

RESEARCH ARTICLE

Rights and Deliberative Systems

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This article maps a significant area of contribution to (and control of) deliberative democratic systems: human rights enacted in law. Thus it takes up John Dryzek's call for 'close study of actual deliberative systems in the terms that theorists specify'. The article shows how the theory and practice of legal rights often provide a good fit with, and sometimes help to elaborate and advance, aspects of systemic deliberative democratic theory. One rationale for presenting a more detailed legal map of deliberative systems is descriptive: to look more comprehensively at the set of participants and activities within such systems. Yet the project may also be framed as normative. To try to ensure that legal rights do not displace, but rather align with, systemic deliberative democracy, courts and other legal actors may engage in what the article terms (*pace* John Hart Ely) 'deliberative system reinforcement'.

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I. Introduction

This symposium issue of the *Journal of Deliberative Democracy* focuses on the place of law in deliberative democratic systems, but of course there has always been a place for law, lawmaking and legal adjudication in deliberative democracy theory. Institutions that apply or make law, especially courts and legislatures, have long been described as interlocutors of the people in a deliberative democracy. Yet such interactions were often seen as essentially binary, and as taking only a limited set of forms.

For instance, in Habermas's 'two-track' vision (1996: 354–6), deliberative democratic decision-making was said to begin in the social periphery as relatively vague sets of opinions, which later filter through the formal constitutional apparatus of courts and legislatures. Such bodies call upon legal and other elite expertise to help process raw preferences into coherent and concrete law. Another view, associated with Rawls (2005: 137) and others, saw 'telescoping' effects (Kong and Levy: 629), which move in the opposite direction: courts apply an established set of tools of legal deliberation to inform and discipline debate in the public sphere and 'educate citizens in how to reason with one another on contested issues' (Zurn 2007: 192).

Being broad by design, early contributions offered scant detail of the ways in which legal systems actually function to give effect to deliberative democratic methods and objectives (Chambers 2003: 310). They also of course predated key transitions in deliberative democracy scholarship, notably the systemic turn. Systemic studies

of deliberative democracy assess whether deliberative or democratic weaknesses in one part of a governance system are offset or checked by parts elsewhere. The early contributions to deliberative democracy theory traced just a few lines of interaction among legislatures (and sometimes executive bodies), the courts and an undifferentiated people; there was little to suggest complex networks of interactions among democratic and deliberative actors or actions.

With this article I intend to expand the map of systemic interactions in a deliberative democracy, particularly by focusing on a significant area of contribution to—and control of—deliberative democratic systems: human rights enacted in law. Thus I take up Dryzek's (2016: 214) call for 'close study of actual deliberative systems in the terms that theorists specify'. I will show how the literature and practice of legal rights often provide a good fit with, and sometimes advance, systemic deliberative democratic theory. The map to be seen will include the legal actors expressly tasked with implementing rights, but also a wider range of informal legal actors.

One rationale for providing a more detailed map is descriptive: to look more comprehensively at the set of participants and activities in putative deliberative democratic systems. (I limit the account to certain jurisdictions within Norris and Grömping's (2019) list of high-functioning electoral democracies.) This in turn is important for all the usual reasons that deliberative democrats tend to assert. For instance, we may better see where legal rights practice—the advocacy, interpretation and application of legal rights—brings epistemic benefits, such as more informed and relevant policy-making, across the system. We may also better understand how legitimacy, as a philosophical or sociological concept, develops. And

finally, we may gain insight into how societal groups may reach agreement about public policy despite their differences. After Part II outlines the elements of systemic deliberative democracy on which I plan to focus, Part III will then give an overview of how legal rights practice currently – if inconsistently – contributes to deliberative democratic systems. Building on this groundwork, Part IV will explore several key details of these potential contributions.

Mapping the contributions of rights to deliberative democratic systems may be framed, alternatively, as a normative project. Part V will indicate how legal rights' specific contributions to deliberative systems can be recast as aspirational benchmarks. Legal rights practice is often a system in itself, however, and one capable of displacing systemic deliberative democracy. Courts or other legal adjudicators should engage in what I will term *deliberative system reinforcement* to try to make legal rights practice align better with systemic deliberative democracy.

II. Relevant Aspects of Systemic Deliberative Theory

The deliberative democratic systems approach shows how the many interlaced contributors to public decision-making (e.g. legislatures, courts, executive departments and agencies, old and new media, civil society organisations, foundations, lobbyists, companies, unions, identity-based associations and individuals) can complement and influence each other, creating a system that is deliberatively democratic as a whole, even if each part otherwise falls short. The systemic perspective helps to address a main criticism levelled against deliberative democracy: that while it has appeal in theory, it is inadequate in practice as most of its actors are either weak deliberators in some respects, or weakly democratic in some respects. The many nodes in a system of governance may be deliberatively democratic as a whole, given a division of labour in which the nodes compensate for each other's deficiencies (Mansbridge et al 2012).

