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"COURTS AS REPRESENTATIVES, OR REPRESENTATION WITHOUT REPRESENTATIVES"

REPORT
by

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(APEX) Courts as Representatives, or Representation without Representatives[1]

According to public expectations prevailing in contemporary democracies, popular election generates representativeness and the representativeness of political bodies grants legitimacy to the decisions of these bodies. Traditionally, the legitimacy of the judiciary as a mechanism of law enforcement and individual conflict resolution was not based on the same assumptions of electoral democracy. But with the advent of judicial review and constitutional adjudication, a new function was attributed to courts, and apex courts in particular: They have the power to review legislation that is deemed to be the legitimate expression of democratic popular will. This raises new issues of the legitimacy of courts.

In the present paper the representation problem is discussed in the context of apex courts like supreme and constitutional courts. The issue of their democratic legitimacy is related to, but distinct from, the demand that courts be socially or culturally representative of the society, or that they be democratically accountable through popular or other election. But representation is not an unambiguous concept. It connotes a wealth of meanings, including some that indicate that courts and their activities can be better conceptualized within broader concepts. In order to understand the basis of apex courts' legitimacy when they meddle with legislation, the paper reviews various understandings of representation and applies them to courts. Beginning with a discussion of the legitimacy deficit of elected political bodies, I will first provide a short overview of competing concepts of representation in order to clarify elements of representativeness in the judiciary. Following Hanna Pitkin, the paper argues that representation is also an act of creation. It is in this regard that apex courts may contribute to the formation of social representation within the current constitutional mandate of constitutional and judicial review.

COURTS BLAMED FOR THE DEMOCRACY DEFICIT OF PURE ELECTORALISM

Judicial and political branches of representative governments need legitimacy, though for different reasons. When courts act in the absence of legitimacy, in particular when they overrule legislation and replace it with their own solutions, they are attacked for usurping legislative power without popular endorsement (and for not having proper skills or adequate procedures to understand or form conclusions about political questions). The charge of usurpation draws from the fact that judges are not elected, at least not popularly. Needless to say, this accusation is not always correct. Judges in the highest courts are generally indirectly elected, or appointed in cooperation with the elected leaders of other branches of

[1] This paper is based on a Lecture given at Oxford University on 18th October 2012 organized by the Foundation for Law, Justice and Society. However, the following remarks do not concern the UK directly, given that the traditional doctrine of parliamentary supremacy and the absence of a written constitution minimize judicial review of legislation in Great Britain and hence the need for democratic representativeness of the judiciary.
The author wishes to express his gratitude to Denis Galligan for his inspiring comments.

power. Moreover, beginning with the French Revolution and continuing with a number of state courts in the United States, judges were and are popularly elected.

Notwithstanding the above criticism, it is not obvious that the election of judges by the people would lend legitimacy to judgments that run against laws enacted by representatives in Parliament. At the level of everyday experience, at least in some instances, the judicial election process—the way it is carried out and the resulting appearance of dependence on donors and electors—may undermine the independence of judges, as well as their entitlement to authority and respect. Similar arguments can be made in regard to the politically motivated selection of judges, a process that is quite common in the case of constitutional court judges elected by parliaments or appointed by specific political bodies (as in France).

The above criticism of judges' lack of democratic representativeness is partly motivated by legislative (political) and populist discontent. More importantly, this criticism reflects a misunderstanding concerning the importance of elections: there are a number of processes of gaining power other than elections that can result in legitimate power. On the other hand, even fair elections can be insufficient to grant legitimacy, though they may offer, *prima facie,* a semblance of "democracy."

Insistence on popular election might be doubtful even outside the judiciary, that is, with respect to other political bodies. The riddle of why and how legitimacy and authority emanate from the fact of being elected contains an element of mystery. It remains contested that the act of election amounts to a transfer of power from the electorate to elected representatives. In fact, elections rarely generate such a miracle, one that would be reminiscent of transubstantiation. All that a popular election does is to enable the representative to participate in the work of a legitimate organ of power. As David Plotke[2] has demonstrated, the identification of democracy and elections was a tool for distinguishing Western states and totalitarian regimes. Today the dangers of falling into communist oppression are non-existent. Therefore, the thin concept of electoral legitimacy may not satisfy contemporary needs of power legitimation among the electorate, especially given current fears that individuals are losing agency. Of course, election as a fair procedure diminishes some of the democratic difficulties of representative government. It also provides formal equality to citizens, without, however, enabling full self-government. After all, the fundamental expectation of self-government is captured in the slogan "let the people decide." But being elected does not guarantee responsiveness to citizens.

Behind the attacks on the legitimacy of judicial review and related judicial interventionism that describe them as the usurpation of the legislative function, hides a second, partly different legitimacy problem. This legitimacy problem relates not to the judiciary, but rather the elected legislative branch. The representativeness of legislation is controversial and often lacking. Politicians act through Parliament in ways that appear in the eyes of the public as government by partisan bias and special interests. The free election of politicians and political parties looks insufficient on empirical grounds as a means of expressing the popular will and promoting the public interest. The electoral process is better designed for choosing among candidates than for channeling the will of the electorate, or

[2] D. PLOTKE, *Representation is Democracy, Constellations: Int'l J. Critical & Democratic Theory,* 1997, 19-34.

even that of the majority. I leave aside the important problem of the statistical representativeness of elected office holders, an issue also relevant for the judiciary.

Politicians assert that by being freely elected they express the popular will, while other branches of power, critical of politicians' performance, are acting without comparable popular legitimacy. Attacks on the non-elected judiciary originate in the fear among parliamentary politicians of losing status to judges and of having their legislative projects run into constitutional obstacles. They hope to keep their supreme and privileged position, and public immunity for their collective unconstitutional action, by successfully arguing that unelected courts are not legitimate in criticizing legislation. Whereas the legitimacy of constitutional review originates from the recognition of the imperfections of electoral democracy, the political bodies generated by the electoral process have to counterattack in order to protect their privileges. The defenders of rigid separation of powers and parliamentary supremacy claim that irrespective of the alleged shortcomings of the political branches, the judiciary has no democratic mandate to replace them in the realm of political representation. The popular will is to be expressed solely by the electorally anointed representatives of the people.

Irrespective of the possible sources or grounds of the attack on the judiciary, there is a broader and genuinely puzzling issue here. The politicians and scholars who castigate courts for not being elected and therefore not being representative highlight a dilemma of governance and an intertwined difficulty of governmental legitimacy in the modern constitutional state. Modern constitutional systems grant increased powers to constitutional courts to protect the constitution and to international courts to protect and enforce international regimes. This does not sit well with a democratic concept of separation of powers.

It would be wrong to conceive of electoral representation only in the context of the political constitution of collective bodies. Electoral representation is also an attempt at self-government by the people. The two efforts, popular self-government and the constitution of a modern polity, were to some extent historically interrelated. But for practical reasons self-government occurs only through the mediation of representatives. Even in self-government the problem of the principal-agent relationship (the people being the principal and the representatives the agents) remains to be solved.

