Deliberative democracy and constitutionalism: the limits of rationality review

JL Pretorius[*]

Abstract

Recent political evaluation of rights-based constitutional review of legislation and governmental policy in South Africa suggests that our most fundamental political ideal – constitutional democracy – is internally conflicted. Democracy and constitutionalism are perceived by some to serve opposing interests. Those who think differently must demonstrate the internal coherence of constitutional democracy on two levels. The first concerns the institutional design of constitutional review, that is, the procedures, powers and composition of the designated body for exercising this function. The second concerns the extent to which the substantive normative standards employed in the course of constitutional review are necessary to facilitate democratic accountability. The article addresses the latter aspect. A deliberative understanding of democracy provides a fruitful vantage point from which to evaluate the democratic function of standards of constitutional review. The deliberative model grounds democracy in the duty of public justification through discursive engagement. Seen from this perspective, democratically informed standards of constitutional review must comply with two basic conditions, namely maximising deliberative equality and participation, and compelling justificatory accounts for collectively binding decisions in terms of a constitutionally entrenched, integrative value system. Of all the standards employed by the courts for the purpose of constitutional review (such as rationality, reasonableness, fairness, proportionality), a deferential rationality standard is most problematic in this respect. It can lead to a narrow instrumentalist perspective for the evaluation of governmental objectives, which is incapable of facilitating substantive forms of democratic control that could meaningfully enrich the deliberative basis of democratic decision making.

---

[*]BCom BA Hons LLD. Professor of Public Law, University of the Free State.

1 Introduction

The recent past has witnessed high-level political criticism of constitutional democracy and especially its institutional underpinning by means of judicial review. Ngoako Ramatlhodi,[1] for instance, has more than once criticised the judiciary for acting in a 'counter-revolutionary manner' when courts decided unfavourably on aspects of government policy. In his view, these judgments serve only to buttress apartheid-era privilege at the expense of majority interests.[2] In criticising the judgments in the *Glenister*[3] and *Justice Alliance*[4] cases, Gwede Mantashe[5] believes that the judiciary is actually 'consolidating opposition' to government.[6] The President has also on occasion found it necessary to admonish that the 'powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote', and to warn that '[w]e must not get a sense that there are those who wish to co-govern the country through the courts when they have not won the popular vote during elections'.[7]

There are many more examples. Most of them seem to share two notable features. First, reminiscent of the liberal tradition, democracy and constitutionalism appear to be regarded as principles serving different goals. They are not conceived as 'internally connected',[8] but capable of uniting only strategically. Democracy can both protect and threaten liberal principles of justice; and *vice versa*.[9] Frank Michelman has observed that, in this tradition, one is

---

[1]Minister of Mineral Resources and National Executive member of the ANC.

[2]Tolsi 'Judicial autonomy frightens JSC' *Mail & Guardian* (2012-06-15) available at http://mg.co.za/article/2012-06-14-judicial-autonomy-frightens-the-jsc (accessed 2013-11-21).

[3]*Glenister v President of the RSA* 2011 7 BCLR 651 (CC) (declaring Ch 6A of the South African Police Service Act 68 of 1995 unconstitutional and invalid to the extent that it failed to secure an adequate degree of political independence for the Directorate of Priority Crime Investigation).

[4]*Justice Alliance of South Africa v President of the RSA* 2011 10 BCLR 1017 (CC) (setting aside the President's decision to extend the term of office of the Chief Justice of South Africa).

[5]Secretary General of the ANC.

[6]Mkhabela 'Full interview: ANC's Mantashe lambasts judges' *Sowetan* (2011-08-18), available at http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges (accessed 2013-11-15).

[7]Address by President Jacob Zuma, on the occasion of bidding farewell to former chief justice Sandile Ngcobo, and welcoming chief justice Mogoeng Mogoeng, National Assembly, Cape Town, 1 November 2011, available at http://www.thepresidency.gov.za/pebble.asp?relid=5159 (accessed 2013-11-12).

[8]Forst 'The rule of reasons: Three models of deliberative democracy' 2001 (14) *Ratio Juris* 345, 346.

[9]*Id* 347.

ultimately compelled to choose between constitutionalism and democracy as first principles.[10]

The second feature is that the perceived internal tension between democracy and constitutionalism is interpreted against a background of a dialectical understanding of the 'historical forces that gave birth to our Constitution'.[11] Ramatlhodi provides one representative example of the operative reasoning. The Constitution represents a strategic move by the apartheid regime 'to give up elements of political power to the black majority, while immigrating substantial power away from the legislature and the executive and vesting it in the judiciary, Chapter 9 institutions and civil society movements'.[12] The entrenchment of (white) minority privilege has therefore been achieved through a constitutional arrangement in terms of which the legislature and the executive have been systematically divested of any real power to bring about fundamental change.[13] Historical assessments such as this feed an appraisal of constitutional democracy that opposes a majoritarian conception of democracy with a minoritarian conception of constitutionalism. The result is that democracy and constitutionalism are, in addition, contrasted in ideological and implied race-related terms.

Against this background, a theoretical defence of the conceptual coherence of constitutional democracy needs to show how rights-based constitutionalism can be more than a side constraint against majoritarian preferences. It requires, as Christopher Zurn states, a theory that 'conceives of constitutional democracy, not as an uneasy combination of unrelated principles, but rather as internally related and *mutually presupposing*'.[14] This may perhaps most convincingly be done – as Jürgen Habermas, amongst others, has attempted – through a theoretical account of how the legitimacy of modern law necessarily draws on the values and institutions associated with both constitutionalism and democracy.[15] This is, however, not the level on which the interconnectedness of democracy and

---

[10]Michelman 'How can the people ever make the laws? A critique of deliberative democracy' in Bohman & Rehg (eds) *Deliberative democracy: Essays on reason and politics* (1997) 145, 152. See also Habermas 'Constitutional democracy: A paradoxical union of contradictory principles?' 2001 (29) *Political Theory* 766, 767: 'If the normative justification of constitutional democracy is to be consistent, then it seems one must rank the two principles, human rights and popular sovereignty'.
[11]Ramatlhodi 'The big read: ANC's fatal concessions' *The Times* (2011-09-01) available at http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions (accessed 2013-11-12).
[12]*Ibid*.
[13]*Ibid*.
[14]Zurn *Deliberative democracy and the institutions of judicial review* (2007) 225 (emphasis in the original).
[15]See Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* (translated by William Rehg) (1998) 118–131.

constitutionalism will be explored here. The aim, rather, is to confirm the conceptual coherence of constitutional democracy by demonstrating the *democratic* necessity of properly conceived substantive standards of constitutional review of legislation and other governmental action. It is not about the procedures or institutional design of constitutional review – for example, whether it should take the form of judicial review or otherwise[16] – or to demonstrate the instrumental value of constitutional review for a 'better' democracy. Rather, it is about the interrelatedness of the substantive normative standards of constitutional review with core democratic values. In particular, it will be considered how these standards serve to institutionalise democratic values in and through the adjudicative process, in so far as the standards determine both the intensity and normative substance of the duty of public justification – the essential element of a deliberative democracy.

As a background, a brief overview will be provided of deliberative democrats' critique of conventional liberal versions of democracy. This is necessary because all accounts of the compatibility of constitutionalism and democracy operate in terms of a background understanding of what democracy is about. Viewpoints that portray democracy and constitutionalism in inherently oppositional terms are often related to a particular understanding of democracy itself that conceptually invites this opposition. Key components of a deliberative account of democracy will then be suggested as the normative benchmark for evaluating the democratic credentials of substantive standards of constitutional review. The following two interrelated themes will structure the latter discussion: first, how the substantive standards of constitutional review can enhance or diminish public accountability through deliberative participation in the context of the process of constitutional review; and, secondly, the scope that standards of constitutional review allow for facilitating the kind of normative discourse that a deliberative understanding of democracy ideally envisages. The analysis will be conducted with reference to the way in which the Constitutional Court has conceptualised and applied the standard of rationality in the course of constitutional review of legislation and other governmental action in particular contexts. Where necessary, the rationality standard's potential to facilitate democratic legitimation will be contrasted with other standards of constitutional review, in particular fairness, proportionality and reasonableness.

---

[16]For an extensive, recent discussion of this topic, see Zurn (n 14) 253–341.