The systemic view not only tallies up contributors' static perspectives, however, but also identifies dynamic interactions. Systemic actors may transmit their points of view and inform, persuade or offset one another (Boswell et al 2016). Part of what makes a deliberative democratic system distinctive is the mutual reinforcement that may occur among the system's nodes (Hendriks 2016). A typical system may include 'checks and balances of various forms so that excesses in one part are checked by the activation of other parts of the system' (Mansbridge et al 2012: 5).

The deliberative democratic systems view notably takes account of a range of actors well beyond just the narrow set of formal institutions, especially legislatures and courts, that we may typically think of as the sites of democracy or deliberation. The system also includes actors who exercise a less formal, but potentially as substantive, influence on decisional outcomes. The system's decisions work gradually, 'by accretion' (Mansbridge 1986), and thus:

they have no clear-cut point at which an observer can say that a decision has been taken. Yet when the majority of a society or a subgroup changes its

norms or practices, bringing to bear social sanctions on those who deviate from the new norms and practices, it seems fair to say that in a general way that majority has taken a decision, especially when the change has been accompanied by extensive discussion of the pros and cons of such a change (Mansbridge et al 2012: 8).

These observations liberate analyses of democracy and deliberation from just the limited usual slate of formal actors. They encourage consideration of a more complete deliberative and democratic repertoire of people and organisations exercising genuine decisional influence.

However, an important caveat is that some inputs— but especially the most formal and prominent ones—into a deliberative system may deleteriously shape the system. For instance, systemic interactions must not be overly coercive; '[i]n a good deliberative system, persuasion that raises relevant considerations should replace suppression, oppression, and thoughtless neglect' (Mansbridge et al 2012: 5; see also Boswell et al 2016). And a prominent node in the system must not 'displace and weaken' given groups, 'thus reducing the impact of these groups on societal deliberation' (Mansbridge et al 2012: 6; see also Hendriks 2016, 55; Moore 2016).

III. Rights and Deliberative Systems in Outline

Legal rights practice is a system itself, with (as we will see) dynamic interactions both among legal actors and among distinct kinds of deliberation and democratic representation. The outcomes of legal rights systems typically are both formally and effectively binding. Even rights bodies that can be overruled (e.g. courts exercising non-binding rights jurisdiction or subject to legislative override) may exert an effective influence (Kahana 2002: 241). Rights bodies may dominate, or even displace, substantial segments of a deliberative system.

Yet this depends on how legal rights practice is conducted. At least two broad patterns of systemic legal rights practice, which are common but not universal, are broadly consistent with systemic deliberative democracy. The distinction between them is porous, however, and each may be an aspect of the same legal rights practice.

(1) *Accretion* involves the gradual filling—or replacement and refilling—of the broad outlines of legal rights with novel content. As we saw, accretion has a role in accounts of systemic deliberative democracy. It is also notably a central function of legal rights, at least on an interests-based conception that understands rights as having little *a priori* content—as largely empty vessels awaiting specific content. As Ivison (2019) describes the interests approach, 'it brings to the fore the mutability and contestability of "interests", and thus of rights, and highlights the inherent indeterminacy ... of rights claims'. In this view, rights describe those relatively rare individual and societal interests (e.g. concerns, preferences and values) that come to be seen as essential and fundamental in a given society, and thus singled out for protection. Of course, other descriptions of rights may view things differently (for discussion of assorted perspectives, see Waldron 1989). But the interests

approach is a prominent view of rights that overlaps with deliberative systems, and that thus identifies a key potential interaction between rights and deliberative systems. There is potential for rights to be both the sites and the products of deliberation about interests. Indeed, we should even perhaps favour—that is, endorse or try to give effect to—the interests approach to the extent it matches the deliberative systems model and thus draws on the model's benefits as set out in Section II.

What and whom may deliberation about rights accretion involve? Rights bodies including (but not limited to) courts may issue apparently authoritative decisions about which interests should solidify as rights, and in which cases. Alternatively, a broader systemic deliberative process may gradually clarify why certain matters matter to certain people (e.g. many couples' desire for the formal status of marriage), and how these matters derive from more foundational interests (e.g. recognition, dignity and equality). In other words, accretion partly entails acts of representation of interests, which ostensible experts cannot carry out alone. In a deliberative system, acts of representation are, to the extent possible, widely inclusive of the people in a democratic society, comprehensive, accurate and capable of persuading others.

However, if rights fill with content too rapidly or rigidly, this may risk solidifying in amber what might have been just an incomplete specification of a right, or a transient social or judicial consensus. Consider the early 20th century movements in conservative courts in the United States, United Kingdom, Canada and Australia to invoke negative economic rights and principles of federalism (e.g. freedom of contract, states' rights) in order to invalidate progressive legislation. What was problematic about these doctrines was not their elaboration *per se*, but their maximalist application by the courts—an unyielding judicial approach that closed off these doctrines' revisability (Habermas 1996: 384), such as their capacity for further development or reversal, for some time. The interests that a right protects can be determined through a deliberative democratic process or system, which may run for years or even decades, and indeed may never conclude.