Facing disenchantment with electoral politics, constitutional arrangements have historically moved toward granting a greater role to the judiciary in the solving of the principal-agent problem.[3] This shift towards the judiciary in the determination of certain issues which pertain traditionally to the elected legislative branch was facilitated by the legitimacy of courts as defenders of justice. The modern state, in a mode that is different from that of the Kingdom or Empire, is to a great extent about Justice, or at least it claims so in the form of welfare justice. As Judith Resnik and Dennis Curtis have stated: "More recent social movements

[3] At least this was the prevailing trend until recently, when a strong intellectual counter-movement of judicial review scepticism emerged, as illustrated by the popularity of court bashing. See e.g. M. TUSHNET, *Taking the Constitution Away from the Courts,* Princeton University Press, 1999. *See further* J. WALDRON, *Law and Disagreement,* Oxford University Press, 2001.

have transformed adjudication into a democratic practice, and courthouses have come to replace Justice as an icon not only of adjudication but of government more generally."[4]

This form of judicial governance is a challenge to traditional nation-state-based sovereignty where the legislative branch, i.e. Parliament, has the ultimate and unlimited power, at least on paper. Where the legitimacy of constitutional review originates from the recognition of the imperfections of electoral democracy, the branches whose members are selected through electoral democracy, may have the tendency to counterattack the legitimacy of constitutionally mandated judicial review. The criticism of courts for being non-representative originates from the belief that political representation creates supreme and legitimate power. In many regards this simplistic truism serves the interest of the political status quo which finds it inconvenient to be subjected to authoritative criticism by another branch. The truism is regarded as the foundation of political government in everyday discourse. It is reinforced by a shallow understanding of democracy. One of the crucial arguments of the elected branches' counterattack is that irrespective of the alleged shortcomings of legislation, the judiciary has no democratic mandate to take on a lawmaking role, and not just because this would violate the separation of powers, even if sanctioned by the constitution. It is argued that without the democratic legitimacy quintessential for legislative power that originates in political/popular representation, judicial lawmaking is illegitimate. In the formative years of modern political democracy, French Revolution theorist Abbé Sieyès argued forcefully for vesting trust in elected representatives. He held them to be trustworthy for the very reason that they represent the people, and that elections provide a guarantee for the people's trust.

Some separation of powers doctrines insist on exclusive powers of elected representatives, at least with respect to originating legislation. Democratic theory claims that legislation is the privilege of the elected branch precisely because the branch is electorally accountable and representative. However, new constitutional developments, such as the need to protect the constitution and the very complexity of governments, gravitate in favor of a more mixed system of legislation and a more nuanced understanding of the inter-branch relations. The involvement of the judiciary in legislative dialogue has gained traction. For the judiciary to be involved in the electorally legitimated democratic and constitutional process, it must demonstrate its accountability. Representativeness is or could be part of that process.

REPRESENTATIVENESS: A CONTESTED CONCEPT

The debate about the proper allocation of powers within the constitutional system cannot solve the deeper issue of the representativeness of the democratic political system. Even in those democracies where parliamentary sovereignty is not the prevailing doctrine, it is not clear how far judicial review may extend, given the importance of the separation of powers, and especially given that legitimacy for the whole system comes from democracy, which operates through electoral processes.

[4] J. RESNIK, D. CURTIS, *Representing and Contesting Ideologies of the Public Spheres: Representing Justice: Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts, Yale J. Law & Human,* 2012, 19.

Representativeness of the democratic polity has become a contested concept. Huntington was quite clear in regard to the performance of electoral representativeness: "Elections, open, free and fair, are the essence of democracy, the inescapable sine qua non. Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities make such governments undesirable but they do not make them undemocratic. Democracy is one public virtue, not the only one."[5]

Representative government is first and foremost a democratic technique of legitimating power. It defines the subjects participating in the selection of delegates and the process of selection, and it claims legitimacy on the grounds of satisfying these preset criteria. Electoral representation is also an attempt at self-government by the people. But elections do not guarantee self-government. "The people," composed of individuals, is not necessarily really governing itself. Representation is a constitutive act of self-government. By defining a form of representation, the represented create the community that they themselves would like to govern. This is the creative aspect of self-government as representation.

Self-governing people (individuals and the community) are driven by a common sense or ordinary meaning of representation. In this ordinary meaning, representation presupposes some correspondence or reproduction: The represented object or subject wishes to see some commonality between himself or herself and the products of representation. There are uncertainties, however, as to who and what is to be represented. In the simplest terms representation as a political concept relates to Parliament. Traditionally, a Member of Parliament is conceived either as a delegate or as a trustee. The latter metaphor potentially reduces the MP's accountability, and it is no surprise that it is favored by power-holders. Of course, dissatisfied members of the electorate complain as if their MP were a delegate, or at least a trustee in breach of trust.

A terminological clarification that is obvious in some languages is useful at this point. There is a difference between what the German call *vertreten* and *darstellen*, a difference between what the representative does and what the representative is (what is he "standing for"). Speaking in legal terms, *Vertretung* is a mandate. Perhaps because of the power of the ordinary meaning of words, this is the standard expectation of German citizens regarding the delegate. For scholars like Hanna Pitkin, however, representation goes beyond strict mandate, and it includes all the acts of the mandate-holder, irrespective of *ultra vires*. This role is close to the role of the guardian. Guardianship as a political concept, however, smacks of paternalism. The second meaning, *darstellen* refers to a loose reproduction of an original, the reproduction of a single feature. In terms of political decision-making it refers primarily to the actualization of the wishes or desires of the represented. John Stuart Mill, in his *Considerations on Representative Government*, stated that what makes government representative, beyond maintaining the consent of an educated people, is taking public opinion into consideration and making decisions that correspond to it.[6] Finally, it should be added that in German a third term is also used for representation, namely that of *raepresentieren*, which means the incorporation of a moral principle or notion. This may, of course, be relevant for what constitutional courts do in a Dworkinian sense, but one has to

[5] S. P. HUNTINGTON, *The Third Wave: Democratization in the Late Twentieth Century,* Oklahoma, 1991, 9-10.
[6] J. S. MILL, *Considerations on Representative Government,* Everyman's Library, 1936, 175. The relation to public opinion will play a role in the representational efforts of apex courts too.

admit the ambiguity of such an approach. This ambiguity becomes clear in the meaning attributed to *Raepresentation* by Carl Schmitt. For Schmitt this term means the making publicly visible of something existential. The mystical uncertainties of what he calls "existential" cause difficulties for this theory with respect to legal certainty and democracy.

To end this survey it should be added that representation is often understood as similitude, which is also a source of legitimacy. Similitude is understood, among others, as a guarantee of identity. Where the issue is law, politics, art, or even everyday virtue, the authenticity of the represented is of utmost importance. Similitude is a sign or proof of such authenticity. It looks like the original, it has its characteristics, and it is, therefore, authentic even if it is not the original and even if it is not identical. All this points to Plato, and to Aristotle's concept of *mimesis*. Originating in concepts of aesthetics, there is a form of political representation that is based on the correspondence with the represented. The correspondence is not necessarily limited to the individual or community but also to their fundamental characteristics; in contemporary politics, the similarity of some characteristics of the representative to the represented is ordinarily considered a sufficient justification for the representative's authority (see the "One of Us" ideology). This is particularly true in identity politics, where political representation is understood as identity representation. Similarity is crucial for representativeness in populist democracy: representativeness means popularity in public culture, on television in particular. If politics and political choices operate in the same manner as show business, or "*politique spectacle*" as the French call it, then representativeness corresponds first and foremost to attractiveness and sex appeal. Attractiveness is a function of similarity, *similis simili gaudet*. Achieving popularity in elections means being selected for the traits that reflect the identity of the people making the choice. To a considerable extent, popularity based on similitude thus serves as the basis for electoral choices. Similitude fosters acceptance of the representative and therefore to his or her legitimacy.

