *Voices from Below Reflecting on Ten Years of Public Participation The Case of Local Government in the Western Cape* (2005) 29; Masango "Public participation: a critical ingredient of good governance" 2002 *Politeia* 52 53 and De Vos (ed) *South African Constitutional Law in Context* (2015) 93-95.

66 Masango (n 65) 63. Also see De Vos (n 65) 119-122.

67 Arenstein "A ladder of citizen participation" 1969 *Journal of the American Institute of Planners* 219 220.

68 Hoexter (n 26) 83.

69 Atkinson *Techniques of Public Participation in Local Government* (1997) 12.

70 in terms of s 4(1) and 4(2) of Act 3 of 2000.

71 This is not to be confused with the substantive right to procedurally fair administrative action as provided for in terms of s 3 of Act 3 of 2000.

very well exclude the possibility of judicial review in terms of Act 3 of 2000, it does not preclude judicial review in terms of the principle of legality.[72]

Prior to the coming into operation of section 4 of Act 3 of 2000,[73] there was no general duty on administrative officials to engage members of the public in any process, save for instances where specific legislation would impose such a duty.[74] If the administrative official decides to hold a public inquiry such process is governed by subsection 4(2). The decision to follow a notice-and-comment procedure is in turn governed by subsection 4(3). An administrator may depart from the requirements referred to in subsections (1)(*a*), (2) and (3) if it is reasonable and justifiable.[75] "Public" is defined in section 1 of Act 3 of 2000 to mean any group or class of the public.[76] Since section 3 of Act 3 of 2000 provides for procedurally fair administrative action affecting any person, some debate has arisen as to the relevance of section 4.[77] However, as Hoexter points out, section 4 permits public involvement in respect of administrative action which materially and adversely affects the rights of the public[78] or the interests of the public.[79] To the extent that it encourages – and enables – public participation, it increases democratic legitimacy and administrative justice.[80]

Support for the viability of section 4 as a means by which the public can generally participate in legislative administrative action affecting the public is reflected in our case law. In *Minister of Home Affairs v Eisenberg and Associates*[81] immigration regulations were attacked and challenged on the grounds that the minister of home affairs failed to comply with the notice-and-comment procedures of the relevant enabling legislation. With reference to section 4 of Act 3 of 2000, Chaskalson CJ stated:

> "In each case it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before the action is taken. In addition, whether or not such provisions are made, the administrative action must ordinarily be carried out consistently with PAJA."[82]

[72] Hoexter (n 26) 85 and 410.

[73] on 31 July 2002.

[74] Hoexter (n 26) 84-85 who refers to s 32 of the Environment Conservation Act 73 of 1989. Also Burns and Henrico (n 14) 320-324.

[75] In terms of subs 4(4)(*a*), as read with subpar 4(4)(*b*)(i)-(v), the latter providing that a departure from a notice-and-comment procedure or public inquiry procedure is reasonable and justifiable considering factors such as: (i) the objects of the empowering provision; (ii) the nature and purpose of, and the need to take, the administrative action; (iii) the likely effect of the administrative action; (iv) the urgency of taking the administrative action or the urgency of the matter; and (v) the need to promote an efficient administration and good governance.

[76] Burns and Henrico (n 14) 323-324 give some examples of what constitutes the "public" with reference to the effect that certain legislative provisions have on the general public, as opposed to a particular individual, namely s 3(4)(*i*) of the National Education Policy Act 27 of 1996 and the Marine Living Resources Act 18 of 1998.

[77] See Hoexter (n 26) 408-409; Burns and Henrico (n 14) 320-322; Raubenheimer "Section 4 of PAJA: the constitutional standard for participative provisions in land use management" 2007 *SA Public Law* 491 495 and Govender "An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa" 2003 *SA Public Law* 404 406-410.

[78] Hoexter (n 26) 409.

[79] De Ville *Judicial Review of Administrative Action in South Africa* (2005) 227.

[80] Hoexter (n 26) 407-408.

[81] 2003 5 SA 281 (CC).

[82] par 59. See Hoexter (n 26) 409.

