

## Democratic Theory and Constitutional Adjudication

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**Abstract.** By focusing on the practice of constitutional courts this paper aims to present a qualitative-analytical tool which could contribute to a better (self-)understanding and evaluation of constitutional adjudication. Since the specific nature and the very existence of constitutional review necessitates an *a priori* reflection on the legitimacy, exact function and role of constitutional courts within the democratic system, a multidimensional model of democracy might give some insight into the theoretical background of the court's decisions in this respect. This level of analysis focuses simply on the question of which ideal type of democracy might be inherent or envisioned in decisions taken by judges of constitutional courts.

**Keywords:** democratic theory, judicial review, constitutional courts, quality of judicial reasoning

Mapping and qualifying different types of judicial reasoning from the point of view of constitutional interpretation is quite common in legal scholarship. Evaluating judicial reasoning by means of democratic theory is, however, a less explored research field in spite of a clear normative demand for clarifying the role of constitutional courts within a democratic system. This is why analyzing the problem of judicial reasoning from the perspective of a multidimensional model of democracy might be a promising enterprise in achieving a better understanding of constitutional adjudication and its quality.

By focusing on the practice of constitutional courts this paper aims to present a qualitative-analytical tool which could contribute to a better (self-)understanding and evaluation of constitutional adjudication. Since the specific nature and the very existence of constitutional review necessitates an *a priori* reflection on the legitimacy, exact function and role of constitutional courts *within* the democratic system, a multidimensional model of democracy might give some insight into the theoretical background of the court's decisions in this respect.

This level of analysis focuses simply on the *question* of which ideal type of democracy might be inherent or envisioned in decisions taken by judges of constitutional courts.

Before entering upon the main topic we should make it clear, however, that the *applicability of the analytical tool* presented in this paper is rather limited. It should be underlined that the analytical tool is not apt for the study of all decisions of the constitutional courts. The scope of the scrutiny should be narrowed down to the *relevant* decisions through which we have an insight into the explicit or implicit *self-understanding* or *role perception* of the court and the judges. According to our interpretation judicial self-understanding should give, however, evidence on or at least contain elements which refer to the role of the court and judges *within the system of democracy*. Consequently, it is this moment where democratic theory and the question of judicial reasoning intertwine: judges and courts should locate themselves and their role within the system of democracy, the system of separation of powers and checks and balances.

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Furthermore this paper argues that the approach presented here might be expedient in two alternative ways. It might be applied as a *normative theory* or as an *analytical tool*.

Since quality assessments should have some standards, evaluations of judicial decisions based on a framework of democratic theory have *normative* implications. In this sense we *assume* that judicial reasoning is of higher quality if it provides some insights into the self-understanding of judges and courts: judges should make clear which model of democracy enumerated below they prefer. Without this evidence and signs it is unclear what kind of role they ascribe to the constitutional court. And this would be clearly a qualitatively less optimal case.

It does not matter whether these signs are explicit or implicit: the normative expectation is rather that these signs should be *consistent* throughout the time period a judge is in office. By changing the composition of the court the self-understanding of the majority of judges could of course shift from one type of self-understanding to another type. But the question is whether individual judges are *consistently* representing one or another type of self-understanding. This would make the constitutional adjudication more calculable and reliable.

But analyzing judges' preferences in terms of their ideal types of democracy might be regarded also as an *analytical tool* which does not pretend, however, to explain the *causes* of a decision or detect the *motivations* behind the decisions.<sup>1</sup> The analytical tool presented in this paper has only a *descriptive* function but the relevance of a descriptive tool, which clarifies and maps by conceptualization, must not be underestimated. The significance of the phase of conceptualization has been almost neglected in social science research in the last 30 years while a shift towards quantitative components of the research is clearly discernable.<sup>2</sup> This paper will, nevertheless, contribute rather to the better understanding of constitutional reasoning and adjudication by connecting and relating some concepts and theories of democracy theory to constitutional adjudication. The job performed here might be labelled as conceptual mapping.<sup>3</sup>

The aspirations of this paper might be rather modest in one more aspect. Since no existing theoretical work deals in detail with the relationship of constitutional adjudication and various theories of democracy this paper purposes to sketch the *outlines* of a comprehensive study which could give an overview of the relationship of various democratic theories to the institution of constitutional courts and practice of constitutional adjudication. It should be stressed, however, that this paper is confined to delineate merely the *contours* of another comprehensive study which will be published in the near future. Consequently, for a more detailed overview readers should turn to an expanded version of this paper.<sup>4</sup>