In order to address the representation issue in the context of courts, one must look briefly into competing concepts of political representation. A quick glance at the history of concepts and practices of representativeness and representation indicates that electoral representation's *cachet* results from the power of mental oversimplification in politics. Representatives, representativeness and representation are distinct concepts and their indistinct use in the everyday discourse of representative government is part of the war of legitimacy. Following Hanna Pitkin, I understand political representation as an act of creation, including the creation of the very community that is represented. For Pitkin, political representation is not static, it is not a matter of perfect correspondence, but of selecting "which characteristics are politically relevant for reproduction."[7] Talleyrand was able to capture this dialectical or "creationist" meaning at the very moment of its enfolding. This is what he said in the debate on the binding mandate at the National Assembly in 1789: "The deputy […] who was charged by the electoral borough [*bailliage*] to will in his name is charged to will as the borough would have willed, were it transported to the general meeting, that is after having maturely deliberated and compared all the motivations of the different

[7] H. F. PITKIN, *The Concept of Representation,* University of California Press, 1967, 87.

electoral boroughs." For Talleyrand it is the liberty of the deputy to deliberate that makes him a genuine representative.[8]

The election of representatives was historically understood as a constituent/reaffirmative moment in the sense that the political community was reaffirmed by the fact of electing local representatives. This approach lies at the heart of Burke's famous Bristol address of 4 November 1774. Burke expressed his "poor sentiments" in the following famous terms:

> Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*.[9]

Needless to say, in the 18th century political landscape of single constituencies and in the absence of political parties, Burke lost his seat in Bristol, though not necessarily because of the electorate's dislike of his honorable theory. It is more likely that merchants of Bristol were not particularly inclined to accept free trade, which was advocated by Burke; it was certainly a public good at the imperial level, but a disaster to their treasure chests.

Though the binding mandate has been pushed out from modern constitutionalism, the mandate problem resurfaces in radically democratic propositions. Different forms of referendum bring into representative government elements of the binding mandate and is not unheard of in contemporary constitutionalism.

Contrary to Burke, whose main concern was a government that represents common interests, the delegates of the Third Estate in France (in search of the general will) assumed that political representation was about collective representation and not the representation of a specific sub-entity of actual citizens of any electoral borough. In this regard, election-based representative democracy is a specific method of self-definition for the collective political entity. The collective body to be represented is constituted by the very representation, it can exist solely through a special identification process that occurs primarily through elections. Of

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[8] Talleyrand on 7 July 1789 at the National Assembly, *Archives parlementaires,* Tome 8., at 201, quoted in P. BRUNET, *La representation,* in M. TROPER, D. CHAGNOLLAUD (dir.), *Triaté international de droit constitutionnel, Tome 1.,* Dalloz, 2012, 629.

[9] E. BURKE, *Speech to the Electors of Bristol,* 3 November 1774, Works 1:446-448, in P. B. CURLAND, R. LERNER, *The Founders' Constitution,* University of Chicago Press, Liberty Found, 2000. Vol. 1, Ch. 13, Doc. 7. Available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>. It is quite remarkable that in Conor Cruise O'Brien's magisterial work on Burke this radical innovation of political theory is left out from the long quote from the *Address* that is understood as an act of personal honesty, which it indeed was. This is an astonishing example of the difference professional perspectives may cause. *See* O'BRIEN, *The Great Melody. A Thematic Biography of Edmund Burke,* University of Chicago Press, 1993, 75.

course, at least in principle non-democratic representation may also do the trick, for example via corporate or estate delegates, as long as they act as constituents of a collective. The popular electoral process is, however, more credible because it fits into individualist equality. It was egalitarian democracy that gave a new credibility to the legitimacy of elected representative governments. As Thomas Paine stated:

> The true and only true basis of representative government is equality of rights. Every man has a right to one vote, and no more in the choice of representatives. The rich have no more right to exclude the poor from the right of voting, or of electing and being elected, than the poor have to exclude the rich; and wherever it is attempted, or proposed, on either side, it is a question of force and not of right.[10]

This revolutionary idea of equality was in clear contrast even with the French revolution's prevailing ideas of national representation (except for a brief moment in 1792 in the election to the *Convention nationale*.) In the long run, however, electoral representation became a legitimate means of satisfying enhanced demands for equality, in the sense that in principle all citizens—all those affected by the common decision—have equal standing in the general election and hence in the determination of the policy through elected representatives. But the election of the representative is understood to be a temporary power-granting act: The electors transfer their decision-making power. This conception of representation as something that is equally shared by citizens resulted in the comfortable slogan that being popularly elected grants power to govern. However, this conclusion is not inevitable, and it does not sit comfortably with Madison's concept of constitutional self-government.

Madison considered representative government, i.e., government by the elected few, to be an antidote to direct self-governance (understood as unruly democracy). He claimed that passing views through the medium of a chosen body offers better wisdom. This concept of mediated self-government is only distantly related to contemporary understandings of democracy, a word that was anathema in the early days of people's power and constitutionalism.

It is well known that Madison considered the republican form of government a dispassionate, professional, and therefore a good institutional arrangement against factionalism. In this mediated process the election offers chances to bring in less biased decision-makers, and people who are above local prejudice:

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common

[10] T. PAINE, *Dissertation on the First Principles of Government,* 1795, Life 5:221-225, in P. B. CURLAND, R. LERNER, *The Founders' Constitution,* University of Chicago Press, Liberty Found, 2000. Vol. 1, Ch. 13, Doc. 40. Available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s40.html>.

> motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[11]

In other words, the Madisonian argument for representative government was not based on a concept of mandate or delegation, or even true representation of the Nation as a community of interests and values. Instead, government is just a space for rather transparent interest negotiation, which has built-in mechanisms to prevent extreme preferences from prevailing.

Political representation is a historically established solution to the specific difficulties of coordinating collective entities, including political entities. It enables a collective to appear as a single entity. Representation is discussed in terms of authorization, both in regard to the constituent elements (e.g., citizens) and to the external world. In many regards correspondence – i.e. correspondence with the constitutive elements – is the source of authority: the citizen accepts the decision of the delegates because she recognizes herself as an actor of the decision, or at least she recognizes in the decision her wishes and her identity. The contemporary criticism of elected representatives and of democracy is based on the assertion that such recognition does not occur because similitude is absent. Representative governments cannot be representative as they are alienated from the electorate; the electors do not recognize themselves in the delegates nor do they find their preferences reflected in the collective acts that emerge from the deliberations of the representatives. This might not be a relevant objection in a Burkean theory, but the underlying criticism is related to a non-Burkean theory of representation, namely that of representation being the faithful image of an original. The idea of a faithful image animates a fundamental contemporary psychological concern at the level of everyday political practices with serious political consequences.

Historically, correspondence, mandate (civil law delegation) and election were prescriptive concepts that served to generate legitimate political power. Although to some extent their existence in politics is parallel, they are sometimes in competition. The interrelations between these concepts can be demonstrated with reference to development of the power of the Christian congregation over its members, and later on the power of church leadership over the congregation and the Church. The medieval way of thinking about this relationship influenced modern concepts of political representation of the state. In one approach, the congregation or even the whole community of Christians is a mystical body in need of a representative, i.e., a decision-making head. This approach was abandoned when it became necessary to affirm the power of the King over an increasingly sovereign state, where sovereignty meant the supreme and exclusive power.

Parallel to this concept of representation of the body is the Roman law concept of the mandate. The distinct body was enabled one way or another to give instructions as to how to be represented, or at least, it was supposed to be bound to respect some inherent characteristics and interests of the represented. This relationship is like a guardianship as in the case of minors, widows etc. To some extent the identification element of representation was amalgamated into the concept of royal power as representation of the community. The

[11] J. MADISON, *The Utility of the Union as a Safeguard against Domestic Faction and Insurrection (continued), The Federalist,* November 22, 1787, No. 10.