2 Deliberative democracy

The 'deliberative turn'[17] of democracy theory is best placed in context when seen as a reaction against the perceived normative paucity of conventional liberal understandings of democratic politics as 'aggregative majoritarianism'.[18] The latter view portrays democracy primarily in a procedural sense as a technique for collective decision-making in terms of which individuals have equal opportunity to register their individual preferences for competing alternatives in periodic mass elections, with outcomes being decided according to majority rule.[19]

The aggregative model envisages democracy as a market-like process.[20] Politics consists of the competition between strategically acting groups attempting to maintain or acquire positions of power. Voting decisions have 'the same structure as the acts of choice made by participants in a market'.[21] The function of politics is to aggregate and efficiently satisfy individual or group interests. Democratic institutions, such as elections, representative bodies and political parties, are justified as instrumentally useful for collecting and grouping together the political preferences of individuals and groups, in the process of efficiently choosing among various policy options.[22]

Characteristic of aggregative majoritarianism is, according to John Elster, the conception that the political process is instrumental rather than an end in itself.[23] Political preferences are 'prepolitical', that is, not the result of discursive interaction in the political process itself; they are considered more or less fixed and irreducible, and resistant to being transformed by the democratic institutions.[24] Politics is about the aggregation of given preferences, rather than the transformation of preferences through rational public deliberation.[25] The

---

[17]Dryzek *Deliberative democracy and beyond: Liberals, critics, contestations* (2000) 1. For a brief overview of deliberative democracy theory, see Roux 'Democracy' in Woolman *et al* (eds) *Constitutional law of South Africa* 2 ed (2006) 10-15–10-18.

[18]Freeman 'Deliberative democracy: A sympathetic comment' 2000 (29) *Philosophy & Public Affairs* 371, 373 refers to aggregative majoritarianism as the 'reigning analytical conception'. The 'aggregative model' is central to different schools of liberal democratic theory, including corporative pluralism and competitive elite theories (see Zurn n 14 81), rational choice theory (Smith *Deliberative democracy and the environment* (2003) 35–6), and social choice theory (Dryzek (n 17) 30–56).

[19]Freeman (n 18) 381.

[20]Young *Inclusion and democracy* (2000) 19.

[21]Habermas 'Three normative models of democracy' in Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 21, 23. For a comprehensive critique of the market model of democracy, especially in relation to social choice theory, see Elster 'The market and the forum: Three varieties of political theory' in Bohman & Rehg (n 10) 3–33.

[22]Zurn (n 14) 80.

[23]Elster (n 21) 3.

[24]Worley 'Deliberative constitutionalism' 2009 *Brigham Young University LR* 431, 442.

[25]Elster (n 21) 4.

political process is not seen as a system where voter preferences are sifted and evaluated in terms of any normative yardstick or some intuition of the common good; some preferences are valued more than others only in terms of how many others share them or the intensity with which they are held.[26] In so far as concessions for the'common good' are made, the latter is perceived to exist only in the form of the largest sum of sufficiently similar private interests,[27] which is ranked, as Freeman argues, on a par with any other 'subjective preference' for the purpose of aggregation.[28]

It is clear how the aggregative model results in a significant devaluation of the intrinsic value and authenticity of democracy and political processes. First, if political preferences are taken as a given and are considered to be qualitatively 'neutral', then they are, as Iris Marion Young says, democratically recorded and processed irrespective of whether they are the result of 'whim, reasoning, faith, threat, or fear' or motivated by self-interest, altruism or a sense of fairness.[29] Secondly, since preferences are seen as exogenous to political processes, they are also resistant to being influenced and transformed through political interaction and participation.[30] The model therefore lacks 'any distinct idea of a *public* formed from the interaction of democratic citizens and their motivation to reach some decision'.[31] Thirdly, another key concern is what Young calls the 'thin and individualistic form of rationality' that the aggregative model ascribes to political discourse.[32] Political actors may apply instrumental or strategic reasoning in realising their objectives,[33] but are agnostic about the possibility of subjecting the process of aggregation to principles apart from subjective interests or preferences.[34] Politics is not understood as a space where self-interest is moderated, common concerns articulated, differences reconciled, and integration and solidarity furthered. The aggregative model therefore offers no way to evaluate the moral authority of decisions and offers only a weak motivational basis for accepting the outcomes of a democratic process as legitimate.[35]

---

[26]Young (n 20) 20.
[27]Zurn (n 14) 51.
[28]Freeman (n 18) 374.
[29]Young (n 20) 20.
[30]Worley (n 24) 450.
[31]Young (n 20) 20 (emphasis in the original).
[32]*Ibid*.
[33]*Id* 20–21.
[34]*Id* 21. See also Offe & Preuss 'Democratic institutions and moral resources' in Held (ed) *Political theory today* (1991) 143, 152: 'Concerning moral capabilities, the American tradition – and most liberal political thought in general – relies on a realist and empiricist (as opposed to an idealist-rationalist) assumption.'
[35]Young (n 20) 21.

The question as to what it is that grounds the legitimacy of legal norms subject to unrestricted change by political majorities becomes especially acute, as Habermas observes, 'in pluralistic societies in which comprehensive world-views and collectively binding ethics have disintegrated'.[36] Under these conditions, the formal notion of equal participation that the model of aggregative majoritarianism presents as a legitimating basis does not suffice to anchor the legitimacy of democratic outcomes in the recognition of human autonomy and affording people equal concern and respect.[37] This is so for the reason that the aggregative model does not premise democratic decision-making on the necessity of 'giving citizens, *prima facie*, good moral reasons for obeying' decisions.[38]

To meet the higher demands of legitimacy required under conditions of permanent moral diversity, the deliberative conception of democracy is organised around an ideal of political justification, since it requires the finding of publicly acceptable reasons for collectively binding decisions.[39] It is driven by the intuition that democratic legitimacy is closely linked to the ability and opportunity to participate in effective deliberation on the part of those subject to collective decisions, which 'requires justification in terms that, on reflection, [people] are capable of accepting'.[40]

Deliberative understandings of democracy therefore represent an attempt to acknowledge and accommodate moral diversity from a standpoint of discursive inclusion based on equal concern and respect. For Claus Offe and Ulrich Preuss, the principle of equal concern and respect accounts for the reciprocal nature of a democratic process that is truly deliberative. They argue that no set of values and no particular point of view can lay exclusive claim to validity, but, at best, can make such a claim only after it has 'looked upon itself from the outside, thus revitalizing it[self] by taking the "point of view of the other" (or the generalized "moral point of view")'.[41] Against this background, the principle of deliberative inclusion requires a transformation of the institutional settings and practices of democratic opinion and will-formation in favour of the adoption of a 'multi-perspectival mode of forming, defending and thereby refining our preferences', in order to strengthen 'the underpinnings of a civilized civic culture'.[42]

---

[36]Habermas (n 15) 448.
[37]See Cohen 'Democracy and liberty' in Elster (ed) *Deliberative democracy* (1998) 185, 186.
[38]Zurn (n 14) 76.
[39]Cohen 'Procedure and substance in deliberative democracy' in Bohman & Rehg (n 10) 412.
[40]Dryzek (n 17) 1.
[41]Offe & Preuss (n 34) 169.
[42]*Id* 169–170.

In this sense,[43] as Dryzek suggests, deliberative democracy represents an attempt to re-establish the authenticity of democracy as a process engaged by competent citizenship through which democratic control becomes substantive rather than merely symbolic.[44] 'Voting-centric views', which regard democracy as the 'arena in which fixed preferences and interests compete via fair mechanisms of aggregation', are substituted with 'an emphasis on the communicative processes of opinion and will-formation that precede voting'.[45] Simone Chambers explains:

> Accountability replaces consent as the conceptual core of legitimacy. A legitimate political order is one that could be *justified* to all those living under its laws. Thus, accountability is primarily understood in terms of 'giving an account' of something, that is, publicly articulating, explaining, and most importantly justifying public policy. Consent (and, of course, voting) does not disappear. Rather, it is given a more complex and richer interpretation in the deliberative model than in the aggregative model.[46]

By basing their conception of democratic legitimacy on the need for justification through publicly acceptable reasons, the centrepiece of all deliberative democracy theories is their understanding of what counts as publicly acceptable reasons. This is a live and intensely contested controversy, which, more than anything else, reflects the diverse philosophical backgrounds of this group of political theorists.[47] At one end of the spectrum are those theories – referred to by Michelman as a 'strong normative version of an epistemic version of democracy'[48] – insisting that democratic outcomes ultimately draw their rationality and legitimacy from substantive principles independent of the process of deliberation itself. Rawls's theory of justice as fairness and notion of public reason perhaps best represents this version.[49] Habermas[50] advocates a more process-oriented grounding for the epistemic value and legitimacy claims of deliberative democracy, in so far as he argues for certain communicative

---

[43]See also Gutmann 'Democracy, philosophy and justification' in Benhabib (n 21) 344; Gutmann & Thompson *Democracy and disagreement* (1996) 3.
[44]Dryzek (n 17) 1.
[45]*Ibid*.
[46]Chambers 'Deliberative democracy theory' 2003 (6) *Annual Review of Political Science* 307, 308 (emphasis original).
[47]See Zurn (n 14) 70.
[48]Michelman (n 10) 161–2.
[49]*Ibid*. John Rawls in *The Law of Peoples* (1999) 139 states that he is 'concerned with a well-ordered constitutional democracy … understood also as deliberative democracy'. Chambers (n 46) 308 questions Rawls's credentials in this respect. See, however, Zurn (n 14) 53 and Cohen (n 39) 411.
[50]See Habermas (n 10) 766–781; Habermas (n 15) 253–264.