(2) *Settlement* is another potential aspect of legal rights practice that is consonant with systemic deliberative democracy. It entails finding a stable place, among existing rights and other interests, for newly accreted rights content. Settlement thus refers to processes for integrating new rights contents within a wider set of previously settled interests without displacing too much of what was recognised in the past.

Again this cannot be an arid expert or legalistic process. On the one hand, there must be courts or other rights experts capable of deploying legal rights doctrines such as those of proportionality. On the other hand, settlement is not merely an analytic process. It also requires *social* settlement—that is, the management of inter-group differences to generate wide social acceptance for the new rights contents. Interests may be settled in part by convincing groups of people to view their own interests in relatively new ways—even sometimes to forgo some of their own assumed interests. This is a kind of deliberation that may need to occur substantially in the social sphere.

The chief example in this article is that of the legalisation of non-heterosexual marriage in North America. Like any real-world case, the development of marriage equality does not match every broad ideal. Indeed, the normative section (Section V) of this paper will observe that a range of deliberative systemic ideals remain unfulfilled, in this example and others; that section will call for specific improvements to legal rights practice. Nevertheless, existing examples may point to possibilities of overlap or interaction between legal rights practice and deliberative systems, and thus advance the broad mapmaking purposes of this paper (though I remain agnostic about whether or how often such possibilities actually manifest).

The Supreme Courts of Canada and the United States used constitutional equality guarantees to rule in favour of marriage equality, in 2004 and 2015 respectively, after years of judicial and social developments on the subject. Each country took its time getting people on board with the legal changes. Judges seldom ventured far ahead of majority public sentiment; they led, and yet also responded to, currents of social deliberation on the matter (Yoshino 2015). Social perspectives changed rapidly from the 1990s, as each country shifted from having large majorities opposed to legalisation, to large majorities supporting it (Morini 2017). Courts at assorted levels in the states or provinces stayed approximately onside with public sentiment while injecting a relatively rationalist and authoritative set of perspectives into these public conversations.

Public deliberations occurred, in a decentred way, around (Siegel 2017; Yoshino 2015):

- activist groups arguing for and against legalisation;
- popular media (especially television);
- legislative acts partly or completely enabling (or banning) marriage equality or civil partnerships;
- referendums enabling (or banning) marriage equality;
- news media, which featured frequent op-eds as debate over marriage equality intensified;
- academic contributions proffering normative arguments as well as historical, psychological or other empirical information and context;
- influential businesses announcing support for legalisation;
- and finally individuals, who communicated with each other and with civil society organisations or elected representatives, and who also widely republicized expert contributions on social media.

Judicial pronouncements appeared both to shape and to be shaped by social deliberations. As marriage equality wound through courts of provinces and states, the courts arguably were key nodes in the developing analysis and sentiment around marriage equality. From a systemic perspective, it is important that the outcomes and reasons of judicial rulings were widely disseminated. The courts drew on their own rationalist perspective, expertise and apparent legitimacy. Judges below the apex courts mainly influenced conversations via persuasion, since decisions in one state/province (or country) do not bind legal interpretations in others.

As we will see, the *accretion* aspect of these marriage equality cases lay in the vivid articulations—picked up and amplified in courts, and thereafter in popular media—of the dignity, family and equality interests at stake on the side of LGBTQ couples; and in a more precise delineation of which religious freedom arguments remained sustainable on the other side. The *settlement* aspect flowed from these same processes. Articulating and delineating group interests helped to establish which group interests could conceivably be accommodated to one another, and which could not be.

In each jurisdiction, over a number of years popular majorities seemed to reconsider their understandings of marriage as a public good. Many had assumed that majorities were entitled to define the public good, given everyone's stake in it. But the extended deliberations about marriage equality helped to draw important distinctions between the nature of the stakes of various groups. Some who wished to retain the *status quo ex ante* relied on non-public religious doctrine for justification, others on discomfort or 'disgust' (Eskridge 2004: 1296–8) at sharing the institution of marriage with sexual minorities, and still others on largely unexamined social norms. These common bases for opposing reform revealed interests that were ultimately, in most instances, found to be weaker than the equality, family and dignity interests of LGBTQ couples.

Liberal insights about the place of non-public, religious doctrine in defining public goods especially came to the fore as the danger of imposing such doctrines on others became manifest. Spiritual rationales for policy are not shared nor reasonably agreed to by large blocs of citizens. In parallel, other anti-legalisation arguments had relatively mutable bases, such as social norms that undergo change with generational turnover. The only places where marriage equality opponents retained some traction was in debate about the private and associational domains: whether marriage equality must be accepted within religious dissenters' private or business practices (e.g. wedding caterers) (Siegel 2017).

As these public deliberations worked toward an accommodation or balancing of interests, courts fed into the process, but did not dominate it until the end. Until the final judgments of federal apex courts, lower courts were among the nodes in a diffuse, years-long deliberative systemic conversation. Deliberations included both social deliberators and empowered actors. The social aspect may have been required to bring the long-running and divisive policy dispute to a stable conclusion.

In the next section I examine these broad observations of accretion and settlement, and of marriage equality in North America, in greater detail.