## 1. LITERATURE OVERVIEW AND THEORETICAL APPROACH

Approaching constitutional adjudication from the perspective of the *role perception* of judges is a quite recent phenomenon. The *legal model* of judicial behavior, which apart from the US traditionally dominated the legal scholarship until most recently, claims that judges have a clear-cut and very simple role which is to be the mouth of the law. It is,

<sup>1</sup> On various forms of empirical legal research see Dyevre (2010) 297.

<sup>2</sup> Vromen (2010) 249.

<sup>3</sup> Sartori (2009).

<sup>4</sup> Pócza (2015).

however, more than obvious that the legal model is no longer tenable. Judges are not simply the “mouth of the law” as Montesquieu put it. Various research methods on judicial behavior have been shooting up from the second half of the 20<sup>th</sup> century and the legal model has been clearly discredited at least in the US literature.<sup>5</sup> General overviews on methodologies have been provided by Hönnige and Dyevre who argue also that the legal model is less relevant than before in empirical legal research.<sup>6</sup> Our approach should be clearly distinguished from the legal model, but in contrast to the *attitudinal* or *strategic models*, the methodological approach of this paper doesn’t ignore the justifications of decisions given by judges.

Given that the legal model is outmoded, focusing on the role perception of the judges is more pressing. If judges are not only the “mouth of the law” then what else are they? What is the job they are doing? How do they perceive themselves and their role? These are relevant questions which have been most recently dealt with by some scholars who turned back the focus once again on *what* judges said and *how* they argued (either in their decisions or in interviews and scientific articles).<sup>7</sup> This approach might be labelled as a neo-institutionalist approach which is not a naïve one like the legal model but in contrast to the attitudinal, legal realist or strategic models it stresses the importance of arguments given by the judges in their decisions. Robertson’s essential point is “that if so many judges worldwide spend so much time arguing with each other, and act as though these arguments matter to them, they ought to be taken at face value.”<sup>8</sup> Although he did not give an even more persuading argument for the primacy of his research approach we are more optimistic regarding an enterprise which takes judges’ reasoning and argumentations at face value. A combination of neo-institutionalism and discourse analysis seems to be a viable methodological approach which contextualizes the speech-acts of judges by locating them on a conceptual map.

*Neo-institutionalism* means in this context that the position of judges within democratic systems might influence their decisions.<sup>9</sup> Robertson quotes James March and Johan Olsen: “The simple behavioral proposition is that, most of the time humans take reasoned action by trying to answer three elementary questions: What kind of a situation is this? What kind of a person am I? What does a person such as I do in a situation such as this?”<sup>10</sup> In this sense all political actors should consider their own role within an institutional context. This type of role perception accompanies all political acts and actors. How decisive these role perceptions are in terms of decision making at constitutional courts is rather irrelevant from our point of view since justifications of decisions become a part of a more general *discourse*.

Our aim is to provide a tool for mapping the arguments within the constitutional and democratic *discourse*. This is the point where the discourse analysis as a methodological approach gains relevance.<sup>11</sup> Doing this job might be a necessary but also sufficient condition to have a clearer picture of the relationship between democratic theory and constitutional adjudication.

<sup>5</sup> On the legal model see Segal et al. (2002).

<sup>6</sup> Hönnige (2010) 346; Dyevre (2010) 297.

<sup>7</sup> Robertson (2010).

<sup>8</sup> Robertson (2010) 26.

<sup>9</sup> On neo-institutionalism see March et al. (1989).

<sup>10</sup> Robertson (2010) 20.

<sup>11</sup> On discourse analysis see Gee (2011).

Analyzing constitutional adjudication from the perspective of democratic theory is not a totally unfamiliar approach. Nevertheless, up until the present time, no comprehensive overview has been written on this issue. Since democratic theories concentrate largely on institutions all of them have (mainly strong) views on constitutional review and various patterns of constitutional adjudication. Since democratic theories are normative in their nature they argue mainly from one perspective in favor of (or against) a certain type of constitutional adjudication.<sup>12</sup> On the other hand, comprehensive introductions to various types of democratic theories do not concentrate on the specific topic of constitutional review.<sup>13</sup> This is why a comprehensive overview on constitutional review as viewed from the perspective of various democratic theories still has not been written. This paper offers a sketch of such a comprehensive overview.

