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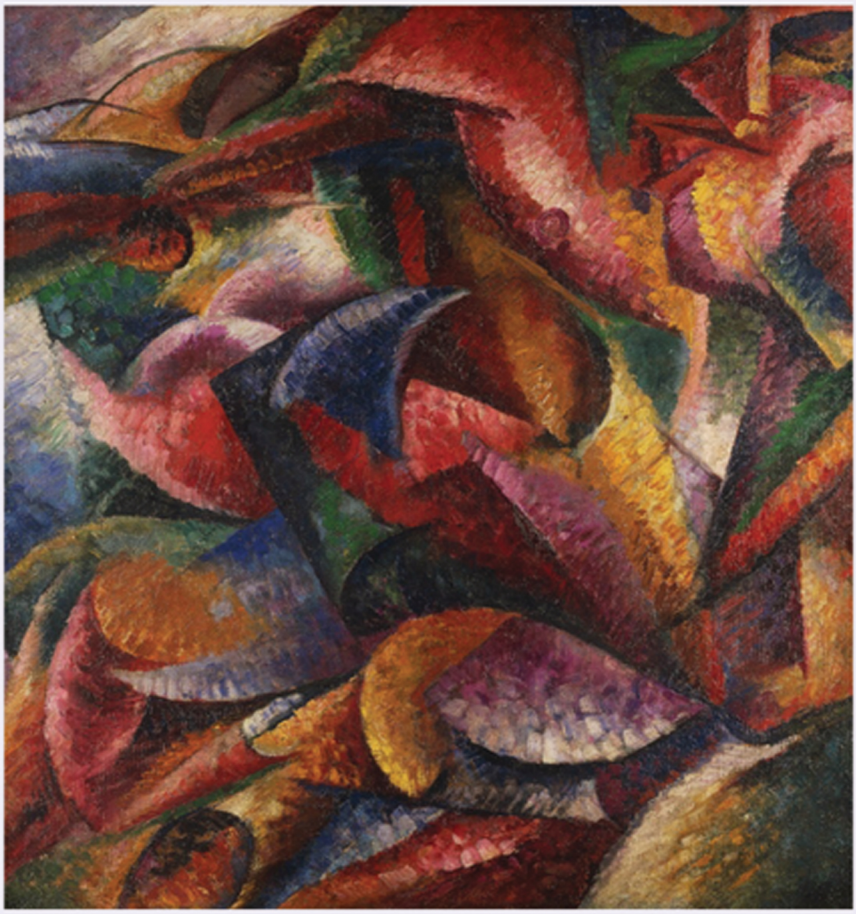

Constitutional Courts and Deliberative Democracy

CONRADO HÜBNER MENDES

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For Danuca

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This book is the corollary of a doctoral dissertation in constitutional theory completed at the University of Edinburgh School of Law. Its asks whether and how valuable collegiate deliberation can permeate the decision-making process of constitutional courts, and argues that "deliberative performance," as defined here, provides a contextual and empirically driven metric to assess the democratic weight of judicial review. I owe many persons and institutions a debt of gratitude for those extraordinary years during which this book has taken shape.

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Conrado Hübner Mendes

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Introduction

THE IMAGERY OF CONSTITUTIONAL COURTS

The political culture of contemporary democracies has rendered a wealth of images about judges and courts. Such an accumulation of metaphors is unmatched by how we refer to other public officials. The representation of judges is rarely mundane. No wonder why this is so. Unlike legislators, which need to perform the all-too-human task of representing interests and negotiating mutual agreements in the name of collective self-government, we load the judicial shoulders with a more mysterious political ideal, namely, the "rule of law, not of men." When it comes to constitutional courts, the burden gets heavier and the accompanying images and ideals more hyperbolic. As the institution in charge of assuring constitutional supremacy and ultimately checking the constitutionality of ordinary political choices, it is seen as the bastion of rights and the ballast against the dangers of majority oppression. Against a backdrop of mistrust of electoral politics, they became the vedettes inside some circles of liberation movements and of struggles for emancipation.[1] This has happened not always because of what courts have actually done, but often for what they are expected to do.

Images need not only be rhetorical flurries that misguide the big audience about the intangible aspects of adjudication. There usually are concepts and arguments lurking behind them. These concepts prescribe functions, raise expectations, and draw the borders of the judicial job. Legal theorists have been trying to grasp constitutional adjudication in all its guises and, in order to introduce this book, I would like to concentrate on five influential images that have been extensively used in the debate about the character of constitutional courts: the veto-force, the guardian, the public-reasoner, the institutional interlocutor, and the deliberator. They need not be mutually exclusive, but each puts emphasis on a particular aspect of the court's enterprise.[2]

This book attempts to explore the last image—constitutional courts as deliberators—but, to the extent that it encapsulates aspects of the others,

[1] See Epp (1998).

[2] In this Introduction, I will henceforth refer to "constitutional courts" or "courts" inter changeably, unless otherwise specified.