IV. Mapping Rights and Systemic Deliberative Democracy

Certain aspects of courts' and other rights bodies' procedures—especially the more visible aspects, rather than their inscrutable internal deliberations (Hutt 2018: 1139)—may from time to time form part of a deliberative system.

A. Inclusive Representation

Courts and other rights bodies may at times exercise a democratic representative function that, though not sufficient on its own, can contribute to a deliberative system by making representation in the system more inclusive. Commentators including Michelman (1998: 425–6; see also Rosanvallon 2011: 118–23) and many others have imagined courts not merely as bodies that deliberate about settled interests, but as ones that first gain a sense of the diversity of a society's interests, for instance by hearing from the litigants who come before them. The notion that judges can or should have access to and consider the views of wide sets of societal groups is, as well, implicit in the many studies that call for improving judicial diversity (e.g. Rackley and Webb 2017).

Courts have found ways to expand their democratic representativeness. 'Friends of the court' (or '*amici curiae*' and 'intervenor') are third parties that participate in litigation in order to speak to perspectives that the main parties to a case may not cover. This practice is more pronounced in high-profile cases dealing with socially contentious rights. Broader perspectives may also result from appellate courts' multiple and varied members (Mendes 2013). The potential, then, is for judicial decision-making at least sometimes to be an instrument of open deliberation (Gutmann and Thompson 1996: 131): to serve as a conduit for underserved interests to find entry into public decision-making, and at least potentially to influence such deliberation. (This differs from other claims about representation, such as that judges may expand democratic representation through their own argumentative reasoning processes *per se* (Alexy 2005: 578–81). Much as Hutt (2021) argues, this does not qualify as *democratic* representation.)

But does a court that effectively serves as a conduit for representation of societal interests merely double up similar representative responsibilities already present in more expressly democratic branches? Moreover, given the still generally narrow demographic make-up of judges, might they serve at best as distorted lenses for representing broader social interests? One important answer is that legal rights processes may create forms of representation that complement those that already exist in legislatures and elected executives. The sociological legitimacy of courts (a broadly shared expectation about who can make binding or persuasive decisions) may amplify what would otherwise be undervalued interests of certain societal subgroups. Judicial rights determinations (or those of other expert rights bodies) may be able to place those interests on initially equal footing with other interests and allow them to be considered on their merits.

Rights practiced in this mode can potentially be important for democratic reasons, then, despite the more common view that rights are countermajoritarian. In theory at least, in a deliberative democracy an argument's cogency renders it persuasive (Habermas 1996: 306). To the extent this is so in practice, diverse people, weak or strong, and few or numerous, may be included in collective decision-making on relatively equal terms (Gutmann and Thompson 1996: 57–59, 110–119; Hutt

2020: 85–86). Courts may, to some extent, serve as sites for such relatively inclusive deliberations, as distinct interests and views enter the crucible of the curial process and exercise a level of influence that polarised legislatures may be unable to match.

Granted, court processes are generally difficult and expensive to access, and in practice are accessed unevenly by different groups (Bellamy 2013: 341). Moreover, as Hutt points out, a court's 'allegiance to the law' may sometimes conflict with a court's putative representative function (Hutt 2021: 10)—though he also notes that at other times it may not. In any case, courts may be just as poor at actually representing people as are other empowered elites, who are too often *elitist* by inclination (Papadopoulos 2012; Moore 2016). Courts may be prone to seeing even indeterminate, value-based policy matters as properly decided by experts such as themselves (Levy 2018). And when judges serve as umpires of deep controversies over rights, they may 'play for one of the teams' (Tokaji 2010: 433), due to their partisan factionalism (Dryzek 2016: 212) or their authorisation by a state whose authority may be the very matter in question (e.g. in cases on minority self-determination).

These are important caveats. However, the potential remains that courts may force governments to take notice of underserved interests in ways that the more polarised and unwieldy processes of legislators may not. As Papadopoulos (2012: 139) writes, 'appeals to the courts can be considered as the functional equivalent of lobbying, with the courts providing an additional access point to promoters and opponents of policy causes'. This description perhaps even undersells courts' democratic functions. When they apply rights, courts may give weight to interests that governments cannot afford to ignore, knowing that courts may upend settled laws and disrupt government agendas. In light of this risk, governments must take notice of the interests that people press through rights processes. The processes may not lead to 'wins' for rights claimants, but at a minimum require formal official consideration of their claims (Mendes 2013: 131).

In Canada under the *Charter of Rights and Freedoms*, individuals and groups lodge dozens of 'Notices of Constitutional Question' weekly at various government levels.¹ This may or may not lead to a concrete, private win for the claimants. Many claimants are self represented. Many have untried and tenuous claims. Some claims are vexatious. But it is the role of courts, attorneys-general and their staffs to adapt such raw claims into the frame of rights, and at least initially to take each claim seriously. Mobilising the apparatus of government to hear claimants' diverse points of view—and to hear them carefully with the giving of reasons—may at least encourage individuals to accept the legitimacy of a decision, even if their claims are unsuccessful (Tyler and Jackson 2014; Waldron 2011).

