

## **An Analysis of the Principle of Public Participation in Policy-Making, including Socio-Economic Impact Assessments, and their Application in South Africa**

### **1. Introduction**

On 23 February 2017, the Deputy Minister of Finance, Mcebisi Jonas, said South Africa needs an outspoken citizenry and a robust media that speaks out or challenges government policy when they disagree with it.<sup>1</sup> South Africa is fortunate to have a justiciable constitution that not only facilitates a participatory democracy, but also encourages it. It has become questionable, however, whether government itself is adhering to the principles of public participation, and, when they appear to do so, whether it is in good faith.

The Public Service Commission, in 2010, acknowledged<sup>2</sup> the following:<sup>3</sup>

“Overall, the PSC’s studies have found that the nature and extent of public participation is generally inadequate, and that concerted efforts are necessary to improve the situation. One of the critical measures that each department needs to put in place is a set of guidelines which will indicate, among others, how public participation will be achieved, who the “targeted” public is, and how the participation will be used to inform policy and practice.”

The first part of this paper will serve as an analysis of the principle of public participation as a part of the Constitution, and as a part of the Rule of Law. I also consider and discuss socio-economic impact assessments (SEIAs) as a potential part of the constitutional requirement of transparency and evidence-based policy-making. The focus will be on public involvement in the policy-making process at national level, rather than involvement in law-making, i.e. the legislative process, or involvement in provincial or municipal policy-decisions. It is, however, apt to note that the Constitution does oblige Parliament<sup>4</sup>, as well as the provincial<sup>5</sup> and municipal<sup>6</sup> legislative bodies, to engage the public when laws are made.

In the second part of this paper, the principles, rules, and considerations outlined in the first part will be applied to the introduction of the Information and Communication Technologies Policy White

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<sup>1</sup> Ilze-Marie Le Roux. “Jonas calls on citizens to speak out on govt policies.” (2017). *Eye Witness News*. Available online: <http://ewn.co.za/2017/02/23/jonas-calls-on-citizens-to-speak-out-on-govt-policy>. Accessed 24 February 2017.

<sup>2</sup> Public Service Commission. “Template for Developing Guidelines on Public Participation.” (2010). Available online: <http://www.psc.gov.za/documents/docs/guidelines/Temp%20Develop%20Guide.pdf>. Accessed: 2 March 2017.

<sup>3</sup> Page 2.

<sup>4</sup> Sections 56, 57, and 59 of the Constitution, for the National Assembly, and sections 69, 70, and 72 of the Constitution, for the National Council of Provinces.

<sup>5</sup> Sections 115, 116, and 118 of the Constitution.

<sup>6</sup> Sections 152 and 160 of the Constitution.

Paper, that was published by the Department of Telecommunications and Postal Services and which was approved by Cabinet in late September 2016.

Citations in quoted works are omitted throughout.

## PART I

### 2. Public participation generally

The government of the Australian state of Victoria, in a report on public participation,<sup>7</sup> wrote *inter alia* that public participation informs policy and assists in its “translation into effective strategies, programs and projects” and that the stakeholders bring value “real life experience” into decision-making, which strengthens the credibility of the policy. “[I]nadequate public participation”, it continues, “can alienate sections of the community, undermine trust and is more likely to result in poorly informed decisions”.<sup>8</sup>

The International Association for Public Participation (IAP2) lists several “core values” that set out the essence of what substantive public participation means. The essence of each value is as follows:<sup>9</sup>

- Persons affected by decisions must be able to participate in the decision-making process.
- The decision must be influenced by the public participation.
- The interests of all stakeholders are important and should be communicated.
- The process of public participation is a facilitation of the involvement of affected persons.
- Stakeholders should play a role in deciding how they participate in the decision-making process.
- Information about the decisions which affect the stakeholders can only be provided through public participation, which enables them to participate substantively.
- Public participation is a feedback mechanism to show stakeholders how their involvement has influenced the decision.

From these general principles, the following can be deduced: people must have a say in the decisions that affect their lives, they must know how the decision was arrived at, and on what basis, and their participation must be meaningful (in other words, government must engage in good faith) and not merely a façade.

This latter ‘good faith requirement’ is often overlooked. Public participation does not simply mean giving stakeholders a platform to voice their concerns; indeed, someone must actually be *listening* to them. Professor Mokoko Sebola of the University of Limpopo reinforces this point, writing<sup>10</sup> that participation “is therefore a complex concept in which a mere passive involvement of the people in

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<sup>7</sup> Victoria Auditor-General’s Office. “Public-Participation in Government Decision-Making.” (2015). Available online: <http://www.audit.vic.gov.au/publications/20150130-Public-Participation-BPG/20150130-Public-Participation-BPG.pdf>.

<sup>8</sup> Page 2.

<sup>9</sup> International Association for Public Participation. “IAP2 Core Values.” Available online: <http://www.iap2.org/?page=A4>. Accessed: 1 March 2017.

