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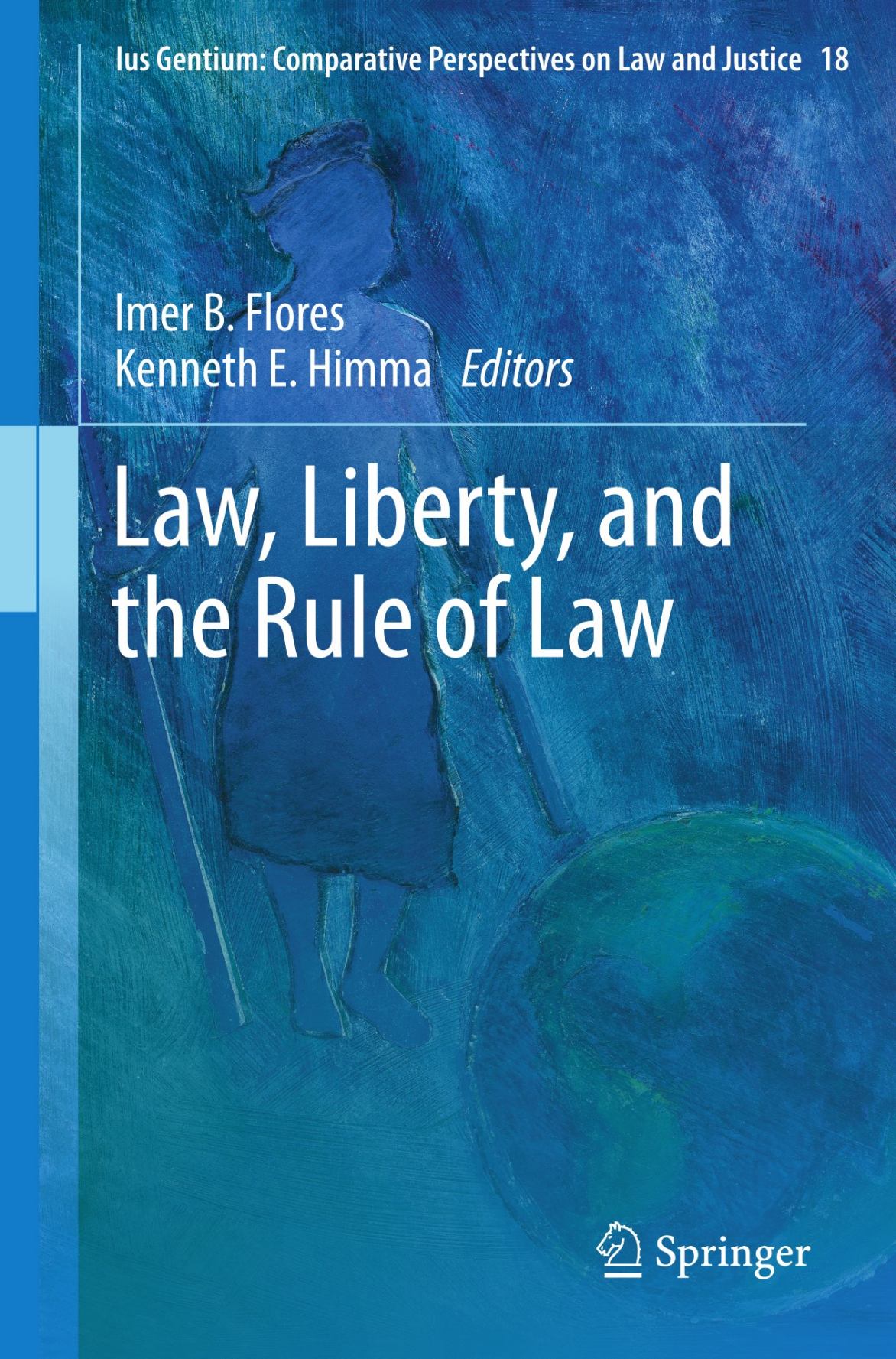

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Chapter 8
Political Deliberation and Constitutional Review

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8.1 Introduction

Prominent advocates of judicial review have claimed that constitutional courts are deliberative forums of a distinctive kind.[1] Surprisingly enough, however, they have not entirely come to grips with the sorts of requirements that should be met if courts want to live up to that promise. Important questions remain unanswered while others endure unasked. Constitutional talk is thus deprived of a set of qualitative standards that guides us in assessing how different courts, for better or worse, may do and are actually doing in terms of that presupposed and esteemed decisional virtue.

This under-elaborated assumption needs to be fleshed out. This article briefly describes how a constitutional court has been conceived in that light, diagnoses the incompleteness of that approach and points to additional elements that are necessary for that theoretical path.

