

Article

Rethinking justice, equality and rights: communitarian challenges for an atomistic-liberalist view of the South African Constitution and Bill of Rights

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Introduction

I certainly agree with arguments that the Constitution contrasts sharply with classical liberal documents, whose chief purpose was to secure individual freedom, rights and property from governmental imposition. A plausible case can be made for a liberal reading not to be the only interpretation of the Constitution since it is possible to read it as an embodiment of 'the idea that the power of community can (and must) be deployed to achieve goals consistent with freedom, (and) that collective power can be tapped to create social circumstances that will nurture and encourage people's capacity for self-determination' (Klare 1998:153). Thus one finds that the Constitution draws a close connection between individual political and collective socio-economic rights. In this regard the Preamble of the Constitution announces that the purpose of democratic transformation is to establish a society based on *social*, as well as political justice. Section 1 of the Constitution envisages equality across the existential space of the social world. My concern, however, is that despite the Constitution's commitment to social transformation and reconstruction, it is still possible for people to read it in a classical liberalist sense which strongly supports the power of individual self-realisation in the private sphere; that this in fact is a dominant reading which is occurring, and that this dominant understanding of the Constitution fundamentally influences current-day social practices.

In this article I hope to bring into question some of the individualistic liberalist nuances of an atomistic-liberalist understanding of the Constitution

and Bill of Rights which can impede South Africa's commitment to a democratic and aspirationally egalitarian ethos. I am not suggesting that the Constitution and Bill of Rights purely advocate atomistic-liberalist views of justice, equality, rights and accountability. Instead, with reference to some of the remarks and to a lesser extent adjudications of the judges of the Constitutional Court, I am asserting that reading the Constitution and Bill of Rights through atomistic-liberalist eyes is distinctly different from doing so through a communitarian-liberalist lens. My contention is that an atomistic-liberalist reading or view of the Constitution and Bill of Rights could seriously thwart attempts at consolidating South Africa's fledgling democracy. But first, I need to expound on atomistic-liberalism and communitarian deliberative democracy, since an understanding of these notions frame the arguments about the challenges for an atomistic-liberalist reading of the Constitution and Bill of Rights.

Atomistic-liberalism grows out of liberalism and affirms the self-sufficient, self-attentive and personal freedom of individuals with limited external constraints. An atomistic, self-attentive individual does not depend on her relationships with others for the realisation of her ends and has ontological priority over the community (Gyekye 1997:35). For Miller (in Simhony and Weinstein 2001:2), atomistic-liberalism defends its political position by 'invoking an individualistic view of the self'. In others words, atomistic-liberalism considers individuals as solitary and abstract beings who find fulfillment in separation from each other (Simhony and Weinstein 2001:2). Kymlicka posits that for many communitarians 'the problem with liberalism is not its emphasis on justice, nor its universalism, but rather its individualism'. According to this criticism, he argues, atomistic liberals base their theories on notions of individual rights and personal freedom, but neglect the extent to which individual freedom and well-being are only possible in community (Kymlicka 2002:212).

Communitarians contend that political philosophy has to attend more to shared practices and understandings within societies, which of course, requires modification of traditional liberal explanations of justice and rights – an issue I shall explore later on. In this regard, Kymlicka (2002:210) identifies three strands of communitarian thought:

Some communitarians believe that community *replaces* the need for principles of justice. Others see justice and community as perfectly consistent, but think that a proper appreciation of the value of community requires us to modify our conception of what justice is. These later

communitarians fall into two camps. One camp argues that community should be seen as the *source* of principles of justice (i.e. justice should be based on the shared understandings of society, not on the universal and ahistorical principles); the other camp argues that community should play a greater role in the *content* of principles of justice (i.e. justice should give more weight to the common good, and less weight to individual rights).

It is the latter position that I adhere to and explore later on. This brings me to a discussion of a communitarian deliberative democracy.

Communitarian deliberative democracy

I try to locate my understanding of a communitarian deliberative democracy somewhere between the vast territories occupied by both Habermas (1996a, 1996b) and Taylor (1985). These intellectuals maintain that public deliberation must be governed by a set of principles woven into fair procedures in order for it to yield legitimate collective political decisions.

Communitarian deliberative democracy, a term that is currently much in vogue, simply refers to 'a conception of democratic government that secures a central place for reasoned discussion [rational deliberation] in political life' (Cooke 2000:947). For Gutman and Thompson (1996:1) a communitarian deliberative democratic theory offers 'a conception of democracy that secures a central place for moral discussion in political life'. They argue that the promise of a communitarian deliberative democratic theory lies in a concern for 'finding terms of cooperation that each citizen can accept' for the reason that contemporary societies are driven by deep conflict and moral disagreement (Gutman and Thompson 1996:26). Benhabib (1996:68) explains communitarian deliberative democracy as 'a model for organizing the collective and public exercise of power in the major institutions of a society on the basis of the principle that decisions affecting the well-being of a collectivity can be viewed as the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals'.

Other defenders of deliberation such as Walzer (1983:304) posit that '[communitarian deliberative] democracy puts a premium on speech, persuasion, rhetorical skill ... and the citizen who makes the most persuasive argument – that is, the argument that actually persuades the largest number of citizens – gets his [her] way'. Benhabib (1996:69) pertinently writes that 'the [communitarian] deliberative model of democracy is a necessary condition

for attaining legitimacy and rationality with regard to collective decision making processes in a polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals. The more collective decision-making processes approximate this model the more increases the presumption of their legitimacy and rationality'. She argues that participation in such deliberation is governed by the norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate; all have the right to question the assigned topics of conversation; and all have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied or carried out (Benhabib 1996:70).

Rationality [reasoned, reflexive discussion] or what Habermas (1996a:147) would refer to as democratic deliberation, can be considered as 'unhindered communicative freedom ... [which involves] rational opinion- and will-formation' and always potentially leads to a transformation in people's preferences. My emphasis is on Habermas' notion of 'unhindered communicative freedom' as a constitutive good of a communitarian deliberative democracy. If an exchange of arguments or points of view in a Habermasian sense should be unconstrained, then it follows from this, that no individual or group of people could legitimately exclude others from deliberating on political matters that interest them. The rights of people to participate in deliberation are legally institutionalised without any individual being excluded from the political process. Habermas (1996b:305) cites Cohen who plausibly explains a communitarian deliberative democracy as follows:

- a) Processes of deliberation take place in argumentative form, that is, through the regulated exchange of information and reasons among parties who introduce and critically test proposals.
- b) Deliberations are inclusive and public. No one may be excluded in principle; all of those who are possibly affected by the decisions have equal chances to enter and take part ...
- c) Deliberations are free of any internal coercion that could detract from the equality of the participants.

