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On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence

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On the Representativeness of Constitutional Courts

How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence

MATTIAS KUMM

Introduction

Constitutional or other rights adjudicating courts do not only resolve concrete disputes on the basis of narrowly drafted specific rules. In most constitutional jurisdictions they tend to play an independent role as jurisgenerative junior partners to political branches of government in the process of concretizing and specifying the abstract rights provisions listed in constitutions, at times becoming an independent force for social change. I have argued elsewhere¹ that some of the core structural features that characterize rights review in many jurisdictions – the expansive scope of *prima facie* rights, the proportionality test to determine the limits of a right as well as the structure of deference doctrines – reflect a particular understanding of the point of rights-based judicial review: to ensure that acts of public authority are, both in terms of the procedure used and the outcomes generated, demonstratively justifiable to those burdened by them as free and equal persons. If such a judicial role is legitimate in liberal constitutional democracies, it can only be because courts, too, are representative institutions, alongside other politically more responsive institutions. But if judges are not elected, in virtue of what are they representative? What, more specifically, are the variables that might raise their level of representativeness, without unduly

¹ See M. Kumm, “The Idea of Socratic Contestation and the Right to Justification,” *Law and Ethics of Human Rights* 4(2) (2010), 139–175 and, more recently M. Kumm, “The Turn to Justification: On the Structure and Domain of Human and Constitutional Rights,” in Adam Etinson (ed.), *Human Rights: Moral or Political* (Oxford: Oxford University Press, 2018), ch. 7.

undermining the impartiality and independence that is required for courts to successfully play this role?

In the following I distinguish between four complementary dimensions of representativeness – volitional, identitarian, argumentative, and vicarious – to analyze claims about the representativeness of courts and ways of enhancing it.² I argue that it is not desirable to increase courts' volitional representativeness (strengthening the electoral link between judges and the people). And even though identitarian representativeness (ensuring that various groups defined in terms of race, ethnicity, gender, religion, nationality, etc. are represented on the court) is important in contexts of historical practices of exclusion, the focus of constitutional designers should not be limited to these factors. Among the normatively salient variables that should be the focus of constitutional designers is *argumentative representativeness*, implicating questions of methodology, style, and structure of judicial opinions. Furthermore *vicarious representativeness*, which concerns the constitutional embeddedness of judicial institutions in the political system and, more specifically, the mechanisms that allow political branches to challenge decisions of courts, should be among the factors on which attention is focused.

The following seeks to provide an analysis of a variety of central institutional variables concerning judicial review and how they matter for the representativeness of courts. Its purpose is to increase awareness for the variety of institutional choices that determine whether judicial power is adequately representative in a given context. It does not seek to provide either a comprehensive discussion or assessment of any one of these variables or a developed theory of what constitutes the right institutionalization of judicial power in a liberal constitutional democracy. But it does want to change the nature of the debate on judicial review. Even if one believes, as I do, that for all practical and theoretical purposes the debate on judicial review has in principle been settled in its favor,³

² These distinctions partly overlap and are partly distinct from the four forms of representation – formalistic, descriptive, symbolic, and substantive – distinguished by Hanna Pitkin in her classical work, *The Concept of Representation* (Los Angeles: University of California Press, 1967).

³ There have been some high-caliber last-ditch efforts to keep the debate alive; see J. Waldron, "The Core Case against Judicial Review," *Yale Law Journal* 115 (2006): 1346–1406 and R. Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007). The case for judicial review is based both on consequential considerations – patterns of outcomes tend to be improved – as well as outcome-independent grounds of principle relating to the

the question of how to adequately institutionalize judicial review has barely begun.⁴

Volitional Representativeness: Judges between Judicial Self-Selection and Democratic Election

Courts, unlike legislatures, are generally not elected. But courts, too, are *volitionally representative* in the following sense: They derive their authority from a chain of legitimation that is ultimately anchored in “the people.” No court could plausibly claim to be a representative institution if its judges were appointed by way of an occult practice of philosopher kings who select those worthy for highest judicial office among themselves (think of cardinals selecting the pope in the Catholic Church) or by arbitrary sacred traditional rules claimed to go back to time immemorial.

