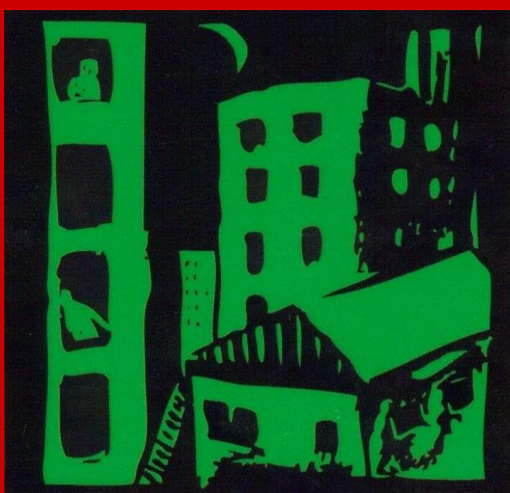
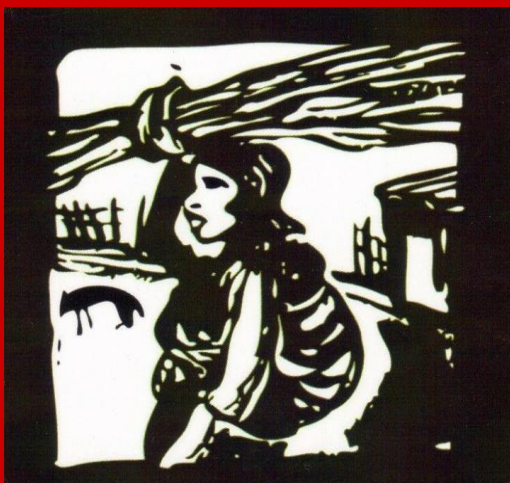


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**Beyond labels:
Executive action
and the duty to
consult¹**

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ABSTRACT

Whether executive action attracts a duty to consult has been contested judicial terrain. In this article, we aim to contribute to the development of a principled approach to requiring consultation in executive decision-making. We grapple with the distinction between procedural fairness as a requirement of just administrative action and procedural rationality as a requirement of the principle of legality.

¹ The authors are grateful to colleagues at the UCT Law Faculty who provided invaluable feedback on an earlier version of this article presented at an internal seminar. Murcott would also like to acknowledge the generous funding of the National Research Foundation's Black Academic Advancement Programme, which made this collaboration possible.

We then move beyond these labels by engaging with the values underlying the Constitution's vision of participatory democracy. Despite contradictions in the case law, we suggest that the developing requirement of "procedural rationality" as a basis for a duty to consult offers fertile ground for advancing the values of accountability, responsiveness, and openness in executive decision-making. We therefore encourage recognition of participatory democracy as the normative framework within which the rationality of executive decision-making should be substantively assessed. Finally, we demonstrate that links between participatory democracy, a duty to consult, and executive decision-making have some grounding in existing case law, which, we argue, can be further developed.

Keywords: Administrative law; executive action; participatory democracy; procedural fairness; procedural rationality.

1 INTRODUCTION

The right to administrative justice enshrined in section 33 of the Constitution of the Republic of South Africa, 1996 (Constitution) explicitly requires that exercises of public power falling within the scope of "administrative action" must be procedurally fair. While what is fair will depend on the circumstances, given that procedural fairness is a variable concept, it is settled law that administrative action, whether it affects the public or an individual, attracts a duty to hear representations.² When administrative action affects the public, what is required is a public inquiry, notice and comment procedure, whether both a public hearing and notice and comment procedure, or another procedure which is different but fair.³

In contrast, whether *executive* action⁴ attracts a duty to consult⁵ is hotly contested judicial terrain.⁶ The contestation relates to whether, when, and how, in the exercise of executive powers, procedural rationality will require a duty to consult in order for the executive to act in a manner which is consistent with the Constitution and therefore valid. The extent and reach of executive powers are vast, with executive policy-making

² Sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"); Hoexter C & Penfold G *Administrative law in South Africa* 3rd ed Claremont: Juta (2021) at 502–506; Murcott M "Procedural fairness" in Quinot G (ed) *Administrative justice in South Africa: An introduction* 2nd ed Cape Town: Oxford University Press (2020) at 174–175.

³ Section 4(1) of PAJA.

⁴ We use the term "executive action" to refer broadly to exercises of public power by executive functionaries not falling within the ambit of "administrative action". For detailed discussion on the distinction between administrative action and executive action, see *Minister of Defence and Military Veterans v Motau* 2014 (8) BCLR 930 (CC) paras 26–51. See also Corder H "Reviewing 'executive action'" in Klaaren J (ed) *A delicate balance: The place of the judiciary in a constitutional democracy* Cape Town: Siber Ink (2006) at 73–78.

⁵ By "duty to consult", we mean, broadly, a duty to invite and consider representations prior to an action being taken. The precise mode and nature of such consultation depend on the circumstances of the particular case.

⁶ See discussion below.

having a profound impact on all sectors of society.⁷ The significant reach and impact of executive action has, for example, come to the fore in the context of the Covid-19 pandemic, with a large number of executive decisions having had drastic and long-term consequences across the country.⁸ It is therefore both concerning and undesirable that jurisprudence on this question is plagued by confusion and contradiction.⁹ Fundamentally, too, clarifying the extent to which the public ought to be involved in such decision-making reflects and gives shape to the participatory nature of South Africa's democracy.

Indeed, building on a long tradition of participatory democracy during the liberation struggle, the Constitution in many ways echoes the Freedom Charter's call: "the people shall govern!"¹⁰ Participation in executive decision-making can facilitate governance by the people, and is particularly important given that "not ... every policy which the executive develops and implements can claim a genuine democratic mandate".¹¹ As Budlender has noted, "the theory that the executive has a monopoly of wisdom on policy questions based on a democratic mandate [seems] somewhat remote from reality".¹²

In this article, we aim to contribute to the development of a principled approach to requiring consultation in executive decision-making. We grapple with the distinction between procedural fairness as a requirement of just administrative action and procedural rationality as a requirement of the principle of legality. We then move beyond these labels by engaging with the values underlying the Constitution's vision of participatory democracy. We begin with a critical survey of the Constitutional Court's

⁷ For an enlightening account on the nature, prevalence and influence of policy-making instruments, see Adderley M *Judicial regulation of administrative policies that influence the exercise of statutory discretions* (LLM dissertation, University of Cape Town, 2016) at 3–12. As Adderley notes, societal regulation "bristles with policies in a myriad of forms including guidelines, circulars, memoranda, instructions and directives". See also Budlender G "People's power and the courts: Bram Fischer Memorial Lecture, 2011" (2011) 27 *South African Journal on Human Rights* 582 at 584–587.

⁸ For instance, decisions relating to the extension of the national state of disaster and the availability of social relief distress grants. See, for example, O'Regan V "State of disaster extension shows government doesn't understand pandemic, says expert" *Daily Maverick* (15 March 2022) available at <https://www.dailymaverick.co.za/article/2022-03-15-state-of-disaster-extension-shows-government-doesnt-understand-pandemic-says-expert/> (accessed 24 June 2022); and Jubase H "Panic sets in among Eastern Cape families as uncertainty grows over R350 grant" *Daily Maverick* (24 June 2022) available at <https://www.dailymaverick.co.za/article/2022-06-24-panic-sets-in-among-e-cape-families-as-uncertainty-grows-over-r350-grant/> (accessed 24 June 2022).

⁹ Commentators describe the jurisprudence of the Constitutional Court on this issue as "confusing and contradictory"; see, for example, Freedman W & Mzolo N "The principle of legality and the requirements of lawfulness and procedural rationality: *Law Society of South Africa v President of the RSA* (2019 (3) SA 30 (CC))" (2021) 42(2) *Obiter* 421 at 429.

¹⁰ Buhlungu S "Reinventing participatory democracy in South Africa" in de Sousa Santos B (ed) *Democratising democracy: Beyond the liberal democratic canon* New York: Verso (2005) 38–54.