conditions[51] to be met for citizens' own agreements on substantive principles of justice to be legitimate.[52] His aim is to conceive a deliberative process whose structure grounds 'an expectation of rationally acceptable results'.[53] Those who qualify as 'pure proceduralists'[54] deny the authority of process-independent principles and generally insist that democratic theory should be purged of any substantive principles, beyond what is required to secure the fairness of the democratic process itself. They argue that holding democratic outcomes accountable in terms of substantive principles pre-empts the moral and political authority of (the majority of) citizens.[55] Somewhere inbetween are theories that measure the validity of reasons with reference to more or less formal principles, which is believed to enhance acceptability across divergent, comprehensive world views. Forst[56] suggests, as candidates, the two principles of reciprocity and generality. Reciprocity entails that, in making a claim or presenting an argument, no one may insist on a right or resource he or she denies to others, whereas generality means that 'all those subject to the norms in question must have equal chances to advance their claims and arguments'.[57]

Gutmann and Thomson perhaps make the most important point why democratic theory that shuns substantive principles for the sake of remaining 'neutral' is normatively questionable: it sacrifices an essential value of democracy itself.[58] It forfeits any plausible normative grounding for the claim to have treated citizens the 'way free and equal persons should be treated – whether fairly, reciprocally, or with mutual respect – in a democratic society in which laws bind

---

[51]These conditions are, however, not purely procedural. They include the notion of an 'ideal speech situation' as well as the constitutionally guaranteed rights of private and public autonomy. See Rawls *Political liberalism* (1993) 427–433 for an analysis of the substantive elements in Habermas's theory.

[52]Zurn (n 14) 78.

[53]Habermas (n 15) 448. It is this connection with a conditionally compliant deliberative democratic process which grounds the legitimacy claims of majority rule, according to Habermas (n 15) 306: 'Because of its internal connection with a deliberative practice, majority rule justifies the presumption that the fallible majority opinion may be considered a reasonable basis for a common practice until further notice, namely, until the minority convinces the majority that their (the minority's) views are correct'.

[54]Gutmann & Thompson 'Deliberative democracy beyond process' in Fishkin & Laslett (eds) *Debating deliberative democracy* (2003) 31.

[55]*Ibid*.

[56]Forst (n 8) 362.

[57]*Ibid*. As Gutmann & Thompson (n 43) 13 show, formal principles of this nature usually beg the question, since they invariably raise questions that appeal to substantive principles for resolution; for instance '[g]enerality forces us to take up substantive arguments … which consider whether differences between [categories of people] … are morally relevant in a way that would support a policy of [for instance] preferential hiring'.

[58]Gutmann & Thompson (n 43) 31.

all equally'.[59] 'Sensible theories' of democracy will avoid both the extremes of 'pure proceduralism' or 'pure epistemicism'.[60] As Zurn observes, neither substance nor procedure can exclusively lay claim to legitimacy. Those who lean more to the substantivist side will concede that many democratic decisions are justifiable simply because they result from fair democratic procedures.[61] At the same time, they will insist that some procedure-independent substantive content sets limits to the range of acceptable outcomes of any democratic process.[62] He explains further:

> [I]f the procedural account of legitimacy is to be more than an arbitrary and unjustifiable stipulation of rules, it must explain the legitimacy conferring power of its recommended procedures in terms of some principles or ideals that the procedures are purported to serve: increasing rationality, ensuring equality, allowing for autonomy, ensuring fairness, and so on.[63]

Once the necessity of mutual justification is acknowledged as an essential definitional element of democracy, reference to substantive values becomes inevitable. These values are, and will remain, contestable, but unavoidably demanded in terms of the need to strengthen the legitimating base of democratic outcomes. The point of a deliberative democratic process is to require an account of how decisions measure up when evaluated in terms of (often divergent) understandings of the constitutive values of democratic legitimacy. The latter provide both direction and substance to the generally accepted democratic notions of publicity and accountability.

As soon as the obligation of public justification through deliberative engagement is proposed as a necessary condition of democratic legitimacy, it becomes clear how exponents of deliberative democracy can more credibly claim to have indicated a way of reconciling democracy and constitutionalism. Constitutionalism is not merely pragmatically postulated as a necessary constraint on democratic decision-making from a standpoint conceptually disconnected from the notion of democracy itself. The deliberative understanding of democracy lays a more plausible foundation for the constitutive function of constitutionally protected values and rights as necessary conditions for the legitimacy of democratic will-formation. Democratic legitimation through public justification depends on the extent to which a constitution is designed to, and succeeds in,

---

[59] *Ibid*.
[60] Zurn (n 14) 80.
[61] *Ibid*.
[62] *Ibid*. Cf also Rawls (n 51) 431: 'The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim "garbage in, garbage out"'.
[63] Zurn (n 14) 80.

safeguarding the deliberative legitimacy conditions of democratically established law. Justification through deliberative engagement depends on both procedural (participatory) and substantive ('public reason') conditions – even if the latter will remain open-ended and contestable. In this sense, constitutionalism authoritatively defines and safeguards a democracy's legitimating basis by entrenching a deliberative structure, which is defined by both inclusive participation and accountability in terms of a particular normative framework. Constitutionalism thus has the function of indicating not only the extent and forms of democratic participation, but also – however provisionally and imperfectly – the normative orientation of a democracy's justificatory discourse. The role of the latter element in a properly functioning deliberative democracy is to ensure that justificatory reasoning is firmly situated in the 'evaluative space' (Charles Taylor) of a constitution.

Seen from this perspective, as Zurn (following Habermas) notes, the tasks of constitutional review are manifold:

> [K]eeping open the channels of political change, guaranteeing that individuals' civil, membership, legal, political, and social rights are respected, scrutinizing the constitutional quality and propriety of the reasons justifying governmental action, and ensuring that the channels of influence from independent civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers.[64]

Given the fundamental importance of constitutional review and the fact of the indeterminacy of much of the constitutional essentials, this function itself must – in order to reflect the interdependence of democracy and constitutionalism – display a deliberative character. It would be hard otherwise to counter the accusation of paternalism or elitism often directed at the institution of constitutional review.[65] The interpretation and application of the Constitution must be equally situated in a fully inclusive deliberative space. The process of constitutional review itself must be reflective of, and conducive to, the substantive democratic values of participation, inclusivity, openness, transparency, and public justification. It is one of the strong points of deliberative democracy theory that it has succeeded in breaking through the narrow focus of conventional understandings that restricted the scope of democratic participation to elections and the proceedings within organs of representative government. Institutionalising the notion of public justification cannot be limited to governmental settings of this nature without leaving crucial enclaves of politico-legal opinion and will-formation untouched by the need for public accountability.

---

[64] *Id* 242–3.
[65] *Id* 54–5.

Each institutional setting will, of course, provide a unique context for the way public accountability has to be realised. Regarding constitutional review, public accountability needs to be realised on at least two levels. The first, which will not be considered any further here, concerns the complex issue of the institutional design of constitutional review. Under this heading, the main issues are the procedures, powers and composition of the designated body for exercising this function, and its place in the architecture of democratically constituted governmental institutions. The second level concerns the question – and this will be considered further – of how the substantive standards of constitutional review serve to institutionalise the core ethos of deliberative democracy, that is, public justification through deliberative engagement. It is about the potential of these standards to realise core deliberative democratic values, namely transparency, inclusivity and accountability in terms of the Constitution's 'public reason'. As an illustration, the way that the principle of rationality is being conceptualised and applied as a standard of constitutional review of legislation and other governmental action will be discussed, with the emphasis on that standard's potential in facilitating democratic legitimation in particular contexts.

3 The 'minimum threshold' rationality standard

Rationality is a minimum requirement, prescribing the lowest possible threshold for the validity of the exercise of public power.[66] It is considered to be implied in the notion of the rule of law and to be an incidence of the principle of legality.[67] To be rational, public power must be exercised in a non-arbitrary manner, in the sense that decisions must be rationally related to the purpose for which the power was given. Rationality is not directed at testing whether legislation or executive action is fair, reasonable or appropriate.[68] It implies deference or restraint on the part of the courts towards the legislature and the executive, which is grounded in the principle of separation of powers. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision is rationally related to that purpose, a

---

[66] *Poverty Alleviation Network v President of the RSA* 2010 JOL 25039 (CC) para 65.
[67] *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 3 BCLR 241 (CC) para 85; *Law Society of South Africa v Minister for Transport* 2011 2 BCLR 150 (CC) para 29. See also Du Plessis & Scott 'The variable standard of rationality review: Suggestions for improved legality jurisprudence' 2013 (130) *SALJ* 597, 598-600.
[68] *Moutse Demarcation Forum v President of the RSA* 2011 11 BCLR 1158 (CC) para 31; *United Democratic Movement v President of the RSA* (1) 2002 11 BCLR 1179 (CC) para 55; *Law Society* (n 67) para 35.

court may not interfere with the decision 'simply because it disagrees with it, or considers that the power was exercised inappropriately'.[69]

Viewed superficially, the rationality standard appears to involve a simple analytical exercise. From the perspective of this standard's potential to effect public justification, however, many important contextual questions seem not to have been definitively settled.[70] What kind and degree of reflective evaluation does this standard allow regarding the ends of governmental action? What normative perspective underlies its notion of 'legitimacy'? Does it entail an evaluation of the legitimacy of governmental ends as freestanding objectives or in relation to other competing ends? If the former, how does the standard avoid treating governmental objectives as ends in themselves and therefore essentially self-legitimising? If the latter, what normative orientation – if any at all – does the standard provide for weighting or reconciling competing ends? Is the evaluation of ends or means and their coherence to be embedded in a more substantive enquiry with reference to constitutional values? What factors should determine the appropriate fit between ends and means? In what follows, an attempt will be made to consider these questions in the context of the rationality standard's capacity to realise the deliberative democratic objective of public accountability.

