

## Comparing the Legitimacy of Constitutional Court Decision-Making: Deliberation as Method

TOON MOONEN

**W**ITHIN THE FIELD of legal theory and legal philosophy, a major space has always been reserved for questions of legitimacy. It comes as no surprise that in some areas of law, such as constitutional law, these questions have been at the centre of debate for decades. The rise of constitutional courts as important players in this field is undoubtedly related to that. Nevertheless, whereas the legitimacy of the constitution is one thing, the legitimacy of constitutional review by court is quite another,<sup>1</sup> and the topic of this contribution may be different still: the legitimacy of constitutional law, defined as the result of decision-making by courts.<sup>2</sup> Especially in countries with relatively young constitutional courts, such as Belgium, questions in that regard still need adequate discussion. The mere fact that the Belgian court was only established when Mark Van Hoecke's first achievements in academia were already many years behind him and will celebrate its 30th birthday the very same day of his academic goodbye is the best evidence of his long and rich career. Drawing on his work, I will put forward the outline for an alternative theoretical method to assess the legitimacy of constitutional

<sup>1</sup> In general, nobody would argue that the political branches are not constrained by the constitution. One could, however, wonder—and many have in fact questioned—why democracies need constitutional review by the judiciary. Some have vigorously argued against it (see, eg J Waldron, 'The Core of the Case Against Judicial Review' (2006) *Yale Law Journal* 1346). I will proceed from the assumption that the main argument why societies have installed (or accepted) constitutional review by courts is based on the idea of checks and balances: because there is a risk of a chronically under-enforced constitution, politics cannot be the judge of its own activity.

<sup>2</sup> For those with a strong normative view on how constitutional review should be exercised, there may not be a real difference: doing it badly may then be considered worse than not doing it at all.

court activity. I will argue that constitutional courts, taking their existence as given, have the most to win in terms of legitimacy if they operate according to the principles underlying the idea of deliberative democracy. This approach eases comparison beyond national substantive particularities.

## I. DEALING WITH CONSTITUTIONAL PLURALISM

The debate about the legitimacy of (the activity of) constitutional courts in a democracy is familiar. The question is how judges, who are not directly accountable to the citizens but are authorised to interpret the constitution and set aside the analysis of the democratically elected legislature, can justify their work in terms of democratic governance. Many would accept that today democracy is not only about majoritarianism, but is also about the conditions to provide each citizen with an opportunity to engage in the political process on equal footing. The challenge posed by constitutional review, then, is not as much its counter-majoritarian character, as it is classically dubbed, in the sense that it overrules majoritarian policy measures. Seen from this perspective, the threat of a *gouvernement des juges* is only troubling for those with a narrow conception of democracy. The challenge is in the delimitation of those conditions, which in practice form the outer limits of ordinary, majoritarian legislative discretion. This specification of the challenge may solve one problem; however, it confronts us with a daunting other one.

Of course, I am not contemplating scenarios here in which judges have explicit antidemocratic agendas or otherwise shadowy aspirations to power. Giving constitutional courts the mandate to determine, on the basis of a constitutional text, which guarantees the citizen precisely has and which he does not have, or how power is dispersed over various levels of government, nevertheless remains something of a leap of faith. The reason is that, whereas constitutional text may solve some problems in clear and straightforward ways, lawyers (and also linguists and political scientists) nowadays agree that it cannot provide concrete answers to all thinkable constitutional dilemmas. All who are somewhat familiar with legal theory, methodology of law and/or comparative law know about the existing diversity, throughout space and time, concerning democratically admissible approaches to constitutional interpretation.<sup>3</sup> Clearly, this