¹¹ Budlender (2011) at 585–586.

¹² Budlender (2011) at 587.

fluctuating jurisprudence on whether executive action attracts a duty to consult. Despite contradictions in the case law, we suggest that the developing requirement of “procedural rationality” as a basis for a duty to consult offers fertile ground for advancing the values of accountability, responsiveness, and openness in executive decision-making.¹³ We therefore encourage recognition of participatory democracy as the normative framework within which the rationality of executive decision-making should be substantively assessed.¹⁴ Finally, we demonstrate that links between participatory democracy, a duty to consult, and executive decision-making have some grounding in existing case law, which, we argue, can be further developed.

2 SITUATING THE DEBATE – A JURISPRUDENCE IN FLUX

It is well-established that all exercises of public power, including executive action, must comply with the principle of legality as an “incident of the rule of law”.¹⁵ As an “evolving concept”,¹⁶ the precise contours of the principle have developed (and continue to develop) through judicial interpretation.¹⁷ This development has not been without controversy. The “vigorous and rapid expansion”¹⁸ of the legality principle into a “parallel universe of administrative law”¹⁹ has been subject to significant debate,²⁰ particularly as its expansion has been associated with the side-lining of the Promotion

¹³See discussion below and the cases referred to there.

¹⁴In other words, the normative framework of participatory democracy should inform the interpretation of the rationality standard and ground of review against which all exercises of public power are assessed.

¹⁵*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC) at para 17. Section 1(c) of the Constitution establishes the “supremacy of the Constitution and the rule of law” as a “founding value” of South Africa’s democracy.

¹⁶Sachs J in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC) at para 614.

¹⁷Hoexter & Penfold (2021) at 160.

¹⁸Hoexter & Penfold (2021) at 160.

¹⁹Hoexter & Penfold (2021) at 161.

²⁰The development of rationality review has, in particular, been a source of considerable controversy. See, for example, Price A “Rationality review of legislation and executive decisions: Poverty alleviation network and Albutt” (2010) 127(4) *South African Law Journal* 580–591; Rautenbach IM “Means-end rationality in Constitutional Court judgments” (2010) 4 *Journal of South African Law* 768–779; Price A “The evolution of the rule of law” (2013) 130(4) *South African Law Journal* 649–661; Kohn L “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” (2013) 130(4) *South African Law Journal* 810–836; Du Plessis M & Scott S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” 2013 130(3) *South African Law Journal* 597–620; Rautenbach IM “Rationality standards of constitutional judicial review and the risk of judicial overreach” (2018) 1 *Journal of South African Law* 1–17; Tsele M “Rationalising judicial review: Towards refining the ‘rational basis’ review test(s)” (2019) 136(2) *South African Law Journal* 328–360.

of Administrative Justice Act 3 of 2000 (PAJA), in conflict with the principle of subsidiarity.²¹

In this article, we do not venture into the merits or otherwise of the courts' reliance on the legality principle as a free alternative to PAJA, nor do we assess the development of the principle of legality generally.²² We also do not delve into the thorny challenges of distinguishing the exercise of public power as executive as opposed to administrative action, or vice versa.²³ Rather, our focus is on the development and current (somewhat confusing) state of South Africa's jurisprudence in relation to whether executive functionaries will be required to consult, whether with the public or certain stakeholders, when exercising executive functions. In this section, we provide an overview of the jurisprudence of the Constitutional Court, which has fluctuated between rigid and flexible approaches to procedural constraints on the exercise of executive powers. We also reflect on the jurisprudence of the Supreme Court of Appeal (SCA), which has generally seemed more receptive to imposing a duty to consult on executive decision-making.

2.1 Earlier Constitutional Court jurisprudence: Fluctuating between rigidity and flexibility

In the seminal case of *Masetlha*,²⁴ Deputy Chief Justice Moseneke, writing for a majority of the Court, held – seemingly definitively – that “it would not be appropriate to constrain executive power to requirements of procedural fairness”.²⁵ Viewing consultation requirements as “a cardinal feature”²⁶ in the review of *administrative action*, the majority appeared to endorse a blanket release of executive decision-making from any procedural fairness constraints. By contrast, the minority opinion of Justice Ngcobo, emphasising the role of participatory democracy in the constitutional scheme, favoured all exercises of public power being subject to procedural fairness requirements.²⁷

²¹See, for example, Hoexter and Penfold (2021) at 161; Murcott M & Van der Westhuizen W “The ebb and flow of the application of the principle of subsidiarity: Critical reflections on *Motau* and *My Vote Counts*” (2015) 7(1) *Constitutional Court Review* 43–67; Murcott M, Burns G & Payne S “Administrative law” in Tait M et al. *Yearbook of South African Law* Claremont: Juta (2021) 70 at 72–79.

²²For discussion, see Murcott, Burns & Payne (2021) at 73–83 and 87–91.

²³For more on this distinction, see Penfold G “Substantive reasoning and the concept of ‘administrative action’” (2019) 136(1) *South African Law Journal* 84 at 103, where he aptly notes: “Of the various thorny questions that arise in seeking to identify ‘administrative action’, arguably no area is more difficult than — nor raises the separation of powers as starkly as — the distinction between administrative and executive action.”

²⁴ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (CC).

²⁵ *Masetlha* (2008) at para 77.

²⁶ *Masetlha* (2008) at para 77.

²⁷ *Masetlha* (2008) at paras 81–82.

The rigidity of the *Masetlha* majority judgment attracted searing critique as “problematic”,²⁸ “obviously wrong, retrogressive and at odds with the Constitution”,²⁹ and having “set the law of procedural fairness back twenty years”.³⁰ The hard edge of *Masetlha*, however, was softened in the subsequent case of *Albutt*.³¹ In that case, Justice Ngcobo (by then, Chief Justice) commanded unanimous support for the proposition that executive decision-making may be constrained by a duty to consult if the purposes for which the executive power at issue was granted could not be achieved without such consultation.³² In other words, consultation may, in some cases, be necessary for an executive act to be rational. Following *Albutt*, the requirement that all exercises of public power must be rational in *process* as well as outcome was further explained in *Democratic Alliance* as follows:

“We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.”³³

Albutt's recognition that legality could require executive decision-making to be subject to the requirement of consultation (what has since become known as an aspect of “procedural rationality” or “process rationality”) was a welcome,³⁴ albeit controversial,³⁵ move away from the blanket exclusion suggested in *Masetlha*.

²⁸Murcott M “Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?” (2013) 130(2) *South African Law Journal* 260 at 266.

²⁹Plasket (2020) at 712.

³⁰Hoexter C “Clearing the intersection? Administrative law and labour law in the Constitutional Court” (2008) 1(1) *Constitutional Court Review* 209 at 210.

³¹*Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (5) BCLR 391 (CC).

³²In that case, the Court held that “victim participation in accordance with the principles and the values of the TRC was *the only rational means* to contribute towards national reconciliation and national unity” (our emphasis, *Albutt* (2010) at para 69).

³³*Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) at para 37.

³⁴Some were hopeful that *Albutt* might even pave the way for a more general incorporation of procedural fairness requirements in executive decision-making (see Hoexter C “The rule of law and the principle of legality” in Carnelley M and Hoctor S *Law, order and liberty: Essays in honour of Tony Mathews* Scottsville: University of KwaZulu-Natal Press (2011) 55 at 61). Others, while welcoming the development, anticipated a less robust reliance on the *Albutt* approach, arguing that its application was still limited to circumstances where consultation was necessary to serving the purpose of the power at issue (see Price A “Rationality review of legislation and executive decisions: Poverty alleviation network and *Albutt*” (2010) 127(4) *South African Law Journal* 580 at 587 and Murcott (2013) at 272).

³⁵The judgment generated significant commentary including, for example, Hoexter (2008); Rautenbach (2010); Price (2010); Kohn (2013); Murcott (2013); Hoexter (2011); Konstant A “Administrative action and procedural fairness – *Minister of Defence and Military Veterans v Motau*” (2016) 133(3) *South African Law Journal* 491–504; and, more recently, Freedman & Mzolo (2019); Plasket (2020); and Hoexter & Penfold (2021) at 571–572.

