DELIBERATIVE DEMOCRACY AND STANDARDS OF CONSTITUTIONAL REVIEW: MIXED SIGNALS FROM THE SOUTH AFRICAN CONSTITUTIONAL COURT*

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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. 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 paper addresses this 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 (e.g., 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.

Key words: Constitutionalism, democracy, human rights, rationality, proportionality

1. Introduction

Recently, prominent South African political officials have cast doubt on the democratic credentials of constitutionalism and especially the institution of judicial review. A case in point is the government’s announcement in late 2011 to conduct a review of the transformation record of the Constitutional Court. This followed repeated expressions of mistrust of judicial authority and accusations of frustration of the popular will by the courts in exercising the function of judicial review. Others, such as the Deputy Minister for Correctional Services, have taken this criticism a step further in assessing constitutional democracy in a way that contrasts, in ideologically polarising terms, a majoritarian conception of democracy with a minoritarian conception of constitutionalism. In his view, constitutional review only serves to buttress apartheid-era privilege at the expense of majoritarian will.

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These opinions invite a reconsideration of how democracy and constitutionalism interrelate. In what follows, I shall discuss one facet of this relationship only, namely the extent to which the normative standards of constitutional review contribute to give effect to core democratic values: in particular equality, accountability, openness, and inclusivity. In doing so, I hope to illustrate – contrary to the politicians I referred to earlier – the co-constitutive interconnectedness of democracy and constitutionalism.

I shall first give a brief account of the general features of the idea of deliberative democracy and its approach to the democratic function of constitutionalism and constitutional review. I shall then attempt to apply some of their insights to how standards of constitutional review relate to democratic values. As an illustration, I shall discuss some problematic aspects in the way courts have on occasion applied the principle of rationality as a standard of constitutional review.

2. Deliberative democracy

The ‘deliberative turn’ in democracy theory at the close of the second millennium is perhaps best understood when seen as a reaction to the failure of the conventional liberal model of democracy to provide a persuasive normative grounding for the legitimacy of democratic decision making, specifically under modern conditions of permanent moral, religious and cultural pluralism. This conventional model is usually referred to as ‘aggregative majoritarianism’, and it depicts democracy mainly in procedural terms as a technique for collective decision making, in terms of which individuals have equal opportunity to register their individual or group preferences for competing alternatives, with outcomes being decided according to majority rule.\(^v\)

Exponents of a deliberative understanding of democracy appreciate that the normative pluralism characterising modern politics has significantly raised the bar for democratic legitimacy. They argue that under conditions of a plurality of conflicting world views, the legitimacy of democratic outcomes is not sufficiently secured through the formal notion of equal participation that aggregative majoritarianism implies.\(^vi\) In the aggregative model, the function of the political process is to aggregate (add up/group together) and efficiently satisfy the individual or group preferences of citizens.\(^vii\) A key concern for deliberative democrats is what Iris Marion Young calls the ‘thin and individualistic form of rationality’ that the aggregative model ascribes to political discourse.\(^viii\) This model is agnostic about the possibility of subjecting the process of aggregation to principles of justice apart from subjective interests or preferences,\(^ix\) and it ‘disparage[s] the idea of any public interest beyond the [largest] sum of [overlapping] individual interests.’\(^x\) Politics is not appreciated as primarily a social context where self-interest is moderated, common concerns articulated, differences reconciled and integration and solidarity furthered. The role of the political process is primarily ‘[to record] and [respond] to individual or group preferences expressed by the greater number of persons voting for a particular view or policy or candidate.’\(^xi\) The aggregative model therefore ‘offers no way to evaluate the moral legitimacy of the substance of decisions’ and ‘offers only a weak motivational basis for accepting the outcomes of the democratic process as legitimate’, because the process of democratic decision making is not premised on the necessity of ‘giving citizens … good moral reasons for obeying’ the decision.

If the authenticity and legitimacy of democracy is to be maintained under modern conditions of deep diversity, a democratic ethos is called for that puts mutual persuasion and justification through deliberative engagement centre stage. To meet the threshold of legitimacy anchored in the mutual recognition of human autonomy, conceptions of democracy, according to Joshua Cohen, must be organised around an ideal of political justification,\(^xii\) since it demands the finding of publicly acceptable reasons, given the background of differences of conscientious conviction.\(^xiii\) Deliberative democrats therefore respond to normative pluralism by espousing a view of democracy anchored in conceptions of public accountability and discursive engagement.\(^xiv\) Accountability is identified as the conceptual core of legitimacy. It requires publicly articulating, explaining, and
most importantly justifying public policy.\textsuperscript{xv}

