



Deliberation and Courts

The Role of the Judiciary in a Deliberative System

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Abstract: We lack analyses of the judiciary from a systemic perspective. This article thus examines arguments offered by deliberativists who have reflected about this institution and argues that the current state of deliberative democracy requires us to rethink the ways they conceive of the judiciary within a deliberative framework. After an examination of these accounts, I define the deliberative system and describe the different phases deliberative democracy has gone through. I then single out elements common to all systemic approaches against which I test whether the regard that the authors show for the judiciary in deliberative terms can be maintained and argue in the negative. I conclude by pointing at the necessity to think about the definition of deliberative systems, and to the value of these discussions for debates on the legitimacy of judicial review when it is exercised under the form of judicial supremacy.

Keywords: courts, deliberative democracy, judicial review, judicial supremacy, judiciary, systemic turn

This article examines systemic approaches in deliberative democracy and, within that context, rejects judicial supremacy, which is the finality with which courts of law authoritatively interpret constitutions. It concludes that, notwithstanding the fact that deliberative systems provide room for the judiciary, that room is not enough as to grant courts the final word in the determination of constitutional meaning.

We lack analyses of the judiciary after the systemic turn in deliberative democracy. Before the systemic approach was generally and explicitly endorsed by deliberativists, some scholars saw the courtroom as an ideal *locus* where the conditions of deliberation could be met. Present-day deliberative democratic theory does not provide us with an image of that sort. I thus examine the opinion some have held concerning the deliberative capacity of judges and argue that their understanding of the courtroom is not the proper approach to follow after the systemic turn in deliberative democracy. I show that endorsing a systemic approach entails a rejection of a privileged treatment of judges in terms of their deliberative capacities, and that this has implications for debates on judicial review of legislation. Significantly, deliberative systems





are incompatible with judicial supremacy, which I understand as the result of two independent but often concurrent features: first, that some legal scholars consider the judiciary the ideal repository of constitutional meaning and, second, that several legal systems and actual practices increasingly transfer political power to their courts in matters of constitutional interpretation. The upshot of these features 'culminates in the extreme position that (a) there is no constitutional problem that cannot be solved by the courts and (b) no constitutional problem is truly solved until it is solved by a court' (Tomkins 2010: 3).

The article first describes the main developments of deliberative democracy and critically examines the role Rawls, Eisgruber, Habermas and Alexy (henceforth, Rawls et al.) ascribed to the judiciary within the theory before systemic approaches were explicitly endorsed. They praised courts on the basis of their alleged ability to engage in rational discourse, provide parties with a hearing and/or act as argumentative representatives of the people, among other arguments. Others have also underscored the judges' deliberative capacities, but I focus on these authors as their arguments cover most of the defences of such idealistic views. Second, the article describes the main tenets of systemic approaches to deliberative democracy. The article then reflects on these changes and claims that the position of courts fostered by Rawls et al. are incompatible with current developments in deliberative democracy. To do this, I single out three elements common to systemic approaches: an extensive conception of deliberation, an interaction-dependent understanding of legitimacy and a holistic orientation in terms of the evaluation of the system. I thus reassess previous understanding of courts on the basis of these considerations.

The final section encourages further reflection on three areas: First, scholars should determine whether or to what extent systemic considerations merit priority over individual ones in processes of systemic deliberation. Second, empirical research should remain pressing and be undertaken from a systemic perspective. Third, the systemic turn opens new possibilities on the debates on the legitimacy of judicial supremacy. The adoption of systemic approaches constitutes a good reason to reject the final character with which some courts interpret constitutional law.

The article contributes to the literature by examining the relationship between courts and deliberation, which has been neglected after the systemic turn. It also improves the understanding of deliberative systems, something necessary provided that the theory is under development (Mendonça 2013: 19). Finally, it provides an argument within deliberative democracy, to reject the supremacy of the judiciary in constitutional interpretation.

Deliberative Democracy and the Judiciary

Deliberative democracy's core claims are that collective decisions be adopted via deliberation, with the inclusion of all potentially affected (Elster 1998: 8).



This operates as justification as well as a condition for the legitimacy of the decisions adopted.¹ Additionally, it has the nature of a regulative ideal – a horizon toward which decision-making processes should strive to attain (Cohen 1997: 67, 72–79; Habermas 1993: 56; Kant 1996: A569–B597; Mansbridge et al. 2010: 65).

Deliberative democracy has been theorised with emphasis on features that some have identified as phases, which overlap to some extent: normative, empirical and systemic.² This description is rather linear merely for explanatory purposes. One must not assume that deliberative democrats' concerns have changed over time, as if each new concern superseded preceding ones, nor suggest that the literature advances as if the systemic stage debunked previous ones. The evolution of deliberative democracy is more complex than what a linear story may tell, but it is instrumental to my purposes and it does not betray the theory at any level. As it happens, we can find systemic perspectives, for example, in the work of Habermas (1996), particularly in his idea of a *two-track* model of democracy, as well as in Cohen's (1997). Yet, the perspective has gained distinctiveness by expanding not only the scope of fora considered optimal for deliberation but the range of types of speech seen as deliberatively accepted. This explains why prominent deliberativists endorsed it through a manifesto (Mansbridge et al. 2012). With that said, I proceed now to explain these phases.