4 Democratic limits of rationality review

There are at least two aspects of rationality review that appear problematic in the light of the perspective of integrating deliberative democracy and constitutionalism. The first concerns the way rationality is conceptualised. It will be argued that the methodology of rationality analysis is open to the risk of encouraging a narrow instrumentalist version of rationality, thereby jeopardising its legitimising value as a standard of constitutional review that requires justification for both governmental ends and means. The second aspect involves

---

[69] *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC) para 45.

[70] The variability of rationality review has been extensively analysed in a number of recent contributions: see Du Plessis & Scott (n 67) 597-620 (noting the implications of variability for the rule of law and suggesting factors and guidelines to make rationality review more predictable); Price 'The evolution of the rule of law' 2013 *SALJ* 649-661 (discussing the extension of rationality review in *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) and its implications for the principle of the separation of powers); Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' 2013 (130) *SALJ* 810-836 (also considering the extension of rationality review in recent decisions to cover procedural fairness, reason giving and something similar to proportionality in terms of the separation of powers doctrine). See further Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*' 2010 (127) *SALJ* 580-591; Price 'The content and justification of rationality review' 2010 (25) *SAPL* 346-381 (exploring, amongst other things, the different forms of and reasons for the variability of rationality review).

the overextension of the scope of application of the rationality standard to Bill of Rights disputes in contexts where it is unsuited to bring about the constitutionally required degree and kind of justification of limitations of fundamental rights.

4.1 Instrumental rationality

From a reading of the case law, it appears that the rationality analysis is often limited, for the purpose of establishing constitutional compliance, to an investigation of the utility of the means to serve particular ends. Although – at least theoretically – the standard also requires courts to investigate the legitimacy of governmental purposes,[71] this aspect is often treated as a given and/or considered within a non-relational, free-standing frame of reference.[72] Cathi Albertyn and Beth Goldblatt write that it is theoretically possible to interpret the rationality standard as requiring a degree of principled justification of state action in terms of 'a defensible vision of the public good'.[73] This version would involve an evaluation of the legitimacy of governmental ends with reference to the value system of the Constitution. It is, however, the deferential version, in which rationality encompasses no more than the formal principle of the rule of law that the exercise of public power should not be arbitrary, that has become the preferred interpretation.[74] The weak variety obviates the need to demonstrate the legitimacy of the impugned governmental end against substantive constitutional values or any conception of the common good.[75]

Assessing governmental purposes on their own terms has the result that the testing of their legitimacy by definition does not involve an evaluation that takes into account the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution's value structure. This means that, for deciding the question whether, and to what extent, a governmental purpose can legitimise particular means, its relative place in terms of the Constitution's value structure as a whole is not considered. The constitutional validity of the way in which a particular governmental purpose is realised ought, however, to be decided with reference to how its realisation gives effect to the Constitution's values and how it impacts on other constitutionally

---

[71] See cases cited in n 66-70.

[72] See Du Plessis & Scott (67) 603. For a case to the contrary, see *Van der Merwe v Road Accident Fund* 2006 6 BCLR 682 (CC).

[73] Albertyn & Goldblatt 'Equality' in Woolman *et al* (eds) *Constitutional law of South Africa* 2 ed (2007) 35-18 (with reference to s 9(1) of the Constitution and *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 25).

[74] *Id* 35-18.

[75] *Id* 35-20. Du Plessis & Scott (n 67) 616 also state that 'one of the problems with the current application of the [rationality] test is that a deferential approach has often been applied to an already deferential standard.'

recognised goods and interests, if the risk of distorting the constitutional value structure by elevating a particular governmental objective as an end in itself is to be avoided. It would be hard to contemplate how the rationality standard could otherwise meaningfully play the role that the court indicated for it in *Prinsloo*, namely to contribute to 'a culture of justification' by requiring an account of how 'governmental action [is] relate[d] to a defensible vision of the public good', as well as to 'enhance the coherence and integrity of legislation'.[76] Constitutionally, the 'vision of the public good' cannot be limited to a particular public purpose and the 'coherence' or 'integrity' of particular governmental aims is evidently not determinable by means of self-reference only.[77]

If the rationality inquiry is made to rest on an analysis that treats governmental purposes as given and ends in themselves, then, in practice, the whole thrust of the inquiry is limited to the question of the utility of the means. Because the utility of the means is then determined within the narrow context of a self-standing governmental purpose, the rationality standard is at risk of degenerating into a matter of pure instrumental rationality. In the well-known analysis of the dominant role of this form of rationality (*Zweckrationalität*) in Western societies, Max Weber depicted its core meaning as referring to the extension of calculative attitudes of a technical character to more and more spheres of activity, optimised by scientific procedures and given substantive expression in the increasing role that expertise, science and technology play in modern life.[78] In his familiar critique, Weber perceived rationalised thinking as necessarily manifesting itself in bureaucratic modes of social organisation, and extending itself over more and more spheres of human association.[79] Since this form of rationality has no notion of limits, it diverts human social interaction away from the unique normative bases of solidarity and cooperation within differentiated social contexts (eg trust, collegiality, justice, the 'common good', equal citizenship, etc.) into narrow, strategically defined directions. Habermas has explained this by extending Weber's prognosis beyond bureaucracy with the concept of the 'colonisation of the lifeworld' of culture and social interaction as a result of the influence and control of technical expertise in the service of economic or political power.[80] Following Habermas, Dryzek argues that, in an

---

[76](N 73) para 25.
[77]See also Albertyn & Goldblatt (n 74) 35-18.
[78]This paraphrasing of Weber's account of instrumental rationality is that of Anthony Giddens, as quoted in Held *Models of democracy* 3 ed (2006) 127. See Weber *Economy and society: An outline of interpretive sociology* (Roth &Wittich eds; trans Fischoff *et al*) (1978) 24.
[79]Dryzek *Discursive democracy: Politics, policy, and political science* (1990) 4–5.
[80]*Id* 5.

instrumentally rationalised world, people are acting like 'calculating machines with an impoverished subjectivity and no sense of self and community'.[81]

The critique of Weber, Habermas and Dryzek highlights an important point about the proper role and limits of instrumental rationality as a normative constitutional standard. There is, of course, nothing wrong with thinking and acting in an instrumentally rational way as such. But instrumental rationality is ill-suited to serve as a normative constitutional standard to justify and legitimise the exercise of public power in order to resolve conflict and effect sociopolitical integration. Instrumental rationality as such provides no basis to choose among different competing ends or to relate them in a meaningful way to an integrating normative perspective – which is what legal standards are supposed to be about if they are to claim any *democratic* justificatory and legitimising value. As argued above, an instrumentalist understanding of the rationality criterion tends to treat governmental purposes as givens and ends in themselves and therefore does not provide any external vantage point to reflect rationally on such ends.

This constrained normative orientation is also the reason why an instrumentally narrowed rationality standard can lead to a deliberative framework that is not inclusive enough to allow the fair representation of all relevant perspectives and interests. As a constitutional norm tasked with, *inter alia*, the goal of resolving conflict and realising sociopolitical integration, it offers little in the form of a framework for reasoning that can prevent the danger of social exclusion and normative distortion. This tendency to exclude and distort undermines the capacity of the standard of instrumental rationality to facilitate a discussion and contestation of the kind of normative reasons that can be legitimately invoked in justification of the exercise of governmental power.

The contrasting majority and minority approaches in *Bel Porto School Governing Body v Premier of the Province, Western Cape*[82] provide an illustrative example of the points made above. The case, in brief, concerned the constitutionality of a rationalisation and redeployment programme of the Western Cape Education Department (WCED). The WCED inherited a situation of inequality in respect of the resourcing of schools due to the racially segregated educational system existing before the interim Constitution. Schools catering for white children were administered by the former House of Assembly Education Department and generally enjoyed considerably better resources than those functioning under the auspices of the other three racially segregated departments. General assistants employed by special schools for disabled children, administered by the House of Assembly Education Department (the appellant schools), were not employed by the Department itself, but by the

---

[81] *Ibid*.
[82] (N 69).

schools, which received state subsidies for the purpose. In all other schools, they were employees of the respective education departments, and later the WCED.