## 2. TYPES OF DEMOCRATIC THEORIES

Variation of democratic theories might shock scholars who want to have a clear picture and give a systematic overview of the relationship between democratic theories and constitutional adjudication. Separating *positive*, *empirical*, and *normative* types of democratic theories might help us to tidy up the field. Buchstein and Jörke argue that *positive theories of democracy* try to avoid any normative evaluation and do not orientate to any existing democracies, but rather they try to grasp how democracy really works. They state that “they do not involve empirical study of the workings of real democracies but rather are deductive theories of political processes under constructed conditions, such as the rationality of agents or the closed logic of functional systems.”<sup>14</sup> Such theories are Schumpeter’s theory on political elite, Luhman’s systems theory or all democratic theories which apply rational choice theories.<sup>15</sup> These theories construct formal models of the democratic process but do not get involved with empirical studies.

By contrast, *empirical democratic theories* try to rank political systems according to a scale of democratic values and institutions or to determine the necessary functional preconditions of democratic systems and measure how such systems perform.<sup>16</sup> Quality of democracy indexes and measuring the performance of democracies are examples of these types of democratic theories. These theories compile various lists and indicators which might serve as a theoretical and conceptual basis for empirical assessments. Selecting certain types of indicators is, however, not a value neutral process. This is why all empirical democratic theories explicitly or implicitly apply one or another model of normative democratic theories.

The starting point of all *normative democratic theories* are the value-laden cornerstones which provide the reference points of all expectations regarding existing democracies. There is a legion of normative theories but as we are interested in evaluating *real existing* types of democracies we focus only on those democratic theories which underpin normatively real existing democracies’ institutions and practices. Let’s call these types of

<sup>12</sup> Dworkin (1996); Kis (2000); Tóth (2009).

<sup>13</sup> Held (2006); Cunningham (2002).

<sup>14</sup> Buchstein et al. (2011) 575.

<sup>15</sup> Schumpeter (1994); Luhman (2012).

<sup>16</sup> Buchstein et al. (2011) 574.

democratic theories *empirically oriented normative theories*. The principal interest of these normative theories focuses on the question “*who should decide in what kind of procedure?*”<sup>17</sup>

But one can get lost even among normative democratic theories which have been embodied in one of the existing democracies after WWII. This is why unifying all empirically oriented normative theories in one multidimensional model of democracy seems to be the best solution to have a clear picture of democracy and democratic theories. A *multidimensional model* of democracy seems to be the most promising also for our purposes, i.e. to make an overview of the relationship between democratic theories and constitutional review.

### 3. MULTIDIMENSIONAL MODEL OF DEMOCRACY

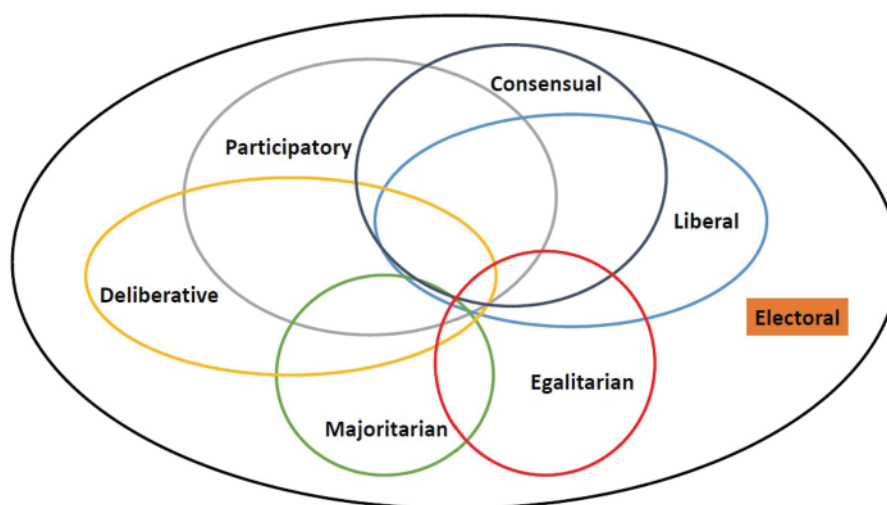
As struggles around the exact meaning of the term democracy have not ceased since the concept emerged in antiquity it is worth summing up the different meanings of the term in one *multidimensional model* of democracy. This model served as a theoretical focus point of worldwide empirical research conducted by Coppedge et al.<sup>18</sup>