This shift gained further ground in *Motau*, where the Court's majority (including Justice Moseneke, the author of *Masetlha*) suggested that *Masetlha* did not stand for the "unequivocal" proposition that procedural fairness is always excluded from the review of executive action, but was rather confined to the specific facts of that case.³⁶ This was a surprising turn given the Court's unqualified holding in the case of *ARMSA*³⁷ (delivered just a year earlier) that "[p]rocedural fairness is not a requirement for the exercise of executive powers".³⁸ The Court's failure in *Motau* to acknowledge or engage *ARMSA* is an example of a troubling unwillingness by the Court to openly reassess and reverse course on its own precedent where necessary, with the ensuing contradiction and uncertainty threatening the legitimacy of the Court and the rule of law.³⁹ Nevertheless, the Court in *Motau* opened the door to a more flexible embrace of requirements of fairness in executive decision-making, subject to the circumstances of any given case. The question was whether the Court would step into this opening in future cases.

2.2 Later jurisprudence: some room to manoeuvre?

Following *Motau*, instead of being opened, the door towards the Court's recognition of fairness as a general constraint on the exercise of public power appeared to edge towards closure. Hints in this direction were apparent in *Electronic Media*,⁴⁰ a high-stakes challenge to the exclusion of decryption capabilities from "set-top boxes", a technology necessary to facilitate South Africa's digital migration plans. One of the broadcasters in the sector, e.tv (Pty) Ltd, challenged the consultation process leading up to that policy determination. The Court rejected e.tv's challenge, with a judgment by Chief Justice Mogoeng (the main judgment)⁴¹ holding that the process followed by the Minister of Communications was rational and complied with the requirements under the relevant legislation.

Notably, in upholding the Minister's determination, the main judgment was at pains to emphasise the need for courts to be sensitive to separation-of-powers concerns when testing executive policy-making. Although citing *Motau*, the Chief Justice elided that judgment's indication that procedural fairness may be a general constraint on executive decision-making.⁴² Instead, in emotive language, the main judgment in *Electronic Media*

³⁶*Motau* (2014) at para 81.

³⁷*Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC).

³⁸*ARMSA* at para 59. Five judges who signed on to the *ARMSA* judgment concurred in the *Motau* majority (Justices Moseneke, Froneman, Khampepe, Skweyiya and Van der Westhuizen).

³⁹On the failure of *Motau* to recognise precedent, see Konstant (2016) at 502 and Tsele (2019) at 329. In a different context, see Boonzaier L "A decision to undo" 2018 135(4) *South African Law Journal* 642 at 651–652, on ignoring precedent in relation to state self-reviews.

⁴⁰*Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* 2017 (9) BCLR 1108 (CC).

⁴¹While the order by Mogoeng CJ held majority support, there were a plurality of opinions. The Chief Justice's procedural-rationality analysis did, however, attract majority support, as Justice Jafta agreed with that aspect of the main judgment's reasoning; see paras 193–209.

⁴²*Electronic Media* (2017) at para 63.

cautioned that South Africa is a “constitutional democracy, not a judiciocracy”;⁴³ that rationality is not a “master key that opens any and every door, any time, anyhow”;⁴⁴ and that judicial intrusion in the policy-determination domain is permissible only when “unavoidable”.⁴⁵

Concerningly, this executive-centric rhetoric may – at first glance – be read as stunting the potential for an *Albutt*-inspired consultative process rationality to be further developed.⁴⁶ However, a closer analysis of the main judgement suggests that the Court’s pronouncements should not (or at least need not) be read as too far-reaching. In *Electronic Media*, a stakeholder consultation process had already been prescribed by legislation, and the relevant broadcaster stakeholders had been consulted at least once in accordance with that process. The problem arose when the Minister excluded e.tv from a *further* round of consultations⁴⁷ with select and undisclosed stakeholders.⁴⁸ e.tv argued that its exclusion from the further consultation process was irrational. In dismissing this claim, the main judgment held that where a consultation procedure is prescribed by legislation, and where such procedure is met, the process-rationality requirement demanded by *Albutt* is then also met.⁴⁹ While there was no obligation on the Minister to consult above and beyond the prescribed legislative process, she was free to do so if she so chose.⁵⁰ If she did undertake further consultation, then – said the main judgment – “she is free from any constitutional constraints in the information-gathering exercise for the purpose of policy-formulation”.⁵¹

We disagree with the conclusion that the Minister is free from any constraints when choosing to undertake consultation processes beyond that required by legislation. As with the exercise of all public power, the Minister is constrained by the principle of legality (including the requirement that the exercise of power must be rational).⁵² Nonetheless, it is significant that the main judgment’s reasoning does not go so far as to exclude the possibility that consultation may be a requirement of rational executive

⁴³*Electronic Media* (2017) at para 1.

⁴⁴*Electronic Media* (2017) at para 6.

⁴⁵*Electronic Media* (2017) at para 2.

⁴⁶See Tsele (2019) for support of the majority’s deferential caution and approach to rationality in *Electronic Media*.

⁴⁷A point emphasised by Justice Jafta in a minority concurrence; see *Electronic Media* at 194.

⁴⁸The identities of the persons with whom the Minister consulted were not disclosed, and the content of the meeting, not revealed (*Electronic Media* at para 61).

⁴⁹*Electronic Media* (2017) at paras 65 and 66. The main judgment (at para 66) further noted that “no law may be said to have provided sufficiently for a consultative process unless that process meets the requirements of procedural rationality”. For more on the treatment of rationality in *Electronic Media*, see Tsele (2019) and Rautenbach (2018) at 11.

⁵⁰*Electronic Media* (2017) at paras 59–60.

⁵¹*Electronic Media* (2017) at para 59.

⁵²For this reason, we prefer the reasoning and outcome of the minority opinion co-authored by Justices Cameron and Froneman. For critique of this approach, see Tsele (2019) at 348–355.

decision-making in some cases (as set out in *Albutt*). Rather, on the facts of the case, there was resistance to affording any one stakeholder a claim to multiple consultation opportunities beyond that provided for in legislation, especially a stakeholder that it perceived as being “actuated by commercial interests masked with the appearance of the advancement of public interest”.⁵³ Indeed, notwithstanding the wide berth that the Court afforded the executive, the majority recognised the value of consultation in policy formulation. As Chief Justice Mogoeng emphasised:

“Consultation is not an inconsequential process or a sheer formality, particularly in relation to national policy development. It exists to facilitate a festival of ideas that would hopefully provide some enlightenment on the stakeholders’ major perspectives so that policy-formulation is as informed as possible for the good of all, not some.”⁵⁴

Despite this recognition, however, the Court would subsequently double down on its unwillingness to impose a general obligation of procedural fairness on executive decision-making. This was the unequivocal position adopted in *Law Society*,⁵⁵ a case challenging former President Jacob Zuma’s efforts to paralyse the functioning of the Southern African Development Community (SADC) Tribunal. The matter concerned high-level executive policy-making, with certain foreign policy decisions made by the President being subject to review.⁵⁶ In response to a claim that the President’s decision-making was irrational and therefore inconsistent with the principle of legality,⁵⁷ the Court left no doubt as to its endorsement of *Masetlha’s* blanket exclusion of procedural fairness as a requirement under the principle of legality.⁵⁸ The Court (including Justice Khampepe, the author of *Motau*) cited with approval *Masetlha’s* statement that “[p]rocedural fairness is not a requirement” for executive action,⁵⁹ and offered no engagement with *Motau’s* qualifier to that assertion. Importantly, though, the Court left open the *Albutt*-inspired pathway of finding consultation to have been necessary for executive decision-making to be rational.⁶⁰ In doing so, the Court sought to clarify the

⁵³*Electronic Media* (2017) at para 27.

⁵⁴*Electronic Media* (2017) at para 38.

⁵⁵*Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) BCLR 329 (CC).