A borderline case exists in which constitutional court justices are effectively selected by other judges.⁵ Even such an arrangement is minimally volitionally representative to the extent it is grounded in an original constitutional or legislative decision to select and appoint judges that way. But volitional representativeness is diminished close to the vanishing point when a court constitutionally immunizes the principle of judicial self-selection from political contestation, as the Indian Supreme Court has done.⁶ If judicial self-selection is claimed to be a

institutionalization of a right to justification, see Kumm, “The Idea of Socratic Contestation.” See also A. Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014) and J. Weinrib, *Dimensions of Dignity* (Cambridge: Cambridge University Press, 2016).

⁴ Besides discussions on the relative merits of centralized and decentralized review – see Victor Ferreres Comella, *Constitutional Courts and Democratic Values* (New Haven, CT: Yale University Press, 2009) – the current focus is on the distinction between traditional forms of judicial review and what Steven Gardbaum has called “the Commonwealth Model” of judicial review; see his *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2012). For the latter see also N. Duxbury, “Judicial Disapproval as a Constitutional Technique,” *International Journal of Constitutional Law* 15(3) (2017), 649–670.

⁵ In India, e.g., a judge is appointed to the supreme court by the president of India on the recommendation of the chief justice of India, the four most senior judges of the court, and the most senior judge from the high court of a prospective appointee.

⁶ On October 16, 2015 the Indian Supreme Court, by a majority of 4–1, struck down the National Judicial Appointment Commission Act 2014 meant to replace the two-decade-old system of judges appointing judges in the higher judiciary by way of constitutional amendment in Article 124 A Indian Constitution, as an unconstitutional constitutional amendment.

necessary feature of judicial independence and judicial independence is made part of the unamendable basic structure of the constitution, then courts have become independent in a way that effectively cuts all links to volitional representativeness. But even though it is not rare for judges to be involved in the selection process for constitutional court positions, where they do have a formal say they are typically outnumbered by political representatives and thus have no majority.⁷ At least in mature liberal constitutional democracies, constitutional court judges should not select themselves and play at most a consultative role in the political process of judicial appointments to ensure an adequate level of volitional representativeness.

In many jurisdictions judges are appointed by elected representatives. Those who do the appointing can be different chambers of parliament, the executive or complex combinations.⁸ The electoral link is indirect and attenuated, but it still exists and is relevant for the representativeness of courts. In this way judges are no different from the president and senators under the original US Constitution. They, too, were considered to be representatives, even though their selection was the result of choices made by intermediaries (the Electoral College and state legislatures, respectively). Volitional representativeness is a question of degree and not a categorical feature that legislatures have and courts lack.

Even though the degree of volitional representativeness of courts could be increased in a number of ways, it is not easy to increase the representativeness of judges without disproportionately sacrificing countervailing concerns. We have good reasons to live with judicial institutions, whose degree of volitional representativeness remains as low as it has traditionally been.

It is not desirable to have judges elected because elected judges, even if elected for only one term, are likely to have sacrificed their independence or at least the appearance of independence as the result of the competitive electoral process.⁹ Furthermore the possibility to be *reappointed* – a

⁷ This is the model often chosen by states on the Iberian Peninsula and South America.

⁸ For European countries see Alec Stone Sweet, *Governing with Judges* (Oxford: Oxford University Press, 2000), p. 49. For a critical discussion of the appointment procedures to supranational European courts, see M. Bobek, *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford: Oxford University Press, 2015).

⁹ In the United States, where in some states judges are elected, the practice finds its supporters; see e.g., L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: Chicago University Press, 2012), providing empirical

practice that is commonplace in particular with regard to international courts – also increases the representativeness of judges, given that they could be evaluated on the basis of their record and thus be held accountable. But this is exactly the kind of accountability that is in direct conflict with the independence of judges and is not generally desirable: To play their particular judicial role, it is central that judges do not think about their reappointment when making decisions in politically disputed cases.

