

# Why Judicial Review?

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## Abstract

Despite the flourishing of judicialisation of rights across the world, scepticism is not in short supply. Critiques range from concerns over the democratic legitimacy and institutional competence of courts to the effectiveness of rights protections. This article takes a step back from this debate and asks why should we establish or persist with judicial review. For reasons of theory, methodology, and practice, it argues that closer attention needs to be paid to the motivational and not just mitigatory purposes for judicial review. The article examines a range of epistemological reasons (the comparative advantage of the judiciary in interpretation) and functionalist reasons (the attainment of certain socio-political ends) for judicial review and considers which grounds provide the most convincing claims in theory and practice.

**Keywords:** Judicial review; rights; legal and political theory; constitutional theory; international adjudication

## 1. Introduction

Why should we support judicial review? What factors should count in *motivating* a political community to establish or sustain an institutional practice that permit judges a final or authoritative say on questions of rights?<sup>1</sup> Or, to put it in the language of normative legitimacy,<sup>2</sup> what *outputs* does judicial review offer that might help overcome qualms over *process* concerns such as democratic representativity or policy distortion?

This question is, of course, not new. The voluminous debate on judicial review stretches back to the US Supreme Court's iconic judgment in *Marbury v. Madison* in 1803<sup>3</sup> and, more locally, to a similar decision by the Norwegian Supreme Court in 1820.<sup>4</sup> However,

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<sup>1</sup> In this sense, judicial review in administrative law is excluded from the focus.

<sup>2</sup> See generally, Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004).

<sup>3</sup> *Marbury v. Madison* 5 U.S. 137 (1803) (U.S. Supreme Court). However, US state courts had exercised this power much earlier: see Barry Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and shaped the Meaning of the Constitution* (Farrar, Straus and Giroux 2009).

<sup>4</sup> Eivind Smith, 'Constitutional Courts as "Positive Legislators" - Norway' (International Academy of Comparative Law, XVIII International Congress of Comparative Law 2010). This judgment was undoubtedly influenced by the American experience, but it is arguable that it was equally a product of

it is a question worth revisiting in light of ongoing theoretical contestation and contemporary legal developments. The question of why we need judicial review is never far from the minds of those engaged in constitutional reform processes and efforts to extend the adjudicative reach of international human rights regimes.<sup>5</sup> If judicial review is to be defended, an interrogation and articulation of its potential value in general seems necessary at the outset. It is not sufficient to offer up a list of fine-grained mitigatory reasons that serve only to soften critiques.<sup>6</sup> Moreover, establishing motivational reasons creates and frames the space for a serious encounter with different critiques: it ensures that the debate is not operating at cross-purposes.

This article begins in section 2 by considering why we should be concerned about the *motivational* question for judicial review. Section 3 provides a critical assessment of the *epistemological* claim that judges possess a comparative advantage in interpretation. Section 4 examines various *functionalist* arguments, in which judicial review helps secure certain socio-political ends. The article concludes with an assessment of which grounds are the most convincing.

A word on method. The question at hand can be answered on multiple planes. On the one hand, I situate each of the motivational claims and counter-claims within political and legal philosophy. Such arguments are highly stylised, possess numerous assumptions common to political philosophy,<sup>7</sup> and use a largely moral calculus in assessing costs and benefits. On the other hand, the paper also plays the ‘science game’, to use Pinker’s depiction.<sup>8</sup> Each motivational claim is assessed as to whether it is sufficiently consistent with: (1) *theory* from the social sciences about how actors actually behave; (2) *empirical* evidence of such behaviour from studies in law, political science

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indigenous factors in Norwegian political and judicial development: see Rune Slagstad, 'The Breakthrough of Judicial Review in the Norwegian System' in Eivind Smith (ed.) *Constitutional Justice Under Old Constitutions* (Kluwer Law International 1995), 81, 82, for a background. In the first 46 years of constitutional review, the Norwegian court largely issued brief, formal conclusions, although these were the subject of public and legal debate: *ibid.* It was only in 1866, in *Wedel Jarlsberg Ufl* 1866 p. 165 (Supreme Court of Norway), at 172 that the Chief Justice formally articulated the grounds and method for exercising judicial review, which carries a doctrinal resemblance to *Marbury*. See further Eivind Smith, *Konstitusjonelt demokrati* (Fagbokforlaget, 2009), 43 and Slagstad, *ibid.* 96.

<sup>5</sup> Note that the question posed here is not one of standard legal method, which can be answered by pointing to legal sources: the ‘constitution of X says so’ or ‘Article 2 of the ICCPR says so’. Various legal sources may embody and signal good reasons for adopting judicial review; and they may also compel its use in practice. See, e.g., ‘*General Comment 9, The domestic application of the Covenant*’ (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998) (CESCR), para. 3. However, such foundations do not offer an independent normative justification.

<sup>6</sup> Andrew Petter, 'Taking Dialogue Theory much too Seriously (or Perhaps Charter Dialogue isn't such a Good Thing after All)' (2007) 45 *Osgoode Hall Law Journal* 147, 147.

<sup>7</sup> See, for example, Robert Dahl, *Democracy and its Critics* (Yale University Press 1989) and Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal* 1346. The latter sets up his critique with four such assumptions: democratic institutions are procedurally ‘in reasonably good working order’; the judiciary is well-functioning (independent and oriented towards institutional tasks of hearing complaints, resolving disputes, and upholding the rule of law); there is a commitment by ‘most members of the society’ to the ‘idea of individual and minority rights’; and there can be reasonable disagreement over the content of rights and each position is held with sufficient ‘sincerity’. p. 1360.

<sup>8</sup> Steven Pinker, *How the Mind Works* (W. W. Norton & Company 1997), 55.

and sociology; and (3) *diverse* national contexts.<sup>9</sup> There is of course a clear limit as to how much theory, jurisprudence and empirical findings can supplement to a philosophical reflection. Nonetheless, I provide sketches and summaries in order to provide a much richer gloss on the validity of the morally-oriented arguments.

## 2. Judicial Review and its Critics

Why should we be concerned with the normative motivations for judicial review? There are at least three reasons. The first is theoretical: There is a tendency in the current literature to focus on epistemological arguments (both for and against) to the neglect of functionalist arguments which are more commonly found amongst practitioners. The second is methodological: being clear about the purpose of judicial review is crucial in navigating the various debates about the legitimacy, competence, and effectiveness of judges. The third is practical: reasons offered for judicial review appear to shape both its institutional reach and jurisprudential trajectory. Each of these justifications is briefly examined in turn.

### 2.1. Theoretical framing

Greater attention to the motivations for judicial review is necessary in the theoretical literature as certain reasons have dominated the discussion. Broadly speaking, it is possible to divide potential motivational grounds into two categories: epistemological and functional. *Epistemological* arguments emphasise the comparative advantage of the judiciary in interpretation. In divining the meaning and application of a particular right, courts are said to be more reliable in interpretive exercises than legislatures and executives. *Functionalist* arguments are epistemically modest although possibly more empirically demanding. It is not presumed that courts possess greater moral insight than other branches of government; rather, judicial review garners its institutional advantage through its socio-political function(s).

In the prevailing scholarship on the legitimacy of judicial review, epistemological reasons are endowed with a certain pre-eminence. In this universe of argument, we find methodological agreement between two of the most-cited bookends of the debate. Dworkin establishes the question as follows: ‘The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conclusions.’<sup>10</sup> Likewise, this epistemic baseline stands central in Waldron’s critique of the substantive legitimacy defences of judicial review: ‘Outcome-related reasons, by

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<sup>9</sup> In this respect, it is consistent with the idea of global legal research espoused by William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009). However, it seeks to avoid unconscious ethnocentrism or “jurisdictionalism”. Twining counsels that ‘claims to “universality” or “generality” of concepts, norms, or empirical facts should be treated with caution if they are based on familiarity with only one legal tradition’ (p. xviii).

<sup>10</sup> Ronald Dworkin, *Freedom’s Law* (Oxford University Press 1996) 34.

contrast, are reasons for designing the decision-procedure in a way that will ensure the appropriate outcome (i.e., a good, just, or right decision)'.<sup>11</sup>

This typology is not watertight. Both types of reasons can be nestled together. Ronald Dworkin often adds a functional claim to his epistemic one: 'democracy requires that the power of elected officials be checked by individual rights' and the 'responsibility to decide when those rights have been infringed is not one that can be sensibly be assigned to the officials whose power is supposed to be limited'.<sup>12</sup> Other authors offer coterminous and longer justificatory lists.<sup>13</sup> Moreover, the claims can substantively overlap. To take Dworkin again, he sometimes asserts the interpretive advantage of the judiciary in more functionalist tones: judicial intervention is said to not only ensure, on balance, better answers but it also restructures public discussion about rights by foregrounding principled reasoning.<sup>14</sup> Nonetheless, in legal and political theory epistemic reasons are often foregrounded, which suggests that we need a more critical analysis of this methodological choice. Moreover, these grounds are somewhat divorced from the functional and instrumental reasons that are commonly marshalled in practice for establishing the institution of judicial review.

Equally, we need to think carefully about which types of functional reasons should count and how. For instance, in a recent article, Fallon repeats the classical lines of a functional argument:<sup>15</sup> Courts must possess the opportunity to invalidate legislation because the mere existence of legislation is likely to be more harmful to rights.<sup>16</sup> Judicial review provides therefore a critical and additional veto check against such risks.<sup>17</sup> However, as shall be seen, Fallon's reasoning has been subject to significant critique on the grounds that it cannot account for the multitude of legislation that seeks to *positively* protect rights.

## 2.2. Methodology

A second reason for examining motivational reasons is the methodological role they play in debates over legitimacy, institutional competence, and effectiveness. For normative

<sup>11</sup> Waldron (n 7) 1373.

<sup>12</sup> Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3 *European Journal of Philosophy* 2, 10.

<sup>13</sup> David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) provides a long list of reasons to support judicial review which cover both categories: time, independence and principles, expertise, absence of bias, accountability and justification, and particularity of decision-making (pp. 119-132).

<sup>14</sup> 'The public participates in the discussion – as it has in the United States, for example, about abortion, school prayer and many other issues – but it does so not in the ordinary way, by pressuring officials who need their votes or their campaign contributions, but by expressing convictions about matters of principle'. Dworkin (n 12) p. 11.

<sup>15</sup> In Norway, see M. Kinander, *Grunnlovsfesting av sosiale rettigheter – en dårlig idé*, Civita, 13 April 2014.

<sup>16</sup> Richard Fallon, 'The Core of An Uneasy Case For Judicial Review' (2008) 121 *Harvard Law Review* 1693. 'In a nutshell, the best case for judicial review in political and morally healthy societies does not rest on (as has often been asserted) on the idea that courts are more likely than legislatures to make *correct* decisions'. *ibid* 1695. Emphasis in original.

<sup>17</sup> 'The best case ... rests on the subtly different ground that legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights'. *ibid*.

*legitimacy* assessments, it is common to weigh process against output reasons in establishing when a particular coercive institution is legitimate or not.<sup>18</sup> In Waldron's well-known critique of judicial review, its undemocratic features are weighed against its supposed epistemic outputs. Given his cursory approach to setting out the motivational reasons for establishing judicial review, it is possible that his balancing assessment might be different if a broader palette of reasons were included.

Similar cost-benefit or balancing approaches are taken in debates over the *institutional competence* of the judiciary. It is often asked whether judges should possess powers to review complex and polycentric issues, ranging from national security through to the allocation of limited budgetary resources. The concern is that courts risk distorting efficient and effective public policy. In addressing this tension, Jeff King sets up an expertise-accountability trade-off: the quality of expertise for a government's position (institutional competence) is to be balanced against the risks to individual rights (accountability function of judicial review). Thus, when a State cites "collective" expertise (a position endorsed by a government agency/department, UN agency, or professional association) this 'greatly skews the accountability trade-off towards deference to expertise'.<sup>19</sup> However, King's analysis privileges one functional reason for judicial review. As we shall see, there might be other grounds that justify judicial intervention when his trade-off favours strong judicial abstention or deference. Thus, the question is of relevance to the judiciary itself as it weighs competing factors in deciding when and how to exercise its discretionary powers.

A growing literature has also tracked the *effects* of rights adjudication.<sup>20</sup> A key question in designing such research is determining what types of impact we expect from courts. The principal schools of thought have focused on either material impacts (changes in policies and social realities)<sup>21</sup> or symbol and constitutive impacts (changes in politics and attitudes);<sup>22</sup> although others straddle both camps. As Scheingold put it, 'it is

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<sup>18</sup> Buchanan (n 2).

<sup>19</sup> Jeff A. King, *Judging Social Rights* (Cambridge University Press 2012), 234. He does acknowledge that that 'accountability' concerns can become so sharp that 'expertise' concerns are dismissed, *ibid* 233, but his examples in the book suggest that such cases are rare.

<sup>20</sup> See, e.g., Varun Gauri and Daniel Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008); Beth Simmons, 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR' (2009) 27 *Nordic Journal of Human Rights* 64; Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge 1998); Valerie Hoekstra, *Public Reaction to Supreme Court Decisions* (Cambridge University Press 2003); César Rodríguez Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press 2015); David C. Thompson and Faith E. Crampton, 'The Impact of School Finance Litigation: A Long View' (2002) 28 *Journal of Education Finance* 133; Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 *International Organization*, 1; Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds.), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2014).

<sup>21</sup> Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press 1991).

<sup>22</sup> Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (The University of Chicago Press 1994).

necessary to examine both the symbolic and the coercive capabilities which attach to rights'.<sup>23</sup> To a large extent, this research is guided by an underlying normative debate on the legitimacy or usefulness of judicial review and public interest litigation.<sup>24</sup> Yet, it is interesting to observe that there are fewer empirical studies on some of the normative reasons for adjudication analysed in this article, in particular the epistemic quality of judicial reasoning and the effects on deliberative reasoning.

### 2.3. Practical effects: A patchwork of judicial review

The final reason is that motivational grounds appear to affect the design and trajectory of judicial review in practice. On the one hand, the judicialisation of rights has flourished across the world in the wake of the Cold War.<sup>25</sup> Numerous courts occupy an important and sometimes central place in the protection of constitutional and international rights. This transmogrification is evident in the constitutional reforms in a swathe of new democracies,<sup>26</sup> constitutional renewal and heightened judicial engagement in older democracies (including Norway),<sup>27</sup> and a spreading tapestry of international courts and complaint mechanisms.<sup>28</sup> The twinning of electoral democracy with national and international judicial review constitutes a persistent feature of contemporary constitutional reform and practice. Exclusion of the latter from this equation is typically met with strong domestic and international protest.<sup>29</sup> Further, there is an expansion of rights that are subject to review. From a limited number of narrowly framed civil rights, adjudicators are now ruling on a broader swathe of rights as well as duties. As Figure 1

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<sup>23</sup> Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change* (Yale University Press 1974).

<sup>24</sup> This is not to imply that unintended or unforeseen impacts, whether positive or negative, should not be analysed. Indeed, any full assessment of the justification or legitimacy of judicial review should incorporate the full palette of effects and consequences.

<sup>25</sup> For an early global attempt to overview rights jurisprudence, see Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002). While the form of judicial review varies, there is a clear embrace of either the US Supreme Court model, the neo-Kelsenian German Federal Constitutional Court, or a mixture of both. In most cases, courts are armed with power to strike down legislation and demand or trigger new laws and policies.

<sup>26</sup> This was the case across Eastern Europe, almost all of Latin America, and many countries in Southern Europe, Africa, and Asia.

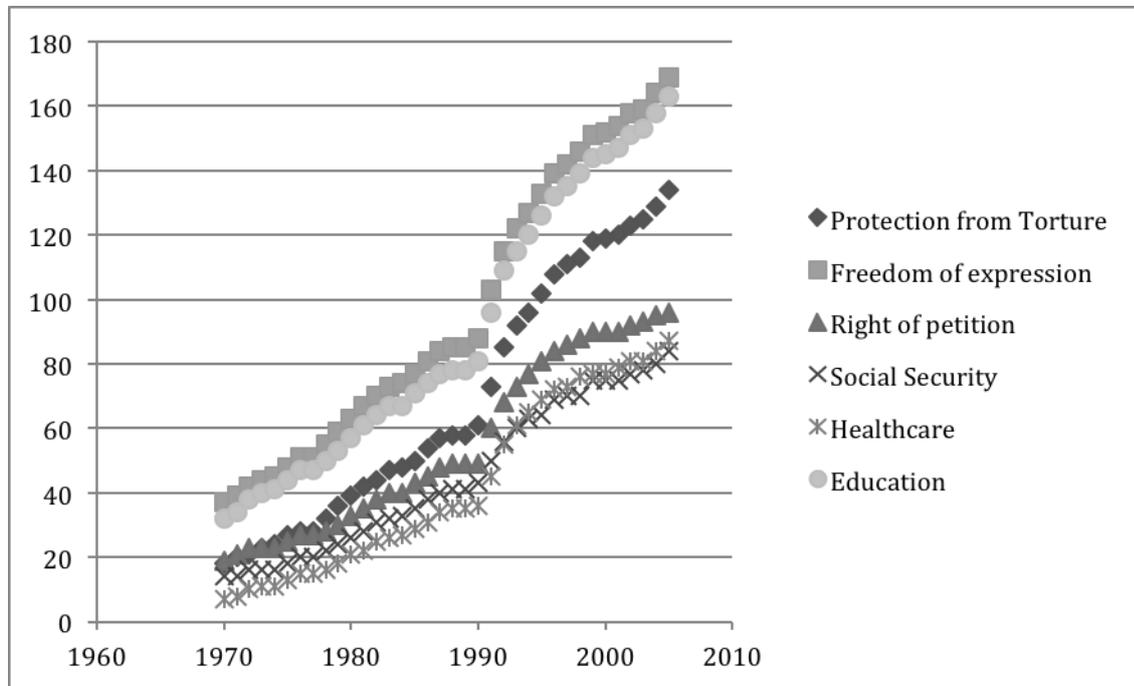
<sup>27</sup> Other examples include Canada, Finland, Iceland, and New Zealand. This process was also facilitated by the incorporation of international human rights treaties in domestic law, e.g., the European Convention on Human Rights (ECHR) in the United Kingdom and a raft of treaties in the Norwegian Human Rights Act 1999.