The first topic shows how the ideal of political deliberation has been tied, though yet insufficiently, to constitutional courts and what further steps would be relevant for a comprehensive account.

[1] Despite the crucial differences between "constitutional courts" and "supreme courts", I will use the former expression as encompassing the latter one. For the purposes of this paper, what matters is their basic commonality: the power to overrule legislation on the basis of the constitution. This commonplace will be diagnosed and thoroughly described later in the paper.

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8.2 Constitutional Courts as "Custodians" of Public Deliberation

Political frictions between parliaments and courts were not born in North-American soil with the advent of judicial review of legislation in the beginning of the nineteenth century. The chronicles of the modern rule of law show that their origins can be traced further back. Neither have these quarrels been always formulated in the perspective of the democratic legitimacy of an unelected body with the legal competence to overrule the acts of an elected one.

Nevertheless, the emergence of judicial review, and specially its gradual enhancement over time, has significantly dramatized that historical tension. It resonated in constitutional theory and triggered new sorts of questions then inspired, indeed, by the democratic ideal. What was originally a US feature became, later in the twentieth century, through the burgeoning of constitutional courts and the accompanying judicialization of politics in Western democracies, a multinational one.

The dispute upon the democratic legitimacy of the existence of judicial review, and upon the valid scope of its practice, has been fervent throughout the twentieth century. It was first Thayer and then, decades later, Bickel, who ventilated this concern in the most notorious way. The fear of "democratic debilitation" (Thayer 1893), to the former, and the nuisance brought by the "counter-majoritarian difficulty" (Bickel 1961, 16–8), to the latter, just furnished catchier slogans to the ingrained Jacksonian conception of democracy that persevere in part of the American political mind.

This populist take on democracy was not entirely embraced by later cycles of constitutional fertility in Western democracies. The constitutional courts created by the post-war, post-fascist or post-communist constitutional regimes were not seen as "deviant institutions".[2] Neither has the "counter-majoritarian difficulty" automatically travelled together with them. One cannot assume, however, that the general theoretical justification of constitutional courts is settled, or that these courts do not face resembling challenges in their everyday operation. The argument, indeed, is far from over.

Advocates for judicial review of legislation often conceive it as a reconciliatory device of (liberal) constitutionalism and (representative) democracy. It would be an institutional compromise that recognizes the priority of the right over the good (Rawls 1971, 31), or the co-originality of individual rights and popular sovereignty (Habermas 1996). It institutionalizes the irreducible tension between procedures and outcomes in the concept of political legitimacy, and recognizes that the electoral pedigree is not enough reason, all of the time, for decisional supremacy in a democracy.

Variations of this simple idea abound. But there is nothing, so far, that connects constitutional courts with deliberation. As a matter of fact, deliberativists are, more often than not, suspicious, if not forthrightly unsympathetic, of the deliberative prospects of courts. Deliberative democrats resist putting too much weight on courts not only due to their elitist character. They do so because of the supposedly restrictive code that shapes the argumentative abilities of this forum.

[2] Another expression of Bickel (1961, 18).

Courts would be straitjacketed by the apparently stringent vectors of legal language. Nothing could be more at odds with the openness of the deliberative ideal than this. Waldron, Glendon, Zurn and others have expressed doubts about the possibilities of legal argumentation to encompass deeper moral considerations (Waldron 2009; Glendon 1993; Zurn 2007). Judicial discourse would be legalistic and myopic, a distraction from the nub of the matter. Their patterns of reasoning would impede judges to see what is genuinely at stake. Their professional duty to take legal materials into account would harm straightforward deliberation. The operation of law would simply not comport with the transformative claims to which deliberative politics should be permeable. This concern is a serious one, but cannot be too quickly generalized as an inevitable or universal feature of constitutional courts.[3] Moreover, it is little comparatively informed and typically based on the reasoning habits of US Supreme Court.

This caveat does not entail that no deliberativist accommodates constitutional review within a deliberative democracy. Many actually do. However hesitant and refusing to accept any deliberative eminence of the constitutional review process, it may have a room to occupy in the background. Habermas, for example, calls on the court to assure the "deliberative self-determination" of lawmaking and to assess whether the legislative process was undertaken under decent deliberative circumstances (1996). The court, in his account, needs to mediate between the republican ideal and the degenerate practices of real politics. It is a tutor that guarantees the adequate procedural channels for rational collective decisions rather than a paternalistic regent that defines the content of those choices. It does not substitute for the moral judgments made by the legislator, but investigates the procedural milieu under which these judgments were formed. Zurn largely reproduces this justification. Within his "proceduralist version of deliberative democratic constitutionalism", he carves a space for constitutional review. He accepts an external agency to enforce procedures but, like Habermas, refuses to accord it substantive moral choices. The court would not second-guess parliament, but just make sure it is in good working order (Zurn 2007). Their notion of "procedure", though, is a robust one and the extent to which it is successfully severed from substance remains an open question.