According to this model democracy has a core concept broadly understood as the *minimal concept* of democracy. This common core, which has been also called minimalist or the Schumpeterian concept of democracy, relies on the idea of a fair democratic election. According to this view the one and only requirement of democracy is holding free and fair elections. Of course, many additional factors might be regarded as important for ensuring and enhancing electoral contestation, e.g. civil liberties, freedom of the press, independent judiciary, rule of law, and so on. Nevertheless, these factors have been regarded as secondary to electoral institutions.

While sharing this common core, *empirically oriented normative theories* diverge on additional but still necessary conditions of democracy. By surveying the literature of democratic theories it is not impossible, however, to differentiate between six models or core dimensions of democracy. These are the following dimensions: liberal, consensual, deliberative, egalitarian, participatory and majoritarian-representative. The relationship between these adjectives is neither fully conjunctive nor totally disjunctive: they have some common features and overlaps but they differ on crucial points as regards the necessary requirements of democracy. Their relations could be demonstrated as follows.

<sup>17</sup> The preferences in terms of institutional arrangements (“Which institutional design fits best to the expected decision making process?”) are not always unambiguous hence traditional categorization of democracies (presidential, parliamentary, etc.) might be useless in this regard.

<sup>18</sup> Coppedge et al (2011) 247 et al and 159.



**Figure 1. Multidimensional model of democracy**

*Adapted from Coppedge et al. 2011*

I think the terms used here speak almost for themselves. Nevertheless, by relying on the theoretical considerations of the empirical research conducted by Coppedge et al. one could sum up schematically the special characteristics of the six dimensions by referring to ideals, the most important questions and most important institutions of specific democratic theories, which serve as a fundament for each dimension. As mentioned above, *electoral democratic theories* urge fair elections and the central question they put forward reads as follows: Are important government offices filled by free and fair multiparty elections before a broad electorate? Special institutions important for these democratic theories include electoral systems and political parties.

The ideal democracies of *liberal theories* are those in which governments are limited, a vast number of veto points are built into the system, a wide range of various institutions of checks and balances constrains the legislative and executive branches of government, and individual liberty is pronouncedly protected. The focal point of the liberal democratic theories lies in the question of whether the power of the majority, as revealed in legislation or the executive, is constrained to an appropriate extent and individual rights are guaranteed adequately. Preferred institutions are independent bodies (like media, interest groups and civil society) and constitutional courts.

By contrast, *majoritarian theories* insist on the rule of the majority without any institutional constraint and stress the relevance of vertical accountability by means of democratic elections. Power should be centralized and not dispersed and the competition of political parties makes democracy work.

*Consensual theories* of democracy emphasize the significance of power sharing and the essential need for multiple veto points. The central question of these theories reads as follows: “How numerous, independent, and diverse are the groups and institutions that participate in policymaking?” Since consensual democratic theories highlight the most relevant groups of the society, institutions like federalism, proportional electoral system, oversized cabinets and an extreme multi-party system are preferred.

*Participatory* and *deliberative* theories share the view that democracy consists of government by discussion. Nevertheless, *participatory* democratic theories stress more the direct democratic elements, the active participation of a wide range of the population and focuses on local governments. *Deliberative* democratic theories are less keen on the decision making processes by direct involvement of the population and draw attention rather to the public and reasonable discussion before decisions are taken. Deliberative democracies are particularly interested in freedom and plurality of media.