<sup>28</sup> For an overview, see Karen Alter, 'The Global Spread of European Style International Courts' (2012) 35 *West European Politics* 135, 135.

<sup>29</sup> Witness the response to recent constitutional crises in Egypt and Hungary when judicial review was under threat from strong executives: see Tom Perry and Marwa Awad, 'Egypt's Mursi to meet judges over power grab' *Reuters* (November 26) <available at <http://www.reuters.com/>> and Keno Verseck, 'Constitutional Reforms: Hungary Steps Away from European Democracy' *Spiegel International* (11 March) <available at <http://www.spiegel.de/>>.

demonstrates, there has been a remarkable and commensurate rise in the constitutional recognition of various civil and social rights.<sup>30</sup>

Figure 1 Trends in Constitutional Rights: 1970-2005<sup>31</sup>



Yet, this trend is not universal. The reach of judicial review does not extend to the four corners of the world. For a start, many Asian and Middle Eastern States cannot be found on this constitutional map: courts in these regions are granted fewer powers and are more tightly restrained, while international treaty protocols for individual complaints go unratified.<sup>32</sup> For example, the average level of acceptance of international human rights adjudicative mechanisms is strikingly low for these two regions: 1.05 and 0.6 compared to 3.08 for the rest of the world. Yet, these States ratify substantive human rights treaties at a rate just below the global average.<sup>33</sup> Conforming with Ginsburg's observation of the emergence of national judicial review, the presence of electoral democracy is largely a

<sup>30</sup> The trend remains clear and startling even if we adjust for the fact there has been an increase in the number of States in the period 1970-2005: the average increase in recognition of these rights falls from 691 per cent to 459 per cent. The number is determined by UN membership: see <http://www.un.org/en/members/growth.shtml>.

<sup>31</sup> The source of the original data is the CCP Data Set <http://www.comparativeconstitutionsproject.org/>. In order to transform it into times series data, it was determined whether for each year a constitution (dated by its most significant recent reform, usually at a time of democratic or post-colonial transition) included the particular right. As the recognition of some rights may be through earlier amendments to the constitution there is likely to be a margin of error. However, the overall trend is fairly clear.

<sup>32</sup> Note that some States may ratify a human rights treaty or incorporate constitutional rights with no intention at the time of fulfilling the rights or judicial orders for their enforcement. In other words, they are the 'false positives': see generally *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

<sup>33</sup> These were calculated through the use of the Human Rights Treaty Index, created by the author.

necessary but not sufficient condition for explaining acceptance of international human rights review.<sup>34</sup> While judicial review has emerged, sometimes surprisingly, in more authoritarian regimes, it is often highly fragile.<sup>35</sup>

However, ambivalence is not constrained to regions that with a sizeable share of authoritarian and anocratic<sup>36</sup> governments. In more mature democracies, constitutional reform processes have halted at the door of enhanced judicial review.<sup>37</sup> Recently, in Norway, parliamentarians could not agree on formalising the Supreme Court's powers of judicial review which it had claimed and exercised for 194 years.<sup>38</sup> In Europe and Latin America, different coalitions of States have sought to weaken the powers of regional human rights bodies<sup>39</sup> while the tribunal for the Southern African Development Community was stripped of its powers to consider individual complaints.<sup>40</sup> Moreover, this uncertain picture of State commitment may be evident in assertions of patchy compliance with judgments, including by some Western European democracies.<sup>41</sup>

Jung and Rosevear argue that there has been a slowdown in constitutional recognition of judicial review of *social rights*. Noting the lower rate in the period 1990-2004 compared to the period 1974-1989,<sup>42</sup> they suggest that the rise of the Washington-based consensus tempered recognition. However, this statistical and causal interpretation is questionable, and using the same data, Figure 2 reveals that the general trend line remains upwards.<sup>43</sup> Nonetheless, what the graph does demonstrate is the equal

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<sup>34</sup> It explains 91 per cent of the coverage of adjudicative mechanism. The residual is ratification of the Optional Protocol to CRPD by Saudi Arabia, Syria, and Yemen. Note that it is only a necessary condition: some electoral democracies such as India, Pakistan, and Indonesia have not accepted a single international human rights complaint mechanism.

<sup>35</sup> See, e.g., Zhushi [2008] 15 (Supreme Peoples' Court of China).

<sup>36</sup> Hybrids of authoritarianism and democracy.

<sup>37</sup> In Australia, a national consultative process led recently to recommendations for a charter of civil rights backed by weak or dialogical judicial review; yet, neither mainstream political party has taken the proposal forward.

<sup>38</sup> It was finally confirmed in 2015. See Arnulf Tverburg, 'Høyesterett, Stortinget og prøvingsretten', *Lovdata*, 12 June 2015, available at [https://lovdata.no/artikkel/hoyesterett\\_stortinget\\_og\\_provingsretten/1569](https://lovdata.no/artikkel/hoyesterett_stortinget_og_provingsretten/1569) (accessed 28 June 2015).

<sup>39</sup> For instance, the recent Protocol No. 14 to the European Convention on Human Rights permits a single judge to decide on the admissibility of complaints and to reject claims that do not evince a 'significant disadvantage' - which many States consumed resources and were not worthy of international adjudication. The Brighton Declaration by Council of Europe Member States seeks to take this process further by tightening other admissibility conditions and making the margin of appreciation doctrine more explicit. High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012.

<sup>40</sup> Nicole Fritz, 'SADC leaders hot air blows down Tribunal' *OSISA* <available at <http://www.osisa.org/law/blog/sadc-leaders-hot-air-blows-down-tribunal>>.

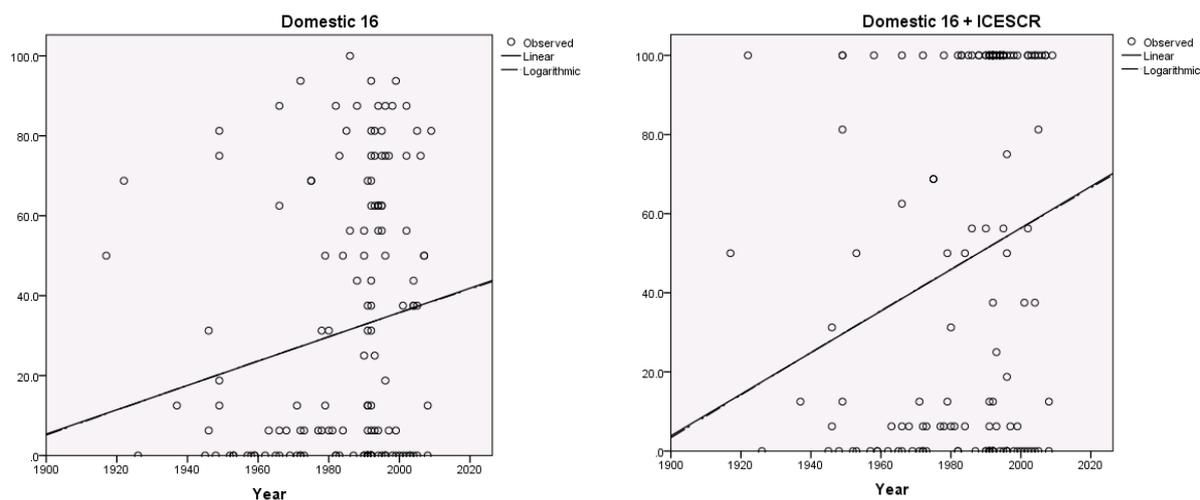
<sup>41</sup> See, e.g., OSJI, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Justice Initiative 2010).

<sup>42</sup> Courtney Jung and Evan Rosevear, 'Economic and Social Rights Across Time, Regions, and Legal Traditions: A Preliminary Analysis of the TIESR Dataset' (2012) 30 *Nordic Journal of Human Rights* 372, 381. Note that they use only the dataset of 136 countries minus the ten western countries. However, the exclusion of these ten countries does not change the results.

<sup>43</sup> We would generally expect a gradually plateauing of the line as fewer States are left in the pool, which would suggest that a logarithmic curve should be calculated. However, during this period the number of States has also increased discounting the assumption behind that approach. The trend would be even

persistence of the non-recognition of judicially enforceable social rights during recent constitutional reform.<sup>44</sup> This was notable in Norway's recent constitutional reform: The right to education and the social rights of children were included in a reformed bill of rights, but the right to health and adequate standard of living were rejected by a parliamentary super-minority.<sup>45</sup>

Figure 2. Constitutional Recognition and ICESCR Incorporation over Time<sup>46</sup>



Does this patchwork of institutionalisation reflect normative differences over the importance or risks of judicial review? Explaining the rise of judicialisation is the subject of a growing body of empirical work. Thus, the fragmented nature of expanded judicial review suggests that normative dissensus remains a factor. It is not just a matter of time before policymakers, the legal profession and the entire public become accustomed to the idea; it is a site of deeper disagreement. This makes the march of judicial review less inevitable and more conditional on changes on ideas as much as politics and culture.

### 3. Epistemological Arguments

Epistemological justifications of judicial review tend to be the preserve of political philosophers, legal theorists, and lawyers. Like others, Michelmann sets up the inquiry as one of deciding which institution is able to 'get the basic laws, including all morally telling interpretations of them, *right*'.<sup>47</sup> Importantly, the question is usually phrased in

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higher if we included recent constitutional reforms in Kenya, Egypt, Uruguay, Timor and Fiji amongst other countries.

<sup>44</sup> Indeed, the correlation scores are very low:  $R^2 = 0.03$  for figure 2A,  $R^2 = 0.05$  for Figure 2B.

<sup>45</sup> Arnulf Tverberg, 'Ny vår for menneskerettighetene i Grunnloven?', *Lovdata*, 12 June 2014. However, section 92 appears to have made the entire ICESCR judicially reviewable.

<sup>46</sup> In Figure 2B, the year of constitutional adoption was presumed to be the year of ICESCR incorporation though this was adjusted in one case to a later date.

<sup>47</sup> Frank Michelmann, *Brennan and Democracy* (Princeton University Press 1999), 59. Emphasis added.

relative rather than absolute terms. Which institution is most ‘likely’ to arrive at, or ‘better’ at arriving, the ‘correct’ or ‘true’ answer?<sup>48</sup> In essence, it concerns the *reliability* of interpretation.

The clear challenge for epistemological claims for judicial review is the existence of reasonable disagreement. Rights are a quintessential “under-theorised agreement”, permitting a range of plausible interpretations. In hard cases, this interpretive ambiguity is put to the test. As Tushnet states:

[C]onstitutional provisions are often written in rather general terms. The courts give those terms meaning in the course of deciding whether individual statutes are consistent or inconsistent with particular constitutional provisions. But as a rule, particular provisions can reasonably be given alternative interpretations. And sometimes a statute will be inconsistent with the provision when the provision is interpreted in one way, yet would be consistent with an alternative interpretation of the same provision.<sup>49</sup>

To compound matters, interpretive differences are not confined to disagreement between the different branches of government. Judges can be divided amongst themselves: synchronically (majorities, minorities, and separate opinions), hierarchically (differing views between upper and lower courts), or diachronically (reversal of earlier decisions).

The odyssey of *Sherbert v. Verner* in the United States exhibits dramatically all three features.<sup>50</sup> In the case, a South Carolina government agency refused to grant unemployment benefits to Mrs Sherbert, a member of the Seventh Day Adventist Church. While local job opportunities were available, she claimed that such employment was not possible because it required working on a Saturday, the Sabbath in her religious denomination. By a majority of 7 to 2, the US Supreme Court held in its 1963 judgment that a law or rule which substantially interferes in *effect* with the free exercise of religion can only be justified on two grounds: it constitutes a ‘compelling state interest’ and no ‘alternative forms of regulation’ are available. Applied to the facts, they found in favour of Mrs Sherbert.<sup>51</sup>

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<sup>48</sup> See, e.g., ibid Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275, 278.

<sup>49</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008), 20.

<sup>50</sup> Tushnet, ibid 20, uses the case to simply illustrate disagreement over time, but it constitutes a striking example of all three forms of judicial disagreement.

<sup>51</sup> *Sherbet v. Verner* 374 U.S. 398 (Supreme Court of the United States), 403 (Justice Brennan for the majority). Now, the Court is not pronouncing here on the meaning of the right. In each of these cases under discussion, the state could have made an exemption: indeed, the state or Oregon responded to the judgment by exempting from its criminal statute the religious use of peyote. However, by graduating the level of scrutiny of different types of interferences with the right, it in a sense delineating what is in the core of right.

The doctrine stood for 27 years but in 1990, the same court, by a majority of 5 of 4, loosened or abandoned the strict scrutiny test in *Employment Division, Department of Human Resources v. Smith*. In overruling the Oregon Supreme Court, which had found that the use of the drug peyote in a Native American church ritual could not constitute grounds for employment dismissal and the subsequent denial of unemployment benefits, they found that interferences were only invalid if imposed with the *intention* of harming religion.<sup>52</sup> In effect, the Court confirmed the alternative logic and interpretation of the original *Sherbet* dissenters.

Beyond revealing intra-judicial disagreement within courts, across courts, and over time, the case reveals even more about the extent of the disagreement. First, the US Congress emphatically disagreed with the 1990 decision and passed the Religious Freedom Restoration Act (unanimously in the House and by 97 to 3 in the Senate). Yet, in a subsequent ruling, the US Supreme Court partly overturned the Act on the basis that Congress sought to usurp the Court's interpretive power over the constitution.<sup>53</sup> Secondly, the diachronic direction of judicial disagreement was not predictable. It is often assumed that courts are unidirectional and dynamic, such that rights protections expand over time.<sup>54</sup> Here, the right to religious freedom was significantly curtailed by the Court and its greatest impact appears to have fallen on minority religions: Judaism, Islam, and Native American religion. Thirdly, the form of legal reasoning was not foreseeable. Predominant legal theories of interpretation did not correspond with their protagonists in the Court. The most famed originalist, Scalia, devoted not a hairbreadth of analysis to the intention of the Framers of the US Constitution. Rather, he placed great weight on contemporary circumstances and the turmoil the *Sherbert* rule would create in a society characterised by religious diversity.<sup>55</sup> It is the dissenting minority that invokes the originalist claim, along with other arguments, and it is Justice Blackmun who returns to the struggle of the founding fathers to win and constitutionalise religious liberty.<sup>56</sup>

Such puzzling dissensus also extends to the international level. The European Court of Human Rights and UN Human Rights Committee have divided along similar lines on religious freedom. In one instance, they came to dramatically different conclusions concerning the same applicant and the same issue. In *Mann Singh v. France*, the Court found a challenge to the prohibition on the wearing of a turban in a driver's licence photo to be a 'manifestly ill-founded' claim.<sup>57</sup> Yet, the Human Rights Committee in (*Mann*)

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<sup>52</sup> *Employment Division, Department of Human Resources v. Smith* 494 U.S. 872 (1990) (Supreme Court of the United States), at 878, Justice Scalia, writing for the majority.

<sup>53</sup> The law could apply to federal government but not to the states and local government

<sup>54</sup> Indeed, Mark Tushnet (n 49), makes this point repeatedly in his book despite his gesturing towards this case as an example of reasonable disagreement.

<sup>55</sup> *Employment Division, Department of Human Resources v. Smith*, p. 888.

<sup>56</sup> 'I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.' *ibid.* p. 909.

<sup>57</sup> *Mann Singh v. France*, Application no 4479/07 (Judgment 13 November 2008) (ECHR).

*Singh v. France*, found a violation of religious liberty for a ban on the use of a turban for a passport photo.<sup>58</sup> It held that the State's objective of identification for public safety was irrational. If the applicant always wore a turban, a "turban-less" image would not assist officials wishing to identify him.

This extended vignette on religious freedom exposes reasonable disagreement in its different forms in the variegated and shifting landscape of judicial review. In the two dominant doctrinal approaches surveyed, strict and deferential review on religious interference seem reasonable on first blush. Although the former is clearly more protective of individual rights, the ebb and flow of these cases seem to raise real questions over the comparative advantage of the judiciary.

Isolated cases, however, do not hammer nails into the coffin of an argument. The epistemological claim is more measured: judges are more likely to arrive at a better interpretation. Such a strategy permits a proponent of judicial review like Dworkin to both defend the institution and criticise individual judgments,<sup>59</sup> particularly those of the current U.S. Supreme Court. While conceding that judges will 'inevitably disagree', he asserts that the reasoning of the present majority in a range of decisions 'cannot be justified by any set of principles that offer even a respectable account of our past constitutional history'.<sup>60</sup> The move also allows Dworkin to maintain his notion that almost all cases will contain the "right" or "best" answer, even if only discernible by a Herculean superjudge.<sup>61</sup>

Nonetheless, this strategy does not address the methodological challenge. Can we be sure that courts will more consistently arrive at better interpretations? And, if so, under what conditions? The problem is that there is no clear and agreed upon aggregative metric or ruler that we can put under constitutional interpretations of courts, legislators, and executives to determine which is the most epistemologically reliable. The most effective route is arguably longitudinal qualitative and partly quantitative analysis, which may reveal the underlying motivations of different actors and the wisdom of their considerations. The problem is that one is usually reduced to tracing individual or small samples of interpretations; and one can find courts and legislators behaving badly (and decently).<sup>62</sup>

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<sup>58</sup> *Singh v. France* Communication no 1928/2010, Decision on the Merits, UN Doc. CCPR/C/108/D/1928/2010 (2013) (UN Human Rights Committee),

<sup>59</sup> This distinction is sometimes overlooked by critics. For example, Wojciech Sadurski (n 48), appears to mischaracterise Dworkin in this way.