A system of legal rights practice may, then, inject influential representative processes of interest-accretion into the wider deliberative system. To be sure, there is also another potential role for rights in supporting representation, and this one better recognised. Ely's (1980) 'representation reinforcement' theory provides

that while counter-majoritarian judges lack legitimacy to apply substantive rights, they should nevertheless step in to enforce democratic process rights and reverse the occasional efforts of legislatures to undermine electoral democracy. I will have more to say on Ely in Part V.

B. Emotive Appeal

Legal rights may broadcast, across a deliberative system, the salience of chiefly affective, even 'primordial' (Horowitz 2003: 72–82), human interests. For example, the need for public recognition of identity—a need itself recognised in constitutional and political theory (Taylor 1997)—is a *felt* need, not one derived from reasoned argument (at least not in the first instance). Yet even though many identitarian and other basic interests are not reasoned *per se*, they are potentially no less important than other interests. Indeed they may be more so. As Hume puts the point (2000 [1739]: 266; see also Walzer 1998: 58), reason 'is the slave of the passions': we cannot reason rationally until we have, in the first place, identified reason's non-rational objectives.

By being emotive, legal rights practice may clarify these kinds of objectives. For instance, at the US Supreme Court, the concluding words of Justice Kennedy's majority opinion in the *Obergefell* case on marriage equality speak lyrically of the needs of couples to be loved—words that have 'inspired numberless opinion pieces and internet memes' (Levy and Kong 2018: 5). He writes:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. ... Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right (*Obergefell* 2015:).

Love, belonging, family, community and equality are among the basic interests that Kennedy constitutionally recognises—and promotes—though of course this recognition did not begin with one judge. Indeed, in the lengthy history of litigation that occurred across the American federation before the matter got to the US Supreme Court, many judges had already fleshed out the factual, logical, normative and emotive factors surrounding marriage equality (Yoshino 2015).

C. Rights as Archives of Interests

The exposure of interests is not necessarily limited to moments in time, but may help lay down a lasting record (Allan 2018: 145; Rosanvallon 2011: 118). Legal cases can secure the formal recognition of deeply held interests. As case-by-case practice progresses, it may bring longevity to rulings about rights by creating an 'archive' (Genovese et al 2019) of the common forms of harm that rights claimants experience and that should be prohibited. Judicial outputs can thus serve as memory banks for a deliberative system: settled perceptions about essential

social interests that may be accessed repeatedly in future systemic deliberations.

The notion of using law and legal practice to help develop a social record has origins deep in Western legal traditions. As Postema (2010: 48) describes the views of Pufendorf, the 17th century German legal scholar, law ‘moves a range of disputes “off-line” out of the domain of the public and the political’, classifying certain controversies as, if not finally settled, then at least settled for the time being. ‘Separate but equal’ schools, bans on ‘miscegenation’ and on marriage equality—all of these, and many more, impacted on interests that came to be protected in law, as litigation identified and categorised distinctive types of psychological and other harms.

None of the harms had been unknown. But had they not become the focus of legal rights cases, they may never have become as widely and stably recognised. Legal rights practice may thus help to concretise distinct doctrines of harm-prevention. Other democratic fact-finding tools (e.g. commissions of inquiry, legislative subcommittees) may also have these effects. But legal precedent and the related legal practice of argument by analogy create continuity over time: ways to access and recall, with relative ease, an expanding catalogue of prohibited harms.

D. Testing Empirical Claims

Access to accurate and reasonably comprehensive factual background is a condition of sound deliberation (Bächtiger et al 2018: 8). Rights bodies such as courts test the truth of factual claims. In addition to evidentiary rules in trial litigation, in the rights context proportionality and equality doctrines help to test assertions of fact in both trial and appellate proceedings. These protocols probe whether a government’s justification for a breach of right is too speculative or poorly demonstrated by evidence, which may in turn temper the justification’s effects in the wider deliberative system.

Of course, courts may have biases or be under the sway of the same unexamined assumptions as the rest of a community. It is unusual to see a court step too far out ahead of the social mainstream on questions of value. For instance, presented with an early opportunity to consider marriage equality in 1993, a Hawaiian court had little trouble rejecting marriage equality claims (*Baehr v Lewin*). Yet several years later many US courts had begun ruling differently, following changes in social norms around the issue. We should not, therefore, overstate the role of factual testing in rights outcomes.

Yet neither should we ignore it. Over the long course of marriage equality litigation, US and Canadian courts had occasion to test and retest several suspect claims: for instance, that children of same-sex couples tend to experience poor psychological outcomes; that heterosexual marriage was a millenniums-old cultural and legal category embedded in Western tradition; and that same-sex attraction is wholly a product of ‘choice’ (Yoshino 2015: 202–13). What seemed self-evident to some tended to wither under the light of scrutiny in trial and appellate proceedings. Expert witness testimony (e.g. by parenting psychologists and historians of sexuality) systematically rebutted the assumptions of the opponents of marriage

equality legalisation (Yoshino 2015: 280). Ultimately, courts made formalised decisions of fact, which in turn informed media reportage and debate.