Each has an equal opportunity to be heard, to introduce topics, to make contributions, to suggest and criticise proposals. The taking of yes/no positions is motivated solely by the unforced force of the better argument.

Moreover, if according to Habermas each individual has 'an equal opportunity to be heard' in the deliberative process, then communitarian

deliberative democracy underpins a concern for the inclusion of minority viewpoints, and sets limits on what the majority can legitimately do. Of course, Habermas' argument that political deliberation must be concluded by majority decision-making does not seem to undermine the views of minorities. In this regard, he claims the following:

Political deliberation, however, must be concluded by majority decision in view of pressures to decide. 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 views [the minority's] are correct. (1996b:24)

Habermas conceives majority decision-making in analogy with reasonableness. For him, the reasonableness of majority decision-making depends on two elements: (a) political deliberation must be concluded by majority decision-making; and (b) the principle of majority decision-making functions as a rule of argumentation requiring minority participants to persuade the majority of the 'correctness' of their views. The point Habermas makes is that *de facto* majority decision-making cannot be the criterion of better and reasonable argumentation but rather, that deliberative majority rule be 'considered as a reasonable basis for a common practice ... until the minority convinces the majority that their views are correct'. In other words, democratic decisions by majority rule may be revised (and possibly reversed) on the basis that minorities have good reason to question the legitimacy of the majority outcome. Put differently, the future possibility of reversing majority outcomes means that minority views are not permanently excluded from the democratic decision-making process. The kind of majority outcome envisioned by Habermas grows out of a compromise reached between majorities and minorities after agreement could not be negotiated on the basis of deliberation, that is, the majority could not convince the minority of its views and vice versa. Thus, a communitarian deliberative democracy endeavours to seek ongoing deliberation in search of the 'better' argument between majorities and minorities after the parties have temporarily reached a compromise for the sake of progress. By implication, a communitarian deliberative democracy actually compels the majority to take the minority into account, that is, making reasons answerable to minorities. In the words of Bohman (1996:184) 'majority rule provides a perfectly acceptable basis for such [deliberative] cooperation so long as minorities have the reasonable

expectation of being able to affect and to revise political discussions, including decisions about the character and the conditions of political participation'. The point is that majority rule should not be abandoned for ongoing debate, reflexive discussion and a means permanently to exclude minorities but, instead, should be used as a temporary aggregative procedure of voting to prevent the occurrence of impasses between majorities and minorities. In a Habermasian way, majority rule is a revisable and compromising decision taken not only to ensure that minority opinion is respected – such as the modification of majority views to meet the objectives of minorities – but rather, to safeguard an open and honest deliberation of an issue prior to taking a decision by majority vote. Thus the discussion has to shift from the question of the prevalence of simple majority decision-making in deliberative processes, to one of what constitutes better and reasonable argumentation. To some extent, Habermas (1996a:24) recognises this point:

In contrast, a discourse-theoretic interpretation insists on the fact that democratic will-formation draws its legitimating force both from the communicative pre-suppositions that allow the better arguments to come into play in various forms of deliberations and from the procedures that secure fair bargaining processes.

This brings me to the question: What constitutes better and reasonable argumentation? Communitarian liberalism improves possibilities for communication through which people can produce arguments to justify their points; for all people to exercise their voices in communal (shared) and rational deliberation. It is my contention that it is with reference to the notion of rationality that the strength of better and reasonable argumentation can come to the fore without having to appeal to the preference of majority political decision-making. My argument that rationality, with reference to the ideas of Taylor (1985), best elucidates the ideal of better and reasonable argumentation most congruent with communitarian deliberative democracy, has four main normative elements: (a) the view that rational articulation of arguments is a valuable part of human agency; (b) the view that political formulations have to be consistent and without contradiction; (c) the view that everyone should in principle be attuned with 'the order of things'; and (d) the view that relevant arguments need to be advanced in unconstrained inter-subjective processes of rational deliberation.

I shall now elucidate these normative conceptions of better and reasonable argumentation. Firstly, by 'rational articulation' I mean the individual's readiness to express and provide reasons in support of his or her self-

interpretations and judgments in a lucid, coherent and logical manner. Support for such a view of rational articulation can be found in Taylor's (1985:137) idea of rationality: '[Rational articulation] seems to involve being able to say clearly what the matter in question is ... [in such a way that] we have a rational grasp of something when we can *articulate* it, that means, distinguish and lay out the different features of the matter in perspicuous order'. In short, citizens engaged in public deliberation along the lines of democratic decision-making should articulate their preferences, that is, supply well-ordered reasons in support of their claims to others of their subjectively held views and judgments. In doing so, they open up subjectively held political views and judgments to rational challenge by others. In other words, individuals do not impose their 'private reasons' on the democratic process without justifying and subjecting it to any form of public critical scrutiny.

Secondly, my discussion of rationality also aims to show why consistent political formulations constitute part of a convincing defence for better and reasonable argumentation and hence, a communitarian deliberative democracy. It makes no sense for individuals in political processes to articulate their self-interpretations and judgments with ambivalence and contradictions. The beneficial effects of rational articulation can accrue only if the individuals concerned articulate their political preferences with consistency in deliberative politics. Taylor (1985:137) claims the following:

To strive for rationality [in deliberative politics] is to be engaged in articulation, in finding the appropriate formulations. But it is a standard intrinsic to the activity of formulating that the formulations be consistent. Nothing is clearly articulated with contradictory formulations ... So consistency is plainly a necessary condition of rationality.