I would rather start by sketching each one of them. A veto is a mechanical device to contain the actions of some countervailing force. It is part of the formal logic of the separation of powers and its internal dynamic of "checks and balances," reputedly at the service of liberty.[3] Modern constitutions would bestow upon courts the function of counterweighing the decisions of parliaments and executives. This would be one of the devices through which constitutionalism attempts to moderate different sources of power and institutionalize limited authority. It would prevent tyranny and arbitrariness. Parliaments and governments, under such decision-making machinery, are not all powerful. Courts, in turn, are a negative blockage the accord of which is required for legislative decisions to be constitutionally valid and effective.[4]

A more colorful depiction of courts conceives them as guardians of the constitution. A guardian would be an apolitical adjudicator who carries out the task of checking the constitutional validity of ordinary legislative decisions. There would be no creative or volitional element in such operation, but a disinterested and technocratic application of the law. Unlike the first image, which highlights the physicalist equilibrium between forces and counter-forces, this one is more content-driven. The court is a bound agent on behalf of its principal, a commissarial guarantor of the will of the constitutional founders, however that will is conceived. It allows for the practical meaningfulness of the constitution as the "supreme law of the land."[5] This basic idea somewhat evokes, in the realm of constitutional adjudication, the classical characterization of judges as the "mouthpiece of the law" (*bouche de la loi*).[6]

The remaining images are intimately related, part of a same package of theoretical endeavors to uphold courts on the grounds of their robust argumentative capacity and privileged perspective. Each, however, brings a new nuance to the frontline. A third way to enclose the task of courts envisions them as chief public reasoners of democracy or, in a popular phrase, as

[3] The classical reference is found in the Federalist Papers, n 51. See also the distinction between two conceptions of constitution—as machine and as a norm—proposed by Troper (1999).

[4] The "veto" language has also received some conceptual sophistication by other authors, not necessarily to refer to courts. It could certainly be further refined by distinguishing between obstructive and constructive types of veto and so on. A well-known distinction is between "veto-point," a neutral institution that political actors use as instruments to achieve their goals, and "veto-player," an institution that has an identifiable agenda and negotiates with the others to achieve a final outcome. The former would be peripheral whereas the latter would be integrated to the political process. Volcansek: "The court becomes a veto-player if it can say what the constitution means and invalidate both executive and legislative actions" (2001, at 352). See also Tsebellis, 2002, at 328.

[5] This was the formulation of *Marbury v. Madison*, 5 U.S. 137 (1803), which established the putative logical necessity of judicial review for the sake of constitutional supremacy (a necessity later de-constructed and criticized by authors like Nino, 1996, at 186).

[6] "Bouche de la loi" and "pouvoir nul" are classical expressions of Montesquieu to refer to subordinate adjudication. Chapter 2 will come back to this.

"forums of principle."[7] Due to their insulated institutional milieu and argumentative duties, constitutional courts would be able to decide through a qualitatively unique type of reason. This theoretical stripe claims that judicial review enables democracies to convey a principled political discourse on the basis of which the dignity and force of the constitution are founded. This singular contribution would secure that rights are exercised and protected within a "culture of justification."[8]

The previous images share the assumption of judicial supremacy. Accordingly, as far as the interpretation of the constitution is concerned, courts would have the last word. The fourth image, however, rejects this traditional premise and portrays courts as institutional interlocutors. Judicial review would be a stage in a long-term conversation with the legislator and the broader public sphere. Understanding it as the last word would be empirically inaccurate and normatively unattractive: inaccurate because such an approach would miss the broader picture of an unending interaction over time; unattractive because rather than a monological supremacist, the court should work as a dialogical partner that challenges the other branches to respond to the qualified reasons it presents. In that sense, there would be no ultimate authority on constitutional meaning but a permanent interactive enterprise. The court, here, is still a public reasoner. It does not, though, speak alone and seeks to be responsive to the arguments it hears.[9]

Lastly, the court is also pictured as a deliberator. This image grasps an internal aspect of courts that the others would overlook: they are composed by a small group of individual judges who engage with each other argumentatively in order to produce a final decision. This internal process constitutes a comparative advantage of courts in relation to otherwise designed institutions. Courts allegedly benefit from the virtues of collegial deliberation and, thanks to their peculiar decisional conditions, are more likely to reach good answers upon constitutional interpretation. Thus, apart from a catalyst of inter-institutional and societal deliberation, as the previous image suggested, courts themselves would also promote good intra-institutional deliberation.[10]

[7] Dworkin visualizes the court as the "forum of principle," Rawls as the "exemplar of public reason," among several other American scholars with resembling arguments. But this is far from an exclusive American trait. This function is widespread in the constitutional discourses of several other countries. Important examples include Germany, South Africa, Spain, Colombia, among others. Chapter 3 will come back to this.

[8] This is common currency, for example, in South African constitutional discourse. Albie Sachs summarizes that trend: "we had moved from a culture of submission to the law, to one of justification and rights under the law" (2009, at 33). For an extensive overview, see also Woolman and Bishop (2008).

[9] For a map of the literature, see Mendes (2009b) and Bateup (2006).

[10] There are numerous articles on judicial collegiality, usually written by judges themseves. A good starting point is Edwards (2003). Specifically about constitutional courts, see Ferejohn and Pasquino (2002).