The representative function of courts, introduced above, may also have an epistemic aspect. A process that is public, as well as relatively open to social representations, may access an important epistemic resource in the form of diverse social views that lack the same levels of prejudgment often witnessed among governmental insiders (Christensen and Moynihan 2020; Gutmann and Thompson 1996: 95–127).

E. Testing Normative Claims

Legal adjudication additionally may be a crucible for reasoning through social controversies’ normative aspects, which are never far from the surface in rights cases. Judges and other lawyers draw upon both the constitutional text and sources external to the text to scrutinise normative constitutional rights reasoning. Legal rights practice may in turn publicly broadcast, across the wider deliberative system, the results of these stress-tests of normative propositions.

Marriage equality opponents deployed a number of normative arguments. The argument from tradition provided that settled social and legal norms should remain unchanged. Judges in turn had to scrutinise not only the argument itself, but also the nature of appropriate legal argumentation: what kinds of arguments should or should not be raised in the controversy? Tradition alone was unsuitable as it provided no substantive guidance as to why one tradition, and not another, should be constitutionalised, left unaltered or discarded. As Justice Richard Posner wrote in the US Federal Circuit case *Baskin v Bogan*, ‘[t]radition per se ... cannot be a lawful ground for discrimination—regardless of the age of the tradition’ (661–3).

Another argument was that heterosexual marriage is a semantic category with no normative implications *per se*. This argument may have provided an effective shield for heterosexual-only marriage, based on sophistic argumentation steeped in jargon and esoterica. Yet the root notion that language is somehow immune to change was just a variation of the argument from tradition, and—for the same reasons—an unsustainable argument once laid bare (Mercier 2007).

One argument that lacked such normative emptiness stemmed from orthodox theological positions. But such claims were problematic for other reasons. Theories of public reason imagine disparate groups appealing not to their own comprehensive moral doctrines, but to public values of more general application (e.g. freedom, non-domination and the non-violent resolution of differences) (Rawls 1997: 773). In some ways this strand of theory merely provides a gloss on venerable liberal principles such as the freedom from religious coercion, which arose after Europe’s destructive early modern wars of religion (Ishay 2008: 77). That freedom militates against theological doctrines being invoked against religious dissenters without any additional justifications that every citizen may reasonably be expected to share (Rawls 2005: 462).

As Gutmann and Thompson (1996: 54–55) write, ‘the principles of democracy must provide some guidance for living with fundamental moral disagreement’. Legal rights practice potentially provides such guidance in, for instance, the proportionality test’s requirement of an explicit normative justification for a breach of right (Cohen-Eliya and Porat 2011). There is also a judicial duty to provide publicly reasoned justifications for judgments, as the legal theorist Mashaw (2018) explores. Moreover, rights guarantees often expressly limit available justifications to those consistent with freedom and democracy (e.g. Article 9(2) of the *European Convention of Human Rights, 1950* and Section 1 of the *Canadian Charter of Rights and Freedoms, 1982*).

Proportionality and equality doctrines can provide litigants with ready metrics to test government actions for arbitrariness by asking whether A receives as much of a public good as B. Unexplained differences may publicly highlight an injustice. Equality testing also draws the above-noted analogies between past and present cases, importing some of the sense of horror and indignity of past injustices into current social controversies. The marriage equality cases frequently adverted to historical prohibitions on miscegenation as reference points, and to show how the logic of equality can upend even norms once viewed as settled (Levy and Orr 2016: 9).

F. Accommodation and Balancing

Rights are seldom absolute. When legal rights processes apply broad principles to concrete cases they weigh rights against other rights, or against other interests. Weighing is also an essential part of deliberation (Fishkin 2009: 35). But not all processes of weighing are alike. The ubiquitous proportionality test in rights adjudication has elements that resemble deliberative democratic forms of accommodation, which seek out ‘win-win’ public policies agreeable to all parties (Mansbridge et al 2010: 69–72). Proportionality decisions may therefore publicly illustrate, across a deliberative system, the availability of accommodative policy (Levy and Orr 2016: 49–50), and call into question assumptions that policy is irreducibly zero-sum as between identifiable ‘losers’ and ‘winners’.

Modern proportionality and equality testing follow relatively standard sequences of steps. For instance, where a government justifies a breach of right on the basis of an objective that is valid in principle, but goes beyond what is required to achieve the objective, then proportionality or equality testing may pinpoint this type of fault. In a Canadian case, hiring rules for a firefighting squad had included height requirements that indirectly discriminated against female applicants (*British Columbia (Public Service Employee Relations Commission)* 1999). The adoption, instead, of general physical fitness standards measured the skill of prospective firefighters just as well.