Both Nino and Sunstein play in unison with the logic of this account. Nino does not doubt that a constitutional court is an aristocratic body and that the assumption of any judicial superiority to deal with rights evokes "epistemic elitism" (Nino 1996, 188). However, he accepts that the belief on the value of democracy presupposes certain conditions. The exceptions to the default preference for majoritarian processes constitute the mandate of courts, and they are of three kinds: first, the court needs to draw the line between *a priori* and *a posteriori* rights and to protect the former if genuine democratic deliberation is to ensue; second, in the name of personal autonomy, the court needs to quash perfectionist legislation that oversteps the domain of intersubjective morality and establishes an ideal of human excellence; finally, the court

[3] Kumm, for example, rejects this generalization by showing how the "rational human rights paradigm", employed by several European courts, avoids this legalistic trap (2007).

needs to preserve the constitution as a stabilized social practice against abrupt breaks (Nino 1996, 199–205).

Sunstein also defends that the Supreme Court has a role to play in the maintenance of the "republic of reasons" to which, for him, the American constitution committed itself. His advice for "leaving things undecided" through a minimalist strategy to kindle broader deliberation by the citizenry is the best-known part of his account. The less-known portion is its complement: when "pre-conditions for democratic self-government" are at stake, a maximalist take is, according to him, the pertinent one.[4] In some enumerated circumstances, rather than crafting "incompletely theorized agreements", the court should look for complete ones (1995). Nonetheless, he supposes, the cost of maximalism is the consequent impoverishment of deliberation in the public sphere with respect to these judicially bared issues.

Despite defending constitutional review, the deliberative concern of these authors lies actually elsewhere. Such function, for them, is justified only to the extent that it unlocks, safeguards and nurtures deliberation in other arenas. The court is just the warden of democratic deliberative processes, not the forum of deliberation itself. This is not the angle I want to illuminate.

8.3 Constitutional Courts as "Public Reasoners" and "Interlocutors"

There are three more robust ways to couple constitutional courts with deliberation. Rather than a mere custodian of democratic deliberative processes, the court may be a more intrusive participant of societal deliberation either as a "public reasoner", as an "interlocutor" or yet as a "deliberator" itself. The public reasoner and the interlocutor supply public reasons to the external audience. Both images ignore, however, how judges internally behave and disregard whether they have simply bargained or aggregated individual positions to reach common ground. The qualifying difference is that an interlocutor, unlike a public reasoner, is attentive to the arguments voiced by the other branches and dialogically responds to them. Finally, the court as a deliberator, apart from being an inter-institutional interlocutor, is also characterized by the internal deliberation among judges. When courts are referred to as "deliberative institutions", it is not always clear which of these three specific senses is under reference. I will briefly sketch these three images so that their occasional weaknesses become clearer.

"Public reasoner" is an evocative umbrella-term that encompasses a prolific dissemination of derivative images. They all share a very similar insight. Rawls and Dworkin are probably the leading figures on that account. Their proposal of a court

[4] This is not his only hypothesis for allowing maximalism to supplant minimalism (Sunstein 2001, 57).

as an "exemplar of public reason" or as a "forum of principle" is not only a description of the American Supreme Court, but also a prescription of how this function should be incorporated into a democracy. Two other creative accounts fit in this category too. Alexy thinks of a constitutional court as a "venue for argumentative representation" and Kumm, in turn, conceives it as an "arena of Socratic contestation". I proceed to condense each one.

Rawls is largely enthusiastic about constitutional review. He asserts that, "in a constitutional regime, public reason is the reason of its supreme court" (1997a, 108). He even assumes that "in a well-ordered society the two more or less overlap" (1997a, 10fn). Or, yet, in his most confident passage, he suggests a litmus test for knowing whether we are following public reason: "how would our argument strike us presented in the form of a supreme court opinion?" (1997a, 124) For him, the constraint of public reason applies to all institutions, but in an exceptionally burdensome way to constitutional review: "the court's special role makes it the exemplar of public reason" (1997b, 768). In other moments, he moderates his terms and remarks that the court "may serve as its exemplar", as well as the other branches (1997a, 114). The comparative advantage of courts, however, is to use public reason as its sole idiom. The court would be "the only branch of government that is visibly on its face the creature of that reason and of that reason alone" (1997a, 111).

