

# Participation in Executive Rule-Making: Preliminary Observations towards a Conceptual Framework

*Petrus Maree*

## *A. Introduction*

With the growth of the administrative state, the volume and scope of executive rule-making has increased exponentially. This symptom of modernity raises concerns for the democratic legitimacy of these rules and for securing good governance in their implementation. However, whether or not participation in executive rule-making would promote legitimacy and good governance is a question beyond the scope of this contribution. Therefore I deconstruct this question as a preparatory step towards identifying a conceptual framework within which the role participation might play can be analysed.

I raise the complexity of an inquiry into the potential role of participation and identify preliminary questions which are discussed briefly. These questions shed light on the matter of which considerations are relevant to a conceptual framework. Subsequently, since South Africa has adopted a legal system of constitutional supremacy,<sup>1</sup> the constitutional framework within which the main inquiry must be analysed and answered is set out. This section sets out the nature of democracy and the executive in the South African context, which provides some guidance and serves as reference points to the overall discussion. Next, I emphasise the variety of rules created by the executive and discuss examples of executive rule-making<sup>2</sup> and the rules which ostensibly safeguard democratic legitimacy. Finally, I proffer a preliminary, conceptual framework for assessing the role of participation on the basis of South Africa's constitutional framework and its

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1 Section 2 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), the supremacy clause.

2 The term executive *rule*-making is preferred to executive *law*-making since the legal status of the large variety of rules promulgated by the executive is not always certain.

particular forms of rule-making, with specific reference to the separation of powers and the nature of the administrative state.

### B. Preliminary Questions

The question whether public participation in executive rule-making would promote good governance and democratic legitimacy suggests that these concepts have self-generating meanings and, consequently, that the question as such is answerable. It is tempting to address the question head-on and present final deductions, but such an approach would be premature and superficial. Even though the Constitution lies at the core of any South African response to this question, the terms themselves are uncertain. Therefore, the following preliminary questions are identified, which illustrate the complexity and foundational character of such a question.

Firstly, what does one mean by “the executive”? Are administrators and the formulators of policy subsumed under this term?<sup>3</sup> This question might appear frivolous at first glance, but the Diceyan legacy still apparent in South African administrative law today justifies further scrutiny of the concept as a point of departure.<sup>4</sup>

In response to the rise of the administrative state,<sup>5</sup> Maurice Vile proposes a distinction between administrators and policy-makers, instead of simply referring to the executive as a single branch comprising homogeneous institutions.<sup>6</sup> In fact, Vile advocates for a separation of powers consisting of four branches. More recently, Ackerman has reinforced this approach to the separation of powers:

“It is past time to rethink Montesquieu’s holy trinity. Despite its canonical status, it is blinding us to the world-wide rise of new institutional forms that can-

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3 See, generally, MJC Vile, *Constitutionalism and the Separation of Powers*, Indianapolis 1998 2nd ed, ch 13; *B Ackerman*, Good-bye, Montesquieu, in: S Rose-Ackerman/PL Lindseth (eds.), *Comparative Administrative Law*, Cheltenham & Northampton 2010, pp. 128-133.

4 *PJH Maree*, Investigating an Alternative Administrative-Law System in South Africa, LLD Thesis University of Stellenbosch 2013, pp. 135-139 (available at <http://hdl.handle.net/10019.1/85591>).

5 The administrative state is also described as the welfare, developmental or regulatory state or, in French, *l'état providence*, which encapsulates the relatively modern development of the state as benefactor.

6 *Vile*, note 3, ch 13.

not be neatly categorized as legislative, judicial, or executive. Although the traditional tripartite formula fails to capture their distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government. A ‘new separation of powers’ is emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual framework containing five or six boxes – or maybe more.”<sup>7</sup>

Ackerman’s exacting critique of Montesquieu’s *trias politica* is valid also for the function of rule-making in general, and particularly executive rule-making, owing to its proliferation and scope. Without recognising the nature of executive rule-making and its consequences, the role of participation can only be analysed superficially. Therefore, the distinction between the administration and the policy branch, as divisions within the traditional “executive”, is critical to a nuanced analysis of the matter.