<sup>10</sup> Mokoko P Sebola. “Public participation in South Africa’s Policy Decision-Making Process: The Mass and the Elite Choices.” (2016). 14 *International Public Administration Review*. 55-73.

government activities does not align with the definition. [...] It can be concluded that in any form of public engagement in which public influence is not considered, no public participation can be claimed to have taken place”.<sup>11</sup>

### 3. Constitution of South Africa

#### 3.1 Interpretation

On the question of public participation, various provisions of the Constitution<sup>12</sup> become relevant, directly or indirectly. It is important to note, first, that a constitutional provision can never be read in isolation. In the case of *S v Makwanyane*<sup>13</sup>, Chaskalson J held<sup>14</sup> for a majority of the Constitutional Court, that a provision of the Constitution “must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular” other provisions in the chapter of which it is a part. This supports the idea that the Constitution must be read holistically, bearing in mind the values and purpose of the entire text as well as the particular provisions.

An important canon of legal interpretation is that when there has been a change in the wording of a law, a substantive change was intended. In other words, if a provision in the current version of the statute was changed, it necessarily means that a change in effect or consequence is intended by the legislature.

A further canon which complements this is the principle that the text in a law should not be seen as meaningless puffery. Indeed, every word of a provision of any law, especially a constitutional law, should be given effect. In other words, they must be interpreted as enforceable and justiciable.<sup>15</sup>

These interpretative principles must be borne in mind when the provisions of the Constitution that relate to public participation, are read.

#### 3.2 Relevant provisions

The most relevant provisions relating to public participation are those contained in chapter 10 (Public Administration) of the Constitution, moreover, in section 195. Section 195(1)(e) provides that the public administration “must be governed by the democratic values and principles enshrined in the Constitution”, including that the people’s “needs must be responded to, and the public must be encouraged to participate in policy-making”. Section 195(1)(g), further, provides that transparency “must be fostered by providing the public with timely, accessible and accurate information”.

The principles in section 195(1) apply to all organs of state and every sphere of government, according to section 195(2).

It is important to note the use of the words “democratic values”. As has already been mentioned, the text of the Constitution cannot be regarded as irrelevant puffery – every word and provision must be

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<sup>11</sup> Page 56.

<sup>12</sup> Constitution of the Republic of South Africa, 1996.

<sup>13</sup> *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>14</sup> At par 10.

<sup>15</sup> *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd.* 1993 (4) SA 110 (A).

given effect. This means that some consequential substance must underlie the obligation that the public administration be governed by democratic values. Professor Bernard Bekink writes:<sup>16</sup>

“Democracy thus means the power or strength of the people. In a democratic system, the power to govern is not vested in one person (a monarch) or in a small group of persons (an aristocracy) but in the people of the state. In this regard, democracy presupposes free political expression, the right of all to take part in political decision-making and the protection of minority interests.”

The election of public representatives to Parliament and other legislatures on provincial and municipal levels is dealt with separately in the Constitution. Section 195, in particular, states that the *public administration* must be governed by these values. This means that it cannot simply be said that the people’s participation in the political process is already provided for by way of general elections. This is a principle that governs the day-to-day administration of the state. “Democracy thus requires government by explanation,” writes Bekink, “rather than by force.”<sup>17</sup> Bekink explicitly references section 195 and other sections entrenching the principle of democracy when he writes that given “its entrenchment in the constitutional text, any law or conduct inconsistent with democracy, is invalid”.<sup>18</sup> Bekink later also references the case of *Hardy Ventures CC v Tshwane Metropolitan Municipality*<sup>19</sup> wherein the Transvaal Provincial Division “held *inter alia* that the basic values and principles which govern the public administration are applicable to all three spheres of government [...]. The Court concluded that the municipality had failed to adhere to the referred principles. Such conduct, according to the Court, would lead to inefficiency and unfairness and would ultimately result in a bureaucratic culture that was inimical to the new constitutional ethos. The Court mentioned that erratic administration often results in arbitrariness and thus undermines qualitative administration in a democratic state”.<sup>20</sup>

The Public Administration Management Act,<sup>21</sup> whilst claiming to “promote the basic values and principles governing the public administration referred to in section 195(1) of the Constitution”, does not expand upon these principles to any notable extent, other than to repeat them verbatim from the text of the Constitution. It provides in section 16(1)(a), however, that the Minister of Public Service and Administration “may prescribe minimum norms and standards regarding the promotion of values and principles referred to in section 195(1) of the Constitution”. The Public Service Act,<sup>22</sup> furthermore, does not expand upon facilitating public participation in terms of section 195. This is unlike the Promotion of Administrative Justice Act<sup>23</sup> (PAJA) and the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>24</sup> which are two other pieces of constitutionally-mandated legislation that elaborate on the constitutional provisions to which they give effect.

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<sup>16</sup> Bernard Bekink. *Principles of South African Constitutional Law*. (2012). 34.

<sup>17</sup> Bekink references “Mureinik E ‘A Bridge to Where: Introducing the Interim Bill of Rights’ 1994 *SAJHR* 1031-32.”

<sup>18</sup> Bekink (footnote 16 above) 35.

<sup>19</sup> *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (TPD).

<sup>20</sup> At par 11.

<sup>21</sup> Public Administration Management Act (11 of 2014).

<sup>22</sup> Public Service Act (Proc 103 of 1994). This Proclamation has the same status as an Act of Parliament.