First, the normative stage established the distinctiveness of deliberative democracy by emphasising the epistemic, educational and/or moral benefits of employing processes of deliberation.³ Deliberation became the characteristic feature of the model, differentiating it from other perspectives highlighting the market rather than the forum (Elster 1986). Manin emphasised the importance of deliberation for the legitimacy of political decisions (1987: 359), and Cohen defined deliberative democracy as 'an association whose affairs are governed by the public deliberation of its members' (1997: 67). For Bohman, during early formulations of the theory 'deliberation was always opposed to aggregation and to the strategic behaviour encouraged by voting and bargaining' (1998: 400). Also fundamental was Habermas' contribution to discourse ethics (1981), and then to law and politics (1990: 83; 1996; Dryzek 2000: 2; Martí 2006: 15).

One can also identify an empirical turn in deliberative democracy.⁴ Consequently, the theory informed disciplines such as public law, international relations, policy studies, identity politics, political talk, social psychology and led researchers to conduct experiments on areas as varied as focus groups, town meetings, school desegregation, deliberative polls, online deliberation, citizen summits, community policy programmes, participatory designing of health systems and city's budgeting, and so on.⁵ Authors showed interest in institutional problems by 'pointing out empirical problems and obstacles that cannot always be anticipated by conceptual argument alone' (Bohman 1998: 401).



Currently, we witness a turn towards a systemic stage, which seeks 'to develop a comprehensive account of deliberative democracy as a large-scale system' (Kuyper 2015: 54). The upcoming sections elaborate on this approach.

The empirical turn suggested proposals for turning the ideal into something feasible, which were often motivated by divergent views on micro and macro deliberation.⁶ Micro deliberation, the one taking place in mini publics like citizen juries, deliberative polls and so on, emphasises deliberation in small-scale sites, where the theoretical requirements of deliberative democracy may be tested while coping with the practicalities of experimenting at large-scale societal levels.⁷ Conversely, macro deliberation is concerned with participation and inclusion in large societal scale (Lafont 2015: 40–41).⁸

The relations between these levels is complex, since the quality of deliberation fostered by micro accounts and the amount of public participation demanded by macro accounts are in tension (Bohman 1998: 400; Habermas 1996: 107): increasing one may come at the cost of the other.⁹ Hence, scholars are somehow forced to choose between the inclusion of those potentially affected by the decisions adopted (Lafont 2015: 15; Young 1999) and the reason-giving demands of the process, measured by the rationality of the arguments wielded (Fishkin 2009: 191).

One solution proposed to deal with this has been a division of labour that takes both elements into account. Accordingly, institutions like legislatures, citizen review boards and executives would embody the participatory and inclusive pole, while judicial institutions would be ideal candidates for the reason-giving, argumentative side of the tension (Papadopoulos 2012: 142; Sen 2013: 308; Zurn 2007: 166).

Several deliberative democrats and legal scholars who value deliberation have supported the aforementioned division of labour between participatory and expert deliberative institutions, a division in which courts find a significant place.¹⁰ With different normative commitments and via different strategies, John Rawls, Christopher Eisgruber, Jürgen Habermas and Robert Alexy are authors who have considered that the court satisfy this dualistic deliberative criterion for democratic legitimacy (Zurn 2007: 166–184). They are sympathetic to the view that 'if ... we are trying to locate the institutions where reasoning and deliberation play an important role in public life, it is apt to begin with courts and especially with courts dealing with constitutional issues' (Ferejohn and Pasquino 2002: 22). I choose to scrutinise these authors given the prominence of their work. Second, I bracket parts of their work insofar as their considerations have direct bearings on legal and constitutional theory in deliberative terms. Portraying Rawls as a deliberative democrat is reasonable, although admittedly contestable. Yet, there is literature supporting his inclusion and his work has inspired other deliberative democrats in the construction of their own accounts.¹¹ My discussion of Habermas' account is justified by its evolution toward the application of discourse ethics to a discourse theory where law gains a prominent place as a subsystems' articulator. Eisgruber's





and Alexy's accounts are worthy of analysis given their concern with justifying important hierarchical roles for the judiciary by accentuating its deliberative capacity. In Christopher Zurn's words, these are authors who 'can plausibly be considered among the ranks of those deliberative democrats who supply explicit arguments to support a political division of labour between populist, majoritarian institutions and expert deliberative institutions, a division of labour that would apparently satisfy the dualistic deliberative criterion for democratic legitimacy' (2007: 166).

Two further clarifications are in order. First, I do not focus on these authors because their opinions regarding the judiciary exhaust, or are the most salient features of, their theoretical concerns. Instead, I select specific aspects of those concerns for my own purposes. Second, my question is whether the courtroom is the ideal forum for *deliberation*. I emphasise this because the aforementioned authors do not distinguish between this and another distinct category, namely *adjudication*. This could be because they discuss high courts, that is tribunals whose operation tends to blur the distinction between the two terms. It is admittedly misleading to claim that what a constitutional court does when deciding a case is to act as an arbiter between two parties in the same way that lower courts solve disputes between two litigants, that is that all they do is to adjudicate and not deliberate – things are more complex than this. Nonetheless, both terms are different and a conceptual elucidation is necessary as they may be mistakenly used without distinction.