⁵⁶In particular, the negotiation and signing of the 2014 Protocol on the Tribunal in the Southern African Development Community by the President, and his decision to suspend the Tribunal’s operations (*Law Society* at para 7).

⁵⁷The applicant’s challenge to the rationality of the President’s decision was not based on a claim that the President had a duty to consult. An argument advanced by the second *amicus curiae* that the President had a duty to consult the public before signing the protocol at issue was addressed separately by the Court.

⁵⁸*Law Society* (2019) at paras 63 & 64.

⁵⁹*Law Society* (2019) at para 63.

⁶⁰The Court in *Law Society* implicitly endorses *Albutt’s* articulation of process rationality as an aspect of the principle of legality (at para 63). In addition, as discussed at below, in the 2022 cases, *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and*

distinction between “procedural fairness” and “procedural rationality”, as we explain in the next part of this article.

At this point, a summary of the Court’s position on the procedural constraints applying to executive action following *Masetlha*, *Albutt*, *Electronic Media* and *Law Society* seems to be as follows (fluctuations aside):

- Procedural fairness is not a self-standing requirement for the judicial review of executive action as an aspect of the principle of legality.⁶¹
- However, consultation nevertheless may be required by legality.⁶²
- A duty to consult may be imposed on exercises of executive action when prescribed by legislation.⁶³ The process prescribed by legislation must be rational.⁶⁴
- In the absence of legislation prescribing such a process,⁶⁵ consultation may yet be necessary for the steps in a decision-making process to bear a rational relation to the purpose for which the power is conferred.⁶⁶ In other words, consultation with the public may be required to satisfy the demands of what has been labelled “procedural rationality”.⁶⁷

2.3 What’s in a label: Procedural fairness or procedural rationality?

The Court has sought to explain the distinction between “procedural fairness” and “procedural rationality”, and the role of consultation requirements in each. In *Law Society*, Chief Justice Mogoeng, writing for the majority, held:

“Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.”⁶⁸

Another v e.tv (Pty) Limited and Others 2022 (9) BCLR 1055 (CC), the Court explicitly relied on the *Albutt*-pathway to establish a duty to consult in relation to executive action.

⁶¹*Law Society* (2019) at para 67.

⁶²*Albutt* (2010) at para 69 and *Motau* (2014) at para 80.

⁶³*Motau* (2014) at para 80.

⁶⁴*Electronic Media* (2017) at para 66.

⁶⁵*Electronic Media* (2017) at para 67.

⁶⁶*Albutt* (2010) at para 69; *Minister of Water and Sanitation v Semcorp Siza Water (Pty) Ltd and Another* 2021 (10) BCLR (CC) at para 49.

⁶⁷*Law Society* (2019) at para 64.

⁶⁸*Law Society* (2019) at para 64.

Similarly, in *Sembcorp*,⁶⁹ Justice Jafta (supported by the majority) highlighted that procedural rationality “has nothing to do with the fairness of the process and has no bearing on whether there should have been a pre-decision hearing”.⁷⁰ The fact that process-rationality in the case of *Albutt* required a hearing “was a mere coincidence” which did “not mean that in every case where there was no hearing, procedural rationality had been breached”.⁷¹ In other words, said Justice Jafta, “There will be a violation of procedural rationality only if the purpose for which the power was exercised could not be achieved without a pre-decision hearing.”⁷²

The Court’s explanation of the distinction between procedural fairness and procedural rationality has not convinced commentators. Freedman and Mzolo are concerned by what they see as a “suggestion that procedural fairness and procedural rationality are separate aspects of the procedural dimension of rationality”,⁷³ with only the procedural fairness requirement involving an element of consultation. They consider it “more correct to treat procedural fairness as one aspect of a broader requirement of procedural rationality”.⁷⁴ Separately, Hoexter and Penfold critique as “artificial” the Court’s effort to pigeon-hole the purposes served by consultation as either a matter of “procedural fairness” or as a matter of “procedural rationality”.⁷⁵ They point out that the purpose of procedural fairness is not only to afford a hearing to a party adversely affected by a decision (the purpose that the Chief Justice highlighted in *Law Society*), but also to enhance the rationality of decision-making.⁷⁶ Since a process of consultation almost inevitably serves both these ends, they argue, seeking to distinguish the role of consultation in an “either/or manner” is little more than “judicial sophistry”.⁷⁷

We agree that consultation can serve multiple objectives.⁷⁸ However, two points of distinction need emphasis. First, fairness refers to a broad set of normative imperatives for the exercise of public power that may overlap with, but are also distinct from, those of rationality. In particular, procedural rationality does not necessarily aim to secure the process-oriented values of dignity and legitimacy that are intrinsic to, and should

⁶⁹*Sembcorp* (2021). While rationality-review was at issue in *Sembcorp*, the case was not concerned with whether the relevant executive functionaries had a duty to consult in the process of decision-making.

⁷⁰*Sembcorp* at para 49.

⁷¹*Sembcorp* at para 49.

⁷²*Sembcorp* at para 49.

⁷³Freedman & Mzolo (2021) at 429.

⁷⁴Freedman & Mzolo (2021) at 429.

⁷⁵Hoexter & Penfold (2021) at 573–575, a critique shared by Tsele (2019) at 357.

⁷⁶Hoexter & Penfold (2021) at 575.

⁷⁷Hoexter & Penfold (2021) at 574.

⁷⁸For a historical account of the objectives underlying natural justice requirements in South African law, see Baxter LG “Fairness and natural justice in English and South African law” (1979) 96 *South African Law Journal* 607–639.

always be advanced by, a guarantee of procedural fairness.⁷⁹ Therefore, a decision taken without a hearing can still meet the procedural rationality threshold, even though it would fail to be participatory and satisfy all of the demands of procedural fairness.⁸⁰ Similarly, while consultation as a matter of procedural fairness may advance the goal of rational decision-making, consultation as a matter of procedural rationality will be required only where it is *necessary* in order for decision-making to be rational.

As Murcott has noted previously, the question in relation to procedural rationality “is not whether rationality would be ‘enhanced’ by a hearing, but rather whether a hearing is the ‘only’ means to achieve the relevant government purpose”.⁸¹ Secondly, procedural fairness entails a broader set of activities than simply a consultation process. It may include, for example, notice of the decision after it is taken, notification of internal appeal procedures, and notification of the right to request reasons.⁸² Understood in this way, the Court is not bifurcating the “procedural dimension of rationality” into procedural fairness, on the one hand, and procedural rationality, on the other. Rather, it is reaffirming that (i) the purposes or expectations sought to be achieved through a procedural-fairness standard may overlap with, but ultimately differ from, those of procedural rationality; and (ii) procedural rationality may include a requirement to consult in some cases, although this does not necessarily mean that all the requirements of procedural fairness will necessarily be triggered.

In our view, then, while the Court’s distinction between the labels of procedural fairness and process rationality might be expressed inelegantly, it is not altogether “artificial”. Moreover, while consultation based on procedural rationality is more limited than procedural fairness (and ultimately a “second-best” approach),⁸³ it still offers fertile ground for advancing the values of accountability, responsiveness, and openness in cases of executive decision-making. This recognition is valuable, we believe, since a suggestion that any requirement of consultation in executive decision-making is irreconcilable with *Masetlha’s* line of jurisprudence may dissuade some judges from further developing consultation as an aspect of the rule of law. This reluctance was, for example, evident amongst a majority of the Court’s members in *Electronic Media*. As we discuss next, there are promising examples of how the *Albutt*-inspired consultative-process-rationality approach can be developed, including recent jurisprudence from the Constitutional Court.

⁷⁹See Baxter (1979) 634–638.

⁸⁰Plasket (2020) at 710 makes this point too when he notes that “if a rational decision can be taken without a hearing being given, both the dignity-value and process-value of procedural fairness are lost”.

⁸¹Murcott (2013) at 272.

⁸²Sections 3 and 4 of PAJA.

⁸³Plasket (2020) at 699.