There are two ways in which the volitional representativeness of courts might plausibly be increased without disproportionately undermining countervailing concerns.

First, *public hearings* as part of the appointment process might give greater weight to the link between judges and the people. Yet the US experience with such hearings in the past decades suggests that it is not easy to design hearings that might fulfil a useful function. Either politicians ask specific questions that a future judge concerned with her future independence should not and rightly will not answer, or the questions and responses are so general or specifically legalistic that they are of little value for strengthening the representative link. There have been proposals that suggest strategies for making such hearings more meaningful, but it is not obvious that public hearings might significantly increase the representativeness of courts.

More promising is to establish shorter rather than longer *tenure terms* to strengthen the volitional representativeness of courts. Shorter terms might be useful to ensure that judges are sufficiently attuned to contemporary mainstream sensibilities as reflected by majorities. Of course, the appointment cycles of judges should be nontrivially longer than those of elected representatives, clearly signaling their distance from the run-of-the-mill majoritarian electoral politics. But It makes a difference whether judges are appointed for 9 or 12 years or whether they receive life tenure (which, in the United States leads to an average tenure of more than 25 years for the immediate predecessors of the current crop of Supreme Court justices). It may be an empirically contingent question whether in any particular political context a shorter term is more likely to ensure that judges will be attuned to contemporary sensibilities than a long term (in particular life tenure). It is perfectly plausible that some judges on the court for a quarter of a century are more empathetically gifted and discursively engaged than a young ideologically blindsided judge. But

evidence for the claim that elections tend to boost institutional legitimacy of courts, despite slightly negative effects of some campaign activities.

for the assessment of volitional representativeness, what matters is not the degree to which judges are sensitive to contemporary sensibilities as an empirically contingent fact, but the extent to which the makeup of a bench can be understood as the result of an explicit choice by politically accountable actors as a matter of law. And here, clearly a shorter term increases the occasions on which political will can determine the makeup of the bench.

Identitarian Representativeness

Identitarian representation refers to basic salient social traits in virtue of which judges claim to represent those to whom their decisions are addressed. Candidates for relevant traits are race, gender, religion, ethnicity, nationality (particularly in the international context), or class. There is a link between identitarian representation and judicial legitimacy, but it is limited and qualified. Identitarian representation matters in two ways, one of general relevance and the other of particular salience in the international context. First, it is important that present or past practices of exclusion and discrimination should not be symbolically reinforced by the makeup of the court. The makeup of the court should reflect an effort to overcome such historical patterns of discrimination and exclusion. Second, whether there have been or continue to be patterns of exclusion, the makeup of the bench ought to be such that all parties can plausibly believe that their point of view will be appropriately understood and assessed. Even absent past or present practices of discrimination and exclusion, this may be an issue for international courts, when judges may lack all familiarity with the culture and local context of a state that happens to be a party before it. For international courts it is generally useful to have a judge on the bench who is a citizen of the state that is a party to the dispute, to enhance judicial deliberations by making nonobvious culturally sensitive contextual information available. Note how, in an ideal social world where there is no prejudice against any social groups and an equally deep and empathetic understanding of all of them, it would be misguided to link the attractive idea of having a wide range of experiences reflected on the court to traits such as race, ethnicity, nationality, class, and the like. These group markers are a bad proxy for the presence of relevant wide-ranging experiences and empathetic dispositions, given significant variances even within the group defined with reference to these traits. But in the world we live in,

identitarian representativeness provides important assurances against legitimate concerns of exclusion.

Argumentative Representativeness

Even if courts are less volitionally representative than legislatures, and identitarian representation is of only qualified significance, courts can claim representativeness also in virtue of the arguments they justify their decisions with. There is also *argumentative representation*. Argumentative representation exists, if and to the extent the courts, trying to find the correct answer to the legal question brought before them, engage in a practice of public reasoning that is attuned to – even if not necessarily deferential to – arguments that played a central role in the political process and that connects to beliefs held by those to whom the law is addressed.¹⁰ Argumentative representation can be realized to a higher or lower degree, depending on the interpretative methodology adopted, the style of opinion writing, and the role of plural (concurring, dissenting) opinions.