Last but not least, *egalitarian* democratic theories focus on outcomes of democratic processes and seek equal distribution of power among the citizens. Institutions which could guarantee this equal distribution include health care systems, public schools and tax systems. All this can be summed up in a table as follows:

**Table 1. Characteristics of the democratic theories**

<p><b>I. Electoral</b>  <i>Ideals:</i> Contestation, competition  <i>Question:</i> Are important government offices filled by free and fair multiparty elections before a broad electorate?  <i>Institutions:</i> Elections, political parties, competitiveness, suffrage, turnover</p>	
<p><b>II. Liberal</b>  <i>Ideals:</i> Limited government, individual liberty, rule of law  <i>Question:</i> Is power constrained and individual rights guaranteed?  <i>Institutions:</i> Civil liberties, independent bodies (media, interest groups, judiciary), constitutional courts</p>	<p><b>III. Majoritarian</b>  <i>Ideals:</i> Majority rule, vertical accountability  <i>Question:</i> Does the majority rule?  <i>Institutions:</i> Consolidated and centralized, with special focus on the role of political parties</p>
<p><b>IV. Consensual</b>  <i>Ideals:</i> Power sharing, multiple veto points  <i>Question:</i> How numerous, independent, and diverse are the groups and institutions that participate in policymaking?  <i>Institutions:</i> Federalism, separate powers, PR, supermajorities, oversized cabinets, large party system</p>	<p><b>V. Participatory</b>  <i>Ideals:</i> Direct, active participation in decision-making by the people  <i>Question:</i> Do citizens participate in political decision making?  <i>Institutions:</i> voting, consultation, civil society, local government, direct democracy</p>
<p><b>VI. Deliberative</b>  <i>Ideals:</i> Government by reason  <i>Question:</i> Are political decisions the product of public deliberation?  <i>Institutions:</i> Media, hearings, panels, other deliberative bodies</p>	<p><b>VII. Egalitarian</b>  <i>Ideals:</i> Equal distribution of power among citizens  <i>Question:</i> Are all citizens equally empowered?  <i>Institutions:</i> Income, health, education, and other indicators of empowerment</p>

*Adapted from Coppedge et al. 2011*

Since our aim is to apply the multidimensional model of democracy and not to discuss its virtues or deficiencies, even less the weaknesses of a schematic approach, let me proceed to the application of this model.<sup>19</sup>

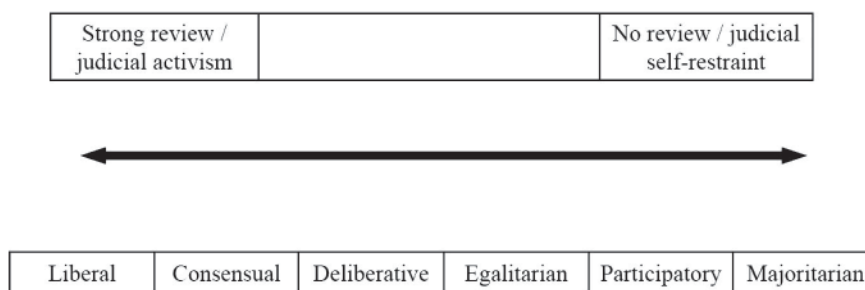
<sup>19</sup> For a less concise summary of the dimensions see Póczy (2015).

#### 4. JUDICIAL REVIEW AND DIMENSIONS OF DEMOCRACY

Our research does not survey all aspects of these democratic theories and dimensions but selects one question and gives an overview of the tenets of democratic theories on constitutional review. What follows might give the reader only superficial impressions on the topic, however, a more comprehensive study will be published as mentioned above. By compiling this overview I mostly relied on the works of the most important scholars who might be called representatives of the particular democratic theory.

By differentiating between two core types of constitutional adjudication, strong and weak, we can locate the six dimensions or types of democratic theories on a scale which attributes positive or negative attitudes towards constitutional review.

##### Judicial Review and Dimensions of Democracy



**Figure 2. Judicial review and dimensions of democracy**

On the left-wing end of the scale we find the *liberal dimension*, which definitely advocates strong forms of judicial review and judicial activism. On the right-wing end we find the *majoritarian-representative dimension*, which refutes the very existence of the strong form of judicial review and any form of judicial activism while occasionally admitting the applicability of the weak form of review. The other four dimensions could be located somewhere in between these two extreme positions.