In line with Vile’s approach, South Africa’s Constitutional Court has acknowledged the distinction between executive functions and administrative action.<sup>8</sup> The Constitution also recognises the public administration and its distinct role.<sup>9</sup> However, the administrative “branch” as a distinct entity remains largely unacknowledged, in line with a Diceyan tradition.

Secondly, what does one mean by executive rule-making? Under British colonial rule, the doctrine of parliamentary sovereignty became firmly entrenched in South Africa. Its legacy is still apparent today, despite the current system of constitutional supremacy:<sup>10</sup> for instance, Parliament is regarded as the seat of rule-making and as capable of performing an oversight function and holding the executive to account. This state of affairs can no longer be assumed uncritically and yet the mechanisms safeguarding executive accountability, such as parliamentary oversight and judicial review, are based on a system where Parliament generates rules and the executive merely implements them. In addition, a large variety of rules is created by the executive. Given our past of parliamentary sovereignty and our adherence to a traditional separation of powers, the perceived centrality of the legislature to rule-making is unsurprising: in general, regulatory neglect of executive rule-making is a consequence.

7 Ackerman, note 3, p. 129. See Maree, note 4, pp. 47-53.

8 *President of the Republic of South Africa v South African Rugby Football Club* 2000 (1) SA 1 (CC) paras 139, 142; *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 26 et seq.

9 Sections 195-197 of the Constitution.

10 See s 2 of the Constitution.

Thirdly, what is meant by participation? In other words what constitutes participation? Participation in what and by whom? Participation by how many and when? Arguably, the right to approach a court with a complaint related to rule-making meets the requirement of participation. However, one could counter that participation is required before those rules are promulgated.

Fourthly, what does one mean by good governance and legitimacy? For instance, efficiency is often posited as characteristic of good governance. However, balancing efficiency in a narrow sense with other normative objectives remains a pertinent challenge for the developing state. Efficiency itself is also a loaded term, as revealed by the question “efficiency in what?” For instance, does one measure the efficiency of an executive rule relating to public procurement by means of the racial demographics of private firms in South Africa or by means of economic and financial criteria? Or, how should one balance these competing concerns?

Finally, what constitutes improvement and how would one measure improvement in the legitimacy of state action and in good governance? If mechanisms enforcing participation are introduced in order to achieve certain objectives, the suitability and effectiveness of those mechanisms should be determinable.

The exposition of these questions is not an attempt at gratuitous problematisation. These questions assist in identifying the constituent parts of the conceptual framework. Also, the modest claim is made that these considerations are still fundamentally open-ended in the South African context owing to the relatively recent adoption of the final Constitution.<sup>11</sup> Even though this event signifies an abrupt and radical departure from the past, determining the content of this departure remains a work in progress. Nevertheless, headway has been made both in unravelling and constructing the meaning of the Constitution. Etienne Mureinik and Karl Klare’s contribution to this endeavour should be mentioned in this regard. The concepts “a culture of justification” and “transformative constitutionalism”, developed by them, are regarded as authoritative appraisals of the constitutional era.<sup>12</sup> Above all, South Africa’s own context must inform notions of good governance and participation as well as their relationship

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11 The questions identified above are not the focus of this paper; they inform the responses to the main inquiry, responses which will be tentative as a result.

12 See *E Mureinik*, A Bridge to Where? Introducing the Interim Bill of Rights, *South African Journal on Human Rights* 31 (1994), p. 3; *K Klare*, Legal Culture and

to executive rule-making; consideration of its own particular history and constitutional aspirations is paramount.