2.4 Developing consultative-process rationality

In its recent 2022 *e.tv* judgment,⁸⁴ the Court demonstrated a willingness to build on the *Albutt* approach to require, in certain circumstances, consultation with “affected parties” where executive action impacts on the general public.⁸⁵ The case emerged from yet another instalment of the ongoing saga over the country’s digital migration scheme (which had also come under scrutiny in *Electronic Media*).⁸⁶ Justice Mhlantla (writing for a unanimous court) held that determination of the date by which the country would switch entirely from analogue to digital broadcasting⁸⁷ could not be made rationally without “giv[ing] notice and tak[ing] account of the representations received ... with the public or affected parties”.⁸⁸

For the first time since *Albutt*, then, the Court (constituted by an entirely different bench than in *Electronic Media*) has demonstrated a willingness to impose consultation on executive decision-making. However, the Court’s reasoning was somewhat thin. It reasoned that, to be lawful, the Minister’s decision had to comply with the Constitution, and concluded that “digital migration policy discussions must include an opportunity where affected parties are given notice and afforded an opportunity to make representations on the analogue switch-off date”.⁸⁹ To justify its conclusion, the Court reasoned that a decision concerning the analogue switch-off date was “not mechanical”, that “important interests were at stake”, and that, therefore, it would not, following *Albutt*, be “procedurally rational for the Minister to set the analogue switch-off date without notice to the industry and affected parties”.⁹⁰

It may be objected that the Court’s approach results in yet another slippage into a procedural fairness inquiry, as the mere fact of an adverse impact on rights or, indeed, “important interests”, appears to be sufficient to trigger a requirement to consult (with the Court failing to engage sufficiently with the question as to whether it is the *only* means by which to rationally achieve the purpose of the particular power at issue). This may again lead to concerns about inconsistency and incoherence in the case law. As we read it, however, the Court’s focus is not merely on the question of whether rights or interests have been affected; the Court is also concerned with whether the exercise of

⁸⁴See note 60 above.

⁸⁵*Electronic Media* (2017) at para 52.

⁸⁶See discussion above.

⁸⁷The decision by the Minister of Communications and Digital Technologies was held to be executive action (*Electronic Media* (2017) at para 36).

⁸⁸*Electronic Media* (2017) at para 53.

⁸⁹*Electronic Media* (2017) at para 51.

⁹⁰*Electronic Media* (2017) at para 52. The imposition of a deadline by which members of the public had to register to receive a “set-top box” was also challenged. Failure to register by the deadline meant that some individuals would have no access to any transmissions for some months. This decision was held to be irrational on the basis that the deadline imposed did not provide members of the public with an adequate opportunity to register (*Electronic Media* (2017) at para 72).

the power at issue can be made rationally without relevant information pertaining to the impact of the decision being taken into account. Crucially, the Court notes:

“[C]ritical questions raised in consultations before the analogue switch-off date would have sought to determine the number of persons who qualify to receive STBs, who would like to register for STBs before the analogue switch-off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such.”⁹¹

In other words, the Court recognised that, given the nature of the decision at issue, the decision could not be determined rationally without taking into account certain relevant information, information that could *only* be provided by industry stakeholders and members of the public whom the decision would affect. This is a welcome recognition of the observation by Budlender (quoted earlier) that the executive does not necessarily have “a monopoly of wisdom” on policy questions. Here, the Court adopts a similar approach to that of the SCA (even though Justice Mhlantla does not refer to that Court’s jurisprudence). Almost a decade ago, in *Scalabrini*,⁹² the SCA held that a decision to close a refugee reception office in Cape Town was “quintessentially one of policy” and therefore fell outside the scope of administrative action.⁹³

Nonetheless, the SCA set aside the decision on the basis that the relevant executive functionaries had failed to consult certain stakeholders, including the applicant, a non-profit organisation with expertise on refugees and asylum-seekers. Relying on *Albutt*, the Court noted that “there are indeed circumstances in which rational decision-making calls for interested persons to be heard”.⁹⁴ The Director-General of Home Affairs, said the Court, was evidently aware that there were various stakeholders with “long experience and special expertise”⁹⁵ in relation to the issues raised by the closure of the reception office, and that there had been a commitment to engage with stakeholders prior to any closure decision.⁹⁶ In this context, the decision to close the office without receiving input from those stakeholders was “not founded on reason and was arbitrary”, and was “inconsistent with the responsiveness, participation and transparency that must govern public administration”.⁹⁷

The SCA was, however, cautious to resist a suggestion that there is a general obligation on the executive to consult interested parties, holding that this would be taking things

⁹¹*Electronic Media* (2017) at para 48.

⁹²*Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2018 (4) SA 125 (SCA).

⁹³*Scalabrini* (2018) at para 58. The minority judgment dissented on this point; see para 83.

⁹⁴*Scalabrini* (2018) at para 68.

⁹⁵*Scalabrini* (2018) at para 70.

⁹⁶*Scalabrini* (2018) at para 70 and 72. The Court’s emphasis on the commitment to consult prior to the taking of the type of decision at issue resonates with a duty of fairness arising from the doctrine of legitimate expectations. For more on the doctrine, see Murcott M “A future for the doctrine of substantive legitimate expectation? The implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu Natal*” (2015) 18(1) *Potchefstroom Electronic Law Journal* 3133 at 3136–3139.

⁹⁷*Scalabrini* (2018) at para 70.

“too far” and that the “very nature of representative government is that matters of government policy are properly to be ventilated in the appropriate representative forums”.⁹⁸ Instead, the SCA confined the duty to consult to circumstances “where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware”.⁹⁹

Scalabrini thus recognised that where there is an established practice of consultation between executive functionaries and stakeholders with long-standing knowledge or specialist expertise in a sector, a failure to consult those stakeholders may be irrational. More recently, in *Esau*,¹⁰⁰ the SCA held that in some cases executive action may also be constrained by a duty to consult the *general public* in order for such action to be rational. At issue in that case were the so-called “level 4” regulations determined by the Minister of Cooperative Governance in response to the Covid-19 pandemic. The SCA held that, under the principle of legality¹⁰¹ and as a matter of process rationality, the Minister would have a duty to consult the public before determining the specific regulations at issue. According to the SCA, its determination that consultative process rationality would be required in the circumstances was underpinned by the fact that the “[t]he effect, potential or real, on the [rights, lives and livelihood of every person subject to them is drastic” and that “[t]he experience of people who endured the strict lockdown was *highly relevant* to the CoGTA Minister’s decision-making in respect of the content of the regulations”.¹⁰²

The jurisprudence of the SCA and Constitutional Court outlined in this section demonstrates an encouraging embrace of consultative process rationality as an aspect of the rule of law, an embrace building on the approach to rationality adopted in *Albutt* and *Democratic Alliance*. Although not always clearly articulated, the following can be distilled from *e.tv*, *Scalabrini* and *Esau* as circumstances where consultation will be required for executive action to be rational:

- First, where the interests of the public are drastically impacted on by a decision, information regarding that impact is relevant to the exercise of the

⁹⁸*Scalabrini* (2018) at para 67. As discussed in the next section, we are not convinced that characterising South Africa’s constitutional democracy as purely representative is accurate or helpful. Rather, we argue that the distinctive recognition of participatory democracy in the country’s constitutional scheme, and the values underlying such a scheme, are advanced when consultation is required in executive decision-making.

⁹⁹*Scalabrini* (2018) at para 72.

¹⁰⁰*Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] 2 All SA 357 (SCA).

¹⁰¹ The SCA held that the regulations were administrative action. However, given the long-standing controversy over the nature of regulation-making, the SCA also addressed the argument as to whether the regulations, if assumed to be executive action, were rational. See *Esau* (2021) at paras 81–100.

¹⁰²*Esau* (2021) at para 103. Emphasis added.

power at issue, and such information can be obtained only through consultation with the public.