The position of the *liberal dimension* and democratic theory is perhaps the most elaborated and unambiguous: constitutional courts should be considered as bulwarks against the tyranny of the majority which is, in turn, the most significant danger for democracy.<sup>20</sup> By defending effectively individual rights courts play a crucial role in the theory of liberal democracy. Constitutional courts are forums of principles where arguments clash with arguments and decisions will reflect the outcome of a rational debate. Courts are most appropriate for defending individual rights and deciding on difficult issues because judges, in contrast to MPs and other political actors, follow a principled and not an interest-based reasoning. Beyond this principled reasoning the most significant and decisive *a priori* argument for establishing constitutional courts with wide competences is that they are bound not only to give exhaustive reasoning but also to remain consistent. Consistency might be a conclusive argument and has been considered also as a *differentia specifica* of

<sup>20</sup> Dworkin (1996); Kis (2000); Tóth (2009).



constitutional courts in comparison to other deliberative assemblies. Since predictability of the courts' decisions is one of the most important components of legal certainty (rule of law) courts cannot deviate as easily from former decisions as other political actors.<sup>21</sup> According to the theory of liberal or constitutional democracy courts are in charge of protecting individual rights by consistent reasoning.

Turning to the *consensual* dimension and democratic theory, firstly we have to premise that this dimension is badly under-theorized with regard to constitutional adjudication and has a rather ambiguous attitude towards constitutional review. The consensual democratic theory is comfortable with both strong judicial review and with the denial of any form of it in spite of the fact that constitutional courts were not constitutive elements of consensual democracies in the '70s and '80s. Arend Lijphart was convinced that constitutional courts could play a positive role in a consensual democracy by providing a further forum for balancing and compromising interests of different interest groups.<sup>22</sup> The most recent literature is, however, rather skeptical in this regard. McCrudden and van der Schiff point out eventual detrimental side-effects of constitutional adjudication in a society which is based on a fragile balance between the *most significant* groups.<sup>23</sup> Constitutional courts could blow up this fragile balance between the leading groups of a society by insisting on the protection of individual rights even in case of a conflict between individual rights and some practices of consensual democracy. Consensual democratic theory concentrates on the most significant groups of the society and prefers to maintain balance between these groups. The theory's main concern is these groups and not the marginalized individuals. Consequently an intransigent constitutional court which protects marginalized individual's rights is rather a ballast of consensual democracy and not a paramount institution of it. By contrast, a court which protects group rights might be favored by adherents of consensual democracy. Since consensual democracies have been frequently established in post-conflict societies where delicate and fragile balances guarantee the existence and the cohesion of the political community, advocates of consensual democracy might contest the need for constitutional courts and constitutional adjudication.

As for the *deliberative* theory in its original version, presented by Jürgen Habermas, it is also rather skeptical concerning the virtues of constitutional review.<sup>24</sup> Habermas acknowledges that courts have to argue very profoundly and by doing this the quality of their arguments could contribute to enhancement of the quality of public discussion. But he challenges this type of argumentation and argues that constitutional review might lead to legalistic deliberations, which is a rather heavy constraint on the political community. The formal-legalistic language of constitutional courts' decisions averts the focus of deliberation from the substance of the topic.<sup>25</sup> This is why classical proponents of deliberative democracy cast doubts on the benefits of constitutional courts and are inclined to constrain the institution to control the *process* of deliberation. Both Habermas and John Hart Ely were convinced that constitutional courts should not be part of the deliberation and decision making processes of the political community.<sup>26</sup> The role of the courts should be confined to guaranteeing fair procedural framework for the deliberation and must not have the last say

<sup>21</sup> Kis (2000) 186.

<sup>22</sup> Lijphart (1999); Popelier (2013) 499.

<sup>23</sup> McCrudden (2013) 477; Habermas (1996); van der Schiff (2010); McCrudden et al. (2013).

<sup>24</sup> Habermas (1996).

<sup>25</sup> Habermas (1996) 274.

<sup>26</sup> Ely (1980).

on any substantial political issues. Adherents of deliberative democracy seek open debates with as many participants as possible. But constitutional courts are aristocratic bodies, which negotiate behind closed doors in order to maintain their authority. Constitutional courts are paternalistic institutions, which might not promote the issue of a wide ranging deliberation.