In order to establish a single system and equalise conditions in all schools, the WCED adopted rationalisation plans. These included a general provisioning scheme applicable to all schools, with the resultant redeployment and retrenchment of teachers and general assistants. The rationalisation followed negotiations with trade unions representing staff employed by the WCED, but excluded the general assistants employed by the appellant schools. In terms of the plan, employees of the WCED would be given preference in the filling of posts. All of this left the general assistants employed by the appellant schools in a precarious position, should they be found redundant. The governing bodies of the appellant schools contended that the decision by the WCED to implement the rationalisation and redeployment scheme without first employing the general assistants at their schools infringed their constitutional rights to equality and to just administrative action.

The application was unsuccessful in the High Court and was also dismissed on appeal to the Constitutional Court. Chaskalson CJ, for the majority, in effect measured the constitutionality of the rationalisation scheme in terms of a rationality standard regarding both the equality and just-administrative action[83] challenges. He argued that the WCED had decided not to deal with staffing and other 'equality issues' at the various schools within the province on a piecemeal basis. Instead, it sought to develop a coherent and comprehensive plan for addressing these problems in order to meet two requirements, equity and compliance with budget.[84] He therefore considered it 'perfectly rational' for the WCED not to employ the appellant schools' general assistants, but to give preference to existing employees of the WCED for retrenchment or redeployment, since it 'is not arbitrary to refuse to take on new employees where existing employees have to be retrenched. Nor is it arbitrary to give preference to your own employees over others'.[85]

---

[83]Except for the challenge based on procedural fairness. Applicable at the time was item 23(2)(b) of Schedule 6 of the Constitution. He rejected the notion that the item requires substantive fairness: 'The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn. In respect of the challenge based on item 23(b)(iv), he argued at para 128 that 'I am satisfied that even if sub-item (iv) is applicable to the appellants' claim, and even if justifiability may in certain cases permit a standard of review more intensive than review for rationality, this is not a case in which it would be appropriate to set a higher standard, or for this Court to interfere with the decision of the WCED'.

[84]*Bel Porto* (n 69) para 42.

[85]*Id* para 44.

If the rationality of the scheme is considered from an instrumentally rational vantage point, it is clear how the scheme's negative consequences for the applicants can be rationalised in terms of its utility in contributing to cost saving and rationalisation. But such a rationality standard does not provide the depth of inquiry necessary to convincingly justify why these goals should override all other considerations in the context of the case, and why specifically the aggrieved group should be treated worse than other concerned staff in reaching these goals. That is why the minority accepted the necessity of a justificatory standard that allows a contextually much more wide-ranging and inclusive inquiry than the deferential rationality standard applied by the majority.[86] They (the minority) emphasised the importance of the interrelatedness of democracy and constitutionalism for constitutional review: 'the democratic system of government as expressed in the Constitution should determine the power to review administrative action and the extent thereof'.[87] In particular, the standards of constitutional review ought to be dictated in terms of what is required to give effect to the foundational values of accountability, responsiveness and openness.[88] A proper inquiry into justifiability in the circumstances of the case therefore required a broader evaluation of not just the rationality and coherence of the process, but of its fairness and the reasonableness of its outcome.[89]

When the deliberative scope has been broadened in this way, the path is cleared to expose the one-sided contextual significance that the majority – because of the inherent constraints of the rationality analysis – attached to the factual circumstance that the general assistants at the appellants' schools were not employed by the WCED. Sachs and Mokgoro JJ argued[90] that, in all material respects, such assistants were in effect public servants working in government schools in exactly the same way as the general assistants at other special schools. It was unjustifiable to disregard the years of dedicated service which many had given to government schools. There could therefore be no justification for excluding them from negotiations regarding the rationalisation scheme and

---

[86] *Id* para 164: 'In our view, the concept of justifiability requires more than a mere rational connection between the reasons and the decision, such as that the general assistants in question were technically not in the employ of the WCED. Although a rational connection would certainly be necessary, it would not on its own be sufficient … Justifiability as required by section 33(d) on the other hand, must demand something more substantial and persuasive than mere rational connection'.

[87] *Bel Porto* (n 69) para 163.

[88] *Ibid*.

[89] *Id* para 165. For an analysis of the similarities and differences between reasonableness and rationality review, see Du Plessis & Scott (n 67) 601-603; Price 'Evolution of the rule of law' (n 70) 653; Price 'The content and justification of rationality review' (n 70) 357-359; Kohn (n 70) 826-827, 834-835.

[90] *Bel Porto* (n 69) para 135.

categorically putting them at a disadvantage as to the possibility of retrenchments or redeployment.[91] What compounded the unfairness is that the aggrieved general assistants were all lowly paid members of disadvantaged groups. Although the schools where they were employed previously exclusively attended to white children, they were at the time of the court proceedings predominantly black.[92]

Once the boundaries of the rationality analysis have been crossed, the deliberative focus is extended to encompass considerations beyond rationalisation and financial discipline. Regarding the latter, the minority noted that, although there could be no objection to rigorous bookkeeping to ensure that state monies are effectively used, 'the bottom line of the constitutional enterprise is not to be found at the foot of a balance-sheet, but rather in respect for human dignity. Fairness in dealings by the government with ordinary citizens is part and parcel of human dignity'.[93] Sachs and Mokgoro JJ therefore also referred to the necessity of preserving, apart from good management and well-qualified people, collegial integration and institutional ethos in especially the appellant schools,[94] and, most importantly, the interests of the affected children. In this respect, they emphasised the special relationships that the disabled children develop with familiar, individual caregivers. All of this results in the need for the state to account for its decision in terms of a standard that goes beyond mere rationality: 'In a sensitive environment involving children who are particularly vulnerable, any substantial threat to disturb the equilibrium that was not necessitated by the circumstances would require well-supported justification'.[95]

In *Albutt v Centre for the Study of Violence and Reconciliation*,[96] the Court applied a rationality-based reasoning that is markedly different from the deferential, instrumental approach. At issue in this instance was the President's decision to institute a process for granting pardons to persons convicted of offences which they claimed had been committed with a political motive, but who had not applied for amnesty in terms of the truth and reconciliation process. A multiparty advisory body was created to consider and advise the President on applications for pardons. This body refused a request of the victims of the offences to be allowed to make representations. The Presidency later confirmed this refusal. In testing the rationality of the President's decision to disallow victim

---

[91] *Ibid*.
[92] *Id* para 167.
[93] *Id* para170.
[94] *Id* para 168.
[95] *Id* para 169.
[96] 2010 5 BCLR 391 (CC). For a discussion of this case, see Du Plessis & Scott (n 67) 603-605; Kohn (n 70) 828-831; Price 'Rationality review of legislation and executive decisions' (n 70) 584-586.

representations, the Court examined the purpose of the special-pardons dispensation and the exclusion of the victims from participation in a principled manner against a wide background of constitutional values, in particular accountability, responsiveness and openness, as well as national unity and national reconciliation.[97] The Court argued that the requirement to afford the victims a hearing is implicit in the specific features of the special dispensation process. In particular, the 'objectives of national unity and national reconciliation require, *as a matter of rationality*, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based'.[98]

In his separate, concurring judgment, Froneman J perceptively noted that the court – by measuring the rationality of the decision in terms of the broad constitutional values underlying the participatory process of the Truth and Reconciliation Commission[99] – had situated the presidential power to grant pardons in a context distinct from considerations that govern its normal application. He recognised that this could be interpreted as an unwarranted extension of the rationality standard.[100] In his view, however, the court's approach had enriched this standard by incorporating in its application foundational constitutional values and notions of participatory democracy which 'finds resonance, not only in our recent history, but also in pre-colonial history and in our own conception of democracy'.[101]

4.2 Overextension of the rationality standard in Bill of Rights disputes

It is generally acknowledged that rationality is too deferential a standard to facilitate the degree of justification required of governmental action which impacts on fundamental rights.[102] The Constitution, in section 36, therefore commits itself to a standard of review which requires all rights-limiting measures to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In the view of the court, section 36 prescribes a reasonableness standard involving a proportionality requirement. It requires rights-limiting measures to be justified by important public interests and to be no more intrusive than necessary in order to serve those interests.[103]

---

[97] *Albutt* (n 97) para 71.
[98] *Id* para 72 (my emphasis).
[99] *Id* para 90.
[100] *Id* para 89.
[101] *Ibid*.
[102] *Law Society* (n 67) para 36.
[103] *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 104.