- Secondly, where the decision-maker is aware that expert stakeholders have information relevant to the decision to be taken, failing to take into account such information is not rationally related to the purpose of the conferred power.¹⁰³

In our view, as we shall discuss below, recognition by the courts of a duty to consult in such circumstances is to be welcomed as advancing the constitutional values of participation, transparency and accountability that animate South Africa's participatory democracy. The developing jurisprudence on rationality should be assessed within this normative framework.

3 BEYOND LABELS: PARTICIPATORY DEMOCRACY AS A NORMATIVE FRAMEWORK

We have argued above that sense can be seen in the distinction made by the court between procedural fairness and process rationality. The labelling of these conceptual containers should not, however, distract from a substantive assessment of the "desirability, necessity and possibility"¹⁰⁴ of imposing such constraints on executive decision-making. In particular, a substantive assessment as to whether the rights, values, and purposes of South Africa's post-apartheid, transformative Constitution are advanced should be considered in any given case.¹⁰⁵

In this part, we discuss the normative framework for participatory democracy – entrenched in South Africa's constitutional scheme and emerging from the country's historical context – as a basis for moving beyond labels. We illustrate, furthermore, how the values of participatory democracy have informed consultation requirements in various jurisprudential contexts, thereby laying the foundations for a principled approach to procedural rationality moving forward; such an approach resists conceptualism and involves a substantive assessment of the propriety of the imposition of a duty to consult on executive action.

¹⁰³ In the process-rationality enquiry set out in *Democratic Alliance*, the Court details a further step of having to assess whether "ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational" (para 39). The SCA in *Scalabrini and Esau*, and the Constitutional Court in *e.tv* (at least in relation to the determination of a switch-off date), do not engage explicitly with this stage. The SCA does, however, briefly note this aspect of the inquiry when considering consultative process rationality in a challenge to the ban on the sale of tobacco and related products during the Covid pandemic in *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] 3 All SA 332 (SCA) at paras 108–112.

¹⁰⁴ See Murcott (2013) at 269–270.

¹⁰⁵ Roux T "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009) 20(2) *Stellenbosch Law Review* 258 at 261.

3.1 Participatory democracy and South Africa's constitutional scheme

The rule of law, human dignity, equality, freedom, accountability, responsiveness, and openness are founding values of the Constitution.¹⁰⁶ Each of these values must be viewed within the country's unique context. As such, by asserting a duty to consult as a component of rationality in *Albutt*, the Constitutional Court acknowledged that it was interpreting the rule of law with reference to "the political strife that preceded and accompanied the birth of our democracy".¹⁰⁷ The Constitution's preamble, which holds significant interpretive value, highlights that it was adopted to "heal divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".¹⁰⁸ The Constitution has thus been described as incorporating a social justice imperative.¹⁰⁹ Advancing social justice in a substantive (distributional) sense – to achieve the kind of transformation envisaged in the preamble – requires not merely an equitable distribution of goods and harms in society;¹¹⁰ it also requires an appreciation of the unjust root causes of maldistribution, including a failure to recognise (or not adequately recognise) the moral worth and dignity of human beings, particularly through exclusionary decision-making and a lack of participation (procedural injustice).¹¹¹ In a procedural sense, social justice is advanced when people are included in decision-making that impacts on the quality of their living conditions, whereas exclusion contributes to maldistribution.¹¹²

The Constitution was adopted to "lay the foundations for a democratic and open society, in which government is based on the will of the people and every citizen is equally protected by law".¹¹³ In *Doctors for Life*,¹¹⁴ the majority of the Constitutional Court

¹⁰⁶ Section 1 of the Constitution.

¹⁰⁷ *Albutt* (2010) at para 88.

¹⁰⁸ Preamble of the Constitution, about which the Court, in *S v Mhlungu* 1995 (7) BCLR 793 (CC) at para 112, remarked: "The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes." The Court went on to affirm that drawing on the preamble in interpretation was "not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole."

¹⁰⁹ Langa P "Transformative constitutionalism" (2006) 17(3) *Stellenbosch Law Review* 351 at 359; Pieterse M "What do we mean when we talk about transformative constitutionalism" (2005) 20(1) *Southern African Public Law* 155 at 159; Liebenberg S *Socio-economic rights adjudication under a transformative constitution* Cape Town: Juta & Co. (2010) at 100–101.

¹¹⁰ Murcott M *Transformative environmental constitutionalism* Leiden: Brill (2022) at 19, where it is explained that "distribution" should be construed not literally but with reference to the manner in which various social institutions and practices (structures and systems) collectively influence the shares of resources available to different people. See also *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) BCLR 68 (CC) at para 46.

¹¹¹ Murcott (2022) at 19.

¹¹² Murcott (2022) at 19.

¹¹³ Preamble of the Constitution.

emphasised that “our constitutional democracy is not only representative but also contains participatory elements”¹¹⁵ and that “participation by the public on a continuous basis provides vitality to the functioning of representative democracy”.¹¹⁶ This model of participatory democracy envisaged by the Constitution stands in stark contrast to “a thin and impoverished notion of democracy” based primarily on electing representatives.¹¹⁷ As Budlender asserts:

“Our Constitution contemplates a richer and “thicker” form of democracy. And it does so precisely so that the people may govern. We have a Bill of Rights precisely because those who made our Constitution, informed and guided by a vast public participation process, recognised that representative democracy is not enough. A democracy also needs rights which are guaranteed to everyone, particularly when they are in a minority, and particularly when they are marginalised or powerless.”¹¹⁸

Although political power shifted at the end of apartheid away from “grass-roots structures such as street committees, civic organisations, local union structures, women’s organisations, and youth bodies” towards elites “who were close to, or part of, the political negotiations”,¹¹⁹ the vision of democracy in the Constitution echoes that of the Freedom Charter in important ways.¹²⁰ For example, the Constitution protects the rights of communities and groups, as opposed to merely protecting individual rights, one of the ways in which it departs from a Western liberal view of constitutionalism and upholds the African philosophy of ubuntu.¹²¹ The notion of ubuntu entails that “humans can only become fully human in and through community”.¹²² Ubuntu entails, furthermore, that “through dependence of humanity on community ... ‘being human’ acquires social and moral dimensions”.¹²³ The notion has been found to permeate the

¹¹⁴ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC).

¹¹⁵ *Doctors for Life* (2006) at para 111.

¹¹⁶ *Doctors for Life* (2006) at para 115.

¹¹⁷ Budlender (2011) at 582–583.

¹¹⁸ Budlender (2011) at 583–584.

¹¹⁹ Buhlungu (2002) at 57–61.

¹²⁰ Budlender (2011) at 583.

¹²¹ For example, section 38(d) of the Constitution affords standing to anyone acting in the public interest. For a critical analysis of ubuntu as a communitarian concept within African philosophy, see Chibvongodze DT “Ubuntu is not only about the human! An analysis of the role of African philosophy and ethics in environment management” (2016) 53(2) *Journal of Human Ecology* 157 at 159–165; Terblanché-Greef AC “Ubuntu and environmental ethics: The West can learn from Africa when faced with climate change” in Chemhuru M (ed) *African environmental ethics: A critical reader* Switzerland: Springer Nature (2019) 93 at 100; Weidtmann N “The philosophy of ubuntu and the notion of vital force” in Ogude J (ed) *Ubuntu and the reconstitution of community* Indiana: Indiana University Press (2019) chapter 4.

¹²² Rettová A “Cognates of ubuntu: Humanity/personhood in the Swahili philosophy of utu” (2020) *Decolonial Subversions* 31 at 32.