Once again the argument for absolute majoritarian preference in political deliberation becomes insufficient for the reason that, in defence of the better argument, majority views might not always be consistent and unambiguous political formulations. Absolute majority preference provides no criterion for assessing the quality of arguments; rather, consistent political formulations provide such a criterion. Rational argumentation in this sense means that everyone is deemed capable of making informed and consistent judgments on political matters, more precisely, that no-one's consistent and reasonably articulated arguments should be discounted on grounds of majority or minority preferences. The point is, every citizen's contribution in deliberative politics, if consistently articulated, must be seen worthy of consideration.

Thirdly, by being rational, individuals also have to be attuned with the 'order of things', in this instance, political decisions, procedures and issues of public policy. In other words, individuals intent on producing the better argument have to be engaged in an informed (with understanding and impartiality) and perceptive way with his or her socio-political context, and with other persons for the common good of it. Taylor (1985:142) establishes a connection between the idea of achieving the better argument and being in attunement with the 'order of things':

We do not understand [articulate the better argument] without understanding our place in it, because we are part of this order. And we cannot understand the order and our place in it without loving it, without seeing its goodness, which is what I want to call being in attunement with it.

However, does being part of the 'order of things' necessarily mean that every individual should directly participate in deliberative politics? I do not think that being part of the 'order of things' on the basis of political participation implies direct consent of every individual on every issue. Being attuned to political issues does not mean that every citizen must be directly involved in the affairs of government. Certainly in South Africa direct participation on the part of every citizen would be unfeasible since the emphasis on direct democracy would be more on getting the mass of citizens involved in political decision-making rather than reflecting on the reasonableness of the decisions themselves. Representative political structures dedicated solely to the debate of political matters of public concern such as voting and elections can counteract the difficulties associated with direct participatory democracy. To say that every citizen should directly participate in political deliberation is to assume (a) that individuals only have subjective beliefs, aspirations and political values, which ought to shape democratic practices; and (b) that there are no inter-subjective (common) meanings about political discourse which individuals might collectively share. I agree with Taylor (1985:36) when he claims that people in any society have all sorts of beliefs and attitudes, which may be thought of as their individual beliefs and attitudes, even if others share them. But what they do not own are the meanings constitutive of political discourse. For example, public debate on political matters is not just an arena where pre-formed interests or views of people are fought out, culminating in a majority vote. The point is that public debate is constituted by inter-subjective meanings or a set of common terms of reference such as for people to reasonably reflect on their views during the process of deliberation, and

for them to reach an agreement on what political decision should be made on the issues in question. These inter-subjective meanings are rooted in the political practice of public debate and could not be the single property of individuals (Taylor 1985:36).

A communitarian deliberative democracy also has its critics. Benhabib (1996:7) claims that defenders of the 'agonistic model' of democratic politics such as Mouffe and Barber object to how all deliberative democrats place the rules that structure deliberation beyond 'contestation'. I agree with her response when she claims that while fundamental principles of a communitarian deliberative democracy must be at least partially contestable, 'participants must recognise one another's entitlement to moral respect and reciprocity in some sense ... [of which] the determination of the precise content and extent of these principles [without being oblivious about conflict and the politics of difference] would be a consequence of the discourses themselves' (Benhabib 1996:79). Moreover, some other objections may be waged against the idea of a communitarian deliberative democracy, the most obvious being that such a view of democracy with its emphasis on consensus and the force of the better argument is time consuming; that a high degree of consensus or unanimity on public issues could only be attained at the cost of silencing dissent and curtailing minority viewpoints (Benhabib 1996:77); and that a high level of education and economic welfare is presupposed if such a system can be viable. My response to this is that though a communitarian deliberative democracy cannot be easily instantiated, it can nevertheless be approximated sufficiently closely to provide a framework for democratic participation that can address the looming dangers of majoritarianism and atomistic individualism discussed throughout this article.

In addition, Elster (in Christiano 1998:167) argues that a communitarian deliberative democracy demands 'an unusually high degree of participation from citizens' and that it would be unrealistic to assume that 'all will participate equally extensively'. He contends that in certain circumstances deliberation 'may go on far too long in that the quality of decisions may deteriorate' (Elster in Christiano 1990:167). In the first place, a communitarian deliberative democracy invokes the notion of proxy which does not assume that all citizens participate 'equally extensively'. The idea of proxy at least ensures democratic participation on the part of most citizens. Also, the criticism that the quality of political decisions may deteriorate does not make sense if the point of deliberation is compromise since people are 'bound only

by the results of deliberation and by the preconditions for that deliberation' (Cohen 1986:22). In essence, a communitarian deliberative democracy does offer South Africa a politically better accountable framework than an atomistic-liberalist view of the country's Constitution and Bill of Rights.

However, my potential critic might justifiably claim that my argument for a communitarian deliberative democracy seems unconvincing since it neglects the social conditions required for effective fulfilment of constitutive practices of deliberative democracy which include, reasoned (rational) and collective discussions through debate, reflexive questioning and interrogation. In other words, my potential critic's concern might not be to question the capacity of reasoned discussions and reflexive argumentation to further democratise South African society, but rather whether deliberative democracy can occur without the establishment of realisable social conditions that could develop and sustain it. Taylor's (1985:190-1) 'social thesis' tells us that the capacity to exercise and sustain a conception of the good (in this instance, a communitarian deliberative democracy) can only happen within the context of realisable social conditions in which people can share their experiences, make autonomous – I would argue deliberative and meaningful – choices and organise their public spaces. Like Taylor, Rawls (1993) also recognises that individual autonomy cannot exist outside social conditions that provide public spaces for deliberation and which support the capacity of people to achieve meaningful choices. They particularly recognise and discuss the role of the family, schools, and the larger cultural environment in cultivating individual autonomy. The lack of minimum and realisable social conditions often seem to limit the potential for deliberation (Bohman 1996:109). I shall now focus my discussion on the challenge to establish minimum and realisable social conditions in order for a communitarian deliberative democracy to be exercised and sustained in South Africa.

My contention is that the nurturing of a communitarian deliberative democracy in South Africa would be difficult if it does not address questions about minimum and realisable social conditions – whether it involves increasing at least the level of education of the population, economic empowerment of citizens, time availability to engage in deliberative activities and the interest of politicians to foster such practices among their constituencies. For purposes of this article I shall consider three conditions for the exercise of a communitarian deliberative democracy: one about the need to improve organised public spaces or shared forums that provide people with opportunities for collective inquiry; a second about the need to

establish social unity among people with different and competing ways of life; and a third about the need to secure basic social rights.