In such account, the court is a key device for the regime to comply with the liberal demand of legitimacy: a politics of reasonableness and justifiability deserved by each and every citizen as equal and free members of the political community. Coercion is admissible to individuals only if based on reasons that all "may reasonably be expected to endorse" (Rawls 1997a, 95). Public reason is thus the linchpin of such machinery. The readiness and willingness to listen and to explain collective actions in terms that could be accepted by others is the pivotal democratic virtue, labelled by him as "duty of civility" or as a manifestation of "civic friendship". Not all reasons, therefore, are public reasons, but only those which refuse to engage in a comprehensive doctrine of the good, and keep within the bounds of a strictly political conception of justice. Such discipline, moreover, does not apply to any issue, but only to constitutional essentials and matters of basic justice. The role of the court is to ascribe public reasons "vividness and vitality in the public forum", to force public debate to be imbued by principle. There would reside its educative quality too.

Dworkin adopts a similar approach. The distinction between principles and policies is at the core of his theory. Principles ground decisions based on the moral rights of each individual, whereas policies inform decisions concerning the general welfare and collective good. Both co-exist in a democracy. They embody two different types of legitimation, one based on reasons, the other based on numbers. The catch is that, when in conflict, the former trumps the latter. Neither law as integrity, nor democracy as partnership (which, in Dworkin's "hedgehog approach" to values, are interdependent), can be exhausted by arguments of policy. They cannot be squared with this purely quantitative perspective.

For Dworkin, judicial review is democracy's reserve of principled discourse, its "forum of principle". Only a community governed by principles manages to promote the moral affiliation of each individual. Political authority becomes worth to be

respected thanks to its ability of voicing arguments and displaying "equal concern and respect", not to its techniques of counting heads. The institutions of such a regime need to foster communal representation, apart from a statistic one. Judges, on that account, do not represent constituents in particular, but a supra-individual entity – the political community as a whole. An elected branch cannot be sufficiently trusted as the "forum of principle" because of the counter incentives it faces.

To remove questions of principle from the ordinary political struggle is the court's mission. Other types of argument may obfuscate the centrality of principle. There is no legitimacy pitfall on that arrangement because democracy, correctly understood, is a procedurally incomplete form of government – there is no right procedure to attest whether its pre-conditions are fulfilled. The promotion of pre-conditions can emerge anywhere. When it comes to principles, the legitimacy test is a consequentialist one. We measure it *ex post*, by assessing whether a decision is correct, or at least attempting to provide the best possible justification. Procedural inputs do not matter for that purpose. The court is not infallible, but the attempt to institutionalize an exclusive place for the promotion of principle cannot be illegitimate because of its inevitable fallibility (Dworkin 1985, 34, 1986, 1990, 1995, 1996, 1998). Lesser fallibility, if plausible, is enough. The legitimacy of the court depends, then, on its independence from ordinary politics.

Alexy keeps the same tune. Judicial review is reconcilable with democracy if understood as a mechanism for the representation of the people. It is representation, though, of a peculiar kind: rather than votes and election, it works by arguments (2007, 578–9). A regime that does not represent except through electoral organs would instantiate a "purely decisional model of democracy". Alexy, however, believes that democracy should contain arguments in addition to decisions, which would "make democracy deliberative". Elected parliaments, to the extent that they also argue, may embody both kinds of representation – "volitional or decisional as well as argumentative or discursive" – whereas the representation expressed by a constitutional court is an exclusively argumentative one. The two conditions for argumentative representation to obtain are the existence of, on the one hand, "sound and correct arguments", and, on the other, rational persons, "who are able and willing to accept sound or correct arguments for the reason that they are sound or correct". The ideal of discursive constitutionalism, for him, intends to institutionalize reason and correctness. Constitutional review is a welcome device if it is able to do that (2007, 581).

For Kumm, at last, judicial review is valuable because it institutionalizes a practice of Socratic contestation. This practice engages authorities "in order to assess whether the claims they make are based on good reasons" (2007, 3). Liberal democratic constitutionalism, he contends, has two complementary commitments: for one, elections promote the equal right to vote; for the other, Socratic contestation guarantees that individuals have the right to call public acts into question and receive a reasoned justification for them. Parliaments and constitutional courts are the respective "archetypal expressions" of both commitments. If legitimacy, on that liberal frame, depends on the quality of reasons that ground collective decisions, judicial review is a checkpoint that impedes this demand to dwindle over time. The Socratic habit of subjecting every cognitive statement to rigorous doubt helps democracy to highlight and test the quality of substantive outcomes, instead of

passively resting merely on fair procedures. Constitutional courts, through this "editorial function", hold parliaments accountable for the reasons upon which they decide. They probe collective decisions and, by doing that, have the epistemic premium of casting aside, at least, legislative decisions that are unreasonable (2007, 31).