All images above cast quite optimistic light on what constitutional courts are or should be doing. Detractors of judicial review responded in the same metaphorical voice and furnished, to each of them, a less than praiseworthy flipside. Rather than a mere veto, courts would be political animals with an ideological agenda; rather than guardians, courts would embody an oracle with an inaccessible and armored expertise, would pretend to be mere phonographs and conceal themselves behind a mystifying cover;[11] rather than a public reasoner, courts would be rhetoricians, window-dressers of hidden positions or, at best, paternalistic aristocrats; rather than dialogical partners or deliberators, they would be strategic policy-seekers. These are the cynical counterparts that confront the mainly normative allegories sketched above. Together, they sum up the variegated imagery that constitutional theory has assembled in order to defend or condemn judicial review.

As noted, this book elaborates and tests the idea that courts can and should be special deliberators, that is to say, can and should develop significant deliberative qualities in the absence of which constitutional democracies get impoverished. It seems to me that this apprehension of the function of courts is more insightful than the alternatives. It still lacks, though, a systematic treatment. That is what I will try to do.[12] The other images still pervade the book and help me to explain, by contrast, what I mean. It is helpful, thus, to keep them in mind. The next section sets forth the methodological standpoint of the book and the last summarizes its overall structure.

[11] The court would be just a rubber stamp of parliament. Morris Cohen coined and attacked the phonograph theory. I will come back to this in Chapter 2. Here is a good sample of additional pejorative expressions: "bevy of Platonic Guardians" or "philosopher kings" (Learned Hand); "oracles of law" (Dawson); "constitutional oracle" (Stephen Perry); "moral censors of democratic choice" (Scalia); "wise council of tutors in moral truth" (Christopher Zurn); "moral prophet" (Rainer Knopf). Sometimes you can also hear even stronger expressions like "judicial tyranny," "judicial imperialism," among others. This rhetorical misuse of political vocabulary and the spread of an obscurantist anti-judicial lexicon has been misleading the public about the nature of adjudication for decades.

[12] It is opportune to add a quick biographical note. The problem has a personal intellectual history and summarizing my research path may help to make sense of the project in a wider perspective. I condense that research path in three steps. The first was to interpret the debate between Dworkin and Waldron with respect to judicial review. They are paragons of the last word framework and advocate supremacy for either one or the other side of the court-parliament scale. I have applied their arguments to the Brazilian constitutional regime, and although I did not fully embrace Waldron's claims, I showed how his concerns are relevant to problematize extremely rigid constitutions like the Brazilian, which empowers courts to overrule even constitutional amendments (see Mendes, 2008). The second step relativized my previous position and explored what that traditional polarization gets wrong. Such a myopic debate about the ultimate authority misses the interactive and long-term aspect of politics and a binary take on who should have the last word overlooks the variability of political legitimacy. Theories of dialogue, without ignoring the question of last word, would be more proficient to forge a gradualist approach to legitimacy (see Mendes, 2009a and 2009b). Finally, I am now trying to develop a measure of output that can more productively inform a gradualist debate about legitimacy. There are more or less legitimate courts, and hopefully the criteria devised here help to perceive it. That is the horizon of this book.

A METHODOLOGICAL VANTAGE POINT: GAINS AND LOSSES OF MIDDLE-LEVEL ABSTRACTION

This is a book on normative theory. It is concerned with the way constitutional courts should behave in a "well-ordered constitutional democracy," to borrow Rawls' well-known phrase.[13] I departed above from a general canvass about how constitutional courts are visualized in contemporary democracies. I did not give much of an explanation, however, of what I meant by constitutional courts. They are not, indeed, a homogeneous category, but comprise different designs and work under distinct legal cultures, argumentative traditions, constitutional texts, and political environments.

This raises legitimate methodological questions: can normative theory devise prescriptions and guidelines that are equally applicable to any constitutional court? Would such a theory not need to be jurisdiction-bound? Do all extant constitutional courts have a common set of invariants that allow us some generalization? Can something useful be said at this level of abstraction? Is there such a thing as a non-parochial constitutional theory? To what extent can constitutional theory travel across constitutional regimes? Anyone that delves into the literature on the topic may easily come across opening statements like "this is a theory for the American Supreme Court" or "these arguments apply to the German constitution."[14] Whether this is the only productive approach is what I want to thematize here.

For a certain mode of thinking, each court can only be grasped and explained within a very specific context. Contexts, moreover, are never identical across jurisdictions. Judges are different creatures in different settings (for reasons related not only to legal tradition and design, but also to a series of other background factors). Law and politics would be singular phenomena in each place and the boundaries between them diversely set. One can never entirely understand an institution, that thought goes, outside such context, let alone recommend what that institution should do.

This cautious methodological position is not unfounded. Such warning, though, should be taken with a grain of salt. It does not exclude, but rather presupposes, a complementary logical space which, however limited, must be occupied by what I will call "middle-level" normative theory. Or so I shall argue. This book permeates that space (as do so many other theoretical works that, despite not turning this methodological premise explicit,

[13] Rawls (1997a). This expression is a variation of "well-ordered society," basis of Rawls' theory of justice (1971).

[14] See, for example, Dworkin (1996) and Alexy (2010). Several authors claim to be doing jurisdiction-bound theory but cannot help slipping into more abstract considerations in order to carve more solid foundations for their normative projects. The fact that they have been usually appropriated by other legal cultures also indicates a certain commonality across jurisdictions.

also advance general arguments on what are the most appealing democratic institutions, on the role of constitutional courts and so on[15]). Let me briefly explain this idea.