<sup>3</sup> A brief sketch is enough to illustrate the point. Argumentative approaches may include classical canons of legal interpretation, since they in principle take values as a criterion a democrat might find valuable, such as original or present consent, rationality or stability. Approaches may also involve more sophisticated argumentation patterns, such as by arguing that, for the sake of certainty, a constitution should as much as possible be considered to be a set of rules instead of standards. Some judges find particularly important the constitutional interpretation by elected branches of government. Others rely on more substance-oriented models of reasoning. In addition, many, if not most, will probably be willing to concede that in some difficult cases it is inevitable for judges—especially when relying on open-ended adjudicative tests—to take into account personal elements, based on an individual conception about what the constitution should provide in order for the citizen to be able to lead the ‘good’ life, thereby infusing

does not make comparative research on an international level any easier and, on the internal level, constitutional texts mostly do not provide guidelines on this. As a result, courts, and especially constitutional judges, take into account myriad factors when they determine constitutional meaning for the purposes of the review. More often than not, multiple solutions for the cases constitutional courts have to adjudicate are imaginable, and it is easy to see how citizens in a democracy reasonably disagree on what constitutes a good constitutional decision. They may reasonably disagree because, within the framework of a pluralist democracy, different politico-legal values can guide the exercise of constitutional review and lead to different outcomes. In fact, as Sunstein argues, democratic constitutional governance would be practically impossible if citizens did not accept the fact that they may agree on the theoretical outlines of good constitutionalism but disagree on their application, or agree on concrete cases but based on a variety of theoretical arguments. ‘For arbiters of social controversies, incompletely theorized agreements have the crucial function of reducing the political cost of enduring disagreement.’<sup>4</sup> The absence of a hierarchy—or even agreement about the identification—of the interpretative criteria admissible under democratic constitutional government often makes discourses incomparable. Even if we are not willing to concede in theory that multiple approaches to constitutional interpretation are legitimately possible, at least in practice we observe that there is no consensus and no way of enforcing one above the other based on its intellectual merits only. In Michelman’s words:

To assert [reasonable interpretive pluralism] is to declare impossible a publicly reasoned demonstration of the truth about what it is everyone has reason to agree to in the matter of legal human-rights entrenchments and interpretations. Reasonable interpretive pluralism does not place truth in this matter beyond reasoned argument, or make it just a matter of opinion or desire or power; it makes it *politically* unavailable, in real political time, among people who, aware of human frailty and ‘burdens of judgment,’ all perhaps sharing belief that here is a truth on the matter, can neither all agree on what that is nor dismiss as unreasonable their opponents’ positions.<sup>5</sup>

In real life, there is an abundance of democratically plausible theories about how a constitutional court should go about its business. If an interested layman asks what the constitution says on this or that particular question, one answer often follows: it depends. Moreover, most theorists themselves take

a dose of consequentialism and ideology into a decision. For a comparative view see, among the vast number of sources, eg J Goldsworthy (ed), *Interpreting Constitutions* (Oxford, Oxford University Press, 2006).

<sup>4</sup> C Sunstein, ‘Constitutional Agreements without Constitutional Theories’ (2000) 13 *Ratio Juris* 125. The absence of agreement does not diminish the system’s own legitimacy per se. See also eg J Habermas, ‘On Law and Disagreement. Some Comments on “Interpretive Pluralism”’ (2003) 16 *Ratio Juris* 193.

<sup>5</sup> F Michelman, ‘Human Rights and the Limits of Constitutional Theory’ (2000) 13 *Ratio Juris* 71 (emphasis in original).

nanced positions, trying to reconcile different perspectives, adding variables to their theory to ease out differences, thereby compromising to the extent that, even when questioned about constitutional philosophy, many would be forced to answer: that depends, too. Relatively speaking, some constitutional philosophies and solutions will be considered more or less appropriate than others in a particular space and time. But sometimes such an agreement will not exist. The problem is that if contending approaches depart from different premises about the weight of various elements of or the implications of democratic government for good constitutional decision-making, it is impossible to determine objectively which ones of these contentions are correct. As a result, it comes as no surprise that in reality many disagreements exist about the merits of a theory, but participants in those debates usually at least implicitly concede that more than one theory could reasonably compete within the same time and space without making the system for that reason alone undemocratic.