<sup>23</sup> Promotion of Administrative Justice Act (3 of 2000).

<sup>24</sup> Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000).

Section 32(1)(a) of the Constitution provides that “everyone has the right of access to any information held by the State”, which is given effect in the Promotion of Access to Information Act.<sup>25</sup> The Act appears to be principally concerned with records, defined<sup>26</sup> as “any recorded information, regardless of form or medium, in the possession or under the control of [a] public or private body, respectively, and whether or not it was created by that public or private body, respectively”.

The last important section to bear in mind for public participation is section 33(1), which provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.

### 3.3 *Interim Constitution*

Considering the canon of interpretation mentioned above, i.e. that a change in the wording of a law must, of necessity, indicate a change in the consequence or effect of that provision, it is prudent to compare the Constitution’s provisions to that of the interim Constitution.<sup>27</sup>

The interim Constitution does not provide for public participation. *Vis-à-vis* the public service, the interim Constitution provided the following in section 212:

#### **“THE PUBLIC SERVICE**

212. [...]

(2) Such service shall –

- (a) be non-partisan, career-orientated and function according to fair and equitable principles;
- (b) promote an efficient public administration broadly representative of the South African community;
- (c) serve all members of the public in an unbiased and impartial manner;
- (d) be regulated by laws dealing specifically with such service, and in particular with its structure, functioning and terms and conditions of service;
- (e) loyally execute the policies of the government of the day in the performance of its administrative functions; and
- (f) be organised in departments and other organisational components, and the head of such department or organisational component shall be responsible for the efficient management and administration of his or her department or organisational component.”

Section 212(b), (c), and (e) might be interpreted indirectly as endorsing some kind of public participation doctrine, but no explicit mention is made.

In contrast, as we have already seen, section 195(1)(e) of the current Constitution provides that the public administration “must be governed by the democratic values and principles enshrined in the Constitution”, including that the people’s “needs must be responded to, and the public must be encouraged to participate in policy-making”. Section 195(1)(g), further, provides that transparency “must be fostered by providing the public with timely, accessible and accurate information”.

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<sup>25</sup> Promotion of Access to Information Act (2 of 2000).

<sup>26</sup> Section 1 of the Promotion of Access to Information Act.

<sup>27</sup> Constitution of the Republic of South Africa Act (200 of 1993).

It is clear, therefore, that in adding these provisions where they previously did not exist, the constitutional drafters intended public participation *per se* to become a principle governing South Africa's public administration.

### 3.4 Conclusion

The provisions in section 195 of the Constitution must, of necessity, be justiciable, as they do not appear in the preamble, which is the only portion of the Constitution that is not necessarily directly enforceable.<sup>28</sup> Furthermore, the Constitution provides that the public administration "must be governed by the democratic values and principles enshrined in the Constitution". This might appear to be mere filler text to a layperson. However, as with the subsections in section 195, this provision, too, must be justiciable and it is evident that this statement intends to incorporate the values underlying the remainder of the Constitution, especially those in the Bill of Rights, into the culture of the public administration.

## 4. Administrative action

The section 33 constitutional right to just administrative action is given effect in PAJA, wherein administrative action is defined<sup>29</sup> as "any decision taken by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation [...] which adversely affects the rights of any person and which has a direct, external legal effect, but does not include the executive powers or functions of the National Executive, including the powers or functions referred to in section 79 [...], 84 [...], 85 [...], 91 [...], 92 [...], 93, 97, 98, 99 and 100 of the Constitution".

Determining whether a function or power is "public", according to Langa CJ, is a difficult exercise. He writes:<sup>30</sup>

"Determining whether a power or function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest".<sup>31</sup>

Section 4 of PAJA, titled "Administrative action affecting public", makes an "innovative addition to the law on procedural fairness" as far as public participation is concerned.<sup>32</sup> Section 4(1) provides:

### "Administrative action affecting public"

- (1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –
  - (a) to hold a public inquiry in terms of subsection (2);

<sup>28</sup> The Preamble is, however, of interpretive significance. See *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at par 112.

<sup>29</sup> Section 1 of the Promotion of Administrative Justice Act.

<sup>30</sup> *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).

<sup>31</sup> At par 186.

<sup>32</sup> C Hoexter. *Administrative Law in South Africa*. (2012). 84.

- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
- (e) to follow another appropriate procedure which gives effect to section 3.”

“In essence,” writes Professor Cora Hoexter about public inquiries, “these procedures require proposed legislation to be published for public comment. At the end of a specified period the comments are assessed by the rulemaking authority and the proposed legislation is modified where the comments are considered persuasive. Only then is the legislation promulgated in its final form – ideally with a concise description of the comments received and the administrator’s reasons for adopting the legislation in the form chosen.”

The definition of administrative action, however, would appear not to include the formulation and implementation of policy, as section 85(2)(b) of the Constitution is excluded from the application of the Act. Section 85(2)(b) provides:

**“Executive authority of the Republic**

85. [...]
  - (2) The President exercises the executive authority, together with the other members of the Cabinet, by –
    - [...]
    - (b) developing and implementing national policy;
    - [...]”