National Assembly of the French Revolution was composed of the representatives of the Third and Second Estate, who were elected with clear binding mandates on behalf of specific communities which were considered to constitute the realm (though the realm was already represented in the body of the King). Technically, of course, the difficulty with this binding mandate was that such a mandate would have made it nearly impossible for those assembled on behalf of the Third Estate to work towards their radical national plan. But the real issue was the recognition of the national collective entity beyond the King in the existence of elected representatives, who were in their individual capacity authorized to represent the Nation by being locally elected. In these circumstances, they recognized each other as being elected on behalf of the Nation, where the Nation or the People could not have existed, or at least could not have expressed itself, outside its representative body.

While concerns about the communities (national versus local) that legislators represent are not absent from contemporary constitutional thought, they have been overshadowed by democratic equality ideologies which are in partial conflict or tension with these more community-oriented concerns. For practical purposes the emphasis was and is on the empowerment of the individuals who constitute the people. It is in this context that the act of election was singled out and elevated to a method of formally legitimating the power of legislators. Nevertheless, the products of the elected representatives are not necessarily representative.

At this point, the need for trustees acting for the insufficiently represented collective entity or its good comes to the fore: are constitutional courts such trustees? If so, what are these courts going to correct, and how? After all, most constitutions with strong constitutional review provisions mandate only the protection of the constitution and the rights and competences written into the constitution. This is not necessarily an invitation or authorization to correct misrepresentations of the will or identity of the people.

The discontent that originates from popular dissatisfaction with political/parliamentary representation can be articulated as one of improper representation of the intentions of the individual subjects. This approach is what Hanna Pitkin calls a “one-to-one, person-to-person relationship.” For Pitkin, however, representation is a “public, institutionalized arrangement” where the arrangement is intended not only to promote the public interest but also to be “responsive to popular wishes when there are some.”[12] In other words, representation is satisfactory if it is responsive. Other formal theories of legitimation in constitutional theory seem to suggest that is a one way street, which contributes to the democratic deficit and growing political alienation of minorities. This alienation is particularly pronounced where these minorities remain electorally unorganized or where they can only be heard after giving up certain constituent elements of their identity and existence.

Political representation is a principal-agent problem. A normative theory of representation thus has to answer, first, what makes the principal honor the commitments of the agent. Second, what makes the agent honor the preferences of the principal? Third, a theory of representation should consider that, at least at a certain point, the principal should pass judgment on the content of the agent’s decision or performance, beyond the fact that the agent had the right to act. It seems to me rather a shallow claim that authorization by formal election, and accountability, if it exists at all, are sufficient for asking the electorate (and the

[12] H. F. PITKIN, *The Concept of Representation, op. cit.,* 221, 233.

community) to honor the agent's decisions, though this would follow under a contract theory of mandate (though ironically electoral authorization denies contract theories).

This takes us to the interrelation of the representative, the represented and the representation. So far the emphasis has been on political representation as electoral representativeness. But even if the representatives are a constitutive and renewable element of the represented community—that is, if the community is shaped by the very act of selecting the representatives and by allowing the representatives to shape the community—this does not grant them legitimacy. All that follows from being elected is a sort of procedural legitimacy because representatives must act within the formal rules. For substantive legitimacy, the act of representation has to be recognized by the represented as their own act, an act corresponding to their wishes or accepted by their future actions. However, popular participation in decision making is generally limited to electoral choice; the elected can therefore feel alienated or even betrayed. They understand themselves as not being represented. They see no representation in the sense of similarity, which boils down these days to identity and identity politics. The same applies to representation on the basis of a mandate, which is the alternative justification of the legitimacy of representation that has been in many regards out of favor after Burke's address to the electorate in Bristol. Binding mandate is a constitutional rarity and only floor crossing is an issue: electoral promises are "more honored in the breach than in the observance.".

JUDGES AS TRUSTEES: TRADITIONAL THEORIES.

The idea that courts and judges fit into one or another form of representation was historically quite widespread. Of course, the primary role of judges is understood to be conflict resolution according to preexisting rules. Therefore the standard problems of political representation cannot be simply transferred to the judiciary. However, we pose the question: Ought a judge do what his constituent society wishes, or what he thinks best for society? This question seems to be fundamentally contrary to the notion of unbiased and independent judicial decision-making. But an independent decision-making process does not rule out the representativeness of the judicial product. If the judgment should be some kind of correspondence and therefore representation, even if primarily to a textually reflected image of the popular will, the consequences of the decision's representational value do matter. If judges have a duty to represent and make visible a legal reality, is this a factor constraining or enlarging judicial power? Burke, halfway between tradition and modernity, considered judges to be trustees of the people, in the sense that the King was also a trustee.[13] The

[13] "It would (among public misfortunes) be an evil more natural and tolerable, that the House of Commons should be infected with every epidemical phrensy of the people, as this would indicate some consanguinity, some sympathy of nature with their constituents, than that they should in all cases be wholly untouched by the opinions and feelings of the people out of doors. By this want of sympathy they would cease to be a House of Commons. For it is not the derivation of the power of that House from the people, which makes it in a distinct sense their representative. The king is the representative of the people; so are the lords; so are the judges. They all are trustees for the people, as well as the Commons; because no power is given for the sole sake of the holder; and although government certainly is an institution of Divine authority, yet its forms, and the persons who administer it, all originate from the people." E. BURKE, *Thoughts on the Cause of the Present Discontents,* 1770, Works 1:347-349, in P. B. CURLAND, R. LERNER, *The Founders' Constitution,* University of Chicago Press,

French revolution reflects an ambivalent position in this regard: Judges were elected in the name of a representation theory of the Nation. This was intended to counter traditional concepts of *Parlement*, the territorial judicial authority in the Ancien Regime. The judges, like the delegates of the National Assembly, were seen as decoupled from territorial communities. This decoupling was intended to reinforce centralization without increasing the powers of the King. However, the French judge was not considered a delegate. The insistence on elected judges stemmed from the election frenzy of the Revolution: That was the first age that succumbed to the sex-appeal of a simplified popular representation – legitimacy by participation. Election was the ultimate source of legitimacy. In 1790 even priests had to be elected in revolutionary France. Election of judges was also seen as a remedy against the venality and corruption of the earlier system of judicial appointments.[14]

It should be added that except in moments of revolutionary fervor, the practice or even theory of popularly elected judges was hardly ever popular outside the United States. In the United States the Founding Fathers did not contemplate the popular election of judges. Nevertheless, in the populist movement of the early decades of the 19th century, popular election became attractive in some of the American states. Today in a number of states in the US, and very exceptionally in Japan and Switzerland, state court judges are popularly elected. Courts of commercial arbitration (recognized by members of a chamber of commerce) and religious and community tribunals are sometimes elected. The 1993 constitution of Peru provides that judges can be elected, but no use has been made of this enabling provision. Apex courts, being closer to politically relevant decision-making, are often indirectly elected (i.e., they are often elected by political branches**).** Non-popular election (i.e., election by Parliament) is more common, especially for apex courts. Such election, just like appointment by the political branches, is problematic in part because it undermines impartiality and independence. In one country, the members of the federal tribunal are elected by legislators for a period of six years, are eligible for re-election and the parliamentary tradition is that judges are elected in proportion to the political party representation in that Parliament. One of the major parties recently declared that judges who consider international law applicable against domestic law are to be considered ineligible on the ticket of that party. I will not name this democracy but it is clear to see that this approach is based on a firm belief in representation through parties.