Granted, in many cases some zero-sum disagreement inevitably arises, and cruder balancing is thus required to address a tension between incompatible rights or interests. All parties may stand to lose something significant, no matter the outcome. For example, a court that mandates marriage equality legalisation may carve

out exceptions to avoid compelling religious authorities to perform marriages for LGBTQ couples. But in this case perceived losses are likely experienced on both sides: among equality activists offended by any exemption, and among religious traditionalists objecting to any recognition of marriage equality. Certain second-best possibilities still remain, however, for deliberation in such scenarios (Warren and Mansbridge 2013). Negotiation to identify the concerns of each side can be civil in tone, and in substance as fair as possible. Empirical scholarship of law has shown similar possibilities, demonstrating that processes of respectful listening and fair judgment tend to be viewed as legitimate even by those on the ‘losing’ side of a decision (Tyler and Jackson 2014).

G. Social Settlement

Thus far the catalogue of rights’ potential contributions to systemic deliberation shows how courts and other rights adjudicators can direct and discipline popular conversations about contested policy. But systemic deliberative democracy also stresses how public decisions may occur—and even begin or remain—largely within social processes of custom and norm formation (Mansbridge et al 2012: 8). This suggests the possibility of ‘social settlement’: changes in thinking about a right that occur not in formal institutions, but substantially in the social arena, and that yield accommodative settlements between groups. Social processes, underpinned by legal rights practice in a deliberative system, may to some extent see broad-ranging deliberative conversations probe potential substantive policies to find those best able to ground social settlements.

In the marriage equality cases, it became clear to many over time—through deliberations involving not only judges, but also legislators, media, civil society groups and individuals—that the excluded group would never come to accept its exclusion. The dignitary and psychological harms of the exclusion were too severe and unavoidable to be set aside and ignored. The equality of LGBTQ people—people increasingly acknowledged to constitute largely fixed identity groups—came to be understood as central to their self-worth. A settlement that expects a minority group to yield to its exclusion may remain unstable at best (Eskridge 2004: 1297–1300).

On the other hand, theological points of view can and do shift, at the very least to recognise that such comprehensive doctrines cannot be imposed on others if a society aims to minimise inter-group discord. In Rawls’s account, those who invoke comprehensive doctrines in the public sphere may gradually abandon or modify their claims in order to remove conflicts with other groups. Thus the groups’ different views will in time overlap to support the same general policy agreement (Rawls 2005: 246–7; Rawls 1997: 781–82, 795; see also Scanlon 1998). Rawls (1997: 796) gives the example of how Catholic notions of religious freedom shifted in more liberal-democratic directions. Exclusionary views may also of course have non-theological origins, and for instance may stem from social conventions of often surprising resilience; however, these, too, in practice have been shown to be capable of change (Morini 2017).

Rawls's account understandably lacks legal detail. However, constitutional theorists—particularly those who understand courts as partisan or out of touch with social currents—outline ideas of, for example, popular constitutionalism, which preserves spaces for constitutional norms to develop partly outside the courts and other formal channels (Kramer 2004). Related legal theories include 'legal pluralism' (Merry 1988), 'political constitutionalism' (Bellamy 2007) and 'deliberative constitutionalism' (Levy et al 2018; Hutt 2020), which often critique strong judicial enforcement of formal rights and favour social and informal modalities of rights interpretation.

Some of these theories stipulate, as do I in this article, generally high-functioning electoral democracies. Yet even such democracies may from time to time see governments act egregiously in breach of settled rights: acting either excessively or wholly without justification (e.g. gratuitously discriminatory targeting of groups, or retention of power through electoral manipulation). A court should always provide a 'backstop' (Levy and Orr 2016: 123) to reverse such acts when necessary.

More generally, however, social settlement describes a protracted process whereby conflicts come to be mitigated through social norm modification. This perspective broadens the account of inter-group accommodation beyond a static notion of utilitarian balancing conducted in a moment of time. It is alive to the likelihood of social norm change, and aware that this may especially occur at weak points where norms are particularly brittle because they are exclusionary and not reasonably generalisable. Such norms may eventually yield to those that are more stable over the long term. Legal rights practice that is gradual and spread out across a deliberative system may improve societal clarity about which groups in conflict are more likely to change their positions over time.

V. Deliberative System Reinforcement

The contributions of legal rights practice to deliberative systems outlined in the previous part outlined possibilities only occasionally realised in practice. I turn now to consider how formal legal actors may meta-deliberate (Thompson 2008) about deliberative systems in order to try to 'activate and steer' (Hendriks 2016: 46; see also Ponet and Leib, 2018: 612) such systems to realise deliberative systemic objectives more consistently. Such conscious deliberative system design, which we may term 'deliberative system reinforcement', has at least three varieties.

(1) *Deliberative rights practice benchmarks.* Each observation of the previous part may be recast as a specific normative benchmark. For example, judges undertaking proportionality testing may consciously deemphasise strict balancing in favour of more flexible analyses. Some judges already favour such an approach (Dixon 2020). One reason why they should is to avoid zero-sum rights decisions when more nuanced, accommodative outcomes are possible.