The cursory description above does not do justice to the complexity of each author. It shows, still, the similar logic of their arguments. All equally tackle a monotonic picture of democracy that relentlessly pervades objections against counter-parliamentary institutions like constitutional review. Their chorus intones: "democracy is not only that". Democracy is rather shaped by a duality. However this less intuitive component is called (public reasons, principles, rational arguments, contestation), there would be no genuine democracy without it. The court does not have a monopoly of such code, but has the virtue of operating exclusively on that basis. It is a monoglot. There lies its institutional asset. It avoids the danger of political polyglotism, the cacophony of reasons that may lead to harmful trade-offs and prostrate this cherished yet permanently endangered dimension of the complex ideal of collective self-government.

I am not discussing whether their arguments on the legitimacy of judicial review are sound. Neither am I interested in thematizing whether elected parliaments or other institutions could play that function as much as courts. The description of the expectations they place on courts, however, enables us to grasp some implications later.

Courts as "public reasoners", therefore, entail more than what was prescribed by Habermas and other deliberativists. Courts as "interlocutors" too. This image springs from "theories of dialogue", which echo an old insight of Bickel, for whom the court should prudently engage in a continuing "Socratic colloquy" with other branches and society (Bickel 1961, 70). These theories have developed through many sophisticated stripes since the 1980's (Mendes 2009). Some of their statements underline what other aforementioned authors also claimed: the court can catalyse deliberation outside it. For these theories, though, the court is not an empty ignition of external deliberation, but rather an argumentative participant. And unlike ivory-tower reason-givers, as the previous image suggested, "interlocutors" join the interaction in a more modest and horizontal fashion. They do not claim supremacy in defining the constitutional meaning. Dialogical courts know that, in the long run, last words are provisional and get blurred in the sequence of legislative decisions that keep challenging the judicial decisions irrespective of the court's formal supremacy.

8.4 Constitutional Courts as "Deliberators"

Constitutional courts have been so far seen as deliberation-enhancing, but still not, necessarily, as deliberative themselves. Those accounts, I submit, are unsatisfactory. They fail to open the black-box of collegiate courts and to grasp whether those taxing expectations are plausible, or under what conditions they are achievable, and to what degree. They rely on an optimistic presumption: since judges are not elected, their superior aptitude to deal with public reasons eventuates. This inference conceals several mediating steps. There is a lot to be done between the premise and this

putative effect. It is intriguing how that presumption could overlook the internal dynamics of this conflictive multi-member institution.

This is not a prolifically discussed question in constitutional theory. Apart from some thoughtful testimonies from famous constitutional judges (Sachs 2009, 270; Barak 2006, 209), the specific value of collegial deliberation for constitutional courts has not been fully explored yet. Do the roles of "public reasoner" or "interlocutor" require some sort of good internal deliberation? Are they compatible with non-deliberative aggregation? If the practice of Socratic contestation between branches is likely to improve the outcomes of the political process, is it not plausible to argue that deliberative engagement among judges is likely to improve, in turn, the quality of Socratic contestation? Would it be acceptable to replace a collegiate court by a wise monocratic judge that produces well-reasoned decisions? Michelman hints why this may not be the case (1986, 76):

> Hercules, Dworkin's mythic judge, is a loner. He is much too heroic. His narrative constructions are monologues. He converses with no one, except through books. He has no encounters. He has no otherness. Nothing shakes him up. No interlocutor violates his inevitable insularity of his experience and outlook… Dworkin has produced an apotheosis of appellate judging without attention to what seems the most universal and striking institutional characteristic of the appellate bench, its plurality. We ought to consider what that plurality is for. My suggestion is that it is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom.

"Plurality" and "dialogue", in the light of "judicial practical reason" and for the sake of "judicial self-government" resound some deliberative virtues. We ignore how courts deliberate at our own theoretical peril. We may be missing something potentially valuable and immunizing judges from critical challenge when they decide to turn a deaf ear to the arguments of their peers and opt to act as soloists or strategic dealmakers. We remain deprived from any critical template.

The superficial yet widely accepted assumption that courts are special deliberative forums calls for refinement. Not much is said about what a deliberative forum entails. That contention simply stems from the institutional fact that courts are not tied to electoral behavioural dynamics, hence their impartiality and so their better conditions to deliberate. We should certainly not underestimate that courts occupy an interesting institutional position for deliberation. It is still not clear, though, whether courts are being as deliberative as that presumption believed, or why they should deliberate in the first place. In contemporary regimes, we will find all sorts of constitutional courts, some better than others in the deliberative exercise, some absolutely null.