In *Minister of Health NO v New Clicks South Africa (Pty) Ltd*,[83] Chaskalson CJ correctly pointed out how administrative fairness standards required one to distinguish between legislative administrative action as opposed to administrative adjudication. The latter pertained to individual decisions, such as the refusal to grant a licence, whereas the former pertained to rule-making in which "diverse and often conflicting interests have to be taken into account" and the "decision relates to a question of policy".[84] The regulations that were the object of judicial review in the *New Clicks* case were found to have met the requirements of section 4 of Act 3 of 2000 on account of the fact that the administrators had engaged in extensive public participation procedures before issuing the relevant medicine pricing regulations.[85]

In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*[86] the full bench of the court found that the decision of the director general to allow the construction of a pebble-bed nuclear reactor had to comply with sections 3 and 4 of Act 3 of 2000 due to the fact that it affected the rights of individuals and the public in general.[87]

In *Combrink v Minister of Correctional Services*[88] the court found the implementation of a departmental guideline – which was in the form of a circular letter – pertaining to parole to be subject to the right to just administrative action in terms of section 4 of Act 3 of 2000.

Section 4 of Act 3 of 2000 can thus be described as a mechanism by which members of the public may resort to employing for purposes of ensuring there is public participation in respect of subordinate legislation. Conceivably there will be instances where due to the substantial socio-economic divisions in our society many persons who stand to be affected by such action will either not have the financial means of enforcing such rights or simply be unaware thereof. This is the reality of the situation as referred to by Atkinson. However, the presence of section 4 – and the right afforded members of the public – to be involved in and participate in legislative administrative action must be recognised for the value it contributes to our democratic processes. This is in stark contrast to our pre-democratic position where members of the public were essentially none the wiser about matters concerning them until such time that subordinate legislation was enacted.

The words "materially and adversely affected" as they appear in subsection 4(1) will "activate" the provisions of section 4 and impose on the administrator the obligations as set out in subsections 2 and 3. However, there is no duty which is imposed on an administrator in respect of every single legislative administrative action taken. Such duty it would seem can only arise on a case-by-case basis and in particular where the administrative action in question materially and adversely affects the rights of the public.[89] As noted by Chaskalson CJ in the *Eisenberg* case, each case must be decided with reference to the particular primary legislation which provides for administrative action whether a special procedure must be followed. Moreover, whether or not special procedures are provided for the administrative action must be consistent with Act 3 of 2000. This is, however, understandable for

[83] n 34.
[84] par 153 and 154. See Hoexter (n 26) 410.
[85] par 182 and 484. See Hoexter (n 26) 410.
[86] 2005 3 SA 156 (C).
[87] par 48. See Hoexter (n 26) 411.
[88] 2001 3 SA 338 (D). See Burns and Henrico (n 14) 320 n 22.
[89] Burns and Henrico (n 14) 324-325.

the effective running of the state administration and in particular so as to preclude section 4 from being applicable to trivial matters.[90]

4 *Conclusion*

The extent of public participation in respect of legislation is guaranteed by various provisions of the constitution. In this way our constitution can be described as giving effect to the participatory dimension of democracy. Public participation in the legislative process ensures that the greatest number of views are taken into account and considered in the policy-formulating phase before such policy is implemented in the form of legislation. The enactment of subordinate legislation, however, is not necessarily conditional on the responsible member of the executive having solicited and engaged public participation. Whether or not public participation is required in respect of particular subordinate legislation will be informed by the content of the empowering provision of the legislation. Alternatively, it can be determined by the importance of engaging public participation in the formulation of particular subordinate legislation. This will all be determined on a casuistic basis. The limited extent, or lack of public participation apropos subordinate legislation is safeguarded by the provisions of section 4 of Act 3 of 2000 which can be invoked on grounds that particular administrative action materially and adversely affects the rights of the public. Some may argue that section 4 does not serve as an appropriate substitute for addressing concerns that public participation is not a precursor to the enactment of subordinate legislation. However, when one considers the practical efficacy with which the affairs of modern government must be administered it must be acknowledged that administrators who are tasked with exercising public powers (in the form of enacting subordinate legislation) do so subject to the supremacy of the constitution and the principle of legality. In this sense it is conceivable and understandable that public participation, unlike the case with deliberate legislation, will not be required in each and every instance when subordinate legislation is enacted.