It is nonetheless important to bear in mind, however, that PAJA is not part of the Constitution. It is constitutionally-mandated, but section 33, as a part of the text of the Constitution, is of more significance than the provisions of PAJA. The principle of subsidiarity stands in the way of direct reliance on the Constitution. The Constitutional Court held in *Mazibuko v City of Johannesburg*<sup>33</sup> that “where legislation has been enacted to give effect to a right, a litigant should reply on that legislation [...] or alternatively challenge the legislation as being inconsistent with the Constitution”.<sup>34</sup> According to Professor Hoexter, thus, “Direct review under s 33 is thus available only in limited instances, either where the constitutionality of the PAJA itself is impugned [...] or where other original legislation is challenged on the basis that it infringes on the rights in s 33 unjustifiably”.<sup>35</sup>

PAJA, arguably, is inconsistent with the Constitution, for exempting the development and implementation of national policy from the scope of its application. Section 33 of the Constitution provides:

**“Just administrative action**

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.  
 (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

<sup>33</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

<sup>34</sup> At par 73.

<sup>35</sup> Hoexter (footnote 32 above) 119.

- (3) National legislation must be enacted to give effect to these rights, and must –
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.”

Nothing in this section provides for or alludes to an exception for the making and implementation of policy by the President, Cabinet, or executive officials. If the definition of administrative action is read without the specific exemption, national policy is, without doubt, an example of administrative action as it usually “adversely affects the rights of any person and which has a direct, external legal effect”. By the end of the apartheid era, the term “administrative action” was understood legally to be a very wide concept. “Even prerogative powers,” writes Hoexter, “which were traditionally thought not to be justiciable owing to their highly political character, became reviewable toward the end of the apartheid era.”<sup>36</sup> Hoexter continues:<sup>37</sup>

“In short, there is no need for ‘administrative action’ to have quite so broad a definition as it was given at common law. [...] The PAJA, however, goes too far in this regard. Its definition of administrative action is both complicated and narrow, thus creating an unfortunate disparity between the constitutional and statutory concepts of administrative action.”

Section 33(3)(c), when read in conjunction with section 195, lends further weight to the notion that legislation made in terms of section 33 should apply to policy-making.

## 5. The Rule of Law

Section 1(c) of the Constitution – a Founding Provision – provides:

### “Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
  - [...]
  - (c) Supremacy of the constitution and the rule of law.
  - [...]”

It is important to take note of the wording of this subsection. *Both* the Constitution *and* the Rule of Law are said to be the supreme values upon which South Africa is founded – they are co-equal. Madala J famously noted in the *Van der Walt* case<sup>38</sup> that the principle of the Rule of Law “permeates” the entire body of South African law, and indeed the very Constitution itself.<sup>39</sup> Professor Bekink, furthermore, writes:<sup>40</sup>

“Under the new constitutional dispensation, the principle of the rule of law is not only specifically entrenched in the Constitution; it is recognised as a founding value of the

<sup>36</sup> Hoexter (footnote 32 above) 173.

<sup>37</sup> Hoexter (footnote 32 above) 174.

<sup>38</sup> *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC).

<sup>39</sup> At par 65.

<sup>40</sup> Bekink (footnote 16 above) 62.



Constitution and underlies our open and democratic society. The rule of law must therefore be promoted when provisions of the Constitution, in particular the Bill of Rights, are interpreted.”

It is important, therefore, to conduct a Rule of Law analysis of public participation in conjunction with the constitutional analysis.

In *Van der Walt*, Madala outlines three “basic tenets” of the Rule of Law, namely:

- Power must not be exercised arbitrarily. Functionaries should not enjoy “wide unlimited discretionary or arbitrary powers”.
- Equal application of the law. The law, adjudicated by the courts, applies to everyone, regardless of who they are.
- The law protects basic human rights.

Madala continues, saying,<sup>41</sup> “I would also add that [the Rule of Law] excludes unpredictability.” He approvingly quotes, too, from the Indian Supreme Court that the Rule of Law excludes unreasonableness. This sentiment is mirrored by Bekink:<sup>42</sup>

“Firstly, there must be a rational relationship between the law and state conduct and the achievement of a legitimate governmental purpose. The state may not act capriciously or arbitrarily. If there is no rational connection between conduct and purpose, then the actions of government will be contrary to the rule of law principle and thus unconstitutional and invalid. Secondly, no government action may infringe on basic fundamental rights, unless such infringement is regarded as a lawful limitation according to the Constitution.”

Bekink also supports the notion that the Rule of Law is not a value-neutral concept, but that both a procedural *and* substantive threshold of legality must be met for this concept to be respected.<sup>43</sup>

The Constitutional Court, too, recognised the doctrine of vagueness as a tenet of the Rule of Law, in the case of *Affordable Medicines Trust v Minister of Health*<sup>44</sup> where the Court held:<sup>45</sup>

“The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”

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<sup>41</sup> At par 66.

<sup>42</sup> Bekink (footnote 16 above) 63.

<sup>43</sup> Bekink (footnote 16 above) 64.

<sup>44</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

<sup>45</sup> At par 73.