First, organised public spaces according to Crowley (1987:282) refer to those spatial locations below the level of the state in which people share experiences and language where they '... can discover and test their values through the essentially political (and non-politicised) activities of discussion, criticism, example, and emulation ... [where they] test ideas against one another ... [and] come to understand a part of who they are'. Some examples of spatial locations below the level of the state are to be found within and between groups and associations below the level of the state which include, friends, family, religious institutions, cultural associations, professional groups, trade unions, universities and the mass media. Before invoking a communitarian deliberative democracy, one first needs to encourage people operating in spatial locations below the level of the state to create opportunities for themselves and others 'to give voice to what they have discovered about themselves and the world and to persuade others of its worth' (Crowley 1987:295). By implication, one first needs to improve the forums of civil society under conditions in which freedom of speech and association can ensure that individuals make their autonomous choices, collectively share and evaluate their experiences which a communitarian deliberative democracy value so highly.

Second, if different groups of people such as are to be found in South Africa do not want to stay together in a single state, then no amount of agreement on a communitarian deliberative democracy will keep a state together. This suggests that the nurturing of a communitarian deliberative democracy requires a sense of social unity among different and competing individuals and groups that goes deeper than the sharing of the principles which govern their society. People or citizens must feel that they belong to the same South African society. In this regard, Kymlicka (2002:257) aptly proposes the following:

They [citizens] must have a desire to continue to live together and govern together, and to share the same fate, rather than seeking to form their own separate country, or seeking to be annexed to some foreign state. Social unity, in short, requires that citizens identify with each other, and view their fellow citizens as one of 'us'.

Such a notion of shared belonging can help sustain the relationship of trust and solidarity needed for citizens to accept the results of democratic decisions (Miller in Kymlicka 2002:257), and the rules of a communitarian

deliberative democracy. The point I am making is that if citizens within a state share a way of life, then they will want to live in a single state, want to govern together, and also accept the legitimacy of communitarian deliberative democratic decision making. I agree with Kymlicka (2002:258) when he makes the point that citizens sharing a way of life will want to make sacrifices for people who have different and competing ways of life, for instance, to redistribute resources to the less well-off, since in helping co-citizens they are simultaneously strengthening their shared way of life and, in that sense, helping themselves. What underlies this form of social unity is that citizens share a national identity (without requiring cultural assimilation into the hegemonic conception of the good life) and yet might share very little in terms of ethnicity, religion, or conceptions of the common good. In essence a communitarian deliberative democracy can better be nurtured if a sense of social unity is established which can increase the likelihood that citizens fulfil their obligations towards cultivating deliberative democracy.

Third, it would be difficult to exercise a politics of communitarian deliberative democracy if the state does not secure basic social rights to citizens which include the right to move freely, to earn a living, and to receive social benefits, health care and education. In other words, providing basic social rights to citizens would help secure loyalty to a politics of communitarian deliberative democracy. For example, state intervention (certainly in South Africa) through legislation has to be aimed at minimising high levels of unemployment in the country. In this way, socio-economic injustices rooted in the economic structure of society can be reduced which, in turn, could secure large numbers of jobless citizens a right to earn a living, thus enabling them to escape from poverty. The point I am making is that large disparities in people's life-chances and standards of living brought about by the fact that some people have rewarding and fulfilling careers while others do not have jobs at all could poison relations between them (the poor and other members of society) which, in turn, may harm people's ability to pursue a politics of communitarian deliberative democracy. Similarly, the right to education on the part of all citizens in South Africa should not just be confined to a right to education just to meet some need for rationality, literacy, or knowledge, but also to educate all citizens in a way that will help integrate them into the national culture. The point is that unless basic social rights are provided to a large part of the population which can increase their economic, social and educational prosperity, a politics of communitarian deliberative democracy would be difficult to exercise.

Justice and equality

One response to the question of what public goods can undermine atomistic-individualism, and thus provide some premises for a communitarian deliberative democracy, is found in Taylor's (1985) idea of distributive justice. Before I explore how the idea of communitarian deliberative democracy can frame distributive justice, like Taylor, I first need to draw on Rawls' (1993) celebrated theory of justice as fairness, which formulates some conditions for the use of the concept. The two principles which constitute Rawls' theory of justice can be summarised in the claim that justice as fairness is firstly conceived as a framework of deliberation which can lead to sufficient convergence of points of view necessary to achieve effective and fair social cooperation among equally conscientious persons (Rawls 1993:368). Secondly, this framework of deliberation guarantees the freedom and equality of citizens as persons capable of being fully cooperating members of a democratic society (Rawls 1993:369). The principles read as follows:

- a. Each person has an equal right to a fully adequate scheme of equal basic liberties, which is compatible with a similar scheme of liberties for all.
- b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest of benefit of the least advantaged members of society. (Rawls 1993:291)

Thus, the appeal of Rawls' justice as fairness thesis is that it purports to disclose conditions of securing 'reasoning together with others', that is communitarianism, through deliberation, cooperation and compromise – referred to by Rawls as 'sufficient convergence of judgment'. Communitarianism can be sustained insofar as citizens learn to mutually respect one another and cooperate in a spirit of fairness and willingness to compromise. A condition of justice as fairness, what Taylor refers to as 'separate human beings ... collaborating together', distinguishes it from other conditions which impose limits on people cooperating together, for instance, when individuals function independently (atomistically) from one another or when majority political groups unjustly marginalise minorities. In a Rawlsian sense, justice as fairness is premised on conditions whereby (a) citizens are engaged in cooperation as free and equal persons, and (b) citizens deliberate in order to achieve 'free agreements fairly arrived at and fully honored' (Rawls 1993:265). Most of these conditions of justice which presuppose that people cooperate, deliberate and compromise in a society can be engendered by the idea of a communitarian deliberative democracy.