SAMEVATTING

WETGEWENDE ADMINISTRATIEWE OPTREDE EN DIE BEPERKTE OMVANG VAN PUBLIEKE DEELNAME

Die Suid-Afrikaanse grondwet bevat talle uitdruklike bepalings ingevolge waarvan die nasionale, provinsiale en plaaslike wetgewer moet verseker dat daar openbare deelname in die wetgewende proses is. Die motivering vir sodanige deelname in die wetgewende proses is om uitvoering te gee aan die burgerlike en politieke regte van die publiek. Dit veronderstel dat slegs ingeligte menings ondersteun deur die lede van die publiek neerslag in wetgewing behoort te vind. Nakoming van die voorskrif van openbare deelname verleen stukrag aan die erkenning van 'n veelsydigheid van standpunte wat uiteindelik 'n positiewe neerslag behoort te vind in die formulering van beleid en die vorming van wetgewende maatreëls wanneer dit uitgevaardig word deur die wetgewer. Erkenning van die waarde van openbare deelname gee uitvoering aan die kultuur van aanspreeklikheid, 'n ingesteldheid van verantwoordbaarheid en deursigtigheid wat deel vorm van die onderliggende waardes van ons grondwetlike demokratiese stelsel.

Lede van die uitvoerende gesag ontleen hul wetgewende magte aan primêre wetgewing en in die besonder die grondwet. Sodanige magte manifesteer by wyse van ondergeskikte wetgewing in die vorm van reëls, kennisgewings, proklamasies en regulasies. In hierdie sin word na uitvoerende reëls verwys as wetgewende administratiewe optrede.

[90] Burns and Henrico (n 14) 325.

Geen uitdruklike voorsiening word in die grondwet gemaak om te verseker dat openbare deelname ten opsigte van wetgewende administratiewe optrede te alle tye moet plaasvind nie. Die omvang van openbare deelname hang af van die bepalings van die primêre wetgewing en die mate waartoe 'n lid van die uitvoerende gesag hom gebonde ag om die beginsel ook in ondergeskikte wetgewing te implementeer. In baie gevalle is die regulering wat verorden moet word dermate van openbare belang dat die verantwoordelike lid van die uitvoerende gesag openbare deelname sal verlang. Openbare deelname ten opsigte van wetgewende administratiewe optrede kan as beperk beskryf word. Terwyl oorwegings van noodsaaklikheid en praktiese doeltreffendheid die aanvaarding van ondergeskikte wetgewing mag regverdig selfs ondanks gebrekkige openbare deelname, behoef die gemeenskap beskerming teen die misbruik wat die uitoefening van openbare bevoegdhede mag inhou. Die uitoefening van sodanige bevoegdhede behoort deurgaans onderhewig te wees aan toetsing teen die grondwet en die beginsel van legitimiteit. Artikel 4 van die Wet op Bevordering van Administratiewe Geregtigheid maak in die besonder voorsiening vir openbare deelname in alle gevalle waar administratiewe optrede regte van die publiek potensieel wesenlik kan raak en die publiek kan benadeel.

BRONNE VAN VORDERINGSREGTE – LUIDENS DIE *DIGESTA – SED, EX AFRICA SEMPER ALIQUID NOVI*

D 44 7 1*pr*: "Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris – verbintenisse ontstaan uit kontrak, delik of op grond van een of ander besondere regsreël uit verskillende ander oorsake" – dus indien geen geldige kontrak erken word nie, kan daar geen sprake van 'n vorderingsreg gebaseer op 'n kontrak wees nie, maar:

"Implicitly, therefore, the learned judge had accepted that the respondent *could enforce its contractual claim even though the contract was invalid" per* Cachalia JA in *Umgungundlovu District Municipality v Amaraka Investments 37 (Pty) Ltd* (case no 921/19) 2020 ZASCA 52 (15 May 2020) par 13 – eie kursivering. Die hoogste hof van appèl het die appèl teen dáárdie merkwaardige bevinding van die hof *a quo* waarkragtens die eis as *kontraktuele eis* as afdwingbaar gehandhaaf is nieteenstaande die juiste bevinding dat die kontrak ongeldig is, egter eenparig met koste verwerp en dus daardie merkwaardige bevinding klakkeloos gehandhaaf. "The judicial institutions currently have a shortage of skills" per Cachalia JA "Denuding the bench of skills – the Judicial Service Commission and the selection of judges" 2020: April *Advocate* 26. *Roma locuta est, causa finita est*.