We are now confronted with a number of judges that may have different takes on constitutional philosophy and method, or, at least, different preferred outcomes, for whatever reason. As said, differences between interpretative theories can be relative, but they can also imply critical shifts in outcome. I do not propose a substantive normative theory of constitutional interpretation; neither do I argue that anyone will be as adequate as another. I do, however, propose that, in many situations, it will be impossible to conclude on that objectively. Claims about substantive legitimacy are often precarious for that reason, and comparison of legitimacy arguments between systems is difficult. Given that context, the goal of the previous observations was to set the stage for a different methodological approach to thinking about the legitimacy of the activity of a constitutional court.

## II. LEGITIMACY AND THE CONSTITUTIONAL COURT'S AUDIENCES

I propose an approach of what constitutes legitimate judicial decision-making that rises above the pros and cons of particular interpretative approaches, since engaging in a seemingly unresolvable exchange of possible interpretative truths and nothing more is, from a legitimacy point of view, dissatisfying. Of course, this has been done before. In what follows, I will in particular start from Van Hoecke's model of circles of communicative legitimation of judicial decision-making, which he recently also applied to constitutional cases.<sup>6</sup> As he argues, '[j]ust as *law* is constantly made in and through legal practice,

<sup>6</sup> M Van Hoecke, 'Constitutional Courts and Deliberative Democracy' in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Antwerp, Intersentia, 2013) 183–97 (emphasis in original).

*legitimation* too is constantly achieved through deliberative communication'.<sup>7</sup> Decisions are increasingly legitimate, he continues, if they succeed in convincing increasingly larger audiences of their qualities. Starting from the parties to a case, those concentric communicative circles further concern the rest of the judicial apparatus, the professional legal audience, non-professional civil society and all citizens. Van Hoecke derives legitimacy precisely from the discussion and acceptance of judicial interpretations as authoritative in increasingly encompassing environments.<sup>8</sup> Most importantly, this process of convincing does not necessarily mean that everybody changes her mind on substantive methodology or outcome; it does mean that audiences accept that the court has taken a position that is reasonably permissible in view of any of the values a democracy under the rule of law cares about.

Eventually, acceptance of decisions of constitutional courts in the society to which they apply is the ultimate touchstone for their legitimation. This does not mean that a majority should agree, but that a majority may accept the decision, and should not consider it to be clearly unreasonable or unacceptable.<sup>9</sup>

Van Hoecke's communicative circles can be easily identified if the theory is applied to constitutional courts. Given that no constitutional court depends on a single judge, for a start, the first circle of legitimacy would be the court itself: the more judges agree to the decision, the more internal legitimacy it has. On the next level, we find the parties to the case, which may include citizens, but overall also the government and potentially other societal actors acting as *amicus curiae*, including even, for example in federal states, other governments. Having them accept a concrete decision as legitimate is, of course, a serious accomplishment, and even more so if it can convince the professional community surrounding the court, including first and foremost the other high courts with some constitutional jurisdiction. In constitutional cases, it often also becomes a matter for academia and other specialised stakeholders to discuss, too, and especially Parliament. More often than is the case with ordinary adjudication, in constitutional matters the court makes a decision, the legitimacy of which is the topic of explicit discussion throughout the entire body politic of the state. Today, through the internationalisation of law and especially fundamental rights protection, one can also say that even transnational actors have become part of the communicative audience of a constitutional court, including supranational institutions, but potentially also foreign audiences. In

<sup>7</sup> M Van Hoecke, 'Judicial Review and Deliberative Democracy: A Circular Model of Law Creation and Legitimation' (2001) 14 *Ratio Juris* 420 (also integrated in M Van Hoecke, *Law as Communication* (Oxford, Hart Publishing, 2002) 172–78.

<sup>8</sup> Van Hoecke, 'Judicial Review and Deliberative Democracy', *ibid.*, 418–23.

<sup>9</sup> Van Hoecke, 'Constitutional Courts and Deliberative Democracy', above n 6, 196. We would not even go so far as to consider the presence of a majority relevant; the difference between acceptance by a large minority may in practice not be much different from acceptance by a small majority. See about the importance of acceptability also Michelman, above n 5, 73.

that sense, the legitimacy of our own constitutional choices is not entirely independent from what people outside the polity may think.