Once the deliberative notion of mutual justification is postulated as a core condition of democratic legitimacy, constitutionalism’s democratic credentials could be more plausibly defended, because justification depends on constitutionally secured legitimacy conditions.\textsuperscript{xvi} A constitution entrenches a minimum consensus in respect of those normative legitimacy conditions a political society considers fundamental enough to be recognised as binding conditions of constitutionally legitimised law. Approached from this angle, constitutional review is compatible with and indispensable for democracy as long as it maintains an orientation directed ‘toward broadening democratic participation, increasing the quality of political deliberation, and ensuring that decision making is reasons-responsive and thereby democratically accountable’.\textsuperscript{xvii}

3. Rationality review

3.1. General rationality standard

In South African public law, rationality is a minimum requirement, prescribing the lowest possible threshold for the validity of the exercise of public power.\textsuperscript{xviii} 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.\textsuperscript{xix} Rationality review is not directed at testing whether legislation or executive action is fair, reasonable, proportional or appropriate.\textsuperscript{xv} It is a standard that implies considerable deference or restraint on the part of the courts towards the legislature and the executive. A court may not declare a decision irrational ‘simply because it disagrees with it, or considers that the power was exercised inappropriately.’\textsuperscript{xxx}

There are at least two aspects of rationality review that appear problematic in the light of the perspective of integrating deliberative democracy and constitutionalism. First, rationality analysis is open to the risk of encouraging a narrow instrumentalist version of itself, thereby compromising its value as a meaningful standard of constitutional review. Secondly, the rationality principle is sometimes applied as the controlling standard in fundamental rights disputes, an area where it is incapable of facilitating the required legitimising account for the exercise of public power.

3.2. Instrumental rationality

As has been said, the rationality inquiry includes testing the legitimacy of the purpose for which public power is exercised. However, in those instances where a court – in deferential vein – strongly emphasises the minimum threshold character of the rationality standard, very little – if anything – is required to establish the legitimacy of a governmental purpose. It is simply treated as a given or considered only superficially on its own terms. In addition, the legitimacy of a governmental purpose is normally evaluated by considering it in isolation. This is problematic, because the purpose is then treated as an end in itself and the legitimacy that it bestows on particular means is assessed without taking into account its relative place in the context of the value system of the Constitution as a whole, and without allowing for other competing considerations.

When governmental purposes are regarded as given and ends in themselves, the entire focus of rationality testing is restricted to the question of the rationally of the means only. Since, as we have seen, the ‘rationality’ of the means is not concerned with their reasonableness, proportionality or fairness, it can only be about its utility value in promoting the particular governmental purpose. However, if and when rationality is conceptualised as concerning only the utility of a measure for the purpose of achieving a particular end, this standard is at risk of being reduced to a thin version of rationality, one that Max Weber famously referred to as pure ‘Zweckrationalität’ or instrumental rationality. There is, of course, nothing wrong with thinking and acting in an instrumentally rational way as such. But instrumental rationality is ill-suited to function as a normative standard to justify the exercise of public power for the purpose of socio-political integration and to legally resolve conflict. This is so because an instrumentalist understanding of rationality lacks a normative basis to choose between competing purposes and interests or to relate them in a meaningful way to a fair integrative perspective.\textsuperscript{xxi}
An important risk of applying instrumental rationality in an adjudicative context is therefore that it can lead to a deliberative framework that is one-sided and not inclusive enough to allow the fair representation of all relevant perspectives and interests. The contrasting majority and minority judgments in the Bel Porto School Governing Body case provide an illustrative example. The case, in brief, concerned the constitutionality of a rationalisation scheme of the WCED (‘the Department’) to establish a uniform educational system and to equalise conditions in the formerly racially segregated schools. One important difference between schools was that only general assistants in the former white special schools for disabled children were not employed by the department, but by the schools themselves. The rationalisation scheme included the redeployment or retrenchment of general assistants in special schools. The scheme was adopted after negotiations with trade unions representing staff employed by the Department, but excluded the general assistants employed by the former white schools. The scheme gave preference to employees of the Department in the filling of vacant or newly created posts, which left the general assistants not employed by the department in a precarious position, should they be found redundant. The governing bodies of the schools that employed them contended that the scheme infringed their constitutional rights to equality and just administrative action. The Constitutional Court dismissed the claim. The majority in effect found that the rationalisation scheme only needed to comply with the rationality standard in order to be constitutional.\textsuperscript{xxiii} It held that the scheme was rationally related to the two legitimate objectives of promoting equity and saving of costs\textsuperscript{xxiv} and courts should not be prescriptive about the means chosen by the Department to attain these goals. It was also not irrational for the Department to give preference to its own employees over others.\textsuperscript{xxv}