### C. *The Constitutional Framework*

#### I. The Constitution in General

The preliminary questions must be assessed in the light of the Constitution: section 2 of the Constitution provides that the “Constitution is the supreme law of the Republic” and that “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Thus the Constitution not only entrenches certain values, but obliges the state to take positive steps to secure those values. This is illustrated by section 7: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” Section 8 states that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”<sup>13</sup> Therefore, according to the unqualified wording of section 8, the Bill of Rights applies to all branches of state, including the administration.<sup>14</sup> Finally, the Constitution, in general, and the Bill of Rights, in particular, are justiciable and enforceable. Section 172 provides that the courts “*must* declare that any law or conduct that is inconsistent with the Constitution is invalid” and “may make any order that is just and equitable”.<sup>15</sup> Thus the rule of law in the sense of the supremacy of the Constitution is established in relation to the state as a whole, in a radical departure from parliamen-

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Transformative Constitutionalism, *South African Journal on Human Rights* 14 (1998), p.146.

- 13 Section 239 of the Constitution defines “organs of state”. The Bill of Rights includes socio-economic rights such as the right to housing and the right to education, sections 26 and 29 of the Constitution, respectively, which themselves oblige the state to take specific, positive steps.
- 14 The public administration is specifically recognised by section 195 of the Constitution.
- 15 Sections 172 (1) (a) and (b) of the Constitution, respectively. See section 8 of PAJA for a similar provision in the context of the judicial review of administrative action. Note that PAJA as a whole gives effect to section 33 of the Bill of Rights.

tary sovereignty.<sup>16</sup> This extends to the executive and the public administration.

## II. Principles of Democracy

Democracy is repeatedly emphasised throughout the Constitution. For instance, the constitutional prominence of democracy is illustrated in the Preamble to the Constitution; democracy is also included among the Founding Provisions; more specifically, section 36 provides that “[t]he rights in the Bill of Rights may be limited only... to the extent that the limitation is reasonable and justifiable in an open and democratic society”. Thus democracy is a general founding principle that informs all rights and democratic principles are always directly applicable in the limitation of rights.

The Constitution entrenches general notions of democracy, such as universal suffrage, as well as more specific conceptions of democracy, such as participation. Section 57(1)(b), regulating the internal arrangements of the National Assembly, provides that the “National Assembly *may*... make rules and orders concerning its business, with due regard to representative and *participatory democracy*, accountability, transparency and public involvement.”<sup>17</sup> Similarly, section 59(1)(a), regulating public access to and involvement in the National Assembly, provides that the “National Assembly *must* facilitate *public involvement* in the legislative and other processes of the Assembly and its committees”.<sup>18</sup> This is an expression of participatory democracy, confirmed by the Constitutional Court: “[o]ur Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy.”<sup>19</sup> The Constitutional Court has struck down legislation where the requirement of public involvement

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16 See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers of South Africa; In Re: Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC).

17 Emphasis added.

18 Emphasis added. Section 118 of the Constitution provides the same protection at the provincial level.

19 *Matatiele Municipality and Others v President of the RSA and Others* 2007 (6) SA 477 (CC) para 40.

was not met, thereby confirming the status and justiciability of participation:

“The obligation to facilitate public involvement is a material part of the law-making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid.”<sup>20</sup>

These provisions are significant since the Constitution protects participation in the legislative function, even where representation is strongest at national and provincial level. Democracy, in a representative sense, is obviously strongly protected within the legislature and therefore democracy is safeguarded in the creation of legislation. However, despite this significant protection, the Constitution also imposes obligations of participation upon the legislature in the creation of legislation. Thus, the Constitution requires, in express terms, participation in the formulation of generally applicable rules. In the South African context, given the traditional, tripartite understanding of the separation of powers, its history of unchecked parliamentary sovereignty and the durability of a Diceyan conception of administrative law, it is not surprising that rule-making and its regulation are regarded as almost solely the purview of the legislature. The failure to recognise the role of the modern administration contributes to the failure to protect democratic legitimacy in the context of the executive. On the whole, South African jurisprudence maintains a classical separation of powers, which is exacerbated by the judiciary’s enthusiasm for a rhetoric of deference.<sup>21</sup>

Thus, even though the Constitution expressly recognises the value of participation, the protection afforded by it is limited to the legislative branch, at least ostensibly. This is an artificial and superficial approach to promoting participation: participation requires protection whenever the function of generating legal rules is performed. That the presence of a certain institution proves to be decisive is overly formalistic.