Nevertheless, recent attempts try to find a way in which even a strong form of constitutional review might be harmonized with the theory of deliberative democracy. Cass Sunstein's idea of judicial minimalism has been one of the most promising in this regard. Sunstein argues that judicial decisions should be as narrow and as shallow as possible. Judges should decide only the cases before the court and should not set down broad rules (narrowness). Furthermore, minimalist judges try to avoid issues of basic principles by reaching "incompletely theorized agreements" (shallowness).<sup>27</sup> Judges should focus on the case before the court and decide it without referring to abstract principles because this judicial mentality leaves the most important and controversial questions open for further discussion and does not narrow down the scope of deliberation. Another effort, which tries to reconcile constitutional review with deliberative democratic theory, defined several criteria of constitutional adjudication which might explicitly improve the quality of the general deliberative process.<sup>28</sup> Before taking decisions courts should organize open hearings to collect as many arguments as possible. Rules of decision making should facilitate debate among judges. What kind of rules could promote rational deliberation of judges depends, however, on context and cannot be predetermined *a priori*. Mendes suggests different rules for different constellations. After the decision has been taken courts should publish concurring and dissenting opinions, and the justification of decisions should refer to the possibility of being wrong. There are a number of further criteria which should be considered but the main goal should be always to promote deliberation among citizens.

The *egalitarian* democratic theory's attitude towards constitutional review is instrumental: if constitutional courts facilitate the process of on-going improvement of the welfare of citizens, the existence of constitutional courts might be legitimate. By contrast, if constitutional courts block the program of expansive redistribution their legitimacy remains doubtful. One of the most important proponents of this idea, Sotirios Barber, argues that a constitution and its interpretation must serve the most important aim of a political community, which is the welfare of the citizens. In his most recent book Barber uses the term *constitutional failure* to describe a situation in which political institutions (including constitutional courts) could not achieve this aim.<sup>29</sup> Constitutional courts fail also if they are not able or willing to enforce social rights. Therefore, enforcing social rights by constitutional adjudication might be a central issue of egalitarian democratic theory. Nevertheless, egalitarian democratic theories doubt in general that constitutional courts' judges are inclined to protect social rights since the dominant view in legal scholarship and among judges is that social rights are not enforceable. Enforcing social rights would be an interference with legislation since decisions on welfare services have serious financial consequences. Judges are not responsible for the budget of the country, as pointed out by opponents of Barber's thesis. According to another egalitarian scholar, Mark Tushnet, this program might be accomplished by a combination of strong social rights with weak courts.<sup>30</sup>

<sup>27</sup> Sunstein (2001) 10.

<sup>28</sup> Mendes (2013).

<sup>29</sup> Barber (2014).

<sup>30</sup> Tushnet (2008).

Tushnet argues that the success of social rights depends not on the strength of the courts but on the strength of social rights included in a constitution. This means that constitutional courts are bound to enforce social rights explicitly articulated in the constitution. Weak courts are simply empowered to propose certain kinds of interpretation of social rights not explicitly mentioned in the constitution but legislation will have the last say on these issues.<sup>31</sup> Weak courts cannot annul legislative acts even if they have the competence to review them. This type of constitutional review is based on a dialogue between courts and other branches of government and assumes that decisions of constitutional courts may have a serious impact on public discourse even if legislative acts could not be declared void by them. Weak courts, which protect or even promote a wide range of social rights, do not imply direct risks for the budget but advance the issue of a fair and more egalitarian society.<sup>32</sup>

Turning to the fifth type of democratic theory we will face even more powerful misgivings about the usefulness of constitutional courts. As *participatory* theory advocates the inclusion of ordinary citizens in as many processes of decision making as possible, proponents of participatory democracy mistrust all elite institutions. Constitutional courts are pronouncedly such institutions.<sup>33</sup> They declare their decisions *ex cathedra* without getting involved in a broad discussion with the public sphere. Excluding ordinary citizens from deliberation and decision making processes concerning the most fundamental issues of a political community is perhaps one of the most serious vices according to the proponents of participatory democracy. Participatory democratic theories trust in ordinary citizens' mental capacity. They argue that there is not any difference between judges and ordinary citizens as regards their moral capacities. Since constitutional questions are essentially moral questions and not formal-legalistic questions there is no reason why citizens should be excluded from decisions of the highest importance. Since judges have no special moral capacities, rational and pervasive disagreement about the ends of a society will prevail also among judges. If this is the case there is no legitimate argument why judges should decide moral questions and not the people. Constitutional questions, like other political questions, do not have one final answer or solution, thus decisions taken directly by the people might be reopened and discussed in the public sphere and by public involvement. By contrast, decisions of the constitutional courts seem to be eternal or less appropriate for boosting further debate among the population. In the US context some "popular constitutionalists" argue that challenging the Supreme Court's competence in having the last say had been customary until the '60s.<sup>34</sup> Until then the American electorate and the political elite resisted more or less effectively the efforts of the SC to expand its competence. Today criticizing the decisions of the Supreme Court is quite common but challenging the competence of the SC to decide important issues is no longer acceptable in the US. According to Kramer this is one of the biggest problems with American democracy and his main aspiration is to regain the power for the people to decide in *every* case.<sup>35</sup>