The fundamental task of normative theory is to prescribe, on the basis of values and principles, ideal or desirable states of affairs, or how things ought to be. It founds a judgmental standpoint from where to proclaim what arrangements are attractive and, comparatively, better than others. It equips one with critical lenses from which to assess a concrete object or process. It supplies a militant idiom.

In the sphere of politics, such prescriptions can inhabit distinct layers. At the level of utmost abstraction, it traces the deep values that should regulate the communal life. The proper articulation of values like dignity, autonomy, equality, community, among others, is the goal at this stage. Further down, normative theory also inquires into the secondary principles and institutions that better translate the values defined in the primary step. Democracy and its procedures may be found here. Closing this chain, each political community will make its own tertiary choices in the light of its own context and peculiar dilemmas. These are the constitutive parts of the argumentative tree: the roots strike the balance of abstract values, the trunk proposes its institutional corollaries and the crown comprises the concrete historical instantiations. Each could be further decomposed, but this suffices for the moment.

The modern ideal of constitutional democracy is shaped by an elementary procedural framework that is not strikingly heterogeneous: among others, fair electoral competition, representative parliaments, and the protection of basic freedoms are constants without which, to a greater or lesser degree, the regime is not recognized as such. Constitutional courts are, more often than not, part of that project, or, to use an anthropological jargon, "near universals"[16] of constitutional democracies.[17]

If, on the one hand, concrete instantiations of constitutional courts are products of particular historical narratives, it would be utterly wrong to deny that they are enmeshed in that common wave of political discourse. They are conceptualized under a backdrop of largely equivalent set of principles and signified by similar symbolic references. That project transcended

[15] Waldron (2006a) is a good example.

[16] Brown provides a definition of near universal: "one for which there are some few known exceptions or for which there is reason to think there might be some exceptions," as opposed to absolute universals, which is found among all people known to history (2004, at 48).

[17] It is something in between the contrast that Raz, for example, draws between philosophy and sociology of law: "The latter is concerned with the contingent and with the particular, the former with the necessary and the universal" (1979, at 104).

jurisdictional boundaries and, to the extent that it entails a core set of institutional devices, some normative theory had to travel together with them.

The normative arguments this book formulates, once more, intend to be applicable to any constitutional court. I presuppose very little by this term and isolate only three common denominators. For the purposes of this book, constitutional court will be a (i) multi-member and non-elected body[18] that, (ii) when provoked by external actors,[19] (iii) may challenge,[20] on constitutional grounds, legislation enacted by a representative parliament. This body is accountable for the reasons it provides and not for the periodical satisfaction of its constituents. That is my departing assumption. Everything else is up for supplementary institutional imagination.

I take a stand, nonetheless, on the target that such extra imagination should track or, more precisely, on the specific mission that the institution will carry out. Deliberation, or deliberative performance, in the multi-faceted way defined in this book, is my north. It gives my analysis a sense of direction, but remains open-ended. I provide reasons to defend that such a body should be deliberative, and point to the normative implications that ensue. There certainly are many alternative yet valid routes to that north, and only contexts will present the occasional obstacles and shortcuts.

All real constitutional courts, as we know from the repertoire offered by institutional history, despite sharing those three basic features, go much beyond them. Comparative law itself often sets a stricter technical use of that term.[21] Middle-level theory does not supply single detailed solutions for the many further variables that need to be fleshed out, does not determine, in all minutiae, what is the best constitutional court for all times and places. It illuminates, however, what is at stake in each institutional dilemma. It refrains from closing an all-encompassing formula for solving the various trade-offs that spring from each context. At the same time, it is aware of these trade-offs and may even dictate, once the context is known, how they should be balanced and solved. It is a theory for the wholesale, not the retail. That is as far as it can go. Jurisdiction-bound theory will complete the overall normative task by filling in what the other lets open.

[18] Some would prefer the umbrella concept of "judicial independence," but I prefer to avoid it not only because it tends to suggest an untenable notion of total "separateness" from political branches, but also because it already commits to other institutional variables that I prefer to leave open.

[19] Inertia is another feature that would promote independence and impartiality. Courts are not allowed to act "ex officio," to have their own initiative, to put forward their own causes.

[20] "Challenge" is a more flexible term that comprises not only the actual power to override or invalidate legislation but also weaker forms of authority like the competence to "declare the incompatibility," as introduced by the UK Human Rights Act (1998) into the British constitutional system.

[21] See Cappelletti (1984).

Middle-level theory, therefore, has an imperfect traction and gains plausibility by candidly recognizing its limits. It should not promise, indeed, what it will not and cannot deliver. In order to have some bite, it must follow at least two requirements upon which the validity of its claims depends. First, it should be malleable and adaptable enough to the specificities of different circumstances. Its versatility protects it from being hostage to jurisdictional particularities and, at the same time, turns it into a context-sensitive normative model. It endorses alternative instantiations of the ideal as long as they make justified choices between the apposite variables. Second, and as a consequence of the first, it needs to identify up until where it can go, that is to say, to employ a measure self-restraint.