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20 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 209.

21 *Maree*, note 4, pp. 83-99. See, especially, *Logbro Properties CC v Bedderson NO* 2003 (2) 460 (SCA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

### III. The Executive and Transformation

The Constitution also describes the executive branch and function. It is the executive that determines policy, budgetary allocations, and its administration.<sup>22</sup> Thus, the realisation of socio-economic rights is very much the executive's responsibility. However, as pointed out, the executive remains a loaded and vague term. On the one hand there is the Cabinet, head of the executive proper. The Cabinet, comprised of Ministers and presided over by the President,<sup>23</sup> can be described as policy formulators and individual Ministers are responsible for formulating regulations. These are published in the *Government Gazette* and, thus, there is a measure of publicity and the possibility of participation where comments are invited prior to promulgation. On the other hand, there is the public administration, consisting of "pure" administrators, which is responsible for implementing legislation and regulations. The administration also promulgates numerous rules, practice notes and instructions. Many of these binding rules are not published at all. This is problematic since these are the very rules, at grass-roots level, that determine how administrators act.

On the whole, the constitutional structures in place to control the executive are rooted in a paradigm of parliamentary accountability: in theory, members of Cabinet are accountable to parliament. However, given the implications of party politics on traditional forms of checks and balances and of the executive's extensive mandate, parliamentary oversight often proves insufficient.<sup>24</sup>

As mentioned, the executive as a whole is not restricted to the policy branch, but also includes the administration. Section 195 sets out the basic principles and values governing the public administration. These include the following: the administration must be governed by the democratic values enshrined in the Constitution; efficient and economic use of resources must be promoted; public administration must be development orientated; and the public must be encouraged to participate in policy making. Thus we see the dual interests of participation and active governance where democratic principles are entrenched alongside commitments to development or transformation. One should note the emphasis on participation, even outside of the legislative process.

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22 Section 85 of the Constitution.

23 Section 91 of the Constitution.

24 See *Vile*, note 3, 399-400; *Ackerman*, note 3, pp. 128-129.

However, historical suspicion of the administration and of administrative law impeded the growth of principles and values regulating the administration.<sup>25</sup> At best it was a necessary evil, controlled in line with red-light theories.<sup>26</sup> At present, however, the administration has an extensive constitutional role to play. Thus the duality of administrative law: on the one hand, the rule of law must be upheld, including democratic legitimacy in the creation of legal rules; on the other hand, the administration is obliged by the Constitution to act and realise constitutional imperatives, of which rule-making is an essential component. It is administrative law that should facilitate the fulfilment of all of these competing mandates.

To an extent, the functions and nature of the executive are set out in the Constitution. However, the executive is not defined and these provisions establish conflicting concerns. For instance, the administration must formulate rules in a manner that is procedurally fair, but it must also implement ambitious projects of socio-economic transformation. These contrasting objectives are not necessarily in conflict, but often are: for instance, municipalities regularly identify challenges in planning and implementing complex bureaucratic schemes as a cause of perennial under-spending.<sup>27</sup> There are costs associated with promoting participation and instituting corresponding processes<sup>28</sup> which need to be balanced against the expected gains in legitimacy and good governance.

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25 *C Hoexter*, *Administrative Law in South Africa*, Cape Town 2012 2nd ed, pp. 13-23. For instance, in 1948 *Beinart* argued that, “reared and nurtured in the traditional Diceyan concept of the rule of law and the individualistic conception of society, the South African lawyer like his English counterpart, is still wont to regard administrative law as an undesirable outcrop, and has given it scant attention” in what has become an authoritative quotation on the subject of pre-Constitutional administrative law, *B Beinart*, *Administrative Law*, *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 11 (1948), p. 206.

26 On the concepts of red and green-light theories, consult *C Harlow/R Rawlings*, *Law and Administration*, Cambridge 2009 3<sup>rd</sup> ed, ch 1. Harlow and Rawlings originally coined these terms in the first edition of the book.