The term adjudication answers how judges decide cases, which in turn is ambiguous between reasoning to establish the content of the law, on the one hand, and reasoning from the content of the law to the decision a court should reach in a specific case, on the other (Dickson 2015: 3–4). It does not exhaust the uses of the concept deliberation, which is not limited to the vocabulary of legality, as it can be exercised through different discursive forms. Adjudication is not, then, the only device giving 'formal and institutional expression to the influence of reasoned argument in human affairs' (Fuller 1978: 366).¹² Moreover, there is a difference in relation to the purposive nature of both concepts, which in adjudication is that of reaching decisions. Deliberative procedures, on the other hand, may or may not end up in a decision through complementary mechanisms. Deliberation may include voting or bargaining, but it may also finish without any decisions adopted. With this clarified, I now move to the examination of scholars who seem to be trapped in confusions of this sort.

Rawls saw the U.S. Supreme Court as the exemplar of public reason and its discourse as the best instance of the language deliberators should use given the expected neutrality of public reason (Rawls 1996: 231–240), 'carefully eschewing reference to citizens' diverse comprehensive worldviews, while nevertheless rendering decisions based on fundamental political values shared by all reasonable citizens. Courts are democratic because they exemplify how to *speak* in the political language shared by citizens' (Zurn 2007: 167).





Rawls advanced three arguments in support of this idea. First, building on Bruce Ackerman's dualistic democracy (1991: 3–33), he thought that in applying public reason, courts 'prevent[ed] the law from being eroded by the legislation of transient majorities, or more likely, by organised and well-situated narrow interests skilled at getting their way' (Rawls 1996: 233). Second, 'public reason is the sole reason the court exercises' (1996: 235). Neither citizens nor legislators need be guided by public reason, as they may prefer to deliberate from and vote for their own comprehensive views when matters of justice are not at stake. Judges, on the other hand, do not have recourse to any specific comprehensive view (1996: 235–236). In addition, the court's status as a deliberative institution 'is further buttressed by its ability to invigorate and galvanize public discussion, even at times when the court's own reasoning might itself fall short' (Sen 2013: 26–27). Third, the court is exemplary as a result of its members' capacity to give public reason vividness and vitality in the public forum by authoritatively and reasonably adjudicating on fundamental political questions (Rawls 1996: 237). It is important, however, to stress that these remarks do not imply that Rawls was advocating judicial supremacy, something which he explicitly rejects (1996: 237, 240).

In turn, Eisgruber justifies the Supreme Court's prominent place in U.S. politics by interpreting the Constitution as a 'practical device that launches and maintains a sophisticated set of institutions which, in combination, are well suited to implement self-government' (2001: 3). He thinks the reviewing powers of the court should be regarded as practical mechanisms implementing a 'subtle form of democratic rule'. The court ought to be understood as a representative institution 'well-shaped to speak on behalf of the people about questions of moral and political principle' (2001: 3, 5), because, unlike legislators, of the institutional incentives judges are free from electoral incentives (Doherty and Pevnick 2013; Zurn 2007: 172). Here the division of labour results from the justices' insulation from the political process, which allows them to speak on behalf of the people and remain faithful to principled reasoning even in the face of political and social pressure. Hence, judges represent the people's convictions about what is right and wrong, and make feasible the aspiration that values should take priority over interests. Because elected representatives must please voters to get re-elected, they are likely to represent the people's interest. Conversely, politically insulated justices' distinct contribution lies in their position 'to represent the people's convictions about what is right' (Eisgruber 2001: 5).

Turning now to Habermas, I should express the caveat that his main concern is with constitutional review rather than with *judicial* constitutional review. The latter is instrumental to the former, as for him whatever institutional arrangement is ultimately adopted must serve the purpose of securing the constitutional conditions of deliberative politics (1996: 279–280). Courts are instruments for meeting those conditions, again for reasons of distribution of labour.





Habermas' claim hinges on a distinction between discourses of application and discourses of justification. Accordingly, he sees constitutional review as the application of already justified constitutional norms to ordinary legislation. The adjudicator assumes the role of an impartial referee between citizens and their representatives; it ensures that public opinion is directed into the legally structured public sphere by keeping open the channels of political change, guaranteeing respect for the individuals' legal, social and political rights. It does this by 'scrutinizing the constitutional quality and property of the reasons justifying governmental action, and ensuring that the channels of influence from independent, civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers' (Zurn 2007a: xiii–xiv).