Compared with a proportionality inquiry, a deferential rationality standard is clearly unable to realise the degree of democratic accountability expected of rights-limiting measures. As said earlier, rationality review requires only a minimum measure of justification in respect of the legitimacy of the purposes pursued and of ends–means coherence. As a result, it relieves the state of the duty to justify actions in two significant respects.[104] First, the rationality standard allows the state much greater leeway regarding the extent to which rights may be limited to achieve governmental ends than would have been the case under a proportionality standard. Rationality review therefore does not express the same responsiveness to situations where the infringements of rights are unnecessarily invasive. To the extent that a rights-limiting act can be rational, even if disproportional or unfair, a mere rationality standard of justification would demand no explanation for the disproportional or unfair invasion of rights.[105] Secondly, the rationality standard relieves the state of the vital justificatory exercise of demonstrating, by means of a reasoned assessment of the competing considerations at stake, that a right is outweighed by a public good in the particular circumstances of the case. By comparison, the proportionality standard compels the state to account for the prioritisation of a public good over a fundamental right in the particular circumstances of the case in terms of a reasoned assessment of the 'nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society'.[106] Since the context for justification is firmly situated in this normative setting, a justification must and can only be structured in terms of these values. This is the reason why rights-restricting measures should not be justifiable with reference to considerations of 'reasons of state', or traditions, conventions, and preferences as such. The proportionality standard therefore possesses the analytical structure to uncover the state's understanding of constitutional justice which informed its decision-making. In this way, proportionality stands in direct service of the democratic values of openness, transparency and reason responsiveness.

In another vital respect, the superior democratic credentials of the principle of proportionality recommend it as the appropriate standard in terms of which account must be given for rights-limiting measures. The proportionality standard opens up a much wider contextual frame of reference for resolving rights disputes

---

[104]Some of these points have been argued previously in Pretorius 'Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Service*' 2013 (130) *SALJ* 31, 37–42.

[105]See, for example, *Prinsloo* (n 73) para 36; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 BCLR 139 (CC) para 16.

[106]*Makwanyane* (n 103) para 104.

than would have been the case had the controlling perspective been rationality only. Proportionality analysis is conducive to a deliberatively more inclusive process of constitutional review that allows more voices to be heard and more perspectives to be represented. This is done in two ways. First, since proportionality review involves the balancing of competing claims, it opens discursive avenues for a wider spectrum of relevant concerns to influence judicial deliberation.[107] Secondly, because section 36 requires rights limitations to be justifiable in an open and democratic society based on human dignity, equality and freedom, it in principle opens up reference to any and all the values characteristic of such a society in opposition to, or in defence, of the limitation. Unlike a rationality criterion, proportionality avoids structuring deliberation in such a way that perspectives cannot be raised because they are categorically deemed irrelevant, irrespective of how closely they reflect fundamental constitutional values.

This difference illustrates how standards of review determine adjudicative context, and context prescribes, as Foucault has argued, the set of discursive procedures and conditions that operate as a form of 'discourse control'.[108] Context regulates the qualifications and opportunities of speakers to participate and establish the conditions under which their points of view are heard as relevant and authentic or not.[109] Standards of review, through context demarcation, can either limit or enable the possibility of counter discourse.

In the light of the above, allowing rationality to be the controlling constitutional standard for the review of rights limitations is a clear case of overextending the modest justificatory function that this standard is capable of performing in terms of what the democratic values of accountability, openness and transparency require. However, in spite of this explicit recognition of the need for a higher standard of scrutiny for infringements of fundamental rights,[110] the court has designated rationality as the operative standard of review in respect of fundamental rights limitations in at least three respects. In the first case – the right to equality in terms of section 9(1) – this has been achieved by defining the scope of the right in terms of a particular species of governmental action (ie action which constitutes 'mere differentiation', as opposed to 'discrimination') against which only minimum protection in the form of a deferential non-arbitrariness requirement is warranted.[111] Secondly, the court has interpreted

---

[107]Pretorius (n 104) 42.
[108]Foucault 'The order of discourse' in Young (ed) *Untying the text: A post-structural anthology* (1981) 48-78, 61.
[109]Lindstrom 'Context contests: Debatable truth statements on Tanna (Vanuatu)' in Duranti & Godwin (eds) *Rethinking context: Language as an interactive phenomenon* (1992) 101-124, 104.
[110]*Bel Porto* (n 70) para 127.
[111]*Harksen v Lane* 1997 11 BCLR 1489 (CC) para 38.

section 9(2) of the Constitution to mean that affirmative action measures are not subject to the standard of fairness applicable to differentiation on any of the prohibited grounds of discrimination.[112] What is required, in effect, is also a form of rationality only as the governing standard of review for action impacting on equality rights in this context.[113] In the third case, namely the right to freedom of trade, occupation or profession,[114] the court has ruled that the regulation of the practise of a trade, occupation or profession need only be held accountable in terms of the rationality requirement.[115]

4.2.1 Section 9(1)

In *Prinsloo*,[116] the Court distinguished, in the context of defining the scope of the equality right, between state action that constitutes 'mere' differentiation and action that qualifies as discrimination. Under section 9(1), the only condition for the constitutionality of mere differentiation is that the state is expected to act in a rational manner. It should not regulate arbitrarily or manifest 'naked preferences that serve no legitimate governmental purpose'.[117] In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*, the court pointed out that, also in the context of the equality clause, the test for rationality is a relatively low one.[118]

The court subscribes to the conventional explanation for adopting a differential approach to unequal treatment that does not meet the definitional threshold of discrimination. Courts would be overburdened if all classifications needed to be justified in terms of the limitation clause.[119] The burden of justification should depend on the degree of the prejudicial impact of unequal treatment; those forms of unequal treatment that qualify as discrimination are (historically) more serious and should be accounted for in terms of a more demanding justificatory standard, and *vice versa.*[120]

The *Bel Porto* case is, however, a clear example that this assumption does not always play out in practice. The conceptual categories do not necessarily predict the seriousness of the consequences in the presumed way. Rautenbach correctly warns against a rigid, categorical approach, since the nature and the

---

[112] *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 32.
[113] See, however, the qualification made in n 133 below.
[114] S 22 of the Constitution.
[115] See *Affordable Medicines Trust v Minister of Health of the RSA* 2005 6 BCLR 529 (CC) paras 77, 92.
[116] (N 73) para 25.
[117] *Id* para 36. See also Price 'The content and justification of rationality review' (n 70) 348-350.
[118] 2004 6 BCLR 569 (CC) para 67. Rationality review in terms of s 9(1) does not allow courts to intervene in 'policy choices': *Jooste* (n 105) para 16.
[119] See *Prinsloo* (n 73) para 17; *Bel Porto* (n 69) para 47.
[120] *Jooste* (n 105) para 16.

extent of the impact of mere differentiation ('ordinary regulatory unequal treatment') may vary considerably. In cases where the impact is more substantial, he suggests that more weight ought to be attributed to the importance of the purpose of the differentiation and the employment of less restrictive alternatives.[121] Albertyn and Goldblatt also argue that several legal distinctions not protected under section 9(3) of the Constitution can give rise to levels of disadvantage that deserve stronger protection than the rationality standard can provide. Examples of such distinctions that warrant heightened scrutiny are the category of offender and differentiation on the basis of property ownership or income level (in so far as they do not in any event constitute unlisted grounds of unfair discrimination under s 9(3)).[122] They propose that, in such cases, the rationality standard could be strengthened by requiring a closer fit between ends and means or more compelling purposes for the differentiating measures in appropriate circumstances; or reconceptualising rationality as a more principled standard that compels a justificatory account for differentiation in terms of the fullest respect for the value of substantive equality.[123] This would entail an explanation of how the measure fulfils the Constitution's 'egalitarian vision of full and equal participation in society'.[124]

It is precisely in this respect that rationality fails as a standard of constitutional review that gives full effect to the deliberative democratic imperative of public accountability for equality-limiting measures. Deliberative democracy envisages a justificatory reasoning securely positioned in the Constitution's value system. Without such a normative orientation, the justificatory deliberation facilitated by standards of constitutional review would be constitutionally pointless. As will be argued in the next section, rationality review is unable to anchor public justification of equality rights-limiting measures in the constitutionally intended evaluative context of substantive equality.

4.2.2 Section 9(2)

Section 9(2) of the Constitution authorises legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality. Under standard unfair-discrimination jurisprudence, all measures differentiating in terms of the grounds specified in section 9(3) must be proven fair. Fairness is a more demanding requirement than rationality, and its content overlaps to a substantial

---

[121]Rautenbach 'General introduction to the Bill of Rights' *Bill of Rights Compendium* (Issue 9 2001) 1A-70.
[122]Albertyn & Goldblatt (n 74) 35-28.
[123]*Id* 35-28–35-29.
[124]*Id* 35-28.

degree with the reasonableness/proportionality requirement of section 36.[125] The court has therefore in essence assigned a justificatory role to fairness in the context of the limitation of equality rights similar to the one played by reasonableness/proportionality more generally.