The French liberal theory of the 19th century accepted that the judge is a representative of the Nation but has a function that is different from that of political representatives.[15] This was never considered to be an argument for popular election. Contemporary continental legal ideology maintains the core of the 19th century concept insofar as judges exercise their power on behalf of (and in the name of) the Nation. The objections to a contemporary judicial representation theory might be the following: As a rule, courts cannot have formal legitimacy as representatives because there is no way a constituency may formally recognize them or their acts as representing the people. Traditional, election-based answers to the principal-agent problem are in conflict with the judicial function and the rule of law (in the sense that

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Liberty Found, 2000. Vol. 1, Ch. 13, Doc. 6. Available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s6.html>.

[14] T. L. ANENSON, *For Whom the Bell Tolls: Judicial Selection by Election in Latin America, 4 Sw. J. L. & Trade Am.,* 1997, 262, argues that popular election would be appropriate in Latin-America, given the need to be responsive to local community needs, and in the fight against corruption.

[15] LABOULAYE, Séance du 21 juin 1875, *Annales de l'Assemblée nationale,* 1875, Tome 39, 86. *Cited in* BRUNET, *La representation, op. cit.,* 635.

judges are law-bound). There is no specific political community that would recognize a court as its own representative. While transparency and accountability are democratic concerns that apply to the selection of judges, it does not follow that democracy requires popular election.[16]

Like politicians, judges are in some ways accountable for their decisions, and accountability of some elected officials is comparable to that of judges. The accountability of parliamentarians is limited as it does not apply during their mandate, and it is not personal vis-à-vis the constituents who vote for parties. To the extent that a judicial decision is subject to review, judges are accountable, and disciplinary requirements are stronger for judges than for politicians. As to apex courts, there is less direct accountability, but to a considerable extent their decisions are renegotiated in legislation and in lower courts.

The appropriateness of popular election of judges is particularly hotly debated in the United States, especially because of the distortions inherent to the judicial electoral process, with all the resulting conflicts of interest. Should judges be elected at all, rather than appointed in a non-popular selection process? In this regard I limit myself to quoting *The Economist*. The weekly magazine discussed the matter in the following terms: "Back in 1906 Roscoe Pound, a scholar at Harvard Law School, started a campaign to have judges appointed by saying: 'Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.' When he spoke, eight in ten American judges stood for election. Today, the figure is 87 percent. Americans are still reluctant to accept that politicians should be chosen by the people, but not judges."[17]

Undeniably, judicial selection is an important problem for democracy, and where the dominant mode of legitimation is by popular election, judicial selection is under stress. To quote Resnik and Curtis again, "Democracy has not only changed courts but also challenged them profoundly. Egalitarianism poses deep problems for polities that have thus far been unwilling to commit the resources that would support all the adjudicatory opportunities promised."[18]

The legitimacy of the selection or election process has to satisfy a number of sometimes contradictory considerations. The legitimacy of the judiciary, and apex courts in particular is sometimes evaluated in terms of the background of judges (gender, minority status, or, especially in the case of international courts, national diversity).[19] However, this matter is better framed in terms of diversity and not representation. Of course, the social composition of the judiciary is a genuine problem in terms of potential class or group bias. Wolfgang Kaupen's pathbreaking research has demonstrated that the family background of the German judiciary did play an important role in their interpretation of the law, which might have had an impact on the public perception, and reluctant social acceptance of the

[16] J. RESNIK, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure, CLR,* 2004-2005, 579.
[17] *Guilty, Your Honour? This year's judicial elections may be worryingly free-speaking.* (The Economist, 22 July 2004). For a review of judicial selection and arguments against popular judicial election *see e.g.,* L. EPSTEIN, J. KNIGHT, O. SHVETSOVA, *Comparing Judicial Selection Systems, Wm. & Mary Bill Rts. L. J.,* 2001, 7,
[18] J. RESNIK, D. CURTIS, *Representing and Contesting Ideologies of the Public Spheres: Representing Justice: Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts, op. cit.,* 24.
[19] The European Assembly, the representative body that elects the judges of the ECHR has formal rules on achieving gender balance and as an international court it is based on the rule that each state has to have a judge on the court, justified by equality of states as sovereigns.

judiciary.[20] But I will limit myself to problems of judicial representativeness as symbolic representation. More properly, we are confronted here with the signaling function of selection resulting in some kind of representation of people or recognized virtues of society. Here the representation is understood in terms of likeness or similarity: In this approach, the socio-cultural background of the composition of a court or of the whole judiciary is understood to signal political preferences. Here the issue is: do judges in their person reflect society correctly? Is it correct from the perspective of constitutionalism and is it possible as a matter of practicality that courts, and apex courts in particular, have to be socially representative in the sense of reflecting the socio-cultural composition of society? In a broader sense: Political recognition of social diversity increases the symbolic legitimacy of courts – but is this a (proper) source for the legitimacy of judgments, which are in principle legitimate because they correspond in a specific way to laws, and perhaps result in socially acceptable conflict resolution? The representative social diversity of the judiciary may signal important political choices, but it enhances legitimacy in law only to the extent that it creates a *prima facie* respectability: The socially representative court is less likely to be elitist. It promises the respect of all of us by embodying traits that are similar to the body of people it represents. It does not necessarily provide an internal legal legitimacy. Special personal experiences of the judge related to his or her social background may contribute to better understanding of a problem, but this idealized improvement of background knowledge does not guarantee legally credible judgments. Justices Thurgood Marshall and Clarence Thomas offered opposite solutions to discrimination on the basis of their somewhat similar life experiences and racial background. Judgments are not expected to represent public opinion in the statistical sense. The politics of mirror representation correspond to a concept of symbolic representation. This has important political functions, especially in terms of identity politics.

Irrespective of its pragmatic merits, the ideal of social likeness that is based on the socio-cultural composition of the judiciary is open to criticism. Hannah Pitkin describes such likeness as a strategy of power. The representative judges are appointed within a power game between the ruled and the ruler, where the ruled accept leadership. Here the ruler (the agent) is not identifying himself with the electorate through shared or jointly developed policy goals but he works "on the minds of the people who are to accept" leadership.[21] While soft quota may serve symbolic representation and increase credibility among certain excluded groups (and it may well be part of a general affirmative action project) the genuine issue is more one of *exclusion* than inclusion. Singling out certain relevant experiences and representations excludes other experiences *a priori*. For example, to insist on prior judicial experience in the nomination of human rights judges disregards the relevance of human rights advocacy or academic experience.

Traditionally it was assumed that legislation's "constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law."[22] However, we live in a world where the government's promises to serve the public good are not observed. In order to correct this mischief of bias, where the corrective power of the democratic process does not manifest itself, or where such correction might be delayed with serious consequences, a traditionally judicial virtue may come to the rescue. Here the

[20] W. KAUPEN, T. RASEHORN, *Die Justiz Zwischen Obrigkeitsstaat und Demokratie: Ein Empirischer Beitrag zur Soziologie der Deutschen Justizjuristen,* Luchterhand, 1971.
[21] H. F. PITKIN, *The Concept of Representation, op. cit.,* 101.
[22] *Fullilove v. Klutznick,* 448 U.S. 448, 502 (1980) Justice Powell, concurring.

shortcomings of the democratic process are remedied by judicial intervention, primarily through judicial control of legislation and of the political branches more generally. Moreover, rule of law and other settled principles do matter even to legislation. When it comes to the rule of law, or to blatant human rights violations, lawmakers have difficulties relying on the fact that they are representative in one or another sense of the term, since they may sometimes need to disregard socially endorsed values in favor of recognized principles of law. (Retroactive legislation, for example, remains an aberration even if supported by the majority.) Moreover, government is expected to do more than govern—it must also satisfy demands for some kind of justice, which is a traditionally judicial function. Judicial interference in matters that are socially construed as issues of justice are easy to accept. Indeed, one can see that public administration is increasingly judicialized. For example, it is increasingly accepted that hearing officers are built into the system of US federal administration.