¹²³ Rettová (2020) at 32.

entire Constitution, particularly the Bill of Rights.¹²⁴ In *S v Makwanyane*, ubuntu was found to regulate the exercise of rights “by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all”.¹²⁵

The participatory implications of ubuntu were underscored in the 2021 case, *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*.¹²⁶ In upholding the interrelated rights to culture, an environment not harmful to health, well-being and administrative justice, the Court highlighted that indigenous peoples in South Africa “have strict rules about consultation that emphasise the importance of seeking consensus. This is part of their customary law and avoids the imposition of top-down decision-making.”¹²⁷ Although in *Sustaining the Wild Coast* the Court was not assessing whether executive decision-making attracts a duty to consult, it usefully connected African custom, informed by the philosophy of *ubuntu*, to consensus-building as a model for good governance, and offered the perspective that consultation should, at least sometimes,¹²⁸ be geared towards building consensus. This aligns with the promotion of what Barritt refers to as an “elaborate form of participatory democracy” known as “deliberative democracy”. This form of democracy:

“[g]oes further than simple participation because it requires participants to do more than just contribute a particular view: it requires them to discuss and deliberate that view, as well as those of other participants. It therefore fosters a collaborative decision-making process, where the interests and values represented and considered produce a decision that is more than just the sum of its participants. Critically, deliberative democracy has a unique ability to “transform” rather than simply collect preferences.”¹²⁹

The Constitutional Court has, in the interpretation and enforcement of various rights in the Bill of Rights, recognised that the Constitution embraces a radical form of participatory democracy.¹³⁰ For instance, building on earlier jurisprudence¹³¹ when interpreting and enforcing the right to housing in section 26 of the Constitution in

¹²⁴ *S v Makwanyane* 1995 (3) SA 391 at para 237.

¹²⁵ *Makwanyane* at para 224.

¹²⁶ *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] 1 All SA 796 (ECG) at paras 25–29. See also Froneman J in *Albutt* where he states that “[t]he notion of participatory democracy is also an African one” at para 91.

¹²⁷ *Sustaining the Wild Coast* (2022) at para 25.

¹²⁸ Adopting a flexible and contextual approach discussed in Hoexter & Penfold (2021) at 580–583. See also *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) at para 95.

¹²⁹ Barritt E *The foundations of the Aarhus Convention* Oxford: Hart Publishing (2020) at 67–68. See also Liebenberg S “Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’” (2012) 12(1) *African Human Rights Law Journal* 1 at 6–12.

¹³⁰ Contrary to the focus on representative democracy in *Scalabrini* discussed at section above.

¹³¹ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC).

Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality,¹³² the Court recognised the importance of participatory democracy in the context of meaningful engagement with occupiers as a requirement for a lawful and constitutional eviction.¹³³ In doing so, it acknowledged that there are several provisions in the Constitution that “require the substantive involvement and engagement of people in decisions that may affect their lives”, including concerning “political decision-making, access to information, just administrative action, freedom of expression, freedom of association and socio-economic rights”.¹³⁴

This approach to meaningful engagement yielded a fundamental transformation of power relations among municipalities and occupiers, placing them on a more equal footing so as to enable dispute resolution about unlawful occupation in a respectful and dignified manner.¹³⁵ In the context of enforcing the right to protest, the Court in *Mlungwana* acknowledged the significance of the right to freedom of assembly in all democratic societies, but particularly in South Africa, where the majority of people had been excluded and prevented from participating in the affairs of the country under apartheid.¹³⁶ Relying on the sentiments expressed in *Mlungwana*, and in *Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality*, the High Court advanced participatory democracy by acknowledging protest as a means to make the voices of the most marginalised and impoverished among us heard, so as not to frustrate “a stanchion of our democracy: public participation”.¹³⁷

This jurisprudence, which is indicative of the Constitution’s potential to reinforce “a robust tradition of participatory democracy” that emerged during the country’s liberation struggle, was articulated in the Freedom Charter and nurtured by a progressive trade union movement and anti-apartheid grassroots activism.¹³⁸ During the liberation struggle, these forces advanced a participatory model of grass-roots democracy through democratic organs of self-government.¹³⁹ The democratic traditions of the liberation struggle serve as a counterweight to the idea that consultation in executive decision-making should necessarily be stultified because it is impractical, inefficient, or too complex.¹⁴⁰ Such objections contribute to marginalisation,

¹³² *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) BCLR 68 (CC).

¹³³ *Schubart Park* (2013) at paras 42–51.

¹³⁴ *Schubart Park* (2013) at para 43.

¹³⁵ Budlender (2011) at 591. See *Schubart Park* at paras 45–48 on the dignity-value of consultation.

¹³⁶ *Mlungwana and Others v S Another* 2019 (1) BCLR 88 (CC) at paras 60–72. See also *SATAWU v Garvas* 2012 (8) BCLR 840 (CC) at para 53.

¹³⁷ *Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality* [2022] 3 All SA 466 (GJ) at para 75.

¹³⁸ Buhlungu (2002) at 40, 46–53.

¹³⁹ Buhlungu (2002) at 40, 46–53.

¹⁴⁰ Buhlungu (2002) at 61–63.

deprivation, and “the exclusion of the majority from shaping their future”.¹⁴¹ A malleable¹⁴² duty to consult and facilitate meaningful public participation in the context of executive action allows for necessary and valuable democratic deliberation, which can ultimately enhance efficiency. Mobilising the public encourages self-organisation and is empowering, whereas demobilisation can lead to “mass inertia” and a society that views people as passive recipients of service delivery rather than actively involved in governing.¹⁴³

Buhlungu argued in 2005 that there was a need to critique the notion of democracy and to reappropriate and inject “emancipatory content into the discourse and practice of democracy”, drawing on the liberation struggle.¹⁴⁴ Doing this is an important part of addressing the lived realities and the ongoing struggles for social justice of marginalised and vulnerable people, given that “participation is a crucial dimension of social emancipation that allows subordinate classes to articulate their interests and assert their power”.¹⁴⁵ Buhlungu’s invitation to critique and debate the notion of democracy facilitates a re-evaluation of narrow and rigid approaches to the review of executive action.¹⁴⁶ Courts ought to reflect explicitly on the desirability, possibility, and necessity of consultation requirements in executive decision-making within the context of South Africa’s participatory democracy. Such reflection would locate the requirement of rational decision-making within the framework of substantive constitutional values and imperatives, including the rule of law, human dignity, equality, accountability, responsiveness, social justice, and ubuntu.

3.3 Jurisprudential links: Participatory democracy, executive action and procedural rationality

While the cases discussed in the previous section do not engage with the general question of whether executive action attracts a duty to consult, it is significant that courts have recognised the participatory character of South Africa’s constitutional democracy and the value of consultation in some contexts. There is, moreover, some jurisprudential support for the view that the requirements for executive decision-making must be informed by the demands of participatory democracy.

¹⁴¹ Buhlungu (2002) at 62.

¹⁴² See Hoexter & Penfold (2021) at 554–555 on the “crucial role of variability” in the context applying fairness to administrative action, which ought also to apply equally to fairness in the context of executive action; this position stands in contrast to an all-or-nothing approach.

¹⁴³ Buhlungu (2002) at 58–59. See also Murcott M “The role of environmental justice in socio-economic rights litigation” (2015) 132 *South African Law Journal* 875 at 898–899 for a critique of “technicisation” by the courts, in assessing the reasonableness of a policy concerning access to water, which leads to exclusion and disempowerment of vulnerable and marginalised people from decision-making. Problems with technicisation apply equally to executive action that excludes vulnerable and marginalised people from participation.

¹⁴⁴ Buhlungu (2002) at 61.

¹⁴⁵ Buhlungu (2002) at 62.

¹⁴⁶ See cases discussed above.