27 *National Treasury*, *The State of Local Government Finances and Financial Management as at 30 June 2014 Fourth Quarter of the 2013/14 Financial Year. Analysis Document*, November 2014, pp. 19-21.

28 In an economic sense, as opposed to a purely financial sense.

#### D. Instances of Executive Rule-Making

There are different levels and forms of executive rule-making. For example, regulations are issued by Ministers and published in the *Government Gazette*. Therefore, there is a measure of publicity and participation: draft regulations are also published in the *Government Gazette*. Other rules such as instructions, which are issued by pure administrators, i.e. not policy formulators or members of parliament, are not published at all. This is problematic since these are the rules, at grass-roots level, that determine how administrators act. These are the concrete rules that tell administrators what to do and administrators are held accountable to these rules; that is, their superiors enforce them directly, unlike the broader values or rules as set out above.

How is the constitutional norm of participatory democracy regulated where the executive creates rules? Below particular examples of the regulation of executive rule-making are discussed from a participatory perspective with a focus on public procurement as an illustrative field.

#### I. Administrative-Law Protection: The Promotion of Administrative Justice Act 3 of 2000

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is South Africa's primary administrative-law statute and gives effect to the right to just administrative action in section 33 of the Constitution. Section 33 provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair" and section 4 of PAJA gives effect to procedural fairness in matters affecting the public. In order to give effect to the right to procedurally fair administrative action, in the context of action impacting on the public, an administrator *must* follow one of a number of prescribed procedures such as a public inquiry or a notice and comment procedure.<sup>29</sup> Failure to follow any of these procedures renders the administrative action susceptible to judicial review.<sup>30</sup> However, the decision as to which procedure to follow cannot qualify as administrative action; any decision with a public impact that qualifies as administrative action and that is not subject to one of the exclusions must comply with sec-

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29 The administrator has other options in terms of s 4 of PAJA.

30 In terms of s 6(2)(c) of PAJA.

tion 4, though. A decision in terms of section 4(1) cannot qualify as administrative action owing to one of the exceptions in section 1 of PAJA. However, a decision that does qualify as administrative action (i.e. meets all the requirements of the definition and does not qualify as an exception) must comply with section 4 and where it does not can be reviewed with section 6(2)(c) of PAJA. If this is not the case, section 4 provides no protection and is unenforceable. Such a reading of PAJA would be inconsistent with section 33 of the Constitution and unconstitutional. Thus the review of an administrative action for compliance with section 4, cannot include review of the choice or failure to make a choice in terms of section 4, which is a distinct decision. However, a decision in terms of section 4(1) may be reviewed on the basis of the general constitutional principle of legality.

However, there is a substantial threshold to the application of this statute as a whole and, by implication, section 4. It is worthwhile setting out the hurdles facing an applicant who wishes to enforce the imperatives imposed by section 33, in order to appreciate the extent to which the protection for participation is limited. For PAJA to apply there must be an administrative action, which is defined as “any decision taken... which adversely affects the rights of any person and which has a direct, external legal effect”.<sup>31</sup> Generally, the decision must be taken by either an organ of state acting in terms of the Constitution or legislation, or by a private person exercising a public function in terms of an empowering provision.<sup>32</sup> Thus the emphasis is on the functional nature of the act, rather than the institution performing it.<sup>33</sup> The definition of administrative action has been subjected to harsh criticism and the Constitutional Court has described it as “unwieldy”.<sup>34</sup>

Section 4 applies to the procedures preceding the actual decision referred to in the definition of administrative action. In this way it safeguards participation in administrative decisions, but even though PAJA provides for the judicial review of decisions which do not comply with

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31 See Hoexter on the definition’s German origins, *Hoexter*, note 25, pp. 227-229.

32 Section 1 of PAJA defines “empowering provision”.

33 The functional approach is also evident in section 239 of the Constitution. The Constitutional Court has also confirmed the predominance of the functional approach in regulating public power, *President of the Republic of South Africa v South African Rugby Football Club* 2000 (1) SA 1 (CC).