Most case law will be somewhere on a sliding scale of legitimacy, theoretically ranging from decisions nobody considers democratically acceptable to those about which everybody in the interpretative community agrees were decided correctly and for the right reasons.<sup>10</sup> Clearly, as a result of this approach, legitimacy is no longer defined as the connection between what one believes to be the right method to deal with a case and how the court has decided. What matters is whether we are willing to accept that the constitutional court could have reasonably reached its decision.<sup>11</sup> In a sense, the threshold for the court to produce substantively legitimate constitutional law is lowered from what one thinks should be the right answer to what one can imagine any democrat could accept as the right answer.

Of course, one might object that this does not fundamentally change the picture. Some members of the audience may still consider a given solution—or an entire line of cases—to be overall less legitimate than desirable, regardless of whether they are willing to concede that others may reasonably think differently. Ending the story here would mean obfuscating the problem and not really solving it. Arguably, the problem is unsolvable if substantive ‘correctness’ somehow remains the nexus of legitimacy. Tying the legitimacy of the court’s activity only to the result may thus not be helpful, and not even fair towards a court: if what is constitutionally good is a subjective matter, then the legitimacy of the court’s activity is doomed to forever remain contested. Although I agree that it is perfectly fine to forever argue about what is constitutionally the good thing to do, it is another thing to intrinsically relate the whole of the court’s legitimacy to the result of that argument.

This does not mean, however, that a constitutional court is ultimately excused more easily than before because in a democracy, if not anything, then at least ‘many things go’. I argue that the lowering of the court’s substantive legitimacy requirements (to what is a reasonably democratic solution, instead of the required solution) should be compensated by taking into account the efforts the court makes to achieve this threshold with its audience. The

<sup>10</sup> Given what I have said above about the irrelevancy of majoritarianism as such when deliberating about the content of constitutional values, the conclusion must be that a larger margin of legitimacy is preferable over a smaller one.

<sup>11</sup> Arguably, theories that are, in their premises or in their application, democratically irrational—because they do not relate to any value anyone considers worthy of attention under such government—could be rejected. Most actual competing approaches, however, cannot be rejected outright as democratically irrational because they appeal to values most would agree to be important for democratic constitutional government. Admittedly, people may disagree about what values serve constitutional democratic government in the first place. This raises particular problems, such as the practical observation that many in the audience might not have elaborate views on that, or the normative proposition that some approaches may be not be compatible with any conception of democratic governance, regardless of what the audience thinks. A hard core of democratic agreement is presupposed, if only because it is necessary to create a forum in which the court’s audiences can authentically discuss the reasonableness of a decision. One needs some democracy in order to properly sustain it.

practical question, then, is how larger communicative audiences can be convinced, given all of the possible democratic arguments and approaches, that the constitutional court has made an acceptable decision. Such ‘process legitimacy’ cannot simply imply a referral to the fact that constitutional courts are usually composed through specific procedures, usually with parliamentary involvement, and with certain political, federal or institutional balances in mind. Although evidently necessary, it is unsatisfying to take such safeguards described above for granted, because they only guarantee a good basis for adequate process. They do not guarantee the process itself. The answer to this problem lies in an application of the principles of deliberative democracy to the process of constitutional court decision-making.<sup>12</sup>

### III. ACHIEVING LEGITIMACY THROUGH DEMOCRATIC DELIBERATION

Since the 1980s, a variety of different theories have been proposed which have since been classified as relating to the concept of deliberative democracy. The field and scope of application of these are wide, so I will content myself here with a recent definition by Frankenberg. Deliberative democracy

picks up, on the level of normative theory, liberal democracy’s claim to legitimacy based on reasons—as distinct from a situationally contingent acceptance—and connects its key focus, not on a predetermined will but on the process of its formation, with participatory democracy’s claim to popular participation.<sup>13</sup>

For deliberative democrats, discourse and the processing of arguments are more important in terms of legitimacy than voting and the counting of votes. Unlike other forms of democracy, the centre of the legitimacy of a decision is the way it is taken—more precisely, the extent to which all arguments presented have been the subject of a real, fair and qualitative discussion. Some authors have already discussed the connection between democratic deliberation and constitutional court activity. Mostly, the judge or the court is seen as a forum for, or a facilitator of, democratic deliberation. In that sense, Popelier and Alvarez propose that the success of a court in contributing to democratic deliberation in society depends on such parameters as individual access, the motivation of the decision, judgment flexibility and the capacity to test legislation against those constitutional norms that facilitate the democratic debate themselves.<sup>14</sup> Quite clearly, and importantly, locating the legitimacy of the

<sup>12</sup> In this chapter we do not elaborate on the merits and challenges of a deliberative approach to the ordinary democratic process in general.