Interpretative Methodology

Modern constitutions are characterized by the fact that they do not only contain rights in the forms of ordinary rules (e.g., “no person may be subjected to the death penalty”) but also often relatively abstract principles (“no person may be subjected to unreasonable punishment”). Generally the jurisprudence of constitutional courts tends to be focused on the specification and concretization of those abstract principles. The question is how courts go about the task of ascertaining the meaning of these abstract principles for the purpose of resolving concrete cases before them. In terms of interpretative methodologies, it is useful to distinguish between originalist-, conventionalist-, and public reason-oriented approaches. *Originalist* methodologies are focused on persons, events, and contexts connected to the original enactment of a constitutional provision and locate the legitimacy of a law in the will of the original enacter. They often lead to arcane and disputed historical

¹⁰ With the focus on public debates, the conception of argumentative representation here is different from the one defended by Alexy, which is focused on ideal argumentation. See R. Alexy, “Balancing, Constitutional Review, and Representation,” *International Journal of Constitutional Law* 3(3) (2005), 572.

accounts based on law office historiography that may be unresponsive to the range of normative concerns and debates as they relate to the constitutional principle in the present. *Conventionalist* methodologies are focused on analyzing text, precedent, or established conventions – anything that can be conventionally referenced as legal authority or as socially accepted as law. Conventionalists may include the original circumstances of the enactment of a legal norm as a relevant fact for the interpretation of a norm, but it is just one besides a range of others. The defining feature of conventionalist approaches is that they seek if not to exclude at least to minimize the role of general practical reasoning in legal decision-making. Because of the sharp distinction between arguments connected to legal pedigree and conventions, on the one hand, and policy arguments, on the other hand, such an approach is not and has no ambition to be *argumentatively* representative, but to make do without the kind of general arguments that characterize public debates. Across liberal constitutional democracies conventionalism plays only a modest role in constitutional adjudication because of the often highly abstract nature of the norms that courts are called upon to interpret. In constitutional adjudication, because of the lack of pedigreed resources for determining decisions, conventionalist sensibilities often push toward minimizing the judicial role and granting considerable deference to political branches, if the lack of legal authority is not compensated for by strong social support for a specific legal interpretation.¹¹ The most widely used approach among rights enforcing courts in liberal constitutional democracies is what I call a *public reason-oriented approach*. That approach also includes reference to legal authority, where there is legal authority on point, but it does not fear engagement with more open forms of general practical reasoning. Structuring the judicial rights inquiry by reference to some version of a proportionality test, courts assess whether the measures taken by public authorities are susceptible to a reasonable justification with regard to the burdens imposed on the rights bearer. When a court can openly ask whether there is a legitimate purpose for the government to act, whether the government chose the least restrictive of equally effective means, and whether on balance the burdens it imposes on a rights bearer are justified with reference to what

¹¹ This is apparently the case across Nordic countries, where courts striking down legislation on the grounds that it violates abstract rights provisions guaranteed in the constitution is a relatively rare event; see J. Nergelius (ed.), *Nordic and Other European Constitutional Traditions* (Leiden, The Netherlands: Martinus Nijhoff Publisher, 2006).

is gained in terms of furthering a legitimate purpose, a court opens up the possibility engage-and-assess arguments in a way that is responsive to publicly articulated concerns of all relevant parties.

Styles of Opinion Writing

Argumentative representativeness is also a function of the style of opinion writing, not just of the methodology of legal interpretation used. To take on the extremes, there is the way that the French Conseil Constitutionnel and Conseil d'État justified its decisions until the 1990s: The language was terse and formal, and opinions were short. Reading these opinions did not give the reader any idea of the range of considerations that judges inevitably had to engage to make a well-informed decision, and it does not make transparent the considerations that ultimately made the judges decide the way they did. On the other hand, you have the highly discursive style of US Supreme Court justices or UK Supreme Court judges. Here the arguments are presented in a more elaborate developed way, engagement with counterarguments takes place, and opinions may on occasions reach book length. The latter style of writing scores higher with regard to argumentative representativeness than the former.¹²

A Unitary Court or a Plurality of Opinions

Finally, a court required to speak only in one voice tends to lead to less representative argumentation than decisions that allow for concurring and dissenting decisions. A judicial practice allowing for concurring and dissenting opinions is more likely to reflect the plurality of views among the constituency than a practice in which the court appears only as a unitary actor, providing one judgment endorsed by the court as a whole.