<sup>60</sup> Ronald Dworkin, 'Bad Arguments: The Roberts Court & Religious Schools' *The New York Review of Books - Blog*. Indeed, the unified legislature and cross-political alliance that sought the restoration of the *Sherbet* test suggests that the Supreme Court might have erred significantly.

<sup>61</sup> Ronald Dworkin, 'My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Anymore' in WJT Mitchell (ed.) *The Politics of Interpretation* (University of Chicago Press 1983), 287. 'I have insisted that in most hard cases there are right answers to be hunted by reason and imagination'. *ibid* viii.

<sup>62</sup> A constructive example is Mark Tushnet (n 49), who does so, acknowledging the limitations and then challenges proponents of judicial review to come up with counter-examples.

Proponents of judicial review tend not to travel too long down that path. Rather, they point to certain defining features of judicial review that suggest that courts will arrive at better answers. It is a “forward-looking” method that presumes “favourable conditions” generates “a good outcome”.<sup>63</sup> We can categorise these as the: (i) authenticity of case-based review; (ii) the semi-public mode of deliberation; and (iii) the form of decision-making. Each will be examined in turn. These epistemic arguments may be compelling but deserve close consideration. They all draw on particular institutional attributes of courts, and as the legal process school in particular has sought to emphasise, institutional features may not consistently correlate with the quality of judicial reasoning.<sup>64</sup>

### 3.1. The authenticity of case-based review: Evidential particularism

A commonly-cited epistemic advantage of judicial reasoning is its factual palette: the particularity and authenticity of concrete cases. The argument runs that legislative and executive reasoning tends to be dominated by general and stylised considerations. Yet, at least in the field of individual rights, such reasoning may be less appropriate, occluding the practical and problematic effects of rules (or lack thereof) on disparate individuals. Bilchitz sets out this critique of legislatures in customary fashion:

General decision-making across a range of cases can obscure the problems that may arise in particular instances to which that general decision may apply. General decision-makers may simply overlook or fail to give sufficient weight to the problems that may be faced in particular cases.<sup>65</sup>

The claim is alluring enough. It resonates deeply with the defence of judge-made common law in Anglo-American jurisdictions. Rules and principles develop and mature best through the inductive and analogical reasoning of courts in actual cases, avoiding the ‘perils of prophecy’ through a ‘long course of trial and error’.<sup>66</sup> In rights jurisprudence, the scenario is common enough. A law may be highly defensible on general grounds, but its impact falls disproportionately, whether unfairly or unwittingly, on particular individuals or groups. Video surveillance, efficient criminal trials, religious education, conditions for unemployment benefits and so on may constitute positive public aims, but their consequences are unlikely to impact individuals in a uniform manner.

Nonetheless, there are serious problems with this argument (putting aside its somewhat anti-democratic overtones). First of all, it is equally possible to encounter the reverse scenario. Laws may be motivated by very particular situations without regard for their

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<sup>63</sup> On discussion of this method generally, see Jon Elster: ‘Clearing and Strengthening the Channels of Constitution-making’ in Tom Ginsburg (ed.) *Comparative Constitutional Design* (Cambridge University Press Cambridge, 2002), 15, 17.

<sup>64</sup> On this point, see Lon Fuller, ‘The Form and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353.

<sup>65</sup> Bilchitz (n 13), 127.

<sup>66</sup> Roscoe Pound, *The Formative Era of American Law* (Little, Brown & Co 1938), p. 51, cited in Donald Horowitz, *The Courts and Social Policy* (The Brookings Institution 1977).

general and systemic effect on rights. A terrorist bombing, the abuse of social benefits by one family, an alleged rape by a member of an ethnic minority, a surge in homelessness in urban business districts, may all trigger legislative solutions that possess no generalised justification or grounding in empirical reality. In these circumstances, we would want courts to *lift* rather than *concentrate* the perspective.<sup>67</sup> Thus, we may wish to fully reverse Bilchitz's position and ask whether the legislature has properly engaged in 'general decision-making across a range of cases' and evaluated the systemic impacts of rights, which may be *represented* (not just actualised) by an individual in a legal case.

It might be retorted that over the last two centuries, the degree to which legislation is targeted at such specific groups has waned in mature democracies. Nonet and Selznick describe a general shift from *repressive* legal regimes to *autonomous* and *responsive* law.<sup>68</sup> Repressive law is concerned the maintenance of order and selective subordination in the interests of the rulers and elite, while autonomous law offers impartial, neutral, and equal treatment and responsive law attends to the needs and values of the disempowered and disadvantaged. But vestiges of repressive law persist and its potency remains latent.<sup>69</sup> Every policy narrative requires an "enemy" and, even when law and politics are framed in autonomous terms, repressive motivations may be observable if not transparent.

A good illustration is *A & Others v. Secretary of State for the Home Department*.<sup>70</sup> The September 11 bombings in New York led the British parliament to embellish its fresh and comprehensive Terrorism Act of 2000. Foreigners could be detained and deported if the relevant government minister believed they were a risk to national security and suspected their involvement in international terrorism. The provision created a "prison of three walls": detainees could voluntarily leave for their home or third country. Yet, if they did not or could not due to fears of torture, detention would continue *ad nauseum*. While passing the law, the government sought to immunise it from challenge by making a derogation order from rights to liberty and security in the European Convention on Human Rights on the grounds of a public emergency.

The primary question for the House of Lords was not whether a general rule had particular effects. The law was all about particularity: its force was trained on a particular group – to which all eleven defendants as foreigners belonged. Instead, the court was confronted with three general questions: Was there a public emergency

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<sup>67</sup> Waldron (n 7), p. 1379, makes a similar point – noting the tendency of legislatures to enact cases on the basis of notorious individual cases – but then states in the same breath that these same legislatures are then better placed to weigh the issues involved. The argument doesn't necessary follow of itself.

<sup>68</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (Transaction Publishers 1978), p. 21: 'under appropriate conditions, specific processes emerge that tend to transform ad hoc prebureacratic decision-making into more systematic bureaucratic decision-making'.

<sup>69</sup> Nonet and Selznick note the continuing relevance of repressive law in contemporary society: *ibid.* p. 116.

<sup>70</sup> *A & Others v. Secretary of State for the Home Department* [2004] UKHL 56 (House of Lords, United Kingdom).

justifying the derogation? Was the legislation proportional to its aim?<sup>71</sup> Finally, was it discriminatory against foreigners? The majority sided, somewhat reluctantly, with the government on the first question on the grounds that, in determining the existence of a public emergency, the executive possessed greater institutional competence and benefitted from a wide margin of appreciation.<sup>72</sup> Yet for the rest, the answer was negative. The legislation failed the proportionality test. The use of immigration measures was unlikely to advance the stated security goals: deportees would still be free to plan attacks against the UK, as would nationals.<sup>73</sup> It was also discriminatory: no reasonable and objective criteria existed for imposing harsher treatment on non-nationals given the considerable number of British citizens involved in or suspected of international terrorism.<sup>74</sup>

Of relevance are the considerations that were weighed. The particular circumstances of the defendants did play a role: the court took seriously the consequence that innocent foreigners could be held *incommunicado ad infinitum*.<sup>75</sup> However general considerations were equally important in the proportionality test, and ultimately decisive. They revealed an inconsistency between the legislative measures and the stated aims. Not only was the law difficult to square with the need for generalised equal treatment, the law, as one commentator put it, made 'no sense in security terms'.<sup>76</sup>

Secondly, even if we persist with the individualist perspective, it may be empirically limited. The particularity justification may be just that - rather particular to Anglo-American jurisdictions. Not all constitutional and international rights cases arrive in the form of individual complaints. The form of judicial review varies significantly.<sup>77</sup> Adjudicators in many jurisdictions are granted the power to abstractly review legislation, issue advisory opinions, and entertain complaints by legislators or collectives/organisations. These powers are particularly prevalent in civil law jurisdictions, while liberal standing rules in some common law countries permit public interest complaints. The latter two powers exist in regional quasi-judicial procedures and the final in some southern common law countries, particularly South Asia. To varying degrees, the production of factual evidence and evidence of particular violations

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<sup>71</sup> Even if derogation is justified by a public emergency, Article 15 of the European Convention of Human Rights provides that any derogation must be 'strictly required by the exigencies of the situation'.

<sup>72</sup> Lord Bingham of Cornhill, for the majority, paras. 26-29.

<sup>73</sup> 'The choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom.' Lord Bingham of Cornhill, for the majority, para. 43.

<sup>74</sup> *ibid.* para. 68.

<sup>75</sup> See quotation at footnote 27.

<sup>76</sup> Walker (2008: 1143).

<sup>77</sup> On institutional features, see the global overview in Tom Ginsberg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge 2003), 34.

is required, but it may not be central to the case. Moreover, some adjudicatory bodies may launch investigations and inquiries.<sup>78</sup>

It might be objected that this criticism is unfair. Not all defenders of judicial review support abstract or collective forms of review. In their view, a lack of particularity may deprive the claim of legally manageable content<sup>79</sup> or the meaningful context for the interpretation and application of a right.<sup>80</sup> This is partly true. The individualised structure of much judicial review does carry certain benefits, although perhaps more of a functional than epistemological kind.<sup>81</sup> But collective forms of review offer complementary benefits. As will be argued later, it can ameliorate the critique that rights are too individualised in their focus, capture the collective dimension embedded in most rights, provide broader guidance and legal certainty to the meaning of particular provisions and allow courts to rule on important questions when individual applicants are pressured to abandon or settle their claims.

Waldron goes a step further and labels the particularist virtues of Anglo-American courts a mere ‘myth’.<sup>82</sup> In appellate review, the traces of ‘the original flesh-and-blood rights-holders’ have “vanished” as the argument becomes more abstract. According to him, complainants are selected by advocacy groups ‘in order to embody the abstract characteristics that the groups want to emphasize as part of a general public policy argument’.<sup>83</sup> This critique is pertinent though overstated. In the common law world, the factual record from lower courts is left largely intact (although it can be more easily contested in civil law jurisdiction). Moreover, while public interest advocates do try to identify more sympathetic claimants and narratives, their degree of control over litigation can be marginal.<sup>84</sup>

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<sup>78</sup> For example the UN Committee against Torture, Committees on the Elimination of Discrimination against Women and the UN Committee on Economic, Social and Cultural Rights.

<sup>79</sup> Tara Melish, 'Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics (JILP)* 1, 61: 'A justiciable claim is nevertheless generally described as one involving a live controversy between adverse parties ... Its contours serve to concretize disputes in judicially-manageable ways, delimiting the types of claims appropriate for judicial review'.

<sup>80</sup> Bruce Porter, 'The Crisis of ESC Rights and Strategies for Addressing It' in John Squires, Malcolm Langford and Brett Thiele (eds.), *The Road to a Remedy* (2005), 48, 52: 'Rights adjudication must begin with the individual context of each claim'- although, see conditioned support for collective claims in Bruce Porter, 'Canada: Systemic Social Rights Claims and a Partial Defence of Soft Remedies' in Malcolm Langford, Cesar Garavito-Rodriguez and Julieta Rossi (eds.), *Making it Stick: Compliance with Social Rights Judgments* (Cambridge University Press, 2015), ch. 7.

<sup>81</sup> The consequences for rights protection may be clearer: See section 4.2 below.

<sup>82</sup> Waldron (n 7), 1379.

<sup>83</sup> *ibid* 1379.

<sup>84</sup> Advocates and social movements do not have decisive control over who litigates, when they litigate, and how they litigate. For example, Thomas M. Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43 *Law & Society Review*, notes how the American gay and lesbian movement tried tactically and strategically to halt early litigation by LGBT individuals wishing to marry but with little success. The extent to which civil society support structures are a determining factor of litigant success is debated in the literature: cf. Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); Bruce Wilson, 'Rights Revolutions in Unlikely Places: Costa Rica and Colombia' (2009) 1 *Journal of Politics in Latin America*

Yet, Waldron is right in pinpointing the generalised element of judicial review. In 1976, Chayes identified this feature as a particular turn in civil law from that of retrospective and bipolar litigation dominated by individualised remedies to the more forward-looking model of public law characterised by multiple parties, a more predictive and evaluative approach to fact-finding and the presence of structural or general remedies.<sup>85</sup> The Chayesian paradigm shift is of course highly stylised. It ignores the long tradition of these general features in private law the fact that that most public law cases are modest in ambition or concern individualised administrative remedies.<sup>86</sup> However, Chayes is most likely correct that general considerations may be more *prominent* in cases that seek 'vindication of constitutional or statutory rights' rather than 'private rights'.<sup>87</sup>

To sum up, the particularity of judicial review may give the courts a slight epistemic advantage over legislators and executives. Though if adjudication can and should concern broader principles and policies, questions remain over a judicial comparative advantage on this terrain, as we shall see in section 2.3. Two further factors may ground such a claim.

### 3.2. A semi-public deliberation: Informational exposure, decisional seclusion

Adjudication is a unique institution on account of various structural features which work in opposite directions. In theory, the judiciary is fully *exposed* to an array of arguments and facts but is *secluded* from political pressure, permitting it to make non-partisan or principled decisions. An adjudicator is an extroverted perceiver and an introverted decision-maker, making them sensitive to conflicting accounts but independent in judgment.

The first characteristic is a hallmark of deliberative democracy theory. Robust exposure to different views is said to produce better decision-making. Michelmann sets up the question as to comparative epistemic advantage as follows:

(O)ne condition that you think contributes to greatly to reliability is the constant exposure of the interpreter – the moral reader – to the *full blast of the sundry opinions* on the question of rightness of one or another interpretation, freely and uninhibitedly produced by assorted members of society listening to what the others have to say out of their diverse life histories, current situations, and perceptions of interest and need.<sup>88</sup>

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59;and Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 26 *South African Journal on Human Rights* 39. Advocates may search for ideal cases that may best fit a particular narrative, but the messiness of reality tends to intrude and the narrative may be quickly reshaped by media, judges, and commentators.

<sup>85</sup> Abraham Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282.

<sup>86</sup> As to the first, Chayes, *ibid* 1283, acknowledges that this 'traditional conception of adjudication is no doubt overdrawn'.

<sup>87</sup> *ibid* 1284.

<sup>88</sup> Michelmann (n 47), 59. Emphasis added.

Even though evidence from empirical research on deliberative democracy suggests that these assumptions have limits and defects,<sup>89</sup> we can accept for the moment that interpretive reliability improves with full argument and informational exposure. The question is whether courts possess any particular comparative advantage, structurally or in terms of the different incentives and costs different actors possess in accessing information.

The second structural characteristic of judicial deliberation is the requirement of impartiality and independence. The political insulation of the courtroom may allow dispassionate, and consequently better, reasoning. Sibley argues that conduct can only be ‘deemed reasonable by someone taking the standpoint of moral judgment’ and this often requires the intervention of a third party.<sup>90</sup>

To be reasonable here is to see the matter – as we commonly put it – from the other persons point of view, to discover how each will be affected by the possible alternative actions; and, moreover, not ‘merely’ to see this (for any merely prudent person would do as much) but also be prepared to be disinterestedly *influenced*, in reaching a decision, by the estimate of these possible results.<sup>91</sup>

These features of informational exposure and decisional seclusion can be captured within a principal-agent model, as done in effect by Kis.<sup>92</sup> We begin by asking why political authority is delegated first from the people to elected representatives. In Kis’s view, most mature democracies prefer a system of electoral democracy over direct democracy because ordinary citizens face challenges in obtaining relevant information. Condorcet’s jury theorem – that a majority is more likely to get the right result than a minority – does not work at scale. Referenda generate few incentives for citizens to become fully informed since the weight of their respective vote is so small: it approaches zero as the population becomes large. Bentham made precisely this exact point in 1788: ‘the greater the number of voters the less the weight and value of each vote, the less its price in the eyes of the voter, and the less of an incentive he has in assuring that it conforms to the true end and even in casting it all’.<sup>93</sup>

Thus, the greater the complexity of the issue and the more information needed the ‘more serious the danger that the voters’ judgment will not be just unreliable but subject to some systematic distortion’.<sup>94</sup> On balance, Kis concludes that representative institutions have an epistemic advantage over citizens. The costs of accessing and processing information is low (due to economies of scale, research staff, and bureaucratic channels)

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<sup>89</sup> See the overview in David Ryfe, ‘Does Deliberative Democracy Work?’ (2005) 8 *Annual Review of Political Science* 49.

<sup>90</sup> W.M. Sibley, ‘The Rational Versus the Reasonable’ (1953) 62 *The Philosophical Review* 554, 557.

<sup>91</sup> *ibid.*

<sup>92</sup> János Kis, ‘Constitutional Precommitment Revisited’ (2009) 40 *The Journal of Social Philosophy* 570.

<sup>93</sup> Jeremy Bentham, ‘Lettre d’un Anglois’, in Jemery Bentham, *Rights, Representation and Reform* (Oxford University Press, Oxford, 1788/2002), 35, cited in Elster (n 63), 22.