From an instrumentally rational point of view, it is clear how the scheme’s negative consequences for the complainants can be rationalised in terms of its utility in attributing to cost saving and the general equalisation of conditions in special schools taken as a whole. But, such a standard does not facilitate a justificatory account that can convincingly explain why, in reaching these goals, specifically the complainant group should be treated worse than their counterparts in other schools. After all, the complaining assistants were in all material respects public servants working in government schools in the same way as their counterparts and they were all lowly paid members of disadvantaged groups.\textsuperscript{xxvi} In addition, at the time of the court proceedings, all of the formerly white segregated schools where also predominantly black.\textsuperscript{xxvii} As the minority judgment correctly noted, under these circumstances, the deferential rationality standard of review fails to hold the Department to account to the degree required by the foundational democratic values of accountability, (reason-) responsiveness and openness.\textsuperscript{xxviii} The degree of justification required in the circumstances of the case therefore necessiitated a wider ranging inquiry into not only the rationality of the scheme, but also the fairness of the process preceding its adoption and the reasonableness of its outcomes.\textsuperscript{xxix} Because it does not ask all the relevant questions, the rationality standard fails to allow a deliberative process that accommodates all relevant concerns. As Judges Sachs and Mokgoro noted, although cost saving is unobjectionable, ‘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.’\textsuperscript{xxx} Wider concerns – not catered for by the rationality analysis – must also be taken into account, including good management, the necessity of preserving well qualified people, collegial integration and the institutional ethos in each individual institution, and most importantly, the interests of the disabled children.\textsuperscript{xxxi} The minority concluded that there can therefore be no justification for excluding the complaining assistants from negotiations regarding the rationalisation scheme and categorically putting them at a disadvantage as to retrenchments and redeployment.\textsuperscript{xxxii}

3.3 Overextension of the rationality standard
The example of the Bel Porto case shows that the rationality standard can only to a limited extent facilitate a justificatory account
for governmental action. This is why particularly measures that infringe on fundamental rights is held to account in terms of a more demanding standard of constitutional review. The Constitution requires limitations of fundamental rights to be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This implies a proportionality standard, which requires that rights-limiting measures must be justified by important public interests and that the limitation must not be more intrusive than necessary in order to serve those interests.

The reason why a deferential rationality standard is unsuitable to bring about the degree of public justification expected of rights-limiting measures, is because it relieves the state of the duty to justify its actions in two significant respects. Requiring a rational relationship between means and ends is a far less exacting standard than demanding that means should be proportional to ends. Rationality review therefore does not express the same responsiveness to situations where the infringement of rights is unnecessarily intrusive. In addition, the state is relieved 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 contrast, proportionality requires an account of how the author of the rights-limiting measure has assessed, on the one hand, the ‘nature of the right that is limited, and its importance in an open and democratic society based on dignity, freedom and equality; and on the other hand, the purpose for which the right is limited and the importance of that purpose to such a society’. The vital point is that since the context for possible justification is firmly situated in the deliberative normative setting of ‘an open and democratic society based on dignity, freedom and equality’, a justification must and can only be structured in terms of the values underlying such a society. 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.

Proportionality analysis also allows a deliberately more inclusive process of constitutional review, in terms of which more voices are heard and more perspectives represented. This is done in two ways. Firstly, since proportionality review – unlike rationality – involves the balancing of competing claims, it opens discursive avenues for a wider spectrum of relevant concerns to influence judicial deliberation. Secondly, because rights limitations must 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 by the parties in opposition to or in defense of the rights-limitation.

In the light of this, rationality ought not to replace proportionality as the controlling constitutional standard for the review of rights limitations, if the deontological status of fundamental rights is to be secured. The Bel Porto case is in fact an example of the unwanted consequences when this happens. I will attempt one further illustration with reference to s 9(2) of the Constitution.

This section – the so-called affirmative action clause – mandates 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 its standard unfair discrimination jurisprudence, the Court requires all measures differentiating in terms of the grounds specified in s 9 to be proven fair. Fairness is a much more demanding standard than rationality and its content overlaps to a substantial degree with the proportionality requirement. Given the fundamental role of equality in the Constitution as a whole, only important public interests can justify limitations of the right to equality. The degree of invasion of equality rights will also be an important factor in assessing fairness. The Court has therefore in essence assigned a broadly similar justificatory role to the fairness standard in the context of the limitation of equality rights than the one played by proportionality more generally.