In *Minister of Finance v Van Heerden*, the court deviated from its standard unfair-discrimination jurisprudence and settled on a kind of rationality requirement, instead of fairness, as the controlling constitutional standard for valid affirmative action.[126] Moseneke J, writing for the majority, proceeded from the position that remedial measures are not subject to the presumption of unfairness.[127] The court therefore rejected the reasoning of the High Court that the differential parliamentary pension benefits scheme, because it was based on the intersecting grounds of race and political affiliation, constituted discrimination and should be subject to the presumption of unfairness.[128] Moseneke J argued that the High Court's approach would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.[129] To allow unfair discrimination testing of affirmative action would also 'unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination'.[130]

In the light of the above, the court found that, for a differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination to be constitutional, it suffices if it complies with the 'internal requirements' of section 9(2).[131] Once this is established, no fairness or proportionality testing under section 9(3) or 36, respectively, applies. In order to comply with section 9(2), a remedial measure must meet three conditions: the beneficiaries of the measure must be persons or categories of persons who have been disadvantaged by unfair discrimination; the measure must be designed to protect or advance such persons; and it must promote the achievement of equality.[132]

The above can be, and has been, interpreted and applied as a type of instrumental rationality standard only; that is, to be constitutional, it need only be shown that the affirmative action measure benefits members of disadvantaged

---

[125]See Pretorius (n 104) 40–42.
[126]The following comments repeat arguments made in an earlier contribution on the subject: see Pretorius 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' 2010 (26) *SAJHR* 536–570.
[127]Although the court's reasoning for the non-applicability of the unfairness presumption to s 9(2) measures is far from unproblematic, it will be set aside for the purposes of this article. See, in this respect, Pretorius (n 126).
[128]*Van Heerden* (n 112) para 32.
[129]*Ibid*.
[130]*Ibid*.
[131]*Id* para 36.
[132]*Id* para 37.

groups.[133] The possible unfairness or disproportionality of the concrete impact on non-favoured groups does not affect its constitutionality.[134] This is the logical consequence of the insistence of the court that measures complying with the internal requirements of section 9(2) are not subject to any fairness testing. To read any fairness or proportionality content into these requirements themselves would therefore contradict this starting point.[135] If this point of departure is consistently followed through, no further constitutional hurdles remain to be cleared, once the fairness- and proportionality-neutral section 9(2) conditions have been met.

If and when section 9(2) of the Constitution is so interpreted, it sets a standard for the constitutional review of affirmative action incapable of meeting the deliberative democracy justificatory conditions of inclusivity and accountability, in the context of equality rights disputes. An instrumental rationality standard, as argued above, tends to disconnect the pursuit of a particular public good from a wider context of competing goods and from an integrating and harmonising normative perspective. Without such a context and perspective it is, however, impossible to determine the relative importance of a particular public good in given circumstances.[136] This means that, in the context of adjudicative processes of constitutional review of affirmative action, the representation of particular competing interests and considerations is either completely disallowed or, from the outset, substantially devalued in terms of the overriding competitor public good. Thus the standard determines not only who is allowed to participate deliberatively in the adjudicative process, but also the equality of the terms of participation.

This is clearly exemplified in the observation of Mokgoro J in *Van Heerden*: 'The goal of transformation would be impeded if individual complainants who are aggrieved by restitutionary measures could argue that the measures unfairly discriminated against them because of their undue impact on them'.[137] It is hard

---

[133]See, for example, *South African Police Service v Solidarity obo Barnard* 2013 1 BLLR 1 (LAC) paras 44, 46; *Alexandre v Provincial Administration of the Western Cape, Department of Health* 2005 6 BLLR 539 (LC) para 150. Cf, however, *Solidarity obo Barnard v SAPS* (165/2013) 2013 ZASCA 177 (28 November 2013).

[134]See, for example, Mokgoro J in *Van Heerden* (n 112) paras 78–80.

[135]It needs to be mentioned that Moseneke J did indeed apply a kind of fairness testing as part of the s 9(2) enquiry – see para 51. The point, however, is that this cannot be reconciled with the starting position that measures compliant with the internal s 9(2) requirements are not presumptively unfair – which means that the s 9(2) requirements themselves must not imply any fairness testing. For a fuller analysis, see Pretorius (n 126) 561–7.

[136]Pretorius (n 126) 554–6.

[137]*Van Heerden* (n 112) para 80. See also the Labour Appeal Court judgment in *Barnard* (n 133) para 26: 'It is misconstrued, in my view, to render the implementation of restitutionary measures subject to the right of an individual to equality'.

not to read this as requiring from us a dogmatic choice between either fairness or restitution. Together with Sachs J in the same case, we should insist on both. He argues that what is required 'is how, in our specific historical and constitutional context, to harmonise the fairness inherent in remedial measures with the fairness expressly required of the State when it adopts measures that discriminate between different sections of the population'.[138] In his view, recourse to fairness and proportionality is indispensable to effect 'the necessary reconciliation between the different interests of those positively and negatively affected by affirmative action' in a way which 'takes simultaneous and due account both of the severe degree of structured inequality with which we still live, and of the constitutional goal of achieving an egalitarian society based on non-racism and non-sexism'.[139]

It is equally important to interrogate to what extent a standard of instrumental rationality allows the author of a specific affirmative action measure to be held accountable in terms of the underlying value of substantive equality that such a measure is constitutionally intended to serve. In *Van Heerden*, the court described the overall purpose of section 9 as the realisation of 'a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity'.[140] Given its narrow strategic means–ends focus, rationality analysis does not offer an analytical framework capable of demanding a justificatory account in terms of this understanding of the goal of substantive equality. It lacks the normative substance and contextual setting necessary to be able to function as an *inclusive* fairness-based standard for the assessment, evaluation and integration of competing equality claims, or for balancing equality claims and competing public interests.[141]

4.2.3 Section 22

The appropriate test for determining what constraints on economic activity and the earning of a livelihood, which fell outside the purview of section 26(2) of the interim Constitution,[142] the predecessor of section 22, was considered in *S v Lawrence*.[143] Section 26(2) permitted measures limiting the right for a number of

---

[138] *Van Heerden* (n 112) para 136.
[139] *Ibid*.
[140] *Id* para 44.
[141] Pretorius (n 124) 566.
[142] S 26 provided as follows: '(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory. (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality'.
[143] *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC).

specified purposes, but required limitations compliant with these purposes to still be justifiable in terms of the pivotal normative benchmark of the limitation clause, namely 'an open and democratic society based on freedom and equality'. The court, however, decided to disregard this strong textual indication for a more exacting standard, and found that the language of section 26(2) neither required measures to be reasonable nor proportional, both of which were the requirements of the general limitation clause of the interim Constitution. In effect, it interpreted the justificatory standards of reasonableness and proportionality as not implied in the notion of an open and democratic society based on freedom and equality.

The court adopted rationality as the controlling standard, holding that 'section 26(2) should be construed as requiring only that there be a rational connection between the legislation and the legislative purpose sanctioned by the section'. Courts should be loath to intervene on matters of economic policy. It argued that, in a democracy, it would be 'a serious distortion of the political process if [the judiciary] could veto the policies of elected officials'. To adopt a stricter standard of review would require courts 'to sit in judgment on legislative policies on economic issues'.[144]

This approach to the interpretation of the economic freedom right has survived the transition to the 1996 Constitution, at least as far as the regulation of the practise of a trade, occupation or profession is concerned. A distinction needs to be made between measures that impact on the choice of a trade, occupation or profession on the one hand, and regulation of the practise of a trade, occupation or profession on the other hand. A limitation of the freedom of choice must be justifiable in terms of the limitation clause, whereas regulation of practise is subject to the less stringent standard of rationality only.[145]

Currie and De Waal argue, however, that the separation between choice and practise is often difficult to maintain.[146] In recognition of the fact that choice and practise actually represent 'poles of a continuum', German constitutional jurisprudence has adopted a more graduated approach regarding the standard of review in this context.[147] Rather than linking standards of review to rigid conceptual categories, the strictness of the standard of review follows the actual impact of the regulation. The more invasive a regulation of trade, occupation or profession is, the more stringent the standard of justification needs to be.[148] The strictness of constitutional review then no longer dogmatically hinges on

---

[144] *Id* para 42. See also Currie & De Waal *The Bill of Rights handbook* (2013) 460.
[145] Currie & De Waal (n 144) 462. See also *Affordable Medicines Trust* (n 115) para 80.
[146] Currie & De Waal (n 144) 463, 466–7.
[147] *Id* 462.
[148] 7 *BVerfGE* 377 (1958) (*Pharmacy* case).

definitional categories, such as 'practise', 'choice', 'economic regulation' or 'policy choices', but on the nature and extent of the impact of the regulation.[149]

5 Section 25(1) jurisprudence as a counterpoint

Section 25(1) of the Constitution prohibits arbitrary deprivation of property by any law. The court commonly refers to rationality and non-arbitrariness as interchangeable concepts in cases decided in terms of the above-mentioned constitutional provisions.[150] In the light of this strong textual indication, one would have expected rationality to be the controlling standard of review for deprivation of property also.[151] Yet, in this instance, the court rejected a categorical approach and adopted a contextually more nuanced and flexible standard. Unlike the court's jurisprudence regarding mere differentiation and regulation of the practise of a trade, occupation or profession, it is recognised that deprivations of property may vary in the extent of their impact on property holders and may affect a variety of relationships – factors that may require the state to provide a more compelling justification for its actions than could be achieved by means of the rational relationship test.[152] In this sense, the section 25(1) jurisprudence of the court – much like the German jurisprudence on occupational freedom[153] – indicates a method of unlocking the potential of the rationality standard to more responsively realise the deliberative democratic accountability objectives of constitutional review.