However, whether people should in fact engage in public deliberation as 'equals' is a matter challenged by the idea of a communitarian deliberative democracy. The notion of a communitarian deliberative democracy affords people an equal opportunity (which is in tune with Rawl's second condition of justice) to engage in public deliberation willingly and rationally to justify their political arguments by subjecting them to scrutiny by others and to reach convergent understandings, and to share in the inter-subjective deliberations within their socio-political contexts—conditions necessary to ensure that justice as fairness prevails. Yet, this does not mean that people necessarily embark upon public deliberation as complete equals. Of course both illiterate and literate voters are equally entitled to cast their votes or to articulate their political arguments justifiably through public deliberation. But this would be tantamount to sham equality. It is like saying that there is equality in entitlement when each person has the right to articulate good political arguments, even though illiterate citizens would in all probability be unable to exercise such a right to which they are entitled (South African citizens are equally entitled to own property or to gain a university qualification, but due to financial constraints some are unable to). The sort of point I am making is that people might be afforded an equal opportunity to engage in public deliberation or might be equally entitled to do so, but this does not necessarily mean that they would actually be doing it on the basis of complete equality. People in society do have different levels of education and political arguments articulated by some would be better than or even override, those of others, which makes egalitarian public deliberation difficult, if not impossible, to pursue.

What follows from the above is that it would be difficult to conceive of justice on the grounds that people deliberate, cooperate and compromise as complete equals. It is here that the idea of communitarian deliberative democracy breaks with Rawls' first condition of justice, which accentuates the cooperation of persons as 'equals'. A communitarian deliberative democracy frames an understanding of justice on the basis that people have a political voice in order (a) to exercise their critical political judgments in respect of shared deliberative reasoning, and (b) to have someone as a proxy to be his or her 'second self', to speak for him or her. To have someone as a proxy entrusted to care for others who are unable to speak overrides the condition of justice that persons should deliberate in each other's presence as complete equals. A proxy in the first place represents the political voices of people who cannot (and do not have to) function as complete equals in

public deliberation. I shall now focus my attention on such an understanding of justice, which obliterates the chances of people deliberating as complete equals.

Taylor (1985:303) identifies two meanings of justice, which do not consider persons as complete equals in society. His view of distributive justice recognises: first, the issue of 'differentials' which advocates 'allowable differences between wages or incomes received for different kinds of work'; second, the issue of 'equalization policies ... which attempt to redistribute income or economic prosperity, or life opportunities; either by transfer payments, or by special programmes to develop certain regions, or to allow certain disfavoured groups to catch up in one way or another (eg, in education opportunity)'. Both constitutive meanings of distributive justice invoke a notion of equality which departs from the idea that people publicly deliberate as complete equals. On the one hand, the differential idea considers equality of income (remuneration) as unjust since 'it would dry up the stream of outstanding contributions' (Taylor 1985:306). Certainly in South Africa, equality of income would be wrong for the reason that citizens (engineers, scientists, political philosophers, and so on) who have acquired higher intellectual skills should justifiably earn more than others (say, income tax clerks or debt collectors) on the basis that higher capacities are considered to be key to the country's economic, social, cultural and political stability. In this sense certain individuals seem to merit an 'allowable' favourable position in society than others. Put differently, justice does not mean that a society should be one of 'completely equal shares' (Taylor 1985:313). Complete equality of income would also mean that people do not differ in the contributions they make to societal development. It is in this regard that I agree with Taylor (1985:306) when he posits 'that highly talented people ought to be paid more than the ordinary, that professions requiring high skill and training should be more highly remunerated, and in general that complete equality of income, or distribution according to need, would be wrong'.

On the other hand, providing equal opportunities for 'disfavoured' people to improve their conditions in life, whether social, economic, political or educational, involves giving appropriate consideration to distributive justice. In South Africa, the majority of the population has been disadvantaged by the previous apartheid policies. By implication, and in tune with the 'equalization policies' idea, measures need to be taken which can ensure redress and a more equitable distribution of resources 'to help poorer regions' (Taylor 1985:315). What follows from this is that (a) the differential

idea can ensure a degree of justice between individuals on the basis of 'allowable differences' in income, and (b) the 'equalization policies' idea can establish some degree of justice between different (that is, favoured and 'disfavoured') communities, as well as within those communities. By implication, distributive justice is attuned to the idea of a communitarian deliberative democracy, which emphasises that a person fulfils the role of 'proxy' as opposed to all citizens engaging in public deliberation as complete equals. In this regard, to use Taylor's (1985:311) words, public deliberation that makes provision for 'allowable differences' whereby citizens do not have to participate as complete equals, as well as equal opportunities for particularly 'disfavoured' groups are to be considered as 'much more equal'.

The question arises: what are the implications of distributive justice, framed by a communitarian deliberative democracy, for the Constitution and Bill of Rights? The Bill of Rights explains equality as follows:

- 1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth... (The Constitution 1996:5)

In *Pretoria City Council v Walker*, the Constitutional Court was asked to decide whether the different approaches to the levying and collection of service charges in 'formerly white' and 'formerly black' residential areas in Pretoria constituted discrimination in terms of section 8 of the interim Constitution (right to equality, that is, section 9 in the Constitution of 1996). The majority of the judges adjudicated that the difference in treatment on the part of the Council regarding the levying of rates did not constitute unfair discrimination. Dissentingly Judge Sachs (Constitutional Court judge) adjudicated that people who have been advantaged in the past can indeed be vulnerable (to unfair discrimination) but are by no means *excluded* from the protection of the equality provision of the interim Constitution (De Vos 2001:29-30). In other words, my understanding of Sachs' adjudication is that

people living in 'formerly white' and 'formerly black' residential areas in Pretoria should all be treated the same. Now if by equality is meant 'the full and equal enjoyment of all rights and freedoms', the question is whether such an egalitarian demand can be satisfied? In the first place, a demand for 'full' equality on the part of all citizens conflicts with the differential idea of justice which provides for 'allowable differences'. People living in affluent suburbs and had the benefit of regular municipal services at all material times cannot be levied equally on rates and service charges as those residents living in less affluent suburbs disadvantaged by unfair discrimination in the past. In terms of Sachs' atomistic-liberalist adjudication these people need to be levied the same for collection and service charges. The majority of the Constitutional Court interpreted the equality provision clause differently from Judge Sachs.