<sup>94</sup> Kis (n 92), 580.

and the incentives are high (better deliberation could produce more votes).<sup>95</sup> The result is that the main tool citizens possess in a democratic process is one of accountability, namely periodic elections: it 'permits the citizenry to remain sovereign while paying obedience and commands issued by a representative assembly'.<sup>96</sup>

With the rise of complexity in modernity, this account has a certain resonance. According to Stone Sweet, enhanced complexity generates a demand within dyadic relations (two entities) for more triadic forms of governance, by parliaments, executives, and judiciaries.<sup>97</sup> It also coheres with certain empirical research. Hibbing and Thiess-Morse note the paradoxical positions of voters in surveys and focus group studies.<sup>98</sup> While participants expressed a preference for significant control over decision-making, few expressed a preference for strong direct democracy.<sup>99</sup> They warmed initially to the idea of direct rule but quickly raise feasibility concerns, many of them related to complexity and lack of information. Such research does not rule out a role for direct democracy - it is arguably a powerful means to catalyse and tame rather than manage and direct the political process -<sup>100</sup> but it reveals the limits to its contribution and support.

Returning to Kis, this comparative advantage of legislators over citizens can nonetheless generate its own perverse effects. The asymmetry of information between the elected and the electors invites the more "predatory" politician to adopt 'mistaken electoral beliefs' in order to avoid electoral defeat.<sup>101</sup> If rights are affected, this is serious 'because collective self-government depends on each citizen being treated as an equal'.<sup>102</sup> As citizens in most jurisdictions lack direct levers of control over the judiciary, the risks of the judiciary falling prey to this moral hazard is comparably less. Thus, the very feature that makes courts susceptible to charges of democratic illegitimacy may strengthen their epistemological capacity.

It is not too difficult to identify cases in which courts correct predatory information asymmetries. In the seminal prison litigation cases in the USA, it was strikingly

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<sup>95</sup> In addition, he makes the point that that legislation may often be inconsistent with the majoritarian or general view since there may be different reasons why representatives do not follow through on electoral promises or public opinion. *ibid* pp. 583-7.

<sup>96</sup> *ibid* 587.

<sup>97</sup> "To the extent that TDR [triadic rulemaking] is effective, it lowers the costs of dyadic exchange; as dyadic exchanges increase in number and in scope, so does the demand for authoritative interpretation of rules; as TDR is exercised, the body of rules that constitute normative structure steadily expands becoming more elaborate and differentiated": Alec Stone-Sweet, 'Judicialization and the Construction of Governance' (1999) *Comparative Political Studies* 147, 158.

<sup>98</sup> John Hibbing and Thiess-Morse, 'Process Preferences and American Politics: What the People want the Government to Be' (2001) 95 *American Political Science Review* 145, 149.

<sup>99</sup> The overwhelming majority placed themselves in the middle of spectrum between direct and institutional democracy.

<sup>100</sup> Yannis Papadopoulos, 'How does Direct Democracy Matter? The Impact of Referendum Votes on Politics and Policy-making' (2007) 24 *West European Politics* 35.

<sup>101</sup> Kis (n 92), 588.

<sup>102</sup> *ibid*.

revealed.<sup>103</sup> Until the 1970s, all branches of government in the State of Alabama had declined to address prison conditions; there was clearly no electoral gain in addressing the problem. While courts had acted traditionally in a highly deferential manner, it was the instigation of litigation in 1971 that eventually permitted a full and public description of prison conditions, a system 'so thoroughly pervaded by violence, overcrowding, inedible food, and brutal methods of punishment'.<sup>104</sup> The force of the evidence was so strong that even the state's attorney general conceded that they had no case to advance. The entire prison system was ruled unconstitutional.<sup>105</sup> A cursory reading of the European Court of Human Rights judgments on police brutality and prison conditions in Western and Eastern European States makes for equally salutary reading.

Moral hazard, though, is just one feature of informational asymmetry. Kis could have strengthened his case by an analysis of both the resource and time constraints and disincentives to deliberate that representative institutions face. The deliberative democracy school emerged precisely due to the concern that legislatures lacked the willingness or capacity to meet deliberative criteria, such as *reciprocity* (providing mutually acceptable reasons), *publicity* (a sufficiently open forum) and *accountability* (deliberating with and giving reasons to relevant agents).<sup>106</sup> The reasons for this informational asymmetry are practical and structural.

Practically, there is a limit to the time legislators can devote to reflection, deliberation and constituent consultation; and staff and bureaucrats may be unable to generate sufficient or quality analysis on the topic.<sup>107</sup> In most parliaments across the world, there is an enormous volume of legislation and regulation that must be accommodated. Modern parliaments operate therefore under severe time constraints and strictly regulate the time spent on debating legislation.<sup>108</sup>

Structurally, legislatures are not designed for public deliberation but rather for the creation and maintenance of legislating and/or governing majorities and, depending on the political conditions, the aggregation of citizen preferences. There is no reason why public deliberation should be the dominant modus of legislative reasoning: negotiations, deals, threats etc. are all part of the political modus. Moreover, 'If a representative is guided by factional or short-term interest, no amount of deliberation can induce an

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<sup>103</sup> See generally Feeley and Rubin (n 20).

<sup>104</sup> Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press 2001), 21.

<sup>105</sup> *Newman v. State of Alabama* 349 F.Supp. 278 (M.D.Ala. 1972) (District Court of the United States, Middle District of Alabama).

<sup>106</sup> James Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy' (1998) 6 *The Journal of Political Philosophy* 400, 408.

<sup>107</sup> Tushnet (n 49) at least concedes this – noting how interpretations of legislators and executive officials tend to be regularly skewed in certain directions: *ibid.* p. 157. Although, he attempts to partly base this on the existence of judicial review and the irresponsibility it may breed amongst legislators and officials.

<sup>108</sup> Herbet Döring, 'Time as a Scarce Resource: Government Control of the Agenda' in Herbert Döring (ed.) *Parliaments and Majority Rule in Western Europe* (Campus Verlag 1995).

impartial stance'.<sup>109</sup> Scholars have pointed to deliberative paradox thrown up by legislative processes: if discussions occur publicly, parties may be more likely to harden their bargaining position which defeats the point of genuine deliberation.<sup>110</sup>

The combination of these constraints and incentives are evident in practice. Reviewing literature on European parliaments, Rasch concludes that:

In general, plenary debates on legislation in assemblies of (at least) parliamentary systems tend not to be deliberative. Arguing seldom affects information and preferences in a way that become important at the final voting stage. Outcomes almost always are known in advance.... Instead, it is much more common for legislators to use plenary debates as an arena for stating their reasons, revealing their preferences and explaining their vote – primarily to outside party members, media and the general public.<sup>111</sup>

This finding contradicts claims by judicial review critics such as Waldron who praise legislatures as paragons of deliberation. Waldron writes, 'In this regard, it is striking how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review.'<sup>112</sup> Yet, his only example is a debate on abortion in the British parliaments from the 1960s. Also, he fails to reconcile his own normative perspective with his own empirical observations: he has bemoaned earlier the lack of debate in the New Zealand parliament, characterising it as an 'empty chamber'.<sup>113</sup>

Overall, this quasi-deliberative claim for courts is attractive. In the context of fully fleshed-out litigation, a court may be exposed to a greater volume of relevant information and informed expertise and address these in a disinterested and thoughtful manner. However, there are four significant caveats.

First, not all cases are complex. Kis acknowledges for instance that complexity may not loom large for the general public on some issues, particularly issues of 'personal morality'.<sup>114</sup> He names capital punishment, gay marriage or affirmative action since 'people have the opportunity for acquiring shared experience'.<sup>115</sup> This fact may explain why both laws and jurisprudence on these issues arouse significant controversy, and both legislators and courts risk charges of elitism. Nonetheless, even here, Kis notes the importance of information. Judicial intervention may help deepen the understanding of

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<sup>109</sup> Jon Elster, 'Introduction' in Jon Elster (ed.) *Deliberative Democracy* (Cambridge University Press 1998), 1, 5.

<sup>110</sup> Bohman (n 106), p. 420.

<sup>111</sup> Bjørn Erik Rasch, 'Legislative Debates and Democratic Deliberation in Parliamentary Systems' (Presentation at the Oslo-Yale International Workshop on Epistemic Democracy in Practice, Yale University, New Haven, 20-22 October, 2011).

<sup>112</sup> Waldron (n 7), 1384.

<sup>113</sup> Jeremy Waldron, 'Compared to What?—Judicial Activism and the New Zealand Parliament' (2005) *New Zealand Law Journal* 441.

<sup>114</sup> Kis (n 92), 580.

<sup>115</sup> *ibid* 581.

the causes of inequality, which may be needed in order to assess claims for affirmative action or gays and lesbian rights, particularly if one has had no interaction with the persons who would benefit from the law.

Secondly, the informational advantage of courts is both conditional and contextual. Legislative and executive members can avail themselves of information and expertise from parliamentary committees, public consultations, in-house legal expertise and closer attention to mass media,<sup>116</sup> while the significance of predatory political behaviour for rights may vary considerably. As to the adjudicatory process, it possesses its own in-built constraints: significant time and resources can be consumed by procedural machinations and cases vary considerably in terms of exposing courts to a full range of opinions and facts. Indeed, the strictures of legal method and argument may screen out morally relevant information and arguments (see further discussion in section 2.3). Moreover, while adversarial litigation generally allows weaker parties a chance to more fully put their case, alternative or more fine-grained opinions may not secure a hearing unless there is a good process for *amicus curiae* briefs, expert opinions and media/public exposure of on-going litigation.

Thirdly, exposure does not equate to comprehension. What is missing in Kis' account is the differential capacity of both institutions to process complex information. Judiciaries are not experts across all policy domains and face, like any institution, their own challenges with complexity. The trend towards expert decision-making agencies is unmistakable. As will be argued in the next sub-section, the judiciary is adept at expanding their expertise within cases and over time, but one cannot overstate their capacity.

Fourthly, the assumption that courts are independent from politics is contested. Decades of empirical research on judicial behaviour demonstrate that legal reasoning is only one factor in decision-making.<sup>117</sup> Indirect political pressures or personal ideology may compromise judicial independence. The extent to which judiciaries are independent will be taken up later, but for now it is important to note the dilemma.

### **3.3. The mode of decision-making: Justification and method**

A final epistemic advantage may arise in the mode of judicial deliberation: the form and substance of reasoning. As to *form*, judges must State their reasons. For those obliged to provide public and written justification, certain expectations are common: a logical and defensible progression of argument; a demonstration that relevant facts and competing views have been considered; and awareness that the decision has consequences.

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<sup>116</sup> See case studies of Tushnet (n 49).

<sup>117</sup> See, e.g., Martin Shapiro and Alec Stone-Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002); and Duncan Kennedy, *Critique of Adjudication (fin de siècle)* (Harvard University Press, 1997). For empirical studies of the extent of the role of ideology in judging, see Lawrence Baum, *The Puzzle of Judicial Behaviour* (The University of Michigan Press 1997); and Stefanie A. Lindquist and Frank Cross, 'Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent' (2005) 80 *N.Y.U. Law Review* 1156.

Conversely, it might be thought that other branches of government are not so formally constrained. Legislation is passed without any formal process that demands coherent and rigorous reason giving.

This argument has merit but, ultimately, its force is modest. Empirically, not all courts are compelled to provide reasons.<sup>118</sup> Judges in some civil law jurisdictions (e.g. France) provide scant reasoning: authority is presumed to flow from hierarchy and the proper operation of the legal process. Such a result is consistent with the centralised ordering of the civil law judiciary with rigorous internal systems for maintaining legal consistency across decisions.<sup>119</sup> This is to be contrasted with the decentralised and coordinate common law systems. Individual judges possess enormous powers that must be justified publicly to political actors and other members of the judiciary:<sup>120</sup> reasons emerge as an important form of accountability.

However, one should not overstate the discrepancy between legal systems. In some instances, it is a difference in style: e.g., Germanic-influenced courts prefer a highly deductive and impersonal style of form and reasoning. Moreover, there is considerable intra-jurisdictional borrowing in the contemporary design and reform of judicial systems. In particular, the rise of constitutional and international rights review has prompted courts lower in the chain to be more expansive in their statement of reasons. Otherwise they risk being perfunctorily overruled. The European Court of Human Rights has demanded that on certain topics reasons must be given or easily discernible from judicial findings (such as determination of criminal guilt).<sup>121</sup> The Court's justification of its position is apposite in highlighting the reason-centric focus of legal process:

[F]or the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, *the rule of law and the avoidance of arbitrary power* are principles underlying the Convention ... In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society...<sup>122</sup>

Turning to the legislative side of the equation, we should ask whether legislatures experience analogous opportunities, pressures, and incentives to state reasons. Further,

<sup>118</sup> Tushnet (n 49), 3 makes a similar point.

<sup>119</sup> This effect can be seen in the decisions of UN human rights treaty bodies. The reasoning for the decision is skeletal: the Committee's 'considerations in reaching a decision remain covert, secreted within formal opinions that merely state rather than argue towards conclusions', Henry Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?', in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), 15, 39.

<sup>120</sup> Mirjan Damaška, *The Faces of Justice and State Authority* (Yale University Press 1986), 292.

<sup>121</sup> Indeed, the European Court of Human Rights has pressed for minimal reason-giving in the one bastion of common and civil law systems impervious to it: determination of guilt by juries or mixed juries. *Taxquet v. Belgium* [GC], Application no. 926/05 (16 November 2010) .

<sup>122</sup> *ibid* para. 90. Emphasis added.

do they develop reason-giving cultures over time? Structurally, there are grounds for thinking so. Legislation is debated in parliament, often in repeated phases. Justification for positions on at least particularly controversial issues will be demanded by the media, constituents, opposition politicians, and possibly more diplomatically by bureaucrats. The result is that the legislative record can contain substantive reasoning. In four case studies of constitutional questions in legislative debate, Tushnet draws back the curtain to reveal a certain level of reason-giving, such as legislative attention to constitutional rights, parliamentary committees which scrutinised legislation, and the expansion of legal advisors within the executive and legislative branches.<sup>123</sup> From this he draws the conclusion that ‘the performance of legislators and executive officials in interpreting the constitution is not, I think, dramatically different from the performance of judges’.<sup>124</sup>

However, the argument in favour of legislatures can be taken only so far. First, as discussed earlier, there are constraints and incentives that operate to restrict the level of deliberation. These are part of the calculus of legislators. Secondly, the statements of reason tend to be thin. Tushnet argues that sometimes there is ‘flesh on the bones’ in legislative debates, but he acknowledges that most of the times the reasoning constitutes ‘skeletons’ of argument.<sup>125</sup> While he counter-asserts that this is not much different from the verbal discussions between justices,<sup>126</sup> the fact is that judges are at least required to set out those reasons. Even if they may be a rationalisation of intuitions, according to the legal realist tradition, they must be transparent. They can provide the basis for substantive discussion, occasionally in the media but at least amongst the contesting parties, policymakers, politicians and the legal profession.

These considerations might lead us to count the stating of reasons as a slight form of epistemic advantage for courts. However, we have only considered form. We must also ask a more *substantive* question: do the *methods* used by courts produce more reliable interpretations? This is a much more difficult challenge. And, it is at this point, that the twinning of moral and legal epistemological arguments for judicial review splinters, twists, and potentially falls apart.

The *legalistic* reflex is to defend the method of judicial reasoning by reference to doctrinal expertise. In interpreting constitutions and treaties, judges are more likely to follow an established legal method as the relevant legal system dictates: placing the correct weight on legal text, precedent and practice, principles and theories, case and background facts etc. Yet, this very modus of reasoning may count against the courts. If the metric for reliability is good *moral* reasoning, recourse to legal method may demonstrate precisely why we do not want courts to be given the task of rights interpretation. As Waldron puts it, judicial review does not provide ‘a way for a society to focus clearly on the real issues at stake when citizens disagree about rights’ but rather

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<sup>123</sup> Tushnet (n 49), pp. 112-156.

<sup>124</sup> *ibid* 157.

<sup>125</sup> *ibid* 124.

<sup>126</sup> *ibid*.

'distracts them with side-issues about precedent, texts, and interpretation'.<sup>127</sup> He notes, however, that in contemporary constitutions, the gulf between quality moral reasoning and acceptable legal reasoning may not be as great.<sup>128</sup>

This framing presents a sharp choice: If the case for judicial review rests on quality legal reasoning, it is open to the normative charge that it may be poor moral reasoning. If the case rests on quality moral reasoning, it is open to the empirical critique that the reasons judges give must be more legalistic in nature. It seems one has to choose.

Yet, some critics would not even allow that. They would go even further and claim that the first choice is fallacious: courts are not engaged in anything that can be substantively identified as legal reasoning or method. Courts are principally guided by moral and political convictions rather than any objective or external legal criteria.<sup>129</sup> Stated legal reasons are but a subterfuge. Thus, one is only left with an argument from the standpoint of moral reasoning and that is likely to be weak if the official legal reasons are covering unstated moral preferences. This critique is overdriven. No one school of thought has empirically explained judicial outcomes as discussed above.<sup>130</sup> Gibson's observation from 1983 seems to stand the test of time:

In a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do. Thus, judicial decision making is little different from any other form of decision making. Roughly speaking, attitude theory pertains to what judges prefer to do, role theory to what they think they ought to do, and a host of group-institution theories to what is feasible to do.<sup>131</sup>

Nonetheless, the realist or attitudinalist point demonstrates, at least, that one has to be cautious in resorting to legalistic defence of interpretive method.