Habermas' confidence in judges thus hinges on their capacity to engage in constitutional principled deliberation, something consistent with Habermas' Dworkinian premises (1996: 204–224). Yet, he does not argue convincingly for championing the courtroom as the best institutional forum to perform these tasks. He considers alternative institutional arrangements like special legislative committees staffed by legal experts which would induce legislators to 'keep the normative content of constitutional principles in mind from the very start of their deliberations' (1996: 242). Yet, he discards them as he thinks ordinary legislative assemblies do not have a special disposition to consider the content of constitutional rights compared to the disposition they have toward ordinary statutory content. He then engages in a discussion on the interpretive approaches and methodological issues raised by the practices of the U.S. Supreme Court and the German Constitutional Court, leaving a gap in terms of the justification of their constitutional reviewing faculties. Zurn notes that 'these arguments about how a constitutional court should adjudicate already presuppose that the institutionalisation question is settled. Perhaps the richness of the German and American jurisprudential debates simply distracts Habermas from a more wide-ranging consideration of issues concerning the separation of powers and institutional design' (2007a: xv).

Alexy follows an analogous approach. Generally, judges 'have no direct legitimacy and people have, as a whole, no possibility of control by denying them re-election' (2005: 579). Alexy thus claims that their compatibility with democratic government rests on understanding representation as a relation between a *repraesentandum* and a *repraesentans* that can be exercised through elections, but also via argumentation. In his view, there are two types of representation, one decisional justified by elections, and one argumentative or discursive.¹³ Under this scheme, democracies are not justified merely by the presence of elections but by the rationality of the procedures by which rules and principles are identified and deliberatively applied to individuals (2005: 579).

What Alexy calls discursive democracy (cf. Dryzek 2000: 3) is thus linked to conditions of argumentative representation, which connects legal and politi-





cal practices to a dimension of correctness in discursive terms. In turn, argumentation ought to be exercised by balancing constitutional principles, a practice that judges are well suited to perform. It follows that the domain of constitutional rationality is the domain of courts entrusted with the task of balancing rights, understood as requirements of optimisation. Legislatures, on the other hand, are not burdened with the demanding requirements of justification in terms of proportionality and balancing (2002: 47; 2005: 572–573; 2014: 52).

These scholars give high courts a distinctive place in the political system because of their capacity to engage in principled deliberation. A systemic approach, however, poses difficulties to this position. Hence, I will show that systemic approaches pull in the opposite direction, leading to the conclusion that constitutional debate in courts is one special type of discourse, albeit one insufficient to justify a prominent hierarchical place for the judiciary. But first, the next section examines what a systemic approach is.

The Systemic Turn

Democracies are entities in which a wide variety of institutions, associations and sites of contestation accomplish political work. There is no forum, irrespective of its competence or composition, with enough capacity to legitimate decisions simultaneously at the individual and at the societal level.¹⁴ In view of these features, some scholars have advocated for a deliberative system, that is a ‘set of distinguishable, differentiated, but to some degree interdependent parts, often with distributed functions and a division of labour, connected in such a way as to form a complex whole’ (Mansbridge et al. 2012: 5).¹⁵ Hence, a deliberative system ‘encompasses a talk-based approach to political conflict and problem-solving – through arguing, demonstrating, expressing, and persuading’ (ibid.). They further claim that ‘[t]he ideal of a deliberative system [...] is a loosely coupled group of institutions and practices that together perform the three functions [...] [of] seeking truth, establishing mutual respect, and generating inclusive, egalitarian decision making’ (2012: 22).

A deliberative system thus consists of an interrelated set of individuals, civil associations and formal political institutions gathered in a political unit, linked in such a way as to form a complex whole, and engaged in the production, transformation and expression of considered political emotions, preferences, discourses and arguments, in the context of solving conflicts and adopting legitimate, respectful, inclusive and egalitarian collective decisions in an ongoing fashion. The system covers both poles of a continuum ranging from individual and micro to macro deliberative sites, including all sorts of political actors regardless of their institutionalisation, discursive capacity or influence. A system studies parts in light of their contribution to the overall decision-making process in the polity to which they belong, bolstering the capacities of some of them and potentially reducing the influence of others.



Systemic approaches accentuate the importance of reason-giving in decision-making processes. Now, what characterises the reason-giving aspect in a deliberative system is the consideration of non-coercive forms of talk, justification and argument, like rhetoric, bargaining and emotions (Dryzek 2000: 1–2) as potentially accepted as deliberative. This is because individuals and institutions differ in their argumentative capacity, experience, epistemic competence and so on, vis-à-vis other individuals who may justify their preferences in more rational ways.

The examination of the parts accomplishing political work aims at determining to what degree they influence a process of decision-making in a societal scale. This, however, does not mean that all that matters in a deliberative system are those sites expressly designed for adopting decisions. What it means is that individuals and sites become subjects of study to the extent they can contribute to those decisions within the system. That explains why, for example, university debates, radio and television, informal talk in private and public spaces become relevant even though they are not primarily oriented towards adopting decisions (Mansbridge 1999: 212). The Habermasian two-track model is thus expanded by broadening the forms of communication falling under our idea of deliberation, including different varieties of everyday talk, and by moving the field of deliberative democracy beyond its perceived obsession with formal political fora and processes.¹⁶ Behind these considerations lies Jane Mansbridge's notion of the 'political', namely "that which the public ought to discuss", when that discussion forms part of some, perhaps highly informal, version of a collective decision' (1999: 214).