The opposition between making and applying policy that was so elegantly articulated by Justice Powell is increasingly blurred. Given the political bias of legislation, constitutional courts (referring to various constitutional formulations) assume that the ordinary political-legislative process has to observe fundamentals of impartiality and fundamental principles of law. I will argue that apex courts do have a constitutional mandate to correct certain imperfections of the representative system. They may even correct some of the bias of legislative choices to the extent that these choices do not represent the constitution's vision of society.

Where the political system itself denies some people participation in self-government, the system of representation will be flawed. This flaw creates a clear task for the apex courts, which legitimately interfere to correct this shortcoming. Secondly, when courts stand up on behalf of the excluded, they represent the interests of the excluded in the fashion of a guardian, without a mandate coming from, or through, election. In this regard courts are delegates without a mandate; they act as if being delegated by the powerless. A second representative function is clearly encompassed by the theory of "insular minority" protection. In this regard it is the constitutional duty of courts to provide protection to those who are excluded from the minimum protection that stems from participation in the democratic decision-making process. This was the famous program of the Supreme Court outlined in Footnote Four of *Carolene Products*.[23] In this sense, constitutional and human rights courts do have a representative function; they correct flaws in electoral process, enabling the participation, and therefore representation, of the excluded. In a broader sense, it is a constitutional issue, and therefore, at least to some extent, a matter for the courts, to participate in the definition of the people, that is, who is entitled to participate in elections, or who is to be represented; in other words who is "the people". The Supreme Court of the US decided the question of assisted suicide on these grounds: It was held in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) hat there is no federal right to assisted suicide and this is a matter or right to be determined by the people of the various states.

Moreover, at least some courts consider themselves as having a duty to provide special protection to the historically oppressed and vulnerable who cannot have proper substantive representation through the political process, though the justification is generally based more on dignity than on equal electoral rights. The Supreme Court of India sometimes acts as the

[23] *United States v. Carolene Products Co.,* 304 U.S. 144, 155 (1938).

representative of the powerless (without special mandate). This may fit into Pitkin's concept of "substantive acting for others,"[24] but the courts only rhetorically refer to the represented and prefer references to rights and values.

It can be argued that the popularly elected delegate has a better understanding of the appropriate action to take than the judge whose horizon is case-bound. This is not fully correct. Within the understanding provided in law and precedent, the judge is in a situation comparable to the legislator. What makes the difference is that the judge is not acting on behalf of the constituency and is, *perhaps,* less concerned with secondary consequences. But this is a big "perhaps." A constitutional court, however, is not expected to follow the best or "objective" interests and will of the constituents (understood as national community), but rather, only certain values embedded in the constitution. The court's legitimacy comes from the constitution on behalf of the community as a whole that accepted self-government. The assumption is that the constitution describes the "genuine," fundamental value preferences of the constituency, irrespective of the actual majoritarian or other preferences. The courts may *bona fide* claim that specific constitutional values that the court relies upon in quashing legislation serve the interests of the underrepresented.

REPRESENTATION OF FUNDAMENTAL CONSTITUTIONAL VALUES

The above corrections to electoral democracy are either procedural, or concern indirect interest representation for those whose most fundamental constitutional rights cannot be meaningfully taken into consideration in the majoritarian legislative process given the persistent distortions built into that process. There is, however, an additional concept of representation-based judicial intervention that relies on the need for substantive representation. In some instances apex courts are understood as representing or acting on behalf of fundamental constitutional values that are unrelated to specific constituencies. In practical terms, the "insular minority/vulnerable group interest representation" and the "fundamental value/substantive representation" concepts overlap. It can be argued that courts "represent" people in one or another of the above senses, thereby complementing elected democratic institutions, for example by identifying and sustaining the people's fundamental values. Even when the empirical people turns against such attributed values, for example through its elected representatives, the theory holds that courts still faithfully and legitimately represent and defend genuine popular wishes. According to this understanding, courts sustain the very democratic system that enables people to self-govern while fully respecting all of the members of the community.

At this point it is appropriate to recall Burke once more. He attributed to the House of Commons the duty to act in harmony with "the public sentiment of people."[25] This is what Hamilton called "a due sympathy between the representative body and its constituents."[26] Constitutional judges may be capable of reasoning in harmony with the public sentiment, for example by taking notice of uncontested judicial findings emerging in the laboratory of lower courts that reflect public sentiment. Judicial representation of people's "true" constitutional

[24] H. F. PITKIN, *The Concept of Representation, op. cit.,* 141.
[25] E. BURKE, *Thoughts on the Cause of the Present Discontents, op. cit.*
[26] A. HAMILTON, *Concerning the General Power of Taxation (continued), The Federalist,* January 5, 1788, No. 35.

self (if it exists at all) has the advantage that the judiciary is not beholden to special interests or party politics, and can avoid the pragmatic and temporary pressures created by shortsightedness and whim. But the judiciary's representation will never be purely reflective of the public's opinion and sentiment; it will be selective and creative too, in the hope that thanks to its own legitimacy, the people, at least by acquiescence, will recognize the accuracy of the judicial finding.

From the perspective of theories of representation, when courts stand up for underlying social and constitutional values, adding to, or even contradicting legislation, such acts may count as representation of the community so long as they may be "in some way or for some reason, […] be ascribed to another,"[27] i.e. the represented. I hasten to add that even if this claim of representation makes sense, it cannot, in itself, make the act of judicial interpretation constitutionally legitimate. Constitutional adjudication has to satisfy specific requirements of formal constitutional legitimacy. However, constitutional legitimacy is not a purely formal legal issue; it has clear political and even cultural dimensions.

Are constitutional value judgments generated or confirmed by courts representative, especially where they supplement legislation? How can we evaluate such claims of representativeness? These judgments are acts of re-creation, they bring into presence an already existing practice or value. The pre-existing is reinforced, legitimated by judicial endorsement. A fair number of social acts must point in the same direction in order to qualify as a pre-existing practice or value. The re-creativity in judicial review is limited by the constitution and by the previous acts of the apex court. Moreover, such constitutional value judgments need at least tacit endorsement by the represented community, for example through acquiescence.

This type of judicial action on behalf of the community may be legitimate, at least in the eyes of a constitutional theory that recognizes that democracy (and parliamentary representation in particular) needs corrections. But judicial correction will continue to suffer from a democratic legitimacy deficit in the sense that the judiciary does not interact as much with the electorate as the political representative bodies. The represented have little chance to influence the judicial process. Judicial "representation" of public interests or constitutional values in cases where legislation is non-existent or disregarded is analogous to a guardian who acts on behalf of incompetent actors (agents). It is not clear what would legitimize such action other than the desire for paternalism and for combatting the intrinstic biases that characterize the political branches.