Middle-level political theory strays from uncharted normative imagination, which builds the political edifice from scratch. It rather imagines what a constitutional court can be, taking for granted a few consolidated features that can be identified in all courts. Its advantage is to allow for more creative thought-experiments. However constrained by the minimal denominators, it is not tied to real constitutional courts. What it captures in horizontality, though, it inevitably loses in verticality. It does "cover more by saying less," as Sartori would note.[22] That does not mean that I will abstain from climbing or descending, when appropriate, that "ladder of abstraction,"[23] just for the sake of methodological purism. On the contrary, the book's account occasionally addresses ideal theory and offers contextual examples. When it moves upwards and downwards, crossing the boundaries of this middle-level and tilting the argument's centre of gravity, it may lose either in specificity or generality. As long as such gains and losses remain clear, they may enrich the inherently unstable borders of the middle-level.[24] Such instability, though, does not erode its analytical function.

This book advances a pragmatic yet principled case for a deliberative constitutional court or, more generally, a case in favor of a distinctly deliberative institution that is safe from the electoral sort of political pressure and legitimation.[25] A pragmatic yet principled endorsement is probably the only type of normative case one can cogently make for an institution. It is not a defence from an a-historical and deracinated point of view. There is a contingent genealogy of this institution, and it was spread over the reputedly democratic world in the last sixty years. Their differences are significant, but should not be overstated under pains of missing a clear sense of commonality. They are proxies of a similar ideal, not coincidental accidents.

[22] Sartori, 1970, 1033. [23] Sartori, 1970, 1053.

[24] I thank Oxford University Press's reviewer for this clarification.

[25] It is an appeal similar to Pettit's (2005) case for a dualist democracy, one that includes both the exercises of voting and contestation, the "authorial" and "editorial" functions of institutions.

I try to raise conclusions that are applicable to all contexts that share those minimal institutional denominators. For the same reason, however, I stop short of making specific prescriptions. I do not and cannot assume too much by way of common denominators. Neither do I want to derive too essentialistic concepts about the function, structure, and capacity of courts. I leave room for contextual and contingent factors, which cannot be managed at this abstract level.

I believe that this fine line between middle-level and jurisdiction-bound theory, however contested, can and should be drawn.[26] This "virtue of incompletion,"[27] however limited a virtue it might be, allows for a less particularistic approach. Whether this book succeeded on taking up that task is a different story. This section hopefully hinted at a template of criteria by which the reader might assess my attempt to chase that aim.

A ROADMAP OF THE ARGUMENT

The book has nine chapters. In the first chapter, I locate the general discussion about the ideal of political deliberation as a way of collective decision-making within the contemporary literature. Besides an abstract definition of deliberation, the chapter systematizes the intrinsic and instrumental reasons that justify deliberation, supplies criteria to recognize the circumstances in which deliberation might be desirable or not, and shows the specificities that different deliberative sites may have. The second chapter examines how deliberation might relate to law conceptually, by way of legal reasoning, and institutionally, by way of collegiate adjudication. The third chapter dissects the singularity of constitutional adjudication, as opposed to parliaments or ordinary courts, describes how it has come to be perceived and defended as deliberative, and finally diagnoses the gaps in this mainstream approach.

The fourth chapter expounds the key argument of the book and fleshes out the core meaning of deliberative performance. It basically applies the analytical categories of the first chapter to the deliberative phases of a constitutional court and puts forward standards of performance. The fifth chapter will consider the ethical benchmarks that judges should follow in order to

[26] There surely is nothing methodologically original in the idea of "middle-level" theory. I could number important authors that engage in exactly such activity. A clear recent example is Waldron (2006a), particularly in his attempt to locate an abstract "core" against judicial review. The idea of a "core" is precisely the definition of hypothetical conditions under which, for him, judicial review would neither be necessary nor desirable. He claims, at a "middle-level," that these conditions obtain in most contemporary democracies, hence the illegitimacy of such institution in all those settings.

[27] These are Walzer's words. He also points to the philosophical tradition that takes up the opposite approach: "Completeness means a closed system, an account of the single best regime, a 'whole' that can be rationally discovered or invented but not rationally contested or revised" (1990, at 225).

animate a court in the deliberative course. These standards correspond to judicial virtues that stand out in each deliberative phase. The sixth chapter focuses on institutional design, the chief facilitator of deliberative performance. More specifically, it will group the devices that are mostly related to the deliberative capacity of courts, and point to the trade-offs that underlie the choice of each device.

Chapter 7 depicts the legal backdrop on the basis of which constitutional courts elicit public justifications for deciding. These boundaries encompass the value-laden character of the constitutional language, the burden of precedent, the argumentative duties towards the inferior courts and towards other branches, and the cosmopolitan reverberations that foreign case-law may have.

Chapter 8, in turn, organizes the political constraints of constitutional adjudication. They comprise the tensions involved in agenda-setting and docket-forming, in defining the degree of cohesion of the written decision (whether single or plural), in calibrating the width, depth, and tone of the decisional phrasing, in anticipating the degree of cooperation or resistance of the other branches and in managing public opinion. The chapter further recommends that the virtues of prudence and courage should help a constitutional court to handle the political pressures it faces. The ninth and last chapter draws some concluding remarks about the repercussions that the overall argument might have for democratic theory.