Incorporating the contributions of different sites of deliberation and understanding how they relate to each other allows us to think in terms of large-scale implications (Chambers 2013: 201–202). Endorsers of systemic perspectives enquire how every site could contribute to the deliberative process, examining the competence of all the relevant actors and how their capacities can be used to adopt decisions. Rather than striving for accomplishing decisions of high justificatory quality and placing major burdens of legitimacy on them, they identify all the potential deliberative sites, *prima facie* accepting their capacity, improving them when necessary but making use of their contributions as limited as they may be, so the legitimacy of the ultimate decision is distributed across the board.

Finally, the deliberative system serves epistemic, ethical and democratic functions (Mansbridge et al. 2012: 10–13).¹⁷ It produces preferences and decisions grounded in relevant reasons, tested against others who have a stake in the results of the process who, in turn, offer their own perspectives, arguments and preferences to reach considered and fair agreements (ibid.: 11). Adding to these epistemic desiderata, an ethical function implies that a deliberative system must promote mutual respect and take individuals as ends and not as means, as self-authoring sources of reasons and claims. The democratic function supposes the inclusion of all claims, viewpoints, preferences and interests



in egalitarian terms, and is perhaps the most central function of a deliberative system (Mansbridge et al. 2012: 11–13).

Deliberative Systems and Courts

We are now in a position to assess the role of the judiciary within a deliberative system. To do so, I single out three elements common to systemic approaches: (1) an extensive conception of deliberation, (2) an interaction-dependent understanding of legitimacy and (3) a holistic orientation. The assessment leads to the conclusion that, because courts of law should not be seen as ideal instantiations of deliberation, there are good reasons to question the final character with which they interpret constitutions.

An Extensive Conception of Deliberation

Systemic approaches expand conceptualisations of deliberation to incorporate everyday talk, which anchors ‘one end of a spectrum at whose other end lies the public decision-making assembly’ (Mansbridge 1999: 212). That includes ‘talk among both formal and informal representatives in politically oriented organisations, talk in the media, talk among political activists, and everyday talk in formally private spaces about things the public ought to discuss’ (ibid.: 211).

This, which is one of the critical moves that allowed the systems approach to emerge (Parkinson 2012: 153–154), is incompatible with a juristocratic division of labour. For a start, these views of courts relegate public reason to one aspect of the full array of available forms of talk, limiting the deliberative public sphere to those who access the court and articulate their claims in the jargon of constitutional and legal experts. They rely too heavily on rationalist instantiations of deliberation, leaving little room for alternative forms of discourse, such as bargaining, rhetoric or emotions.

Systemic approaches welcome alternative sorts of speech to the extent they are justified deliberatively.¹⁸ This entails allowing non-coercive forms of negotiation such as convergence, incompletely theorised agreements, integrative negotiations and fully cooperative distributive negotiations, as well as rhetoric, all of which incorporate self-interest and/or non-coercive power (Dryzek 2000: 1–2; 2010; Mansbridge et al. 2010: 70–72). Hence, neutrality regarding competing conceptions of the good, the one that Rawls sees in the Supreme Court, does not seem like a sufficient argument to see courts as exemplars of a deliberative ideal anymore.

Eisgruber’s account is not promising either. Failing to consider informal and non-judicial talk as conducive to principled decisions is at odds with perspectives that ground political legitimacy in the interaction of the different parts of a system (Chambers 2012: 71). Similarly, Alexy’s distinction of forms of representation is incompatible with these systemic features, for he relegates



electoral representation to a decisional sort of legitimacy, leaving argumentative representation to the reasoning performed by the courts. For him, the discourse embodied by the method of balancing principles justifies the deliberative representative task courts are to perform. Conversely, systemic approaches start from the opposite assumption that no forum can by itself legitimate most of the decisions adopted in a polity, let alone all of them (ibid.: 65). They evaluate the legitimacy of decisions considering the full array of available discourses, so that the concept of public reason be enlarged 'to encompass a "considered" mixture of emotion and reason rather than pure rationality' (Mansbridge 1999: 213). This is something that courts are not fit for doing. Judges are required to justify their decisions on the grounds of legal and constitutional sources through the application of a second-order type reasoning (Raz 1975: 36, 39–40). That is, courts should not apply standards which are not seen as valid law. Emotions, political and philosophical non-legal arguments are thus discarded as valid forms of discourse for them (Waldron 2009a, 2009b).

An Interaction-dependent Understanding of Legitimacy

Deliberative systems are composed of interrelated parts that accomplish political work through different discourses and at different stages of the decision-making process. The resulting division of labour is, thus, different from the one envisioned by Rawls et al., whereby judges decide on matters of principle, leaving matters of policy and expediency to majorities. From a systemic perspective, this is an oversimplified picture of the political fora available in modern democracies, which fails to consider the myriad discourses that generate inputs in both matters of policy and principle.