34 *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 33.

section 4, the protection is restricted. In the first place it is only available if the definition of “administrative action” is met. Secondly, it is uncertain that the formulation of a general rule, as opposed to its application, will qualify as administrative action.<sup>35</sup> PAJA expressly excepts legislative and executive functions from its purview; thus decisions that are classified as legislative or executive cannot qualify as administrative action. In any event, PAJA is focused on the application of rules, rather than the rules themselves.<sup>36</sup> For instance, it is arguable whether the mere formulation of rules by the executive will always qualify as administrative action: the rules themselves will not necessarily and automatically have a “direct, external legal effect” that “adversely affects the rights of any person”, as required by section 1(i) of PAJA. It is more likely that these requirements will only be met in the implementation of such rules. On the whole this statute does not secure public participation in the formulation of rules, but rather protects the right to procedural fairness where a decision has negatively impacted upon one’s rights. In this sense it is retrospective.

## II. The Public Finance Management Act 1 of 1999

The Public Finance Management Act and its regulations provide another example where PAJA would not apply. According to the National Trea-

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35 See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC). Since this Constitutional Court judgment of 2006 the matter of the status of regulations in relation to PAJA remains uncertain. Therefore, whether or not rules made by the executive will qualify as administrative action, in terms of PAJA, is unclear. The SCA has, in one sentence and without explanation, relied on the *New Clicks* case to state that the making of regulations qualifies as administrative action (*City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA)). The SCA adopted this view even though only Chaskalson CJ, in a minority judgment on this point, argued that regulations will always qualify as administrative action. The SCA’s position conflicts with Hoexter and Quinot’s reading of *New Clicks*, though (*Hoexter*, note 25, p. 201; *G Quinot*, *Administrative Law Cases and Materials*, Cape Town 2008, p. 242). See *Hoexter*, note 25, pp. 200-202.

36 See *Van Zyl v New National Party* [2003] All SA 737 (C) paras 86-88 where the court explains that decisions of an “administrative nature”, an element of the definition of administrative action, typically involve the implementation of legislation. See also *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) paras 140-143.

sury Department: “The Act promotes the objective of good financial management in order to maximise service delivery through the effective and efficient use of the limited resources.” One recognises the commitment to transformation, the executive in action, as well as the normative objectives to which the administration must adhere, such as good financial management and efficiency. Section 76 provides that the Treasury must make regulations and issue instructions to departments in terms of which they can manage their economic and financial affairs. This includes a framework for public procurement.

However, the Act, read with the Regulations,<sup>37</sup> delegates the formulation of a so-called “effective and efficient supply chain management system” to the head of department; in other words, the function of formulating rules regulating procurement within a department is delegated to a pure administrator. These supply chain rules are not published and participation in their formulation is not formally required. Even the link to representative legitimacy is dubious.

### III. The Preferential Procurement Policy Framework Act 5 of 2000

Similarly, the Preferential Procurement Policy Framework Act (PPPFA) illustrates the lack of regard for democratic legitimacy. Race-based policies, such as preferential public procurement, are central to the ruling party’s manifesto and enjoy strong democratic support. Section 217 of the Constitution provides for the procurement of goods and services by organs of state.<sup>38</sup> Section 217 sets out standards to which all procurement processes are to comply and authorises organs of state to pursue “horizontal policies”,<sup>39</sup> especially in relation to historically disadvantaged persons.<sup>40</sup> All public procurement processes must be “fair, equitable, transparent, competitive and cost-effective.”<sup>41</sup> Section 217(2) authorises organs of state to formulate procurement policies that identify “categories of preference in

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37 Sections 36 and 16A, respectively, of GN R225 *Government Gazette* 27388 of 15 March 2005.

38 “Organ of state” is defined by section 239 of the Constitution.

39 *S Arrowsmith/P Kunzlik* (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge 2009, ch 1.

40 Section 271(1)(b) of the Constitution.

41 Section 217(1) of the Constitution.

the allocation of contracts”<sup>42</sup> or that provide for “the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.”<sup>43</sup>

The PPPFA was promulgated to give effect to section 217, in line with section 217(3).<sup>44</sup> According to the PPPFA every organ of state must formulate a preferential procurement policy in line with the statute:

2(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed;
- (b)
  - (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
  - (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price.