One may agree or disagree with the book at various stages. First, one can start doubting the general importance of deliberation in politics and collective decision-making. Second, one might raise a relevant suspicion about whether courts are plausible deliberative candidates. Finally, even if one agrees both with the significance of deliberation and with the contribution that a court can make in that matter, one might still reject the model of deliberative performance concocted here, either in its gross structural shape (organized around the ideas of "core meaning," "hedges," and "facilitators") or in its internal components.

If a court is going to be presented in the deliberative mode, I believe these are necessary theoretical steps. I furnish a controlled normative argument that shows what is at stake if a court wants the benefits and burdens of deliberation. I investigate in what sense and to what extent a constitutional court can and should be a deliberative institution, and why a non-deliberative court is inferior to a deliberative one. I lay out, in other words, some patterns of excellence and the potential distinctiveness of constitutional adjudication with regards to its capacity to deliberate and to trigger external deliberation on constitutional meaning. It involves peculiar sorts of failures and achievements.[28]

[28] I believe this exercise is analogous to the one made by Lon Fuller in his classical book *The Morality of Law* (1968). There, he devised the principles of excellence in lawmaking and examined how to manage them together in order to build and sustain the rule of law, balancing those standards case-by-case.

The book helps to assess the political legitimacy of judicial review in a gradualist, adaptive, and contextually sensitized way. It has a broad scope and rings several bells in political theory generally conceived. It strives to contribute to different departments of this literature. It may raise a few constructive challenges to the portions of democratic theory that do not assign any role to deliberation; of deliberative democratic theory that accepts the description of courts as mere legalist distractions or deviations from deep moral reasoning; of constitutional theory that do not spell out what a deliberative court entails, that do not pay attention to the politics of adjudication or that, on the other extreme, reductively conceives it as politics by other means. I put forward, in sum, an experimental way of evaluating constitutional courts.

I will not describe the type of deliberative forum that real courts actually are out there. I will rather talk about what sort of forum they can be. I do not furnish an exhaustive list of answers, but a reasonably comprehensive and systematic map of the relevant questions. The answers will legitimately hinge upon alternating circumstances. The model provides me an angle and a heuristic gear through which to compare real constitutional courts.

The book intends not only to forge a pilot "deliberometer," a prototype of the critical equipment that constitutional democracies should develop in order to keep constitutional adjudication under public scrutiny, but also, and first of all, to justify a constitutional court that is specially proficient in deliberating. I probe this stimulating image and envisage some of its promising consequences.

Lastly, a caveat should be stated. The term "deliberation" is used with more than one single meaning along the book. The definition stipulated in Chapter 1, which is my pivotal reference for the concept of deliberative performance, refers to deliberation as an inter personal argumentative engagement. Deliberation, however, has also been used by the literature in slightly different, yet related, senses. Sometimes, deliberation is conceived as mere reason-giving, as the reflexive balancing of reasons, as the exposure to reasons, or as a loose sort of conversation that leads to decision.

Deliberation, therefore, is a term with a large baggage of meanings in the tradition of political philosophy, and also in the contemporary literature of constitutional theory. This instability or variability of conceptual uses may be seen as a problem or rather as a quality of the book. It may be a problem because it risks creating conceptual uncertainty and blurring the very object which I seek to examine. To the extent that these differences are made clear, and that the case for deliberative performance specifies exactly what is entailed by each standard, this risk was hopefully avoided or mitigated. The advantage of this malleable treatment, on the other hand, is to capture aspects of deliberation that, despite relevant for deliberative performance, would fall out of a strict conceptual reach.

1

Political Deliberation and Collective Decision-making

1. INTRODUCTION

Deliberation is believed to evince an appealing ideal for politics. Surprisingly enough, however, the precise benefits it can bring or the harms, if any, it can inflict are not easily discernible. Dialogue and conversation, debate and justification, sympathy and engagement, publicity and rationality, persuasion and openness, transparency and sincerity, respect and charity, mutuality and self-modesty, consensus and common good are but a few hints that allegedly point to what such ideal is about. Self-interest and closure, fixed preferences and aggregation, optimal compromise of pre-political desires, conversely, would negatively indicate what falls short of the deliberative quality threshold. This is an easy black-and-white contrast, for sure. As with every caricature, it does not lead us very far in understanding, evaluating, and illuminating possible avenues for the improvement of contemporary politics.

The fact remains, though, that deliberation, as traditionally depicted, is indeed multicolored and hard to grasp. The persistent resort to such opposition might show that, more than a mere didactic shortcut, it is an unavoidable way to capture this slippery phenomenon. On the grandiose side, politics is praised as a way of life, or at least as the legitimate environment to manage the tensions of pluralism in a wise and respectful manner. On the mundane side, politics is seen as a means to amalgamate and accommodate private ends, to survey the opinions shaped in our individual lives. One is reflective and emancipatory; the other unreflective and solipsistic, fragmenting and disruptive. One operates by channeling voices and weighing reasons of fellow partners in a common enterprise; the other, by counting heads of winners and losers within a minimal agreement of modus vivendi. Collective decision, for one, is a product of strenuous intellectual exercise and cooperation; for the other, just an inventory of individual wills fairly negotiated. And the distinctions could go further. If asked to choose, one would hardly deny the greater attractiveness of the former option. Common sense is on its side. Again, this would be too quick.