In the Van Heerden case the Court deviated from its standard unfair discrimination jurisprudence and appears to have settled on a kind of rationality requirement, instead of fairness, as the controlling constitutional norm for valid affirmative action.
The Court took as point of departure that affirmative action measures are not subject to fairness testing, if they comply with the ‘internal requirements’ of s 9(2), namely: the beneficiaries of the measure must be 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. It was argued further that to allow unfair discrimination testing of affirmative action would frustrate attempts at transformation, and would also ‘unduly require the judiciary to second guess the legislature and the executive’ in this respect.

This approach can and has been interpreted and applied, or example by the Labour Appeal Court, as a type of instrumental rationality standard; in other words, to be constitutional, it needs only to be shown that the affirmative action measure benefits members of disadvantaged groups. The possible unfairness or disproportionality of the concrete impact on non-favoured groups as such does not affect its constitutionality. This result logically follows from the insistence of the Court that measures complying with the internal requirements of s 9(2) are not subject to any fairness or proportionality testing. To read any fairness or proportionality content into these requirements would, therefore, contradict this starting point. Once the fairness- and proportionality-neutral ‘internal’ conditions have been met, no further constitutional hurdles remain to be cleared.

If and when s 9(2) of the Constitution is so interpreted, it sets a standard for the constitutional review of affirmative action that is incapable of meeting the deliberative democracy justificatory conditions of inclusivity, accountability and openness. An instrumental rationality standard, as has been argued earlier, tends to disconnect the pursuit of particular socio-political goals from a wider context of competing interests and goods. This is why Max Weber observed long ago that instrumental rationality has no notion of limits. It typically absolutises specific socio-political goals and disconnects them from their historically contingent and contextually relative settings.xii Because such goals then – in the context of fundamental rights disputes – dominate the adjudicative agenda, the representation of particular competing interests and considerations are from the outset substantially devalued in terms of the overriding competitor socio-political goal. This seems to be the clear implication in the observation of Judge Mokgoro in Van Heerden: ‘The goal of transformation would be impeded if individual complainants who are aggrieved by [affirmative action] measures could argue that the measures unfairly discriminated against them because of their undue impact on them’.xli It is hard not to read this remark as requiring from us a dogmatic choice between either fairness or transformation. Together with Judge Sachs in the same case we should, however, insist on both. 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.’xlii

4. Conclusion

In conclusion, I hope that the discussion of the different standards of constitutional review illustrates a point made by Sandra Fredman, namely that democracy requires stronger, not weaker constitutional review. She says that respect for the democratic process requires greater, not less, attention to the duty to account and explain, which includes exposure to public scrutiny and debate, with the resultant enhanced accountability of decision-makers.

There must be a rational relationship between the scheme which is intended to protect 'the interests of those minorities who could not be expected to prevail through the orthodox democratic procedures.'

This depiction comes from Christopher Zurn 'Deliberative democracy and the institutions of judicial review 2007, 36-7, who uses it to describe an older liberal model of constitutional democracy (Alexander Bickel, Jesse Choper), in terms of which majority rule is viewed as the keystone of democratic politics, whereas the protection of constitutional rights is intended to protect 'the interests of those minorities who could not be expected to prevail through the orthodox democratic procedures.'

Ibid.


'Freeman 'Deliberative democracy: A sympathetic comment' (2000) 29 Philosophy & Public Affairs 371, 372. See also Freeman 381: 'Democracy is often depicted simply as a political procedure providing for universal franchise withequal rights to vote and hold political offices, and where decisions are made according to majority rule.; Worley 'Deliberative constitutionalism' Brigham Young University LR (2009) 431.

Zurn op cit 71: majoritarian models stress the idea of the equal impact of private interest on governmental actions. See also Cohen 'Democracy and liberty' in Elster (ed) Deliberative Democracy (1998) 186: 'According to the aggregative conception of democracy, then, decisions are collective just in case they arise from arrangements of binding collective choice that give equal consideration to...the interests of each person' bound by the decisions.'

Zurn op cit 63. Young 19.


Worley op cit 450.


Id 417.


Ibid. Freeman op cit 382: 'Because of this diversity ... citizens recognize a duty in their public political deliberations to cite public reasons-considerations that all reasonable citizens can accept in their capacity as democratic citizens-and to avoid public argument on the basis of reasons peculiar to their particular moral, religious, and philosophical views and incompatible with public reason.'