Rawls and Dworkin conceived the deliberative ability of courts merely as reason-givers. They do neither elaborate on how courts may oscillate when pursuing that function nor, indeed, on how we may discern that oscillation. They would probably accept that some courts are better reason-givers than others but, to assess that variable quality, they do not offer much analytical resource apart from a liberal theory of justice. For them, we would have to confront the substantive controversy on its face: whether the outcomes are right or wrong, better or worse. Alexy and Kumm, in turn, offer the structure of proportionality reasoning. Though less substantive, it still does not tell much about what surrounds the decision.

The court as an interlocutor gains a subtle attribute in relation to the reason-giver: it is more cautious in modulating the decisional tone and in demonstrating that all arguments are given due regard. It displays that, apart from being a good arguer, the court is also a good listener and digests the reasons from the outside. Both images catch, in any event, a still defective picture of a constitutional court's potential as a deliberative institution. Courts can be and, to various extents, actually are, deliberative in a more fecund sense. Its institutional context and procedural equipment create peculiar conditions to do so. To grasp only the reason-giving aspect is to miss a broader phenomenon. We need to measure these variances and to see whether they have any implication for the legitimacy of constitutional review.

Ferejohn and Pasquino pushed that debate to a richer stage. They agree that courts face a tighter regulation with respect to the delivery of reasons. For them, the separation of powers encompasses various kinds of accountability, each of which occupying distinct spots of a "chain of justification". The longer the thread of delegation, or the more distant an authority is from election, the greater will be its duty of reason-giving "in return". On one extreme, a weightier deliberative burden compensates for the electoral deficit. On the other, the deliberative deficit is counterbalanced by the closeness to the people. These varying charges are "inversely correlated with democratic pedigree" (Ferejohn 2008, 206).

Thus, they share with Rawls the claim that courts are "exemplary deliberative institutions". They note, though, that there is not just one way to be deliberative. Deliberation can be internal or external and has a distinct target in each case: "to get the group to decide on some common course of action", in the former, and "to affect actions taken outside the group", in the latter. One "involves giving and listening to reasons from others within the group", whereas the other "involves the group, or its members, giving and listening to reasons coming from outside the group" (Ferejohn and Pasquino 2004, 1692).

This distinction is a useful one and sheds light on separate functions and settings. The recognition of the court as an actual "deliberator" becomes more evident. Judges deliberate internally while striving to reach a single settlement, and externally while exposing their decision to the public. The authors then compare the features of a set of courts through these lenses. From what they managed to see, two main patterns are inferred: the US Supreme Court, which represents a model that centres on external deliberation, with little face-to-face engagement among judges and a liberality to express themselves in multiple individual voices; and the Kelsenian courts, which would value clarity and hence tend to communicate, after struggling in secret deliberation, through a single voice in most cases (Ferejohn and Pasquino 2002, 35). One archetype is outward-looking whereas the other prioritizes the inside. Despite all the dissimilarities between the courts under inspection,[5] the authors observe that

[5] They are considering the US Supreme Court, and the German, Italian and Spanish constitutional courts. They also examine the French Constitutional Council, but it does not fit these patterns because a system of parliamentary sovereignty brings variables that impede such stable categorization.

all, in their own ways, "retained the exemplary deliberative character" proclaimed by Rawls (Ferejohn and Pasquino 2002, 22).

This description is then followed by some intriguing explanatory hypotheses. The Kelsenian model, where the authority of review is concentrated exclusively in a special court, would require more unity "if ordinary courts are to be able to apply" the constitutional court's decisions (Ferejohn and Pasquino 2002, 33). The US model, characterized by a diffused authority to declare unconstitutionality across the judiciary, would require greater coordination between the Supreme Court and inferior judges. Hence the multiple individual voices, which allow the other actors of the legal system to anticipate the court's actions (Ferejohn and Pasquino 2002, 35).

Each deliberative pattern would be contingent on the political situatedness of the court. This independent variable would determine how deliberation looks like in each context. Both the internal and external aspects are always present, but "partly in conflict": "If the individual Justices see themselves as involved in a large discussion in the public sphere, they may be less inclined to seek to compromise their own views with others on the Court" (Ferejohn and Pasquino 2004, 1697–8). In that light, the US Supreme Court would be much more "externalist" than its European counterparts.