Justice Sachs, for example, in a minority opinion in *New Clicks*,¹⁴⁷ held that executive action (not falling within the scope of administrative action) is not necessarily exempt from procedural controls.¹⁴⁸ Instead, recalling the participatory nature of South Africa's democracy, he underscored that the Constitution was itself "a product of national dialogue"; that "[h]ardly a day goes by without the holding of consultations and public participation involving all stake-holders, role-players and interested parties"; and that the "principle of consultation and involvement" is a "distinctive part of our national ethos".¹⁴⁹ In this context, he said:

"It would be strange indeed if the principles of participatory democracy and consultation operated when the chain of public power began with the enactment of the original legislation, then vanished at the crucial stage when the general principles of the original statute were being converted into operational standards and procedures, only to re-surface at the stage of the implementation of provisions impacting on specific individuals."¹⁵⁰

Similarly, in his minority judgment in *Masetlha*, Justice Ngcobo recognised that the exercise of executive power forms part and parcel of South Africa's participatory democracy and cannot be freed from its requirements of "accountability, responsiveness and openness".¹⁵¹ Justice Froneman¹⁵² also made the link between consultative process rationality and participatory democracy explicit in his concurring judgment in *Albutt*, where he emphasised that "the democracy our Constitution demands is not merely a representative one, but is also, importantly, a participatory democracy", maintaining that this "holds true even for the executive function at stake".¹⁵³ He rooted an understanding of participatory democracy in an African tradition "that runs deep in the lives of many people in this country".¹⁵⁴

In *Electronic Media*, Justices Cameron and Froneman, in their minority opinion,¹⁵⁵ again linked requirements of rational decision-making to "our own brand of constitutional democracy", which is "one of participatory democracy, designed to ensure accountability, responsiveness and openness".¹⁵⁶ As they explained:

"So, when one determines whether consultation as a prerequisite to the determination of policy by the Executive has been complied with, one must

¹⁴⁷ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC).

¹⁴⁸ *New Clicks* (2006) at paras 625–628.

¹⁴⁹ *New Clicks* (2006) at para 625.

¹⁵⁰ *New Clicks* (2006) at para 626. Justice Sachs was assessing constraints on the exercise of regulation-making powers, but his view can be considered as applying to executive action more generally.

¹⁵¹ *Masetlha* (2008) at paras 181–2.

¹⁵² Cameron J and Van der Westhuizen J concurring.

¹⁵³ *Albutt* (2010) at para 90.

¹⁵⁴ *Albutt* (2010) at para 91.

¹⁵⁵ "Minority" in the sense that their proposed result did not prevail.

¹⁵⁶ *Electronic Media* (2017) at para 96.

ascertain whether the consultation has been done in a manner that rationally connects the consultation with the constitutional purpose of accountability, responsiveness and openness. No superimposed judicial stratagem of undermining separation of powers is at work here. To the contrary, rationality in process and substance is umbilically linked to the pulse-beat of our constitutional democracy, one based on accountability, responsiveness and openness.”¹⁵⁷

Admittedly, the explicit grounding of the principle of legality within a participatory democracy framework in cases concerning the review of executive action is to be found in minority opinions. However, we do not read the majority judgments of the court as having definitively ruled out such a link. In *Albutt*, Justice Froneman’s concurring minority opinion did not attract disagreement from the majority; in *e.tv*, the majority of the Court did not disavow the view that the nature of our participatory democracy may inform the requirements of rational governance in some cases.

Our optimistic assessment of the Court’s jurisprudence does, however, confront a more direct challenge in *Law Society*. In that case, Chief Justice Mogoeng roundly rejected an argument that participatory democracy demands public participation before the signing of an international protocol by the President.¹⁵⁸ The apparent death knell for assessing executive action in the light of South Africa’s framework for participatory democracy is worth quoting at length. The majority held as follows:

“Public participation in the law-making process is a requirement, specifically provided for in our Constitution, that must be met by our law-making institutions. But, participatory democracy is not provided for in similar terms [emphasis added] in relation to the exercise of presidential or executive power. The negotiation and signing of international agreements like the impugned Protocol is an exercise of executive power. And there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making processes as proposed. Desirable though it might be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the Executive, whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision-making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public ... There is thus no merit in the contention that the public should have been consulted in compliance with the dictates of participatory democracy before the President negotiated or signed the impugned Protocol.”¹⁵⁹

Read in isolation, this pronouncement appears sweeping, but, when considered closely and in context, the reach and potential impact of the Court’s statement can be assessed. First, the Court was responding to an argument that participatory democracy required public participation to be the default requirement whenever the President negotiated

¹⁵⁷ *Electronic Media* (2017) at para 96.

¹⁵⁸ *Law Society* (2019) at paras 86–88.

¹⁵⁹ *Law Society* (2019) at paras 87–88.

and signed a treaty.¹⁶⁰ The claim was therefore cast in very wide and peremptory terms, and it is this *very broad* claim which the Court rejected when it stated that there is “no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making processes *as proposed*” (our emphasis). Secondly, the Court was concerned with the exercise of a “high” policy-making determination, relating to a foreign policy decision made by the President in terms of his constitutional powers (with no intervening legislative framework). It was therefore *this type* of executive power that the Court had in its sights when stating (i) “we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement”; and (ii) “participatory democracy is not provided for *in similar terms* in relation to the exercise of presidential or executive power”.¹⁶¹

In other words, the Court was not suggesting that *all* executive action is hermetically sealed off from the constitutional demands of participatory democracy. To suggest otherwise would entail overruling *Albutt* – which the Court does not do.¹⁶² Instead, and more narrowly, the Court is not convinced that participatory democracy establishes a *general* duty for the President to consult when negotiating and signing international agreements. The Court should therefore not be seen to be precluding participatory democracy from acting as a normative framework informing malleable consultation requirements on the executive branch when appropriate (that is, when a decision will be irrational for failure to consult).¹⁶³

In summary, assessing constraints on executive action through the prism of participatory democracy has not yet carried the support of a majority of the Constitutional Court’s members. However, the Court has also not excluded the possibility of this explicit link being made in future cases, building on the foundations already established by some of the Court’s minority opinions. Indeed, the Court’s reasoning in *e.tv* arguably would have been bolstered by explicit recognition that the requirement of consultative process rationality, in that case, aligns with the vision of participatory democracy that emerges from South Africa’s constitutional scheme, as well as the jurisprudence discussed at above.

¹⁶⁰ The argument was advanced by the Centre for Applied Legal Studies, which intervened as second *amicus curiae*.

¹⁶¹ *Law Society* (2019) at para 87.

¹⁶² If not confined to the specific facts, the Court’s statement that consultation “can *never* rise to the level of a failure to fulfil a constitutional obligation to consult the public” (emphasis added) would be at odds with *Albutt*. Since the Court does not in any way suggest that this is its intention, a narrower reading of the Court’s statement can be inferred, or must otherwise hold, in order for it to be consistent with prior jurisprudence.

¹⁶³ Our reading of the excerpt quoted above is also supported by the fact that Cameron J and Froneman J, in their concurring judgment, did not consider it necessary to counter the majority’s framing of the role of participatory democracy in the circumstances of the case (a broader reading of which would conflict with their opinions as set out in *Allbutt* and *Electronic Media*).

4 CONCLUSION

We have sought to offer clarity on the distinction between procedural fairness and procedural rationality. We have explained that procedural fairness entails a broader set of activities and normative aims that may overlap with, but are ultimately distinct from, those of rationality. As a result, a decision taken without a hearing can potentially be procedurally rational, even though it will not be procedurally fair. We have also illustrated that the value of these labels should not be overstated. They should not distract from underlying substantive questions about why imposing a duty to consult on executive action may be appropriate in our constitutional scheme. Questions about the attainment of the rule of law through lawful, rational executive decision-making should not be separated from the need to advance the vision of participatory democracy, the Constitution's social justice imperative and ubuntu.¹⁶⁴ Moving beyond labels, and drawing on jurisprudence enforcing various rights, we have argued that imposing a duty to consult on the executive in appropriate cases enhances South Africa's participatory democracy by allowing the people to govern.

AUTHORS' CONTRIBUTIONS

Both authors contributed to the conceptualisation of this article and made equal contributions to the drafting of the manuscript. Ally was responsible for final revisions and editing.

¹⁶⁴ This aligns with the widespread call for substantive reasoning as part of a policy of transformative adjudication in South African administrative law. See for example, Pieterse (2005) at 159; Hoexter C "Judicial policy revisited: Transformative adjudication in administrative law" (2008) 24 *South African Journal on Human Rights* 281 at 284 and 286–287; Quinot G "Substantive reasoning in administrative-law adjudication" (2010) 3 *Constitutional Court Review* 111 at 114–118.

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