It is similitude that makes such determinations of constitutional values credible from the point of view of representativeness. The values protected by the courts resemble values cherished by people. Judges cannot claim that they represent society in any sense of delegation of power through election or other form of transfer of power. But they can claim that, because of their impartiality, they are the best-suited institution for producing a correspondence between the values or sentiments of the people and the values or sentiments expressed in their judgments. In addition, constitutional courts may claim that they are formally called upon by the constitution to carry out the task of identifying partly unidentified values that correspond to the values held by the people. They are not representatives of the people, but what they

[27] H. F. PITKIN, *The Concept of Representation, op. cit.,* 139.

discover in their judgments is nonetheless representative of what is essential in the constitution and hence for the people.

Obviously, the idea of representation as the discovery of essential features derives from Plato. For Plato, the Equal exist behind the imperfect similarities of objects. With respect to the law, similarities in precedents and other relevant legal findings can be found to point toward an underlying value. The claim that judicial findings represent true values may well refer to these findings' creative discovery of such similarities. A Platonic theory of "courts as representers" claims that the judge is capable not only of reproducing reality through similitude, but also expressing the hidden reality that underlies that similitude.

Such Platonic representation, even if one disregards its metaphysical assumptions about pre-existing knowledge, remains open to criticism, which legal scholarship has supplied in abundance. Platonic representation runs against robust democratic theories that rely on representing the will of empirical people. Notwithstanding the German doctrine of the objective hierarchy of values in the German Basic Law, there is no uncontested empirical evidence that there is a pre-existing thing (value), at least not beyond the constitution, waiting for discovery. The alleged similarity of the constitutional value with recognized social practices can be characterized simply as the creative result of interpretation. Activist constitutional judgments are a mixture of empirical references to expressions of otherwise imperfect popular will and underlying, non-empirical or non-popular trends.[28]

The difficulties and dangers of essentialism loom large. One can be rightly afraid that a constitutional court that claims to discover and enforce "essentials" will claim powers originating in a thought process not accessible to others and not open to public scrutiny. Such priestly access to justice is a recipe for arbitrariness and results in judges' isolation from society.

Notwithstanding the above objections, the "bringing into presence" of underlying values is an appropriate form of constitutional interpretation when it implies representation of society's values. The personal characteristics of the judges themselves do not need to be representative, only the values they discover. A likeness to underlying social values can be established within judicial reasoning. But this cannot be confused with a search for essentials. Of course, apex courts generally have the mandate to be relatively autonomous and creative in this regard, at least according to the theory that constitutional courts must protect the constitution. The discovery of the constitutional values in social values (and

[28] *See, e.g.*, the ECtHR references to "European value consensus." *See e.g. S.H. and Others v. Austria,* ECtHR, Application no. 57813/00, Judgment of 3 November 2011, Paras. 96, 106, Separate Opinion of Judge De Gaetano, Para. 4, Joint Dissenting Opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, Paras. 7-8, 10-11; *Stummer v. Austria,* ECtHR, Application no. 37452/02, Judgment of 7 July 2011, Paras. 105, 132, Partly Dissenting Opinion of Judge Tulkens, Para. 10; *A, B and C v. Ireland,* ECtHR, Application no. 25579/05, Judgment of 16 December 2010, Paras. 235-237, Concurring Opinion of Judge Finlay Geoghegan, Paras. 1, 4-10; Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, Paras. 2-9; *Dickson v. The United Kingdom,* ECtHR, Application no. 44362/04, Judgment of 4 December 2007, Paras. 79-81; *Animal Defenders International v. The United Kingdom,* ECtHR, Application no. 48876/08, Judgment of 22 April 2013, Para. 123, Concurring Opinion of Judge Bratza, Para. 14, Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinič and De Gaetano, Paras. 8, 15. *See also* the reference to the allegedly growing number of US states decriminalizing sodomy in *Lawrence v. Texas,* 539 U.S. 558 (2003).

practices) is a creative act in the sense of careful and balanced selection and harmonization. Such selection is inherent in all representation and it constitutes, at least in some cases, an act of limited and bounded creation.[29]

Aristotle's related concept of art, one certainly inspired by Plato's intuitively attractive approach, might be a source of inspiration for a theory of judicial representation as correspondence. According to Aristotle, art is mimesis, meaning a form of imitation. "Imitation … is one instinct of our nature." [30] It presupposes, arguably, that nature or reality is a given, an object that is independent of the imitation, even if reality becomes stylized through artistic interpretation. The artistic, image-oriented approach to representation emphasizes presence by likeness, where likeness is created by reproduction. (Political science theories of substantive representation reflect this concern.) In the Aristotelian approach mimesis is an act of choice or selection: Sophocles c*hose* his heroes like Oedipus, and he indicated *why* Oedipus is the hero. For Aristotle, tragedy is selective at least in the sense that tragedy is the imitation (mimesis) of certain kinds of people and actions. Correspondence is not purely mirror-like. The act of making present is also an act of choice or selection. In the case of constitutional (re)presentation (which is authenticated by the tools of constitutional and interpretative reconstruction), the legitimacy of the constitution as a living instrument is based on the credibility of the legal tools used to reconstruct it. By this logic, one could argue that the judge chooses to represent certain people, in particular those denied a voice in the current political system.

Nevertheless, the concept of mimesis remains of limited value for legal representation: in theatrical performances, the playwright writes the script and the actor performs for an audience. There is no such audience for the judge, at least in principle. The judge acts as a constitutional interpreter, attributing a non-political meaning, an objective reality, to the constitution. To interpret the law, she should not concern herself with the reactions of the "audience," that is of politicians or even society at large. In practice, however, this may not be true. Theories that emphasize the political nature of constitutional adjudication imply that constitutional adjudication sometimes cannot be evaluated by legal considerations alone and argue that constitutional adjudication may rely on methods that go beyond positivist techniques of statutory interpretation.

Pitkin emphasized that representation is "*re-presentation*, a making present again."[31] This implies that only the existing, be it essential or not, is to be made present, visible. In this sense representation means that what is made present was already present in some form. However, this does not rule out an element of creativity in the sense that the already present has to be selected, formalized and reinforced against other possibilities. This is important and even crucial for a constitutional court. It means that in some form the legally reproduced has already existed socially (and even legally in the form of an applicable principle); it is not, therefore, an arbitrary creation of the judge (nor that of parliamentarians). However, Pitkin advocated a dynamic concept. Political representation should be able to reflect the *changing nature* of the represented agent both at the individual and collective levels: the individual

[29] Obviously, creative representation of constitutional values, asserted against the position of the political branches must remain exceptional, and has to be used with care. It has to be used sparingly, among others for pragmatic reasons. It will loose its credibility if it does not fit into less controversial judicial activities, and it will become irrelevant if it runs too often into political opposition.

[30] ARISTOTLE, *Poetics,* Cosimo, Inc., 2008, 6. (1.IV.)

[31] H. F. PITKIN, *The Concept of Representation, op. cit.,* 8.

preferences change as well as the self-understanding and needs of the collective entity, and these changes are exactly the result of the interaction between the represented collectivity and the delegate. The performance of courts as representatives (or in carrying out a related role) can be satisfactory so long as they understand these dynamics. They cannot be the only institution responsible for this reflection and they cannot claim exclusive powers in that regard.

Within a theory of political representation the central issue is this: why exactly one particular absentee or another has the right or other claim to have her views made present in constitutional interpretation? Why should a court look to a specific understanding and corresponding empirical reality of the people instead of another one, in particular the one that is represented in the parliamentary majority of the day? Why should, for example an idealized and speculative political community of the constitutional founders' generation be of more importance than the majority behind a law enacted yesterday? Why constituency X versus Y, and in particular, why an imaginary or idealized Y instead of an empirically existing X?