The starting point of a book that deals with political deliberation, thus, should unpack this umbrella-concept into its parts. Such systematization is relevant not only for the sake of clarity, but also to set the variables and their connections in an administrable way. Inasmuch as the case for deliberative politics is put forward both through intrinsic and instrumental reasons, so does the case against it. On the side of the advocates of deliberation, there are normative sympathizers, who think deliberation is a political good regardless of its results, and empirical believers, who point to positive effects that are likely to ensue. On the side of the antagonists, conversely, we may have normative critics, who reject the appeal of deliberation, and empirical skeptics, who state that the expected causal connections are simply unfounded or yet to be proven.

This chapter supplies some analytical categories that drive the whole dissertation and describes the cardinal elements of political deliberation. The second section stipulates the conceptual frame of deliberation. The third explains why and how normative sympathizers endorse it and critics oppose it. The fourth advances the instrumental debate and conveys the sorts of positive effects empirical upholders envision, and of negative or innocuous effects skeptics believe to be more accurate. The following fifth and sixth sections help to understand the chasm between advocates and antagonists in a more contextualized way, and two categories illuminate that dispute: the circumstances and the sites of deliberation. In sum, the chapter proceeds in three consecutive steps: definitional, justificatory, and contextualizing.

The contemporary literature, rich as though it may be, has not yet consolidated a comprehensive framework to address political deliberation. In the lack of a set of distinctions, however, it becomes hard to make sense of the controversies surrounding deliberation and of the exact targets at which objections against it are aimed. This chapter tries to do this preparatory conceptual work so that we can talk meaningfully and productively about the several angles of political deliberation. I provide one possible matrix of analysis through which to navigate inside this kaleidoscopic literature.[1] The chapter is an attempt to reconstruct a relevant part of a burgeoning bibliography and to put together the pieces for a comprehensive picture. It goes beyond description and takes a stand on several controversies in order to establish a theoretical foundation for the book.

[1] A relevant part of the literature mentioned in this chapter participates in the contemporary family of "deliberative democracy" theories. For the present purposes, I decouple democracy from deliberation and concentrate on the latter. The attempt to conceptualize deliberation regardless of it being democratic has been less common in recent times. More often, both concepts are conflated. For an analysis of the two separate components, see Pettit, 2006, at 156–157. Chambers (2009) also distinguishes between "deliberative democracy" and "democratic deliberation."

2. THE CONCEPTUAL FRAME OF POLITICAL DELIBERATION

Democratic theory has recently revived deliberation as a valuable component of collective decision-making. Deliberation features no less than a respectful and inclusive practice of reasoning together while continuously seeking solutions for decisional demands, of forming your position through the give-and-take of reasons in the search of, but not necessarily reaching, consensus about the common good. Thus, participants of deliberation, before counting votes, are open to transform their preferences in the light of well-articulated and persuasive arguments. Despite a range of variations, both conceptual and terminological, within the literature of deliberative democracy, this can plausibly be regarded as its minimal common denominator.[2]

The previous paragraph wraps up an intricate set of elements. Any political decisional process that fails to tick the boxes of that checklist could be a proxy but still not deserve to be called deliberation. Let me further depict the several components of that stipulative working definition. It bundles together seven major aspects that make up the deliberative encounter: first, it presupposes the need to take a collective decision that will directly affect those who are deliberating or, indirectly, people who are absent; second, it considers the decision not as the end of the line but as a provisional point of arrival to be succeeded by new deliberative rounds; third, it is a practice of reasoning together and of justifying your position to your fellow deliberators; fourth, it is reason-giving through a particular kind of reason, one that is impartial or at least translatable to the common good; fifth, it assumes that deliberators are open to revise and transform their opinions in the light of arguments and implies an "ethics of consensus"; sixth, it also involves an ethical element of respect; seventh, it comprehends a political commitment of inclusiveness, empathy, and responsiveness to all points of view.

Each of these pieces deserves further refinement. I will elaborate one by one a bit more. First, again, the decisional element. We are dealing with political rather than other sorts of deliberation.[3] Politics demands authoritative decisions that command obedience. Decisions compel deliberation with a practical course of action that a group or a political community needs to select. It is a serious choice that faces constraints of time and resources, and hence distinct from other sorts of conversation or inquiry that are not committed to such a drastic burden, like science, philosophy or, less solemnly, everyday cheap talk. Scientists and philosophers do not take decisions of the

[2] Several recent publications agree on the existence of a consolidated common denominator within the literature and usually announce it at the outset. See Dryzek, 1994 and 2000; Gutmann and Thompson, 1996; Chambers, 2003; Manin, 2005; Goodin, 2003; Bohman, 1998.

[3] From now on, I will be using "deliberation" and "political deliberation" inter changeably, unless otherwise expressly noted.

same sort. The elements of coercive authority and legitimation are not in question. It does not mean that scientific or philosophical questions cannot be implicated in political decisions. This, in fact, frequently happens. However, when the political dilemmas are framed by scientific or philosophical conundrums, coercive choices will have to be taken regardless of the existence of a right answer in those non-political domains, which conceptually do, and practically should, remain independent. The moment those questions enter the field of politics, they are turned into a different operational logic. Political deliberation has a degree of urgency that faces a peculiar temporal scale. It leads to a closure, provisional as it may be. Moreover, the effects of such a decision directly impact the lives of the deliberators, and possibly, depending of how the deliberative site is shaped, of people that are outside of it.