The division of labour in a deliberative system aims at including every actor accomplishing political work, including courts and legislatures, but also interest-group associations, political parties, media, universities, think tanks, blogs, movies, schools, organised advocacy groups, foundations, private and non-profit organisations, individuals and so on.¹⁹ Relying on a single forum to embody every ideal of deliberation places an unnecessary burden on such a site, a burden which should be distributed across the board.²⁰

Sequential models exemplify how legitimacy in a deliberative system should be sought in different settings. Robert Goodin envisages representative democracy as proceeding in different stages (2005: 189), exploring 'the possibilities of dividing up the deliberative task, assigning different portions of it to different agents, and holding them to different deliberative standards accordingly' (2005: 182). He presents this as an 'alternative to the "unitary" model of deliberation that presently dominates discussion among deliberative democrats' (2008: 186). Similarly, Carolyn Hendriks's notion of integrated deliberation occurs in a variety of discursive spheres in which public discourse materialises through the exposition and discussion of different viewpoints where different agents play different roles at different times (2006: 499).





Judges thus become one group among others who are welcome to give inputs, arguments and solutions to collective problems in different ways, with different degrees of expertise. The idea is captured in John Dryzek's notion of discursive legitimacy, according to which a procedure is legitimate 'when a collective decision is consistent with the constellation of discourses present in the public sphere, in the degree to which this constellation is subject to the reflective control of competent actors' (2001: 660). The second part of this quote reminds us that a systemic perspective does not deny that there are people with different degrees of expertise. That control is not, however, itself the condition of legitimacy, which rather rests on the acceptability of the decision on the grounds of its discursive inclusion. So, even if, *arguendo*, one accepts courts as ideal controllers of the political process,²¹ the problem of the legitimacy of the decision remains distinct. Such a problem in a deliberative system is rather Aristotelian: 'it is possible that the many, no one of whom taken singly is a sound man, may yet, taken all together, be better than the few, not individually but collectively, in the same way that a feast to which all contribute is better than one supplied at one man's expense' (Aristotle 1281a39).

Admittedly, Aristotle's argument depends upon the epistemic competence of the decisional body. Moreover, he values participation instrumentally, something which is not to be accepted unconditionally. Yet, it illustrates that deliberative systems cannot place the burden of legitimacy on one agent, courts included.

A Holistic Orientation

This element looks at the relationships between the parts and the system and at the sort of criteria determining how the system fares (Mansbridge 1999: 221). Should systemic or holistic considerations prevail over the individual level or should it be the other way around?

Systemic approaches relax the demands of epistemic competence and the standards of deliberation by which individual sites are measured; deficiencies in one site may be compensated by other parts. This, together with Dryzek's contention that '[i]n the end, it is systemic considerations that merit priority' (2010a: 335), shows there is a tendency in the literature to favour holism (the system over the parts) rather than individual sites. In Mansbridge's wording: 'the criterion for good deliberation should be not that every interaction in the system exhibit mutual respect, consistency, acknowledgement, openmindedness, and moral economy, but that the larger system reflects those goals' (1999: 224).²²

The balance between both dimensions is determined by the epistemic, ethical and democratic criteria mentioned earlier. However, 'they give us little purchase in guiding our judgement on either the justification of non-deliberative speech acts and practices or the relative weight to give these particular acts and practices against the deliberative system as a whole' (Owen and Smith 2015: 225). It then becomes important to develop those criteria so that the



evaluation of deliberative quality does not occur only at the systemic level, thus avoiding Mansbridge et al.'s fear of 'falling into the blind spot of old style functionalism' from becoming a reality (2012: 19).

This tendency raises concerns about systems that meet those epistemic, ethical and democratic conditions but may still show deficiencies at the individual level, with deliberation taking place only between elites or where individual participation is passive or in-existent. In republican terms, the danger of domination emerges insofar as the contributions individuals make to the system are unheard. If what matters is increasing the quality of the system irrespective of a malfunctioning individual sphere, then some individuals may be rendered unfree if analyses showed a good performance at the systemic level.

Now, courts may gain importance in light of this third element, as their functional orientation toward individual cases may help detecting failures at the level of individuals potentially excluded from systemic benefits. Indeed, judicial procedures exist in virtue of the state's duty to organise institutions where individuals resolve their discrepancies, which could work as a way of achieving a deliberative minimum at the individual level. Courts are especially useful in contexts where power relations are unlikely to favour the worst off for they can adjudicate irrespective of the power the parties may have, thus providing the necessary conditions for non-coercive and non-abusive exercises of self-interest. Courts would serve the system, make individuals visible and test how general norms are being applied to specific persons.

The resolution of those controversies does not require the creation of additional procedures or special competences. It would certainly require the existence of a system of lower courts repairing individual grievances and rights infringements, and higher courts exercising their nomophilactic function of a uniform application of the law. It does not imply, however, institutions or practices like judicial supremacy, whose exercise changes normative statuses of individuals who are not parties at the case decided by the court. Courts could then contribute by counteracting the effects of a holistic perspective by granting individuals the chance to participate in an institution functionally oriented to hear individual grievances and to provide a hearing to air them. This is something that, within the dominant perspective in deliberative systems, represents an important institutional contribution.