Legislation can be accused time and again of being out of touch with constitutional realities, i.e. constitutional values of the society of the day. After all, legislation does not always reflect the genuine wishes and interests of the majority or even those in whose name the legislature acted, and even less the public interest. The standard response is that such criticisms are legally irrelevant and even destructive: law and legislation are about attributing exclusive authority to the elected body to determine what is in the public interest, or what corresponds to the majority's will. These criticisms are illegitimate because they invoke actors outside the parameters of the poltical system. But external critics of the legislative process should not be ostracized completely, ignored until the next elections come around (which do not always usher in desired or even promised legislative corrections). Judicial review is intended to provide an exterior source of corrections to electoral democracy, though in some jurisdictions judicial review is meant primarily to correct executive decisions only. A considerable number of democracies recognize in a fundamental way that the constitutional system as such requires judicial oversight as well as corrections to the democratic process; finding the right form of cooperation between these (and perhaps other) constitutional life forms is a matter for debate and negotiation.

Contemporary pluralistic multicultural societies are often divided on value-laden issues, and this may result in legislative inaction. For example, certain practices might be considered socially permissible and in line with very abstract constitutional values. The legislature, however, may fail to act in light of such practices and may remain silent on the matter, even if inaction perpetuates previous legislative decisions that hamper or even criminalize socially permissible practices. How a court can determine what is the "genuine" and constitutionally valid popular will in the absence of legislative action? Consider the criminalization of sodomy or the growing acceptance of various forms of death with dignity or *in vitro* fertilization. Public opinion is commonly cited with respect to the permissibility of these practices, usually in the form of public opinion polls. Of course, the judge is not bound by such data, and public opinion is in any case only consideration the judge might make. But it is quite possible that legislators will follow a minority view because they can be reelected with the support of that minority. Such "over-representation" of minority preferences is an ordinary consequence of collective action. A small interest group will organize itself where the issue is of great importance to that group. Because of the organized and even institutionalized representation

of the group interest, it can present itself as the public interest, the national tradition etc. The group will have more influence than the majority, which might consist of uninterested, isolated individuals.

It is rather problematic to determine what kind and form of majority is needed for a claim that reflects a fundamental moral choice of society. Public opinion is very malleable in the age of mass communication. While up to 70 per cent of the American public favored assisted dying in public opinion surveys,[32] when the time came to vote on referenda that proposed legalizing the practice, majorities in state after state rejected the proposal (with two exceptions, so far). Likewise, gay adoption was supported by the majority of the French in 2012, and that position was perhaps confirmed by granting a majority to the Socialists in the national elections. Once gay adoption legislation was seriously considered and debated for in the legislature, this majority seemed to disappear. It is likely, however, that if gay adoption were to adopted, and in the absence of major scandals, people would quickly accept the practice. And what if they didn't? Is this a decisive factor for a constitutional court? Take the example of the abolition of the death penalty by the Hungarian Constitutional Court in 1990. This was a highly unpopular decision at the time, but one that the political elite considered to be a constitutional and political necessity for the acceptance of Hungary into democratic Europe, an uncontested societal goal at the time.[33] Today, even after a new generation has come to participate in public life, the general public is still in favor of the death penalty. Is this to say that the Constitutional Court did not represent the nation's constitutional values?

Certain theories of constitutional adjudication consider that judicial review is part of the legislative process, which is, after all, not only about representation. Such a blurred understanding of the legislative process may run against a quasi-Rousseauist theory of democracy wherein the general will is to be formed and expressed by the people/nation. Brunet, however, offers a better interpretative framework: if it is the constitution that expresses the general will, and if legislation has only an accidental relationship to the general will, then the elected legislator does not represent popular will. The constitutional judge or court, on the other hand, is arguably one of the best representatives of the people, or at least a trustee acting within the mandate of the constitution.

Habermas, too, offered an account of judicial correction of parliamentary representation. In his view, public autonomy goes way beyond majority representation and is threatened by unequal social power. It is the role of constitutional courts to stand up against both state and private encroachments into this public autonomy.[34]

According to these accounts, courts may become representatives of community values (and interests). These values serve as foundations of the community. As such they are also part of the mandate that the constituent people gave to its elected delegates. If Pitkin is correct, for a democracy the goal is not symbolic representation but rather the "accurate reflection of

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[32] The Pew Research Center, *More Americans Discussing – and Planning – End-of-Life Treatment. Strong Public Support for Right to Die,* January 5, 2006. Available at <http://www.people-press.org/files/legacy-pdf/266.pdf>.
[33] Hungarian Constitutional Court, Decision 23/1990 (X. 31.) AB. *See e.g.* L. SÓLYOM, G. BRUNNER, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court,* The University of Michigan Press, 2000, 118-138.
[34] J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,* The MIT Press, 1996, 277-279.

the popular will".[35] Courts do have or should have a role in evaluating whether the legislative process does accurately reflect the popular will. Such evaluation may have a secondary effect on the parliamentary electoral process, for example by delegitimizing the incumbent party or its opposition. There are good reasons to believe that there is a constitutional mandate for courts not only to reflect the accuracy of legislative action in terms of Kelsenian negative legislation (striking down unconstitutional laws) but also filling in legislative gaps in conformity with the community's fundamental value choices and constitutional project, particularly when the community is divided. Accountability for such evaluation is not limited to the electoral process, as a shallow concept of democracy would suggest, even if the accountability of courts remains unsettled.

Concepts of representative democracy operate with false certainties. It is taken for granted that representation is valuable, since it enables people to exercise sovereignty. However, sovereignty remains a concept dependent on its definition, and it is, therefore contestable and contested; and the very concept and, most importantly, related practices, are changing.[36] Similar uncertainties emerge in the context of defining the people. Who can be a citizen? To what extent are non-citizens to be counted among the people, even if they do not possess participatory rights? Are non-citizen nationals, for example those living abroad, to be counted among the people? These matters were non-issues in homogeneous and stable nation states, but such states are historical accidents, and the assumption no longer reflects contemporary European realities. These are divisive social issues; it is understandable that for the sake of social stability they are often left to judicial gestation and partial judicial solutions. Decisions related to granting or denying citizenship are subject to judicial review, demonstrating the inherent difficulties of popular representation.

In these contexts, the legitimacy of courts cannot come from mimetic representation of fundamental values, though reference to such recognized values is crucial in judicial decision-making. The representativeness of judicial determinations will to some extent be creative, although this creative representation will only be credible if it corresponds to some sort of reality. In other contexts, the legitimacy of constitutional adjudication originates from the need to correct the imperfections of political representation. This is not a matter of representing the popular will but rather of judicial reasoning and evaluation. The social and political mediation between social groups that electoral representation provides may fail, and in these circumstances courts may have to fill the gap or attenuate the conflict. The procedural aspects of constitutional adjudication (including the relevance of precedent as distilled and accepted through social practices and popular wisdom) provide credibility to judicial determinations of social facts and values. In this regard, the activities of apex courts may fit well into the larger scheme of representative government or democracy as envisioned by Madison. By exercising judicial review over the decisions of the elected branches, apex courts, as professional and dispassionate bodies, act as important parts of republican government, limiting factionalism and preserving unity.

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[35] H. F. PITKIN, *The Concept of Representation, op. cit.,* 106.

[36] It is, among others for this reason that, at least on the Continent, courts are regularly called to determine whether the legislative and executive branches are or are not violating national sovereignty in granting new attributions to the European Union. *See, e.g*. the Lisbon judgment of the German Federal Constitutional Court, BVerfG, 2 BvE 2/08, Judgment of 30 June 2009.