Similarly, illiterate and politically uninformed citizens cannot 'fully' and equally deliberate with informed citizens on matters of public concern. Neither can illiterate citizens equally enjoy 'all rights' such as to deliberate on political issues that affect them if they are already excluded due to an inability justifiably to articulate their arguments or points of view. The egalitarian principle that 'everyone' should be subjected to 'full and equal enjoyment of all rights and freedoms' is overwhelmingly concerned with individual privilege and aspiration, which seem to ignore that people possess different levels of understanding and knowing. Illiterate citizens can equally enjoy their right to public deliberation if they can be allowed to take a politically informed person as proxy who in their absence can represent their political concerns and aspirations. In this way, better equality can be ensured for the reason that citizens do not have to deliberate on public matters as atomistic individuals and complete 'equals' with their own choices, aspirations or points of view but rather, as communitarians whose interests can be represented and enhanced by proxy. By implication, an atomistic-liberalist interpretation of the Constitution particularly its insistence on equality of individuals on the basis of 'equal' political participation can actually inhibit rather than advance collective action.

However, my potential critic might argue that the South African multi-party democratic system already operates on the basis of representatives having been elected to government and who serve the legitimate interests of the majority of citizens. However, many of these representatives do not necessarily perform their political roles as proxies for the reason that, in the first place, such electors seem to be distanced from the constituencies

whose interests they have to represent. In this regard, the African National Congress (ANC) government is undoubtedly committed to expanding educational facilities, job creation programmes and health care to rural areas. Yet, service delivery in these areas remains lacking as a consequence of local government representatives being 'even further removed from the rural citizenry' (Koelble 1999:266) which in turn, brings into question any genuine participation of individuals as proxies.

This brings me to a discussion of Taylor's notion of distributive justice, which allows for the provision of equal opportunities for 'disfavoured' citizens who, with reference to the Constitution, have been 'disadvantaged by unfair discrimination'. Undoubtedly the majority of South African citizens who have been unfairly discriminated against along racial lines warrant equality of opportunity whether in terms of employment, education, economic prosperity, health care, property ownership and housing. I agree. However, does this necessarily mean that taking away certain individuals' resources in order to promote the welfare of others, in this instance, removing resources from advantaged white minorities to promote the welfare of the disadvantaged black majority? I do not think so for the reason that equal opportunities within a communitarian deliberative democratic framework has an enabling and caring function whereby others (in this case, the disadvantaged) should be encouraged and assisted through legislative measures (for example, affirmative action, land restitution and educational development) to cultivate their capacities in order to improve their situation. Only taking away resources from advantaged white minorities would not necessarily enhance the welfare of the disadvantaged majorities unless the latter are encouraged and supported to improve their capacities.

In fact a communitarian deliberative democracy demands that minority advantaged citizens should at least be assured minimal security from internal legislative measures which might cause them to relinquish their resources, for instance, land and other economic assets. The Constitution clearly speaks of legislative measures, which need to be designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. My concern is that an atomistic-liberalist reading of the Constitution does not distinctly guarantee the security of minorities who might argue that legislative measures to advance the position of majorities can eventually lead to discrimination against minorities. If employment opportunities along affirmation action procedures continually favour majorities who have previously been discriminated against, white minorities

who might legitimately qualify for employment opportunities might feel that they are discriminated against. In the *Pretoria City Council v Walker* case, the Constitutional Court remarked that it 'has a clear duty to come to the assistance of such a group (racial minority) as long as this will not endorse and protect privilege and perpetuate inequality and disadvantage' (De Vos 2001:30). My argument is not in favour of retaining minority privilege (particularly of those people who have been advantaged in the past) as my potential critic might purport, but rather that all people (whether minorities or majorities) should be assured of at least minimal security from, in this instance, unfair discrimination. Unless people are assured of minimal security vis-à-vis their status as minorities and majorities, it would be difficult to conceive that the state would not 'unfairly discriminate directly or indirectly against anyone ... (on the grounds of) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth' (The Constitution 1996:5). In this regard, I find Walzer's (1983:14-19) distinction between simple and complex equality extremely useful, particularly in relation to the idea of providing minimal security to minorities. On the one hand, simple equality involves everyone having the same resources, that is, investments, property, education, and so on. In South Africa simple equality is unattainable for the reason that some citizens whether minorities or majorities would always have more resources than others – a society of equals is 'not a lively possibility' (Walzer 1983:20). Even if resources were to be equalised 'talented men and women will enlarge the resources available to everyone else ... [again giving rise to] attendant inequalities' (Walzer 1983:14). In other words, it is impossible to imagine a society in which 'everything is up for sale and every citizen has as much money as every other' (Walzer 1983:14). On the other hand, complex equality means 'that no citizen's standing in one sphere or with regard to one social good can be undercut by his [her] standing in some other sphere, with regard to some other good' (Walzer 1983:19). Thus, disadvantaged majorities may have fewer resources than advantaged minorities, which make them unequal in the sphere of social life. However, majorities and minorities will not be unequal as long as the less dominant resources of majorities do not constrain their efforts to better opportunities in any other sphere whether education, health care, employment, and so on. In this way, complex equality seems to be an enabling good attuned to the notion of a communitarian deliberative democracy, which can avoid the practice of unfair discrimination in relation to majorities and minorities.

Of course the argument can be used that disadvantaged majorities are in any case inhibited by economic constraints to enjoy better opportunities in comparison with advantaged minorities. But then, as has already been pointed out earlier, legislative measures have to be taken (without discriminating unfairly against minorities) which can hopefully ensure a more equitable distribution of resources in order to assist the disadvantaged majority. This argument seems to be in line with Rawls' (1993:291) second condition of justice, according to which inequalities between advantaged minorities and disadvantaged majorities are justified only if they could bring the greatest possible benefit to those most disadvantaged and simultaneously prevent unfair discrimination against advantaged minorities. Once again with reference to *Pretoria City Council v Walker*, the majority judgement of the Constitutional Court concluded that the difference in treatment regarding the levying of rates and service charges did not constitute unfair discrimination, since levying residents of 'formerly white' suburbs more for collection and service charges than those residents living in inconvenient 'formerly black' suburbs, could bring the greatest possible benefit to those previously disadvantaged.