Finally, *majoritarian* democratic theories worry about the well-known counter-majoritarian difficulty, which emerged by the spread of constitutional review and judicial activism. According to the proponents of the majoritarian democratic theory the hope to

<sup>31</sup> Tushnet (2008).

<sup>32</sup> Tushnet (2008) 253.

<sup>33</sup> Tully (2007) 334; Tully (2002) 204; Puchalska (2011); Blokker (2013).

<sup>34</sup> Kramer (2004).

<sup>35</sup> Kramer (2004) 231.

find agreement on the most important (constitutional issues) is illusionary.<sup>36</sup> People disagree profoundly on basic questions, thus consensus might not be achieved even among citizens with similar cultural backgrounds. Only a *modus vivendi* might work in modern societies. Regarding constitutional review, they see no reason why constitutional judges could reach a consensus if the cases they have to deal with are concerned with the same moral issues on which there is no agreement among ordinary citizens. Rational disagreement cannot be eliminated, as this is the one and most essential characteristic of modern pluralist societies. If this is the case the one and only legitimate decision making process is the majority rule. Consequently, proponents of majoritarian democracy deny the legitimacy of constitutional courts as institutions which violate the principle of majority and equality embodied in the democratic decision making principle “one man one vote”. Furthermore, the argument that constitutional courts would serve as bulwarks against tyranny of the majority fails as well. Empirical data shows that most of the time constitutional courts’ decisions overlap with the view of the majority. On the other hand, tyranny of the majority is almost inconceivable in modern pluralist societies, where majorities consist of ever shifting coalitions of various minority groups.<sup>37</sup> Empirical evidence demonstrates that minority protection has been by far more effective in countries without constitutional courts and review (like the UK) than in the US where strong form of judicial review existed.<sup>38</sup> Empirical evidence shows also that the thesis that argumentation and reasoning of constitutional courts are of higher quality is seriously deceptive since argumentations of constitutional courts are mostly legalistic and do not concern the essence or substance of the issue.<sup>39</sup> Last but not least majoritarian opponents of constitutional review underline that decision making processes are based on the majority rule even in constitutional courts, consequently the decision making process in constitutional courts would also be exposed to the alleged tyranny of the majority (of the judges).<sup>40</sup>

## 5. CONCLUSION

Keeping in mind this overview of the six possible dimensions of democracy along with their implications for the legitimacy of constitutional review we should conclude that the different dimensions might have divergent *a priori* views on constitutional courts and constitutional adjudication. But how should we relate these findings to the question of the quality of judicial reasoning? It seems to be quite a simple task: by studying decisions, concurring and/or dissenting opinions of constitutional courts one could figure out trends in attitudes of judges towards one of these democratic dimensions which could provide clear evidence on the self-understanding and role perception of judges and courts within the democratic system and the system of checks and balances.

I admit that this highly concise outline of democratic dimensions’ approach to constitutional adjudication has been completely rudimentary. Nevertheless, I am convinced that creating a strong and explicit link between democratic theory and constitutional adjudication could improve the quality of judicial reasoning since it expresses the role perception and the self-understanding of a court or a judge. Although by exposing their

<sup>36</sup> Bellamy (2007) 16, 20; Waldron (1999).

<sup>37</sup> Bellamy (2007) 37, 43.

<sup>38</sup> Bellamy (2007) 44.

<sup>39</sup> Waldron (2006) 1353.

<sup>40</sup> Waldron (2006) 1396.

self-perceptions judges reveal some of their assumptions and attitudes beyond the law, at the same time they create a standard of evaluation of judgments. Standards might differ, consequently evaluation might also differ, but *consequent* application of standards, however different they might be, is even better than inconsequent role perception. This is how democratic theory could contribute to the improvement of judicial reasoning.

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