It is clear, therefore, that if a law is vague, or the consequences of its provisions are not reasonably predictable, or it empowers a functionary to act arbitrarily,<sup>46</sup> it will not satisfy the principles of the Rule of Law, otherwise known as the requirement of legality.

The most important tenet of the Rule of Law is the prohibition on arbitrariness. Arbitrariness is not only a symptom of unfair and bad governance, but is also very harmful to the economy. In its SEIA guideline – discussed below – government correctly notes:<sup>47</sup>

“A less easily identified cost arises when an implementation mechanism opens the door to corruption. It is important to ensure that proposals provide adequate controls on the discretion of individual officials to benefit or harm the public or enterprises. These controls typically take the form of clear criteria for official decisions; requiring officials to publish their decisions and justify them in terms of the criteria provided; and establishing an easily accessible and fair appeals route.”

The Good Law Project report, *Principles of Good Law*,<sup>48</sup> includes a useful “good law checklist” which is relevant for determining whether a particular law or regulation – and possibly policies as well – adheres to the Rule of Law. The checklist includes the following:

- Provisions must be certain and not vague.
- The consequence of provisions must be predictable.
- Provisions must be ascertainable in advance by those to whom they apply.
- Provisions must not apply retrospectively.
- The executive may not be empowered to repeal or amend laws passed by a legislature.

The recent case of *e.TV v Minister of Communications*<sup>49</sup> sets down some of the important Rule of Law principles for public participation. The Supreme Court of Appeal held that there “are of course differences between bylaws, administrative decisions and policies. But the same principle underlies the requirement of publication of a policy for comment: openness and accountability, the foundations of a democratic State, require the participation of those affected”.<sup>50</sup> It went on to say that where “a policy or policy amendment impacts on rights [...] it is only fair that those affected be consulted. Fairness in procedure, and rationality, are at the heart of the principle of legality.”<sup>51</sup> In *e.TV*, the SCA quotes with approval from the case of *Minister of Home Affairs v Scalabrini Centre*.<sup>52</sup> In that case, the SCA held:<sup>53</sup>

“That conclusion in this case does not have as a consequence that there is a general duty on decision makers to consult organisations or individuals having an interest in their decisions. Such a duty will arise only in circumstances where it would be irrational to take the decision

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<sup>46</sup> ‘Arbitrariness’ is defined as unreasonable, i.e. not reasoned, choices, or unrestrained exercise of power. See Merriam-Webster Dictionary. “Arbitrary.” Available online: <https://www.merriam-webster.com/dictionary/arbitrary/>. Accessed: 27 February 2017.

<sup>47</sup> DPME (note 59 below) 5.

<sup>48</sup> Good law Project. *Principles of Good Law*. (2016). 99.

<sup>49</sup> *e.TV (Pty) Ltd and Others v Minister of Communications and Others* 2016 (6) SA 356 (SCA).

<sup>50</sup> At par 37.

<sup>51</sup> At par 38.

<sup>52</sup> *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA).

<sup>53</sup> At par 72.

without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware.”

In other words, not consulting stakeholders would be irrational if the stakeholders have special knowledge relevant to the decision.

I now quote at length the final paragraph of the SCA’s decision *vis-à-vis* the requirement of legality in *e.TV*:<sup>54</sup>

“In my view, the failure by Minister Muthambi to consult ICASA and USAASA is even more egregious given their statutory duties. (The court a quo considered that they must in fact have been consulted. But it based this conclusion on flimsy evidence and the Minister says nothing in response to the e.tv allegations about failure to consult these bodies.) So too the failure to consult the appellants, all of whom had an interest in the policy, was quite simply irrational. Thus the ECA’s silence on the requirement of consultation in respect of the amendment of the policy is of no moment. The Minister was required by the principle of legality, which encompasses the obligation to act rationally, to consult the statutory bodies and all broadcasters with an interest in the digital migration process. Minister Muthambi’s failure to consult, based upon her misunderstanding of what the 2015 amendment signified, was taken in a procedurally unfair manner, and was irrational.” (my emphasis)

It appears, therefore, that the Supreme Court of Appeal endorses the view that public participation is required by the Rule of Law *per se*, if not consulting would be irrational. This, even when the legislation governing the particular public administrator in question is silent on public participation.

The principles of the Rule of Law may, strictly speaking, not be applicable in the policy phase of legislating or regulating, however, policy, often, is the first step toward eventual law. If the policy is defective, it follows, therefore, that the law will also be defective. While policy may not be directly challengeable in terms of the Rule of Law, it nonetheless remains important for the Rule of Law to be applied during the policy phase.

## **6. Socio-economic impact assessments (SEIA)**

The opposite of arbitrariness is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.<sup>55</sup> Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.<sup>56</sup> It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g), which provides that transparency “must be fostered by providing the public with timely, accessible and accurate information”, requires that policy or legislative interventions must be supported by demonstrable evidence. To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to

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<sup>54</sup> At par 45.

<sup>55</sup> Hoexter (footnote 32 above) 344.

<sup>56</sup> Hoexter (footnote 32 above) 340.

satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional.

In *Principles of Good Law*, the Good Law Project writes:<sup>57</sup>

“Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them.”