<sup>13</sup> G Frankenberg, ‘Democracy’ in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 255.

<sup>14</sup> P Popelier and A Patino Alvarez, ‘Deliberative Practices of Constitutional Courts in Consolidated and Non-consolidated Democracies’ in Popelier et al, above n 6, 208–29. Public reasoning, and its relation to political philosophy, as a determinative factor for the legitimacy of constitutional

court's activity in the approval it can count on in its audiences—as opposed to measuring it against a specific normative theory—is by definition a valorisation of argumentation and deliberation. I further qualify the part of a constitutional court in democratic deliberation in two ways.

Before doing so, however, it is important to specify to which debate deliberation through a constitutional court actually contributes. One might be tempted to limit the scope of its influence to the ordinary policy debate (which is the mainstream object of deliberative democracy theory), but that is only part of the story at best. As we have seen, the deliberation for which the court is a forum principally concerns the constitutionally acceptable—or, in the context of the positive state, mandatory—nature of certain measures. The deliberation to which the court contributes is thus not simply a rationalised prolongation of the policy debate citizens might have contributed to by voting, rallying, lobbying or otherwise. On the contrary, the deliberation concerns whether it is constitutionally admitted, prohibited or (even) mandated to have that policy. As a result, and although a constitutional court decision has ordinary policy ramifications, the debate is principally one about the constitution. The difference may seem self-evident, but it is easily overlooked and has important consequences for the deliberative nature of the debate, first of all because it will instigate the participants to produce different kinds of arguments, but moreover because some of the choices the judges make are taken out of the realm of majoritarian policy deliberation altogether.<sup>15</sup>

### A. The Court as an Actor in a Process of Deliberation

First, describing a constitutional court as a place of deliberation is only an adequate description of the overall process of constitutional determination if the decision of the court has some kind of a definitive character. This element can easily be overlooked, though in practice that is not usually the case. Quite often, a constitutional court is not the ultimate forum, but only one actor in a larger network of deliberating institutions. The organisational template of a democratic state may contain other actors, such as courts and advisory bodies, which also engage in constitutional interpretation without being

adjudication under circumstances of democratic pluralism has also been the object of elaborate theorizing in recent American political science literature. See, eg R den Otter, *Judicial Review in an Age of Moral Pluralism* (Cambridge, Cambridge University Press, 2009).

<sup>15</sup> Even a judge who would want to constitutionally affirm the policies of his personal ideological preference and outlaw the others is institutionally only capable of doing so in terms of a constitutional question, not in terms of policy preference. Especially if a judge would design a very specific policy, for example by recognising positive obligations from an abstract constitutional principle, his policy judgment is still framed as a constitutional requirement. This fact alone may be enough for many judges to draw a sharp line between constitutionally preferable choices and politically preferable choices, although the effect of both—a policy being installed or removed—is the same.



directly dependent on the previous assessment of the constitutional court. In systems of ‘weak(ened) review’, as it is described in Tushnet’s vocabulary,<sup>16</sup> the court may even be an institution of constitutional deliberation in competition with the legislative branch itself. In those situations, an exchange of arguments takes place, or has to take place, between the institutions themselves. Arguably, the principles of deliberation could be applied to these contexts, meaning that the constitutional opinion of the constitutional court is an element of discourse, persuasion and search for consensus among all bodies involved.<sup>17</sup> More generally, many of the factors identified as influencing court decisions actually originate within the constitutional court’s audience—other courts, political branches, but also doctrine—confirming the deliberative nature of the decision-making in a complex institutional context. The fact that the court decides in this way of course facilitates the acceptance within those audiences that we are looking for.