The prescribed amount is set by regulation: contracts valued between R30 000 and R1 million activate the 20 point provision and contracts above R1 million activate the 10 point provision.<sup>45</sup> The specific goals referred to in the PPPFA include “contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability”.<sup>46</sup> Thus, in general, protected categories carry a weight of 10 to 20 points out of 100, which is significant, even though the larger proportion is based on price.<sup>47</sup>

The PPPFA is a national statute promulgated by Parliament. Therefore the content of the Act bears the quality of democratic legitimacy to the extent that the statute stems from the legislative process. As pointed out above, the South African legislative process implies a degree of participation. The

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42 Section 217(2)(a) of the Constitution.

43 Section 217(2)(b) of the Constitution. See section 9(2), read with section 36, the limitations clause in the Bill of Rights.

44 Section 217(3) requires that “[n]ational legislation must prescribe a framework which the policy referred to in subsection (2) must be implemented”.

45 Regs 5 and 6 of GN R502 *Government Gazette* of 8 June 2011.

46 Section 2(1)(d)(i) of the PPPFA. The connection between this provision and section 217 of the Constitution is apparent.

47 See *Geo Quinot*, Promotion of Social Policy through Public Procurement in Africa, in *Geo Quinot / Sue Arrowsmith* (eds), *Public Procurement Regulation in Africa*, Cambridge 2013, p. 396.

express allocation of points to transformative objectives dovetails with foundational constitutional aspirations such as the promotion of dignity, equality and socio-economic rights. In addition, the conclusion of contracts with the historically disadvantaged can be regarded as an incidence of transformative constitutionalism.<sup>48</sup>

On the face of it, in the context of public procurement the PPPFA provides a degree of protection to persons disadvantaged by discrimination. Given the nature of colonialism, Apartheid and their legacy such an approach is plausible and, as mentioned, has a constitutional foundation. It would not be unreasonable to infer that the purpose of the provision is to benefit historically disadvantaged individuals themselves, such as black contractors for instance, by means of the preferential policy. Historically disadvantaged individuals (HDIs) were originally defined as South African citizens disenfranchised during Apartheid, females etc. in the 2001 Regulations.<sup>49</sup> This definition evidently reflects the import of section 2 of the PPPFA.

However, the Codes of Good Practice on Black Economic Empowerment<sup>50</sup> qualify the application of the PPPFA and arguably dilute it. Certainly, the link between the statute and corresponding regulations is tenuous. The generic scorecard determines the BBBEE status of contractors and the BBBEE status of contractors determines whether a contractor qualifies as an HDI or not, thereby replacing the requirements of the 2001 Regulations and elaborating on section 2 of the PPPFA.

The Codes of Good Practice provide a generic scorecard to calculate BBBEE status. The scorecard consists of seven elements: ownership, management control, employment equity, skills development, preferential procurement, enterprise development, and socio-economic development initiatives.<sup>51</sup> Thus, the original emphasis on HDIs has been converted into these elements, eliminating the discretion originally afforded to procuring

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48 “Transformative constitutionalism”, a concept espoused by *Klare*, note 12.

49 GN R725 *Government Gazette* 22549 of 10 August 2001.

50 Issued in terms of the BBBEE Act, GN 112 *Government Gazette* 29617 of 9 February 2007.

51 Code series 000 statement 000 para 7. Preferential procurement in this context refers to private procurement.

authorities<sup>52</sup> and providing for a more structured approach and more certainty.<sup>53</sup> However,

“it is possible for a completely non-HDI entity (for example, a previously advantaged South African bidder or a foreign bidder) to have a higher B-BBEE status (and thus obtain more preference points in procurements) than an HDI, based on the former’s initiatives under elements other than ‘ownership’ and ‘management control’.”<sup>54</sup>