It goes on to describe what a SEIA would encompass:<sup>58</sup>

- “2. Socio Economic Impact Assessment (SEIA). Multi-faceted analysis and quantification of:**
- 2.1 The purposes of laws – precisely what “mischief” they are addressing;
  - 2.2 Desired consequences;
  - 2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;
  - 2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;
  - 2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;
  - 2.6 Inter-departmental considerations – the extent to which other departments are implicated;
  - 2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity.”

The Department of Planning, Monitoring and Evaluations’ (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:<sup>59</sup>

### **“3 The role of SEIAS**

SEIAS aims:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them.”

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<sup>57</sup> Good Law Project (footnote 48 above) 34.

<sup>58</sup> Good Law Project (footnote 48 above) 35.

<sup>59</sup> Department of Planning, Monitoring and Evaluation. “Socio-Economic Impact Assessment System (SEIAS): Guidelines.” (2015). 4.

The DPME regards SEIA as more than a mere cost-benefit analysis. SEIA, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, “help decision makers to understand and balance” the impact of policy on different groups within society.<sup>60</sup>

That regulations or legislation can lead to unintended consequences is acknowledged by government. It may happen as a result of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.<sup>61</sup>

The SEIA System applies to legislation and regulations, as well as policy proposals.<sup>62</sup>

## 7. International examples

Article 21(1) of the Universal Declaration of Human Rights states that “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives”. South Africa has ratified the UDHR.

Article 13(1) of the African Charter on Human and Peoples’ Rights contains substantially the same provision: “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

It is important to consider the language of these provisions. They provide for representative democracy as well as the *direct* involvement of “everyone” in the government of their country. The implication is that the human right of public participation, as envisaged by the UDHR and ACHPR, is much broader than mere elections.

In 2015, the United States federal government’s General Services Administration introduced the ‘Public Participation Playbook’, which is a comprehensive guideline for policymakers to follow in developing new programmes.<sup>63</sup>

In the Victorian example mentioned above, an exhaustive list of public participation principles is provided.<sup>64</sup> They are quoted below:

### “PUBLIC PARTICIPATION PRINCIPLES

#### Responsiveness

Fully advising government of the:

- Significant potential impacts of decisions on stakeholder groups and the public
- Challenges and opportunities related to the participation exercise
- Respond to the engagement and input of the public in a timely and constructive manner
- Identifying and promoting public participation better practice in government decision-making

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<sup>60</sup> DPME (footnote 59 above) 7.

<sup>61</sup> DPME (footnote 59 above) 4.

<sup>62</sup> DPME (footnote 59 above) 8.

<sup>63</sup> US Government. “US Public Participation Playbook.” Available online: <https://participation.usa.gov/>. Accessed: 2 March 2017.

<sup>64</sup> Victoria Auditor-General’s Office (footnote 7 above) 5.

### **Transparency and integrity**

- Ensuring that those affected understand the scope of the pending decision, the decision-making process and any constraints on this process.
- Addressing public and stakeholder concerns in an honest and forthright way and communicating results back to the public in a way they understand.

### **Openness**

- Embedding in all decision-making processes an openness to appropriately understanding and incorporating the views of those affected by decisions and providing access to all relevant information about the decision in a manner that participants can understand, so that their contributions may be fully informed.

### **Accountability**

- Being clear about the scope and objectives of the public participation exercise.
- Demonstrating that results and outcomes are consistent with the commitment made at the outset of the process.
- Being clear about the contribution participants will be asked to make and the responsibilities associated with this.
- Providing appropriate time and resources to ensure that those affected can participate in a meaningful way.

### **Inclusiveness**

- Making every reasonable effort to include the stakeholder groups and members of the public affected by the pending decision.
- Making reasonable adjustments where necessary to remove barriers to participation and ensure an inclusive approach.
- Providing appropriate time and resources to ensure that those affected can participate in a meaningful way.
- Being aware and taking account of the needs of diverse communities to be able to participate in a meaningful way.

### **Awareness**

- Being aware and taking account of legislation that should shape the approach to public participation.”

The report contains information relating to each item and how the public administration in question can go about implementing it.

## **PART II**

### **8. Context**

Between September and October 2016, the Minister of Telecommunications and Postal Services, Siyabonga Cwele, gazetted the National Integrated Information and Communications Technology Policy White Paper, which was later signed by Cabinet and adopted as official policy.

The Free Market Foundation (FMF), has various concerns about the content of the policy itself, but, for the purposes of this paper, I will focus on whether the policy adhered to the rules and principles of public participation, as discussed above. Government alleges that it adhered to these principles and conducted a SEIA on time – the FMF and various industry stakeholders believe it did not.

According to an FMF background briefing paper on the ICT policy, the Green Paper was published in January 2014, the Policy Discussion Paper was published in November 2014, and the Policy Review Report in March 2015. Between the publication of the Policy Review and the White Paper, however, “three critical policies were inserted into the final WP and no public or industry consultation that insiders are aware of” took place. These three policies are that of the Wireless Open Access Network (WOAN), that access must be offered at ‘cost-based’ pricing, and that government might take back radio frequency spectrum which it had already allocated to operators who had invested heavily in spectrum infrastructure.