## B. The Court Deciding Through Democratic Deliberation

Secondly, perhaps the most critical observation to be made is that, although constitutional courts may indeed be suitable fora for problems of constitutional interpretation, and thus attract arguments about constitutional governance from all corners of society, none of the actors raising those arguments are actually involved in the final decision-making about a problem. Citizens, governments, intervening parties or amici curiae argue to the best of their abilities and understandings, but, in the end, it is the court that decides. Contrary to what is the case in more conventional cases of deliberative decision-making, the arguments raised before the court are not necessarily intended to convince the other parties involved in the controversy. The court is not a moderator, easing the discussion and facilitating the finding of a solution among the participants. There is thus a degree of contradiction in saying that the court is a forum for democratic deliberation if the actors proposing the arguments are not the ones who will finally take a decision.

This observation does not render the assertion that constitutional courts contribute to deliberative democracy false, though it does call for an important qualification. Constitutional courts do contribute to a deliberative decision-making process concerning constitutional values if their own internal decision-making is also determined by qualitative deliberation, and if that argumentative deliberation can be tracked in the formal decision delivered by the court. The core of the argument of this chapter is that, if the substan-

<sup>16</sup> See, eg M Tushnet, ‘The Rise of Weak-Form Judicial Review’ in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Cheltenham, Edward Elgar, 2011); see also M Tushnet, ‘Alternative Forms of Judicial Review’ (2003) *Michigan Law Review* 2781.

<sup>17</sup> About interinstitutional deliberation see, eg J Tulis, ‘Deliberation between Institutions’ in J Fishkin and P Laslett (eds), *Debating Deliberative Democracy* (Malden, Blackwell, 2003) 200–11.

tive legitimacy of the court's activity is based on a deliberative exchange with its audiences, as I have argued above, then, in deciding in a deliberative way itself, the constitutional court has the best chance to convince the largest communicative circles around it, thereby increasing its overall legitimacy to the maximum possible. As Michelman concludes:

a possible characteristic of the regime, in virtue of which everyone subject to it could abide by it out of respect for it, is that the regime's human-rights interpretations are in some way made continuously accountable to truly democratic critical re-examination, re-examination that is fully receptive to everyone's perceptions of situation and interest and, relatedly, everyone's opinion about true justice. If that is a true proposition, and if it further turns out that accountability to democratic critical examination is the *only* practically possible respect-worthiness-conferring virtue that a regime of human-rights interpretations might have in conditions of reasonable interpretive pluralism, we would then have explained how recourse to a democratic procedure can possibly confer normative legitimacy on a human-rights regime.<sup>18</sup>

Because constitutional courts are often composed in such a way that they represent a variety of approaches to the constitution and its place in accommodating 'the good life', in controversial cases, not all judges will be convinced by the same arguments. As a result, the disagreement existing in society, and which was brought to court, is likely to exist in the court too. Part of the legitimacy of its decision depends on whether the court takes on the responsibility to address in full all democratically rational arguments raised before it. Importantly, it should also reproduce that deliberative process in the decision it delivers. That final point is essential, because, although a court could deliberate qualitatively and then deliver a single-sentence decision, not being required to publicly account for the deliberation leaves the court's communicative audiences increasingly unconvinced and leaves the door open for less well-deliberated decisions.

#### IV. THE CHALLENGES FOR THE CONSTITUTIONAL JUDGE

If a constitutional court takes a deliberative approach, the chance that the inner communicative circles, consisting of other courts, advisory bodies and political institutions, will accept and incorporate the solutions of the constitutional court as the most appropriate way to think about the debate increases. Van Hoecke concludes that '[c]onstitutional courts have a privileged position in this communicative process, as they may authoritatively determine the

<sup>18</sup> Michelman, above n 5, 73 (emphasis in original). See also J Ferejohn and P Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice' in W Sadurski (ed), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective* (The Hague, Kluwer, 2002) 27.

exact scope of constitutional rules and principles'.<sup>19</sup> Ideally, focusing on process and acceptance within societies rather than hard-to-objectivise substantive standards, the comparison of legitimate court activity is made easier methodologically. Unmistakably, though, however self-evident a deliberative approach to judicial decision-making may seem, it puts quite a heavy burden on the judges: it is an intellectually demanding responsibility.