How can the argument be saved? There are at least three ways forward in trying to re-scramble the egg of law and morality. The first and most common way forward is to limit the scope of the claim to a subset of areas where the two clearly overlap. The legal process school, among others, argues that the articulation of rights and duties should be

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<sup>127</sup> Waldron (n 7), 1353. The argument is fully developed at pp. 1383-4.

<sup>128</sup> 'If one is lucky enough to have a fine and up-to-date Bill of Rights, then there may be some congruence between judicial reason-giving and the reason-giving we would look for in fully rational, moral, or political deliberation. But if one has an antiquated constitution, two or three hundred years old, then the alleged reason-giving is likely to be artificial and distorted'. *ibid* p. 1383.

<sup>129</sup> See, e.g., Kennedy (n 117) and; Martin Shapiro, *Law and politics in the Supreme Court: New Approaches to Political Jurisprudence* (Free Press of Glencoe, 1964), Eric Posner and Miguel de Figueiredo, 'Is the International Court of Justice Biased?' (2005) *Legal Studies* 34 599.

<sup>130</sup> See Frank Cross and Emerson Tiller, 'Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals' (1998) 107 *Yale Law Journal* 2155; and William R. Shaffer, Gunnar Grendstad, and Eric Waltenburg, 'Standards of Interpretation—Rejoinder to Føllesdal' (2014) 127 *Tidsskrift for Rettsvitenskap* 77.

<sup>131</sup> James Gibson, 'From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior' (1983) 5 *Political Behavior* 7.

limited to those areas where the judiciary has institutional competence. In Lon Fuller's classic treatment of institutional competence, adjudication is positively viewed as contributing a distinct form of decision-making to public policy: 'a form of social ordering institutionally committed to 'rational decision' that is based on 'participation through proofs and arguments'.<sup>132</sup> However, judges are likely to make mistakes in adjudicating in areas where they must access information not presented by parties or that trigger complex and polycentric repercussions of a judgment.<sup>133</sup> This consequentialist argument fits neatly with some liberal arguments that judicial review thus should be limited to negative liberty rights.<sup>134</sup> Therefore, we might be more comfortable that courts will be more reliable in these sorts of cases.

However, the argument struggles on various points. Most of the controversial cases discussed in this piece have involved classical liberty rights. Such a demarcation of competence may be arbitrary or a mere historical reconstruction.<sup>135</sup> In addition, courts have developed various techniques to improve their access to information and expertise in more complex cases, from *amicus curiae* submissions through to experimental and reflexive doctrinal techniques and remedies.<sup>136</sup> Such approaches seek to maximise the respective competences and contributions of the courts and other branches of government to solving a problem.

A second and alternative way forward is to embrace the standard of moral reasoning and contend that courts are superior in this respect.<sup>137</sup> Dworkin does this in four moves. First, he argues that in practice lawyers and judges 'instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases

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<sup>132</sup> Fuller (n 64), 380. See also pages 364-5. However, it is not rational in the sense that is based pure logical deduction or incontrovertible empirical facts. It is something closer to a process of reaching partial reflective equilibriums where participants 'trace out and articulate the implications of shared purposes': *ibid* 381.

<sup>133</sup> *ibid* 394.

<sup>134</sup> See, e.g., *Sinnott v. Minister for Education* [2001] 2 IR 545 (Supreme Court of Ireland).

<sup>135</sup> For instance, in the majority judgment in *A & Others v. Secretary of State for the Home Department*, [2004] UKHL 56, discussed above, the use of greater deference on the question of 'public emergency' was justified on the basis that 'The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution... Conversely the greater legal content of any issue, the greater the potential role of the court' (para. 29). Yet on its face, the approach seems tautologous if courts also define what the legal content of an issue is. In this case, the majority referred to the European Court of Human Rights jurisprudence in support of demarcating that boundary, but that does not necessarily give any independent principled ground for making the clear distinction.

<sup>136</sup> For an overview of a broad range of informational and reflexive techniques, see Malcolm Langford, 'Beyond Institutional Competence: A Consensualist Model of Rights Adjudication' (Presented at the International Association for Constitutional Law, Oslo, 16-20 June 2014 2014). On reflexive and experimental approaches, see generally Michael Dorf, 'The Domain of Reflexive Law' (2003) 103 *Columbia Law Review*; and Charles F. Sabel and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015; and Sandra Liebenberg and Katherine Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in Helena Garcia, Karl Klare and Lucy Williams (eds.), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2014), 237.

<sup>137</sup> Ronald Dworkin, *Law's Empire* (Belknap Press 1986); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Dworkin (n 10).

through fresh moral judgments.’<sup>138</sup> Secondly, while he concedes it would be ‘revolutionary’ for judges to make such a concession,<sup>139</sup> he argues that this moral approach largely fuses with legal method. This is because basic legal rights are framed in abstract moral terms: treating them as moral rights constitutes the only sensible means of legal interpretation.<sup>140</sup> Thirdly, he contends that moral reasoning on rights must be based on principles rather than policy: there must be “distributional consistency from once case to the next” because rights ‘do not allow for the idea of the strategy that may be better served by unequal distribution of the benefit in question’.<sup>141</sup> Finally, courts as a “forum of principle” are better placed for such a task. They are constrained by ‘articulate consistency’:<sup>142</sup> Legislatures and executives are likely to give undue weight to policy considerations due to their orientation towards the advancement of “general welfare”.<sup>143</sup>

Dworkin’s defence of courts as forums of principle is compelling in the abstract but is practically limited. His later model of “law as integrity”, which embeds judges more firmly in their legal context (Anglo-American although potentially exportable to civil law systems), places a constraint on principle-based reasoning. In the “chain gang”, judges are both backwards and forwards-looking: seeking to both fit their chosen principle with previous interpretations and the best available and contemporary moral interpretation.<sup>144</sup> Such coherence may not always be achievable. As the *Sherbet* saga showed, judges are likely to possess different preferences for weighing the past and future. A further constraint is Dworkin’s acknowledgement that rights can be relative as much as absolute: they are not always full trumps: sometimes, policy considerations will be strong enough to dominate.<sup>145</sup> The necessary weighing of arguments raises the question of judicial expertise, their capacity to determine the weight or force of policy considerations, something Dworkin does not address yet is common in almost all rights cases.

Dworkin’s best case seems to be that courts will generally give more weight to moral principles but that legal precedent and policy considerations may sometimes dominate. Even if we accept this argument, it is not patently clear that it amounts to the most compelling case for judicial review. Dworkin’s approach ends up mirroring the sorts of claims by the legal process school – that judges are expert in one type of approach. In this case, it is principles rather than discrete cases.

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<sup>138</sup> Dworkin (n 10), 3.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid* 7. ‘According to the moral reading, these clauses must be understood in the way their language naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power’.

<sup>141</sup> Dworkin (n 137).

<sup>142</sup> *ibid* 88.

<sup>143</sup> *ibid.* ‘Policies are aggregate in their influence on political decisions and it need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike’.

<sup>144</sup> Dworkin (n 137).

<sup>145</sup> Dworkin (n 137).

However, if courts are called to also assess various policy considerations, we should expect them to be up for this task. This provides a third way forward. What is notable in the religious freedom and counter-terrorism judgments discussed above is the presence of significant consequential reasoning by courts - their close scrutiny of the policy-based claims of governments. However, the overall picture is different from Dworkin's: courts emerge not so much as forums of principle, with immaculate moral reasoning, but rather as forums of principled pragmatism. It is a mode of reasoning well summarised and promoted by Carter and Burke. They argue that 'well-reasoned legal decisions' are those fit best together 'the facts established at trial, the rules that bear on the case, social background facts, and widely shared values', rather providing epistemic clarity: 'Law does not provide a technique for generating "right answers"'.<sup>146</sup>

If principled pragmatism were the standard, how would courts perform? Most parliamentarians and ministers also aspire to be principled pragmatists - marrying value or ideological commitments with complex reality. Given that rights tip the balance in favour of principled reasoning, we might expect generally courts to have some epistemic advantage. However, some of the cases discussed above suggest that courts can be superior in consequential reasoning and inferior in principled reasoning.

### 3.4. The limits of epistemological justifications

Are courts better placed to interpret rights? Of the various arguments traversed above, the strongest arguments for adjudicators are their *political seclusion* and their bias towards *principled* forms of reasoning. Their relative freedom from partisanship and the demands of coherence seem particularly to enhance the prospects of reliable interpretation, at least legally and possibly morally. Epistemological reliability might be enhanced further when courts are better exposed to the particularities of alleged rights violations, are able to secure a broad evidential and informational base, and are required to state fully reasons.

Nonetheless, none of these features provides a knockout blow. On balance, courts emerge with some sort of *prima facie* interpretive distinction, but how significant is it? Moreover, will it endure in the most important or significant rights cases? In many ways, the epistemological and somewhat legalistic justification of rights review suffers much

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<sup>146</sup> Lief H. Carter and Thomas F. Burke, *Reason in Law* (8th edn Longman, 2010), 11, 14. In a similar fashion, Tobin focuses on rationality, pragmatism, and consensus building in interpreting international law when formalistic and purposive approaches do not offer clarity: 'the interpretation offered should be clear and practical, coherent, and context-sensitive'. The 'underlying objectives of these factors' is to 'generate a meaning for a human right which is capable in bridging the impasse that all too often characterizes the understanding of a human rights within the relevant interpretive community'. John Tobin, 'A Constructive Approach to Treaty Interpretation' (2012) 23 *Harvard Human Rights Journal* 1, 49. Coherence is defined to include both coherence within argumentative reasoning as well as within the legal system.

the same problem as the notion of representative and deliberative parliamentarism. Both ideas are heavily stylised and vulnerable in practice - so-called 'nirvana fallacies'.<sup>147</sup>

In addition, an emphasis on the epistemological virtues of judicial review brings potential adverse consequences for rights practice. It encourages the conflation of judicial reasoning with the "real" meaning of rights. Such conflation might, of course, be instrumentally beneficial for compliance: it adds to the authority of judicial reason. Yet, it is also perilous. There is the danger of rigidity: the ideational or legal space for alternative moral and political conceptions of rights (whether more expansive, restrictive, or contemporary) is diminished. Further, it may encourage courts to be risk adverse. Judges may reason that restraint or refuge in doctrines such as justiciability is to be preferred to a charge of incompetence or illegitimacy. A legal and institutional environment open to the prospect of judicial infallibility may encourage both judicial dynamism, sensitivity, and innovation.

#### 4. Functionalist Arguments

These lukewarm epistemological conclusions provide the appropriate departure point for a different set of arguments, which can be described as functionalist. By functional, I mean a goal-centred instrumentalism and not the empirical school of structural-functionalism.<sup>148</sup> Framed by an institutional logic, functionalist claims begin in essence from the assumption that the judiciary is a political actor and that the legal process is a form of politics - not electoral politics but rather a distinct judicial politics. On its face, this observation does not challenge a positivist conception of adjudication, which accepts that law serves instrumental and political ends. However, we might acknowledge that law is inflected internally by a certain politics as judges use discretion to shape trial procedure, select and weigh facts, interpret and apply ambiguous language, and craft remedies.

In thinking about functional justifications, three arguments seem to motivate the choice of judicial review: (i) social stability; (ii) accountability; and (iii) structured public deliberation. Each will be discussed in turn. As will become clear, these choices are motivated by features that are clearly specific to judicial review of rights. I am less convinced by functionalist motivational claims for which there are clear alternatives to courts. The result is that the arguments draw on many of the specific features of the legal process identified above but strip away the pretension that law is *fully* insulated from politics as the epistemic dimension is given less weight.

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<sup>147</sup> Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006).

<sup>148</sup> According to Malcolm, functionalism generally captures 'any theory claiming that the best, or only, way of defining something is in terms of what it does or the role it plays in the ongoing course of events'. Norman Malcolm, 'Functionalism' in Philosophy of Psychology' (1979-80) *Proceedings of the Aristotelian Society*, 1. Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy', *West European Politics* 25.1 (2002), 77, 77-78 also uses the term in this way to describe certain arguments for judicial review.

The other consequence is that I do not consider some common functionalist arguments. This includes the claim that courts facilitate the adaption of constitutions to new social circumstances: the same role can be played by constitutional amendment.<sup>149</sup> Likewise, I briefly consider but dismiss the inclusion of democracy amongst the motivations for judicial review. While tempting, such arguments are better trotted out in a more modest manner at the mitigatory level, in response to concerns that judicial review is anti-democratic.<sup>150</sup> Nonetheless, the motivational arguments addressed herein possess shades of representative, participatory and deliberative democracy, to which I will allude. Moreover, there may be some specific national contexts in which the democratic function of judicial review is more salient.

#### 4.1. Political legitimation and trust building

The first functional role of judicial review is the most ephemeral. Judicial review provides one answer to a foundational question in political theory and practice: how to justify the coercive power of the State or majoritarian-based government.<sup>151</sup> By pointing to judicial review of basic rights, an assurance is offered to individuals who must comply with law or who may suffer its neglect. Authority is legitimated accordingly through the guarantee of certain procedural and substantive protections.

This reciprocal function of judicial review produces two instrumental benefits of normative significance. First, it may constitute a condition precedent for the initial formation of a “demos” or political community. Secondly, it may help build and maintain trust within society over time, particularly between distrustful factions, groups or classes. Social trust is increasingly recognised as crucial to achieving most ends in a modern State.<sup>152</sup>

Curiously, this function of judicial review reverses an assumption that is thought to disqualify it, namely plurality of opinion. The very existence of disagreement between individuals and groups, together with uncertainty over the consequences of majoritarian rule, may precipitate the establishment of judicial review. As Rosenfeld puts it: ‘in heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression’.<sup>153</sup>

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<sup>149</sup> Ginsburg finds a correlation between constitutional endurance and flexibility but that such flexibility may be generated by flexible amendment procedures as much as judicial review: ‘The Virtues of Evolution in an Age of Revolution: Norway’s Enduring Constitution in Comparative Perspective’, *Nytt Norsk Tidsskrift*, 3 (2014), 225-237. English version on file with author.

<sup>150</sup> See footnotes 217-219 in section 4.3.

<sup>151</sup> For an overview of the arguments for legitimating the State, see John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press 2001).

<sup>152</sup> See, e.g., Richard Wilkinson and Kate Pickett, *The Spirit Level* (Penguin 2009).

<sup>153</sup> Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2000-2001) 74 *Southern California Law Review* 1307, 1310. Charles F. Sabel, ‘Constitutional Orders: Trust Building and Response to Change’ in JR Hollingsworth and R Boyer (eds.), *Contemporary Capitalism: The Embeddedness of Institutions* (Cambridge University Press 1997), 154 puts it in similar terms: ‘each step in the construction of a

The mechanism by which this occurs has been described as one of “insurance”.<sup>154</sup> Empirically, we expect judicial review to emerge when individuals, groups and political parties feel compelled to protect themselves against future and unacceptable political risks. The result is a constitutional settlement that requires commitment to mechanisms in which all actors accommodate an acceptable, but not excessive, degree of risk. Such institutions transform ‘fuzzy uncertainty (where anything is possible)’ into a ‘specific assessable risk (of betrayal) that a trustor is prepared to accept’.<sup>155</sup>

These risks may be apparent and visible at the time of constitution-making. For example, a losing side in an armed conflict, a small political party, or a linguistic minority, may all feel particularly vulnerable. In addition, judicial review of basic rights can provide an on-going means by which a State can legitimate its authority and sustain trust with different groups. Constitutional adoption does not imply constitutional acceptance: Violence, capital flight, migration, patronage and non-compliance with law (criminal, tax, labour, social security law conditions etc.) represent alternatives to submission to authority. Judicial review provides one means by which dissent is redirected back into political processes by helping ensure that the burdens of compliance are tolerable.

This function is not limited to the domestic level. International review represents a form of insurance. Notably, ratification of international human rights treaties and complaint protocols surges in periods of domestic constitutional reform. Moravcsik argues that such actions exploit the ‘symbolic legitimacy of foreign pressure and international institutions to unleash domestic moral opprobrium’.<sup>156</sup> As a result, the ‘domestic balance shifts in favour of protection of human rights’ as a State ‘seeks to avoid undermining its reputation and legitimacy at home or abroad’.<sup>157</sup> Further, we might expect judicial review to expand at the international level in order to legitimate the growing coercive power of new global actors. For example, the adoption of the EU Fundamental Rights Charter was justified partly on the grounds that Europeans citizens should be protected from adverse decisions by the European Commission.<sup>158</sup>

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constitutional order is an exercise in deliberative trust in which the testing of mutual trustworthiness simultaneously encourages a clarification of the potential benefits of cooperation and the redefinition of past conflicts from historical enmities to comprehensible, forgivable, and forgettable misunderstandings’.

<sup>154</sup> Ginsberg (n 77), 22.

<sup>155</sup> Reinhard Bachmann and Andrew Inkpen, 'Understanding Institutional-Based Trust Building Process in Inter-Organizational Relationships' (2011) 32 *Organization Studies* 281, 284.

<sup>156</sup> Andrew Moravcsik, 'International Human Rights Regimes' (1995) 1 *European Journal of International Relations* 157, 161. Emphasis added.

<sup>157</sup> Ibid.

<sup>158</sup> Similarly, the World Bank Inspection Panel was established in 1993 the face of the World Bank's legitimacy crisis in the face of damning reports of the impacts on local communities of financing of large hydropower projects. See Bradford Morse and Thomas Berger, *Sardar Sarovar: Report of the Independent Review* (Resources Future International Inc. , 1992). Chris Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power' (2012) 1 *Global Constitutionalism* 369; and Maliks (2012) also draws a domestic parallel in their arguments for global forms of judicial review, but for different reasons. However, the expansion of international judicial review to restrain such extra-territorial State power is often hobbled by large western States or the new rising powers. The pattern of ratification for the International Criminal Court is a notable example.