On 12 October 2016, the Shadow Minister of Telecommunications and Postal Services, Marian Shinn, “lodged an application for the impact assessment or any other documentation that informed the planned establishment of this network as set out in the [White Paper] gazetted on [3 October]. There has been no response from DTSP which means, in terms of the [Public Access to Information Act], that as 30 days have passed since it was lodged, the application has been denied”.<sup>65</sup>

On 25 January 2017, Leon Louw, Executive Director of the Free Market Foundation, said that the White Paper is unconstitutional, in part because “no socioeconomic impact assessment – a requirement of cabinet – was done”. Louw went on to say, “There must be public participation, which must inform policy”. However, the aforementioned three policies were apparently never subject to consultation.<sup>66</sup>

On 28 February 2017, the Department of Telecommunications and Postal Services denied<sup>67</sup> the allegations that no proper consultation took place. “[The Minister] has held five engagements with role players in [the] ICT sector on the implementation of the policy since the cabinet approved it back in September 2016,” wrote departmental spokesperson, Siya Qoza. Qoza went on to allege that a SEIA was, in fact, conducted, in line with the DPME directive. “The SEIAS report on the ICT white paper,” writes Qoza, “[...] is available on the department’s website, was approved by the [DPME] and accordingly submitted with the policy document before it was approved by cabinet.”

## 9. Analysis

### 9.1 *Has there been adequate public participation?*

The DTSP claims that there has been thorough public consultation and participation in the formulation of the White Paper, from its inception in the Green Paper.

While the FMF does not dispute that there was participation in drawing up the Green Paper, the Discussion Paper, and the Review Report, there are serious concerns about the White Paper. As already mentioned there was no public participation on the WOAN, cost-based pricing, or the expropriation (or non-renewal) of radio frequency spectrum, which are items the industry became aware of only after the policy was said to be final.

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<sup>65</sup> Democratic Alliance. “Cwele ducks accountability on radical network.” Available online: <https://www.da.org.za/2016/12/cwele-ducks-accountability-radical-network/>. Accessed: 2 March 2017.

<sup>66</sup> Duncan McLeod. “ICT white paper ‘not constitutional’.” (2017). *Tech Central*. Available online: <https://www.techcentral.co.za/ict-white-paper-unconstitutional/71367/>. Accessed: 2 March 2017.

<sup>67</sup> Siya Qoza. “Louw ‘wrong’ on ICT white paper: ministry.” (2017). *Tech Central*. Available online: <https://www.techcentral.co.za/louw-wrong-on-ict-white-paper-ministry/72154/>. Accessed: 2 March 2017.

### 9.2 *Has the SEIA been available to the public?*

The DTPS implicitly alleges that its SEIA report has been widely available on its website. The SEIA report itself says it was done on 26 February 2016, whereas the ICT White Paper was published sometime between September and October 2016. According to the Internet Archive Wayback Machine, no SEIA report was published as of 14 June 2016.<sup>68</sup> The DTPS website states in an information box that the document was uploaded on 12 January 2016. However, almost a month earlier, on 14 December 2016, Minister Cwele was already telling the public that the new ICT policy “is final”.<sup>69</sup>

In other words, the DTPS has kept the SEIA confidential for almost a year, and, even before publishing it to the public, declared that the policy is final.

This is certainly inappropriate from a public participation perspective. Neither the public nor the ICT industry was allowed to view and comment on the SEIA until after it was decided that the policy is ‘final,’ meaning the SEIA is redundant. Even though the DTPS claims to have consulted the public thoroughly on the ICT White Paper, the SEIA was not revealed during any of the public engagements that took place after the policy was declared final.

Section 32(1)(a) of the Constitution, as well as the provisions of the Promotion of Access to Information Act, are clear – anyone has the right to access to any information held by the State. The DTPS’ refusal to publish the SEIA during the period of its alleged completion, February 2016, and December 2016, when the policy was declared ‘final’, is a violation of government’s constitutional obligation to maintain transparency.

### 9.3 *Is the SEIA sufficient?*

The SEIA conducted by the DTPS<sup>70</sup> will be briefly considered in light of the principles discussed above.

As mentioned above, the three most-contentious elements of the White Paper – which were arguably not subject to appropriate public or stakeholder consultation – are the introduction of a Wireless Open Access Network (WOAN), cost-based pricing, and government’s intention to potentially take back spectrum at its discretion for use by the WOAN. The WOAN is a proposed addition not supported by evidence,<sup>71</sup> which makes its appearance in the artificial SEIA a cause for greater concern.

At no point does the SEIA acknowledge the risks that the FMF, in association with organisations such as Africa Analysis, have identified. Superficial ‘risks’ and ‘concerns’ from the industry are honed in

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<sup>68</sup> Internet Archive Wayback Machine. Available online: <http://web.archive.org/web/20160714065817/http://www.dtps.gov.za/documents-publications/policies.html> Accessed: 6 March 2017.