First of all, it implies that a judge is open to potentially being convinced by others. Decision-making among actors unwilling to be persuaded under any circumstances may still be democratic and acceptable to some, but the process would amount to not much more than vote counting. That would not contribute to increase legitimacy; it would be a mere confirmation of the existing disagreements of opinion within the court's audience. Secondly, the eventual decision remains a group responsibility and effort because, even if a judge argued against the solution adopted, it is still her right, but also her duty, to have her arguments incorporated. This does not mean that the deliberation should, for that reason alone, lead to a compromise. Her arguments should be part of the deliberative process; it does not mean that the result should necessarily accommodate her position in some way too. Such an approach requires detachment from the judge: on a first level, she will argue on the merits of a case, and agree or disagree with the outcome of the deliberation; on a second level, she should be willing to think, along with the drafters, about how the decision as taken may be used to convince as much of the communicative audience as possible, either by making sure that the court shows the sceptics among them how it considered her arguments and why it eventually rejected them, or by making the court's principal argument as strong as possible. Thirdly, and paramount, the responsibility of the judge goes so far that it is her duty to consider if all democratically rational approaches and solutions are on the court's discussion table, especially if for some reason they were not (adequately) represented in court, and even if she feels not particularly attracted to it.

All that does not make the job of constitutional court judge any easier. It requires competent lawyers, skilled debaters, talkers but also listeners, and above all imaginative people capable of analysing what arguments go on in each of the court's communicative audiences. Imagination and empathy, moreover, are also requirements for the deliberative process between the judges itself, since empathic judges, often having done a great deal of deliberation already on their own,<sup>20</sup> can take the discussion easily and quickly to the right level. Authentic deliberation requires a judge to leave the comfort zone of her personal constitutional rights and wrongs, and forces her to grapple with the fact that the alternative methods of her colleagues may find reasonable support, and should thus be accounted for. It implies that an argument

<sup>19</sup> Van Hoecke, 'Constitutional Courts and Deliberative Democracy', above n 6, 196.

<sup>20</sup> See R Goodin, 'Democratic Deliberation Within' in J Fishkin and P Laslett (eds), *Deliberative Democracy* (Malden, Blackwell, 2003) 54–79.

cannot be ignored during debate or in the decision, and that, if an argument is rejected, it should be the best version of it. Anything else will give way to the challenges that the deliberation has not been fair and reasonable, thus putting pressure on the legitimacy of the decision.

Taking into account the necessary independence from the legislature to avoid corruption of the process in view of bare policy concerns, Zurn is convinced about the comparative advantages of separate and specialised constitutional courts.<sup>21</sup> It seems, however, that institutional organisation is not even the most important determinant of a court's practical potential to embody this kind of qualitative deliberative constitutional discussion. Practically, as long as a constitutional court and its audience refrain from embracing its role in democratic constitutional governance, decisions may not reflect the deliberative dialogue sought. Of course, such reluctance is not hard to understand.

In a well-functioning constitutional democracy, judges are especially reluctant to invoke philosophical abstractions as a basis for invalidating the outcomes of electoral processes. They are reluctant because they know that they may misunderstand the relevant philosophical arguments, and they seek to show respect to the diverse citizens in their nation.<sup>22</sup>

Especially in those systems that are, for reasons of federalism or the heterogeneous composition of society, *de facto* consensus democracies (so-called consociational systems),<sup>23</sup> such as Belgium, public and highly deliberative decision-making may seem naive or illusionary, or at least it is put under great pressure.<sup>24</sup> The possibility to convince, or the willingness to be convinced or to recognise the reasonableness of a particular unwanted solution, may indeed be jeopardised to a greater extent than in other contexts. Nevertheless, in those societies, the court's audiences know—and many would even approve—that decisions could only be reached through the art of complicated compromise. Deliberation does not require compromise, but neither does it exclude it. The publicly translated deliberation that can be expected from such courts can be exactly about the interests at stake and the search for a workable compromise.