In essence, a communitarian deliberative democracy engenders a notion of justice, more specifically distributive justice, which does not encourage one group of people or individuals to dominate unfairly over another group of people or other individuals, in this instance, advantaged minorities over disadvantaged majorities and vice versa. A communitarian deliberative democracy challenges and undermines the notions of justice and equality framed according to an atomistic-liberalist view for the reason that such an explanation of the Constitution and Bill of Rights makes it difficult to provide minimal security and to protect the legitimate rights of all citizens (minorities and majorities). A communitarian deliberative democracy threatens the idea of individualism, which seems to remain entrenched in an atomistic-liberalist reading of the Constitution and the Bill of Rights vis-à-vis notions of justice and equality – a situation South African politics can ill-afford. Judge Ackermann (one of the judges of the Constitutional Court) on his interpretation of section 11(1) of the interim Constitution clearly challenges an atomistic-liberalist reading of the Constitution when he had the following to say: 'Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that *an individual's right to freedom must be*

defined as widely as possible, consonant with a similar breadth of freedom of others' (Sarkin et al 2000:310, my italics).

This brings me to a discussion of how a communitarian deliberative democracy can impact upon the Constitution and Bill of Rights with reference to basic (human) rights, more specifically political rights.

Political rights

In this section I shall argue that a communitarian deliberative democracy can frame the notion of political rights in such a way as to limit atomistic-individualism. My exploration into the question of rights as formulated in the Constitution is confined to those of political rights as a form of basic (human) rights. Basic rights are supposed to answer the question of how any person ought to be treated and what kinds of actions can be legally enforced by the state to ensure that a person is treated in a 'morally proper way' (Plant 1991:254). On the one hand, basic or human rights as articulated in the Constitution primarily relate to civil and political rights (my focus) such as the right to life, the right of citizens to have their dignity respected, and protected, the right to freedom and security, the right to freedom of conscience, religion, thought, belief and opinion, the right to freedom of expression, the right to freedom of association, the right to make political choices, the right to freedom of movement (The Constitution 1996:6-8). On the other hand, constitutionally, basic rights also encompass social and economic claims such as the right to fair labour practices, the right to property, the right to have access to adequate housing, the right to have access to health care services, the right to a basic education, and the right of citizens to use the language and to participate in the cultural life of their choice (The Constitution 1996:8-11). Different from basic (human) rights are legal rights which refer to those rights a person has and can exercise in relation to the legal rules or law under which a person lives as a citizen (Plant 1991:254). Legal rights include the right to administrative action that is lawful, the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, and the right to a fair trial (The Constitution 1996:13). My focus is not so much on the distinction between different kinds of rights, but rather how an atomistic-liberalist view of the Constitution seems to favour a preference for individual political rights by putting constraints upon other people's action in relation to an individual. I argue that an atomistic-liberalist view of the Constitution seems to prohibit those actions by others, which would diminish the individual

autonomy and freedom of a citizen to live her own political life in her own way. My contention is that an atomistic-liberalist view protects the political rights of the individual citizen, which seems to be an invasion of the sphere of autonomy of the collective. With reference to the Constitution and Bill of Rights, I shall argue that such an individualist notion of political rights seems to be incommensurable with a framework of communitarian deliberative democracy.

The Constitution emphasises political rights as follows:

- 1) Every citizen is free to make political choices, which includes the right –
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- 2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- 3) Every adult citizen has the right –
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and do so in secret; and
 - (b) to stand for public office and, if elected, to hold office. (The Constitution 1996:7)

I shall address the following three issues vis-à-vis the notion of political rights within an atomistic-liberalist frame: first, the right of every citizen to be 'free to make political choices'; second, the right of every citizen 'to free, fair and regular elections'; and third, the right of every citizen 'to stand for public office'. First, if every citizen should atomistically be 'free to make political choices' such as recruiting members, forming and campaigning for a political party or cause, then the implication is that anybody else would be restricted from interfering with the 'political choices' of such individuals. In other words atomistic individuals are primarily concerned with political activities of value to them without considering the interests of others. If individuals should be 'free to make political choices' such as to campaign for a cause, then the autonomy of other persons would in fact be limited to the extent not to interfere with the 'political choices' of atomistic individuals. My contention is that such an atomistic-liberalist interpretation of constitutional rights is untenable and incongruent with the ethos of the Constitution and Bill of Rights. Let us assume that such an atomistic-liberalist view of political rights is to be upheld. Then, the right of every

citizen to be 'free to make political choices' could be interpreted as a subjectivist right whereby citizens do as they choose without interference from others.

Consider the following example. If an individual should have a right to campaign for the appropriation of previously un-owned natural resources, such a person would not only infringe the rights of others who might be restricted from campaigning for a similar cause, but also decrease their freedom. The point I am making is that any individual person cannot atomistically be 'free to make political choices'. Atomistic individual freedom in any case might infringe the rights of others who by virtue of the Constitution should have their political rights protected. Thus it seems that an atomistic-liberalist explanation of the Constitution cannot secure individual political rights other than by restricting interference by others, which in turn, can be considered as a violation of others' political rights. In short, every citizen cannot atomistically be 'free to make political choices'. On this view, one's right to make political choices and to act on his (her) actual or potential desires without considering the rights of others is of no help for a politics of communitarian deliberative democracy.

A communitarian deliberative democracy (as articulated earlier) frames an understanding of political rights whereby citizens make political choices considered as reasonable by others on the basis that such citizens be held accountable by and to others for the choices they make. Certainly in South Africa it is not reasonable for most citizens after decades of racial discrimination and prejudice that an individual or group be atomistically afforded the political right to establish a racist party considering that the Constitution's Bill of Rights in section 9 (3) and (4) in any case prohibits any form of racial discrimination. Of course, individuals have political choices. However, these choices cannot be articulated 'freely' without any sort of justification as to why they need to be conceived as reasonable by other citizens. In the first decision handed down by the Constitutional Court since its inception in 1995, *S v Zuma*, Judge Kentridge signalled awareness of limiting individual choices when he remarked: 'I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preoccupations. But it cannot be too strongly stressed that the Constitution does not mean whatever we [as individuals] wish it to mean [in articulating our political choices]' (De Vos 2001:5). The point is that atomistic-liberalist political choices or interests of one individual or group do not happen

independently from the justifiable choices of others in the whole political society. This means that every citizen is not atomistically 'free to make political choices' without rationally explaining the basis of his or her choices to others through public deliberation. Put differently, individuals in society do not just form racist parties without being challenged by citizens who advocate non-racism.