(2) *Second-order benchmarks.* Legal actors may also take account of the interactions among nodes in the wider deliberative system, beyond the system of legal rights

practice. For instance, 'second-order' legal rights regulate processes of lawmaking and democracy (e.g. rights to vote or to engage in political speech). Depending on how they are interpreted, such rights may support or distort a wider deliberative system. For example, legislative schemes often seek to mitigate deliberative democratic faults by requiring news media to provide duties of reply, or by limiting political misinformation; however, a too-narrow judicial vision of deliberation and democracy may prevent such schemes (e.g. *Miami Herald Publishing Co* 1974). Blunt balancing tests can artificially disentangle speech and deliberation by assuming them to be in tension. These tests presuppose that a deliberative scheme breaches speech rights, and also tend to weigh against findings that such schemes are justified. Yet political participation is reciprocal with political deliberation (Hutt 2020: 82). Rights adjudicators should adopt 'thick' readings of speech interests (Levy and Orr 2016: 60–61) that do not as a default view deliberative legislative schemes as opposed to speech.

(3) *Open legal rights systems.* As the legal theorist Teubner (1993) observes, legal systems substantially generate their own normative content. From the perspective of deliberative system reinforcement, a key resultant risk is that a legal rights system may be closed to social deliberation about rights. As Hendriks describes the challenge of deliberative system design, there should be 'loose connectivity where institutions and actors mutually influence and adjust' (Hendriks 2016, 55; see also Moore 2016). Yet from legal literatures on 'juridification' and related concepts, we know that the formal influence of law—the capacity effectively to have the final word in a political and social controversy—tends to displace other, less formal patterns of social or political conduct (Hirschl 2009; see also Habermas 1981).

Legal rights practice may therefore be not just one set of nodes within the wider deliberative system, but the main—or even the only—formally approved site for deliberation. The more arcane (or contradictory or incoherent) a constitutional rights doctrine is, the greater risk there is that rights will be viewed as the preserve of courts alone—not of democratic representatives, nor of any wider sets of actors (Appleby 2014).

Conversely, however, legal rights and deliberative systems may share or integrate their nodes. As an example, as we saw in the marriage equality cases, a lower court's rights judgment can be widely republicized—in old and new media, in the rhetoric of empowered actors or activist groups, etc—across jurisdictions where the judgment does not bind but is persuasive. Subsequent judgments in higher courts may take notice of these developing views.

Alternatively, the legal rights system may yield a putatively final decision by an apex court, but this may prompt complex legislative and social responses. Responses can include social backlash or (more constructively) further discussions of policy differences that prompt a society to 'forge new constitutional understandings' (Siegel 2017: 1731).

In each of these patterns, there is a dynamic back-and-forth between a legal rights system and the wider set of

formal and informal nodes of a deliberative system. Such inter-systemic linkages reflect a legal rights system that is 'open', in the sense that it accretes rights content not only from within its own processes, but with attention to the wider deliberative system. Judicial modesty is required in order to avoid overwhelming informal forms of deliberation in the accretion and settlement of rights content. (Such modesty requirements are hardly foreign to legal theory, as we have seen.)

Deliberative system reinforcement differs from a prominent, yet problematic, theory of rights practice. 'Representation reinforcement' (Ely 1980) favours courts stepping in to reverse choices about democratic rules if, for instance, those rules are underinclusive of particular societal groups. Yet representation reinforcement potentially displaces existing informal norms of political regulation, such as the informal norms of comity often necessary to prevent partisans from manipulating democratic rules. The juridification of US elections has often had effects broadly opposite to those intended (Levy and Orr 2016: 153–160). Rather than arrest party-political manipulation, the gradual elaboration of formal and judicially reviewable rules for democracy has intensified partisan battles for control—often over those very rules. Attempts to contain electoral disputes chiefly via formal rule-making and litigation have an appealing and straightforward logic, but are misguided to the extent they displace more nebulous, yet often more effective, informal norms.

Representation reinforcement distils the judicial protection of democracy largely to a matter of inclusive representation, omitting concern for democratic deliberation more broadly. Deliberative system reinforcement, by contrast, tries to support deliberative systemic processes by constructing, or at least leaving undisturbed, spaces for protracted social deliberation. Rights should be open to being amended over the long-term in the wider deliberative system. And courts and other formally empowered expert rights bodies should inform rather than co-opt such systemic deliberations, hesitating to depart too markedly from developing public consensuses on rights contents. Relying systemically on the social component of rights deliberation may, in some cases at least, be a means of achieving a social settlement around rights, and setting such settlements up to endure.

VI. Conclusion

This article has explored how deliberative systems theory can draw on the large, yet still largely untapped, literatures of legal rights. (The flipside approach—bringing systemic deliberative theory into legal rights theories—is a task for future work.) The article's mapmaking exercise helps to fill out the details of the significant, and even at times dominant, legal rights dimension of the wider deliberative system. Legal institutions may as often as not frustrate deliberative systems by displacing alternative forms of decision-making. Yet alternatively, legal rights may, and at least occasionally do, form part of a wider system in which diverse actors engage in protracted

processes of co-creation and settlement of rights contents in contentious policy areas.

Note

¹ This account is based on the author's governmental work on litigation under the Canadian *Charter*.

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The author has no competing interests to declare.

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