In *First National Bank* the court held that a deprivation of property is arbitrary if the 'law' referred to in section 25(1) does not provide 'sufficient reason' for the particular deprivation in question or is procedurally unfair.[154] In this context,

---

[149]*Prince v President of the Law Society of the Cape of Good Hope* 2002 1 SACR 431 (CC) para 155: 'Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by s 36'; *Van Heerden* (n 112) para 140: '[W]here different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation'.

[150]For example, see *Jooste* (n 105) para 16: '[T]he only purpose of the rationality review is an enquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference.'

[151]See, in this respect, Roux 'Property' in Woolman *et al* (eds) *Constitutional law of South Africa* (2003) 46-I, 46-21.

[152]*First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC) para 65; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing in the Province of Gauteng* 2005 2 BCLR 150 (CC) para 34; *Prophet v National Director of Public Prosecutions* 2007 2 BCLR 140 (CC) para 61.

[153]See Currie & De Waal (n 144) 462.

[154](N 152) para 100.

'arbitrary' is not limited to non-rational deprivations in the sense of the absence of a rational relationship between means and ends. It refers to a more demanding standard of review than mere rationality, but, at the same time, it is less stringent than the proportionality evaluation required by the general limitation clause.[155] Depending on the particular situation, 'there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution'.[156]

Although non-arbitrariness is also premised on a means–ends evaluation,[157] it situates this evaluation in a wider and more open-ended contextual frame that differs from the mere rationality inquiry in a number of respects. The non-arbitrariness evaluation could require a closer fit between means and ends in appropriate circumstances.[158] This is the result of the court's approach that, depending on the interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when 'sufficient reason' can only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.[159] Further, once the particular factual constellation necessitates the level of justification for a deprivation to transcend the mere rationality threshold, governmental ends themselves become the subject of stricter scrutiny. To be non-arbitrary, demonstrating the importance – and not merely the legitimacy – of governmental ends may be necessary to justify a specific deprivation of property. A particularly invasive deprivation will require compelling reasons to be justifiable.[160] In addition, the non-arbitrariness evaluation may involve a scrutiny of the purpose of a deprivation in terms of a type of evaluative balancing foreign to the mere

---

[155] *Id* para 65.
[156] *Id* para 100.
[157] *Id* para 98: '[F]or the validity of such deprivation, there must be an appropriate relationship between means and ends'; *Mkontwana* (n 152) para 34: 'To determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law.'
[158] *First National Bank* (n 152) para 98: '[T]here must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve.'
[159] *First National Bank* (n 152) para 100; *Prophet* (n 152) para 62.
[160] *First National Bank* (n 152) para 100. See also *Mkontwana* (n 152) para 35, but cf the criticism of Van der Walt *Constitutional property law* (2011) 251 that what the court in *Mkontwana* applied in fact was 'thin rationality style analysis'. A stricter proportionality-like analysis was also applied in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).

rationality inquiry.[161] This would entail an evaluation of the relative importance of competing ends and their role in realising the values of the Constitution.[162] All of this opens up a much more inclusive and demanding deliberative framework for the justification of governmental action than the one mediated by the mere rationality standard.

6 Conclusion

Overly deferential standards of constitutional review serve neither constitutionalism nor democracy. Among the standards currently applied for the purpose of constitutional review, an instrumentally conceived rationality standard is most at fault in this respect. This form of rationality review allows for only a weak and diluted constitutional imprint on specific areas of economic, social and political life. It delimits these terrains as enclaves where the full force of the Constitution does not apply, sometimes even in circumstances where state action involves significant prejudice or compromises fundamental rights protection.

This form of rationality review inverts the legal hierarchy underlying the notion of constitutionalism. The required degree of deference that ought to be afforded to the legislature or the executive should be determined by a purposive (value-driven) interpretation of the scope and meaning of the constitutional provision in question; not the other way around where the scope of constitutional protection is pre-emptively narrowed by dogmatically invoking conceptual categories historically linked to deferential judicial attitudes shaped in pre-constitutional times (such as 'policy decisions', 'political questions', 'economic regulation', 'executive discretion', 'separation of powers'[163], *etcetera*.).

---

[161]See Roux (n 151) at 46-23 (it is in the application of the test for arbitrariness that courts 'will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in, or the public interest underlying the law in question').

[162]In this respect, the court in *First National Bank* (n 152) para 64 considered as relevant in determining the meaning of the word 'arbitrary' in s 25(1), the sometimes competing purposes of s 25, namely not only to protect private property, but also to advance the public interest in relation to property in the light of our history of racial discrimination regarding property rights. See also para 98 (the non-arbitrariness analysis involves 'a fair balance between the public interest served and the property interest affected'); and *Prophet* (n 152) para 63, 67–8 for an example of such a weighting of competing considerations in the context of determining the arbitrariness of a seizure of property in terms of the Prevention of Organised Crime Act.

[163]See Allen 'Common law reason and the limits of judicial deference' in Dyzenhaus *The unity of public law* (2004) 289, 291: 'If talk of "deference" and "margins of appreciation" is merely a confusing reference to the idea that the executive and judicial functions are distinct and independent, it may serve only to obscure and weaken our grasp of constitutional theory. What is crucial, at any rate, is to observe and maintain the distinction between deference as "respect", on the one hand, and deference as "submission" on the other. Deference is not due to an administrative decision merely on the ground of its source or "pedigree", but only in the sense (and to the extent) that it is supported by reasons that can withstand proper scrutiny' (citation omitted).

In spite of the fact that deferential rationality review implies submitting to democratically elected bodies and functionaries, it does in fact not serve democracy in any material sense. This is so because this form of review fails to meaningfully contribute to enriching the deliberative basis of democratic decision-making. It fails to facilitate substantive – rather than merely symbolic – forms of democratic control that are capable of engaging competent citizenship.[164] Democratic legitimation needs to rest on substantive public justification of binding decisions, institutionalised by means of, among other things, constitutional review. In so far as it does not require substantive justification for coercive governmental action, 'mere' rationality review contributes little to democratic legitimisation in this sense.[165] It also inhibits the democratic values of deliberative equality, participation and inclusivity in the adjudicative setting itself. To the extent that rationality review resorts to a narrow instrumental focus, some perspectives and interests are sometimes privileged, whilst relevant, competing concerns are categorically undervalued or disregarded entirely.

The minority in *Bel Porto* rightly acknowledged the 'democratic system of government as expressed in the Constitution' as the controlling perspective for deciding the extent and degree of judicial review of state action.[166] When it is necessary, therefore, to realise the degree of accountability that deliberative democracy requires, an intensification of the scrutiny that the 'minimum threshold' rationality standard allows, is called for. In *Albutt*,[167] for instance, the court's appreciation of this appears from its appeal to the democratic values of accountability, responsiveness and openness as its justification for expanding rationality review to include procedural fairness considerations.[168] Equally, the higher scrutiny favoured by the minority in *Bel Porto* was also substantiated by express reference to the same foundational democratic values.[169]

The court's section 25(1) jurisprudence illustrates how rationality review can be an instrument to effect meaningful constitutional justification for state action

---

[164]Dryzek (n 17) 1.

[165]Du Plessis & Scott (n 67) 618 proposes that the onus in proving rationality be placed on the person or body exercising the public power at issue, since that would better achieve 'the constitutional goals of justification, transparency and accountability.'

[166](N 69) para 163.

[167](N 96) para 71.

[168]See Kohn (n 70) 810.

[169]If variable degrees of rationality scrutiny in different circumstances are clearly related to and substantiated in terms of these deliberative democracy considerations, it ought to go some way in assuaging misgivings regarding separation of powers encroachments which are sometimes raised against intensifying the degree of judicial review in terms of the rationality standard. See in this respect Kohn (n 70); Price 'Rationality review of legislation and executive decisions' (n 70); Price 'The evolution of the rule of law' (n 70); Price 'The content and justification of rationality review' (n 70).

in different circumstances.[170] A similar approach will allow, if circumstances require, rationality review to comply with the two basic conditions for democratically informed standards of constitutional review: to maximise deliberative equality, inclusion and participation, as well as to compel justificatory accounts for coercive state action in terms of the full scope of the Constitution's value system.

[170]Du Plessis & Scott (n 67) 615 suggest as guidelines for determining the proper degree of scrutiny with which the rationality standard ought to be applied in different circumstances, something similar to the s 25(1) multifactor contextual analysis, namely the factors suggested in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 45 for the application of s 6(2)(h) of the Promotion of Administrative Justice Act. These include the nature of the decision, the range of factors relevant to the decision, the nature of competing interests involved, the identity and experience of the decision-maker, the reasons given for the decision, and the impact of the decision on the lives and well-being of those affected. Cf also Price 'Rationality review of legislation and executive decisions' (n 70) 588-590 (arguing that rationality review should vary with intensity depending on the context, but that courts' discretion in this respect needs to be constrained by the two considerations underpinning the separation of powers, namely the democratic principle and institutional competence).