Second, an atomistic-liberalist view of the constitutional (political) right of every individual citizen 'to free, fair and regular elections' is a major concern for advocates of a communitarian deliberative democracy. Atomistic-liberalism is mainly concerned with individuals maximising their own forms of life grounded on what is of value for them, disengaged from matters of public importance. For example, in *S v Dlamini* case, the Constitutional Court ruled that community reaction should not decide when a person should be detained or not. The Court summarised the grounds to oppose the right to deny bail to Dlamini (the accused) as follows:

Looking at public opinion and taking into account the likely behaviour of persons other than the detainee, so counsel suggested, smack of preventive detention and infringe a detainee's liberty interest protected by s 35(1)(f) of the 1996 Constitution. Elevating the sentiments of the community above the interests of the detainee is constitutionally impermissible ... It would be disturbing that an individual's legitimate interests should invasively be subjected to societal interests. It is indeed even more disturbing where the two provisions do not postulate that the likelihood of public disorder should in any way be laid at the door of the accused. The mere likelihood of such disorder independently of any influence on the part of the accused would suffice. (Sarkin et al 2000:299)

More specifically, in adjudicating on the *S v Dlamini* case, Judge Kriegler stated the following: '... the sentiments of the community should only be acceded to in those rare cases (the likelihood of disturbance or undermining of the public peace, crime rate) where it is really justified' (Sarkin et al 2000:301). By the Court's own admission, this has been a fundamentally illiberal provision (Sarkin et al 2000:301) since not denying the accused bail is an atomistic-liberalist adjudication intent on securing the rights of the accused at the expense of the sentiments of the community.

Similarly, illiterate adults living in rural squatter camps might atomistically in a self-determining way claim that it is of value for them to have the right 'to free, fair and regular elections', since literacy is strictly not necessary for elections to be held in a society where illiterate adults live; and for that

matter, still as an instance of 'the right to free, fair and regular elections', illiterate citizens do not have to bother to develop their intellectual capacities within the area of political understanding. Surely if an illiterate person pursues her own interests as she sees them so long as she does not interfere with others, then she has 'the right to free, fair and regular elections'. But if one recognises that 'the right to free, fair and regular elections' is one way through which one can make informed and rational political choices, then some minimal degree of capacity to make such choices requires that one assists illiterate persons to develop the ability to think and act for themselves. In other words, illiterate persons' right to free, fair and regular elections can be enabled by assisting them to understand the political setting in which they live, and to make them see that they could do something about it. The point is, elections can only be 'free, fair and regular' if conditions exist that could enhance the possibility for the occurrence of informed and rational political practices. Illiterate adults in rural squatter camps who lack the capacity to make informed and rational political choices cannot be left on their own to cast their vote. If the freedom to vote is important for its effect on a society's dignity, then anything else that promotes people's dignity – such as providing support to illiterate adults so as to make informed choices – is also important. Hence, it is inconceivable that every citizen should atomistically have the right 'to free, fair and regular elections' if he or she is not assisted to develop an intellectual inclination in order to exercise such a political right in an autonomously rational way.

The question arises: How could one prevent such an atomistic-liberalist view of political rights? A communitarian deliberative democracy invites most citizens to be attuned with the political 'order of things', and with other citizens for the common good of it. This not only involves citizens contributing to public deliberations on what constitutes a good political life but also implies that citizens in a Rawlsian sense share in the coercive political power that they exercise over one another by establishing conditions for 'free, fair and regular elections' to flourish. This is different from saying that every citizen has the right 'to free, fair and regular elections'. Rather, most citizens should be attuned with the order of good political processes which involve the assistance of illiterate citizens whose capacity for self-determination has not progressed far, conditions that could lead to the exercise of a rational (autonomous) political right on the part of most citizens 'to free, fair and regular elections'. For instance, citizens should at least have been taught how to complete a ballot form and to cast a ballot. Similarly, it is the

responsibility of the political parties to justify their political decisions and opinions to citizens (illiterate or not) before they decide to vote.

The Constitution accords the right to every citizen 'to stand for public office and, if elected, to hold office'. Atomistically speaking, it seems that such an emphasis on individual political rights poses a major concern for the collective political community. What if an individual, after having been elected to public office, seems less and less interested to promote deliberation and merely impose political decisions upon citizens? Should such an individual have the right to stand for and or hold public office? If one considers that an individual elected for public office represents a political constituency and has to serve the legitimate interests of the wider political community, such an individual cannot just be anyone but rather one, in a communitarian sense, who is capable of involving citizens in deliberation. This involves the inclusion of the very people affected by a decision, as well as the encouragement of free and open exchange of information and reasons sufficient to acquire an understanding of both the issue in question and the opinion of others. In other words, a person who holds public office has to be cognisant of at least two main features of deliberation: that deliberation is a dialogical process which needs to be nurtured amongst citizens which s/he represents, and that it is public to the extent that it is a joint social activity involving citizens affected by political decisions. However, atomistically, such an individual cannot be denied the political right 'to stand for public office and, if elected, to hold office'. It is in this regard that the idea of a communitarian deliberative democracy accords political rights to individuals not merely to pursue their goods in their own way. What they pursue also depends on the political accountability they need to show and have shown towards the broader public which implies that they need to cultivate deliberation, since it is only in dialogue with one's constituency – in speaking to them, answering them, and taking up their views – that one performs political tasks as efficiently and reliably as possible, that is, improving the quality of political justification and decision making.

Conclusion

In this article I have brought into question an atomistic-liberalist reading of the Constitution and Bill of Rights, which seems to place individual rights above those of the community. The Constitution is committed to entrench democratic norms and values into the so-called 'public sphere' which makes an atomistic-liberalist reading of it highly problematic. Moreover, I have

argued that a communitarian deliberative democratic framework shapes notions such as justice, equality and political rights, so as to enhance inter-subjective, rational political deliberations. Consequently, the idea of a communitarian deliberative democracy provides a conceptual framework which undermines an atomistic-liberalist explanation of constitutional principles.

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