Systemic approaches are antithetical to practices where judicial supremacy is the norm and, instead, justify policies redistributing political power from courts to other fora. Hence, the room available for the judiciary in a deliberative system is more limited than the exercise of strong judicial review of legislation such as the one exerted in countries where courts have abstract and final reviewing powers.²³ None of the arguments here advanced justifies that decisions adopted by courts at the individual level generate *erga omnes* effects, or obligations for other bodies of government to read norms in the same ways courts do. Cases may still reach higher courts, and bills may still be evaluated by constitutional courts, but the arguments I have provided limit the effect of their decisions to



what could be seen as *warning signs* and not as authoritative prescriptions with illocutionary effects on other agents – they justify judicial review but not judicial supremacy. In Larry Kramer’s words, this sort of institutional arrangements

should not entail major changes in the day-to-day business of deciding cases [...] [w]hat presumably would change is the [judges] attitudes and self-conceptions as they went about in their routine [...] responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions (2004: 253).

Two institutions consistent with this role come to mind, namely the U.K. declaration of incompatibility and the Canadian notwithstanding clause. The first, regulated by the Human Rights Act 1998, allows judges to determine whether legislation is inconsistent with the European Convention of Human Rights. Courts are mandated to read the convention and the legislation as compatible (section 3.1), so the declaration is issued only in the extreme that such compatibility is not possible. The challenged provision remains valid and producing full effects (section 4.b) and government and parliament have the possibility to initiate a fast-track legislative procedure (section 10). This remains, however, a faculty they may or may not exercise according to their own judgment. The second allows Parliament or the legislature of a province, under section 33 of the Constitution, to declare that an Act or a provision shall remain operating notwithstanding a provision included in section 2 or sections 7 to 15. These are cases where courts are limited in their reviewing powers, and where institutional dialogue may be initiated in ways that government, the legislature and the courts may complement each other.

These institutional arrangements have two advantages from a systemic perspective: first, they help cope with the problems raised by holism, as explained in this section. Second, they allow the connection to be made between the individual and the systemic level in which legislatures are generally placed. Courts thus act as informational transmission belts between citizens individually considered.

Conclusions

Systemic approaches are incompatible with Herculean images of judges (cf. Dworkin 1978: 105). The accounts represented by Rawls et al. do not provide guidance as to how the distribution of labour they favour would hold in the current state of deliberative democracy, nor as to how judicial discourse would make sense from a systemic perspective, which sets different thresholds in terms of the types of reasoning qualifying as deliberative. It is hard to see how these sorts of theories would be sensitive to non-legal, non-expert, non-technical everyday talk in the sense that they become dispositive, that is self-standing reasons for decisions.





Deliberative scholars should reflect upon, first, whether systemic considerations merit priority. The epistemic, ethical and democratic functions elaborated by Mansbridge and colleagues are insufficient to specify when systemic considerations yield to the correction of distortions at the individual level. Courts may be useful in correcting those distortions, but while those criteria are unclear, it remains difficult to specify any institutional division of labour. Researchers should theorise about these criteria and about the roles individuals occupy in order to avoid the risk of an insensitive and insensible holism.

Second, empirical research should remain pressing from systemic perspectives – the division of labour between the parts of the system will be better understood if we acquire more knowledge about different actors' deliberative capacities. The vision of courts as ideal deliberators bypasses many agents and interactions between them. It is also a contested empirical claim as under certain institutional conditions ordinary citizens may also adopt decisions on principled grounds.²⁴ What is more, scholarship on deliberative measurement does not give much room for the claim that judges deliberate at all during key parts of the judicial process: given the anonymity of the ways in which they discuss the merits of their cases, we have limited knowledge of whether those discussions conform to our conceptions of what deliberation should be. This is important for a related problem: courts do not deliberate for the pure sake of deliberation but for the sake of making decisions. Should they have a special place in virtue of this feature? We should answer in the negative because the link between deliberation and decision-making is not something to be taken at face value. Deliberative systems are characterised by the presence of several parts deliberating without aiming necessarily at making decisions. Why should those parts receive any less attention than their decision-making-driven counterparts?

Third, the case made here reinforces the arguments against privileged positions of courts in the authoritative determination of constitutional meaning, namely judicial supremacy. In spite of their variety,²⁵ in the core of those arguments lies the suggestion that we should question the supposition that rights are better protected by this practice than they would be elsewhere, and that apart from the outcomes courts generate, judicial review is democratically illegitimate (Waldron 2006: 1346). Although they do not settle matters by themselves, my arguments strengthen both dimensions in the following sense: on the outcome-side of the argument, systemic approaches' openness to every forum accomplishing political work increases the available inputs and solutions to political problems that courts, in their isolation, may not be able to envisage. Judges may find good solutions to hardcore political and moral issues,²⁶ but given the circumstances of politics and the diversity of viewpoints available in contemporary societies, more heads are likely to come up with a broader set of solutions than a few judges sitting on the bench would – Aristotle resonates here.

On the procedural side, the notion of legitimacy under a deliberative system creates a tension with the idea that the final say on constitutional matters falls





on a politically insulated constitutional court (Doherty and Pevnick 2013; Hamilton 1948: 396). Provided that systemic approaches allocate legitimacy across several actors, we should give political power to institutions that incorporate as many of those actors as possible. Courts may be one of them, but chances are that other institutions have better credentials as inclusive agents.