Vicarious Representativeness

Vicarious representativeness is a function of the constitutional embeddedness of judicial institutions in the political system and, more specifically, the mechanisms that allow political branches to challenge decisions

¹² For an analysis and comparison of different styles of opinion writing, see M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004).

of courts. Vicarious representativeness of courts exists to the extent a judicial decision can be regarded as *endorsed by the legislature implicitly*. The easier it is for the legislature to enforce its will against the courts, the more plausible it is to assume implicit legislative endorsement. The easier it is for the legislature to overturn the decision by the court, the more the decision of the court can be regarded as vicariously representing the considered judgment of the legislature, if the legislature does not overturn it. Vicarious representativeness is thus a function of the rules that govern the interaction between courts and legislatures. It is very high, if legislatures are complicit in the act of revising their previous decision by implementing the court's decision (as in the United Kingdom, where courts can only issue a declaration of incompatibility). It is still high if the legislature can override the decision of the court using an ordinary majoritarian procedure or a procedure only minimally more demanding (like in Canada), it is lower, if a qualified majority is necessary, and such overrule must take the form of a formal constitutional amendment (such as, e.g., in Germany, South Korea, Mexico, and South Africa), and it is negligibly low in a country where the requirements relating to constitutional amendment are more cumbersome still (like the United States). Vicarious representativeness is lowest when the court decides that a particular decision is outside of the purview of legitimate constitutional amendment altogether, invoking either a constitutional eternity clause or some version of a "basic structure doctrine."¹³ This is not the place to discuss what level of vicarious representativeness is desirable. Here it must suffice to make two basic points. First, if it is the point of judicial review to ensure that all burdens imposed on individuals must ultimately be justifiable to them in terms that they might reasonably accept, and if individuals are to have a right to have the issue determined by independent and impartial institutions, then those institutions must also have the authority to provide an effective remedy. Such a remedy does not exist in New Zealand or the United Kingdom, where courts do not have the authority to set aside legislation but require the support of the legislature to give effect to their decisions. Because the effect of the Court's decision here depends on the legislature explicitly endorsing it, the level of representativeness may be very high, but it remains a deficient way of institutionalizing judicial review because it denies individuals an effective

¹³ On the spread of the idea of unconstitutional constitutional amendments in constitutional practice, see Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford: Oxford University Press, 2017).

remedy. Second, even if there are many good reasons why constitutional courts should use the doctrine of unconstitutional constitutional amendments sparingly, in principle this is a doctrine that has strong support in the foundational commitments of constitutionalism. Even the constituent power of “the people” is one that is constituted, regulated, and circumscribed by the idea of self-government of free and equals. Constitutional provisions that can’t plausibly be understood as specifications or concretizations of this idea can’t plausibly claim authority of free and equals. The idea of vicarious representativeness clearly matters. But what this limiting and extreme examples illustrate is that, in the end, endorsement by the legislature or even by qualified majorities is not a criteria that trumps all other criteria.

Conclusion

The debates about the legitimacy of judicial review may well be over. In principle there is nothing illegitimate about constitutional courts having the authority to review all acts of public authority, including legislative acts, with regard to the question whether they violate individual rights. But that does not mean that the institutionalization of judicial review does not raise difficult issues. Courts, like legislatures, are representative institutions. But the degree to which they are depends on a variety of institutional choices. The point of this contribution is to bring into focus some core variables in the design of judicial institutions and describe their relevance to the representativeness of judicial review. Given the powers of constitutional courts in liberal constitutional democracies, these are the issues that debates on judicial review would do well to focus on.