Once the two patterns are elucidated, Ferejohn and Pasquino culminate in a critical assessment of the US court and in a normative appeal for denser internal deliberation, *a la* European courts. American justices "ought to commit themselves to try hard to find an opinion that everyone on their court can endorse" (2004, 1673). Reforms would be necessary to galvanize justices to "spend less time and effort as individuals trying to influence external publics" and to focus on finding common ground, like genuinely deliberative bodies would do (2004, 1700). Despite the positive aspects that multiple opinions might have in some circumstances, they believe the US Supreme Court to have gone too far. The advisable step back, for them, comprises the two fronts of political behaviour: first, the authors recommend an institutional reform to make the court less partisan, namely, a new mode of appointment and tenure; second, they urge the legal community to demand from judges the compliance with deliberative norms oriented towards the pursuit of consensus and an ethics of compromise and self-restraint with regards to the public exhibition of personal idiosyncrasies.

Their series of articles, without doubt, made significant progress toward a broader understanding of how courts might or should be deliberative. The conceptualization of two sorts of deliberation and the call for reforms that confront both design and ethical issues are clear achievements. Their concern is fair: the liberality for multiple voices, and the absence of any constraint, ethical or otherwise, against such practice, harms the capacity of the US Supreme Court to play a deeper deliberative role. However, they have not gone far enough in fleshing out what that role is. In addition, the way they suggest a conflict between internal and external is sometimes misleading.

To start with, their definition of "external" is unstable. One can capture, in their writings, at least three senses of external deliberation: as reason-giving in public *tout court*, which is a common trait of any court; as multiple reason-giving in public, through individual opinions; or as an individualist attitude towards the public by

the disclosure of non-deliberated disagreement.[6] Sometimes, therefore, the authors seem to imply that external corresponds to the soloist US style, which permits individual justices to publicize their own statements regardless of internal dialogue. In other passages, they adopt a more flexible notion and accept that there are different manners to be externally deliberative, even through single opinions.[7]

The relation between external deliberation and the formal style of decision publicly delivered is, therefore, ambiguous: if it means simply the use of reason with the purpose of prompting and affecting the public debate, either single or multiple-voice decision could potentially do; if it means exposing the court's internal disagreement, then, indeed, multiple-voice would be the only way to go.

The connection between internal and external is also problematic. They suggest two unconvincing or, at best, under-demonstrated causalities. First, a bond between, on the one hand, a *per curiam* decision and the prevalence of internal deliberation at the expense of external; second, between a *seriatim* decision and external deliberation, which would overpower the internal. Even if the descriptive portrait is accurate, the inference of an inevitable causal link between the way judges interact among themselves and the way the decision is presented to the public remains strained and little illuminating.

Such formal criterion does not convey much about the substantive quality of reasoning and its ability to shape citizenry discussion. It does not matter whether the court manifests itself through *seriatim*, *per curiam* or something in the middle. As long as it is not oracular or hermetic, any decision may spark external deliberation.[8] A court could arguably struggle internally, but still manifest itself *seriatim*,[9] or be internally non-deliberative and speak *per curiam*. The degree of external deliberativeness, therefore, does not derive exclusively from the form, but more likely from the content and other circumstances. Comparative constitutionalism has several examples of *per curiam* decisions that electrified external argumentative engagement.

Again, from the descriptive accuracy of both patterns, it does not follow that there are inevitable trade-offs between the two, or that the maximization of one precipitates the respective minimization of the other. It is yet to be demonstrated that a court could not excel on both. One might certainly claim that the more the court deliberates internally, the greater chances it would have to reach a consensus

[6] Some extracts give an idea of the variety of definitions of external deliberation: "The Court rarely tries to speak with one voice, apparently preferring to let conflict and disagreement ferment." (Ferejohn and Pasquino 2002, 36); "part of the wider public process of deciding what the Constitution requires of us as citizens and potential political actors." Or later: "It may lead citizens and politicians to take or to refrain from actions of various sorts, or perhaps to respect the Court and its decisions. There is, however, no singular focus on a particular course of action that politicians or citizens must take." Finally: "to engage in open external dialogue about constitutional norms with outside actors." (Ferejohn and Pasquino 2004, 1697–8) "Its aim is to convince those who are not in the room." (Ferejohn 2008, 209)

[7] "There are various ways in which a court may play a role in external deliberation." (Ferejohn and Pasquino 2004, 1698)

[8] Even narrowly reasoned decisions may stir deliberation up. This is, for example, Sunstein's defence of minimalism (1995, 2001).

[9] One classic example is the House of Lords (Paterson 1982).

and manifest itself through a single opinion. This would not, however, discourage external deliberation. Otherwise, the mostly consensual European courts could not be said to motivate external deliberation.