These arguments represent a support to those wielded against judicial review of legislation and do not imply its total rejection. What a systemic approach has no room for is judicial supremacy.

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Acknowledgements

I wish to thank the two reviewers of this journal for their comments and suggestions. I am also thankful to Adrian Blau, Udit Bathia, Lorenzo Zucca, Koldo Casla, Johan Olsthoorn, Sebastian Reyes, Andreas Schäfer and Raphaël Kies for their comments on earlier versions of this article. This article was presented at the 2016 ECPR Joint Sessions in Pisa at the workshop 'Deliberative Systems in Comparative Perspective: Conceptual, Methodological, and Empirical Innovations'. I wish to thank its organisers, John Parkinson, Jonathan Kuyper and André Bächtiger as well as its participants for their comments and helpful suggestions. This research has been funded by CONICYT, Becas Chile programme for the development of Advanced Human Capital (2013–2017).

Notes

1. Bohman (1996: 4; 1998: 401, 402; 2009: 28); Chambers (2003: 308); Cohen (1997: 67); Gutmann and Thompson (1996: 4); Manin (1987: 359); Martí (2006: 22).
2. Chambers (2013: 201–220); Dryzek (2010b: 6–10); Kuyper (2015: 53–54); Lafont (2015: 40–41); Mansbridge et al. (2012: 1–3); Owen and Smith (2015: 213–214).
3. Bohman (1998: 400); Chambers (2003: 307); Fishkin (2014: 27–31); Martí (2006: 40–52).
4. Bächtiger et al. (2010: 32); Bohman (1998); Kuyper (2015: 53–54); Lafont (2015: 40); Owen and Smith (2015: 214); Ryan and Smith (2014: 9).
5. Chambers (2003); Delli Carpini et al. (2004); Fung (2003); Goodin and Dryzek (2006: 221–225); Ryan and Smith (2014: 12); Schkade et al. (2010).
6. Goodin and Dryzek (2006: 220); Lafont (2015: 41); Mansbridge et al. (2012: 1); Owen and Smith (2015: 214).
7. For example, Fishkin (1997); Fung (2003); Gastil and Levine (2005); Goodin and Dryzek (2006); Grönlund et al. (2014). Also, see the case studies available in participedia.net (Fung and Warren 2011).
8. For examples of macro accounts, see Ackerman and Fishkin (2004); Elster (1998); Fishkin (1997); Habermas (1996); Rehg and Bohman (1996).



9. Cohen (2009: 257); Dryzek (2010a: 26); Goodin and Dryzek (2006: 220); Lafont (2015: 42–43); Parkinson (2012: 152).
10. Gutmann and Thompson (1996: 45); Sen (2013: 304); Zurn (2007a: xiii–xiv, 167, 172).
11. Cohen (2003); Dryzek (2010a: 325); Freeman (2000: 382); Morrel (2014: 159); Zurn (2007) 166).
12. Likewise, Harel (2014: 192).
13. Likewise, Rosanvallon (2011: 121–168).
14. Bohman (2012: 72, 73); Chambers (2013: 201–202); Kuypers (2015: 54); Lafont (2015: 41); Mansbridge et al. (2012: 2).
15. Similarly, Chambers (2013: 201–202); Kuypers (2015: 51); Lafont (2015: 41); Owen and Smith (2015: 215).
16. Bohman (2012: 79); Chambers (2012: 68–69); Christiano (2012: 30); Dryzek (2000: 2); Mansbridge (1999); Mansbridge et al. (2012: 2); Owen and Smith (2015: 215); Parkinson (2012: 151).
17. See also Chambers (2013: 207–208).
18. Dryzek (2000: 1–2; 2010); Mansbridge and Warren (2013: 102); Mansbridge et al. (2010: 69).
19. Christiano (2012: 30; 2015: 257–265); Mansbridge (1999: 213); Mansbridge et al. (2012: 2).
20. Chambers (2013: 202); Dryzek (2010a: 326); Mansbridge (1999: 213); Mansbridge et al. (2012: 2–3).
21. For example, Ely (1980).
22. Elsewhere, Mansbridge et al. nuance this claim: ‘normatively [...] the system should be judged as a whole *in addition* to the parts being judged’ (2012: 5; my emphasis).
23. For example, Spain (articles 161 and 2.e bis and 79 of the *Ley Orgánica 2/1979*), Chile (articles 93.1, 93.3, 93.4, 93.5, 93.9, 93.16), France (articles 61, 61–1, 62), Germany (articles 93.1, 93.1.2), Italy (articles 134 and 136, and articles 23–36 of the *Legge 87/1953*) and Portugal (articles 277, 278.1, 278.2, 278.4, 281.1).
24. See, for example, footnote 5.
25. For example, Bellamy (2007, 2013); Gargarella (1996); Tushnet (1999); Waldron (1999a, 1999b, 2006, 2007, 2009).
26. Although, according to Waldron, this is debatable (2009a; 2009b).

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