Although decision-makers now enjoy the benefit of a concrete framework, the manner in which these rules have been formulated and promulgated is concerning. What is the nature and origin of these rules? From the outset it should be emphasised that to a large extent it is unclear. As mentioned, these rules are set by the Codes. However, the Codes were not formulated by means of a legislative process. What is apparent is that the Minister of Trade and Industry issued the Codes in terms of the Broad-Based Black Economic Empowerment Act.<sup>55</sup> Thus the Codes are similar to regulations in that they are issued in the *Government Gazette*, exhibiting a degree of formal publicity. There are no formal mechanisms that oblige the executive to comply with processes safeguarding democratic legitimacy, including participation, though. Simply by choosing to issue rules in the form of codes or regulations, the executive avoids the constraints of democratic legitimacy. These rules, however, are no different to ordinary legislation: they are generally applicable, binding, enforceable and justiciable. Yet, the executive formulates and issues them unilaterally.

### E. Concluding Remarks

On the whole, the constitutional and legislative framework regulating the process of rule-making provides for two often-conflicting ideals: democratic participation and transformative governance. The crucial question is how to balance these concerns. In South Africa one finds a broad spectrum of rules issued by the executive: some entail participation, many not. It is recommended that the focus at this early stage should be directed at the following: firstly, determining the contextual content of participation and

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52 *Quinot*, note 47, p. 398.

53 *Quinot*, note 47, p. 400.

54 *Quinot*, note 47, p. 399.

55 Act 53 of 2003.

good governance in line with the normative framework of the Constitution and, secondly, avoiding formalistic or threshold approaches. On a more speculative level, it is submitted; the opacity of the “administrative curtain”<sup>56</sup> separating citizens and administrators suggests the promotion of participation *could* certainly improve governance significantly.

The constitutional provisions concerning the executive and principles of democracy are central to a conceptual framework of participation. These provisions also inform the nature of the administration in the administrative state, another component of such a framework. The administration not only creates and implements new rules on a daily basis, but does so, on such a scale that real oversight by the legislature is a practical impossibility, even assuming that party politics and simultaneous membership in Parliament and Cabinet do not render inter-branch accountability illusory.

The existing regulation of the function of rule-making in general provides limited protection, as illustrated by the examples of PAJA’s application and public procurement regulations. Here the separation of powers has much to offer. Even in its traditional form, the separation of powers indicates which functions are deserving of independence and protection. One such function is the creation of legal rules; in this sense the author of such rules is secondary to the nature of the function being performed. In other words, exercising the function of creating law should trigger rules safeguarding democratic legitimacy and not the identity of the author. Why does the process for the promulgation of rules by the legislature require participation as a condition for validity, but the process for executive rule-making in general does not?

The separation of powers provides guidance on how to promote the doctrine’s normative objectives: independent institutions are obliged to enforce accountability. Vile and Ackerman’s analysis of the pure separation of powers then argues that a fourth branch reflecting the rise of the administrative state is a necessity. Thus the separation of powers emphasises the role of the administration in the modern state, its sheer scale and its critical place in creating and implementing law. Finally, the administration is not considered in isolation, but in relation to the other branches of states, an analysis which is compromised where the administration and policy branch are conflated.

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56 A term coined by Margot Strauss of SERAJ at Stellenbosch University.

The terms of a potential conceptual framework may seem overly broad. They are certainly not final responses to the question whether participation is the answer to concerns of legitimacy and good governance in executive rule-making. However, before the nature of the administrative function, participation and good governance are established, within the appropriate context, specific legal rules providing for their protection through participation cannot address South African challenges in an integrated and appropriate manner. On the contrary, superficial rules paying lip service to these norms and concepts tend to reinforce pre-Constitutional paradigms, rather than transforming the legal landscape.<sup>57</sup>

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57 Consider, for example, PAJA's expression of the right to just administrative action (section 33 of the Constitution): overall, PAJA codifies the common-law grounds of judicial review as opposed to developing more progressive, green-light theories of administrative-law regulation. Although the right to reasons (section 5) and the specific content of procedural fairness (provided by sections 3 and 4) go beyond the common law grounds of review, these provisions remain retrospective, especially the mechanism for their enforcement: judicial review.