The political legitimisation claim faces, however, four challenges. Each dampens the strength and breadth of the argument. First, there may be *alternatives* to constituting and sustaining trust. Judicial review is not the only means to enhance the sociological legitimacy of State authority. Other options may be available and function more efficiently or effectively: e.g., federalism, regional representation, representation quotas, reserved senate seats, affirmative action, advisory councils with veto powers (e.g. for indigenous groups), standing, or ad hoc commissions to investigate human rights abuses. Constitution-making should not be blind to these options.

However, the benefit of these alternatives is contingent. When a threat is less distinct and stable, and/or a group is geographically and politically dispersed, these approaches may be less relevant or feasible. There are likewise risks that specialist institutions will ossify over time or face political attack and de-funding. In these circumstances, judicial review may be a more practical and durable solution. It is diachronically flexible and more deeply institutionalised as a third branch of government. The judicial model may also be cheaper, in terms of financial costs as well as “agency costs” or “sovereignty costs”. The legal training of judges and their *relative* insulation from politics with a capital P may mean they evince sufficient fidelity to the legal text and the constitutional bargain.<sup>159</sup>

Secondly, the shape of the insurance mechanism may be warped. Some scholars claim that the protection of minority *elite* interests is the dominant reason for the creation of judicial review.<sup>160</sup> Hirschl contends that the ‘constitutionalization of rights and the establishment of judicial review’ are ‘driven in many cases by attempts to maintain the social and political status quo and to block attempts to seriously challenge it through democratic politics’.<sup>161</sup> By way of example, the leading Framers of the US Constitution were anxious to institutionalise multiple forms of control, including judicial review, to check parliamentary majorities and ‘popular irrational passions’ that would threaten property rights and encourage irresponsible fiscal policy.<sup>162</sup>

These elitist claims are arguably overstated. Normatively, it is problematic to simply associate civil and political rights with elite privilege. For instance, there may be good reasons to enshrine the right to property, the most recognised right in the world,<sup>163</sup> even

<sup>159</sup> Ginsberg (n 77), 26.

<sup>160</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

<sup>161</sup> Hirschl (n 160), 213. See also D’Souza Radha D’Souza, ‘Liberal Theory, Human Rights and Water-Justice: Back to Square One?’ *Law, Social Justice & Global Development Journal (LGD)* 1, and Richard Bellamy, ‘The Democratic Constitution: Why Europeans Should Avoid American Style Constitutional Judicial Review’ (2008) 7 *European Political Science* 9.

<sup>162</sup> Roberto Gargarella, ‘Theories of Democracy, the Judiciary and Social Rights’ in R Gargarella, P Domingo and T Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006), 13, 14.

<sup>163</sup> Jung and Rosevear (n 42). Even Australia, which is notable for being the only western country not to have a constitutional or legislative bill of rights, enshrined the right to property in its constitution along with one other right.

if its application has not always been progressive. The right to property has been a condition precedent to the establishment or maintenance of mass and social democracy (locking in economic elites to the bargain) and an important protection for marginalised and indigenous groups, who sometimes face the gravest property rights violations.<sup>164</sup>

Empirically, Hirschl's assertion that elite interests dominate contemporary constitution making and treaty ratification is hard to square with all of the evidence. Constitutional settlement has often hinged on identity-based questions – e.g., linguistic, religious, or political rights for minorities – as well as socio-economic risks for particular groups.<sup>165</sup> In Latin America, and elsewhere, the historical social policy failures of democracies and political clientelism generated stronger demands for social rights as a means of re-orienting politics. While in Sweden (1974) and South Africa (1994), socio-economic rights were introduced as a quid pro quo for recognising economic liberties.<sup>166</sup>

Thirdly, to what extent will the insurance mechanism materialise in practice? Ginsburg deduces that is subject to the balance of power. The extent to which dominant parties will accept judicial review is dependent on the extent to which they *must* evince *commitment* in order to secure authority.<sup>167</sup> If power is relatively diffused at the time of constitution-making, the insurance model will emerge in a strong form as all parties face future risks. If power is more concentrated, its emergence may be dependent on formal constraints: e.g., the securing of a supermajority to approve constitutional reform. In other words, 'where constitutions are designed in conditions of political deadlock or diffused parties, we should expect strong, accessible judicial review'.<sup>168</sup>

Moravcsik makes an analogous though transposed argument at the international level.<sup>169</sup> He argues that the emergence of strong judicial review is dependent on the distribution of new democracies, strong democracies, and dictatorships. The former will be strong supporters, seeking 'to employ international commitments to consolidate democracy – "locking in" the domestic political status quo against their nondemocratic opponents'.<sup>170</sup> However, in strong democracies, the benefits of such insurance weigh less with the result that the "sovereignty costs" of international review tip the balance towards an

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<sup>164</sup> See, e.g., Lucien Karpik, 'Builders of Liberal Society: French Lawyers and Politics' in Terence Halliday and Lucien Karpik (eds.), *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Oxford University Press 1998), 101 Contemporary and older continental European approaches that fine-tune the right to property and the intensity of judicial review seem to be a preferable response to the challenge.

<sup>165</sup> Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005).

<sup>166</sup> Hassen Ebrahim, *Soul of a Nation: Constitution-Making in South Africa* (Oxford University Press 1999).

<sup>167</sup> Ginsburg (n 77).

<sup>168</sup> *ibid* 33.

<sup>169</sup> Andrew Moravcsik, 'The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.

<sup>170</sup> *ibid* 243.

opposition.<sup>171</sup> Strong democracies will be joined by more authoritarian States which seek to avoid significant challenge to the existing domestic order.

These rational choice theories provide an empirical check on the extent to which judicial review will emerge as an insurance mechanism, formally or substantively. However, there may be other causal pathways even when power is not spatially or diachronically diffuse. For instance, even if a dominant party is free from constitutional deadlock, it may face diffuseness and resistance elsewhere in society. Judicial review may be a means of establishing deeper consensus with all groups in society: a regime has to be legitimated in practice. At the international level, realist and constructive theories reveal how States may be respectively compelled or convinced of the need to establish judicial review; ranging from external foreign pressure or incentives to join trade regimes or the acculturation and ideational effects of the spread of rights and the rule of law.

Finally, there is the risk of insincere commitment, particularly if the motivation is elicited by once-off deadlock requirements or incentives or short-legitimacy gains. Authoritarian States may expand judicial power, adopt bills of rights or ratify international treaties simply to distract attention from its *repressive* apparatus.<sup>172</sup> The State cloaks itself in the judicial robes of legitimacy.<sup>173</sup> Even in strong democracies, this risk of a “false positive” exists: international judicial review may be supported simply ‘as an export-trade’.<sup>174</sup> Many democratic governments supported the ECHR on the basis that it was ‘merely a Europeanization of their own national practices’ rather than the creation of a new domestic constraint.<sup>175</sup>

However, even if judicial review helps shore up a despotic order, legitimises external relations, or permits national branding, these commitments may be nonetheless significant.<sup>176</sup> They represent a Faustian bargain for any governing regime: citizens may feel empowered to turn to courts, which may be responsive in turn.<sup>177</sup> The European Court of Human Rights is a striking example. For instance, the first cases challenging the criminalisation of sodomy were filed only two years after the convention came into force

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<sup>171</sup> *ibid* 238.

<sup>172</sup> Tom Ginsberg and Tamir Moustafa, *Rule By Law: The Politics of Courts in Authoritarian Regimes* (Cambridge 2008).

<sup>173</sup> Courts ‘promote regime legitimacy’ only when they ‘enjoy some degree of real autonomy from the executive’ and ‘at least on occasion, strike against the expressed will of the regime’. *ibid* 16.

<sup>174</sup> Mikael Rask Madsen, ‘From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics’ (2007) 32 *Law & Social Inquiry* 137, 144.

<sup>175</sup> Jonas Christoffersen and Mikael Rask Madsen, ‘The End of Virtue? Denmark and the Boomerang of the Internationalization of Human Rights’ (2011) 80 *Nordic Journal of International Law* 257.

<sup>176</sup> To automatically presume the contrary would conflate regime type or process legitimacy with the availability of social goods or output legitimacy. Authoritarian regimes provide a range of public and private goods that are available in democracies; this does not delegitimise necessarily these goods in either context.

<sup>177</sup> This is analogous to the spiral effect generated by international human rights commitments by authoritarian States: Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999).

in 1953 – a claim that most States certainly did not expect at the time.<sup>178</sup> Even in authoritarian States can this Faustian bargain transpire and impact social trust. Some independent surveys indicate rises in social trust after judicial reforms in China, even if the State's motivations were partly suspect.<sup>179</sup>

#### 4.2. Accountability for commitments

The previous sub-section argued that judicial review can provide one important means of legitimating state power and establishing social trust. We now turn to the most common functional justification for judicial review, which is accountability. It is related to the idea of insurance and social trust, as discussed above, but is different in purpose and nature. It is neither concerned with inducing participation in a polity nor fostering social cohesion and trust between particular groups within society. Rather, the objective is to ensure that commitments to rights are honoured, which is to be achieved regardless of which groups originally promoted their recognition. As Raz writes, a 'natural way to proceed is to assume that the enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of the time and place, most likely to enforce them well, with the fewest adverse side effects'.<sup>180</sup>

The classical lines of the accountability argument are well-rehearsed in a recent article by Fallon: courts must possess the opportunity to invalidate legislation, not because they of their interpretive prowess, but because the *existence* of legislation, rather than its absence, is likely to be more harmful to rights.<sup>181</sup> The function of judicial review is simply to provide an additional veto check against potential harms.<sup>182</sup> However, Fallon's reasoning is partly flawed. The straight line that he draws between his premise (best protection of rights possible) and his method (invalidation of legislation) comes easily undone. What if legislation is seeking to positively protect rights? Such rights might include personal security, fair trial, political participation, socio-economic rights, and even many property rights. In such instances, judicial review risks being irrelevant or even counterproductive if it leads to rights-protecting legislation being struck down on the basis that it conflicts with negative rights.

Waldron – to whom Fallon is responding – warns precisely of the consequences of such lopsided rights protections if positive rights are excluded from judicial review. He states:

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<sup>178</sup> Paul Johnson, *Homosexuality and the European Court of Human Rights* (Cambridge University Press 2013). The Court eventually struck down such laws in 1981 in *Dudgeon v United Kingdom* Application No. 7525/76 (4 October 2007).

<sup>179</sup> Ethan Michelson and Ke Li, *Judicial Performance without Independence: The Delivery of Justice and Political Legitimacy in Rural China*, Workshop on Works-in-Progress on Chinese Law, Center for Chinese Legal Studies, Columbia Law School, May 9, 2012..

<sup>180</sup> Joseph Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence* 25, 45.

<sup>181</sup> Fallon (n 16). 'In a nutshell, the best case for judicial review in political and morally healthy societies does not rest on (as has often been asserted) on the idea that courts are more likely than legislatures to make *correct* decisions'. *ibid*, 1695. Emphasis in original.

<sup>182</sup> 'The best case, as Frank Cross has also argued, rests on the subtly different ground that legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights'. *ibid*.

The text of a Bill of Rights may distort judicial reasoning not only by what it includes but also by what it omits. Suppose the members of a given society disagree about whether the Bill of Rights should have included positive (socioeconomic) as well as negative (liberty) rights.... Judges may give more weight to property rights or to freedom of contract, say, than they would if property and freedom of contract were posited alongside explicit welfare rights. And giving them greater weight may lead judges to strike down statutes that ought not to be struck down—statutes that are trying to make up the deficiency and implement by legislation those rights that failed to register in the formulations of the Bill of Rights.<sup>183</sup>

Fallon is aware of the problem and introduces a number of caveats. He assumes that such legislation would not come into conflict with ‘fundamental rights’ (assuming economic rights, such as property and the like, are not included within a constitution) and that courts should refrain adjudicating cases which raise conflicts of rights. Yet these concessions allow Tushnet, largely rightly but somewhat excessively so, to argue that Fallon’s case for judicial review becomes highly restricted (and largely indistinguishable from Waldron’s limited acceptance of judicial review). This is because there are regular conflicts between rights and the exclusion of economic liberties is pragmatically difficult.<sup>184</sup>

What Tushnet does not do is articulate how Fallon’s model might have been reformulated to avoid or mitigate its internal inconsistencies.<sup>185</sup> The way to proceed is not to confuse or conflate accountability with a particular political theory, which in Fallon’s case is a Lockean stream of political liberalism that stresses negative liberty – ‘the absence of coercion by others’.<sup>186</sup> Judicial accountability as an idea resonates in broad a range of political theories and traditions. It even appears in some versions of republican liberty. Eliminating domination requires positive action since inferior status makes freedom tenuous and contingent. Judicial review could help disperse power and build such positive freedom. As Pettit puts it:<sup>187</sup>

[B]eing included, having an audible voice, does not reduce to being satisfactorily represented. What is even more important, especially with the administration and judiciary, is that there is room for you and those of the relevant kind to protest to the representative bodies in question, in the event of your believing that things have not been properly done. You must

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<sup>183</sup> Waldron (n 7), p. 1382.

<sup>184</sup> Mark Tushnet, ‘How Different are Waldron’s and Fallon’s Core Cases For and Against Judicial Review?’ (2010) 30 *Oxford Journal of Legal Studies* 49.

<sup>185</sup> He makes a passing reference to how courts may make different sorts of judgments for positive obligations and failure to legislate, *ibid* fn. 56, but Tushnet’s express intention is to defend largely Waldron rather than oppose him.

<sup>186</sup> Gerald Gaus and Shane D. Courtland, ‘Liberalism’ in EN Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Spring Edition 2011), 1, 2.

<sup>187</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997), 180.

be able to complain and appeal; *you must be able to state a grievance and demand satisfaction.*

Likewise, accountability can be justified by liberal contractarian theories. Behind a veil of ignorance, individuals are likely to choose a set of institutional arrangements that realise basic and material interests. As Føllesdal states:

Liberal Contractualism grants that democratic, majority rule among elected and accountable representatives may be one important mechanism to ensure the protection and furtherance of the best interests of citizens. But other arrangements may also be required, such as super-majoritarian features, constraints and checks on parliament and government of various kinds. There is no *prima facie* normative preference for unrestrained parliaments.<sup>188</sup>

This overlapping consensus of perspectives suggests that it is useful to begin with a general concept of accountability. The notion has become, admittedly, ubiquitous. There is market accountability, criminal accountability, shareholder accountability etc. However, political accountability contains, at least, the compelling idea that intuitional or powerful actors must take responsibility for their commitments. It requires that they explain and justify their actions (*answerability*) and be subject to sanctions if their conduct or explanation for it is found wanting (*enforceability*).<sup>189</sup>

This definition helps in broadening our understanding of the role of courts. On the one hand, it is concerned with the material *enforcement* of particular rights for certain individuals. The South African Constitutional Court clarifies its role in this regard in striking down the death penalty: 'The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.'<sup>190</sup>

On the other hand, it is equally concerned with scrutinising decision-making or the lack thereof: in other words, *answerability*. This answerability function can have broader systemic effects: 'courts serve as *information generating function* that facilitates the accountability of the various parts of the State (or even private providers) to each other, using formal rights and their judicial gloss as yardsticks'.<sup>191</sup> The earlier discussion of

<sup>188</sup> Andreas Føllesdal, 'International Judicial Human Rights Review - Effective, Legitimate or Both?' in Petter Korkman and Virpi Mäkinen (eds.), *Universalism in International Law and Political Philosophy* (Helsinki Collegium for Advanced Studies 2008), 196, 199. This openness to judicial protection of positive rights can be seen in the contractarianism of Rawls when he approves of judicial review of a minimum level of social rights.

<sup>189</sup> Andreas Schedler, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds.), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999), 13.

<sup>190</sup> *S v Makwanyane and Another*, [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC), para. 88.

<sup>191</sup> Gauri and Brinks (n 20), 346. Emphasis added.

religious freedom jurisprudence is illustrative. The State was forced to confront and answer the question as to whether seemingly neutral eligibility rules for social security and drug prohibition caused unjustifiable harm to conscientious religious minorities. Courts provide a mechanism that requires answerability, State reconsideration, and response.<sup>192</sup> One can certainly quibble with the outcome in any of the US Supreme Court judgments, but all judgments served this function.<sup>193</sup>

These twin features of accountability can work likewise for more positive rights or obligations. Take the seminal case of *Airey v Ireland* before the ECtHR.<sup>194</sup> The complexity of Irish divorce laws meant the dissolution of marriage was unattainable for those spouses unable to afford and retain a lawyer. The Court refrained from challenging the stringency and complexity of the divorce law but forced the State to be accountable for its inequitable consequences: in practice, not all citizens possessed a right to a fair trial and respect for family life. The result was the subsequent creation by the Irish government of a system of civil legal aid for family matters.<sup>195</sup>

This accountability function of judicial review also helps clarify certain intriguing features of rights litigation. A large number of cases do not concern the invalidation or absence of legislation. Rather, they involve claims for implementation of *existing* legislation. In this modus, the distinction between judicial and administrative review becomes blurred. In jurisdictions as diverse as India, Colombia, and the ECtHR, the bulk of cases concerns rights-related *statutory* commitments. Why do litigants turn to judicial review, via constitutional and treaty rights, in such cases? The reason seems to be that it empowers them to leverage a more effective response from governments, which may be impervious to weak or highly individualised administrative remedies.