Example Habermas Facts and norms 448: 'The democratic procedure for the production of law evidently forms the only post-metaphysical source of legitimacy [for legal rules]. But what provides this procedure with its legitimating force? Democratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption issuing from proper procedure are more or less reasonable'. To carry this weight of legitimation presupposes communicative presuppositions and procedural conditions for democratic opinion and will formation. This leads to a defense of constitutionally structured democracy in which five categories of rights need to be guaranteed in order for legitimate law, i.e. equal subjective liberties, equal membership rights in the legal community, equal rights to the legal protection and actionability of rights, equal right to participation in political processes, socio-economic rights to the provision of adequate living conditions. These rights are part of the communicative and procedural presuppositions of democratic will-formation, on which the presumption of rationality is based. Without such rights a person’s assent to binding law cannot be assumed to rest on that person’s reasoned assent, but might be the ‘result of distortion, and exclusion through direct or indirect forms of force, coercion, fraud and so on’: Zurn op cit 232.

Zurn op cit 2.

Poverty Alleviation Network & others v President of the RSA & others [2010] JOL 25039 (CC) para 65.

Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others 2000 (3) BCLR 241 (CC) para 85; Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC) para 29; Maseltha v the President of the Republic of South Africa and Another 2008 (1) BCLR 1 (CC) para 80-81; Merafong Demarcation Forum and Others v President of the Republic of South Africa and others 2008 (10) BCLR 969 (CC)para 62; Mousse Demarcation Forum and Others v President of the RSA and Others 2011 (11) BCLR 1158 (CC) 31; United Democratic Movement v President of the RSA and Others (1) 2002 (11) BCLR 1179 (CC) para 55; Sometimes dicta form the court seems to contrast arbitrariness and rational relationship. See eg Glenister v President of the RSA & others (Helen Suzman Foundation as amicus curiae) [2011] JOL 26915 (CC) para 55: ‘there must be a rational relationship between the scheme which
it adopts and the achievement of a legitimate governmental purpose. Nor can Parliament act capriciously or arbitrarily’ (citations omitted).

Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC) para 35. See also para 39: ‘The applicants further urged us to incorporate fairness as an element of rationality. Again, the applicants conflate the rationality and proportionality standards of review. I have already remarked that fairness is not a requirement in the rationality enquiry. If the substance of the complaint is about the deprivation of fundamental rights, it would be subject to the proportionality requirements of section 36 and not of mere rationality’; Bel Porto para 46: ‘[Reasonableness] is a higher standard than [rationality]. If we were to apply a “reasonableness” review at the stage of the section 9(1) enquiry, we could be called upon to review all laws for reasonableness, which is not the function of a court.’

Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others 2000 (3) BCLR 241 (CC) para 90; Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another 2002 (9) BCLR 891 (CC) para 45; Merafong Demarcation Forum and others v President of the Republic of South Africa and others 2008 (10) BCLR 969 (CC) para 63; Poverty Alleviation Network & others v President of the RSA & others [2010] JOL 25039 (CC) para 71;

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Except for the challenge based on procedural fairness. Applicable 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.

Para 42.

Para 44.

Para 135.

Para 167.

Para 163.

Para 165. They specifically indicated the following relevant factors (para 165): ‘The suitability and necessity of the decision are to be examined, and in this regard, a number of factors might have to be considered: the nature of the right or interest involved; the importance of the purpose sought to be achieved by the decision; the nature of the power being exercised; the circumstances of its use; the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; the broad public interest involved. It might be relevant to consider whether or not there are manifestly less restrictive means to achieve the purpose.’

Para 170.

Para 168-9.

Para 135.

Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC) para 36: ‘Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights. That scrutiny is accomplished, not by resorting to the rationality standard, but by means of a proportionality analysis. Our Constitution instructs that no law may limit a fundamental right except if it is of general application and the limitation is reasonable and justifiable in an open and democratic society’


See eg Prinsloo v Van der Linde 1997 (3) SA1012 (CC) para 36; Jooste v Score Supermarket Trading Pty Ltd 1999 (2) SA 1 (CC) para 16; East Zulu Motors (Pty) Ltd v EmpangeniNgwelezane Transitional Council 1998 (2) SA 61 (CC) para 24.


S v Makwanyane 1995 (3) SA 391 (CC) para 104.


Pretorius ‘Fairness in Transformation: A Critique of the Constitutional Court’s Affirmative Action Jurisprudence’ (2010) 26 SAJHR 554–5. This is particularly relevant when those detrimentally affected are also disadvantaged or have little or no real prospect of participating equally in the political process. Langa P recognised the special importance of judicial review in such circumstances in City Council of Pretoria v Walker 1998 (2) SA 363 (CC) para 48: ‘It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection.

Pretorius op cit SAJHR 554.
xiii Van Heerden para 80.
xiv Ibid.