The reason why consociationalism cannot be an excuse for lower standards of qualitative judicial deliberation is one of democratic accountability. As said, most agree today that democratic governance is not only about direct electoral accountability, so there is no reason why a constitutional court would not accept its role of real decision-maker, even though it is clearly a role of a different kind than the political branches, and accountable in a different way.

<sup>21</sup> C Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York, Cambridge University Press, 2007) 274–300. In any case, he would like to see the courts complemented by other institutional and civic fora for constitutional debate.

<sup>22</sup> Sunstein, above n 4, 127.

<sup>23</sup> On this topic see also, eg A Lijphart, 'Constitutional Design for Divided Societies' (2004) *Journal of Democracy* 96; A Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, Yale University Press, 1977).

<sup>24</sup> See also Popelier and Patino Alvarez, above n 14, 204–05.

The point about accountability, however, is most essential: in the absence of a vote, the judges of a constitutional court have to be otherwise accountable, and I argue that they can do this through a deliberative decision-making attitude and openness about the decision-making process. It will probably be exposed to criticism, but until someone proposes the ultimate democratic theory that everyone agrees on, any debate is criticisable. The worst criticism that could be levied is that there is not enough material to criticise, that the material presented does not adequately reproduce the debate that took place or that it was not fully informed.

Clearly, there are weaknesses in complicating the effort of legitimising constitutional decision-making in the way presented here. On the content side, of course, it is not inconceivable that a court succeeds in convincing only some parts of its legal and political audiences. It may fail to convince a specific audience altogether. Sometimes a particular constitutional approach or solution may convince (parts of) the political elite but not professional or academic circles, sometimes it may convince the citizens but not the politicians, sometimes it may convince an international audience but not the citizens or national political bodies. On the process side, judges might reject a deliberative discourse altogether, or, if they embrace it, it may be a constant struggle to live up to it in practice. Some argue that there are important limitations to what courts could realistically achieve anyhow.<sup>25</sup> Moreover, admitting that constitutional adjudication is dictated by deliberation does not entail endorsing the practice, which may be not ideal but excusable in ordinary politics, of strategic thinking or sophisticated bargaining games, and which may heavily burden the qualitative deliberation we are looking for.<sup>26</sup>

More generally, and relating to my opening observations, court designers seem to have two goals, which might interact in a rather paradoxical way. First, they want to keep the constitutional judge as far away from ordinary politics as possible, for otherwise the temptation to confuse constitutional possibility with political opportunity might be too great. Secondly, however, given the existence of constitutional pluralism, the judicial decision-makers should be as close to that variety as possible, because it would be contrary to the deliberative function were all reasonable perspectives not represented in the debate. Keeping constitutional judges far from legislative politics but close to the constitutional polity is a delicate balance. Perhaps reconfiguring classic terms,

<sup>25</sup> See, eg A Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, Harvard University Press, 2006).

<sup>26</sup> See generally, eg P Spiller and R Gely, 'Strategic Judicial Decision-Making' in K Whittington, R Kelemen and G Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford, Oxford University Press, 2008); see also, among many others, L Epstein and T Jacobi, 'The Strategic Analysis of Judicial Decisions' (2010) *Annual Review of Law and Social Science* 341; G Vanberg, 'Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review' (2001) *American Journal of Political Science* 346. Sen has recently argued exactly this concerning the Supreme Court of the United States: M Sen, 'Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System' (2013) 27 *Notre Dame Journal of Law, Ethics & Public Policy* 315.

like judicial neutrality and objectivity, as the capacity to conduct a deliberative argument about constitutional meaning will help to understand what that means. Not all of the questions are answered here, however. Implying process legitimacy in the research effort entails its own methodological problems.<sup>27</sup> The search for an adequate methodology to assess, ideally comparatively, the legitimacy of court activity is an ongoing matter. What is beyond any doubt, however, is the great value of Mark Van Hoecke's thinking and writing about these subjects.

<sup>27</sup> On the comparative difficulties relating to determining judicial reasoning and the value of motivation of judgments see, eg M Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press, 2004).