Two challenges stand out for the accountability claim. The first is relevance. Why should a State with a relatively strong record on rights supervision, which has been achieved with minimal judicial engagement, be tasked with the institution? Many rights-rich democracies might fear that judicial review will unleash a flood of frivolous, vexatious, or excessively idealistic claims rather than play any significant accountability role.<sup>196</sup> Take the hard case: the Nordic countries. They sit atop most global indexes on civil, social, and political rights.<sup>197</sup> Thus, why should Sweden, a State without a tradition of domestic judicial review, feel compelled to embrace the practice or ratify international

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<sup>192</sup> Here, the particularity feature of courts is rather helpful in constituting this mechanism although the courts are equally involved in general scrutiny.

<sup>193</sup> However, Scalia's emphasis on separation of powers and democracy in *Employment Division, Department of Human Resources v. Smith*, possibly reveals that his understanding of the role of court is different. It is the minority in this decision who recognise their mandate as one of providing minoritarian protection.

<sup>194</sup> *Airey v. Ireland*, Application no 6289/73, 32 (9 October 1979) Eur Ct HR Ser A 2 E.H.R.R. 305.

<sup>195</sup> Interview conducted with Mr Brendan Walsh Barrister: Mary Robinson Brendan Walsh & Partners 34 Upper Baggot Street Dublin, November 2002.

<sup>196</sup> This was already apparent in the debates over the creation of the European Court of Human Rights, particularly in the United Kingdom but also in the Nordic States: Moravcsik (n 169).

<sup>197</sup> See review of indexes in Malcolm Langford and Johan Karlsson Schaffer, 'The Nordic Human Rights Paradox' (2013) *University of Oslo Faculty of Law Research Paper No. 2013-25*.

mechanisms? Or why should Norway, whose tradition of judicial review has been limited to a small number of civil rights and a doctrine of deference in property rights cases, be expected to expand its remit of review?<sup>198</sup> As Hirschl argues:

Variations on a combination of well-established, ex-ante parliamentary review and restrained ex post judicial review, deployed in the Nordic region, have proven effective in mitigating the counter-majoritarian difficulty embedded in excessive judicial review and ensuring an alternative, nonjuristocratic way of going about protecting rights.<sup>199</sup>

Yet, even in these States, it is possible to mount a claim for judicial accountability. The first is the danger of atrophy and backsliding. Many of these States face new challenges in upholding rights protections due to increasing social diversification (especially through immigration) and worsening economic conditions, with the current exception in Norway. It is not clear that existing mechanisms of protection are always sufficient. The second is that the picture of Nordic success on civil and social rights must be nuanced in light of various and significant rights violations, particularly with regard to the treatment of Roma,<sup>200</sup> Sami,<sup>201</sup> institutionalised children,<sup>202</sup> prisoners,<sup>203</sup> and suspected communists.<sup>204</sup> The Nordic countries do not possess a clean slate before the European Court of Human Rights and many judgments reveal violations that may not be systemic and grave as elsewhere but certainly worthy of condemnation.<sup>205</sup> For these States, judicial review permits civil society to help “perfect” the realisation of rights and democracy - <sup>206</sup> an opportunity used increasingly by mainstream Nordic civil society organisations, social movements, and specialist legal support structures.<sup>207</sup>

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<sup>198</sup> See Smith (n 4), Ragnhildur Helgadóttir, *The Influence of American Theories on Judicial Review in Nordic Constitutional Law* (Martinus Nijhoff, 2006). For jurisprudence, see in particular *Wedel Jarlsberg* (n 4 above) and *Kløfta* 41 Rt. 1976 s. 1 (Supreme Court of Norway). The latter entrenched strong judicial deference in property rights cases.

<sup>199</sup> Ran Hirschl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9 *International Journal of Constitutional Law* 449, 451.

<sup>200</sup> Gunnar Broberg and Nils Roll-Hansen (eds.), *Eugenics and the welfare state: sterilization policy in Denmark, Sweden, Norway, and Finland* (Michigan State University Press 2005).

<sup>201</sup> Henry Minde, 'Assimilation of the Sami – Implementation and Consequences' (2003) 20 *Acta Borealia* 121.

<sup>202</sup> Johanna Sköld, 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide' (2013) 14(sup1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5.

<sup>203</sup> Vanessa Barker, 'Nordic Exceptionalism Revisited: Explaining the paradox of a Janus-faced penal regime' (2012) 17 *Theoretical Criminology* 5.

<sup>204</sup> See, e.g., *Segerstedt-Wiberg and others v. Sweden* Application no. 62332/00 (6 September 2006) (European Court of Human Rights).

<sup>205</sup> See the review of four Nordic and four comparator European States in the periodic review process for the Convention against Torture, Aled Dilywn Fisher, Malcolm Langford and Johan Karlsson Schaffer, 'Compliance with the Convention Against Torture: Testing Nordic Exceptionalism', 2015 (Working Paper, SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2585377](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585377) 2015)

<sup>206</sup> Moravcsik (n 169).

<sup>207</sup> See, e.g., Margret Heinreksdottir, 'Human Rights in Iceland' (2004) 22 *Nordic Journal of Human Rights* 135; T. Schei, 'Har Høyesterett en Politisk Funksjon?' (2011) *Lov og rett* 319; Christoffersen and Madsen (n 175); and Martin Scheinin, 'Protection of Economic, Social and Cultural Rights in Finland - A Rights-

Beyond this materialist defence, the adoption of domestic and international review may strengthen accountability efforts elsewhere in the world. By expressing a symbolic commitment to judicial review, other States are encouraged or pressured to submit to similar institutions and comply with their judgments.<sup>208</sup> Many rights-confident democracies express their decision to internationally self-bind in largely these terms.<sup>209</sup> Now, this symbolic defence is “other-regarding”, which may make it prone to questions over its relevance (there are multiple States) and instrumental justification (States seem to gain diffuse benefits but carry specific “sovereignty” costs). However, it is important to note that rights promotion may also be justified on instrumental grounds:<sup>210</sup> Promotion of political rights may reduce armed conflicts and military and humanitarian expenditures;<sup>211</sup> civil rights may improve the conditions for foreign investment;<sup>212</sup> and social rights may level the playing field for international trade.<sup>213</sup> It can also strengthen the call by these States in bilateral relations and development cooperation for rule of law reforms while also ensuring that they do not constitute a precedent for authoritarian or democratically fragile States.<sup>214</sup>

The second principal challenge to the accountability argument is effectiveness. Are courts actually able to deliver? Will judges be responsive to rights claims and will compliance and broader impact follow their decisions? Or more particularly, will courts be at least effective as realistic alternatives to judicial review in ensuring accountability in practice?

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Based Variant of the Welfare State' in M Scheinin (ed.) *Welfare State and Constitutionalism - Nordic Perspectives* (Nordic Council of Ministers 2001), 245.

<sup>208</sup> In this sense, law is viewed here as ‘a form of symbolic action or communication’, constituting the ‘set of publicly shared motives by which we name and judge people’s actions and the situations in which they and we act.’ Thomas Meisenhelder, ‘Law as Symbolic Action: Kenneth Burke’s Sociology of Law’ (1981) 4 *Symbolic Interaction* 43, 45.

<sup>209</sup> See, e.g., Christoffersen and Madsen (n 175); Moravcsik (n 169); and Madsen (n 174). Notably, domestic constitutional reforms possess a similar capacity, which dates back to the recognised symbolic effects of the American and French Declarations. Louis Henkin, ‘Introduction’ in L Henkin and A Rosenthal (eds.), *Constitutionalism And Rights: The Influence of the US Constitution Abroad* (Columbia University Press 1989).

<sup>210</sup> On realism and submission to international law, see Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005).

<sup>211</sup> John R. Oneal, Frances Oneal, Zeev Maoz and Bruce Russett, ‘The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-85’ (1996) 33 *Journal of Peace Research* 11. ‘Our logistic regression analyses of politically relevant dyads (1950-85) indicate that ... Kant [1795] was right: International conflict is less likely when external economic relations are important, executives are constrained, and societies are governed by non-violent norms of conflict resolution.’ *ibid*, 11.

<sup>212</sup> Agnès Bénassy-Quéré, Maylis Coupet and Thierry Mayer, ‘Institutional Determinants of Foreign Direct Investment’ (2007) 30 *The World Economy* 764. ‘We find that a wide range of institutions, including bureaucracy, corruption, but also information, banking sector and legal institutions, do matter for inward FDI independently of GDP per capita’. *ibid* 764.

<sup>213</sup> The renewed enthusiasm of western States for the ILO in the wake of globalisation is testament to this although the use of trade-related measures to foster strong forms of labour and social rights realisation can still fall foul of WTO rules: Robert Howse, ‘World Trade Organization and the Protection of Workers’ Rights’ (1999) 3 *Journal of Small & Emerging Business Law* 131.

<sup>214</sup> The Hungarian government, for instance, has justified its increasing emasculatation of the Constitutional Court and many constitutional rights by pointing to weak judicial review in Sweden: Kim Lane Scheppele, ‘Email Communication to author’ (18 May 2013).

Various critical theories claim that courts will be biased towards elite and/or the middle class. A distributive bias may be structural in origin. Advantaged groups are better able to secure access to legal representation, strategically maximise the benefits of repeat litigation, and accommodate the institutional passivity and duration of court-based procedure.<sup>215</sup> Or it may be attitudinal: courts are swayed by their personal ideologies that are likely to be elitist in orientation.<sup>216</sup> They seek to maintain the social and political status quo<sup>217</sup> or are swayed by the hegemonic discourse of neo-liberalism.<sup>218</sup> However, the evidence is mixed and complex on distributive bias. Courts also regularly side with marginalised groups in many states while research indicates that the benefits of decisions can be spread over multiple groups.<sup>219</sup> Judicial fairness or responsiveness is a function of multiple factors, not least the nature of reviewable rights, the appointment processes for the judiciary, forms of access to justice, and the inflection of background public policy and political economy conditions.<sup>220</sup> Thus the institutional design and trajectory of judicial review and its trajectory is as important as its existence.

The same applies to the general effects of courts. Realist claims that courts, without the power of purse or sword, are unable to catalyse material impacts need to be examined carefully.<sup>221</sup> A court's coercive and authoritative capacities can be mobilised directly (through the crafting of appropriate remedies) or indirectly (through social mobilisation or bureaucratic/elite alliances) to advance the realisation of rights and control/direct state power. A growing array of comparative studies reveal the ability of courts to conditionally leverage change, from the reduction of hunger and homelessness through to the advancement of prisoner rights and rights to sexual orientation and gender

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<sup>215</sup> Galanter *supra* note 44 Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' in R Cover and O Fiss (eds.), *The Structure of Procedure* (Foundation Press, 1969), .

<sup>216</sup> *ibid.* 542.

<sup>217</sup> R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004), 213–214.

<sup>218</sup> Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 *Modern Law Review* 532, Leading critical legal scholars tend to be more nuanced and emphasize that the textual ambiguity of law creates the space for ideology-based reasoning. Kennedy argues that 'The rule choices that emerge from [this] interaction should be understood neither as simply the implications of [legal] authority nor as the implications of the ideological projects, but as a compromise'. Kennedy (n 117), 19.

<sup>219</sup> See, e.g., Daniel Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12 *Perspectives on Politics* 375; César Rodríguez Garavito, 'The Judicialization of Health Care: Symptoms, Diagnosis, and Prescriptions' in R Peerenboom and T Ginsberg (eds.), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge University Press, 2014), 246; Tom Ginsberg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, 2003); and Christopher Berry, 'The Impact of School Finance Judgments on State Fiscal Policy' in MR West and PE Peterson (eds.), *School Money Trials: The Legal Pursuit of Educational Adequacy* (Brookings Institution, 2007), 213.

<sup>220</sup> See discussion in Malcolm Langford 'Judicial Review in National Courts: Recognition and Responsiveness', in E. Riedel, G. Giacca and C. Golay (eds.), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014), 417.

<sup>221</sup> As Rosenberg (n 21), 428, classically stated: 'a danger of litigation as a strategy for significant social reform is that symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful. Rather than working to change that reality, reformers relying on a litigation strategy for reform may be misled (or content?) to celebrate the illusion of change'.

identity.<sup>222</sup> Even at the international level institutionalist studies that foreground the role of political power and judicial legitimacy have found that enforceability is contingent on the ability of actors to leverage international judgments in domestic politics.<sup>223</sup> While this empirical research should certainly dampen the enthusiasm of some scholars and advocates for the accountability function of courts, it evinces at least that such an institutional project can be much more than a forlorn hope.

### 4.3. Structured public deliberation

The final argument for judicial review is that courts can help structure public deliberation on rights through its role in the “constitutional order”. In explaining this functional motivation, I will first dismiss two related claims: democracy and rule of law.

#### 4.3.1. Democracy

It is not uncommon to find functional arguments that judicial review constitutes or promotes democracy.<sup>224</sup> The strong form of the claim is that the two are synonymous. According to Dworkin, the ‘defining aim of democracy’ is ‘that collective decisions ... treat all members of the community, as individuals, with *equal concern and respect*’, and the latter is what judicial review achieves.<sup>225</sup> The moderate form is that judicial review enhances democratic representation, participation or deliberation, especially for disenfranchised or marginalised groups.

Both contentions seem problematic. As to the strong form, collapsing judicial review into a single category of democracy unhelpfully dissolves longstanding analytical categories. It either shifts the debate over the democratic legitimacy of judicial review to another linguistic space or occludes important democratic concerns with judicial review.<sup>226</sup> It is more practical to restrict our understanding of democracy to ensuring ‘equal voice and decision-making’. This can be contrasted with mechanisms that seek to realise ‘equal concern and respect’, which may be justifiable on democratic *or* other grounds.

As to the moderate form, I remain unconvinced that the contribution of judicial review to democracy is really a motivating rather than a mitigatory factor. It can be argued, with

<sup>222</sup> See, e.g., Keck (n 84); Feeley and Rubin (n 20); Rodríguez Garavito and Rodríguez-Franco (n 20); Langford, Cousins, Dugard and Madlingozi (n 20); and Gauri and Brinks (n 20).

<sup>223</sup> See, e.g., Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press, 2014); Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014); and Helfer and Voeten (n 20).

<sup>224</sup> See, e.g., Menneskerettighetsutvalget, Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (Dokument 16 2011-2012, 2011).

<sup>225</sup> Dworkin (n 10), p. 17. Emphasis added.

<sup>226</sup> It is thus best seen in dialectic terms. For instance, Jurgen Habermas and William Rehg, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles’ (2001) 29 *Political Theory* 766, argues that the ‘modern’ individual demands both private autonomy (rights) and political autonomy (democracy) and that the realisation of both is interdependent.<sup>226</sup> Walker adopts a similar iterative understanding, suggesting that constitutionalism (including rights and judicial review) continually seeks to both ‘articulate and realize democracy’ as much as it ‘endeavours to qualify and challenge democracy’ Neil Walker, ‘Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship’ (2010) 39 *Rechtsfilosofie & Rechtstheorie* 206, pp. 232-3.

some persuasion, that judicial review does make an empirical contribution to the practice of representative,<sup>227</sup> participatory,<sup>228</sup> and deliberative<sup>229</sup> democracy. For some individuals and groups, it may constitute the only form of democratic participation. However, as judicial review also acts to restrict certain aspects of democracy (such as majoritarianism), its overall contribution or effect may be potentially negligible. Thus, I struggle to see improved democracy as a driving argument for motivating judicial review.

The possible exception to this stance might be that courts are sometimes called upon to play a larger role in society, where it is specifically required. For example, Geoff Budlender argues that courts in South Africa must be part of the process of 'democratisation' of society: they possess this 'function' alongside other pillars.<sup>230</sup> Another approach is to see democracy as an external requirement in rights interpretation and enforcement. We require courts to incorporate democracy in their proceedings and vision as a way of achieving the material and participatory elements of social rights.

#### 4.3.2. Rule of law

Equally, the idea of rule of law is raised as a justification for judicial review. It often serves as a shorthand for both expressing and validating the idea of constitutional democracy. However, as an analytical concept, it operates poorly as a defence of judicial review. In English at least, it fuses the idea of rule *through* law (all power must be exercised in accordance with law - the *etat légal*) with rule *by* law (all laws must conform to constitutional values and such disputes shall be settled by law - the *etat de droit*).<sup>231</sup> The former conception has no relevance to judicial review: it legitimises only judicial scrutiny of executive compliance with general laws. The latter and substantive conception merely echoes the more precise idea of accountability for constitutional or treaty commitments.

The most convincing use of rule of law to defend judicial review is the demand for legal coherence in the face of hermeneutic anarchy. In politically fragmented regimes with

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<sup>227</sup> See, e.g., Wilson (n 84); and *Asylum Seekers Benefits Case 1* BvL 10/10 (2010) (Federal Constitutional Court of Germany) with the discussion in Inga Winkler and Claudia Mahler, 'Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?' (2013) 13 *Human Rights Law Review* 388.

<sup>228</sup> See, e.g., Bruce Porter, 'Claiming Adjudicative Space: Social Rights, Equality and Citizenship' in GB Susan Boyd, Shelagh Day and Margot Young (ed.) *Poverty: Rights, Social Citizenship and Legal Activism* (UBC Press, 2007).

<sup>229</sup> See, e.g., Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 141, 157 and Roberto Gargarella, 'Dialogic Arguments in the Enforcement of Social Rights: Some Initial Arguments' in Alicia Ely Yamin and Siri Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 232.