<sup>69</sup> Department of Telecommunications and Postal Services. “Telecommunications and Postal Services on implementation of National ICT Policy White Paper.” (2016). *South African Government*. Available online: <http://www.gov.za/speeches/national-ict-policy-white-paper-14-dec-2016-0000> Accessed: 6 March 2017.

<sup>70</sup> Department of Planning, Monitoring and Evaluation. “Socio-Economic Impact Assessment System (SEIAS) for the Draft National Integrated ICT Policy White Paper.” (2016). Available online: [https://www.dtps.gov.za/index.php?option=com\\_phocadownload&view=category&id=3&Itemid=133](https://www.dtps.gov.za/index.php?option=com_phocadownload&view=category&id=3&Itemid=133). Accessed: 3 March 2017.

<sup>71</sup> Free Market Foundation. “Media Release: We cannot afford to experiment with our future.” (2017). Available online: <http://www.freemarketfoundation.com/Article-View/media-release-we-cannot-afford-to-experiment-with-our-future>. Accessed: 7 March 2017.



on, with the SEIA claiming that there will be ‘mitigation’ of those risks. For instance, the controversial ‘taking back’ of spectrum is not mentioned, the apparent WOAN monopoly is not mentioned, and cost-based pricing is not mentioned. These, the FMF understands from the industry, are the biggest concerns.

The SEIA mentions that current exclusive right holders of radio frequency spectrum will lose their exclusive use rights. The DTSP does not acknowledge one basic element, i.e. that consumers will lose if investment in the ICT industry decreases as a direct result of the uncertainty created surrounding spectrum allocation.<sup>72</sup> In the table where the SEIA is supposed to weigh up the benefits *as well as the costs* for different stakeholders, which includes the ICT sector, small and medium enterprises, and consumers, they list the benefits only.<sup>73</sup>

The SEIA, therefore, is inadequate. It was prepared by the same department that intends to introduce the policy under examination, and, therefore, predictably, its findings are in favour of the policy and its presumed benefits, and rather non-committal on potential and likely costs. The DPME guidelines allow proposing departments to conduct their own SEIAs, but it follows logically that a degree of impartiality and objectivity should guide the individuals within a department who are involved in conducting the study.

## 10. Conclusion

In this paper, my intention was, first, to establish the general principles of public participation and socio-economic impact assessments, and second, to apply those principles to the Information and Communication Technologies White Paper of the Department of Telecommunications and Postal Services. My conclusions, in brief, are:

The Constitution, in addition to requiring public participation for law-making, in section 195(1)(e), enjoins the public administration to encourage public participation in policy-making as well.

Section 195(1)(g), furthermore, requires the public administration to be transparent and provide the public with “timely, accessible and accurate information”.

These requirements of public participation were not present in the interim Constitution. The constitutional drafters of the current Constitution must have considered this factor to be of such importance as to include it in our highest law.

The Promotion of Administrative Justice Act, which claims to give effect to section 33 of the Constitution (which guarantees the public’s right to just administrative action), may be unconstitutional in that, in the general provisions of the Act, it exempts policy-making by the national executive from— something the Constitution does not explicitly allow.

Socio-economic impact assessments (SEIAs) are the most effective and logical way for government to comply with the section 195(1)(g) requirement that policy must be transparent and provide the public with “timely, accessible and accurate information”. Only by conducting a SEIA is how government can show the public that policies are backed up by evidence and will improve general welfare.

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<sup>72</sup> DPME (footnote 70 above) 5.

<sup>73</sup> DPME (footnote 70 above) 32.

The Rule of Law requires policies to be supported by evidence (i.e. not be arbitrary), lest they be irrational. The Rule of Law is a principle of South African constitutional law, section 1(c) of the Constitution. Policies that are not supported by evidence, or cannot show that they are supported by evidence, theoretically, will, therefore, be unconstitutional.

A Cabinet resolution, administered by the Department of Planning, Monitoring and Evaluation, requires that a SEIA be conducted in anticipation of any new government policies.

The ICT Policy White Paper does not satisfy the principles of public participation for a number of reasons:

- The SEIA, which was allegedly completed in February 2016, was kept ‘confidential’ until January 2017, several months after the Minister claimed the policy was ‘final’. Government did not adhere to the rule that it must be transparent, and that information must be accessible and timely. A SEIA, which is supposed to inform future public participation, if published only after the policy has already been decided upon, is meaningless. This is not public participation in good faith.
- The SEIA does not substantively acknowledge the three main concerns of the industry: The Wireless Open Access Network, cost-based pricing, and the expropriation (or non-renewal) of radio frequency spectrum. These three items, furthermore, were added to the White Paper without public or stakeholder participation.
- The SEIA, which is supposed to objectively consider the costs and potential negative consequences of new policy, in this case, simply serves as another motivation for the White Paper, and, for the most part, disregards the unintended consequences which are sure to result.

Public participation is effectively ‘democracy in action’ during the periods between formal elections. Whereas elections legitimise governments’ overarching mandates, public participation legitimises particular provisions in particular policies. This is because it draws upon the knowledge and experience of the public and interested stakeholders who need to adhere to those policies, and, invariably, pay for their implementation and enforcement.

Without substantive and good faith public participation, democracy in South Africa will amount to a special event that occurs only once every five years.

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