Second, political deliberation survives a decision and may be reawakened in new rounds of debate. Deliberators do not ignore that decisions are momentous choices that consummate concrete effects in a community's life, but neither do they overlook the element of continuity.[4] There is life after decision and the argumentative process goes on. Fresh practices of contestation, therefore, may well call for new collective decisions, which will always have a taint of provisionality. This tension between the need to decide and the ongoing post-decisional disputes, one could rightly say, is not a singular feature of deliberation, but a fact of politics in general, however way it is practiced and conceived. This observation, acute as it may be, overlooks how continuity has a relevant role to play in explaining the value of deliberation. Continuity, for deliberative theorists, is not just a fact of politics, but an integral part of legitimate politics. It highlights a long run perspective that the justification for other procedures fails to realize. It echoes the popular saying: "A debate is not over until it's over." The following five elements help to configure deliberation more meticulously.

Third, deliberation transcends the act of gathering together to take a decision. It requires the participants to display the reasons why they support a particular stand. It comprehends an exercise of mutual justification that allows a thorough type of dialogue before a collective decision is taken. This means that the participants undertake a process of reason-giving and, afterwards, articulate some adequate combination of those reasons as the justificatory ground for the decision. Silence is acceptable neither during nor after the process.

[4] Schmitter rightly points out that "provisionality" cannot do the whole work in exempting deliberation from occasional failures: political decisions are marked by some taint of irreversibility and path dependence, and past mistakes are not entirely corrigible. He wants to counter a sort of "feel-good view" of deliberation, which relies on the continuity of deliberation to correct its own pitfalls (a position that, allegedly, Gutmann and Thompson adopt). "Keep deliberating," therefore, is not necessarily a satisfactory answer for its decisional shortcomings (Schmitter, 2005, at 431).

Fourth, reasons to decide may be of various types and spring from different sources. Not all types and sources are acceptable in political deliberative forums. The collective nature of the decision implies that only reasons that all members could conceivably embrace are compatible with deliberation. This requirement rules out appeals to exclusively private interests, which are not translatable into a language of the common good. Deliberators, as a result, must put themselves inside this chain of argumentative constraints and get out of them consistently.[5]

Fifth, deliberation still demands more. It is not just a matter of giving reasons that are attachable to a plausible notion of the common good. Reason-giving is actually intended to spark an interactive engagement in which deliberators try to persuade each other. A process of persuasion assumes at least three things: one, that its participants are willing or at least open to listen and to revise their initial points of view; two, that there is an ethics of consensus underlying the conversation; three, that coercion is absent.[6] All engage in persuasion because there is a shared belief about the potential existence of a better answer, and that it is worth the effort of trying to unfold it dialogically. The ethics of consensus is the motivational drive that feeds the genuine deliberative encounter. It cannot be confounded, though, with an actual need to craft consensus.[7] Consensus is dispensable not only because of the temporal pressure to decide, but also because deliberators might acknowledge that, as long as their argumentative capacities are exhausted,[8] some points may remain irreconcilable.[9] Again, with or without consensus, which is also inexorably doomed to be provisional, deliberation is always subject to be reignited.

[5] This is one of the most controversial domains of deliberative theory. Rawls (1997b) borrows the Kantian notion of public reason for his liberal conception of justice. Because it excludes comprehensive doctrines of the good life, and is formally rigid, it has been criticized on various fronts. For a relevant distinction between inclusive and exclusive public reason, see Rawls, 1997a, at 119, and for his notion of proviso, see Rawls (1997b). This debate has led to expansions and contractions of what is acceptable in this communicative process. Many now defend that non-rational and non-cognitive forms of expression, provided they can be translated into the common good, can be used. See Chambers, 2003, at 322. For Dryzek, rather than a strict conception of public reason, a more tolerant filter would include argument, rhetoric, humor, emotion, testimony, story-telling, and gossip. This would be compatible with deliberation as long as it "induces reflection upon preferences in non-coercive fashion" (2000, at 2). Mansbridge et al. (2010) share this expansive view and think that "mutual justifiability" can be accomplished through less strict reasoning patterns.

[6] See Mansbridge et al., 2010, at 94.

[7] Such ethics requires just "making aim for consensus" (Ferejohn, 2000, at 76). Consensus is seen as an aspirational aim that regulates conduct, not a compulsory end. To what extent the lack of consensus will be considered a failure of deliberation is gradually becoming a less controversial question among authors. Cohen (1997a) recognizes consensus it as an ideal to be chased while Young (1996) rejects it as oppressive. Chambers points out that deliberative theory has dropped a "consensus-centered teleology" and managed to accommodate pluralism and the agonistic side of democracy (2003, at 321).

[8] See Rawls and his idea of "stand off" (1997b, at 797).

[9] Facile criticisms of deliberation sometimes assume two rather implausible views: that deliberation is pointless unless it leads to consensus; that deliberation, regardless of the context, is always unable