Unless the court simply refuses to offer reasons to ground its decisions, external deliberation cannot be seen as a choice. The outside audience will be able to argue with those reasons regardless of the particular form through which they are communicated – *per curiam* or *seriatim*. But two fertile dilemmas still remain. First, the court needs to ponder whether to have internal deliberation, which, unlike the external, is indeed a choice. Second, the judges should contemplate, in the light of many other considerations, whether to express themselves individually or collectively. European courts certainly diverge from the US Supreme Court. This is not due, nevertheless, to their lack of capacity or willingness to spark external deliberation, but due to a cultural factor: a thicker "aim at unanimity" animates their internal processes (Ferejohn and Pasquino 2004, 169). The American practice, consolidated in the last decades, notoriously strays from that.

In overall, Ferejohn and Pasquino have raised important empirical and normative questions, but have not entirely answered them. Their endeavour to relate constitutional review to deliberation remains, if not too hasty, surely unfinished. There are at least six aspects to be further explored. First, the notion of external deliberation, if excessively tied to one of the forms of public display (the *seriatim*, in their case), fails to capture how the substance of the decision, be it *seriatim* or *per curiam*, may be important from both the empirical and normative prisms. There are ways of reasoning that, even if communicated in the *per curiam* mode, sensibly incorporate disagreements and respectfully engages with them. A cryptic *seriatim* would obviously obtain a lower score in that respect and would simply prevent the faintest external discussion.

Second, their notion of external deliberation still overlooks two different stages and practices in this public setting: the pre-decisional phase, where the court may competently inflame public debate and administer various techniques for receiving argumentative inputs, and the post-decisional, where the court delivers its product until a next round of deliberation on the same issue ensues. The task at each moment and the respective virtues that are necessary to carry them out are not coincidental. The distinction, thus, is not trivial.

Third, Ferejohn and Pasquino, despite defending internal deliberation, do not give a sufficiently comprehensive account of why it may be desirable, except for the values of uniformity, predictability and coordination. In other words, deliberation would be valuable only for the sake of these conventional formal principles of the rule of law. There might be more benefits in deliberation than intelligible and uniform reason-giving though.[10] The willingness to persuade and to be persuaded in an ambient

[10] Shapiro points to the distinction: "Some commentators try to capture this aspect of deliberation by reference to reason-giving, as when courts are said to be more deliberative institutions than legislatures on the grounds that they supply published reasons for their decisions. But significant though reason-giving is to legitimacy (particularly in the unelected institutions in a democracy), it does not capture the essence of deliberation." (2002, 197)

of reciprocity, as deliberation is usually defined, may not lead to consensus, but is no less important when dissensus withstands.

Fourth, when considering institutional design, they call for a qualified legislative quorum in the appointment process and for a fixed term of tenure. For them, this reform would approximate the US Supreme Court to the European ones, because its composition would be less driven by partisan behaviour. Despite crucial, this device still does not exhaust the set of incentives that may push the court to be more deliberative. It remains too reductive and narrow.

Fifth, they rightly add to their suggestion of institutional design a call for deliberative norms, that is, for an ethics that acknowledges the importance of deliberation. However, they do not flesh that out. Behind the abstract exhortation to engage in the process of persuasion, there are minute virtues that can turn such a task more discernible.

Finally, assuming that the legitimacy of constitutional courts is somehow connected to their deliberative quality, as many submit, and since deliberation is a fluctuating phenomenon, a theory must be able to measure different degrees of attainment of the ideal. Put differently, it needs to conceive of measures of deliberative performance. Therefore, if a constitutional court is to become a plausible deliberator, and not only a reason-giver or an interlocutor, these additional questions have to be tackled.

8.5 Conclusion

In a constitutional democracy, there are a variety of more-or-less deliberative institutions. They stand on some point between lawmaking and law-application, between broader or narrower discretionary compasses. Trivial though this may be, judicial tribunals, by a conventional definition, stand closer to the latter end of the spectrum. Closer, at least, than legislatures, most of the time. Constitutional courts, however, turn this convention more complicated. They are situated at a unique position of the political architecture. The distinctions between legislation and adjudication, on the one hand, and between politics and law, on the other, become much less stark than in ordinary instances. There is hardly a sharp criterion to draw that line. This is not due, as it is generally contended, to the open-ended phraseology of the constitutional text, but rather to the underlying quality of constitutional scrutiny: it frames, in a conflictive partnership with the legislator, the boundaries of the political domain.

Constitutional courts have no exclusivity over constitutional scrutiny. It is a fact, though, that they participate in such enterprise. This peculiarity has naturally charged courts with a heavy justificatory burden. The apprehension of a constitutional court through the lenses of its allegedly special deliberative circumstances and capacities may be a significant component of such a justification. That basis, though, remains fragile so far. If deliberation enhances the existential condition of constitutional courts, such courts need to be more than "exemplars of public reason" or "forums of principle", more than reason-givers or interlocutors. These expressions, and the respective expectations that they convey, are in need of deeper elaboration.

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