<sup>230</sup> Geoff Budlender 'People's Power and the Courts', Bram Fischer Memorial Lecture 2011, hosted by the Legal Resources Centre. Sandra Liebenberg also makes this argument in 'Social Rights and Transformation in South Africa: Three Frames', forthcoming in *South African Journal of Human Rights*.

<sup>231</sup> For a discussion of the different faces of rule of law, see Rosenfeld (n 153).

dispersed powers, legal certainty may be elusive if each constitutional entity can articulate and act upon its own constitutional interpretation. Indeed, it may be prudent for these entities to cooperate through a system of authoritative judicial review, which minimises transaction costs and safeguards desired interpretations. The need for legal certainty was acutely felt in the early constitutional debates in the United States.<sup>232</sup> In the context of federalism, Congressman Webster stated:

[C]ould anything be more preposterous than to make a government for the whole Union, and yet leave its power subject, not to one interpretation, but to thirteen, or twenty-four, interpretations? ... Each (government) at liberty to decide for itself, and none bound to respect the decisions of others.<sup>233</sup>

This “fragmentation”-based argument for judicial review *might* also apply in political systems characterised by strict separation of governing powers between a president and legislature. It would *certainly* apply in the highly decentred context of international relations, avoiding the anarchy of multiple State interpretations – subject to the constraint that more powerful actors may strategically defect from such an interpretive regime (e.g. through non-compliance or reservations) or refrain from the initial commitment.<sup>234</sup>

Legal fragmentation may occur even in more centred systems, such as a Westminster parliamentary system. The choice is not always simply between the legislature and the courts as to who will provide legal coherence and certainty. In some areas, law may remain vague, thin, contradictory, or obsolete but political, public or private actors may lack incentives, resources, or time to help resolve the uncertainty. The result is everyday legal pluralism which judges may be called on to resolve. The breadth of this phenomenon varies within and across a legal system but indeterminacy is, nonetheless, an inherent feature of law.<sup>235</sup>

This indeterminacy can continue even when one branch of government is given the final authority over law or the constitution or treaty. A form of dialogue exists although one institution may dominate. Even in the United States, where the court jealously guards its final interpretive authority, a form of dialogue exists between the courts and

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<sup>232</sup> Friedman (n 3), p. 34 (‘judicial review emerged... as the solution to the problem of how to ensure that the wilful, and often recalcitrant, states complied with the laws of the Union’).

<sup>233</sup> *Debates in Congress*, 21st Congress, 1st Sess. (1830), 6:78, cited in Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007), p. 8.

<sup>234</sup> In international law, the United States is perhaps a preeminent example. It regularly invokes international law but rarely commits to the adjudicative regime and when it does, often defects (e.g., non-compliance with international judgments). However, even the United States has increasingly had to adjust to international law in order to legitimate and achieve its realpolitik objectives: see Jose Alvarez, ‘Contemporary International Law: An ‘Empire of Law’ or the ‘Law of Empire’ (2009) 24 *American University International Law Review* 811.

<sup>235</sup> See, e.g., Torstein Eckhoff and Jan Helgesen, *Rettskildelære*, 5th edition (Universitetsforlaget, 2001).

government over time and issues.<sup>236</sup> Conversely, under a traditional system of parliament sovereignty with no judicial review, the British courts have developed and enforced constitutional norms.<sup>237</sup>

#### 4.3.3. *Structured public debate*

The way to capture some of the underlying ideas of judicial review as a promotional tool for democracy or the rule of law is again to think of courts in institutional rather than textual terms. In this case, the interaction of institutions is as important as their legal production and outcomes. Instead of viewing the exercise of rights interpretation as mere resolution of doctrine and disputes, it can be equally understood as the facilitation of a “constitutional order”. It is a space in which society in general and actors in particular narrow the applicable rules of interpretation and find a common ground to debate and settle law in relations defined by flux rather than constancy. This is precisely the case where there is space for *ex post* adjustment of a constitution or treaty.

The general notion of a constitutional order is well articulated by Sabel. He speaks not specifically of political constitutions but rather of a particular legally-sanctioned power relation. A constitutional order is to be distinguished from two other relational forms in society: horizontal market exchange and vertical hierarchy.<sup>238</sup> It represents a background architecture of social and political rules that create and frame power and governance mechanisms. In Sabel’s view, the virtue of a constitutional order is that it helps mediate conflicts and overcomes inertia that develop in vertical and horizontal orderings of power. For example, in contracts, commercial parties may bypass negotiation on detailed supply arrangements and instead create a constitutional order with an open-ended contract that sets the parameters for on-going supply.

These arrangements create frameworks in which parties negotiate and deliberate within the shadow of legal sanction. Sabel contends that the ‘monitoring’ dimension ‘reduces the possibility of duplicity’ but that its ‘central function is to regularize consultation between the parties so as to minimize the cost of mistakes and maximise the possibility of introducing improvements that benefit both’.<sup>239</sup> Likewise, constitutional orders possess a jurisprudential role. Through different forms of “jurisprudence” they help

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<sup>236</sup> Tushnet (n 49). The longevity of a constitution will invoke some sort of pressure for adaption to changing social conditions. Even ardent originalists such as Justice Scalia struggle to maintain the façade of consistent originalism: see historical analysis by Daniel Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago University Press 2002). At the most, we might and should expect certainty in principles rather than factual application.

<sup>237</sup> See, e.g., *R v Secretary of State for the Home Department ex p Adam*; *R v Secretary of State for the Home Department ex p Limbuela*; *R v Secretary of State for the Home Department ex p Tesema* [2005] UKHL 66 (House of Lords - United Kingdom).

<sup>238</sup> Sabel (n 153). See also Rosenfeld (n 153), p. 1339, on the role of constitutionalism in challenging conflicts towards peaceful resolution.

<sup>239</sup> Sabel (n 153), p. 164.

negotiate change over time - especially where exchange may be unfair or bureaucratic hierarchies too slow.<sup>240</sup>

The idea of a constitutional order is not exclusive. Parliaments, executives, and a range of regulatory and oversight institutions create such frameworks for on-going deliberation, consensus building, and jurisprudence creation, whether formal or customary, written or oral. In the field of water regulation, for example, a legislature may eschew detailed regulation and plump for elected water councils with the authority to decide on local policy within parameters.<sup>241</sup>

Arguably, courts provide a useful mechanism for such an order, and not only in interpretation of statutory, common and customary law but also in constitutional and international law. Courts can shape public deliberation and provide a jurisprudence that provides both institutional memory and a body of principles that can help solve future disputes. At its functional core, the presence of a court with judicial review powers presses citizens and political actors to deliberate on rights in a particular way: it narrows the space of potential rights claims; excludes certain types of arguments; favours principled reasoning; ensures some consistency with prior reasoning; enables a modicum of reflection; and pushes actors to match reasons and principles with others in the constitutional orders.

In many instances, a court will not review a dispute or problem; but the shadow of the legal sanction structures the space for public deliberation.<sup>242</sup> The *fact* that the court can have a final or decisive word changes the shape of the political discussion. The rights dimension demands consideration. This can arguably trigger both debates over moral understandings of rights and legal discussions over how a court should or may judge. The threat of judicial review concentrates the mind of the body politic.

Friedman's history of the US Supreme Court provides such an example. He finds that over the *longue duree*, the court largely matches public opinion, but not because the court is a relentless majoritarian actor. Rather, over time, the structured engagement between the court and the public produces a form of consensus. In his words:

Judicial review serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them. It forces the American people to reach answers to these questions, to find solutions - often compromises - that obtain broad and lasting

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<sup>240</sup> Another benefit, which Sabel does not discuss, may be that it allows the original consensus to be continually recreated and reformed in new circumstances without incurring the transaction costs. This idea is present in Thornhill's (n 158), historical and sociological overview of the development of judicial review.

<sup>241</sup> Sabel (n 153).

<sup>242</sup> In this respect, the ambiguity and under-theorised nature of rights becomes a strategic asset as individuals and parties are able to move forward in a constitutional settlement and defer the conflict to a future date with an institution they both trust.

support. And it is only when the people have done so that the Court tends to come in line with public opinion.<sup>243</sup>

This is consistent with many contemporary studies on the impact of public opinion triggered by judgments of the US Supreme Court and some other national courts (Russia and South Africa). While early observational and experimental studies cast significant doubt on the capacity of judges to lead public opinion<sup>244</sup> or to do so without polarisation,<sup>245</sup> a wave of subsequent studies paint a much more nuanced picture.<sup>246</sup> Courts can lead public opinion but the direction and intensity of attitudinal shifts varies amongst different individuals and groups<sup>247</sup> and certain factors condition the general effects.<sup>248</sup> Importantly, shifts in public opinion *can be diachronically* complex as charted by Friedman. For instance, Ura finds a short-term and negative thermostatic reaction flowing from the US Supreme Court's decision in *Roe v Wade* but a long-run movement towards the Court's positions, suggesting that legitimisation effects can be slow to materialise.<sup>249</sup>

Burke and Carter identify in a similar fashion how judges can usefully structure this public deliberation, drawing in essence on a court's informational exposure, decisional seclusion, and legal method. Tracking the emotionally charged *Schiavo* case concerning

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<sup>243</sup> Friedman (n 3).

<sup>244</sup> Larry Baas and Dan Thomas, 'The Supreme Court and Policy Legitimation: Experimental Tests' (1984) 12 *American Politics Quarterly* 335; Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press 1991).

<sup>245</sup> Charles Franklin and Liane Kosaki, 'Republican Schoolmaster: The US Supreme Court, Public Opinion, and Abortion' (1989) 69 *American Political Science Review* 7517.

<sup>246</sup> See, e.g., Hoekstra (n 20); Jeffrey Mondak, 'Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility' (1990) 12 *Political Behaviour* 363; Joseph Daniel Ura, 'Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions' (2014) 58 *American Journal of Political Science* 110; James Stoutenborough, Donald Haider-Markel and Mahalley Allen, 'Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases' (2006) 59 *Political Research Quarterly* 419; and John Hanley, Michael Salamone and Matthew Wright, 'Reviving the Schoolmaster: Reevaluating Public Opinion in the Wake of *Roe v. Wade*' (2012) 65 *Political Research Quarterly* 408. A recent study also demonstrates that survey experimental findings correspond with real-world observational findings if there is extensive news coverage of a decision Katerina Linos and Kimberley Twist, 'Endorsement and Framing Effects in Experimental and Natural Settings: The Supreme Court, the Media and the American Public' (2013) *UC Berkeley Public Law Research Paper No. 2223732* 17.

<sup>247</sup> Individual *background variables* (e.g., political affiliation, gender, race, education level) can be highly significant depending on the issue Roselee Clawson, Elizabeth Kegler and Eric Waltenburg, 'The Legitimacy-Conferring Authority of the US Supreme Court' (2001) 29 *American Politics Research* 566. Likewise, the *relevance of issue* to a respondent can either increase or decrease the effect of a court's opinion (Mondak, *ibid.*): 376-79; Clawson, Kegler and Waltenburg, *ibid.*; and Hoekstra (1995) (n 248 below).

<sup>248</sup> For example, whether such as whether judgments are *salient, noticeable, and immediate* in effect (Valerie Hoekstra, 'The Supreme Court and Opinion Change' (1995) 23 *American Politics Quarterly* 109; Clawson, Kegler and Waltenburg, *ibid.*; Stoutenborough, Haider-Markel and Allen (n 246); and Timothy Johnson and Andrew Martin, 'The Public's Conditional Response to Supreme Court Decisions' (1998) 92 *American Political Science Review* 299); the issues are more technical than moral (Stoutenborough, Haider-Markel and Allen (n 246) and Linos and Twist (n 246) although see Mondak, 'Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation' (1994) 47 *Political Research Quarterly* 675); the decision is unanimous (Mondak, n 246; Linos and Twist, *ibid.*); and the court enjoys a high level of diffuse support. Hoekstra (n 20).

<sup>249</sup> Ura (n 246).

the right of a husband to request termination of life support for his spouse, they conclude that:

[T]he political process never pinpointed what the “the subject” was in a way that allowed people on both sides of the issue to come to closure. Lawyers and judges, on the other hand, proceeded to articulate precise and neatly sequenced questions, each one framed so that the answer, whether one agreed with it or not, seemed plausible. You will also see in the legal process, an openness to new ideas, new information, and the abiding sense that neither side was “right”, or “the winner” until the process finally ended, over 15 years after it began – qualities clearly absent in the debate outside the courtroom.<sup>250</sup>

Likewise, international relations scholars identify this function of international review in triggering change. International courts serve ‘as an external signalling device to trigger an appropriate domestic response’,<sup>251</sup> ‘contribute to political change by delimiting circumspect arguments used by powerful state actors’,<sup>252</sup> and provide an ‘authoritative (re)interpretation of what the law means’.<sup>253</sup>

In this sense, the process is analogous to Rawls’s idea of considered judgments: courts help reduce problematic biases and inconsistencies in public reasoning. Considered judgments are those which are made ‘under conditions in which our capacity for judgment is most likely to have been fully exercised and not affected by distorting influence’.<sup>254</sup> Courts can push society at least towards a ‘narrow reflective equilibrium’: actors will be forced to trim or discard claims that make it difficult to cohere ‘general convictions, first principles and particular judgments’.<sup>255</sup> Courts could even move actors towards a ‘wide’ reflective equilibrium, the best conception of justice after all alternatives have been weighed. Although, as argued in section 2, there are clear limits to positing that political or judicial institutions may reach ideal or best conceptions of justice as embodied in constitutional rights.<sup>256</sup>

Contemporary constitutionalism has also added a further element to this deliberation - the promotion of constitutional values. Robertson argues that contemporary constitutions are marked by this ideational ambition: ‘My claim is that constitutional review is a mechanism for permeating all regulated aspects of society with a set of

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<sup>250</sup> Carter and Burke (n 146), Appendix B.

<sup>251</sup> Moravcsik (n 169), 238.

<sup>252</sup> Karen Alter, ‘Agents or Trustees? International Courts in their Political Context’ (2008) 14 *European Journal of International Relations* 33, 35.

<sup>253</sup> *ibid.*

<sup>254</sup> John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), §10.

<sup>255</sup> *ibid* §10.3.

<sup>256</sup> In proportionality and reasonableness tests, courts are often called upon to consider different policy alternatives. They tend in fact to be rather cautious in expressing clear preferences in such circumstances and prefer to frame rather than define this space.

values inherent in the constitutional agreement the society has accepted'.<sup>257</sup> The South African constitution is commonly described in this vein, as a transformative constitution;<sup>258</sup> and South African judges have recognised partly this transformative role in diffusing their values through their reasoning and remedial relief.<sup>259</sup> Arguably, many of the constitutions of the third wave democracies and some of the second wave democracies fall within this transformational category; as do recent international human rights treaties such as the Convention on the Rights of Persons with Disabilities.

Again though, it is possible to imagine alternatives to a court. Yet possibly, the institutional features of judicial review provide functional reasons why it might be an important body to play in framing public deliberation and decisions over rights. Instead of seeing legal precedent as a form of retrograde moral reasoning, it can be re-framed as a form of institutional memory: providing a baseline for future interpretations. If courts are also disposed to adjusting and updating their interpretations as appropriate, then a fine (but sometimes messy) balance might be achieved.<sup>260</sup> Moreover, the bias towards principle-based reasons provides a means to ensure mutually acceptable forms of public deliberation. The debate is less about policy ends or means but about the consistent application of particular principles, which forces opponents to narrow and alter the frame of ideological disagreement.

## 5. Conclusion

This article asked what should motivate judicial review? Powers to interpret or enforce rights could just as easily be given to a council of philosophers, a panel of randomly appointed ordinary citizens, an independent committee of an upper house of parliament, or a lower house in a legislature. Epistemological justifications, which have dominated political and legal theory for the past few decades, provide part of the answer. It may be possible to claim adjudicators are more epistemologically reliable on account of their particularist form of adjudication, the semi-public forum of adjudication and the bias towards principled forms of reasoning. However, this justification faces the problem that these features are not always suitable for reliable interpretation: we need interpreters

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<sup>257</sup> David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, 2010), 7.

<sup>258</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146.

<sup>259</sup> Pius Langa, 'Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR' (2009) 27 *Nordic Journal of Human Rights* 29

<sup>260</sup> There is sometimes a protest that this destroys legal certainty and the principle of retroactivity. A threshold of legal certainty is important: it stabilises rights and obligations in such a way as to allow social actors to organise their affairs and make decisions. As Justice Brandeis stated, 'Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right': *Burnet v. Coronado Oil & Gas Co.* 285 U.S. 393, 52 S. Ct. 443, 76 L. Ed. 815 [1932] (Supreme Court of the United States). But, as argued above, legal certainty can never be a permanent social fact and actors regularly operate with different interpretations of the law. Such flexibility may be even more important in the case of constitutions which are meant to be living instruments.

to take account of general considerations and realise that legal methods may not always be appropriate. Moreover, it is certainly not clear that adjudicators always get it “right” in practice. There is in addition the risk that it contributes to the idea of judicial infallibility, which encourages either blind adherence or unnecessary judicial restraint.

Functional arguments shift the debate out of the epistemic quagmire and the search for truth-finding institutions. It places the focus on the more earthly reasons for the existence of judicial review: the building of social trust through regime legitimation, accountability for commitments, and the deliberative potential of constitutional orders. Many of the supposed epistemic advantages of courts might be best reframed as functional ones as they help ensure these outcomes. These instrumental benchmarks are also more liable to measurement against actual practice and may also more clearly point to reforms and improvement of adjudication as the intended function is clear and determinable. Nonetheless, it is evident that a functional approach faces its own challenges, in particular whether the empirical assumptions behind it hold in practice.